ADVISORY COMMITTEE
ON
EVIDENCE RULES

November 8, 2024

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

November 8, 2024

New York, N.Y.

I. Committee Meeting --- Opening Business

Opening business includes:

- Introduction of Hon. Jesse Furman as the new Chair of the Committee.
- Report on the June 2024 meeting of the Standing Committee.
- Approval of the minutes of the Spring 2024 meeting.

II. Proposal to Expand the Hearsay Exemption in Rule 801(d)(1)(A) for Prior Inconsistent Statements of Testifying Witnesses

At its last meeting, the Committee approved a proposal to amend Rule 801(d)(1)(A) to allow all prior inconsistent statements of a witness subject to cross-examination to be admissible for their truth as well as for impeachment. The proposal was approved unanimously by the Standing Committee, with the exception of an abstention by the Justice Department. The proposal was released for public comment on August 15.

The Reporter's memorandum on the proposed amendment is behind Tab II.

III. Proposal to Amend Rule 609(a)(1)(B)

At its last meeting, the Committee rejected a proposal to eliminate Rule 609(a)(1), the rule allowing impeachment of witnesses with prior convictions that do not involve dishonesty or false statement. Members agreed, however, to consider a proposal that provides more protection for criminal defendants, by requiring the probative value of such convictions to *substantially* outweigh their prejudicial effect. Behind Tab III is the Reporter's memo on Rule 609(a)(1)(B). Also behind Tab III is a letter from NACDL in support of the proposal; a letter from a consortium of law professors supporting the proposal; a previously distributed survey of public defenders; and a memorandum from the Federal Judicial Center on research to be conducted on Rule 609(a)(1).

IV. Artificial Intelligence and Machine-Learning

At its last two meetings, the Committee has obtained information from experts on the evidentiary challenges raised by artificial intelligence. Broadly speaking, the problems are two: 1) whether changes to the authenticity rules are necessary to deal with "deepfakes"; and 2) whether a change is needed to Article 7 to give courts authority to regulate evidence that is the product of machine learning when no expert witness is proffered to testify.

Behind Tab IV is a memorandum from the Reporter providing updates on these two topics. Also included in the memorandum is a new proposal from Paul Grimm and Maura Grossman to address deepfakes.

V. Proposed New Rule to Cover False Accusations

At its last meeting, the Committee continued consideration of a proposal by Professor Erin Murphy to add a rule that would regulate the admissibility of false accusations. The Committee decided to review state law approaches to the subject. Behind Tab V is a memorandum by Professor Richter analyzing state law approaches to regulating admissibility of false accusations. Also behind that Tab is Professor Richter's previous memo on pertinent Federal case law.

VI. Rule 404(b)

At the Committee's Fall, 2023 symposium, Professor Hillel Bavli made the argument that courts are admitting evidence of uncharged misconduct even where the probative value of the bad act is dependent on a propensity inference. The Committee tabled Professor Bavli's proposed amendment, on the ground that the notice requirement of Rule 404(b) was amended in 2020 to require the prosecution to articulate a non-propensity purpose for bad act evidence, and the Committee should determine how that amendment was working before proposing another amendment to the rule.

Behind Tab VI is a memorandum by the Reporter providing a progress report on the effect of the 2020 amendment in preventing bad acts from being admitted for propensity purposes. Also behind Tab VI is a report from Professor Bavli on the need for an amendment to Rule 404(b).

VII. Rule 702 and Peer Review

Two attorneys have submitted a proposal to the Committee to amend Rule 702 to address the "peer review" factor as set out in *Daubert* and the Committee Note to the 2000 amendment to Rule 702. Under *Daubert* and the Committee Note, the existence of peer review is relevant to a

court's determination of the reliability of an expert's methodology. The attorneys argue that peer review is problematic because many peer-reviewed studies cannot be replicated.

Behind Tab VII is the Reporter's memorandum of the peer review proposal; attached to the memo is the article in which the suggestion about peer review is made.

VIII. Rule 704(b) and the Supreme Court's Opinion in *Diaz v. United States.*

In its last term, the Supreme Court decided *Diaz v. United States,* in which the defendant in a drug-smuggling case argued that Rule 704(b) prohibited testimony from an expert that "most people" who transport drugs across the border do so knowingly. The Court found no error because the expert's testimony was based on probability and not certainty. A question for the Committee is whether the Court's construction of Rule 704(b) counsels or mandates some amendment to the Rule.

Behind Tab VIII is a memorandum from Professor Richter on *Diaz* and Rule 704(b).

IX. Confrontation, Rule 703, and the Supreme Court's Opinion in *Smith v. Arizona*

In its last term, the Supreme Court decided *Smith v. Arizona,* in which a forensic expert testified to a positive drug test, by relying on the testimonial hearsay of another analyst; and the other analyst's findings were disclosed to the jury. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. A question for the Committee is whether the Court's confrontation analysis counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay, but strictly controls the disclosure of that hearsay to the jury.

Behind Tab IX is a memorandum from the Reporter on *Smith* and Rule 703.

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Allison H. Eid United States Court of Appeals Denver, CO	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California College of the Law, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Jesse M. Furman United States District Court New York, NY	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair	Reporter
Honorable Jesse M. Furman United States District Court New York, NY	Professor Daniel J. Capra Fordham University School of Law New York, NY

Members	
Honorable Valerie E. Caproni United States District Court New York, NY	James P. Cooney III, Esq. Womble Bond Dickinson LLP Charlotte, NC
Honorable Mark S. Massa Indiana Supreme Court Indianapolis, IN	Honorable Marshall L. Miller Principal Associate Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Honorable Edmund A. Sargus, Jr. United States District Court Columbus, OH	John S. Siffert, Esq. Lankler Siffert & Wohl LLP New York, NY
Honorable Richard J. Sullivan United States Court of Appeals New York, NY	Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV

Consultant
Professor Liesa Richter University of Oklahoma School of Law Norman, OK

Liaisons	
Honorable Michael W. Mosman (*Criminal*) United States District Court Portland, OR	Honorable Edward M. Mansfield (*Standing*) Iowa Supreme Court Des Moines, IA
Honorable M. Hannah Lauck (*Civil*) United States District Court Richmond, VA	

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
Jesse M. Furman Chair	D	New York (Southern)	Member: 2024 Chair: 2024	---- 2027
Valerie E. Caproni	D	New York (Southern)	2023	2026
James P. Cooney III	ESQ	North Carolina	2022	2025
Mark S. Massa	JUST	Indiana	2022	2025
Marshall L. Miller*	DOJ	Washington, DC	----	Open
Edmund A. Sargus, Jr.	D	Ohio (Southern)	2023	2026
John S. Siffert	ESQ	New York	2023	2026
Richard J. Sullivan	C	Second Circuit	2021	2026
R.L. Valladares	FPD	Nevada	2022	2027
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: Bridget Healy

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* Ex-officio - Principal Associate Deputy Attorney General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Dean Troy A. McKenzie *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Michael W. Mosman (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

H. Thomas Byron III, Esq.
Chief Counsel
Office of the General Counsel – Rules Committee Staff
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Bridget M. Healy, Esq.
Counsel

S. Scott Myers, Esq.
Counsel

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Carly E. Giffin, Esq.
Research Associate
(Bankruptcy)

Laural L. Hooper, Esq.
Senior Research Associate
(Criminal)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

TAB 1A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Washington, D.C., on June 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing Committee; Dr. Elizabeth C. Wiggins, Director, Research Division, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including the committee members and reporters who were attending remotely. Judge Bates also welcomed members of the public and press who joined as observers.

Judge Bates expressed sorrow at the loss of Judge Gene E.K. Pratter the prior month. She completed a full term on the Civil Rules Committee before joining the Standing Committee and she will be missed.

Professor Catherine Struve honored Judge Pratter's legacy as the quintessential Philadelphia lawyer and judge—incredibly skilled in lawyering and rhetoric—and a role model in the Philadelphia legal community. She began her career in 1975 at Duane Morris LLP where she became the firm's first general counsel and expert on legal ethics. She came to teach ethics and trial advocacy at the University of Pennsylvania Law School and served on its board of overseers. Professor Struve also recalled Judge Pratter's generosity and sense of humor.

Judge D. Brooks Smith noted how shocked he had been to learn of Judge Pratter's untimely passing. He came to know her as a friend and colleague when she became a judge, and he quickly learned of her abilities as a district judge. She also contributed greatly when she sat by designation on the court of appeals. He also remarked on Judge Pratter's wonderful sense of style and humor.

Judge Bates thanked Professor Struve and Judge Brooks and added that Judge Pratter will be remembered as an excellent judge who made countless contributions to justice, the federal judiciary, and the rules process in particular.

As this was Judge Kayatta's last meeting, Judge Bates thanked him for his work and recognized that he had been a wonderful contributor to the efforts of the Standing Committee and the rules process.

Judge Bates welcomed the incoming chairs for the Advisory Committees on Appellate Rules and Evidence Rules. Judge Allison Eid, who is from the Tenth Circuit and a former member of the Appellate Rules Committee, will be succeeding Judge Jay Bybee as chair of the Appellate Rules Committee. Judge Jesse Furman from the Southern District of New York, a former member of the Standing Committee, will be succeeding Judge Patrick Schiltz as chair of the Evidence Rules Committee. Judge Bates recognized the great work that Judge Bybee and Judge Schiltz had performed as chairs of their committees, which have been amazingly productive and done excellent work throughout their tenure.

Judge Bates noted that his term as Chair of the Standing Committee had been extended for another year.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2024, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, reported that the latest set of proposed rule amendments had been approved by the Supreme Court and transmitted to Congress. Those amendments will take effect on December 1, 2024, in the absence of congressional action.

Judge Bates noted that the Standing Committee's March 2024 report to the Judicial Conference begins on page 54 of the agenda book and the FJC's report on research projects begins on page 64. Dr. Tim Reagan explained that the FJC in January restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include information about the FJC's Education Division.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Struve reported that the working group hopes to bring proposals to the advisory committees in the fall.

Redaction of Social Security Numbers

Mr. Byron provided the report on several privacy issues, including redaction of social-security numbers. A memorandum from the Reporters' Privacy Rules Working Group begins on page 74 of the agenda book and outlines what the working group and Rules Committee Staff have done over the last several months. The advisory committees and their chairs were asked to provide feedback on this memorandum at their spring meetings.

As previously reported, the rules currently require filers to redact all but the last four digits of a social-security number in court filings, and Senator Ron Wyden suggested that the rules committees revisit whether to require complete redaction. A tentative draft of such an amendment appears on page 75 of the agenda book.

That draft is not being proposed as a rule amendment at this time because it makes sense to consider it in conjunction with other privacy rule proposals that have been received in the last year. As described in the memorandum, there are also other potential ambiguities and areas for clarification in the exemption and waiver provisions that may be worth addressing. The working group, with the help of the advisory committee chairs, will continue considering whether to address any of those issues—in addition to the suggestions from Senator Wyden and others—through the fall, and likely spring, meetings.

Joint Subcommittee on Attorney Admission

Professor Struve reported that there was robust discussion of the various options under consideration by the Joint Subcommittee on Attorney Admission at some of the advisory committees' spring meetings. The subcommittee will continue to consider that input as well as the feedback gathered during the Standing Committee's January meeting. The Subcommittee's consideration is also aided by the excellent research from the FJC regarding fees for admission to federal court bars as well as local counsel requirements for practice in federal district courts. Those FJC reports begin on page 78 of the agenda book. The subcommittee will next meet in July.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on April 10, 2024, in Denver, Colorado. The Advisory Committee presented four action items – two for final approval and two for publication and public comment – and one information item. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 126.

Action Items

Final Approval of Proposed Amendment to Rule 39 (Costs on Appeal). Judge Bybee reported on this item. The text of the proposed amendment appears on page 184 of the agenda book, and the written report begins on page 127.

The proposed amendment to Rule 39 would address allocating and taxing costs in the courts of appeals and the district courts. "Allocate" refers to which party bears the costs, and "tax" refers to the calculation of the costs. The Advisory Committee received two favorable comments, one comment that was not relevant, and one late-filed comment. Aside from some stylistic changes, the Advisory Committee did not believe changes were needed to the published version.

A practitioner member commented that he liked the terminology, which was in response to prior feedback from the Standing Committee, that is, "allocate" when describing who is being asked to pay and "tax" when describing what should be paid. He offered a tweak to Rule 39(a) on page 184, line 3, to say, "The following rules apply to allocating taxable costs…" Adding "taxable" would introduce both concepts. Judge Bybee agreed that the addition would signal exactly what the rule was doing, and, without objection, the addition was made.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 39.**

Final Approval of Proposed Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee reported on this item. The text of the proposed amendment begins on page 163 of the agenda book, and the written report begins on page 129.

This extensive revision of Rule 6 concerns appeals in bankruptcy cases. First, it addresses resetting the time to appeal as a result of a tolling motion in the district court, making clear that the shorter time period used in the Bankruptcy Rules for such motions applies. Second, it addresses direct appeals to the courts of appeals that bypass review by the district court or bankruptcy appellate panel. The amendments overhaul and clarify the provisions for direct appeal, making the rule largely self-contained. Judge Bybee thanked the Bankruptcy Rules Committee for its substantial assistance. There was only one comment during the comment period, and it supported the amendment.

Judge Bates commented that on page 173, line 184, the rule says that Bankruptcy Rule 8007 "applies" to any stay pending appeal, but elsewhere the rule uses "governs." He asked if there is a reason to say "applies" rather than "governs."

Professor Hartnett could not think of one but asked if the style consultants or bankruptcy representatives had a preference. Professor Garner commented that consistency is preferable and that "governs" seems to work. Judge Bybee noted that "applies" was used in the stricken language on line 203 and that the committee note on page 182, line 433, uses "governs." The rule and the note should be made consistent regardless of which word is used.

A judge member agreed with using "governs" if Rule 8007 is all-inclusive as to what controls the appeal. If another rule contains requirements for the appeal, however, Rule 8007 would not "govern," only "apply." Judge Connelly and Professor Gibson indicated that Rule 8007 is the only rule relevant to stays pending appeal.

Professor Struve noted that she had suggested the language change to "applies to" at the spring 2023 Advisory Committee meeting but that she did not object to reverting to "governs." Judge Bates called for a vote on the proposal with the minor change from "applies to" to "governs."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 6.**

Publication of Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis (IFP)). Judge Bybee reported on this item. The text of the proposed form appears on page 213 of the agenda book, and the written report begins on page 132.

This proposal is a change to streamline the way in which Appellate Form 4 collects information for purposes of seeking leave to appeal IFP. It does not affect the standard for whether to grant IFP status. The Advisory Committee has been considering this matter since 2019 and gave the courts of appeals, which have adopted various local versions of Form 4, an opportunity to weigh in on the changes.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Form 4 for public comment.**

Publication of Proposed Amendment to Rule 29 (Brief of an Amicus Curiae). Judge Bybee reported on this item. The text of the proposed amendment appears on page 192 of the agenda book, and the written report begins on page 135.

The Advisory Committee has been considering the proposal to amend Rule 29, regarding disclosures in amicus briefs, since 2019. In 2020, the Supreme Court received inquiries from Senator Whitehouse and Representative Johnson, which were referred to the Advisory Committee.

Judge Bybee expressed the Advisory Committee's appreciation for the substantial feedback from the Standing Committee. The Advisory Committee anticipates receiving a lot of public input, which will inform whether the rule strikes the right balance. It has already received some anticipatory comments that have been docketed as additional rules suggestions.

As explained in the written report, the Advisory Committee considered three difficult issues: (1) disclosure requirements concerning the relationship between a party and the amicus,

including contributions to an amicus that were not earmarked for the preparation of a brief; (2) disclosure requirements concerning the relationship between a nonparty and the amicus; and (3) an exception in the existing rule concerning earmarked contributions by members of an amicus organization.

Judge Bates thanked Judge Bybee and Professor Hartnett for providing an extensive discussion of the rule from various perspectives, including First Amendment considerations.

Much of the Standing Committee's discussion related to concerns about a change that would require leave of the court for non-governmental entities to file an amicus brief during the initial consideration of a case on the merits.

A practitioner member questioned the decision to move away from the Supreme Court's recent rule revision permitting amicus briefs to be filed without leave of the court or the consent of the parties. The Supreme Court's rule presumably reflects the view that the value of helpful amicus briefs outweighs the burden of unhelpful briefs. He wondered if there is actually an overabundance of amicus briefs in the courts of appeals. Even if this rule reduces the number of amicus briefs, there would be more motions for leave to file. He also struggled to see why recusal is an issue for courts of appeals considering that they can strike amicus briefs. If recusal is an issue, rather than limiting the circumstances in which a party can file an amicus brief, perhaps recusal should be addressed directly in the rule (for example, by providing that any amicus brief that would cause recusal of a judge would automatically be stricken) or addressed by the Code of Conduct for United States Judges.

Judge Bates recalled that these concerns were discussed at the Advisory Committee and some unique considerations came up with respect to some appellate courts.

Professor Hartnett remarked that the Supreme Court's rule removes even the very modest filter of consent, so adopting the approach taken in the current Supreme Court rule would require a change from the current Rule 29. One concern expressed at the Advisory Committee was that this completely open rule might result in what are effectively letters to the editor being filed as amicus briefs. However, the recusal issue was a far greater concern to the Advisory Committee. A judge member on the Advisory Committee had explained that the problem is particularly acute during a court's consideration of whether to grant rehearing en banc. When an amicus brief is filed at the en banc stage, no judge is in a position to strike an amicus brief that would require automatic recusal. There is also a recusal problem at the initial panel stage to the extent that the clerk may effectively recuse a judge on the basis of an amicus brief without any judge actually deciding whether the contribution of the amicus brief outweighs the fact that the brief will cause the recusal.

Judge Bybee added that the Advisory Committee's clerk representative was satisfied that this modest change in the rule would not dramatically increase the burden on the clerk's office. He also noted that a prior draft of this proposal followed the Supreme Court's rule and that the requirement of a motion for leave was a recent addition to the proposed amendment.

Multiple members expressed concerns about the increased burden on judges, amici, and parties resulting from a rule that requires a motion for leave to accompany every amicus brief. One judge member noted that motions tend to spawn additional filings—responses, motions for

extensions of time, and replies. She also pointed out that the motion for leave to file may come before a panel is assigned or publicly disclosed. And she was not sure on what basis, other than recusal, leave to file might be denied. Amicus briefs are a way for people to express their views to the court, which is an important part of the openness of the appellate process. If the parties consented to the amicus brief being filed, she did not know why the court would need to police it.

A practitioner member commented that there was a powerful case made at the Advisory Committee meeting about automatic recusal at the en banc petition stage—at least with respect to the Ninth Circuit—because no panel was assigned to decide whether to permit the amicus brief before the en banc petition vote. His reaction as to the panel stage, however, was similar to the judge member's reaction in that recusal prior to a panel assignment was uncertain, and there would be added costs for motions. Nevertheless, he was persuaded that allowing the public to comment on this proposal would reveal whether there is a problem, and a distinction might be drawn after publication between the panel and en banc stages.

Another practitioner member had a mild negative reaction to the added cost but recognized that the reaction from appellate practitioners—and those who pay for their services—during the public comment process will inform whether this procedure is worth the cost. In practice, she always consents to the filing of an amicus brief, even if it is unfavorable to her position. A judge member agreed that she had advised clients to consent to amicus briefs when she was in private practice.

A judge member remarked that, in her circuit, amicus briefs are often circulated before the vote on the petition for rehearing en banc, and an amicus brief is rejected if it would cause a judge to be recused. That said, her circuit does not have en banc proceedings as often as the Ninth Circuit.

Judge Bates invited Judge Bybee and Professor Hartnett to respond to the concerns expressed by some members of the Standing Committee about eliminating consent at the panel stage.

Professor Hartnett suggested that the proposal be published as-is. The proposal may be changed after the comment period to treat the panel and en banc stages differently, but the current structure of the rule was not amenable to making that change during this meeting. From a process perspective, he also explained that, if there is a substantial concern about the burden that a motion requirement will impose, that will come out during the comment period with the proposal in its current form. But, if the proposal were revised (for example, to retain the option of filings on consent), the Advisory Committee could miss out on that feedback. Judge Bybee added that he does not expect judges to comment on this proposal, and that, by publishing the version of the proposal that accommodates some judges' concerns about the en banc process, the rulemakers can elicit comments from the bar.

A judge member expressed skepticism about publishing the proposal with the motion requirement, considering that the appellate judges on the Standing Committee had expressed opposition. But, if the motion requirement were to remain, it would be practically useful for the judge who is considering the motion to have those disclosures in the motion itself, not only the brief.

Judge Bybee's initial reaction was to suspect that recusal issues would be identified by the parties in the motion and that the disclosures would inform the judge about how to weigh the brief. It was also noted that this proposal does not change the current rule with respect to disclosures being contained in the briefs, not motions. The judge member responded that who was contributing money could be relevant on whether to grant leave to file. Also, it has not been an issue because there is not currently a mandatory motion process.

To address disclosures in motions, a practitioner member suggested inserting "motion and" on page 198, line 113, so that the opening of new Rule 29(b) would read "An amicus motion and brief must disclose." Another practitioner member did not think that would capture everything and suggested adding a new Rule 29(a)(3)(C), on the bottom of page 193, to add the disclosures required by Rule 29(b), (c), and (e) to the information accompanying a motion for leave to file. Professor Struve added that Rule 29(a)(4)(A) also requires corporate amici to include a disclosure statement like that required of parties by Rule 26.1. With Judge Bybee's consent, the new subparagraph was added to require those disclosures in a motion for leave.

Regarding the motion requirement issue, a judge member asked about bracketing parts of the proposed rule. A practitioner member suggested bracketing "~~the consent of the parties or~~" on page 193, lines 15–16 and "~~or if the brief states that all parties have consented to its filing~~" on lines 18–19. Judge Bybee agreed with the concept of bracketing that language to call attention to the issue, although he and Professor Hartnett noted that, if that language were restored, it would require some changes later in the rule.

Following further discussion among chairs and reporters during a break, rather than bracketing the language, Professor Hartnett proposed adding language to the report included with the Preliminary Draft, specifically inviting public comment on whether motions should always be required for amicus briefs at the panel stage and whether rehearing should be treated differently. A judge member pointed out that there is language in the proposed committee note, defending the elimination of the consent provision, that would be inconsistent with this solicitation, and Judge Bates suggested that the new report language could refer to the committee note as well as at the rule text. The Standing Committee accepted this proposal.

A few minor changes were made to the proposed rule text and committee note.

First, a judge member questioned why the amicus brief was referred to as being of "considerable help" to the court, on page 192, line 10, whereas it was simply of "help" elsewhere. A practitioner member agreed with omitting "considerable," commenting that no one would want to argue in motions about whether something is of "considerable help" and that it could be an unintentional burden. Professor Hartnett indicated that the phrase was borrowed from the Supreme Court rule, and Judge Bybee indicated no objection to removing "considerable."

Second, Judge Bates asked what is being captured in the phrase "a party, its counsel, or any combination of parties or their counsel" and whether the "or" should be "and." Professor Hartnett indicated they were trying to capture a group of parties, a group of counsel, or a group that includes some counsel and some parties. Professor Struve offered "a party, its counsel, or any combination of parties, their counsel, or both." A practitioner member observed that this provision will cause anxiety, and it is better to be specific even if a little clunky. After further discussion and

with the style consultants' and Judge Bybee's acquiescence, the Standing Committee approved Professor Struve's suggested language.

Judge Bates also asked whether it was necessary to include the clause "but must disclose the date when the amicus was created" in Rule 29(e) when it is also required in Rule 29(a)(4)(E). Judge Bybee indicated the Advisory Committee felt that the repetition was warranted because it is closing a loophole. However, for consistency, the word "when" was removed from the clause in Rule 29(e).

Conforming changes and minor corrections to citations were also made to the proposed committee note. In addition, on page 206, the parentheses around "(or pledged to contribute)" and "(or pledges)" were removed because, as a judge member noted, pledges to contribute are as relevant as actual contributions.

Several issues were also discussed that did not result in changes to the proposal.

Judge Bates asked about the scope of the term "counsel" regarding the obligations placed on parties or their counsel. Professor Hartnett noted that it was not discussed because it is in the current rule, and no one has raised any concerns about it. Judge Bates asked the practitioner members if they had any concerns, and none were offered.

With respect to the disclosure period in Rule 29(b)(4) for "the prior fiscal year," a judge member asked why the period is not the prior or current fiscal year. Professor Hartnett responded that this provision was a compromise when the Advisory Committee was considering whether to use the calendar year or the 12 months prior to filing the brief. This compromise might leave open some strange situations in which there is a dramatic change in an amicus's revenue, but the provision was designed to make administration of the disclosure requirement as simple as possible. Professor Struve added that the contribution or pledge is captured in the numerator, that is the 12 months before the brief is filed, and that the denominator is set by the prior fiscal year. Plus, the total revenue of the current fiscal year may not be knowable.

A judge member commented that some amicus briefs are filed, not to bring anything new to the court's attention, but to notify the court of their support for a position on a policy issue. He added that it was not apparent to him what additional, useful information will be uncovered by this proposal that is not disclosed under the current rule or that is not obvious from the brief. Judge Bybee responded that the Advisory Committee has been weighing that foundational question, and there were some judges who felt very strongly about having this information. Professor Hartnett added that this is a disclosure requirement, not a filing requirement, and that disclosure also serves to inform the public about who is trying to influence the judiciary.

Finally, a judge member asked if there is urgency to publishing this rule now, given the changes made during the meeting. Professor Hartnett responded that the majority of the changes were stylistic and that the most significant change was to require information provided in the brief to also be provided in the motion. No changes were made to address the most serious concerns about the proposed requirement for a motion for leave. Instead, they will flag that issue in the report. Moreover, the Advisory Committee has already started receiving preemptive comments that have been docketed as rules suggestions, and there is a strong sense from the Advisory

Committee that it is time to get formal feedback after a very long time considering this issue. Judge Bates agreed that a substantial delay in publication is not warranted given the thoroughness of the examination that has taken place.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 29 for public comment.**

Publication of Proposed Amendments to Rule 32 (Form of Briefs, Appendices, and Other Papers); Appendix of Length Limits. Judge Bybee reported that the proposed amendment to Rule 29 required conforming changes to Rule 32 and the appendix on length limits. The text of the proposed amendments appears on page 210 of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rule 32 and the appendix of length limits for public comment.**

Information Item

Intervention on appeal. Judge Bybee reported that the Advisory Committee continues to consider intervention on appeal, but nothing new is being proposed right now.

Judge Bates thanked Judge Bybee and Professor Hartnett for their report and thanked Judge Bybee, in particular, for his fantastic and concerted work over the years.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on April 11, 2024, in Denver, Colorado. The Advisory Committee presented action items for final approval of two rules and seven official forms, as well as publication of several proposed rule amendments. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 237.

Action Items

Final Approval of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Proposed New Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R. Judge Connelly reported on this item. The text of the proposed amendments begins on page 253 of the agenda book, and the written report begins on page 239.

Rule 3002.1 applies in Chapter 13 cases and addresses notices from mortgage companies concerning postpetition mortgage payments. The proposed amendment to Rule 3002.1 provides for status updates during the case and enhances the notice at the end of the case. The six accompanying forms—which consist of two motions, one notice, and responses to them—provide a uniform mechanism to do this.

The Standing Committee approved the proposal for publication last year, and the Advisory Committee received a number of helpful, constructive comments. The comments guided the Advisory Committee in making clarifying changes in the proposed rule. The Advisory Committee unanimously approved Rule 3002.1 and the accompanying forms at its spring meeting.

Following a brief style discussion, Judge Bates called for a motion on a vote for final approval for the proposed amendment to Rule 3002.1 and the adoption of the six new official forms as presented in the agenda book. Mr. Byron and Professor Gibson clarified that the effective date for the official forms related to Rule 3002.1, if approved, would be the same as the proposed changes to the rule, December 1, 2025.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rule 3002.1 and new Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R.**

Final Approval of Proposed Amendment to Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Judge Connelly reported on this item. The text of the proposed amendment begins on page 291 of the agenda book, and the written report begins on page 241.

The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may request that the court of appeals authorize a direct appeal. The Advisory Committee received only one comment during publication, and it was supportive. This change is related to, and consistent with, Appellate Rule 6(c)(2)(A), which was given final approval during the Appellate Rules Committee's report.

Professor Hartnett noted that this small amendment to Rule 8006 drove virtually all of the revisions to Appellate Rule 6, and he thanked the Bankruptcy Rules Committee for working closely with the Appellate Rules Committee.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 8006(g).**

Final Approval of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The text of the proposed amendment begins on page 327 of the agenda book, and the written report begins on page 245.

The uniform claim identifier (UCI) is a bankruptcy identifier that was developed to facilitate electronic disbursements in Chapter 13 cases to certain large creditors. Official Form 410, which is the proof of claim form used by any creditor making a claim for payment in a bankruptcy case, currently provides for the creditor's disclosure of the UCI "for electronic payments in Chapter 13 (if you use one)." The proposed amendment would eliminate that restriction, thereby expanding the disclosure of the UCI to any chapter and for nonelectronic disbursements, as well as electronic disbursements. Following publication, the Advisory Committee received one favorable comment.

Mr. Byron and Professor Gibson clarified that, unlike the official forms related to Rule 3002.1, the amendment to Official Form 410, if approved, would take effect in the normal course on December 1, 2024.

Professor Coquillette asked if this identifier could cause any privacy issues. Judge Connelly responded that use of a UCI may enhance debtor privacy, as it does not require a full account number or Social Security number. It is a unique bankruptcy identifier for creditors that use it to identify the creditor, court, and debtor's claim.

An academic member asked what would happen if someone wanted to use Official Form 410 to file a proof of claim on behalf of someone else, such as a would-be class representative filing on behalf of members of a proposed class under Rule 7023. Judge Connelly commented that this form cannot address all circumstances but that this change would not be affected by who is filing the claim. She added that only parties who represent large institutions would be likely to use an accounting system that would involve a UCI. There are also safeguards in place to address false or duplicative claims.

One additional technical change was made to Official Form 410 to conform it to the restyled Bankruptcy Rules scheduled to go into effect on December 1, 2024: The reference to Bankruptcy Rule 5005(a)(2) in Part 3 of the form was changed to Rule 5005(a)(3).

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410.**

Publication of Proposed Amendment to Rule 3018 (Chapter 9 or 11 – Accepting or Rejecting a Plan). Judge Connelly reported on this item. The text of the proposed amendment begins on page 334 of the agenda book, and the written report begins on page 245.

The Standing Committee approved this proposal for publication at its January 2024 meeting. After that meeting, Professor Struve and the Standing Committee's liaison to the Bankruptcy Rules Committee, among others, raised some concerns about the language that had been approved. The Advisory Committee considered those comments and approved some clarifying revisions at its spring meeting. It now seeks approval to publish this revised version for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018 for public comment.**

Publication of Proposed Amendments to Rules 9014 (Contested Matters), 9017 (Evidence), and new Bankruptcy Rule 7043 (Taking Testimony). Judge Connelly reported on this item. The text of the proposed amendments begins on page 341 of the agenda book, and the written report begins on page 247.

This proposal relates to the means of taking testimony in bankruptcy cases, and, if approved, would establish different standards for allowing remote testimony in bankruptcy adversary proceedings (separate lawsuits within the bankruptcy case analogous to a civil action in district court) and contested matters (a motion-based procedure that can usually be resolved

expeditiously by means of a hearing).[1] Under current Rule 9017, Civil Rule 43 applies to "cases under the Code." Civil Rule 43(a), in turn, provides that, at trial, a court may permit testimony by remote means if three criteria are present: (1) good cause, (2) appropriate safeguards, and (3) compelling circumstances. Many bankruptcy courts read Bankruptcy Rules 9014(d) and 9017 together to require that the three-part standard set forth in Civil Rule 43(a) must be met before allowing any remote testimony in a bankruptcy case, whether it is in a contested matter or an adversary proceeding.

This proposal would remove the reference to Civil Rule 43 in Rule 9017, but it would retain Rule 43(a)'s three-part standard for allowing remote testimony in adversary proceedings via a new Rule 7043. A separate amendment would be made to Rule 9014(d) that would incorporate most of the language in Civil Rule 43, but without the requirement to show "compelling circumstances" before a court could allow remote testimony in a contested matter. Good cause—now shortened by restyling to "cause"—and appropriate safeguards would continue to be required for a witness to testify remotely in contested matters.

When this proposal came before Advisory Committee during its fall 2023 meeting, it was pointed out that the Judicial Conference was considering amendments to the broadcast policy based on a recommendation—which has since been adopted—from the Committee on Court Administration and Case Management (CACM). The proposal was delayed so that the Advisory Committee could confer with the CACM Committee. A CACM subcommittee, with input from the Committee on the Administration of the Bankruptcy System, considered this bankruptcy rules proposal and indicated that the proposed amendments and their publication would not violate the new policy or interfere with the CACM Committee's ongoing work.

At the Advisory Committee's spring meeting, there was consensus to seek public comment on the proposal. There was also a question raised about whether this proposal represented a first step with the goal of allowing remote testimony more broadly in bankruptcy cases. Judge Connelly explained that it was not—and is not—the intent of the proposal to herald a broader change, although the Advisory Committee recognizes that adoption of this proposal might lead to future suggestions to adopt the less stringent standard for remote testimony beyond contested matters.

Judge Bates stated that remote proceedings and remote testimony are important issues across the judiciary, not only in the bankruptcy courts. He asked three questions. First, what is the current practice, and is remote testimony being taken already? Second, what are the expected effects of the proposed amendments? Third, what does the standard "for cause and with appropriate safeguards" mean?

As to the first question, Judge Connelly explained that she did not have hard data. Based on conversations with colleagues, she said that remote testimony has been occurring on an ad hoc

[1] Contested matters do not require the procedural formalities used in adversary proceedings, including a complaint, answer, counterclaim, crossclaim, and third-party practice or a discovery plan. They occur frequently over the course of a bankruptcy case and are often resolved on the basis of uncontested testimony. Testimony might concern, for example, the simple proffer by a debtor about the ability to make ongoing installment payments for an automobile that is the subject of a motion to lift the automatic stay. Or, as another example, testimony might be given in a commercial chapter 11 case by a corporate officer about ongoing operational costs in support of a motion to use estate assets to maintain business operations.

basis following the pandemic. Her impression was that, although not unheard-of pre-pandemic, it has become more common to allow remote testimony in contested matters in Chapter 11 cases because these cases involve parties across the country or the world and the hearings tend to be more administrative and for the purpose of gathering information. She thought that permitting remote testimony for background information in consumer cases was rare pre-pandemic but that the practice has become more common post-pandemic—although some judges have told her that they feel they can no longer take remote testimony now that the pandemic has subsided.

As to expectations concerning the proposed amendments, Judge Connelly anticipates that remote testimony will become more common in contested matters, particularly consumer matters. She noted, however, that some bankruptcy judges have expressed concern about taking remote testimony and giving increased discretion to those judges is not likely to change their practice.

Judge Connelly said that "cause and appropriate safeguards" under proposed Rule 9014(d) means what "good cause" and "appropriate safeguards" mean under Civil Rule 43, adding that under the restyled Bankruptcy Rules "good cause" is restyled to "cause." Part of the reason for the proposed change, however, was that under most of the published opinions on Civil Rule 43 courts have held that the "compelling circumstances" element in Rule 43 is almost impossible to meet. Many courts have found that distance to the courthouse and financial concerns—two big issues in bankruptcy—are not compelling circumstances that would allow for remote testimony, though they might be enough to find cause to allow remote testimony.

Judge Bates expressed some concern about the prospect that the amendments would make remote testimony more common than it is under the existing rules, and wondered if it might be expected to overtake the general rule requiring in-person testimony. Judge Connelly stated that live testimony would, of course, remain the default under the rules. A party would need to request permission to testify remotely, and a judge would need to find cause.

Professor Marcus mentioned, for context, the Civil Rule 43(a) proposal on page 527 of the agenda book. The Civil Rules Committee has referred that proposal to a subcommittee, in which Judge Kahn is participating on behalf of the Bankruptcy Rules Committee. The practitioners who have proposed the amendment to Civil Rule 43 wish to significantly expand the availability of remote testimony in proceedings under the Civil Rules. While the bankruptcy proposal does not change the standard for adversary proceedings, the Civil Rules Committee would be very interested in seeing any comments on the bankruptcy proposal.

Professor Hartnett asked how often subpoenas are required in contested matters and whether bankruptcy has the same issues as civil with respect to Civil Rule 45 distance requirements. Judge Connelly responded that subpoenas are common in adversary proceedings but less so in contested matters.

A judge member inquired if the Advisory Committee contemplated a judge making a blanket order setting remote testimony as the default for certain categories of matters. He explained that there is a new courthouse that is not yet accessible to the public for security reasons, but the bankruptcy judges were able to move in because most things are done remotely. Judge Connelly responded that the Advisory Committee did not anticipate such blanket orders. If anything, she had heard from colleagues the opposite, that is, that they would generally not approve requests to

testify remotely. There might, however, be circumstances that prevent people from being able to access the courthouse—like security, the pandemic, or weather—and being able to conduct hearings in those circumstances is valuable to the system.

Ms. Shapiro asked why the CACM Committee did not think this would interfere with its work. Mr. Byron and others explained that the CACM Committee separates the ideas of using technology for broadcasting—making the courtroom more accessible to the public—from remote participation, such as allowing witnesses to testify remotely. Because the CACM Committee is focused on broadcasting, this proposal on remote testimony in contested matters is different in kind from, and does not impede, its work. Ms. Shapiro commented that, whether intended or not, some might conflate remote testimony and remote public access because proponents of cameras in the courtroom use a similar good cause and substantial safeguards standard.

Another judge member pointed out that the committee note for Civil Rule 43 has extensive discussion of what constitutes "good cause" and says that "good cause and compelling circumstances" may be established with relative ease if all parties agree that testimony should be presented by remote transmission. She asked if there should be more detail in the bankruptcy rule's note about it. Judge Bates wondered if that supports a cross-reference in the committee note to the explanation in the committee note to Civil Rule 43 about good cause. Judge Connelly responded that a cross-reference to the Rule 43 committee note might make sense, but she explained that unlike in a two-party dispute, it would be difficult in a contested bankruptcy matter to get the consent of every affected party, which technically could include all creditors in the bankruptcy case. So, while there may be consent of all hearing participants, that might not mean the same thing as consent of all parties in a civil case in district court.

Judge Bates later observed that Civil Rule 43 has been viewed as limiting remote proceedings whereas the proposed bankruptcy rule is intended to expand access to remote proceedings. Yet, they share most of the same language, including a reference in the note to Civil Rule 43, and the only change is the removal of the language requiring compelling circumstances.

Professor Bartell responded that both rules permit remote proceedings but only under very limited circumstances. The proposed bankruptcy rule will simply permit it in slightly broader circumstances. Judge Connelly added that, under both rules, the judge still has discretion and there must be cause. Professor Bartell also noted that, in jurisdictions with a large geographic scope, in-person attendance can be a significant burden on parties, whether on the debtor or creditor side. Presumably, jurisdictions with small geographic areas will have fewer situations calling for remote testimony. Judge Bates noted that the vast area explanation also comes up in other contexts like non-random case assignment.

A judge member commented that there will always be some basis for cause—convenience or lesser expense—so, as a practical matter, dropping compelling circumstances means that this decision will be left to the judge's discretion in contested matters. Judge Connelly noted that this could be another reason to cross-reference Civil Rule 43 for the cause standard.

A practitioner member remarked that the big question is whether this is the beginning of a larger creep toward allowing remote participation in proceedings more generally, and another practitioner member wondered if this proposal should be on the same timeline as the recent

suggestion concerning Civil Rule 43. An academic member pointed out that, while coordination is generally a good idea, the Bankruptcy Rules often adapt to new technology first, and that experience in that arena can inform the other rule sets.

Judge Connelly reiterated that this proposal does not affect Civil Rule 43's application in adversary proceedings; it only affects contested matters and only by removing the need to show compelling circumstances. That is a much more limited change than what is proposed to Civil Rule 43. Delaying the bankruptcy proposal might make things more complicated.

Several committee members felt it would be helpful to add language to the committee note giving a principled reason for why contested matters are being treated differently than adversary proceedings. For example, contested matters occur with routine frequency, often require the attendance of pro se litigants, are shorter, involve more affected parties which makes consent harder to obtain, and often involve testimony where credibility is less of an issue.

Judge Bates remarked that his sense of the Standing Committee's discussion was that it is not necessary to tie the timing of this proposal to that of the proposal concerning Civil Rule 43 but that some additional explanation in the committee note would be useful.

The committee briefly discussed how to incorporate this feedback without delaying publication for another year. A practitioner member asked if this could be handled via email in the coming days, and Judge Bates commented that an email vote is only used if there is some need to resolve the matter promptly. A judge member asked if remote testimony is being permitted around the country. Judge Connelly noted that remote testimony is taking place, although it was hard to tell how often, and there is some urgency in the need to provide clarity. She offered to provide the amendment to the note very promptly. Another judge member remarked that it would be enough for him if the note captured the explanation given during the meeting and that he would like to give the Advisory Committee leadership an opportunity to provide that without derailing the process entirely. Judge Bates emphasized that this would not create a precedent, but, with no opposition from the Standing Committee, he was comfortable with handling this matter by email.

Following the meeting, Judge Connelly and Professors Gibson and Bartell prepared a revised committee note for Rule 9014 that addresses the concerns raised during the Standing Committee meeting, explaining why contested matters are different from adversary proceedings. The Advisory Committee unanimously approved the revised committee note for publication. The revised committee note was circulated to the Standing Committee, which unanimously approved it, and the revised language was included in the agenda book posted on the judiciary's public website.

By email ballot and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 9014 and 9017 and proposed new Rule 7043 for public comment.**

Publication of Proposed Amendments to Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions). The text of the proposed amendments begins on page 331 of the agenda book, and the written report begins on page 248.

By statute, most individual debtors must complete a course on personal financial management to receive a discharge. Rule 1007 provides the deadline for filing a certificate of course completion, and Rule 9006 provides for altering timelines. The proposal is to eliminate the deadline in Rule 1007 and the cross-reference in Rule 9006. The education requirement is a prerequisite for the discharge, but there is not a particular statutory deadline. But because there is a specific deadline in Rule 1007, some courts have denied a discharge even if the debtor completed the education after the deadline. The Advisory Committee seeks to publish this proposal to address the concern that the rule is making it unnecessarily difficult for debtors to obtain a discharge.

Relatedly, Rule 5009 directs the clerk to perform certain tasks, including sending a reminder notice to debtors who have not filed a certification of completion. This proposal would add a second reminder notice creating a two-tiered system with one notice early in the case when engagement is higher, and a second notice, if the certification of course completion has not been filed, before the case is closed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendments to Rules 1007, 5009, and 9006 for public comment.**

Information Items

In the interest of time, Judge Connelly and the reporters referred the Standing Committee to the written materials, beginning on page 250 of the agenda book, for a report on four information items. The information items pertain to suggestions to remove partially redacted social-security numbers from certain filings, suggestions to allow the use of masters in bankruptcy cases, a description of technical amendments made to certain bankruptcy forms and form instructions to reflect the restyling of the Bankruptcy Rules, and a decision not to go forward with proposed amendments to two forms.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on April 9, 2024, in Denver, Colorado. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 375.

Judge Rosenberg reported that, in August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Three public hearings were held on these changes in October 2023, January 2024, and February 2024, presenting the views of over 80 witnesses. The public comment period ended on February 16, 2024. On April 9, the Advisory Committee voted unanimously to seek final approval from the Standing Committee for both proposals.

Action Items

Final Approval of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery). Judge Rosenberg reported on this item. The text of the proposed rule amendments begins, respectively, on page 530 and page 550 of the agenda book, and the written report begins on page 379.

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv), the "privilege log" rule amendments, were published for public comment, and there was a lot of feedback from the viewpoints of both discovery "producers" and "requesters." Summaries of the testimony and written comments begin on page 391 of the agenda book. The Discovery Subcommittee recommended no change to the rule text, but it shortened the committee note considerably. The shortened committee note omitted observations about burdens, avoided language favoring either side, and took no position on controversial issues raised during the public comment process. As described in the Advisory Committee's written report, the subcommittee considered several other issues but ultimately did not recommend other changes to the proposal.

Professor Marcus emphasized that the Advisory Committee preferred an adaptable approach. Shortening the committee note was intended to allow judges to consider arguments from both sides without the note giving support to either.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv).**

Final Approval of Proposed New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The text of the proposed new rule begins on page 533 of the agenda book, and the written report begins on page 414.

Judge Rosenberg acknowledged the long, hard work of many people on Rule 16.1, including contributions from Judge Proctor, the current chair of the MDL Subcommittee, and Judge Dow, the prior Chair of the MDL Subcommittee and the Advisory Committee. She also recognized the work of Judge Bates, the Advisory Committee members and reporters, the stylists, and the many organizations and individuals who have offered their feedback during this seven-year process.

The Advisory Committee heard from over 80 witnesses and received over 100 written comments, representing a diverse set of views and perspectives. The MDL transferee judges expressed strong, unanimous support for the proposed Rule 16.1 at the transferee judges conferences in October 2022 and 2023. In addition, the two judges who have been assigned perhaps the most MDLs and the largest MDL wrote letters in support of the version approved for public comment. The MDL Subcommittee and the full Advisory Committee weighed this feedback carefully.

As detailed in the written report, since publication, the proposed rule has been restructured to address both style and substantive feedback. The revised rule now has two lists of prompts to consider, differentiating topics calling for the parties' "initial" views, those topics where court action may be premature before leadership counsel is appointed, if that is to occur, from those

topics that frequently call for early action by the court. Additionally, the revised proposal omits a provision concerning the appointment of coordinating counsel, which generated negative feedback. Nothing in the revised rule precludes a judge from appointing coordinating or liaison counsel, but the negative public reaction to that provision resulted in its removal from the rule. The rule also highlights the need to decide early whether, and if so how, to appoint leadership counsel. The revised rule also reverses the default such that parties must address the matters listed in the rule unless the court directs otherwise.

The Advisory Committee concluded that republication was not required in light of these changes. Under the rules committees' governing procedures, republication is appropriate when an advisory committee makes substantial changes to a rule after publication unless it determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees. The Advisory Committee concluded that the post-publication changes to proposed Rule 16.1 did not rise to the level of substantial changes. Moreover, the changes were discussed regularly throughout the hearings and rulemaking process, and the changes were made in light of the comments the Advisory Committee received.

Professor Marcus emphasized that the public comment period really works and that the rule proposal today is quite similar to the published version albeit rearranged after careful reconsideration. The support of the transferee judges is significant, and the alternative to something like this rule is to leave transferee judges with no indication of the parties' views going into the initial management conference. The Advisory Committee worked for seven years on this proposal, and the original MDL Subcommittee was appointed by Judge Bates when he was chair of the Advisory Committee.

Professor Bradt remarked that the process and outreach to practitioners, academics, and judges had been extraordinary. Although this rule may not include everything that any particular group would have wanted, it achieved consensus.

Professor Cooper added that this rule is discretionary, not a mandate, and is a terrific guide.

Judge Bates congratulated the Advisory Committee's current leadership, members, and predecessors for an outstanding effort in preparing this rule. It is a modest rule considering the initial proposals.

Judge Rosenberg explained that, shortly before the meeting, a judge member of the Standing Committee had suggested clarifying the term "judicial assistance" in the committee note regarding Rule 16.1(b)(3)(E). In response, Judge Rosenberg proposed the following change to the paragraph beginning on page 547, line 386:

> **Rule 16.1(b)(3)(E).** Whether or not the court has appointed leadership counsel, the court may consider measures to facilitate the resolution of some or all actions before the court ~~it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.~~ In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues,

> selection of representative bellwether trials, and coordination with state courts may facilitate resolution. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution.

Judge Bates pointed out that the paragraph begins with "[w]hether or not the court has appointed leadership counsel" yet this provision is contained in a list that must wait for appointment of leadership counsel. Professor Marcus stated that Judge Bates identified a drafting challenge in that the question of leadership counsel informs a variety of other issues. A judge member suggested striking that introductory phrase, which Judge Rosenberg accepted. This change to the committee note—including the omission of "Whether or not the court has appointed leadership counsel"—was incorporated into the Rule 16.1 proposal.

With respect to proposed Rule 16.1(b)(2)(A)(iv), Judge Bates suggested adding "facilitating" before "resolution." That term reflects the language in proposed Rule 16.1(b)(3)(E) and the language in the committee note explaining that one purpose of item (iv) "is to facilitate resolution of claims." Judge Bates also suggested deleting "some of" in the committee note on page 539, line 140, because this is the only reason given for all of the items. With Judge Rosenberg's agreement and the input from the style consultants, "facilitating" was added to Rule 16.1(b)(2)(A)(iv), and the language in the committee note for Rule 16.1(b)(2) was changed to "court action on a matter ~~some of the matters~~ identified in Rule 16.1(b)(3)."

Judge Bates also commented that whether direct filings will be permitted is a threshold question for the transferee court, but the language in proposed Rule 16.1(b)(2)(D) ("how to manage the direct filing of new actions in the MDL proceedings") seems to presume that there would be direct filings. Judge Rosenberg explained that the current language served to notify the court that there will likely be actions filed directly in the transferee court in addition to those transferred as tagalongs by the Judicial Panel on Multidistrict Litigation (JPML). The use of "manage" in the rule is also intended to encourage parties to think about issues like choice of law and where a directly filed case would be remanded if less than the entire case is resolved in the MDL. Professor Bradt added that there will inevitably be actions filed directly in the transferee court even if there is no direct filing stipulation to waive venue and personal jurisdiction objections. It is the plaintiff's decision where to file in the first instance and the defendant's decision whether to challenge that decision by a Rule 12(b) motion. The current language avoids weighing in on whether a direct filing order pursuant to a defendant's stipulation is necessary, and he worried that it would create confusion if the rule were changed to suggest that the plaintiff could not file first in the MDL forum. Judge Bates said that he would defer to the Advisory Committee's judgment on the direct filing language.

A practitioner member pointed out that the transferee court may be a natural jurisdiction for trial purposes, so there will be direct filings. There could even be direct filings in MDLs involving class actions; she recalled one MDL in which over 400 class actions were filed. MDLs are inherently trans-substantive, and she was impressed by the balance that the Advisory Committee struck to give flexibility. She suggested removing "(g)" from "Rule 23(g)" on page 543, line 256, in response to a concern that she heard from antitrust and securities practitioners. They were concerned that the case management provisions in Rule 16 and 23 might be abrogated by Rule 16.1. Without objection, that change was made to the committee note.

Another practitioner member asked about the interplay of proposed Rule 16.1(b)(2)(D) and (E) and how to manage plaintiffs who file lawsuits outside the transferee court. Professor Marcus noted that such a case when filed in another federal district court is a tag-along, and it will be transferred to the transferee court unless the JPML chooses not to do so. Professor Bradt remarked that how to deal with tag-along actions is fairly regularized. The rule deals with direct filings because there is a lot of confusion that does not apply to tag-alongs. Another practitioner member added that the JPML has a set of detailed rules regarding tag-alongs, which is likely why it has not been brought up in this rule. Whether to transfer the tag-along case to the transferee district is up to the JPML, not the transferee court; so the issues that would actually come before the transferee court (rather than the JPML) are those in the categories described by (D) and (E).

Another practitioner member worried about the term "authority" in proposed Rule 16.1(b)(2)(A)(iv), referring to leadership counsel's "responsibilities and authority in conducting pretrial activities," and what it might suggest about leadership counsel's ability to bind other attorneys. Striking "and authority" would make it more consistent with the committee note, which speaks of duties and responsibilities, not authority. Professor Marcus responded that to say only "responsibilities" would leave out an important part of the appointment of leadership counsel; as proposed Rule 16.1(b)(2)(A)(vi) recognizes, a corollary to appointing leadership counsel often involves setting limits on activity by nonleadership counsel. Judge Rosenberg noted that one of her prior orders of appointment, which was based on a survey of other judges' orders, defined the "authority, duties, and responsibility" of plaintiffs' leadership.

After a review of all of the changes, Judge Bates called for a motion to approve proposed new Rule 16.1.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 16.1.**

Information Items

Judge Rosenberg reported on the work of the Advisory Committee's subcommittees as well as a few other information items. These items are described in the written report beginning on page 523 of the agenda book.

Rule 41 Subcommittee. The Rule 41 Subcommittee was formed in October 2022 in response to submissions identifying a circuit split on whether Rule 41 permits a unilateral, voluntary dismissal of something less than an entire action. The subcommittee has concluded that the rule should be revised to explicitly increase its flexibility so that parties can dismiss one or more claims from the case. That is consistent with the prevailing district court practice and the policy goal of narrowing the issues in the case. The subcommittee plans to put forth proposed text at the fall Advisory Committee meeting, changing "an action" to "a claim."

Discovery Subcommittee. The Discovery Subcommittee continues to work on two items—the manner of service for subpoenas, and filing under seal—that were reported on at the January Standing Committee meeting.

Rule 7.1 Subcommittee. The Rule 7.1 Subcommittee also hopes to put forward a proposal at the fall Advisory Committee meeting. The subcommittee has been considering whether to

expand the disclosures required of non-governmental organizations. Rule 7.1 disclosures inform judges when making recusal decisions under 28 U.S.C. § 455(b)(4). The Committee on Codes of Conduct recently issued guidance providing that judges should recuse themselves when they have a financial interest in a parent company that controls a party to a case before them. Professor Bradt added that the subcommittee is working on a rule that makes it as easy as possible for judges to implement this guidance.

Cross-Border Discovery Subcommittee. Cross-border discovery is a big issue, and the subcommittee is in an early, information-gathering stage. The subcommittee decided to focus first on handling discovery for use in litigation in the United States and the application of the Hague Convention.

Rule 43/45 Subcommittee. A number of plaintiff-side attorneys have suggested resolving a split in courts about the interaction of (i) Rule 45(c)'s limitations on where a witness must appear under subpoena and (ii) the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena. A new subcommittee has been created to look at this issue.

Professor Marcus noted that there are two subcommittees looking at Rule 45. The Rule 45 aspect of this remote testimony question appears easier to solve compared to the Rule 43 part. It is possible that the Advisory Committee will consider the Rule 45 issues together in a single proposal separate from the Rule 43 remote testimony question.

Random Case Assignment. The reporters continue to research this issue and monitor the effects of new Judicial Conference guidance that encourages random assignment of cases seeking nationwide or statewide injunctive relief. Professor Bradt added that he is researching Rules Enabling Act authority for a rule and what a rule might look like. The subcommittee will focus on monitoring the uptake of the new guidance over the summer.

Use of the Word "Master" in the Rules. The American Bar Association proposed removing the word "master" from the rules, particularly Rule 53, and substituting "court-appointed neutral." The Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) supports the proposal. The Advisory Committee would appreciate the views of the Standing Committee on whether the word "master" should be discarded in the rules and, if so, what term should replace it. The term "master" appears in at least six other rules, the Supreme Court's rules, and at least one statute. Judges also use the term in making appointments to assist in the conduct of litigation even without relying on Rule 53.

Professor Marcus sought guidance, particularly from judges. The term "master" has been used in Anglo-American jurisprudence for a very long time, but it has also been used in a very harmful way in contexts mostly unrelated to judicial proceedings. Anecdotally, from the two judges he asked, he heard opposite views about whether a change is needed.

Hearing nothing, Judge Bates noted that the Standing Committee members could reach out to Professor Marcus after the meeting and commented that the Standing Committee would look forward to the Advisory Committee's views.

Demands for Jury Trials in Removed Actions. The Advisory Committee has not yet decided how to address the verb-tense change made during the restyling of Rule 81(c)(3)(A) and the potential issues that it may be causing in removed actions.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever presented the report of the Advisory Committee on Criminal Rules, which last met on April 18, 2024, in Washington, D.C. The Advisory Committee presented four information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 573.

Information Items

Rule 17 and pretrial subpoena authority. The Rule 17 Subcommittee, chaired by Judge Nguyen, has been considering how information is gathered from third parties in criminal cases and has determined that there is a need to clarify the rule. The subcommittee has conducted a survey and gathered information showing that there is great disparity in actual practice regarding how Rule 17 has been interpreted by courts. The subcommittee has been working to draft language for the Advisory Committee to review and possibly to road test.

Rule 53 and broadcasting criminal proceedings. The Rule 53 Subcommittee is considering a suggestion from a consortium of media groups proposing to amend Rule 53 to give courts discretion to televise trials. The Rules Law Clerk has prepared a memorandum on the history of Rule 53, and the subcommittee is now in the process of gathering information about actual practice. Judge Michael Mosman, who joined the Advisory Committee to replace Judge Conrad after he was appointed Director of the Administrative Office of the U.S. Courts, will serve as a member of the Rule 53 Subcommittee.

The subcommittee is also coordinating with the CACM Committee. As Judge Dever commented during the discussion on remote testimony in contested bankruptcy matters, the CACM Committee draws a distinction between using technology to bring witnesses into court and using technology to expand the courtroom.

Rule 49.1 and references to minors by pseudonyms. The Advisory Committee recently received a suggestion from the Department of Justice to amend Rule 49.1 to protect the privacy of minors by using pseudonyms, instead of initials as is currently required. Judge Dever announced a new Privacy Subcommittee, headed by Judge Harvey, to consider this proposal as well as other issues under Rule 49.1, including the redaction of social-security numbers.

Ambiguities and gaps in Rule 40. Magistrate Judge Bolitho submitted a proposal to clarify Rule 40 as it applies when a defendant from outside the district is arrested for violating conditions of release. The Magistrate Judges Advisory Group recently submitted a comprehensive request concerning additional amendments to Rule 40 that would address several issues of concern, including the situation raised by Judge Bolitho. Judge Dever anticipates creating a new subcommittee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on April 19, 2024, in Washington, D.C. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 96.

Action Item

Publication of Proposed Amendment to Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Judge Schiltz reported on this item. The text of the proposed amendment appears on page 102 of the agenda book, and the written report begins on page 97.

This proposal is related to a witness's prior inconsistent statements, which are introduced early and often at trials. In theory, under the current Rule, prior inconsistent statements can be used only to assess the credibility of a witness—not for the substance of the statement—unless the statement was made under oath at a formal proceeding. As a practical matter, prior inconsistent statements are likely being used by jurors for substantive purposes, and the proposed amendment would allow admissible prior inconsistent statements to be used for both credibility and substance.

Aside from prosecutors using grand jury testimony, prior inconsistent statements are rarely made under oath at a formal proceeding. Judges give instructions like the following: "You heard Joe testify that the light was red. You also heard that, a few months ago, Joe told his sister that the light was green. You may use Joe's statement to his sister in deciding whether Joe was being truthful in saying the light was red, but you may not use Joe's statement to his sister in deciding whether the light was red." But many trial judges believe jurors do not understand or follow such instructions, and attorneys often do not ask for these instructions.

As a matter of hearsay law, a prior inconsistent statement cannot be admitted unless the person who made it is on the stand, under oath, and subject to cross-examination; this proposal would not change that standard and would not result in jurors hearing anything new. Rather, the proposal would bring the rule into alignment with practice and spare judges from giving jury instructions that are likely not being followed. It would further bring the treatment of prior *inconsistent* statements into alignment with prior *consistent* statements, which may be considered for both purposes (substance and credibility). This would restore the rule to the version proposed by the original Advisory Committee before Congress, in enacting the Evidence Rules, changed Rule 801's approach to prior inconsistent statements. Additionally, about half of the states have more lenient treatment than the federal rules, and around 15 states allow the use of prior inconsistent statements for any purpose.

One of the practitioner members commented that the proposal was elegant, but the deletion of the limiting language in Rule 801(d)(1)(A) would raise questions about new types of evidence coming in as substantive evidence. For example, in a criminal case, witnesses are commonly confronted with prior statements memorialized in federal agent notes such as the FBI form FD-302. But those federal agent notes are not a transcript and would not themselves be admissible. He wondered whether the rule would encompass prior statements that cannot be easily verified; what if the witness states that they cannot recall what they previously told the agent? He suggested

adding "is otherwise admissible under these rules" in the rule or clarifying it in the committee note. Another practitioner member suggested that the committee note could provide a more fulsome cross-reference to the other rules to expressly clarify that the statement would need to be otherwise admissible.

Professor Capra explained that proving a prior inconsistent statement is done with extrinsic evidence under Rule 613(b), and the statement will be admitted as substantive proof only if there is admissible evidence. Judge Schiltz noted that this is not an affirmative rule of admissibility. The proposal simply lifts the hearsay bar as is already done with prior consistent statements. Judge Schiltz and Professor Capra pointed out that judges could still monitor the use of statements through Rule 403, and authenticity rules also still apply. Nevertheless, they agreed that a new paragraph could be added to the committee note to clarify this issue, and there was some discussion about whether to make that change now or after publication.

A judge member asked why we would only make this clarification (referring to otherwise admissible evidence) as to inconsistent statements and not to consistent statements. Professor Capra agreed that was a good point. The rules do not say that the evidence must be admissible every time there is an exception to the hearsay rule. The judge member asked if there had been issues with the change to consistent statements, and Professor Capra indicated there had not. The judge member stated that she would not limit any change to inconsistent statements, and Professor Capra worried about negative inferences for every other hearsay exception. Another judge member echoed this concern.

The first practitioner member commented that it would be sufficient to address this in the committee note. He reiterated that the note's statement that "[t]he rule is one of admissibility, not sufficiency" implies something that the Advisory Committee did not mean to imply. Professor Capra proposed removing that sentence from the note. The previous judge member indicated that would be acceptable, and that sentence in the note was deleted without opposition.

The practitioner member also suggested deleting the word "timing" on line 79 because Rule 613(b) is not just a matter of timing, and Professor Capra agreed. A conforming change was made in line 79 to make "requirement" plural. For consistency, Judge Bates also suggested adding "prior" before "inconsistent statement" in line 31, which Judge Schiltz agreed was a good idea.

Another judge member thought there was a convincing argument that this proposal will not make a practical difference in most cases. However, this change would make a substantive difference in cases where the out-of-court statement is the only piece of evidence to fill a hole in the sufficiency of the evidence.

Judge Schiltz agreed that it is theoretically possible for a case to be decided on only a prior inconsistent statement, but he found it difficult to produce real-life examples of that happening. Professor Capra added that, as state practice shows, this rule change will make a difference in some cases. He also noted that, when Congress was initially considering Rule 801, a senator objected to the third subparagraph of Rule 801(d)(1) on the ground that a prior identification, not made under oath, should not serve as the sole basis of conviction. Congress, however, revised its thinking because, like an excited utterance, this is a form of hearsay exception, and hearsay exceptions can

be sufficient evidence. The Evidence Rules address admissibility, not sufficiency, of evidence; concerns about sufficiency of evidence are beyond the purview of those rules.

Another judge member offered a hypothetical where five witnesses said that the light was green, and one witness gave an out-of-court hearsay statement that the light was red but recanted at trial, saying he was mistaken and could not recall. That case would now go to a jury. Judge Schiltz agreed that the case would go to the jury, but it is unlikely that jurors would credit the inconsistent statement over the five people who testified. There are already convictions based on out-of-court statements made by people who do not testify in court, such as excited utterances by victims in domestic violence cases. Under this proposal, the person who made the prior inconsistent statement would need to be in court, under oath, and subject to cross-examination.

Ms. Shapiro commented that Judge Schiltz made a compelling argument. As she had expressed to the Advisory Committee, the prosecutor community generally opposed this proposal. First, prior inconsistent statements are definitionally hearsay and unreliable. Such statements contradict what is being said on the stand. Second, prosecutors are concerned about collateral litigation around proving statements that the witness denies ever making. Finally, limiting instructions are common, and we presume juries understand and apply these instructions. Amending this rule because jurors do not understand limiting instructions could lead to many other rule changes. On the other hand, there were some prosecutors who came from states where this proposal was the rule, and they did not have issues. The Department's civil litigators were agnostic.

Professor Capra responded that the prior inconsistent statement may or may not be credible, but the reliability is guaranteed by the person being on the stand and subject to cross-examination. With respect to collateral litigation about extrinsic evidence, that already happens when a party seeks to admit the statement for impeachment purposes, and this is no different from proving any other fact. Finally, this proposal is not an attack on all limiting instructions. This limiting instruction is particularly hard to understand, which was also true in 2014 with respect to amendments addressing prior consistent statements.

Judge Bates asked Ms. Shapiro if prosecutors had a position on the agent notes issue that was raised earlier. Ms. Shapiro explained that federal agent interview notes, such as FBI FD-302 forms, are turned over during discovery as statements of the witness, but the notes are actually the work product of the agent. When an agent is testifying and there is something potentially inconsistent in the interview notes, there can be fights over whether the statement belongs to the witness or the agent. Judge Schiltz commented that these issues exist today, and this proposal does not create new problems in this respect.

Judge Schiltz and Professor Capra also noted that prosecutors coming from state courts that allow the use of prior inconsistent statements as substantive evidence say that the rule is very valuable in certain kinds of cases, like domestic violence and gang cases, where witnesses can be intimidated before the trial. And a panel of state prosecutors in California indicated several years ago that they could not bring many cases without this rule. There is also value to the defense side, and the Advisory Committee's public defender member voted in favor of publishing this rule.

Judge Bates noted that this proposal is only for publication and that further changes can be made later. He asked Judge Schiltz to clarify what the committee was voting on. Judge Schiltz

explained that the rule text is as proposed on pages 102–03 of the agenda book. The changes to the committee note are as follows: on page 103, line 31, "prior" was inserted before "inconsistent;" on page 105, line 77, the last sentence was deleted; on line 79, "timing" was deleted, and "requirement" became "requirements."

Upon motion by a member, seconded by another, and by show of hands: **The Standing Committee, with one abstention,[2] gave approval to publish the proposed amendment to Rule 801 for public comment.**

Information Items

Professor Capra reported on three topics being considered by the Advisory Committee. The written report begins on page 98 of the agenda book.

Artificial intelligence and machine-generated information. The Advisory Committee has convened two panels of experts to educate the committee about artificial intelligence and how it affects admissibility. The Advisory Committee is focusing on two issues: (1) reliability issues concerning machine learning and algorithms and (2) authenticity issues related to deepfake audio and visual presentations.

Regarding machine learning, the Advisory Committee is looking at Article VII of the Evidence Rules. Although the issue is still in its early stages: one possibility is a new Rule 707 treating machine outputs that are used like human experts the same as human expert testimony by applying *Daubert* and Rule 702 standards.

Regarding deepfakes, the problem is how to authenticate alleged fakes. The Advisory Committee is considering proposals to create a structure for resolving these disputes but is also considering waiting and monitoring the caselaw. A New York State Bar Association commission decided to wait to see what courts are doing. In 2010, with respect to social media and allegations of hacking, the Advisory Committee determined that the authenticity rules were sufficiently flexible, and courts handled it well. The question is whether deepfakes are a difference in kind as opposed to degree. Timing also presents a dilemma. If the rule is too specific, it may no longer be relevant in three years. But a rule that is too general may not be helpful.

Rule 609 (Impeachment by Evidence of a Criminal Conviction). Under Rule 609(a)(2), convictions that involve dishonesty or false statement are automatically admissible for impeachment. Rule 609(a)(1) allows a party to impeach with prior convictions that do not involve dishonesty or false statement. For non-falsity convictions, there are two balancing tests. In deference to a defendant's right to testify, Congress provided a more protective rule for defendants: the conviction is admissible only if the probative value outweighs its prejudicial effect. For all other witnesses, the admissibility is governed by Rule 403.

One professor urged the Advisory Committee to abrogate the entire rule because, as many academics argue, the rule does not make sense and is unfair. Many problematic convictions under

[2] Ms. Shapiro indicated that the DOJ would abstain for now and await publication.

Rule 609(a)(1) are being admitted against criminal defendants, particularly those similar to the crime being charged. Professor Capra explained that some Advisory Committee members felt that the problem was not with the rule but its application. On the other hand, if courts are misapplying the rule, then it may be a rule problem.

The Advisory Committee first considered eliminating Rule 609(a)(1) entirely and leaving only Rule 609(a)(2) for convictions that involve dishonesty or false statement. Some members felt that went too far so the Advisory Committee is focusing on a proposal to make the balancing test more protective for criminal defendants under Rule 609(a)(1)—the probative value must *substantially* outweigh the prejudice.

Some Advisory Committee members were also skeptical about whether this proposal would make a difference in how likely criminal defendants are to testify. Trying to determine whether, or to what extent, this rule impacts a defendant's decision to testify is difficult, and the FJC and Sentencing Commission will hopefully be able to help with data.

Evidence of prior false accusations made by complainants in criminal cases. The final information item related to false complaints, most often in sexual assault cases. This proposal came from a law professor who explained that courts are not using a consistent set of rules to handle the admissibility of false complaints of sexual assault. They might use Rule 404(b), Rule 608, or Rule 412. She proposed a new Rule 416 specifically addressing false complaints.

The proposal is in a nascent stage. Reducing confusion would be good. But states have much more experience handling false complaints of sexual assault, and the Advisory Committee resolved to first look at what states are doing. Professor Liesa Richter, Consultant to the Advisory Committee, is conducting a 50-state survey on this issue.

Judge Bates thanked Judge Schiltz and Professor Capra for the report and for Judge Schlitz's many years of excellent service.

OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 606 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the current legislative session will end shortly before the Standing Committee's next meeting.

Action Item

Judiciary Strategic Planning. As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

2024 Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002 (2024 Privacy Report). This was the last item on the meeting's agenda, and the draft 2024 Privacy Report is included in the agenda book starting on page 616. Mr. Byron asked for the

Standing Committee's approval of this draft with authorization for the Chair and Secretary to make minor changes based on feedback leading up to the Judicial Conference.

Judge Bates noted that the CACM Committee played a substantial role in preparing the 2024 Privacy Report. Mr. Byron added that the FJC also meaningfully contributed. The report describes the first phase of a study that the FJC conducted, which will assist both the CACM Committee and the Rules Committees in evaluating the adequacy of the privacy rules.

Without objection, the Standing Committee recommended that the Judicial Conference approve the 2024 Privacy Report, subject to any minor revisions approved by the Chair, and ask the AO Director to transmit it to Congress in accordance with law.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on January 7, 2025, in a location to be announced.

TAB 1B

Agenda E-19 (Summary)
Rules
September 2024

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

   b. Approve, effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

   c. Approve, effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 7-9

3. Approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 11-13

4. Approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 16-18

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Chief Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, Consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC);

and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, U.S. Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act[1] process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees on attorney admission rules, and by those committees and the Appellate Rules Committee on electronic filing by pro se litigants and on the redaction of Social Security numbers (SSNs).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 6 and 39. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor stylistic changes to each rule.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Rule 6 make changes to Rule 6(a) (dealing with appeals from judgments of a district court exercising original jurisdiction in a bankruptcy case) to clarify the time limits for post-judgment motions in bankruptcy cases and Rule 6(c) (dealing with direct appeals from bankruptcy court to the court of appeals) to clarify the procedures for direct appeals. The amendments also make stylistic changes to those provisions and to Rule 6(b) (dealing with appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The proposed amendments to Rule 6(a) clarify the time for

[1]Please refer to Laws and Procedures Governing Work of the Rules Committees for more information.

filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. The proposed amendments provide that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rules of Bankruptcy Procedure. The proposed amendments to Rule 6(c) clarify the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2), providing more detail about how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted. The Rule 6(c) amendments dovetail with the proposed amendment to Bankruptcy Rule 8006(g) described later in this report.

Rule 39 (Costs on Appeal)

The proposed amendments are in response to the Supreme Court's holding in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). In that case, the Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court.

The proposed amendments clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court, or the clerk of either court calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments codify the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court, and establish a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments clarify and improve Rule 39's parallel structure.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Form Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 29 and 32, and the Appendix of Length Limits, as well as Form 4, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with minor changes to the proposed amendments to Rule 29.

Rule 29 (Brief of an Amicus Curiae)

After much consideration, the Advisory Committee recommended publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits. In considering the proposed amendments, the Advisory Committee was mindful of First Amendment concerns and proposed legislation regarding amicus filings.

The proposed amendments require all amicus briefs to include, as applicable, a description of the identity, history, experience, and interests of the amicus curiae along with an explanation of how the brief will help the court. Also, the proposed amendments require an amicus entity that has existed for less than 12 months to state the date the entity was created.

The proposed amendments add two new disclosure requirements regarding the relationship between a party and an amicus curiae. Those disclosure requirements focus, respectively, on ownership or control of the amicus (if it is a legal entity), and contributions to the amicus curiae; in each instance the focus is on ownership, control, or contributions by (1) a party, (2) its counsel, or (3) any combination of parties, counsel, or both. The first provision would require the disclosure of a majority ownership interest in or majority control of

a legal entity submitting the brief. The second provision would require disclosure of contributions to an amicus curiae, with a threshold amount of 25 percent of annual revenue, with the reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure.

In addition, the proposed amendments revise the disclosure obligation with respect to a relationship between a nonparty and an amicus curiae. The current rule requires disclosure of contributions intended to fund preparing or submitting the brief by persons "other than the amicus curiae, its members, or its counsel." The proposed amended rule would retain the member exception, but would limit that exception to persons who have been members of the amicus for at least the prior 12 months or who are contributing to an amicus that has existed for less than 12 months. (As noted above, an amicus that has existed for less than 12 months must state the date it was created.) These proposed amendments would require a new member making contributions earmarked for a particular brief to be effectively treated as a non-member for these purposes and would require disclosure.

The proposed amendments would also eliminate the option for a non-governmental entity to file an amicus brief based on the parties' consent during a court's initial consideration of a case on the merits, and would therefore require a motion for leave to file the brief.

Finally, the proposed amendments set the length limit for amicus briefs at 6,500 words (rather than one-half the maximum length authorized for a party's principal brief) to simplify the calculation for filers.

At its meeting, the Standing Committee made minor changes to the rule. The phrase "may be of considerable help to the court" was changed to "may help the court" both to improve the style and readability and because the Committee determined that including the word "considerable" could create an unintentional burden. The disclosures required by the rule were

added to the required contents of the motion for leave. And to promote clarity, the phrase "a party, its counsel, or any combination of parties or their counsel" was changed to "a party, its counsel, or any combination of parties, their counsel, or both." Other changes to improve style and consistency were made to the rule and the committee note.

Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rule 32 conform Rule 32(g)'s cross-references to the proposed amendments to Rule 29.

Appendix of Length Limits

The proposed amendments to the Appendix of Length Limits conform the Appendix's list of length limits for amicus briefs to the proposed amendments to Rule 29.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

The proposed amendments, in response to several suggestions, simplify Form 4 to reduce the burden on individuals seeking in forma pauperis (IFP) status (including the amount of personal financial detail required), while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.

Information Items

The Advisory Committee met on April 10, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a possible new rule regarding intervention on appeal, considered the possibility of improving the length and content of appendices, and discussed possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention). Also, the Advisory Committee removed from consideration a suggestion to eliminate PACER fees, because it is not a subject governed by the rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval: (1) amendments to Bankruptcy Rule 3002.1 and six new Official Forms related to those amendments; (2) amendments to Rule 8006; and (3) amendments to Official Form 410. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Related Official Forms

Rule 3002.1 is amended to encourage a greater degree of compliance with its provisions by adding an optional motion process the debtor or case trustee can initiate to determine a mortgage claim's status while a chapter 13 case is pending to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The changes also add more detailed provisions about notice of payment changes for home-equity lines of credit.

Accompanying the proposed amendments to Rule 3002.1 is a proposal for adoption of six new Official Forms:

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)
- Official Form 410C13-N (Trustee's Notice of Payments Made)
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim)

Under Rule 3002.1(f), an official form motion (410C13-M1) can be used by the debtor or trustee over the course of the plan to determine the status of the mortgage. An official form response (410C13-M1R) is used by the claim holder if it disagrees with facts stated in the motion. If there is a disagreement, the court will determine the status of the mortgage claim. If

the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under Rule 3002.1(g), after all plan payments have been made to the trustee, the trustee must file the new official form notice (410C13-N) concerning disbursements made, amounts paid to cure any default, and whether the default has been cured. The claim holder must respond to the notice using the official form response (410C13-NR) to provide the required information. Rule 3002.1(g) also provides that either the trustee or the debtor may file a motion, again using an official form (410C13-M2), for a determination of final cure and payment. If the claim holder disagrees with the facts set out in the motion, it must respond using Official Form 410C13-M2R.

Stylistic changes are made throughout the rule, and its title and subdivision headings have been changed to reflect the amended content.

Rule 8006 (Certifying a Direct Appeal to a Court of Appeals)

Rule 8006 addresses the process for requesting that an appeal go directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal. This amendment dovetails with the proposed amendments to Appellate Rule 6 discussed earlier in this report.

Official Form 410 (Proof of Claim)

The form is amended to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Bankruptcy Code, not merely electronic payments in chapter 13 cases. In addition, an amendment is made to the margin note in "Part 3: Sign Below" to conform to the restyled rules approved by the Judicial Conference in September 2023 (JCUS-SEP 2023, p. 24): the reference to Rule 5005(a)(2) is changed to Rule 5005(a)(3).

Recommendation: That the Judicial Conference approve the following:

a. Proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Effective December 1, 2025 and contingent on the approval of the above-noted amendments to Bankruptcy Rule 3002.1, the proposed amendments to Bankruptcy Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date; and

c. Effective December 1, 2024, the proposed amendments to Official Form 410, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to (1) Rule 3018; (2) Rules 9014, 9017, and new Rule 7043; and (3) Rules 1007, 5009, and 9006, with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation, with changes to the language in the committee note to Rule 9014 addressing the different treatment of adversary proceedings and contested matters with respect to allowing remote testimony.

Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan)

The proposed amendments would authorize a court in a chapter 9 or 11 case to treat as an acceptance of a plan a statement on the record by a creditor's attorney or authorized agent.

Rules 9014 (Contested Matters), 9017 (Evidence), and new Rule 7043 (Taking Testimony)

The proposed amendments would (1) amend Rule 9017 to eliminate the applicability of Fed. R. Civ. P. 43 (Taking Testimony) to bankruptcy cases generally; (2) create a new Rule 7043 (Taking Testimony) that would retain the applicability of Fed. R. Civ. P. 43 in

adversary proceedings—thereby authorizing remote witness testimony in adversary proceedings "for good cause in compelling circumstances and with appropriate safeguards"; and (3) amend Rule 9014 to allow a court in a contested matter to permit remote witness testimony "for cause and with appropriate safeguards" (i.e., eliminating the requirement of "compelling circumstances"). The effect of this proposal would be to provide bankruptcy courts greater flexibility to authorize remote testimony in contested matters. This proposed change rests on the difference between adversary proceedings and contested matters: whereas adversary proceedings resemble civil actions, contested matters proceed by motion and can usually be resolved less formally and more expeditiously by means of a hearing, often on the basis of uncontested testimony.[2]

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Proposed changes to Rules 1007, 5009, and 9006 are made to reduce the number of individual debtors who go through bankruptcy but whose cases are closed without a discharge because they either failed to take the required course on personal financial management or merely failed to file the needed documentation upon completion of the course. The proposed amendments to Rule 1007, along with conforming amendments to Rule 9006, would eliminate the deadlines for filing the certificate of course completion. The proposed amendment to Rule 5009 would provide for two notices instead of just one, reminding the debtor of the need to take the course and to file the certificate of completion.

[2]The Advisory Committee on Bankruptcy Rules previously requested input on these proposed amendments from the Committees on Court Administration and Case Management (CACM Committee) and the Administration of the Bankruptcy System, which advised that the proposals would not appear to create any conflict with existing Judicial Conference policy regarding remote access or remote proceedings, nor impact the CACM Committee's ongoing consideration of potential revisions to the remote public access policy.

Information Items

The Advisory Committee on Bankruptcy Rules met on April 11, 2024. In addition to the recommendations discussed above, the Advisory Committee discussed a proposal to require redaction of the entire SSN in court filings; two suggestions to eliminate the requirement that all notices given under Rule 2002 include in the caption, among other things, the last four digits of the debtor's SSN; and a suggestion to allow the appointment of masters in bankruptcy cases and proceedings.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 16 and 26, and new Rule 16.1. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor changes to the proposed amendments to new Rule 16.1.

Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order.

After public comment, the Advisory Committee recommended final approval of the proposed amendments as published with minor changes to the committee notes.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings. After several years of work by its MDL subcommittee, extensive discussions with interested bar groups, consideration of multiple drafts, three public hearings on the published draft, and subsequent revisions based on public comment, the Advisory Committee unanimously recommended final approval of new Rule 16.1.

Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. An initial management conference allows for early attention to matters identified in Rule 16.1(b), which may be of great value to the transferee judge and the parties. Because it is important to maintain flexibility in managing MDL proceedings, proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b)—a revised version of what was published as subdivision (c)—encourages the court to order the parties to submit a report prior to the initial management conference. The report must address any topic the court designates—including any matter under Rule 16—and unless the court orders otherwise, the report must also address the topics listed in Rules 16.1(b)(2)-(3). Rule 16.1(b)(2) directs the parties to provide their views on appointment of leadership counsel; previously entered scheduling or other orders; additional management conferences; new actions in the MDL proceeding; and related actions in other courts. Rule 16.1(b)(3) calls for the parties' "initial views" on consolidated pleadings; principal factual and legal issues; exchange of information about factual bases for claims and defenses; a discovery plan; pretrial motions; measures to facilitate resolving some or all actions before the court; and referral of matters to a magistrate judge or master. Because court action on some matters identified in paragraph (b)(3) may be premature before leadership counsel is appointed,

those topics are categorized separately from those in paragraph (b)(2). Rule 16.1(b)(4) permits the parties to address other matters that they wish to bring to the court's attention.

Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion. This order controls the MDL proceedings unless and until modified.

Following public comment, the Advisory Committee made some minor changes to the proposed new rule as published. In response to extensive public input, it removed a provision inviting courts to consider appointing "coordinating counsel." For the reasons noted above, it restructured the list of matters to be included in the parties' report into the "views" called for by Rule 16.1(b)(2) and the "initial views" called for by Rule 16.1(b)(3), and it revised those provisions to direct parties to address the listed topics unless the court orders otherwise (rather than obligating the court to affirmatively set out minimum topics to be addressed). It also made stylistic changes based on input from the Standing Committee's style consultants.

At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Civil Rules met on April 9, 2024. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible

grounds for recusal, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 81(c)(3)(A) (Applicability of the Rules in General; Removed Actions) regarding demands for a jury trial in removed cases. The Advisory Committee also discussed issues related to sealed filings and use of the word "master" in the rules, and was briefed on the random case assignment policy adopted by the Judicial Conference in March 2024 (*see* JCUS-MAR 2024, p. 8) and the importance of monitoring its implementation, as well as ongoing research related to rulemaking authority in this area. Finally, the Advisory Committee discussed a new proposal to amend Rule 43(a) (Taking Testimony) and Rule 45(c) (Subpoena) concerning the use of remote testimony in certain circumstances, and a new subcommittee was formed to consider this proposal.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 18, 2024, and discussed several information items, including two new suggestions.

The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee is working to develop a draft of a proposed amendment to clarify the rule and expand the scope of parties' authority to subpoena material from third parties before trial. The subcommittee has tentatively concluded that any proposed amendment should provide for case-by-case judicial oversight of each subpoena application, express authorization of ex parte subpoenas, and different standards or levels of protection for personal or confidential information and other information.

Last year, the Advisory Committee received two suggestions regarding Rule 53 (Courtroom Photographing and Broadcasting Prohibited) and proceedings in the cases of *United States v. Donald J. Trump*. The Advisory Committee concluded that it did not have the authority to exempt specific cases or parties from the rule's prohibition on broadcasting, and it acknowledged that any amendment under the Rules Enabling Act process would likely take three or more years. The Advisory Committee determined, however, that further examination of the proposal to amend Rule 53 was warranted, and, as previously reported to the Judicial Conference, a subcommittee was formed. The subcommittee is in early stages of its consideration of potential amendments and will coordinate with other committees evaluating issues of remote public access to federal judicial proceedings.

The Advisory Committee also discussed two new suggestions. The Department of Justice has submitted a suggestion to amend Rule 49.1 (Privacy Protection For Filings Made with the Court) to require the use of pseudonyms—instead of initials—to mask the identity of minors in court filings. A new subcommittee was formed to consider this proposal as well as other privacy issues under Rule 49.1. The Advisory Committee received another suggestion to clarify Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) as it applies when a defendant from outside the district is arrested for violating conditions of release. The Advisory Committee recently received a related submission (from the Administrative Office's Magistrate Judges Advisory Group) which includes a comprehensive proposal for additional amendments to Rule 40. Consideration of these proposals will continue.

FEDERAL RULES OF EVIDENCE

Rule Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 801(d)(1)(A) with a recommendation that it be published for public comment in August 2024. The Standing Committee (with the Department of Justice representative abstaining) approved the Advisory Committee's recommendation, with minor amendments to the committee note.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment provides that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403. The current Rule 801(d)(1)(A) includes a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness, providing that a prior statement is substantively admissible only when it was made under oath at a formal proceeding.

Information Items

The Advisory Committee met on April 19, 2024. In addition to the recommendation discussed above, the Advisory Committee held a panel discussion on artificial intelligence and machine-generated information, and the possible impact of artificial intelligence on the Federal Rules of Evidence. The Advisory Committee also discussed a possible amendment to Rule 609(a) (Impeachment by Evidence of a Criminal Conviction) and a possible new rule to address evidence of prior false accusations made by alleged victims in criminal cases.

PROPOSED 2024 REPORT OF THE JUDICIAL CONFERENCE ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed the judiciary to promulgate rules, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L.

No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules"—Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1—took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." The most recent prior report was completed in June 2022. This report covers the period from June 2022 to June 2024. The Committee considered and approved the proposed draft 2024 report of the Judicial Conference on the Adequacy of the Privacy Rules Prescribed under the E-Government Act of 2002, subject to revisions approved by the chair in consultation with the Rules Committee Staff.

Part I of the 2024 report describes the consideration of several proposed rule changes that include privacy-related issues. The Bankruptcy, Civil, and Criminal Rules Committees are reconsidering the need for the last four digits of SSNs in court filings, and they are also considering whether the privacy rules need to remain uniform with respect to the level of redactions applied to SSNs. One suggestion noted in the 2022 report resulted in the proposed amendments to Appellate Form 4 (discussed earlier in this report) that will be published for comment in August 2024. Several more recent privacy-related suggestions are in the beginning stages of consideration. Part II of the 2024 report describes ongoing judiciary implementation efforts to protect privacy in court filings and opinions. Among other things, the CACM Committee sent a memorandum to the courts in May 2023 sharing suggested practices to protect personal information in court filings and opinions and encouraging continued outreach and educational efforts. The memorandum also reminded courts about the possible inclusion of sensitive information in Social Security and immigration opinions and reminded courts of a software fix implemented in 2020 that can mask certain information in extracts of Social Security and immigration opinions. Part II also reports that the CACM Committee asked

the Administrative Office and the FJC to explore other ways to increase awareness of the need to protect privacy in court filings and opinions. This has led the Administrative Office to update the judiciary's internal and external websites, and the FJC to consider increased ways to address privacy issues in educational materials for new judges and other judiciary officials. Part III of the 2024 report, in turn, discusses the FJC's 2024 update of its studies in 2010 and 2015 concerning the rate of compliance with existing privacy rules regarding unredacted SSNs in court filings, conducted at the request of the CACM Committee. The FJC's 2024 study reveals that instances of non-compliance remain very low. Upcoming FJC studies addressing other aspects of the privacy rules will be considered by the rules committees and the CACM Committee in the coming years and will be addressed in future privacy reports.

The CACM Committee considered the draft report at its May 2024 meeting and endorsed a recommendation that the Judicial Conference approve the 2024 report and ask the AO Director to transmit it to Congress in accordance with the law.

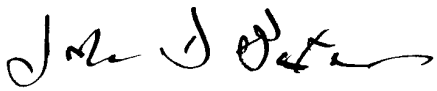
> **Recommendation:** That the Judicial Conference approve the proposed 2024 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix D, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide input on the proposed process for the 2025 review and update of the *Strategic Plan for the Federal Judiciary*. The Committee's views were

communicated to Judge Scott Coogler (N.D. Ala.), the judiciary planning coordinator, by letter dated June 17, 2024.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro
Elizabeth J. Cabraser
Louis A. Chaiten
William J. Kayatta, Jr.
Edward M. Mansfield
Troy A. McKenzie
Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zipps

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TAB 1C

Advisory Committee on Evidence Rules
Minutes of the Meeting of April 19, 2024
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 19, 2024 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Edmund A. Sargus, Jr.
Hon. Richard J. Sullivan
John S. Siffert, Esq.
James P. Cooney III, Esq.
Rene Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Michael Mosman, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Marshall Miller, Esq., Department of Justice
Timothy L. Lau, Esq., Federal Judicial Center
Tom Byron, Esq., Chief Counsel, Rules Committee Staff
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Allison A. Bruff, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Zachary Hawari, Esq., Rules Law Clerk
Melody Brannon, Esq., Federal Public Defender
Alden Dima, NIST
Timothy Blattner, NIST
Michael Majurski, NIST
Bruce Hedin, Hedin B. Consulting
Professor Peter Henderson, Princeton University
Claire Leibowicz, Partnership on A.I.

Present Via Microsoft Teams
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Andrea Roth, U.C. Berkeley
Professor Rebecca Wexler, U.C. Berkeley
Anna Roberts
Asees Bhasin

Cara Salvatore
Daniel Steen
James Comans
John Hawkinson
John McCarthy
Tim Reagan, Esq., Federal Judicial Center
Hon. Amy St. Eve
Professor Julia Simon-Kerr
Professor Maura Grossman
Meredith Mathis
Nate Raymond
Sai
Susan Steinman
Suzanne Monyak
Tejas Bhatt

I. Welcome and Introductions

The Chair welcomed everyone to the meeting and specifically welcomed Judge Michael Mosman, the new Liaison from the Criminal Rules Committee, and Rakita Johnson, a new member of the A.O. staff, to the Committee. The Chair then recognized the U.S. Marshals Service to make a security announcement.

The Chair explained that the Committee would host a symposium on artificial intelligence (hereinafter "A.I.") and its application to the Evidence Rules in the morning followed by the regular Committee meeting to consider potential amendments to the Rules in the afternoon.

II. Symposium on Artificial Intelligence

The Chair introduced the Symposium on A.I. by informing participants that the Judicial Conference has been discussing the impact of A.I. on the federal courts and that Chief Justice Roberts has launched an initiative to help courts adapt to A.I. He explained that Evidence is on the cutting edge when it comes to the development and use of A.I. at trial.

The Reporter thanked Tim Lau for his invaluable help in assembling a panel of distinguished experts. He explained that the Symposium would proceed in three parts: 1) Presentations from experts at the National Institute of Standards and Technology ("NIST") regarding the development of A.I. and the challenges it presents; 2) Presentations from experts on Law and Technology to build a bridge between the unique technical characteristics of A.I. and its practical impact on the legal system; 3) Presentations from legal academics with expertise in providing frameworks for the admissibility of A.I. evidence.

The first portion of the Symposium featured presentations from Michael Majurski, Alden Dima, and Dr. Timothy Blattner of NIST. They discussed the development of A.I. and deep learning and the reliability and security risks it presents. They described the myriad technologies that are tracking, transcribing, altering, and generating information. They noted the obvious risks of A.I. hallucinations or deepfakes and the need for risk management assessment frameworks. These experts emphasized the importance of developing frameworks to ensure that A.I. systems are reliable and explainable and the ongoing work in that arena.

Professor Peter Henderson, Dr. Bruce Hedin, and Claire Leibowicz gave presentations regarding the legal issues generated by advancing A.I. technologies. They discussed the operation of A.I. in making

existing content more accessible, in creating new content, and in analyzing data, emphasizing that A.I. may produce inaccurate results because it is always working to fill in content and make predictions despite a lack of information. A.I. might translate foreign languages incorrectly, fill in non-existent details to enhance low resolution images, or generate hallucinated source material. The experts emphasized the importance of having access to all A.I. system inputs and outputs to assess reliability, and they described the obstacles to such access created by trade-secret protection. They further noted the difficulty in defining A.I. with any precision. The experts also emphasized the importance of ensuring accountability, transparency, competence, and effectiveness in evaluating the use of technology in the legal sphere and the need for lawyers to improve understanding regarding reliable use of technology in practice. These experts also described the use of deepfakes (or synthetic media) and the rapid increase in the sophistication, volume, and accessibility of deepfake generation. They explained that the risk of false allegations of deepfake evidence (with respect to authentic material) presented just as great a threat to the legal system as deepfakes themselves. They discussed the difficulty in detecting deepfake material with great accuracy given the constant improvement in deepfakes to respond to detection, and described various methods for signaling the provenance of media proactively by placing an artifact in the media contemporaneously to demonstrate its authenticity. Widespread use of these artifacts will require collaboration between developers and creators to adopt authenticity infrastructure.

Professor Rebecca Wexler and Professor Andrea Roth from the U.C. Berkeley School of Law both made presentations regarding the problems of authentication of A.I. and other machine-generated output. Professor Wexler argued that there is no need to modify the Federal Rules of Evidence to account for the possibility of deepfakes. She traced the long history of forgery and the ability of the federal courts to account for forgery under existing standards of authentication, arguing that the possibility of deepfakes presents comparable concerns. She noted that Rule 901(b)(5) providing that an "opinion about a voice" is "sufficient" to authenticate media is one Rule that might need to be modified to address A.I. and the possibility of deepfakes.

Professor Roth focused her presentation on all machine-generated evidence and the need to amend the Federal Rules of Evidence to ensure the reliability of machine-generated output admitted into evidence, when not accompanied by an expert. Professor Roth explained that most machine-generated evidence is presented by a trial expert whose testimony is subject to Rule702. But she noted that *Daubert* is inadequate alone to validate the machine-generated output itself and that the use of a certification under Rule 902(13) allows the presentation of machine-generated evidence without a trial witness. Professor Roth emphasized the need for standards in the Federal Rules of Evidence to ensure the reliability of machine-generated output, to allow access to the programs so as to assess their reliability, and to permit the impeachment of machine output that is admitted at trial.

III. Opening Business

The Chair opened the meeting of the Committee by thanking the panelists for their fantastic contributions on the daunting topic of A.I. He then asked for a motion to approve the minutes of the Committee's Fall 2023 meeting. A motion was made, seconded, and unanimously approved.

The Chair then offered a report on the January 2024 meeting of the Standing Committee. He explained that the Advisory Committee had no action items for approval at the Standing Committee meeting and that he had informed the Standing Committee of the Agenda for the Spring 2024 Advisory Committee meeting. The Chair reported that several Standing Committee members asked him about the proposal to adopt a new Rule 416 on prior false accusations and expressed interest in seeing a draft of the Rule.

The Reporter then noted that this meeting would be the last for Judge Schiltz as Chair of the Evidence Advisory Committee and that his service as Chair had been the latest accomplishment in his remarkable

rulemaking career, that included service as Reporter to the Appellate Rules Committee and as a member of the Standing Committee. The Reporter noted that the Evidence Advisory Committee had completed an unprecedented amount of work during Judge Schiltz's tenure as Chair, successfully drafting and proposing 7 amendments and new Rule 107. The Reporter remarked that it had been an honor to work alongside Judge Schiltz. The Reporter presented Judge Schiltz with a book containing the amendments passed during his time as Chair as a token of appreciation.

Judge Schiltz explained that his work in rulemaking has been a highlight in his career. He opined that the Federal Rules of Evidence are the best of all the rules to work on, due to the important policies and rights they protect and ensure. He noted that the Advisory Committee operates as all government should, with an emphasis on meticulous research and a good-faith effort to find solutions for difficult problems. Judge Schiltz said he would miss the work.

Professor Coquillette commented that Judge Schiltz had also been an example of how to be a great Reporter during his time with the Appellate Rules Committee. Judge Bates agreed that it has been a joy to work with Judge Schiltz in his time as Chair of the Evidence Advisory Committee, noting how amazingly productive the Committee has been during his tenure.

IV. Potential Amendments to Evidence Rules to Address Artificial Intelligence and other Machine-Generated Output

The Reporter invited discussion on the morning symposium regarding A.I. and the Evidence Rules. He reminded the Committee that there were no action items for consideration but that the Committee would be monitoring the development of A.I. and considering whether to advance any proposals for the Fall 2024 meeting.

He called the Committee's attention to proposals to amend Rule 901(b)(9) and to adopt a new Rule 901(c) on page 18 of the Agenda materials that would allocate burdens when parties concede that A.I. evidence is being used and that would place the burden on a party objecting to evidence on the grounds that it is a deepfake. One Committee member noted that proposed Rule 901(b)(9)(B) would operate "if the proponent concedes" that an item was generated by A.I. The Committee member suggested that language should be replaced with "if the court finds" to be consistent with the operation of the Rules generally. Another Committee member commented that he got the sense from the experts during the symposium that the most helpful protection in the A.I. context would come from allowing the opponent of the evidence to test the A.I. The Chair noted that trade secrets often prevent this kind of testing and that an approach that required testing would end up excluding the evidence as a result. One Committee member suggested that exclusion might be appropriate if there could be no testing. The Chair responded that a testing requirement could eliminate commonly admitted and crucial evidence, such as DNA evidence.

Another Committee member noted that Rule 901 governs authenticity but that there really are two problems with any machine or A.I. generated output. There is an authenticity concern but also a separate reliability concern. He commented that the reliability concern would need to be addressed through a provision like new Rule 707 outlined on page 25 of the Agenda materials. The Chair agreed that a provision that addresses authenticity by requiring a showing of reliability is mixing apples and oranges. He further noted that proposed Rule 901(c) on page 18-19 of the Agenda materials would allow a judge to admit evidence whose probative value outweighs prejudicial effect *after* its opponent has shown by a preponderance that the evidence had been "fabricated or altered in whole or in part." He queried how a judge could ever admit evidence that had been shown to be "fabricated" under the proposed balancing test.

The Reporter noted that original Rule 901(b)(9) included an accuracy requirement that did not necessarily fit into an authentication rule and that likely belonged in a separate provision like Rule 707, but

that it would be hard to remove it now. The Reporter said that the existing Rule 901(b) proposals could be reworked.

Another Committee member noted the contrast between the position of Judge Grimm and Professor Grossman, who argue that the Federal Rules of Evidence need a provision to address A.I. because A.I. is so distinct from anything that has been encountered before, and the position of Professor Wexler, who argues that dispute resolution has been dealing successfully with allegations of fakery for hundreds of years and that deepfakes can be handled under existing Rules in the same way that allegations of forged handwriting are managed. This Committee member suggested that there are very few cases dealing with A.I. evidence at this point and that the Committee may need more data to determine how serious a crisis A.I. presents for courts before proceeding with any amendment proposals. The Reporter agreed that there are very few cases addressing the issue but suggested that the Committee might want to get ahead of an onslaught of anticipated cases. Peter Hedin noted that there is a distinction between analytical A.I. and generative A.I. He suggested that DNA analysis relies upon algorithms considered to be A.I. and is routinely admitted into evidence. It is the issue of generative A.I. and specifically deepfakes that is new to the courts.

The Committee member commented that he would like to wait to see how judges handle A.I. evidence before proposing amendments to the Federal Rules of Evidence. He argued that it remains to be seen whether A.I. will cause a crisis for the courts or whether federal judges already possess the tools they need to handle this information. The Reporter noted that similar concerns arose with the advent of social media and that the Committee took a wait-and-see approach that turned out to be justified. The federal courts have had little trouble navigating the admissibility of social media evidence using the existing authentication rules. Another Committee member noted that proposed Rule 707 on page 25 of the Agenda materials was more appealing to deal with the reliability of machine-generated output. Mr. Lau cautioned that the term A.I. may not be capable of definition and that it may be undesirable to import that terminology into the Federal Rules of Evidence. The Reporter agreed, suggesting that other, more flexible terminology might be employed such as "synthetic." Professor Roth also noted that the concern over an opponent's lack of access to the software behind machine-generated output would be reduced if independent bodies such as NIST were given access to perform validating audits.

The Reporter reviewed the various proposals contained on pages 18-26 of the Agenda materials. He opined that Rule 902(13) represents a simple certification provision that need not contain all the authentication requirements if it is tied to other amendments to the authentication provisions. He suggested that there would be no need for the amendment to Rule 902(13) on page 28. Professor Roth suggested that judges likely subject machine-generated evidence to *Daubert*-like standards but that there is no authority for a trial judge to do that in the Rules absent a testifying expert. She explained that proposed Rule 707 would authorize judges to subject machine-generated output to the Rule 702 reliability requirements even in the absence of an expert.

A Committee member opined that trial judges already possess the tools necessary to regulate this type of evidence. She recounted a case in which a city medical examiner refused to provide source code supporting DNA evidence to a defendant in which the judge ordered the source code produced under a protective order. The Committee member suggested that trial judges already have the tools necessary to ensure that machine-generated results are valid and reliable. Another Committee member asked how that approach would work with a third-party private vendor. The Committee member responded that private companies would provide the code if it meant that their results would not be admissible in evidence otherwise. The Reporter suggested that most trial judges do not require the production of source code and that perhaps, an amendment could prompt more trial judges to do so.

Judge Bates asked whether a rule like proposed Rule 707 would apply to basic scientific instruments that are well accepted in federal court. The Chair replied that Rule 707 would apply to even basic instruments because their results are "machine-generated." He explained that the foundation requirement of Rule 707 would apply to everything, even blood-alcohol analysis. The Chair expressed concern that the proponent of even basic and well accepted machine output would have to proceed through a full *Daubert* analysis every time an opponent objects to that output. He suggested that a rule defined as broadly as the Rule 707 proposal would overwhelm trials and pose a big problem for judges and litigants. The Chair noted that trial judges were able to navigate the admissibility of social media evidence by requiring some basis for an objection to authenticity before proceeding with an assessment of falsification in the absence of any Rules amendments prescribing a procedure. Another Committee member inquired whether an amendment could draw a distinction between systems in everyday use – such as a clock – and forensic systems – such as facial recognition software. Professor Roth suggested that basic machine-generated output like radar guns had been subjected to reliability review for decades and had long since been accepted. Similarly, basic machine-generated receipts would easily pass muster.

The Reporter stated that he would work on a version of Rule 707 for review at the Fall meeting that would address concerns of overbreadth and its application to basic instruments. He stated that he would look at Rule 901(b)(5) that accepts an opinion about a voice as sufficient to authenticate a recording in light of deepfake possibilities as well. The Reporter explained that his current instinct was not to amend Rule 901(b)(9) to include the reliability requirement there. The Chair agreed, noting that it would not work to import reliability into the authentication rules. Judge Bates opined that it may not be possible to leave Rule 901(b)(9) alone in amending the Rules to deal with machine-generated output when Rule 901(b)(9) currently includes an "accuracy" requirement. The Reporter said he would focus on a Rule 707 proposal but would not drop a potential amendment to Rule 901(b)(9). He promised to communicate with Judge Grimm and Maura Grossman about a Rule 901(b)(9) revision.

V. Potential Amendments to Federal Rule of Evidence 609

The Reporter introduced the discussion of Rule 609 by reminding the Committee that Professor Jeff Bellin made a presentation to the Committee at its Fall 2023 meeting in which he proposed the repeal of Federal Rule of Evidence 609 – the Rule that authorizes the impeachment of witnesses with their prior convictions. The Reporter explained that the Committee had not expressed an interest in repealing Rule 609 altogether but had expressed an interest in exploring modifications to Rule 609(a)(1) – the provision that allows impeachment of testifying witnesses with prior felony convictions subject to balancing. He reminded the Committee that Rule 609(a)(1) contains a balancing test more protective than Rule 403 when applied to admissibility of convictions of an accused. That test --- that the probative value must outweigh the prejudicial effect --- was designed to protect the rights of criminal defendants who are subject to unique prejudice when their prior felony convictions are revealed to the jury.

The Reporter explained that the problem with the Rule 609(a)(1) balancing test applicable to testifying criminal defendants is that federal courts are not applying it properly. He referred the Committee to the case law digest behind Tab 5 of the Agenda materials showing that federal courts are properly excluding prior similar convictions of testifying defendants in only approximately 20% of cases. Because the federal courts have not excluded the prior convictions of testifying criminal defendants that bear close similarity to the charged offense, the Reporter proposed the complete abrogation of Rule 609(a)(1) that permits felony conviction impeachment (with a corresponding amendment to Rule 608(b) to prevent use of that provision to impeach with convictions excluded under Rule 609). The Reporter explained that such an amendment would eliminate felony conviction impeachment of all witnesses, not only criminal defendants; and it would leave intact Rule 609(a)(2), providing for automatic impeachment of all witnesses with dishonesty convictions. He noted the legislative history behind Rule 609, explaining that Congress was only one vote

away from eliminating felony conviction impeachment for crimes that do not involve dishonesty or false statement when Rule 609 was originally enacted.

The Reporter then described the many reasons for eliminating felony conviction impeachment. First, he noted that the felonies not already covered by the dishonesty provision in Rule 609(a)(2) lack probative value with respect to a witness's truth-telling. Violent crimes or drug offenses tell a jury little about a witness's capacity for lying. Further, the Reporter emphasized that several states have limited prior conviction impeachment due to concerns about its limited probative value and potential for severe prejudice. Most significantly, the Reporter highlighted data showing that felony conviction impeachment prevents criminal defendants from exercising their constitutional right to testify. Given the threat to criminal defendants' constitutional rights, the Reporter proposed that Rule 609(a)(1) should be abrogated. He explained that it would be unfair to allow the defendant to impeach prosecution witnesses with prior felonies if the prosecution is barred from using the defendant's felony convictions. He suggested that there is no reason to retain felony conviction impeachment in civil cases if it is eliminated in criminal prosecutions. The Reporter informed the Committee that the American Association for Justice had advocated the abrogation of Rule 609(a)(1), arguing that plaintiffs are denied recovery on viable civil claims by juries because of the plaintiffs' past criminal convictions.

If Rule 609(a)(1) were abrogated, the Reporter noted that corresponding amendments to Rules 609(b) and 608(b) would be needed to prevent the admission of felony convictions and underlying acts through those provisions. The Reporter directed the Committee to drafting options to accomplish these objectives on page 257 of the Agenda materials. He noted that it would be a good idea to limit Rules 609(b) and 608(b) even without complete abrogation of Rule 609(a)(1). The Reporter pointed the Committee to pages 261-263 of the Agenda materials for differing versions of amendments to Rule 609 to abrogate felony conviction impeachment. One version would retain the existing structure of Rule 609(a) and another version would restructure the Rule completely to avoid leaving an open subsection where Rule 609(a)(1) felony impeachment once was.

The Reporter then invited Melody Brannon, the Federal Public Defender from the District of Kansas, to share her experience with Rule 609(a)(1) impeachment. Ms. Brannon described her substantial experience over more than three decades as a federal defender. She explained that the possibility of felony conviction impeachment has an outsized impact on a criminal defendant's constitutional rights, not merely the right to testify at trial, but also the right to plead not guilty and go to trial at all when a defense is dependent on the testimony of the criminal defendant. Ms. Brannon also argued that the introduction of a criminal defendant's prior felony convictions lowers the government's burden of proof. She emphasized that the impact of a felony conviction is felt long before a trial in a holding cell in considering a plea offer when a defense lawyer informs a defendant that their priors will be admissible if they testify. Ms. Brannon explained that she advises clients that their prior felony convictions are highly likely to be admitted if they testify given the liberal application of Rule 609(a)(1) and that they should expect to be impeached. Defendants are not concerned about the credibility costs, but rather the propensity use of their priors. Ms. Brannon explained that defendants have difficulty understanding why their prior convictions will still be used against them after they have served their debt to society for those crimes. She explained that the prejudice from Rule 609(a)(1) impeachment is enhanced for her clients of color due to their disproportionately higher rates of prior conviction. Ms. Brannon highlighted the widespread criticism of felony impeachment and the empirical data revealing its improper propensity effect on jurors. She noted that, in contrast to the voluminous data showing the dangers of felony impeachment, there is no empirical data suggesting that felony conviction impeachment increases the reliability of verdicts. Ms. Brannon opined that the existing Rule 609(a)(1) balancing test is not protecting criminal defendants and that similar prior convictions are frequently admitted even in close cases where they are used for propensity and have an impact on the outcome. She suggested that there is no effective way to limit the use of prior felony convictions to impeachment and to prevent propensity use once they are admitted because human jurors

are incapable of ignoring their propensity relevance. Ms. Brannon closed by explaining that the availability of Rule 609(a)(1) impeachment is preventing criminal defendants from testifying, thus preventing them from going to trial, resulting in guilty pleas even in cases where there is a viable defense. She urged the Committee to publish a proposed amendment abolishing Rule 609(a)(1) impeachment for public comment.

One Committee member asked Ms. Brannon whether she favored abrogating felony conviction impeachment of government cooperating witnesses, as well as for defendants, and whether the loss of that impeachment evidence for government witnesses would undermine an effective defense. Ms. Brannon responded that she favors the complete abrogation of felony-conviction impeachment, including for government witnesses. She explained that losing felony-conviction impeachment of government witnesses would be well worth it to eliminate similar impeachment of criminal defendants. She explained that there are many ways to attack the credibility of cooperating government witnesses. Many have favorable plea deals which suggest their bias. Many have also made prior inconsistent statements that can be used. Ms. Brannon opined that these methods of impeachment are far more effective than showing that a government witness has a prior manslaughter conviction, which tells the jury little about that witness's truthfulness. She stated that preserving a criminal defendant's right to testify was well worth the loss of this impeachment evidence with nonexistent probative value. A Committee member commented that if you ask any criminal defense attorney whether she would rather retain felony-conviction impeachment of government witnesses or abrogate Rule 609(a)(1) impeachment and eliminate such impeachment of defendants, every defense attorney would choose complete abrogation.

Another Committee member asked whether prosecutors would simply increase their efforts to admit a defendant's past crimes under Rule 404(b) if Rule 609(a)(1) impeachment were eliminated. The Reporter responded that would not be a collateral consequence of abrogation because Rule 404(b)(1) would continue to limit efforts to admit prior convictions and because prosecutors *already* routinely attempt to admit a defendant's prior convictions through both Rule 404(b) and Rule 609 if they can. He opined that there would be no effect on Rule 404(b) if Rule 609(a)(1) were abrogated.

Another Committee member suggested that some attacks on a witness for bias include some reference to the witness's criminal history as in the example of a government cooperator who is biased because he was charged in connection with the case and has accepted a plea deal to testify for the prosecution. The Committee member suggested that any rule change ought to ensure that such attacks on bias remain available. The Reporter responded that attacks on bias are always allowable, and that the abrogation of Rule 609(a)(1) would not alter such bias impeachment. Ms. Brannon agreed that the elimination of Rule 609(a)(1) would not inhibit bias impeachment. She suggested that a witness might be impeached with a violation of probation, for example. The Chair inquired whether it would be okay to have a criminal defendant impeached with a violation of the conditions of supervised release. Ms. Brannon responded that a defendant's violation of the terms of supervised release could be probative of dishonesty where that defendant promised to abide by the conditions of supervised release and then broke those promises. If Rule 609(a)(1) were abrogated, the Chair asked whether the government could impeach a testifying criminal defendant for bias on cross-examination by asking: "You've been in prison before, you'd do anything to avoid going back wouldn't you?" Ms. Brannon replied that a defense lawyer would definitely move in limine to prevent such cross questioning referencing criminal history but that such impeachment would be more probative of honesty than simply the fact of some prior felony.

Another Committee member suggested that the Committee would throw the baby out with the bathwater if it were to eliminate felony conviction impeachment altogether. That member argued that Rule 609(a)(1) is well-written and that the only problem with it is that some judges are not applying it well. The member explained that prior violent felonies should simply not be admitted through the existing balancing test because the probative value to show dishonesty is so low. This Committee member explained that Rule 609(a)(1) does help defendants undermine the government's cooperating witnesses and that it should not

be eliminated. This member was not persuaded that felony-conviction impeachment affects a meaningful number of defendants and suggested that there were no trials in many violent crime cases even in the absence of any prior convictions. This Committee member opined that Rule 609 is well-written and well-conceived and should not be changed at all.

The Chair queried whether there was any concern about abolishing Rule 609(a)(1) and allowing jurors to assume that testifying witnesses *lack* any criminal history. Jurors might assume that, if a witness had prior criminal convictions, he or she would have been asked about them. The Chair wondered whether it would make sense to instruct juries that they are not to make any assumptions about criminal history and that witnesses may or may not have prior convictions.

Ms. Shapiro expressed confusion about concerns regarding prior conviction impeachment for violent crimes such as rape. She opined that such convictions would be excluded by the existing balancing test in Rule 609(a)(1), both because they lack probative value as to dishonesty and due to the high likelihood of prejudice. Ms. Shapiro explained that the current rule would only admit other types of convictions that would have relevance to the defendant's credibility as a witness. Ms. Brannon explained that there is a very narrow subset of convictions that courts will not admit under Rule 609(a)(1). The Reporter agreed, noting that convictions for rape and other violent crimes usually do not get admitted under the existing balancing test, but that even those convictions have been occasionally admitted, as seen in the case digest. Ms. Shapiro responded that this would result from improper application of the existing rule rather than a problem with the language of Rule 609. Mr. Miller agreed, arguing that Rule 609(a)(1) as currently drafted empowers the right people to determine the probative value of a prior felony conviction – federal district court judges. He argued that the protective balancing test that requires the probative value of the prior conviction to outweigh prejudice to the defendant strikes the right balance. If trial judges are applying that test improperly, Mr. Miller suggested that there could be opportunities for judicial education but that a rule amendment was not the correct response.

The Chair agreed that if the existing Rule 609(a)(1) balancing test worked as it was intended to, the Rule would likely operate well. He suggested that an amendment to Rule 609(a)(1) that modified the balancing test would improve application of the Rule. For example, instead of requiring the probative value of a criminal defendant's prior felony conviction to simply "outweigh" any unfair prejudice, the balancing test might be rewritten to require that the probative value "substantially outweigh" any prejudice to the defendant. The Chair suggested that such a modification to the balancing test --- combined with instructive language in the committee note --- could get judges to narrow the range of prior convictions they admit against defendants. Mr. Miller responded that he did not have any sense of whether problems applying the existing Rule 609(a)(1) balancing test are widespread. He remarked that he has seen trial judges diligently apply the Rule 609 test.

The Reporter explained that he had contemplated the idea of a modified balancing test and circulated a draft of a revision to Rule 609(a)(1) that would alter the balancing test required to admit a prior felony conviction against a criminal defendant such that it would be admitted only if its probative value substantially outweighs the prejudice to the defendant. The Chair noted that the Committee would not be taking any votes on the newly circulated proposal.

Judge Bates expressed appreciation for the information about prior conviction impeachment provided by the Federal Public Defender and queried whether a survey from the Federal Judicial Center could provide additional empirical data to help inform the Committee's deliberations concerning Rule 609. The Reporter asked what information could be collected by the FJC and noted that it would be difficult to devise a test of the existing operation of Rule 609. A Committee member agreed with Judge Bates, suggesting that he is skeptical of the anecdotal evidence regarding how frequently Rule 609, in particular, prevents a criminal

defendant from testifying. He noted that defendants plead guilty for other reasons, particularly in cases in which there is strong evidence of guilt and they want to get a three-point reduction at sentencing.

The Reporter suggested that there is sufficient information to support an amendment even without a survey. He analogized the Rule 609 balancing proposal to the recent amendment to Rule 702. Rule 702 was drafted correctly and well, but the cases revealed that some federal courts were applying the wrong standard to admit expert opinion testimony. Rule 702 was amended to emphasize the proper standard and to remedy the problems in the case law. The Reporter explained that the case digest on Rule 609(a)(1) shows improper application of the Rule 609 balancing test, and that this improper application justifies a modest modification to Rule 609(a)(1) to require the probative value of a felony conviction to "substantially outweigh" any prejudice to a criminal defendant at the very least. A Committee member asked whether a new Committee note would accompany the balancing amendment. The Reporter explained that there could be no modification to the Committee notes in the absence of an amendment to rule text, but that the Committee could and would include a new note if it proposed an amendment to the balancing test in the Rule.

Mr. Lau said he would explore the possibility of an FJC study on prior conviction impeachment of criminal defendants. He stated that he was not sure that a survey would be helpful and that it would be better to have information regarding the number of Rule 609 objections made by defendants and the rulings. The Reporter asked whether the FJC would be able to include data from unpublished opinions. Mr. Lau noted that that could be explored and that databases like Westlaw are not necessarily complete. The Chair noted that many Rule 609 rulings are not written down in an opinion because they are made on motions in limine. He inquired whether the FJC could coordinate with the Sentencing Commission to ascertain plea rates among defendants with and without prior convictions. The Chair asked Mr. Lau to check with the FJC regarding the design of a Rule 609 study that might be helpful to the Committee.

Mr. Valladares opined that there is a clear problem with Rule 609 as it is applied to criminal defendants and that it needs to be addressed even if the problem is one of application. He noted that lead academics identify Rule 609 as a significant problem and that the Advisory Committee needs to act to remedy the clear injustice being done by the existing Rule. The Chair asked whether a more protective balancing test with a strong Committee note cautioning against admissibility of certain convictions would be a helpful remedy. Mr. Valladares remarked that Professor Bellin had proposed abrogating Rule 609 in its entirety in his Fall 2023 presentation to the Committee and that the proposal to retain Rule 609(a)(2) dishonesty convictions and abrogate only Rule 609(a)(1) was already a compromise position that cut back on Professor Bellin's proposal. Mr. Valladares urged the Committee to consider abrogation of Rule 609(a)(1) as the appropriate fix, though he agreed that a modification of the balancing test would be better than nothing. He argued that the Committee had to do something to address the harmful impact of the Rule on criminal defendants. Another Committee member agreed, noting that the American College of Trial Lawyers strongly supports a Rule 609 change of some kind.

A Committee member opined that defense lawyers will never let a criminal defendant testify even in the absence of Rule 609(a)(1) impeachment. Another Committee member responded that the problem is that Rule 609(a)(1) creates a true inability to testify for a criminal defendant. The Reporter reminded the Committee that the caselaw clearly shows that criminal defendants do testify and do get impeached with their prior convictions even when those convictions should not pass the Rule 609(a)(1) balancing test, thus justifying a rule change.

Ms. Shapiro suggested that all the evidence regarding defendant impeachment with prior convictions is anecdotal and that prosecutors report that it is indeed very difficult to admit violent felonies to impeach a criminal defendant. She explained that the caselaw digest presents an incomplete picture of the true practice under Rule 609 because it omits the trial court rulings that exclude such felonies that are then never

used to impeach the defendant and never challenged on appeal. She noted that it would be helpful to study the states in which prior conviction impeachment is not allowed to ascertain whether criminal defendants testify at a higher rate in those jurisdictions. The Chair noted that the Eighth Circuit opinions appear to permit prior conviction impeachment quite liberally but that he excludes them in his courtroom and those exclusion decisions are missing from any record of the frequency of Rule 609 impeachment. Mr. Lau promised to explore the kind of data he might be able to obtain to get a sense of practice under Rule 609 and its effect on criminal defendants in different jurisdictions.

Another Committee member asked whether different trial judges might disagree about which felony convictions are probative of dishonesty even if the Rule 609(a)(1) balancing test were strengthened. The Chair responded that there is disagreement in that regard, with some judges viewing *any* conviction as probative of a willingness to testify untruthfully. The Committee member noted that some of the data regarding rates of testimony among criminal defendants was quite old (dating back to the 1950's) and that it would be helpful to have more recent data.

Committee members were then polled about potential amendments to Rule 609. One noted that he was largely persuaded by the arguments of the Department of Justice and that in his experience, prosecutors have a difficult time admitting Rule 609 convictions against criminal defendants. He remarked that he was not certain he would oppose a balancing amendment, but expressed concern that Congress may not favor a change to Rule 609. Another Committee member agreed that a criminal defendant's convictions were not routinely admitted in his experience but opined that it would be problematic if courts were approaching this kind of impeachment differently. He reported that he was open to further consideration of an amendment but not yet persuaded. Another Committee member thought that adding the word "substantially" to the Rule 609(a)(1) balancing test would be a helpful amendment that would send a message but that he would like to see more data. Another Committee member remarked that the member would be opposed to abrogation of Rule 609(a)(1) but could consider a modified balancing standard. Another suggested that admission of prior felony convictions differs from judge to judge and that a modified balancing standard could be a simple way to alert judges who are admitting them too freely to adjust their approach to this evidence. Another Committee member opined that criminal defendants are unlikely to take the stand even if they cannot be impeached with prior felony convictions, but expressed willingness to consider a modification to the balancing test in Rule 609(a)(1). Another Committee member argued that convictions that do not fall within the dishonesty category of Rule 609(a)(2) have no probative value in showing lying and so abrogation of Rule 609(a)(1) is a superior option. That said, the Committee member stated that a more stringent balancing test could be helpful for judges who find some probative value in prior convictions that are not dishonesty convictions. The Reporter explained that he would favor abrogation because the probative value of a non-dishonesty conviction will always be substantially outweighed by prejudice to a criminal defendant. That said, the Reporter explained that a subtle change to the balancing test would be an improvement.

Judge Bates agreed that the proposal to modify Rule 609 deserves serious consideration but that he thought additional data from the FJC would be important in determining an appropriate standard. He noted that we are in a place where only 7 states deviate from the Federal Rule, meaning that 43 states still adhere to felony conviction impeachment of even criminal defendants. Judge Bates noted that the Supreme Court would likely consider Rule 609 to be the substantial majority position. The Reporter reminded the Committee that only one state had a rule on illustrative aids, but that the Committee proposed new Rule 107 to regulate them nonetheless. Judge Bates replied that it would still be helpful to see the data that the FJC could uncover. A Committee member suggested that seeing criminal trial and defendant testimony rates in states without felony conviction impeachment could be useful information.

The Reporter asked the DOJ representatives for their thoughts on the modification to the Rule 609 balancing test. Mr. Miller responded that the Department would have its subject matter experts review the

balancing proposal. The Chair suggested that if violent felony convictions are already not being admitted under the current version of Rule 609, as the Department suggested, making the test more rigorous should not affect outcomes.

The Chair explained that the Reporter would bring back a proposal to modify the Rule 609(a)(1) balancing test, along with any FJC data, at the Fall 2024 meeting. He noted that there would need to be overwhelming approval to proceed with a proposal to abrogate Rule 609(a)(1) altogether and that absent such a groundswell of support for abrogation, the Committee would proceed with consideration of a balancing proposal.

VI. Proposal to Amend Rule 801(d)(1)(A)

The Chair next introduced a proposal to eliminate the "oath" and "prior proceeding" requirements from Rule 801(d)(1)(A), so that all prior inconsistent statements made by testifying witnesses would be admissible for their truth, as well as to impeach. This would treat prior consistent and inconsistent statements of witnesses similarly. When admitted, they are admitted for any purpose for which they are relevant.

The Chair explained that prior inconsistencies are routinely admitted at trial to impeach a witness's testimony, but that very few of them are admissible for their truth because of the oath and prior proceeding requirements. Only when the prosecution has called a witness before a grand jury in a criminal case, for example, would that witness's prior inconsistent statement be admissible to prove the truth of what it asserts. This means that the trial judge must give a limiting instruction for the vast majority of prior inconsistent statements that are admitted, cautioning the jury to use a statement for its impeachment value but not to rely upon it substantively. The Chair opined that juries have difficulty understanding these instructions and often do not follow them. Therefore, many of these prior inconsistencies are in fact being used substantively, but we pretend that they are not. He explained that an amendment that frees a jury to rely upon prior inconsistent statements for their truth aligns the hearsay rule with the reality that jurors often do rely upon these statements, ensuring that the Federal Rules of Evidence honestly match the reality in the courtroom. The Chair reminded the Committee that it had proposed an amendment to Rule 613(b) regarding extrinsic evidence of prior inconsistent statements to match the Rule's requirements with the practice at trial.

The Chair emphasized that there is no hearsay danger in allowing these statements to be relied upon for their truth where the declarant must be on the stand and subject to cross-examination regarding the prior statement. The jury will hear the witness's explanation for their inconsistency and choose the version it finds credible. The Chair closed by noting that 15 states have a similar rule that allows all prior inconsistent statements to be admitted for their truth. He stated that the question for the Committee is whether to publish the proposed amendment appearing on page 224 of the Agenda materials that would allow full use of all prior inconsistent statements. The Reporter noted that the amendment would be quite straightforward, simply eliminating the "oath" and "prior proceeding" requirements from existing Rule 801(d)(1)(A). He also reminded the Committee that these are statements that are already admitted, and that the amendment would simply permit the jury to make fuller use of information it already possesses.

One Committee member expressed support for the proposal but questioned whether the change would allow litigants to defeat summary judgment on the civil side with prior inconsistent statements that would count as substantive evidence. The Chair opined that this would not allow parties to foreclose summary judgement by creating inconsistent statements. He explained that when an opponent of summary judgment seeks to file a new affidavit contradicting prior deposition testimony given in the case (that would otherwise justify summary judgment), courts routinely strike the affidavit as a sham affidavit. Another Committee member expressed concern that substantive admissibility of prior inconsistencies could undermine

summary-judgment practice, suggesting a scenario in which a plaintiff's deposition says one thing that would justify summary judgment against the plaintiff but that a third-party witness might file an affidavit stating that the plaintiff told the third party something different/inconsistent that would defeat summary judgment. If that prior inconsistency is now substantive evidence rather than simply impeachment, it could alter summary judgment practice and outcomes. The Chair suggested that it is already inappropriate to grant summary judgment in the face of evidence that a deponent's version of events is contradicted. He further questioned whether making it easier for defendants to win summary judgment should be a goal of rulemaking for the Federal Rules of Evidence.

Another Committee member noted that the rule change would also have significant consequences in criminal cases. He posed a hypothetical victim who reports to police following a domestic disturbance that her spouse hit her but then testifies at trial that there was no assault and that she fell. Under the current Rule 801(d)(1)(A), the victim's prior inconsistent statement to police is not admissible for its truth and may be used only to impeach the victim at trial. Under the proposed amendment, the victim's prior statement could be used by the prosecution for its truth to convict the defendant which is a significant change. The Chair expressed skepticism that any prosecution would rest *solely* on a prior inconsistent statement. In the domestic-violence context, for example, there is almost always evidence of loud arguments or broken furniture or bruises on the alleged victim. The Chair also reminded the Committee that the victim's statement in this scenario is given to the jury under the existing Rules along with a limiting instruction cautioning them not to rely upon it. He opined that juries do rely upon such statements for their truth, but we operate under the fiction that they do not. The amendment would in no way alter access to prior statements that jurors already enjoy. The Committee member remarked that prosecutors do not currently bring the case with the recanting victim to trial because of the lack of admissible evidence and that the substantive admissibility of prior inconsistencies could affect charging and could result in more of these cases being brought. The Reporter noted that the prosecution would get a benefit in being able to use all prior inconsistent statements for their truth, but that it would be a benefit all parties would enjoy across the board – any party could introduce the prior inconsistent statement of any testifying witness for its truth. The Reporter also stated that in the hypothetical given --- a case of domestic violence --- it is good policy to find substantive admissibility in the statement that is closer to the event, and that the current rule would mean that the domestic violence prosecution could not be brought.

Another Committee member noted that trial judges rigorously enforce limits on impeaching one's own witness with a prior inconsistency not admissible for its truth as an abuse of Rule 607. The Reporter commented that another advantage of the proposed amendment is that it would do away with concerns about a party abusing its right to impeach with prior inconsistencies by calling witnesses it knows will not provide helpful information only to impeach with a prior inconsistency that is not admissible for its truth. If all prior inconsistent statements are admissible for their truth, there can be no abuse of the right to impeach one's own witness and trial judges will no longer need to plumb a prosecutor's motives in calling a witness to the stand in assessing the admissibility of prior inconsistent statements.

One Committee member suggested that the change could be helpful if jurors cannot appreciate the distinction between impeachment and substantive use of prior inconsistent statements. He noted that there could be a benefit to criminal defendants who can argue that the prior inconsistent statements of an informant, for example, are admissible for their truth. Another Committee member explained that a criminal defendant has no burden of proof at trial and, thus, does not benefit from substantive use of prior statements. The Reporter suggested that it may still be helpful for a defendant to be able to argue that the facts given in a prior statement are accurate. Another Committee member agreed that the Rules are disingenuous about the current limit on prior inconsistent statements with many being used for their truth by juries. He commented that the proposed amendment would do away with mini-trials concerning the motivations for calling a forgetful or recanting witness who has made prior helpful statements. One additional Committee

member opined that it would be beneficial to simplify Rule 801(d)(1)(A) given that prior inconsistent statements are already admitted and given to juries.

Ms. Shapiro addressed the alternate version of the amendment on page 225 of the Agenda materials that includes a corroboration requirement for prior inconsistent statements, arguing that this requirement should not be adopted because it is unnecessary and detracts from the simplicity of the proposal. The Chair agreed, explaining that the corroboration alternative had been included to address any concerns about a prior inconsistency serving as the sole basis for a conviction. The Reporter noted the consensus among Committee members that a corroboration requirement is not necessary or advisable, stating that the corroboration alternative was not on the table.

Ms. Shapiro informed the Committee that she had collected feedback from DOJ lawyers regarding a potential change to Rule 801(d)(1)(A). She reported that the civil litigators were agnostic about the change and expressed no concerns about summary-judgment practice as a result of an amendment. She explained that prosecutors expressed concerns about the amendment, however. Prosecutors noted that prior inconsistent statements that are not given under oath and at a prior proceeding may be unreliable and that jurors should not be permitted to choose such questionable hearsay over the trial testimony given by the witness. Ms. Shapiro explained that cross-examination of the witness regarding the prior inconsistency may be ineffective and inadequate, particularly when the witness denies making the prior statement or claims a lack of memory. The Reporter responded that jurors are frequently permitted to elevate hearsay over trial testimony concerning an event, such as when a witness's excited utterance differs from her trial testimony. Ms. Shapiro noted that hearsay statements admitted through other exceptions, like the excited utterance exception, enjoy special guarantees of reliability that justify their use and that a witness's prior inconsistent statement (not given under oath and at a prior proceeding) enjoys no special reliability. She further emphasized that we expect juries to comprehend and follow instructions throughout the trial process, such that concerns about limiting instructions in this one context cannot justify an amendment to Rule 801(d)(1)(A).

The Chair then inquired whether Committee members would favor publication of the proposed amendment to Rule 801(d)(1)(A). Mr. Valladares expressed a willingness to publish the proposal for the purpose of gathering feedback from the public comment process. Ms. Shapiro abstained from voting on behalf of the Justice Department. One Committee member expressed opposition to publication, explaining that jurors can and do follow instructions and that it is inappropriate to treat prior statements that are inconsistent with trial testimony like other reliable hearsay statements. Another Committee member concurred and opposed publication.

Another Committee member favored publication, explaining that he had practiced in a jurisdiction that allowed substantive use of all prior inconsistent statements and that it had posed no problems and had largely benefited prosecutors. Additional Committee members agreed that the Committee should publish the proposal for notice and comment. The Reporter reminded the Committee that the original Advisory Committee preferred and proposed substantive admissibility of all prior inconsistent statements. After all members had provided input, the vote was 6 Committee members in favor of publication, 2 members opposed to publication, and an abstention on behalf of the Justice Department.

The Chair noted that unanimity among Committee members was not necessary to publish a proposal and a decision was reached to publish the proposed amendment to Rule 801(d)(1)(A) appearing on page 224 of the Agenda materials. Ms. Shapiro recommended deleting the last sentence of the first paragraph of the proposed Committee note providing that: "A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements." The Chair emphasized that eliminating limiting instructions was one of the major reasons for the amendment and that the Note should retain the sentence. All agreed to

retain the sentence but to delete the word "confusing" from it. Ms. Shapiro then highlighted a sentence in the second paragraph of the proposed Committee note stating: "Thus any concerns about reliability are well-addressed by cross-examination, the oath at trial, and the fact-finder's ability to view the demeanor of the person who made the statement." She suggested that the reference to the "oath at trial" ought to be eliminated as unnecessary. The Reporter agreed to remove the reference to "the oath at trial" from the Note. The Chair noted that the proposal to publish the amendment would proceed to the Standing Committee in June.

VII. Potential New Federal Rule of Evidence 416 Governing Prior False Accusations

The Chair next recognized the Academic Consultant, Professor Richter, to give a report on a proposal to adopt new Federal Rule of Evidence 416. Professor Richter directed the Committee to Tab 6 of the Agenda materials and reminded the Committee that Professor Erin Murphy had attended the Fall 2023 meeting and had proposed a new Rule 416 that would allow evidence of a person's prior false accusations to be admitted to suggest the falsity of a current accusation. The Committee had expressed interest in considering the proposal further. Professor Richter reported that the proposal presents some potential benefits but carries some serious risks that should be carefully considered by the Committee. She recommended that the Committee perform additional research if it was inclined to continue consideration of a false-accusations rule.

Professor Richter noted that prior false accusations come up primarily in sex-offense cases and consist of evidence that a victim allegedly falsely accused a different person of a sexual assault on a different occasion. She pointed out that the vast majority of sex-offense cases in which such evidence is at issue are prosecuted at the state level under state evidence rules. She also emphasized the existing empirical data suggesting that a very small fraction of sexual-assault accusations is false. So the problem does not arise frequently.

Professor Richter explained that admitting prior false accusation evidence under the existing Federal Rules of Evidence is complicated to say the least. Evidence that a victim has made a prior false accusation falls under Rule 404(b) as a person's "other crime, wrong, or act." Other acts are typically subject to the *Huddleston* standard of proof such that the proponent needs to present sufficient evidence from which a reasonable jury could find that the person made a prior accusation and that it was false. While there may be unique circumstances in which a victim's prior false accusations are admissible for a permitted purpose through Rule 404(b)(2), they are principally offered to show a victim's propensity to falsely accuse – meaning that evidence of prior false accusations should ordinarily be excluded under Rule 404(b)(1). If a victim testifies at trial, that opens her up to impeachment with prior dishonest acts under Rule 608(b), however. Subject to Rule 403, a defendant may ask a testifying victim about prior false accusations so long as the defendant has a good faith factual basis for the question. If a testifying victim denies the prior false accusation, the defendant may not admit evidence to prove it due to the ban on extrinsic evidence in Rule 608(b).

Whether a defendant seeks to admit evidence of a prior false accusation through Rule 404(b)(2) or to inquire on cross of a victim about such prior accusations, Rule 412 must be considered in sexual-offense cases. That provision protects alleged victims of sexual misconduct by excluding evidence of the victim's other sexual acts or sexual predisposition. The Advisory Committee notes to Rule 412 state that evidence of false accusations is not excluded by the Rule, and most courts agree that prior false accusations show a victim's prior lying behavior rather than prior sexual conduct. The standard of proving the falsity of a prior accusation to remove it from Rule 412's ambit is not clear in the caselaw. Finally, Professor Richter explained that a criminal defendant might have a constitutional right to present evidence of a false accusation or to impeach a testifying victim with such a false accusation in some circumstances.

Professor Richter called the Committee's attention to Rule 416 proposed by Professor Murphy on page 345 of the Agenda materials that would simplify and expand the admissibility of false-accusations evidence. The proposed new rule would allow "extrinsic evidence" of a person's prior false accusation in any case (civil or criminal and not only in sexual-offense cases) when the falsity of the prior accusation and the person's awareness of its falsity have been established by a preponderance of the evidence. Thus, it would require a finding by the trial judge under Rule 104(a) of a knowing false accusation. The proposed rule would allow trial judges to consider the facts that a complaint was not pursued in the prior case and that the accused denied wrongdoing but provides that those facts are insufficient to establish falsity by a preponderance. Proposed Rule 416 would also require that the prior false accusation was "similar in nature" or "of equal or greater magnitude" to the current accusation. The rule would require written pre-trial notice and compliance with Rule 412(c) where the prior false accusation involves sexual conduct of a victim. Lastly, the rule would specify that a defendant could admit prior false-accusations evidence even if the victim does not testify and could admit extrinsic evidence to prove the prior false accusation if the victim testifies and denies the prior false accusation on cross. Professor Richter noted the many drafting issues and options for crafting a false accusations rule explored in the Agenda materials on pages 345-351 should the Committee decide to pursue one. She noted that the Committee should carefully consider the costs and benefits of a new rule, however, before deciding whether to proceed.

Professor Richter explained that a new Rule 416 would streamline and simplify admissibility of false-accusations evidence and would eliminate the tortured path the evidence must currently take through at least five evidence rules. She noted that admissibility under the existing Federal Rules of Evidence could be considered both under and overinclusive. Because of the limitations on other-acts evidence in Rule 404(b) and on extrinsic evidence under Rule 608(b), it is nearly impossible to admit extrinsic evidence of a prior false accusation. This can be made more difficult in sexual-offense cases in which Rule 412 excludes evidence of a victim's prior acts. This framework may make it too difficult to admit prior false accusations in appropriate circumstances, especially when a criminal defendant could have a constitutional right to do so in certain cases. On the other hand, the current Rules may be too forgiving toward a victim's prior false accusations by requiring only proof sufficient for a jury to find falsity or a good-faith basis for believing an accusation to be false. Such low standards of proof may subject victims to prior-accusations evidence without sufficient findings that they were false. Professor Richter also noted work by esteemed Evidence scholar Ed Imwinkelried positing that false accusation evidence should be admissible in sex-offense cases to create symmetry between the admissibility of a defendant's prior wrongful acts of sexual misconduct under Rule 413 and an alleged victim's prior wrongful acts of false accusation. In sex-offense cases where credibility issues are often dispositive and where a defendant's prior acts are aired before the jury, Professor Imwinkelried has argued that admission of a victim's prior falsehoods is important to create a balanced presentation. Impeachment of a victim with such prior falsehoods is often ineffective without the ability to produce extrinsic evidence following a denial.

On the other hand, Professor Richter explained that there are some serious risks associated with a false-accusations rule. First, such evidence is almost exclusively proffered in sexual-offense prosecutions that are pursued almost entirely in state court, reducing the need for a federal rule on the matter. There are some limited avenues for admitting false-accusations evidence even through the existing Federal Rules, furthering undermining the need for a bespoke provision. More importantly, a rule that allows a victim's prior false accusations to be admitted to show the falsity of a current accusation reverses longstanding prohibitions on propensity evidence and on extrinsic evidence of a testifying witness's dishonest acts. There is no evidence suggesting that victims (of sexual assault in particular) are unusually likely to fabricate accusations or to falsely accuse people repeatedly to justify the reversal of the ban on propensity evidence with respect to their conduct. Indeed, the evidence that does exist suggests a low rate of false accusations, at least in sex-offense contexts. Further, the ban on extrinsic evidence of a witness's prior dishonest acts also serves important purposes in preventing distracting detours into prior conduct. Even if a defendant can establish the falsity of a prior accusation by a preponderance, it seems likely that a victim could still

deny making a false accusation and that the jury would be dragged into a dispute about a prior circumstance and the truth or falsity of a previous accusation. Most concerning is the possibility that the rule might telegraph that victims are unusually likely to make false accusations of sexual assault. Creating a rule blessing the admission of prior false accusations could increase fishing expeditions into the past of sexual-assault victims to mine for such material. Although well-intentioned, the rule could turn back the clock on protections for victims in sexual-assault cases and deter victims from pursuing charges out of fear that their sexual history will be litigated (even in a pretrial context) for evidence of false accusations. Lastly, crafting a standard that balances the rights of victims with the constitutional rights of criminal defendants would be challenging. If the bar for admissibility is set too low, victims suffer, whereas the rights of defendants may be compromised by a standard that is too stringent.

If the Committee wishes to pursue the proposal further, Professor Richter suggested additional study. In particular, she recommended a 50-state survey in an effort to locate optimal drafting alternatives for a federal provision, a survey of sexual-offense cases under the Military Rules of Evidence, and finally exploration of empirical data regarding the incidence of false accusation in sex-offense cases.

One Committee member opined that the proposal was worth pursuing. He noted that the rule would have impact in federal sexual-offense prosecutions in Indian territory and that the lack of any clear path to admissibility under the existing Rules justified additional investment in time to explore the possibility of a new rule. Another Committee member agreed, explaining that most courts review prior false accusations evidence under Rule 412 and that many of the cases involve child victims. Another Committee member agreed, explaining that his jurisdiction adopted caselaw on the issue of false accusations prior to the adoption of the Federal Rules and that it required some legal gymnastics to reconcile judge-made exceptions allowing this evidence with the Federal Rules. Another Committee member expressed concern about any implication underlying a new rule that sexual-assault victims are more likely to fabricate and suggested that the states ought to lead in this area given their experience with this evidence. The Committee member also opined that a good cross of a testifying victim could be effective without extrinsic evidence of a false accusation but stated that the proposal was worth exploring further. Judge Bates agreed that the proposal merits further exploration but thought that getting detailed information on how the states handle this evidence would be crucial to any ultimate determination regarding a Federal Rule.

The Chair noted that there are some significant policy concerns inherent in a false-accusations rule and cautioned that the Federal Rules may not want to lead in this area when the vast majority of cases involving this evidence are prosecuted in state court. Still, he agreed that further study could be performed to ascertain whether any state has crafted an optimal approach to false-accusations evidence. Professor Richter agreed to pursue further study of state practice for the Committee's Fall 2024 meeting.

VIII. Closing Matters

The Chair thanked everyone for attending and for their helpful input. He informed the Committee that the next meeting will be held on November 8, 2024.

Respectfully submitted,
Liesa Richter

TAB 1D

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Congress (Apr 2024)

REA History:

- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

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Rule	Summary of Proposal	Related or Coordinated Amendments
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Approved by Standing Committee (June 2024 unless otherwise noted)

REA History:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

TAB 1E

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Marijuana Misdemeanor Expungement Act	**H.R. 8917** *Sponsor:* Carter (D-LA) *Cosponsor:* Armstrong (R-ND)	CR; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8917/BILLS-118hr8917ih.pdf **Summary:** Would require the Supreme Court to prescribe rules, within one year of enactment, for the review, expungement, sealing, sequester, and redaction of official records related to certain marijuana misdemeanors and civil infractions.	• 07/02/2024: H.R. 8917 introduced in House; referred to Judiciary Committee
Closing Bankruptcy Loopholes for Child Predators Act of 2024	**H.R. 8077** *Sponsor:* Ross (D-NC) *Cosponsor:* Tenney (R-NY)	BK 2004, 9018	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr8077/BILLS-118hr8077ih.pdf **Summary:** Would directly amend BK 2004 and 9018 to provide additional procedures in cases related to the alleged sexual abuse of a child.	• 04/18/2024: H.R. 8077 introduced in House; referred to Judiciary Committee
Bankruptcy Threshold Adjustment Extension Act	**S. 4150** *Sponsor:* Durbin (D-IL) *Cosponsors:* 5 bipartisan cosponsors	BK 1020; BK Forms 101 & 201	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s4150/BILLS-118s4150is.pdf **Summary:** Would extend the CARES Act definition of debtor in Section 1182(1) with its $7.5m subchapter V debt limit for a further two years.	• 04/17/2024: S. 4150 introduced in Senate; referred to Judiciary Committee
Bankruptcy Venue Reform Act **SHOP Act**	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsors:* 7 Democratic & 2 Republican cosponsors **S. 4095** *Sponsor:* McConnell (R-KY) *Cosponsors:* Cotton (R-AR) Tillis (R-NC)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf https://www.congress.gov/118/bills/s4095/BILLS-118s4095is.pdf **Summary:** Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.	• 04/10/2024: S. 4095 introduced in Senate; referred to Judiciary Committee • 02/14/2023: H.R. 1017 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 136 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 43 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.	• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders • 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization. Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 160 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena. Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.	• 07/28/2023: H.R. 5048 referred to the subcommittee on Economic Development, Public Buildings, and Emergency Management • 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 19 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 21 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 33 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant.	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Election Day Holiday Act of 2024 **Election Day Act** **Freedom to Vote Act**	**H.R. 7329** *Sponsor:* Eshoo (D-CA) **H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) **H.R. 11** *Sponsor:* Sarbanes (D-MD) **S.1; S. 2344** *Sponsor:* Klobuchar (D-MN) Each bill has several Democratic or Democratic-caucusing cosponsors.	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf https://www.congress.gov/118/bills/hr6267/BILLS-118hr6267ih.pdf https://www.congress.gov/118/bills/hr11/BILLS-118hr11ih.pdf https://www.congress.gov/118/bills/s1/BILLS-118s1is.pdf https://www.congress.gov/118/bills/s2344/BILLS-118s2344is.pdf **Summary:** Would make Election Day a federal holiday.	• 02/13/2024: H.R. 7329 introduced in House • 11/07/2023: H.R. 6267 introduced in House • 07/25/2023: S. 1 introduced in Senate • 07/18/2023: S. 2344 introduced in Senate • 07/18/2023: H.R. 11 introduced in House • Among others, house bills referred to Oversight & Accountability Committee; senate bills referred to Committee on Rules & Administration
Indigenous Peoples' Day Act	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 86 Democratic cosponsors **S. 2970** *Sponsor:* Heinrich (D-NM) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf https://www.congress.gov/118/bills/s2970/BILLS-118s2970is.pdf **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: H.R. 5822 introduced in House; referred to Oversight & Accountability Committee • 09/28/2023: S. 2970 introduced in Senate; referred to Judiciary Committee
Patriot Day Act	**H.R. 5366** *Sponsor:* Fitzpatrick (R-PA) *Cosponsors:* Gottheimer (D-NJ) Malliotakis (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5366/BILLS-118hr5366ih.pdf **Summary:** Would make Patriot Day a federal holiday.	• 09/08/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 15 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would make Diwali (a/k/a Deepavali) a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 4 Democratic & 2 Republican cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday.	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday.	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 58 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 115 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee

TAB 2

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: Amendment to Rule 801(d)(1)(A)
Date: October 1, 2024

At the last meeting, the Committee approved, for release for public comment, an amendment to Rule 801(d)(1)(A) to provide for broader admissibility of prior inconsistent statements of testifying witnesses. Currently the exemption from hearsay established by Rule 801(d)(1)(A) limits the substantive use of a witness's prior inconsistent statements to only those e made under oath at a formal proceeding. All other prior inconsistent statements are admissible, but only for impeachment purposes. And there is, of course, a difference between admissibility for impeachment purposes and substantive admissibility. See, e.g., *United States v. Kawleski,* 108 F.4th 592 (7th Cir. 2024) (defendant's motion for a new trial was properly denied; the defendant supported his motion by relying on a prior inconsistent statement of a government witness; but that statement did not justify a new trial, because it was admissible only for impeachment purposes). The amendment approved by the Committee for release for public comment provides substantive effect for all prior inconsistent statements.

The Standing Committee, at its June meeting, unanimously approved the proposal (with the exception of an abstention from DOJ). The rule was released for public comment on August 15. The public comment period ends on February 15.

The proposed amendment and Committee Note released for public comment provides as follows:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(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 given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~;

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

(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 substantive admissibility of inconsistent statements of a testifying witness. The Committee has determined, as have a number of states, that delayed cross-examination under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well-addressed by cross-examination and the factfinder's ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] affirmed the statement as his").

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense.

The amendment does not change the Rule 613(b) requirements for introducing extrinsic evidence of a prior inconsistent statement.

****

As of this writing, no public comments have been received on the proposal. (Traditionally, most public comments are not received until February.)

TAB 3

TAB 3A

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: Possible Amendment to Rule 609(a)(1)
Date: October 1, 2024

The Committee has been considering the possibility of amending Rule 609 --- the rule governing impeachment of witnesses with prior convictions --- for the last two meetings.

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 elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

At its Fall 2023 meeting, Professor Jeffrey Bellin made a presentation recommending the abrogation of Rule 609. The Committee was not in favor of a complete abrogation of Rule 609, because that would mean that convictions for perjury and other lying crimes could not be admitted, and such lying-based convictions were considered probative of the witness's character for truthfulness. But the Committee did resolve to consider the abrogation of Rule 609(a)(1), which

allows impeachment with convictions that are not based on lying, subject to balancing tests. Discussion at that Committee meeting indicated that at least some members found convictions offered under Rule 609(a)(1) to be only minimally probative of the likelihood that the witness will lie on the stand --- and that they could be very prejudicial, especially when offered against criminal defendants, and especially when they are similar to the crime with which the defendant was charged. But ultimately, at the last meeting, the Committee voted against abrogating Rule 609(a)(1). Some members determined that while there are undeniably abuses of the rule --- allowing highly prejudicial and not very probative convictions to be admitted against criminal defendants --- those abuses were misapplications by the courts of the balancing test set forth in Rule 609(a)(1)(B). After discussion, the Committee agreed to consider an amendment that would alter the balancing test in Rule 609(a)(1)(B) to make it less likely that courts will admit highly prejudicial and minimally probative convictions against criminal defendants.

This memorandum is in four parts. Part One discusses the existing rule and focuses on Rule 609(a)(1)(B). Part Two provides examples of court rulings allowing impeachment of criminal defendants with highly prejudicial and minimally probative evidence. Part Three discusses the arguments in favor of and against an amendment that would allow admission of a conviction under Rule 609(a)(1)(B) only when the probative value of the conviction *substantially* outweighs its prejudicial effect. Part Four sets out a draft amendment and Committee Note.

It is important to note that the possible amendment to Rule 609(a)(1) is not an action item for this meeting. But if a majority of the Committee is in favor of a change, then it will be further developed and formally proposed at the Spring 2025 meeting.

Attached to this memorandum are three items: 1) A letter from NACDL supporting the proposal to add the word "substantially to Rule 609(a)(1)(B); 2) A letter from a consortium of law professors in support of the proposal; and 3) A previously distributed report on a survey of public defenders, indicating that overbroad impeachment with prior convictions deters defendants from testifying in criminal cases.

Many thanks to Dr. Timothy Lau for all the support and insight he provided in the preparation of this memo.

I. Rule 609(a)(1)(B)

Rule 609(a)(1)(B) provides that a recent conviction not involving dishonesty or false statement can be admitted to impeach a criminal defendant if its probative value outweighs its prejudicial effect. This is a rule of mild exclusion. It is a rule that is more protective against impeachment than the rule applied to all witnesses other than the criminal defendant. As to all

other witnesses, the applicable Rule is 403 --- convictions are presumed to be admissible, and only excluded when their probative value is substantially outweighed by their prejudicial effect.

The legislative history of Rule 609 indicates that this relatively protective test, applicable only to criminal defendants, was generated by a concern about the "deterrent effect" of prior conviction impeachment "upon an accused who might wish to testify." H.R. Rep. No. 93-650, at 11 (1973). *See also* 4 Weinstein & Berger, § 609App.01[3], at 10 (recognizing that the House Judiciary Committee's changes to the rule were motivated by concern that the existing text applying Rule 403 did not "adequately protect[] an accused who wished to testify"). Thus there was a concern, right at the outset, that broad impeachment with prior convictions could deter criminal defendants from exercising their constitutional right to testify. *The presumption that some criminal defendants would testify but for impeachment with convictions was the animating reason behind the protective balancing test.*

Federal courts have used a multifactor test to determine whether a conviction should be admissible under Rule 609(a)(1)(B). The circuit-based tests vary at the margins, but they basically follow the five-factor framework established by the Seventh Circuit in *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976). The *Mahone* factors require the court to consider:

> (1) The impeachment value of the prior crime. This factor recognizes that some crimes not involving false statement (such as theft) might be more probative of character for untruthfulness than others (such as assault or armed robbery).
>
> (2) The age of the conviction and the witness's subsequent history. This factor recognizes that older convictions are less probative than more recent ones, but that probative value of an old conviction may increase if there has been consistent wrongdoing.
>
> (3) The similarity between the past crime and the charged crime. This factor recognizes that if the conviction is for a crime similar to that charged, the prejudice is higher because the jury may draw the impermissible inference that the defendant has a propensity to commit the charged crime.
>
> (4) The importance of the defendant's testimony. This factor recognizes that as the importance of the defendant's testimony to a proper resolution increases, the cost of admitting the conviction increases as well because *impeachment will deter* the defendant from exercising the constitutional right to testify.

(5) The importance of the defendant's credibility. This factor works in tension with factor 4, because whenever the defendant's testimony is important, his credibility is as well. The more central his credibility, the more the test leans toward admission of a conviction.[1]

In many cases, the final two factors are in fact *not* applied to cancel each other out. Most cases emphasize the importance of the witness's credibility; and in some cases that is in fact the *only* factor that the court relies on in allowing impeachment of the accused. *See, e.g.*, *United States v. Cooper*, 990 F.3d 576 (8th Cir. 2021) (in a drug prosecution, a prior conviction for aggravated assault was properly admitted; the only factor relied upon by the court was that the defendant's credibility was important, because his testimony contradicted that of the government's witnesses --- when would that not be the case?); *United States Carroll*, 2024 WL 3924604 (E.D. Mo.) ("Mr. Carroll's credibility is likely to be important to the jury, so the probative value of his past conviction outweighs its prejudicial effect * * * "); *United States v. Tolliver*, 374 Fed. App'x. 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."); *United States v. German*, 2023 WL 1466609, at *1 (11th Cir. 2023) ("A criminal defendant who chooses to testify places his credibility in issue as does any witness; therefore, he is subject to impeachment through evidence of prior convictions.").

It is important to note what is *not* considered in the above factors: the need to focus on a conviction's *marginal* probative value in light of the fact that the defendant's credibility is already impaired by his obvious motive to falsify. Indeed the court usually instructs the jury to focus on the potential bias of the defendant, and yet it is generally not considered in balancing under Rule 609(a)(1)(B). When bias is not considered in determining whether a conviction can be used for impeachment, it 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)(B).

[1] *See United States v. Caldwell*, 760 F.3d 267, 275 n.15 (acknowledging the "tension" between the fourth and fifth factors); Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Their Prior Convictions)* ("In essence, the factors cancel each other out. To the extent a defendant's testimony is 'important' * * * his credibility becomes 'central' in equal degree, leading to a curious equipoise.").

II. Court Rulings Allowing Broad Impeachment Under Rule 609(a)(1)(B)

The balancing test of Rule 609(a)(1)(B) was intended to be protective. The compromise in Congress was that while there would be open admissibility of convictions involving false statements, there should be a strict control on all other convictions of criminal defendants --- given their diminished probative value and the high risk of prejudice. While it is certainly true that many courts have taken the Congressional intent to heart and regularly exclude convictions under Rule 609(a)(1)(B), the sad fact is that many courts routinely admit these convictions --- even if they are for inflammatory acts, or are for crimes identical to that charged, and even admitting multiple convictions.[2]

Here are some of the many recent examples of admission of highly prejudicial convictions, even though the protective balancing test of Rule 609(a)(1)(B) was applicable:

***United States v. Barber*, 2024 WL 3740594 (E.D. Okla. Aug. 9, 2024):** The defendant was charged with the shooting death of his girlfriend. The court found that the defendant's 8-year-old conviction for domestic battery by strangulation was admissible. The court relied on the premises that all convictions are probative and that the defendant's testimony was important as he was the only eyewitness.

***United States v. Williams*, 2024 WL 3540519 (D.N.J. July 23, 2024):** The defendant was charged with felon-firearm possession. The court allowed impeachment with three drug convictions, ranging from 5-7 years old. Considering remoteness, the court reasoned that the fact that they were less than 10 years old made them especially relevant (which is a kind of double-counting because otherwise they would not have been admissible under the rule at all). The court recognized that drugs and guns are associated but noted that case law indicates that "drug convictions are admissible even when the defendant is charged with a drug offense."

***United States v. Otufale*, 2024 WL 3391094 (E.D.N.Y. July 12, 2024):** The defendant was charged with wire fraud and identity theft. The court found that two identity theft convictions were admissible to impeach the defendant, even though the defendant was already going to be impeached with two fraud convictions under Rule 609(a)(2). The court acknowledged the "aggregate prejudicial effect of allowing the Government to cross-examine Lazarre regarding four convictions" but held that the convictions are "highly probative of whether Lazarre would be

[2] *See* Bellin, *supra* at 334: "At both 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."

truthful if called to testify," that the jury should know about all convictions and that "[a]ny aggregate prejudicial effect that results can be mitigated by" a limiting instruction.

***United States v. Hellard*, 2024 WL 2378931 (N.D. Okla. May 23, 2024):** The defendant was charged with assault with a dangerous weapon, malicious mischief, and arson. The court held that a 9-year-old conviction for assault with a dangerous weapon was admissible for impeachment. The court found that the fact that the conviction was less than 10 years old weighed heavily in favor of admissibility --- but that is only to say that the conviction fell within (a) rather than (b); it is double-counting to say that it is especially probative merely because it fits within the 10-year deadline. The court also found that the defendant's credibility was important as the case centered on eyewitness testimony. It did not give weight to the possibility that the defendant would be deterred from testifying.

***United States v. Jones*, 2024 WL 2302262 (M.D. Pa. May 21, 2024):** The defendant was charged with drug trafficking. The court held that a 2004 conviction for drug trafficking was admissible for impeachment. (He was finally released from confinement on that conviction in 2020, so Rule 609(b) did not apply). The court found that the "importance of defendant's testimony" and "importance of defendant's credibility" crossed each other out; and the court concluded that drug convictions are probative of credibility. The fact that the conviction was identical to the charge was apparently not enough to justify exclusion even under the more protective balancing test.

***United States v. Girty*, 2024 WL 1674508 (E.D. Okla. Apr. 17, 2024):** The defendant was charged with firearms offenses. The court held that a 2019 conviction for domestic assault and battery by strangulation was admissible for impeachment. While the impeachment value of the conviction was not high, the conviction was recent, and dissimilar from the crime charged. The court acknowledged that "the violent nature of Defendant's prior felony conviction --- assault and battery by strangulation --- is prejudicial, in that it may invoke an emotional response from jurors" and that admitting the conviction would likely "cause Defendant to abstain from testifying, thus damaging his right to a full defense." But the court held that the defendant's credibility was "central" and therefore the conviction was admissible.

***United States v. Walker*, 2024 WL 182285 (N.D. Okla. Jan. 17 2024):** In a prosecution for kidnapping, the court held that all three of the defendant's prior convictions --- one for firearms and two for drugs --- would be admissible for impeachment. The court stated that the convictions were not very probative, but the prejudice was diminished because they were not similar to the crime charged. The court relied mostly on the importance of the defendant's credibility.

***United States v. Briscoe*, 2023 WL 8237269 (D.N.M. Nov. 28, 2023):** In a carjacking and firearms prosecution the court held that two armed robbery convictions, nine years old, were

admissible for impeachment. The court recognized that the probative value of violent crimes was limited, and prejudice was high given similarity to the charged crime. But the court essentially relied exclusively on the importance of the defendant's credibility were he to testify.

***United States v. Williams*, 2023 WL 5973993 (D.D.C. Sept. 14, 2023):** In a felon-firearm prosecution, the court held that a conviction for carrying a firearm without a license would be admissible. The court recognized that the conviction was not very relevant to the defendant's character for truthfulness. And it recognized that there was a high risk of prejudice because the firearm conviction was very similar to the crime charged. But the court declared that "district courts should be reluctant to exclude otherwise admissible evidence that would permit an accused to appear before a jury as a person whose character entitles him to complete credence when his criminal record stands as direct testimony to the contrary."

Note: ***If the statement of the court in Williams is correct, then why have a balancing test at all? Essentially there were no factors (other than the importance of the witness's credibility) that supported admission. The quote from the case indicates that the court is applying a presumption of admissibility to non-falsity convictions. But Rule 609(a)(1)(B) provides for a presumption of exclusion.***

The court in Williams also mentioned that prejudicial effect was minimized by the fact that it was a felon-firearm prosecution and the jury would in any event know that the defendant had a prior felony conviction. Maybe so, but that very fact also diminishes the probative value of the other convictions. Thus, the felony element in the case washes out.

***United States v. Harper*, 2023 WL 396099 (W.D. Okla. Jan. 25, 2023), *rev'd on other grounds,* 2024 WL 4376127 (October 3, 2024):** The defendant was charged with a sexual assault, and the court found that he could be impeached with two convictions from 2016: use of a car without permission, and assault and attempt to escape. The court stated that "the Rules of Evidence begin from an assumption that prior felony convictions have impeachment value when a defendant takes the stand." It concluded that attempted escape from arrest or detention illustrates dishonesty. It found the convictions were not very prejudicial because they differed from the crime charged. It relied most heavily on the fact that "the central issue at trial is the identity of the individual who attacked E.F" and so the defendant's "testimony and credibility are important and central to the trial." The court did exclude older fraud and other convictions under Rule 609(b).

***United States v. Crittenden*, 2023 WL 2967891 (N.D. Okla. Apr. 17, 2023):** In a prosecution for kidnapping, the government sought to impeach the defendant with 13 prior convictions, falling into three separate categories: (1) possession of firearm offenses; (2) possession of controlled substances offenses; and (3) eluding a police officer. The court found all of the convictions to be fairly probative, noting that none of them were for violence. The prejudice was considered low,

because none of the convictions were for crimes similar to the crime charged. The court found importance of the defendant's testimony to be critical --- but not in the light of preserving the right to testify. Rather, importance of testimony and credibility were both weighed in favor of admission. The court concluded that all thirteen convictions would be admissible to impeach the defendant.

NOTE: It's hard to see how the probative value is sufficient for all thirteen convictions. The marginal value of a conviction goes down as more and more are admitted. That is not necessarily so for prejudice, as the jury is likely to think much worse of a defendant who was convicted two times rather than one, and so forth.

***United States v. Steward*, 2023 WL 8235817 (S.D. Ill. Nov. 28, 2023):** The defendant was charged with possession of contraband in prison. The court held that if he testified, *all* of the following convictions would be admissible against him for impeachment under Rule 609(a)(1)(B): (1) Carjacking; (2) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence; (3) Robbery in Indian Country; and (4) Carrying, Using, and Brandishing a Firearm During and in Relation to a Crime of Violence (so, two of them). The court concluded that prejudice was minimal "because none of Steward's prior convictions were similar to his current offense and thus would not tend improperly to suggest to the jury any tendency on his part to commit the instant offense." Prejudice was thought to be further limited because the jury would know that he was in prison when he did the act charged. (Although that fact should limit the probative value of the convictions as well.) Finally, the court stated that although it did not yet know the defendant's theory of the case, "there is a strong probability that his testimony will differ from, and potentially contradict, that of the corrections officer."

***United States v. Pafaite*, 2022 WL 837489 (M.D. Pa. March 21, 2022):** In a prosecution for distributing methamphetamine, the government sought to admit four separate theft-related convictions. The court held that all the convictions were admissible. The court found the convictions to be very probative of character for truthfulness because they were theft-related. The prejudice of the convictions was found minimal because they were dissimilar to the drug charges. And the importance of testifying factor was crossed out by the importance of credibility factor. The court did not explain why all four convictions should be admitted. That is, the court did not consider whether the diminished probative value of the fourth conviction (at the very least) outweighed the prejudicial effect. (Arguably the prejudicial effect is diminished as well, but there are two answers to that: 1) the jury could well think that a 4-time felon was a more terrible person than a 3-time felon and 2) assuming both the probative value and the prejudicial effect are equally marginal, then the evidence should be excluded under a balancing test that favors exclusion).

***United States v. Howard*, 2020 WL 2781607 (S.D. Ind. May 29, 2020):** In a felon-firearm prosecution, the government sought to impeach the defendant with two armed robbery convictions and a battery conviction. The court held that all three convictions were admissible. The court found the convictions for *armed robbery* to be "crimes of dishonesty." The convictions were considered recent, and thus especially probative, simply because they were within the 10-year time limit of Rule 609(a). Finally, the court declared that "battery and armed robbery are not so similar to a felon in possession charge as to create an unacceptable risk that the jury will improperly consider the evidence of battery and armed robbery as evidence that Howard committed the felon in possession of a firearm charge."

Note: Given that this was a firearms prosecution, query whether a prior armed robbery conviction was "not so similar."

***United States v. Lewis*, 493 F. Supp. 3d 858 (C.D. Cal. 2020)**: In a bank robbery prosecution, the court held that two prior bank robbery convictions would be admissible to impeach the defendant if he testified. The court found the impeachment value of a bank robbery was "high." The convictions were recent, and "the Court can mitigate any prejudice from the similarity of the offenses through the limiting instruction it has asked the parties to provide." *The court made no mention of the fact that the convictions were identical to the crime charged.*

***United States v. Perry*, 2017 WL 2875946 (D. Minn. July 6, 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 --- were 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 (one conviction was *identical* to the charge) 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."

Reading this opinion literally, it means that Rule 609(a)(1) convictions are automatically admissible.

***United States v. Williams*, 2017 WL 4310712 (N.D. Cal. Sept. 28, 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. Jan. 21, 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 court did not consider the fact that while the admitted evidence diminished the prejudicial effect when offered for impeachment, it also limited the probative value.) 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, and so *all of them were admissible*.

***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 were 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 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. [not recognizing that the probative value of these convictions were diminished in the same measure] *The court found all prior felonies admissible to impeach.*

***United States v. Warren*, 2016 WL 931100 (M.D. Fla. Mar. 11, 2016):** The defendant was charged with being a felon in possession of a firearm. The court found that the defendant's prior convictions for possession of drugs with intent to distribute and fleeing from an officer were admissible for impeachment. 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).

***United States v. Boyajian*, 2016 WL 225724 (C.D. Cal. Ja. 19, 2016):** The defendant was charged with a sex offense against a minor victim. The court found the defendant's prior sex offense conviction could be used to impeach the defendant's trial testimony under Rule 609(a)(1)(B) because the defendant's credibility was crucial and because the prior sex offense suggested dishonesty. No consideration was given to the inflammatory nature of the conviction or to its similarity to the crime charged.

***United States v. Sneed*, 2016 WL 4191683 (M.D Tenn. Aug. 9, 2016):** One of the defendants 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. 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. Okla. Sept. 18, 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: 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 stated that all the convictions were relevant and recent. 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 were admissible.

***United States v. Verner*, 2015 WL 1528917 (N.D. Okla. Apr. 3, 2015):** The defendant was charged with possession of methamphetamine with intent to distribute and sought to prevent the government from using the following prior convictions against him as impeachment: 1) a 2006 burglary conviction; 2) a 2007 conviction for possession of a controlled substance; and 3) a 2007 conviction for possession with intent to distribute marijuana and for unlawfully possessing a

firearm. The court held that those convictions would be admissible to impeach the defendant's testimony under Rule 609(a)(1)(B). 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, so the jury needs information about past convictions to evaluate that credibility.

***United States v. Rembert*, 2015 WL 9592530 (N.D. Iowa Dec. 31, 2015):** The defendant was charged with felon firearm possession and intent to distribute marijuana. The defendant sought to preclude the government from impeaching him with a marijuana conviction and a theft conviction. 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 held that both prior convictions were admissible to impeach.

***United States v. Sleugh*, 2015 WL 3866270 (N.D. Cal. June 22, 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. The court 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. July 25, 2014):** In a prosecution for drug distribution, 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. Drift*, 2014 WL 4662505 (D. Minn. Sept. 19, 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 held that both convictions were 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. June 3, 2013):** One of the defendants 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. 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. July 8, 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. The court stated 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 to the crime charged in passing, it concluded that a limiting instruction would reduce 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 Mar. 16, 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 stated that the defendant's testimony would be key to the defense, and 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. Apr. 14, 2010):** In a prosecution for felon-firearm possession (involving a shooting and flight from the police) the defendant sought to exclude three convictions: a 2001 conviction for the manufacture and delivery of cocaine; a 2006 conviction for fleeing and eluding officers in a vehicle; and a 2006 conviction for drug possession. The court found all of the convictions to be admissible. Although the defendant argued that drug possession and flight did not suggest dishonesty, the court declared 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. 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 reasoned that prejudice was lessened because the jury would already know the defendant was a "felon" due to the current charge [*again missing the point that the felony they know about also diminishes the probative value of the other felonies]*. The court concluded that the defendant's credibility was sufficiently important to justify admission of all three prior convictions.

***United States Stolica*, 2010 WL 538233 (S.D. Ill. Feb. 8, 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 armed 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 for impeachment. The court reasoned that bank robbery was indicative of credibility even though it was not a crime of dishonesty. It also found that armed bank robbery presented little propensity risk due to its lack of similarity to the charged offenses --- even though one of the offenses was possession of a firearm. Finally, the court emphasized 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 stated 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. Apr. 20, 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 stated that the prior felony had impeachment value and so was admissible.

***United States v. Lujan*, 2008 WL 11359114 (D.N.M. Nov. 19, 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).

Circuit Court Decisions Allowing Broad Impeachment Under Rule 609(a)(1)

There are a number of circuit court decisions indicating a lack of enforcement of the protective test for criminal defendants in Rule 609(a)(1)(B) that was granted by Congress. Here are just a few examples in which prior convictions have been found properly admitted against an accused under Rule 609(a)(1), even when the conviction is identical to the crime charged, and sometimes when the conduct is especially inflammatory. *See, e.g.*:

• *United States v. Tracy*, 36 F.3d 187 (1st Cir. 1994) (in an armed robbery prosecution it was permissible to impeach the defendant with convictions for aggravated assault and stolen firearms, because the accused's credibility was important).

• *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. Walli, 785 F.3d 1080 (6th Cir. 2015) (in a prosecution for injuring government property the defendants were properly impeached with prior convictions for injuring government property).

• *United States v. Hernandez*, 106 F.3d 737, 740 (7th Cir. 1997) (acknowledging that the similarity of the 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 robbery).

• *United States v. Alexander,* 48 F.3d 1477 (9th Cir. 1995) (prior robbery conviction properly admitted to impeach the defendant in a bank robbery prosecution).

• *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).

• *United States v. Harris*, 720 F.2d 1259 (11th Cir. 1983) (prior drug convictions properly admitted to impeach the defendant in a drug 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. Some data on that point is set forth in a subsequent section of this memo.

III. Arguments About a Rule Allowing Admissibility Only When the Probative Value of the Conviction *Substantially* Outweighs Its Prejudicial Effect

A. Promoting the Intent of Congress

The basic argument in favor of an amendment to add "substantially" to the balancing test is that Congress itself recognized that impeachment with non-falsity convictions could be very prejudicial to criminal defendants and could discourage them from testifying.[3] That is a serious cost, especially considering that the convictions by definition are of diminished probative value because they do not involve dishonesty or false statement. Considering all these factors, Congress concluded that a more protective test was required for criminal defendants. It stands to reason that this more protective test should be most effective when one of three circumstances arise: 1) the conviction is similar to the crime charged; 2) the conviction is especially inflammatory; or 3) the defendant is well-impeached by other sources (thus making a conviction less probative).

And yet, the cases discussed above are replete with admission of convictions that are very similar and even identical to the crime charged. Crimes of domestic violence and sexual assaults, obviously highly inflammatory, have been admitted. And multiple convictions have been admitted, without consideration of the fact that each conviction to be admitted becomes less probative when one has already been admitted. Courts also give no consideration to the fact that a criminal

[3] H.R. Rep. No. 93-650, at 11 (1973), noting the "deterrent effect" of prior conviction impeachment "upon an accused who might wish to testify." *See also* 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").

defendant comes to the stand impeached with bias. And other defendants are impeachable with inconsistent statements and bad acts, which are not taken into account by many courts.

The argument for a change is basically that many courts have not fulfilled the promise of Congress's protective test. Some cases discussed above essentially place the burden on the defendant to show that the conviction should be excluded. Others automatically admit convictions because the defendant has decided to take the stand and therefore he puts his character for truthfulness at issue. But none of these virtually automatic rulings are justified under the protective balancing test. And even when the rulings are not automatic, the courts above give short shrift to prejudice and much weight to probative value.

The argument in favor of the amendment is that a slight change to the balancing test can be a signal to courts that they need to more carefully weigh prejudicial effect and probative value, and give defendants the protection that Congress intended.

B. Does Prior Conviction Impeachment Actually Deter Defendants from Testifying?

At the last meeting the question arose whether a rule excluding convictions of criminal defendants made any sense because defendants won't testify even if their convictions are excluded. Put another way, there are other reasons for a defendant's choosing not to testify, including fear of cross-examination, impeachment with prior inconsistent statements, and so forth. Accordingly, the argument goes, there is no reason to provide a rule that more aggressively excludes convictions of criminal defendants, because these convictions never actually get introduced at trial anyway.

One question for the Committee is whether it can be empirically shown that prior conviction impeachment keeps defendants off the stand. At the outset, it would appear to be impossible, within the confines of the rulemaking process, to provide scientifically validated statistics on this question. The decision-making process in each criminal case is bound to be different. Multiple factors are in play.

That said, there are a number of signs pointing to the fact that the threat of conviction will deter the testimony of some number of defendants.[4] Here are some of the data points:

[4] The FJC was asked to provide data on the relationship between prior convictions and the decision to testify. An August 6 email from Dr. Tim Reagan of the FJC stated as follows:

> We will submit in time for your fall meeting a report on how we think we might be able to provide helpful information on the issue. A survey may be helpful, but we will not launch a full-scale survey before the [Fall] meeting. There never was time for that. What we are doing at this point is having

1. Older Empirical Data

There is some empirical data from about 15 years ago indicating that the threat of impeachment deters defendants from testifying. Professors Theodore Eisenberg and Valerie Hans (two of the most distinguished empiricists on matters of litigation in the United States), report on their findings in *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). They conducted a statistical analysis of 382 actual trials in four large counties around the U.S. in which prior crimes were found admissible for impeachment. They found a "statistically significant association" between the existence of a criminal record and the decision not to testify at trial. They also found a correlation, in cases with weak evidence, between the jury's learning of a criminal record and conviction (from under 20% to over 50%).

Probably the most important finding on deterrence from broad impeachment was a study of exonerated defendants, who by definition were innocent and so would be the most likely candidates, generally speaking, to elect to testify. It turns out that, as of 2008, 39% of the exonerated defendants 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) ("In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand."). 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 records testified. *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").

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loosely structured conversations with a small number of defense attorneys. With some surveys, the questions to ask are pretty obvious. A survey on this topic will require more careful development.

It would not appear, however, that a survey of criminal defense counsel would be very valuable. We already conducted a survey of all the public defenders, which strongly indicated that impeachment with convictions deters testimony. If that survey did not convince Committee members of the deterrent effect of convictions, it is hard to see how a survey of defense counsel will do so.

A separate memo from the FJC on the work that it has done and is doing in research and education is included in this Agenda Book. In that memo is this entry: "At the request of the Evidence Rules Committee, the Center is conducting research on prior felony convictions as impeachment evidence against testifying criminal defendants."

2. Other Evidence

There is significant evidence that: a) a fair number of defendants actually do testify, especially if they are free from impeachment; and b) that for defendants with prior convictions, the possibility of impeachment does deter their testimony. Those points will be discussed in turn.

a) Defendants Testifying:

A review of federal court records indicates that about 25% of all criminal defendants tried by jury testified in cases terminated in 2023. There were in excess of 1500 criminal defendants terminated after jury trials that year, https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2023/12/31, and, of these, hundreds testified. Those statistics are a far cry from a conclusion that defendants "never testify." At the same time, the statistics also suggest that the system is likely not at a saturation point where every defendant who would want to testify is already testifying.

Indeed, some of the famous recent criminal prosecutions involved defendants taking the stand to testify. *See, e.g.*, the trials of Mike Lynch and Sam Bankman-Fried, both of whom were not subject to impeachment with prior convictions. Other testifiers have included Elizabeth Holmes, Colony Capital Founder Tom Barrack, KPMG partner David Middendorf, Privinvest executive Jean Boustani, and Kyle Rittenhouse. *See generally* Tarm, *Are More Defendants Testifying at Trial?* APNews (Dec. 24, 2021), https://apnews.com/article/death-of-daunte-wright-ghislaine-maxwell-ahmaud-arbery-kyle-rittenhouse-kenosha-327ee5f8fdc3b9b20afd10e601fa92df (noting that there is an uptick in defendants testifying, concluding that "[t]here's no recent data on percentages of defendants nationwide who have chosen to testify. That'll take years to compile.").

See also https://time.com/6129830/high-profile-defendants-testifying-ghislaine-maxwell-kim-potter/:

> There are many reasons why [a defendant might choose to testify, including the nature of the criminal charge. In self-defense murder cases, for example, it's crucial for jurors to hear from the defendant about how he or she perceived danger, because nobody else can provide as powerful an account.
>
> "It's much more challenging to put the jury in the defendant's shoes without hearing from the defendant himself," says Jessica A. Roth, a professor at Cardozo School of Law and a former federal prosecutor. The approach helped convince the jury in the Rittenhouse

case: he was acquitted of all charges after testifying that he feared for his life when he opened fire.

In sum, there is a good deal of recent evidence indicating that a fair percentage of defendants do testify.

b) Anecdotal Evidence on Deterrence:

Attached to this memo is a report by the Federal Public Defender (submitted for the last meeting) showing the results of a survey on whether defendants choose not to testify because of impeachment under Rule 609(a)(1). This survey, and the written comments to the survey, at the least provides substantial anecdotal evidence that Rule 609(a)(1) does work to prevent defendants from exercising their right to testify.

c) Data from Federal Cases where Impeachment was Allowed or Denied

I asked Dr. Timothy Lau of the FJC to help me look up whether the defendants in my digest of Rule 609(a)(1)(B) rulings (submitted for the last meeting) testified or not. These are his findings:

Section of This Digest	**Total Number of Defendants Implicated**[5]	Pled guilty	Testified in Jury Trial	Did not Testify in Jury Trial	No information/ did not have to testify due to dismissal/ bench trial
The Court Excludes All of Defendant's Felony Convictions Under Rule 609(a)(1)(B) [*Holmes* through *Hoffman*]	25	11	6	6	2
The Court Admits Some, But Excludes Other Felony Convictions	27	5	5	12	5

[5] Some of the rulings implicate more than one defendant, so this is not a straight count of the cited rulings.

Under Rule 609(a)(1)(B) [*Barker* through *Baker*]					
Court Rulings Allowing Broad Impeachment Under Rule 609(a)(1)(B) [*Barber* though *Jackson*]	41	20	3	13	5

Some trends can be identified:

(1) For the defendants whose convictions were entirely excluded for purposes of impeachment, 6 (50%) out of the 12 defendants who were tried by juries testified, which is higher than the 25% figure that is found across all criminal defendants.
(2) For the defendants whose convictions were fully admissible for purposes of impeachment, *only three* (19%) *out of 16 defendants testified.* That is lower than the 25% average, and dramatically lower than the cases in which impeachment was barred.
(3) For the defendants whose convictions were partially admissible for purposes of impeachment, 5 (29%) out of 17 defendants testified. This is intermediate between the two categories described above.

In sum, the data supports the common-sense intuition that, the more convictions the court excludes for purposes of impeachment, the more likely defendants will testify.

Skeptics can say that the data set in this comparison is small. But the data set is actually more than 90% of the reported cases in which Rule 609(a)(1)(B) was applied to either admit or exclude convictions, from 2010 to now. And it seems difficult from this data to conclude that admission of prior convictions had no effect on the decision to testify.

3. Most Importantly: Congressional Determination and Court recognition.

Any doubt in the proposition that prior convictions deter defendants from testifying is belied by Congress itself. The somewhat protective test of Rule 609(a)(1)(B) --- more protective than the test applied for any other witness --- is grounded in the Congressional assumption that impeachment under a less protective balancing test *will discourage criminal defendants from exercising the constitutional right to testify*. It is the reason set forth in the legislative history, and there is no other reason for the more protective test.

Moreover, federal courts have clearly recognized that impeachment with non-falsity convictions will deter defendants from testifying. Indeed, that is why one of the factors in the five-factor test is to consider the importance of the defendant's testimony --- the more important, the greater risk to the defendant's right to testify, and thus this factor counts against admissibility. And many courts, in their decisionmaking, clearly recognize that impeachment with Rule 609(a)(1) convictions will deter defendants from testifying. *See, e.g.*, *United States v. Girty*, 2024 WL 1674508 (E.D. Okla. Apr. 17, 2024) (recognizing that admitting the conviction would likely "cause Defendant to abstain from testifying, thus damaging his right to a full defense").

All that the proposed amendment does is take that same fundamental assumption and tweak the test, because many courts have undervalued the Congressional concern about deterring the defendant from testifying.

4. State Determinations

As with Congress, the states also work from the premise that broad impeachment with prior convictions will deter the defendant from testifying. Most states have provisions that track Rule 609(a)(1)(B) --- thereby recognizing, as did Congress, that broad use of convictions for impeachment would deter defendants from testifying. *See, e.g.*, Iowa Rule 5.609 (applying the same balancing as Federal Rule 609(a)(1)(B); Arizona R. Evid. 609 (same).

In addition, several states are even more sensitive to the effect of prior convictions on the defendant's decision to testify:

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*.

Michigan Rule of Evidence 609:

> **(a) 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
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) 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.

Thus, Michigan applies the same balancing test, but only theft-related crimes are allowed under that balancing test. Less probative convictions are not admissible at all.

West Virginia Rule 609(a)

(a) General Rule.

(1) *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.

So in West Virginia, convictions are admissible against criminal defendants only if they involve dishonesty or false statement.

Moreover, there are a number of state cases throughout the country that recognize the connection between impeachment with prior convictions and the decision not to testify. In many states, if a prior conviction or bad act is wrongly found to be admissible, it can be found to be a harmful error justifying reversal, even when the defendant does not testify and the conviction/act is not actually admitted at trial. How can that be? It is because *the court assumes that the threat of admitting the conviction kept the defendant from testifying*.[6]

A notable recognition of this presumption of deterrence is the New York Court of Appeals decision in *In People v. Harvey Weinstein*, 2024 WL 1773181 (N.Y. Ct. App.). Weinstein was charged with sexual assaults. The People obtained a ruling that it if Weinstein chose to testify, he could be asked about the following bad acts: directing a witness to lie to Weinstein's wife; filing an application for a passport using a friend's social security number; telling a woman he "could harm her professionally" but could also offer her a book publishing opportunity; using his

[6] This cannot happen in Federal Court because under *Luce v. United States*, 469 U.S. 38 (1984) the defendant must actually take the stand and be impeached with the offensive conviction in order to preserve a claim of error.

It's notable that the number of appeals alleging Rule 609 error has plummeted since *Luce* was decided. In other words, defendants who are subject to negative Rule 609 rulings do not take the stand to preserve the error. This phenomenon itself is indicative of the fact that allowing convictions for impeachment against criminal defendants causes them to decide not to testify.

entertainment company's budget for personal costs; withdrawing from a business deal and asking others to cease its funding; hiding a woman's clothes; insisting that members of his staff falsify a photo for a movie poster by photoshopping a female actor's head on another woman's nude body; telling a private intelligence firm to manipulate or lie to people; scheduling a business meeting in 2012 with a woman under false pretenses; inducing executives to lie on his behalf; making threats and committing acts of violence against people who worked for him; abandoning a colleague by the side of the road in a foreign country; physically attacking his brother; threatening to cut off a colleague's genitals with gardening shears; screaming and cursing at hotel restaurant staff after they told him the kitchen was closed; and throwing a table of food. The Court of Appeal found that it was error to allow enquiry into the bad acts that were not based on dishonesty. It concluded that "the trial court abused its discretion when it ruled that defendant . . . could be cross-examined about prior . . . bad acts and despicable behavior which was immaterial to his in-court credibility, and which served no purpose other than to display for the jury defendant's loathsome character. ***The ruling necessarily and impermissibly impacted defendant's decision whether to take the stand in his defense and thus undermined the fact-finding process in this case, which turned on the credibility of the parties."*** The court found harmful error even though it conceded that some of the bad acts were admissible because they bore on dishonesty.

In sum, the argument that Rule 609 is not problematic because defendants don't testify anyway is undermined by federal and state law, as well as empirical evidence that many defendants do wish to testify and are deterred from doing so by the risk of impeachment with convictions that do not even involve dishonesty or false statement. The assumption that defendants are deterred by impeachment with convictions is the very basis of Rule 609(a)(1)(B). The proposed amendment would implement the assumption by fortifying the protection that Congress because many courts have denied the necessary protections.

Much of the argument about deterrence assumes that for the amendment to be supportable, there must be clear evidence that the threat of conviction is the *sole reason* for a defendant's decision not to testify. That is of course an impossible burden. The question is whether it is *one* of the reasons that impacted the decision. As discussed above, there are a number of indications --- beyond the fact that the principle is one of common sense --- to indicate that the risk of impeachment is likely to have some negative impact on the defendant's decision to testify.

C. Sanitizing Convictions as a Solution

Some courts have found that the way to deal with the prejudice of prior convictions is to admit convictions without letting the jury know what the crimes were. The jury would learn only that the

defendant has been convicted of felonies and is left in the dark about what crime the defendant committed. *See, e.g.*, *United States v. Barber*, 2024 WL 3740594 (E.D. Okla. Aug. 9, 2024) (because prejudice was diminished by sanitizing the domestic battery conviction, its probative value outweighed the remaining prejudice).

With all respect to the many judges that sanitize convictions under Rule 609(a)(1)(B) --- often at the behest of the government --- sanitization is in tension with Rule 609 itself; it makes the convictions impossible to assess for probative value; and it probably does little to protect defendants from prejudice.

There is nothing in the text of Rule 609, 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 does refer to "evidence" of a conviction --- and 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 under Rule 609 to prove "specific instances of a witness's conduct." That reference to 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 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).[7]

Besides the textual problem, sanitizing fails to provide the jury with the information that Rule 609 intends jurors to have. The fundamental principle of Rule 609 is that some convictions are more probative of character for untruthfulness than others. That principle animates the division of convictions between Rule 609(a)(2) and (a)(1). And as discussed in the cases above, one of the factors to balance under Rule 609(a)(1) is the probative value of the conviction --- recognizing that some convictions (such as for violent activity) are less probative than others (such as theft convictions). By stripping the conviction of its name, the jury is deprived of the opportunity to make this differentiation of probative value. Balancing probative value as the *court* sees the crime of which the defendant has been convicted makes no sense if the jury doesn't get the same information. Obviously "probative value" is ultimately to be assessed by the jury. For example, courts find theft-related convictions to be more probative than violent activity convictions. When

[7] 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, because they are not set forth in the judgment of conviction; and the better rule, as discussed below, 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).

that factor is applied in the Rule 609(a)(1)(B) balancing test to admit a conviction, it seems obvious that the jury needs to be told what the conviction is, because the whole point is that the jury, and not the judge, assesses credibility.

If the conviction is sanitized, it is extremely unlikely that the jury is going to correctly assess the probative value of the conviction. Jurors, operating blindly, are almost certain to give the conviction more or less probative value than the conviction warrants. It's like a probative value crapshoot. Mis-assessment is certainly likely 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. Mar. 12, 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 each offense, its date, and the sentence imposed is presumptively required by the Rule, subject to balancing * * * . *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.

Estrada is not directly controlling on the question of whether a criminal defendant's convictions can *ever* be sanitized. The trial court in *Estrada* decided to strip the convictions without analyzing the loss of probative value from such a ruling, and the court found this failure to be error. (i.e., if you are going to strip the conviction, you have to evaluate the probative value of the conviction as stripped). But *Estrada* does point out that stripping a conviction of its name is inconsistent with 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. 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.

There is another reason why sanitization is doing the defendant no favors. Because jurors don't know what the conviction is, they can make their own assumptions --- unsupported by anything other than what they think of the defendant and the other evidence presented. Assume a defendant charged with drug distribution, and the trial judge notes that a prior drug conviction would be highly prejudicial, and so sanitizes it. The jurors are told that the defendant was convicted of a felony five years ago. Of course the jurors will speculate on what the conviction was for. It seems quite probable that they will land on drug distribution. So it might mean, perversely, that a sanitized conviction ends up being extremely prejudicial, probably as prejudicial as the underlying conviction.

There is data to back up the argument that sanitizing convictions can end up prejudicing certain defendants. Professor James MacLeod, *Evidence Law's Blind Spots,* 109 Iowa L. Rev. 189 (2023), shows the bad outcomes from sanitization of convictions, with supporting data. Mock trials were conducted and the conclusion reached was that "when mock jurors learned that the defendant had a prior felony conviction, but did not learn its nature, a significant race-based disparity emerged: mock jurors rated the Black defendant significantly more likely to be guilty than the white defendant."

A final problem with sanitization is that the court ordinarily considers probative value of the conviction --- *but not the conviction as sanitized.* Then it says that the prejudice is limited when the jury only hears about the conviction and not what the crime was. This was the error in *Estrada*.[8] If the sanitization is to be done right, the court has to figure out the probative value of a stripped-down conviction and balance that against the prejudicial effect of that conviction as sanitized. It seems likely that if the court actually did that, it would have difficulty figuring out the probative value of the sanitized conviction. How probative is a sanitized felony as proof of a defendant's character for truthfulness?

Is there anything for the Committee to address with regard to sanitization? There are several possibilities to consider. While it might be argued that sanitization is so problematic that it might

[8] *See also United States v. Briscoe*, 2023 WL 8237269 (D.N.M. Nov. 28, 2023) (finding that violence-based convictions were not very probative, but prejudice was limited by sanitizing the convictions, and impeachment was necessary because "the jury must be well-informed" about the defendant's credibility); *United States v. Blakeney*, 2021 WL 1723224 (E.D. Pa. Apr. 30, 2021) (finding that burglary and drug convictions were particularly relevant for impeachment, but then sanitizing the conviction); *United States v. Jackson*, 2020 WL 7063566 (E.D.N.Y. Dec. 2, 2020) (finding that narcotics convictions were highly probative of credibility, and that prejudice could be handled by sanitizing the convictions).

warrant an amendment on its own, the current question is whether it should be treated as part of the proposed amendment on the Committee's agenda. Some possibilities for treatment include:

1. Prohibiting admission of a sanitized conviction: There are reasons to prohibit the practice, but given its widespread use an absolute ban might be an overstep on judicial discretion. *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). It is at least possible that in some cases a criminal defendant might benefit from sanitization. A total ban seems like overkill.

2. Providing specific guidelines on when sanitization can be used: This could be in the text, or more likely in the Committee Note, given the difficulty of handling the complex problem in the text of an already complex rule.

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, 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 *as sanitized* outweighs its prejudicial effect as sanitized. 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 sometimes fuzzily applied. This alternative is set forth in the draft Committee Note, below.

4. Do nothing. The final alternative is to say nothing about sanitization. If the balancing test is changed and the probative value must substantially outweigh the prejudicial effect, a possible outcome could be that sanitization will be less frequent. And that is because the conviction, even sanitized, is prejudicial, and the probative value of a naked conviction, to the extent it can be assessed at all, is surely on the low side.

D. Notice Requirement?

One question the Committee might consider is whether a notice requirement should be added to Rule 609(a). Some judges appear to include orders requiring pretrial notice of criminal convictions offered for impeachment in their standard pretrial orders. For example, Judge Larimer has the following order:

> Both the Government and the defendant must file notice if they intend to impeach any witness, including the defendant, should he/she choose to testify, by evidence of his/ her character or specific instances of conduct, under Fed. R. Evid. 608, or by evidence of prior conviction, under Fed. R. Evid. 609.
>
> The notice should include the specific nature of the proposed impeachment evidence, including the dates of the prior acts or convictions, and citation to relevant case law that may assist the Court in determining admissibility. Copies of any relevant exhibits sought to be introduced should be attached to the notice.

While such an order is certainly appropriate, it does not follow that a notice requirement should be added to Rule 609(a). Generally speaking, the defendant knows what convictions the government knows about, and can rationally predict that the government will be trying to admit all of them for impeachment. Indeed many Rule 609 determinations are made pretrial after the *defendant* moves *in limine* to exclude them. It is true that notice is required for admission of old convictions under Rule 609(b), but that might be justified by the fact that the parties may have forgotten about or not uncovered an old conviction; and it also might be justified because the defendant might think that the government would not try to admit old convictions and should know in advance of the government's intent to do so.

In the end, it is clear that there is no call to amend Rule 609(a) *solely* to add a notice requirement. Whether one should be added to an amendment that changes the balancing test of Rule 609(a)(1) is a question for the Committee.

E. The Impact on Rule 608(b)

Assume a defendant-witness has a five-year-old conviction for carjacking, and is charged with carjacking. If Rule 609(a)(1)(B) were tightened up, an accused could not be impeached with that conviction. The probative value is very unlikely to substantially outweigh the prejudicial effect. But what if the defendant takes the stand and the prosecutor asks: "Isn't it true that you previously highjacked a car?" The prosecutor argues that she can ask that question because she is not asking

whether the defendant was convicted. She is asking about whether the defendant 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*. Thus, questioning about a bad act is allowed unless the probative value of the bad act in showing the witness's character for untruthfulness is 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 regulated under 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").[9]

If the balancing test of Rule 609(a)(1)(B) were amended, the result is that admissibility of a bad act and admissibility of a conviction for that act would be determined by opposite balancing tests. (There is a conflict already today under the current balancing test for 609(a)(1)(B), but it would be aggravated by the amendment.) It obviously makes no sense to prohibit admissibility of a conviction but then allow the underlying acts to be inquired into. The clear intent of Congress is that impeachment with a conviction is to be governed solely by Rule 609. Rule 608(b) itself directs the reader to Rule 609 when a conviction is involved.

There are a couple of decisions which have allowed Rule 608(b) to be an end-run of another important limitation currently established by courts under Rule 609: that when a conviction is admitted, 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. Two cases allowed a cross-examiner to raise the details of these acts simply by citing Rule 608(b). *See, e.g.*, *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000); *United States v. Barnhart*, 599 F.3d 737 (7th Cir. 2010). But most courts rightly disagree, concluding that the limitations imposed on the details of the conviction would be impermissibly evaded 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; the court recognizes "the unfairness that would result if evidence relating to a conviction is prohibited by Rule 609 but admitted through the 'back door' of Rule 608"; the court cites case law from four circuits in support).

[9] While a bad act that passes through Rule 403 can be raised while examining the witness, extrinsic evidence is not admissible to prove the act. Rule 608(b).

If Rule 609(a)(1)(B) is to be amended, it might be a good opportunity to include language in the Committee Note that if a conviction is inadmissible under the Rule, the government cannot raise the underlying facts under Rule 608. The proposed Committee Note, below, addresses this problem.

IV. Draft Amendment

What follows is a draft amendment and Committee Note to alter the balancing test of Rule 609(a)(1)(B):

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 substantially 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.

Committee Note

Rule 609(a)(1)(B) has been amended to provide a more exclusionary balancing test for convictions that do not involve dishonesty or false statement, when they are offered to impeach the character for truthfulness of a testifying defendant in a criminal case. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed important limitations when the witness was the accused, in order to assure that the accused's constitutional right to testify would not be improperly discouraged. Experience has shown that the congressional intent to limit admissibility of such convictions has often not been realized. Moreover, the probative value of convictions that do not involve falsity is often minimal when they are offered as a prediction that the witness will lie on the stand. And the unfair prejudicial effect of such convictions, especially when it is the accused being impeached, can be profound.

That threat of unfair prejudice may well result in deterring a defendant in a criminal case from testifying at all.

The Committee has determined that a non-falsity-based conviction should not be admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. The Rule retains automatic admissibility for those convictions that are the most probative, i.e., those that required proof that the witness engaged in a dishonest act or false statement.

The strict balancing test contemplates that it is generally improper to allow impeachment of an accused with a conviction that is similar to the crime charged, given the obvious prejudicial effect that the defendant will suffer from such a conviction. Courts should also be cognizant that the impeachment value of non-falsity based convictions is diminished when the defendant is already impeached on other grounds. For example, if the defendant has made a prior inconsistent statement, it would be very unlikely that the probative value of a non-falsity based conviction will substantially outweigh the prejudicial effect to the defendant. Similarly, given the fact that the defendant takes the stand already impeached for having a motive to falsify, the additional probative value of a non-falsity conviction is unlikely to substantially outweigh the prejudicial effect.

While Rule 609 governs evidence of convictions, this amendment also has an impact on admissibility of the bad acts that underlie such convictions. If a conviction is inadmissible under this Rule, it is inappropriate to allow a party to inquire about the bad acts underlying the conviction. Rule 608 permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609.

A number of courts have admitted only the fact of a conviction to impeach a defendant in a criminal case. Thus the jury hears only that the defendant was convicted of a felony, not what the crime was. That solution is 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. It might be thought that admitting only the fact of a conviction would limit its prejudicial effect, but in fact a juror might draw very negative inferences in the absence of information about the nature of the conviction. At any rate, admitting only the fact of conviction is not an automatic safety valve or a means to a rough compromise. The court must find that the probative value of the mere fact of conviction substantially outweighs the prejudicial effect of the conviction as sanitized.

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.

TAB 3B

June 18, 2024

Chief Judge Patrick Schiltz, Committee Chair
Professor Dan Capra, Reporter
Members of the Advisory Committee on Evidence Rules

Re: Proposed Amendment to Rule 609(a)(1)

Dear Chief Judge Schiltz, Professor Capra, and Members of the Advisory Committee on Evidence Rules:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments with respect to the proposed changes to Federal Rule of Evidence 609(a)(1). Our organization has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. Our members have substantial experience with the challenges created by Rule 609 and have submitted amicus briefs before the Oregon Supreme Court and Supreme Court of the State of Washington related to the state counterparts of Rule 609's impact on the people in each jurisdiction. In line with our dedication to advancing the proper, efficient, and just administration of justice, we would like to offer the following comments on the proposed change to Rule 609(a)(1).

NACDL would first like to express support for the proposed amendment to Rule 609(a)(1). This amendment marks an important step toward enhancing the fairness and integrity of our judicial system. By strengthening the threshold governing the admissibility of prior convictions for the purpose of impeaching a defendant-witness's credibility, we are moving closer to ensuring that every defendant receives a fair trial. Though this amendment is a commendable improvement, we would like to address our broader concerns related to the admission of prior convictions against defendants in criminal cases.

The practice of admitting prior convictions against defendant-witnesses undermines several fundamental rights guaranteed by our Constitution. Firstly, it places a significant burden on a defendant's right to testify.[1] Presented with the prospect that their past convictions will be used to discredit them, defendants are dissuaded from taking the stand in their own defense. Indeed, research bears this out. A study of 152 DNA exonerees revealed that nearly 1 in 4

[1] "The right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 US 44, 51(1987) (quoting *Faretta v. California*, 422 U.S. 806, 817, n 15. (1975)).

factually innocent defendants elected not to take the stand in their own defense.[2] Of those exonerees, 91% of had prior convictions that could have been used for impeachment.[3] Placing such a powerful disincentive on testifying silences defendants, deprives the jury of critical accounts, and undercuts the fairness of the trial process.

One of the reasons that defendants with prior convictions are afraid of testifying is that they understand that jurors, despite their best intentions, frequently draw propensity inferences from past conduct. As one study found, when provided evidence that a defendant has a prior criminal conviction, jurors are substantially more likely to convict the accused than in a factually identical case in which there is no indication that the accused has a prior conviction.[4] The study also found that "evidence against a defendant with a prior record appears stronger to the jury," and that jurors tend to use prior convictions—particularly convictions that are similar to the charged offense— "to develop propensity judgments and other generally negative evaluations of a defendant."[5] Stated more simply, admitting prior convictions against defendants erodes the presumption of innocence and undermines the burden of proof required to convict.

The practice also compounds racial bias and treats convictions as lasting or even permanent defects in an individual's character. People of color are statistically more likely to have prior convictions due to systemic biases and over-policing in marginalized communities. The well-documented legacy of mass incarceration has meant that the criminal legal system that existed at the time this rule was adopted was nowhere near the size that it is today. One of the most comprehensive studies on the U.S. population's felony convictions estimates that the number of adults with felony convictions increased from fewer than two million people in 1948 to nearly 20 million in 2010.[6] It also estimates that people with felony convictions account for 8% of all adults and an astonishing 33% of African-American adult males. The disproportional conviction rate among African-Americans reflects the implicit biases that persist in the country. A change to Rule 609 is one way to blunt the effect of those implicit biases. The continued use of these convictions only perpetuates the cycle of discrimination and further entrenches systemic racial inequality.

The Committee should also consider how disparities might arise because of prosecutorial discretion. Prosecutors decide whether to bring charges, whether to pursue felony or misdemeanor charges, and whether to offer plea deals. This discretion can lead to significant disparities in how similar conduct is charged and prosecuted. Inconsistent charging decisions

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[2] John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Studies 477, 489 (2008).

[3] *Id*. at 490

[4] *See* Theodore Eisenberg and Valerie P. 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).

[5] Eisenberg and Hans, 94 Cornell L. Rev., at 1361.

[6] Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of America's Criminal Class, 1948–2010, 54 Demography* 1795, 1806 (2017).

and disposition of cases can mean that the same or similar behavior is admissible against one defendant as a basis for showing a propensity for dishonesty and not others. Given this variability, the use of convictions as a measure for dishonesty undermines the fairness and integrity of the judicial process. Amending Rule 609 to account for such would ensure that prior convictions used to impeach a witness's character for truthfulness are based on a more reliable assessment of the defendant-witnesses' conduct, rather than on the potentially arbitrary outcomes created by prosecutorial decision-making.

The proposed change to Rule 609(a)(1) is also warranted because the existing rule contributes to the trial penalty. In the federal criminal legal system, defendants who exercise their constitutional right to trial are given sentences three times longer on average than defendants who plead guilty, far exceeding the degree of difference that would result only from denial of credit for "acceptance of responsibility."[7] This is the trial penalty. For some crimes, the average differential is as much as eight times greater.[8] This massive differential has had numerous negative impacts on the legal system, most notably that it has contributed to making trials in criminal cases extremely rare. In 2023, fewer than 3% of federal convictions resulted from trials; the rest were all pleas.[9] The Supreme Court has acknowledged that "criminal justice today is for the most part a system of pleas, not a system of trials."[10] The trial penalty and coercive plea bargaining have been recognized as a major problem in our criminal legal system by a swath of organizations across the political spectrum.[11]

One of the major consequences of the trial penalty is the strong coercive effect it has in inducing defendants to waive their constitutional right to trial and plead guilty to avoid the chance of a much higher sentence if convicted at trial. The trial penalty, or the threat of one, is often so severe that it can even drive innocent people to plead guilty. In the National Registry of Exonerations database of all exonerees—people who were convicted of crimes and later

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[7] NACDL, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, at 20 fig. 1 (2018), https://nacdl.org/TrialPenaltyReport.

[8] *Id.* at 17, 20 fig. 1 (showing that for some crimes, such as embezzlement and burglary/breaking and entering, the differential is roughly 8x greater for defendants who went to trial).

[9] U.S. Sent'g Comm'n, 2023 Sourcebook of Federal Sentencing Statistics tbl. 11 (2023) (showing that just 1,824 convictions resulted from trial out of a total of 64,124 convictions in the federal system in 2023).

[10] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

[11] For example, the national End the Trial Penalty coalition and its member organizations and individuals which include academics, defense lawyers, prosecutors, and a broad variety of advocacy groups and individuals. https://www.endthetrialpenalty.org/who-we-are. *See also* the American Bar Association Criminal Justice Section 2023 Plea Bargain Task Force Report and ABA-adopted resolution, https://www.americanbar.org/groups/criminal_justice/committees/taskforces/plea_bargain_tf/.

exonerated—roughly 24% of cases involved a guilty plea.[12] The fact that innocent people will plead guilty to receive a more lenient sentence is also supported by extensive academic research, both in real-world criminal cases and controlled experiments.[13]

It is clear that existing law contributes to the trial penalty and worsens plea coercion. Melody Brannon, Chief Federal Defender of the District of Kansas, rightly points out that the rule, "has an outsize impact on my clients' constitutional rights, and it's not just the right to testify, but it's really the right to go to trial."[14] She said that clients were coerced to plead guilty rather than going to trial because of the strongly prejudicial effect of a jury hearing about a defendant's prior conviction.[15]

While the proposed amendment to Rule 609(a)(1) is certainly a positive development, it is our hope that this amendment is part of a broader effort to reform our evidentiary rules to better protect defendants' constitutional rights and promote a more equitable justice system. Indeed, we urge the Committee to consider revising Rule 609 to forbid the impeachment of criminal defendants with prior convictions that do not satisfy the ordinary standard of Rule 608(b), governing impeachment of a witness by specific instances of prior conduct that are actually probative of truthfulness (as limited by Rule 403). Absent that step, we urge the Committee at least to consider additional measures that would limit the prejudicial impact of prior convictions, such as providing clearer guidance on the balancing test for admissibility and ensuring that judges receive adequate training on implicit bias.

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[12] National Registry of Exonerations, Browse Cases, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last accessed June 11, 2024) (filtering for "Guilty Plea" case).

[13] *See* Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, Psych. Public Pol'y & Law 22(3): 250–59 (2016) (finding in interviews with defendants that 1 in 5 adult defendants pled guilty only because of the substantial sentence reduction they were promised). Controlled experiments also indicate that innocent people are willing to plead guilty to obtain a benefit. *See, e.g.*, Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1, 34-38 (2013) (finding that in a controlled experiment where half of students taking a test cheated (through use of a confederate), that 89% of guilty students were willing to take a plea, and that 56% of the innocent students were also willing to plead guilty in exchange for the benefit of a far more lenient sentence).

[14] *Quoted in* Cara Salvatore, "Panel Voices Concern Over Prior-Convictions Evidence Rule," Law360 (Apr. 29, 2024), *available at* https://www.law360.com/articles/1827603/panel-voices-concern-over-prior-convictions-evidence-rule.

[15] *Id.*

We commend the Committee for its efforts to improve Rule 609(a)(1) and respectfully suggest that further reforms are necessary to fully safeguard the rights of defendants and uphold the principles of justice and equality.

Thank you for your attention to this important matter. We appreciate your dedication to enhancing the fairness of our legal system and look forward to seeing continued progress in this area.

Very truly yours,

/ The National Association of Criminal Defense Lawyers/

By:

/S/ Peter Goldberger
Peter Goldberger
Chair, Committee on Rules of Procedure
Ardmore, PA

/S/ Cheryl Stein
Cheryl D. Stein
Member, Committee on Rules of Procedure
Washington, DC

/S/ Monica Milton
Monica Milton
Counsel for Public Defense and Special Projects
Washington, DC

/S/ Nate Pysno
Nate Pysno
Director of Economic Crime & Procedural Justice
Washington, DC

TAB 3C

UCONN | SCHOOL OF LAW

Julia Simon-Kerr
Evangeline Starr Professor of Law

September 30, 2024

Dear Advisory Committee Members,

The Coalition for Prior Conviction Impeachment Reform (the "Coalition") is a group of 11 law professors,[1] each of whom has studied prior conviction impeachment. We write a second time to your committee to endorse a proposed change to FRE 609(a)(1) discussed at your meeting of April 19, 2024. This new proposal would alter the balancing test for defendants in criminal cases such that defendants could be impeached with prior convictions only if the probative value of the convictions substantially outweighed the risk of unfair prejudice. While, for the reasons given in our previous letter (reproduced below), we believe that eliminating FRE 609(a)(1) would be a better course, we support the change now being considered.

Rather than recapitulate the need for reform, we enclose our previous letter here. We add simply that our research shows that judges consistently misapply the balancing test now inscribed in Rule 609(a)(1)(B).[2] Defendants are impeached with prior convictions that have no established bearing on their untruthfulness and judges often show no sign that they are weighing the enormous risk of unfair prejudice that comes with admitting such prior convictions for impeachment.[3] Further, because this has been a dominant approach to applying the existing balancing test, defendants in consultation with counsel often make the devastating decision not to take the stand in their own defense rather than incur this risk of unfair prejudice from the introduction of a prior convictions under FRE 609(a)(1).[4]

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[1] Professors Jeffrey Bellin (William and Mary Law School), John Blume (Cornell Law School), Bennett Capers (Fordham University School of Law, Montré Carodine (University of Alabama School of Law), Jasmine Gonzales Rose (Boston University School of Law), Lisa Kern Griffin (Duke University School of Law), John D. King (Rutgers Law School), Colin Miller (University of South Carolina School of Law), Aviva Orenstein (Indiana University Maurer School of Law), Anna Roberts (Brooklyn Law School), and Julia Simon-Kerr (The University of Connecticut School of Law).

[2] *See, e.g.*, 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, 325–26 (2008); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835, 864 (2016).

[3] *Id. See also, e.g.*, Julia Simon-Kerr, *Credibility by Proxy,* 85 Geo. Wash. L. Rev. 152 (2017).

[4] *See, e.g.*, Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395, 432–33 (2018); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 491 (2008). *See also* Theodore Eisenberg & Valerie P. 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, 1370 (2009) ("In the cases in which defendants testified, judges reported that, on average, defendant testimony was more important than that of the police, of informants, of codefendants, and of expert witnesses."); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 NYU L. Rev. 1449, 1459–60 (2005) ("Defendants do not testify largely because it is so dangerous. . . It . . . allows the government to elicit the defendant's criminal history . . . which may

In adding the word "substantially" to the balancing test, this Committee would have an opportunity to correct the misapplication of FRE 609(a)(1)(B)'s balancing test. Of equal importance, it could also use the Advisory Committee notes to clarify that only in very rare instances would the probative value of a prior conviction on the question of untruthfulness outweigh the demonstrated and significant risk of unfair prejudice.[5]

We thank you for your attention to this vital issue.

Sincerely,

Professor Julia Simon-Kerr, The University of Connecticut School of Law
Professor Anna Roberts, Brooklyn Law School

On Behalf of The Coalition for Prior Conviction Impeachment Reform

dissuade the jury from hearing the substance of the defendant's story, from having sympathy with the defendant, or from disbelieving the government.").

[5] *See* Anna Roberts & Julia Simon-Kerr, PRIOR CONVICTION IMPEACHMENT: THE NEED FOR REFORM, https://strengthenthesixth.org/focus/PRIOR-CONVICTION-IMPEACHMENT-THE-NEED-FOR-REFORM.

The Coalition for Prior Conviction Impeachment Reform (the "Coalition") is a group of 11 law professors,[6] each of whom has studied prior conviction impeachment. The Coalition formed in 2021 and has since focused its efforts at the state level, filing amicus briefs in cases challenging state equivalents to Federal Rule of Evidence 609 in Oregon and Washington. Two Coalition members authored a report on the need for prior conviction reform in association with the National Association of Criminal Defense Lawyers.[7] Another Coalition member, Professor Bellin, recently presented on the issue to your Committee. We were delighted to learn that possible reform of Rule 609 is on the Committee's agenda, and we felt compelled to write briefly to you to express support for the Committee's putting forward a rule change proposal that would allow for notice and comment on this issue.

Each of us has approached this topic from a different scholarly angle, and we differ in the solutions that we would view as ideal. But we are united in viewing the reform proposed in the Reporter's memo as a vast improvement on the status quo, and in our request that the Committee open this topic up for public comment. While we have collectively written hundreds of pages on this issue, we will flag just three of the factors that make this an urgent topic for public debate:

- **Racial bias**. Prior conviction impeachment is a continuation of policies that barred witnesses from testifying in courtrooms in the United States based on racism, sexism, classism, and other forms of bigotry.[8] Although these patently unconstitutional witness competency laws are gone, impeachment with prior convictions still functions systematically to exclude and silence witnesses with prior convictions who—due to racial disparities at each stage of criminal proceedings—are disproportionately witnesses of color. Rule 609 stands not as a testament to hard-fought Congressional compromise, but as the continuation of a historical view that certain witnesses were not worthy of belief.[9] The rule itself was the product of a racially charged Congressional debate in which the "stereotype of the Black criminal" played a central role.[10] Today, as discussed below, Rule 609 functions in large part as a witness silencing mechanism, and the witnesses it silences are disproportionately people of color.

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[6] Professors Jeffrey Bellin (William and Mary Law School), John Blume (Cornell Law School), Bennett Capers (Fordham University School of Law, Montré Carodine (University of Alabama School of Law), Jasmine Gonzales Rose (Boston University School of Law), Lisa Kern Griffin (Duke University School of Law), John D. King (Rutgers Law School), Colin Miller (University of South Carolina School of Law), Aviva Orenstein (Indiana University Maurer School of Law), Anna Roberts (Brooklyn Law School), and Julia Simon-Kerr (The University of Connecticut School of Law).

[7] Anna Roberts & Julia Simon-Kerr, PRIOR CONVICTION IMPEACHMENT: THE NEED FOR REFORM, https://strengthenthesixth.org/focus/PRIOR-CONVICTION-IMPEACHMENT-THE-NEED-FOR-REFORM.

[8] *See* Julia Simon-Kerr, *Credibility by Proxy,* 85 Geo. Wash. L. Rev. 152 (2017).

[9] *Id.*

[10] Montré Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind. L.J. 521, 549 (2009) (noting that "one must keep in mind that most people at that time-as is true today-saw a Black face when they thought about the criminal element in society.").

- **Constitutional implications**. The threat of prior conviction impeachment chills the exercise of the constitutional right to testify in one's defense. Studies of wrongful convictions and first-hand accounts offered by exonerees who chose not to testify at their trials describe the decision as motivated by a well-founded fear of being branded in the eyes of the jury by their prior convictions.[11] Prior conviction impeachment has also encouraged those facing criminal charges—including those subsequently exonerated—to waive the right to trial and take a guilty plea.[12] Concern for protecting the constitutional right to testify caused the Hawai'i Supreme Court to bar prior conviction impeachment of those facing criminal charges.[13] Relatedly, many evidentiary rules and precepts assume the existence of a meaningful—and vital—opportunity for those facing criminal charges to testify.[14] Evidence rules also favor live testimony of witnesses where possible. By silencing many defendants in criminal cases and imposing a penalty on non-party witnesses who must face questioning about unrelated prior convictions when performing their civic duty and testifying in court, Rule 609 stands in tension with these precepts.

- **Lack of empirical basis**. Prior convictions are not a tested metric of untruthfulness. Instead, they have long signified which witnesses are deemed unworthy of being heard or believed. Yet, being unworthy of belief in the eyes of those in power is not the same as being dishonest. Fifty years after the enactment of Rule 609, it is clear that the only permitted use of convictions under Rule 609, namely to shed light on a witness's "character for truthfulness," is not supported by social science data.**[15]** To the contrary, the best empirical study on the effect of prior conviction impeachment found that "determinations of the defendant's credibility are not the prime method by which criminal record influences guilt judgments."[16] Instead, "[t]he evidence against a defendant with a prior record appears stronger to the jury."[17]

We very much hope that the Committee will put forward a rule change proposal that would allow concerned members of our Coalition, the broader legal academy, the bench, the bar and the public to

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[11] John Thompson, Opinion, *The Prosecution Rests, but I Can't*, N.Y. Times (Apr.9,2011), https://www.nytimes.com/2011/04/10/opinion/10thompson.html (describing Thompson's own inability to tell his story at the trial at which he was wrongfully convicted due to a prior conviction); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 491 (2008).

[12] Recent appellate litigation in Washington makes this point powerfully. *See* Brief of Appellant at *105-07, State v. Gates, 2022 WL 2402337 (Wash. Ct. Apps.).

[13] *See* State v. Santiago, 492 P.2d 657, 660-61 (Haw. 1971).

[14] *See, e.g.,* Roger Park, *The Rationale of Personal Admissions*, 21 Ind. L. Rev. 509, 516 (1988) ("It is fair to receive an admission [under Federal Rule of Evidence 801(d)(2)] because ordinarily the party who made the admission will have the opportunity to put himself or herself on the stand to explain the statement or to deny having made it").

[15] An Oregon Supreme Court Justice recently made that very point in a question to the Government attorney at oral argument. Oral Arg., State v. Aranda, Or. Sup. Ct., https://oregoncourts.mediasite.com/mediasite/Channel/default/watch/94e222ad8fb44fd8bf624fb29d6430fd1d 8:28- 9:18 (Feb. 1, 2023) (asking the government for its response to data suggesting that convictions offer no probative value on truthfulness).

[16] Theodore Eisenberg & Valerie P. 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, 1359–61 (2009).

[17] *Id.*

expand on these points and others during the notice and comment period. In the half century since it was enacted, Rule 609 has proved to be a rule that does little to advance the mission of the Federal Rules, to "ascertain[] the truth and secure[] a just determination." Instead, it is one key reason that so many trials are conducted without the most critical evidence available, the testimony of the defendant.

Sincerely,

Professor Julia Simon-Kerr, The University of Connecticut School of Law
Professor Anna Roberts, Brooklyn Law School

On Behalf of The Coalition for Prior Conviction Impeachment Reform

Coalition Membership
Professor Jeffrey Bellin, William and Mary Law School
Professor John Blume, Cornell Law School
Professor Bennett Capers, Fordham University School of Law
Professor Montré Carodine, University of Alabama School of Law
Professor Jasmine Gonzales Rose, Boston University School of Law
Professor Lisa Kern Griffin, Duke University School of Law
Professor John D. King, Rutgers Law School
Professor Colin Miller, University of South Carolina School of Law
Professor Aviva Orenstein, Indiana University Maurer School of Law
Professor Anna Roberts, Brooklyn Law School
Professor Julia Simon-Kerr, The University of Connecticut School of Law

TAB 3D

Written Comments to Survey on Rule 609(a)(1) Sent to Public Defenders

February, 2024

Note: All of the following are quoted from the original.

Christine Freeman, Middle District of Alabama:

The rule is particularly harmful in the 11th Circuit where the "similarity" test is very broadly applied and where if a jury's verdict indicated it rejected the defendant's testimony, that rejection is given the weight of substantive evidence.

Kevin Butler, Northern District of Alabama:

The client is often the best witness for the defense. If the client takes the stand and is impeached with priors, the jury often the views the client as a bad person, even though the priors are not relevant to the issues at trial. Then the client's conviction is based upon jurors' dislike of the defendant rather than the actual facts presented during the trial. Compounding everything, if the client is convicted, the client is now looking at an enhanced sentence under the Sentencing Guidelines for obstruction of justice.

Jamie McGrady, District of Alaska:

Generally priors of any significance almost always impact a decision to testify and keep the clients off the stand most of the time. Exceptions occur but are not the norm.

Jon Sands, District of Arizona:

This has significant impact on violent crime cases, especially arising from Indian jurisdiction, where such issues as self-defense, diminished capacity, or arguing for a lesser included, require the defendant to testify.

Bruce D. Eddy, Western District of Arkansas:

Rule 609(a)(1)(B) is the single most reason my clients decide not to proceed to trial.

Lisa Peters, Eastern District of Arkansas:

I have practiced federal criminal defense nearly 30 years. This rule has greatly impacted clients' decisions to testify, or even take a potentially winnable matter to trial. In my humble view, justice is not served by the application of this rule, which is used even where the priors are not related to a credibility issue. It disproportionately impacts people of color, who historically have not received fair treatment in our system of justice, and therefore have more criminal history to read to a jury. In its current state, this rule effectively disallows a defendant a fair chance to fight the matter at hand.

Jodi Linker, Northern District of California:

A prior conviction and its effect on a client's ability to testify is always at the forefront of discussions of whether clients will plead or go to trial. It is often a conversation where we have to break the news that yes, the jury will likely hold it against them even though they have done their time and the present case has nothing to do with the past case. It is unduly burdensome.

Heather E. Williams, Eastern District of California:

In my last 14 jury trials, my clients had no prior convictions. 7 testified at their trial.

Virginia Grady, Districts of Colorado and Wyoming:

Our clients are consistently afraid that a prior conviction will cause jurors to draw a negative inference about their testimony and will cause the jury to think that they are a criminal, thus increasing the likelihood of a conviction. When the prior conviction is similar in kind to the charged offense, the fear is heightened and clients are even more hesitant to testify. The inference that underlies Rule 609 --- that a prior conviction equates to a lack of truthfulness --- is a faulty premise. Felonies are committed for a whole host of reasons, and very rarely does one of those reasons have anything to do with truthfulness. The stigma of a felony conviction is outdated and unfair.

Millie Dunn, Northern District of Georgia:

In our district, many judges allow the government to introduce convictions that are older than 10 years. The application of Rule 609 has a very real chilling effect on the client's exercise of both Fifth and Sixth Amendment rights.

Salina Kanai, District of Hawaii:

In a hate crime case I had recently, by client's testimony was effectively foreclosed because he had a prior assault conviction whose race was the same as the alleged victim in the case in which we went to trial. My client had assaults against other people whose race was different from the victim, so the prior that the government sought to admit had little, if anything to do with credibility. Nonetheless it played a large factor in my client's decision not to testify.

Nicole Owens, District of Idaho:

This is one of the major factors in our clients' decision to not go to trial and to not testify.

John Murphy, Northern District of Illinois:

Rule 609(a)(1)(B) plays a pivotal role in every defendant's decision to seek a trial. Regardless of the irrelevance a conviction may have to the issues at trial, every defense lawyer will advise their client that revealing the prior conviction to a jury may create a devastating and unfair impression that cannot be overcome. Thus, very valid challenges to a prosecution are left by the wayside for this reason alone.

Thomas Patton, Central District of Illinois:

It is nearly impossible for a client with a felony conviction to testify on his or her behalf. This is especially true of clients who are African American or Hispanic. Our jurors are almost exclusively white. It is very rare to have a minority in a trial venire. When faced with the choice of testifying and have the jury hear the client has a prior felony conviction or not testifying and keeping that information from the jury clients almost always choose not to testify. The clients just don't think the jury will be able to look past the prior conviction. In many cases, if the defendant cannot testify there is little reason to go to trial. We can't win without the client explaining what happened but the client can't testify because he is afraid the jury will convict him because he has a prior conviction. This is part of why we have so few trials.

Kim Freter, Southern District of Illinois:

Rule 609(a)(1) regularly affects our 922(g) and BOP contraband cases. Clients frequently prefer to enter into an Old Chief stipulation rather than testify and have the title of their conviction come into evidence. The titles frequently sound much worse than the pending case and there is no opportunity to explain the underlying facts. For example, Illinois has an Aggravated Unlawful Use of a Weapon statute that sounds violent and worse than another kind of unlawful use. However, Aggravated Use is essentially possessing a gun without a FOID card --- no violence is involved.

David Beneman, District of Maine:

I can't think of any case in which a client had a strong defense but pled rather than going to trial due to the Rule. I also can't recall a case where we really needed and wanted the client's testimony but they chose not to due to the Rule.

Michael Carter, Eastern District of Michigan:

The rule has a disparate impact on clients who come from marginalized and over-policed communities; it creates an improper barrier for clients who want to exercise their right to testify; and it permits jurors to hear about conduct that has nothing to do with the client's ability to be truthful. Overall, the rule works to severely limit a client's ability to put on a strong defense.

Laine Cardarella, Western District of Missouri:

Often a testifying client is the only witness with a criminal conviction. Our goal is to help the jury identify with our client --- a difficult feat. But add to that the possibility of the client being the only witness impeached with a conviction and it becomes nearly impossible. When that conviction has nothing to do with the client's credibility, it should be excluded. I believe the current rule limits the constitutional right to a fair trial.

Rachel Julagay, District of Montana:

Most clients facing federal indictment have prior criminal history and have encountered wholesale differential treatment from every corner as a result: probation, law enforcement, employers, housing opportunities, families and friends. They know and believe based on countless real world experiences, that people perceive them as not just less trustworthy, but less in every way that matters for responsible adult behavior, simply by virtue of a prior conviction. Frankly, it is very difficult to convince them that there is anyone who would not find them inherently unreliable due to a felony conviction, an uphill battle that any career defense attorney knows too well from efforts to build trust with clients to forge a solid attorney-client relationship. Placing this to some degree well-rounded fear of being mistrusted in the context of most of our clients' total life experiences, which nearly always include extraordinary socioeconomic and other disadvantages, including discrimination, abuse, neglect and turmoil typifying a public defender client's life--it becomes easier to understand why clients hesitate to go to trial and take the witness stand, even when they have a compelling and contrary recollection of events. I would give one example, but this is a defining part of every conversation with every client about trial and testimony. Final note, my practice in "Indian country" teaches me Native clients are

disproportionately affected by this and similar rules due to disproportionate prosecution for felonies in federal court.

Rene Valladares, District of Nevada:

The rule imposes a significant and frequent tax on criminal defendants' right to take the stand and go to trial. In my experience, defendants who are African American of Hispanic are disproportionately impacted by the rule.

Marianne Mariano, Western District of New York:

I think it is hard to measure the impact on the decision to plead guilty. I think it is rare when a trial defense rests on the shoulders of the defendant's testimony such that it would be the primary motivation to take a plea.

Stephen Newman, Northern District of Ohio:

The rule as written is problematic in several ways, chief among them being the likelihood of bias and impermissible use of prior convictions by the jury. Jurors may see a client's prior convictions and consequently determine the client to be a "bad person." And when presented with evidence of prior offenses, particularly those similar to the instant charged offense, there is a strong likelihood the jury will impermissibly use those prior convictions as propensity evidence. For example, it is tempting to think "once a drug dealer, always a drug dealer."

This rule – or the threat of it – comes into play in many cases, as our clients almost always have prior convictions that are likely admissible under this rule, and many of those convictions are similar to the instant offense. And our clients are usually the best and/or only witness available to recount the events surrounding those charges.

We regularly litigate the exclusion of prior offenses in liminal motions, arguing any probative value is substantially outweighed by a danger of unfair prejudice, but those motions are rarely granted. This therefore presents a Hobson's choice for the client: testify and open the door for the prior convictions to come in, or don't testify and close the door on the client's opportunity to explain what happened.

Barry L. Derryberry, Northern District of Oklahoma:

Where testimony is vital to the theory of defense, i.e., self-defense, the rule can impact the defendant's decision to testify.

Jeff Byers, Western District of Oklahoma:

Clients routinely consider (fear) the effect of cross-examination by a prosecutor who knows they have been in trouble. This is especially true in cases where the prior conduct is in some way shameful to them. Clients with ugly priors will often rule out testimony before even receiving advice from counsel. Any client who may need or want to testify is counseled about Rule 609's impact.

Lisa Freedland, Western District of Pennsylvania:

Once a client decides to proceed to trial, the Rule significantly impacts the decision whether to testify. This is especially true for Black clients in my district which has overwhelmingly white juries. Together with the fact that juries rarely include people who have been convicted of anything, this rule is particularly damaging and impactful.

Bill Nettles, District of South Carolina:

In my practice, the primary reasons the client pleads guilty are the weight of the evidence and the penalty the client faces if the client loses at trial. In gun cases where the client is subject to enhanced penalties under 924(e), the prospect of impeachment with a prior conviction is a huge impediment.

Doris Randle-Holt, Western District of Tennessee:

The client is significantly impacted by the federal rule, thinking the jury will be prejudiced against him because of his prior conviction.

Henry Martin, Middle District of Tennessee:

Very few prior convictions of our clients have anything to do with the client's credibility. Clients have a great fear that the jury will convict them merely because the client has one or more felony convictions.

[Included in the response was the following account from a public defender in the office]:

"I have a current client with a viable factual defense – but he has a sex charge on his record from 20 years ago. He also has mental health issues and is low functioning. The

risk of having the jury know about his sex charge is a major factor in how he and I are assessing the benefits of a trial. He would have to testify. If it's too risky for him to testify then we can't have a trial. It's also very hard for him to understand how this old conviction still has to come into evidence."

John D. McElroy, Eastern District of Texas:

Often the client has a story to tell that cannot be presented by any means other than the client's testimony. When the client has any significant criminal history, most clients choose not to risk testifying at trial.

Maureen Scott Franco, Western District of Texas:

Why would a defendant go to trial and testify in their own defense if the government could use a prior, unrelated conviction against them to destroy their credibility? It's an extremely unfair rule, especially against people of color who are more likely to be prosecuted for criminal offenses as opposed to white offenders. No limiting instruction cures the admission of an unrelated prior conviction of a testifying defendant, and most judges allow it in --- even after the balancing test.

Scott Wilson, District of Utah:

The issue skews the entire consideration of how to approach trial and plea in so many cases. A defendant's testimony is one of the most significant variables in deciding whether a trial is a viable option in the first place, and prior felonies will almost always dictate the outcome of that issue.

Lex Coleman, Southern District of West Virginia:

If the prior conviction has nothing to do with the defendant's veracity, how can it ever be less prejudicial than probative? Yet it is ruled as being so, and that deters client testimony or my willingness to use it.

Craig Albee, Eastern and Western Districts of Wisconsin:

These are difficult questions to answer given how cases vary and how unique each decision to testify is. I can say that it has mattered and that it does affect strategy calls throughout the case. It can matter for the decision to plead but it's more with the respect to the decision to testify. It can matter more with a minority defendant and the typically all-white juries we have in our districts, where the prior conviction may be viewed as evidence of guilt.

TAB 3E

Federal Judicial Center

Date: October 8, 2024

To: Advisory Committee on the Federal Rules of Evidence

From: Tim Reagan, Carly Giffin, and Margaret Williams
Federal Judicial Center

Re: Possible Federal Judicial Center Research on Prior Convictions Used to Impeach Testifying Criminal Defendants

The Evidence Rules Committee would like to know what research the Federal Judicial Center could do to provide it with information relevant to a proposal to amend Federal Rules of Evidence 609. We have considered various possible research methods, and we have concluded that the best opportunity for us to be helpful would be a survey of criminal defense attorneys.

The Rule

Rule 609 is in the Evidence Rules' Article VI concerning witnesses. The title of the rule is "Impeachment by Evidence of a Criminal Conviction." It applies "to attacking a witness's character for truthfulness by evidence of a criminal conviction." The rule applies in both civil and criminal cases, and the witness may or may not be a party in the case.

In general, a previous conviction may be admissible to attack a witness's credibility if the crime for which the witness was convicted was serious or the crime involved deceit. The court must balance the probative value of the conviction as evidence—to what extent the conviction actually is relevant to the witness's truthfulness—and the prejudicial effect of the evidence—to what extent the jury is likely to give the evidence more weight than it should have or otherwise be improperly swayed by the evidence. The balancing is weighted more in favor of admission for crimes involving deceit. The balancing is weighted a bit more against admission for juvenile convictions and old convictions.

Although the rule applies to all witnesses, the committee's focus of consideration has been criminal defendants' decisions whether to accept a plea agreement and whether to testify if they do not. Amendment consideration has focused on recent felony convictions for crimes not involving deceit used to impeach testifying criminal defendants, as specified in Rule 609(a)(1)(B). The rule currently states that evidence of such convictions must be admitted if the probative value of the evidence outweighs its prejudicial effect. One proposal seriously considered is to modify the verb "outweighs" with the adverb "substantially."

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 elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) LIMIT ON USING THE EVIDENCE AFTER 10 YEARS. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
  (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
  (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) EFFECT OF A PARDON, ANNULMENT, OR CERTIFICATE OF REHABILITATION. Evidence of a conviction is not admissible if:
  (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or
  (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) JUVENILE ADJUDICATIONS. Evidence of a juvenile adjudication is admissible under this rule only if:
  (1) it is offered in a criminal case;
  (2) the adjudication was of a witness other than the defendant;
  (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
  (4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) PENDENCY OF AN APPEAL. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Recommendation

We have considered four research approaches: (1) an expansive analysis of criminal histories, (2) a review of the psychology literature, (3) case studies of decisions and outcomes, and (4) a survey of defense attorneys. The survey

approach is the most likely to result in real-world causal information, although exploration of the other methods has provided very informative context. The following four sections of this report describe preliminary research using each of the four approaches.

Among the sources we relied on for this report are (1) an April 1, 2024, memorandum to the committee from the committee's reporter, Professor Dan Capra, printed in the committee's April 19, 2024, agenda book regarding "Amendments to Rule 609(a)(1)" and (2) an April 1, 2024, case digest prepared by the committee's consultant, Professor Liesa Richter, with occasional comments by the reporter titled "District Court Rulings on Rule 609(a)(1)(B) Impeachment—2009–Present."

SECTION 1
CRIMINAL HISTORIES

An avenue of research to consider is a look at criminal defendants who do and who do not have prior felony convictions. How many accept plea agreements in each group? How many testify in each group? What are the outcomes of the ultimate federal cases? This approach would relate criminal histories to decisions how to plead and whether to testify.

This line of research would be informative, but the analysis would be correlational. For example, a prior felony conviction might be statistically related to reluctance to testify because both the conviction and the reluctance are related to a common cause—perhaps an antisocial defendant—rather than the conviction itself causing the reluctance. Also, although this method would explore the relation between criminal histories and case decisions, it would not address the impact of the evidence rule.

Additionally, data on prior convictions would be at best difficult to obtain. The federal judiciary does have in its confidential presentence reports information that generally includes information about criminal histories for convicted criminal defendants, but such reports would not exist for defendants who are acquitted or whose cases are dismissed. Acquitted and dismissed defendants' attorneys might know their clients' criminal histories, but that information could be privileged. For a bond-and-detention hearing at the beginning of a case, a pretrial-services report contains the type of prior-conviction information that would ultimately be included in a presentence report, but a federal defender has informed us that the pretrial report is prepared quickly and typically is not as thorough or accurate as a presentence report. Also, we are informed that pretrial reports are not available for research purposes.

Criminal histories, even if we had them, would be challenging to analyze. We would have to identify which prior felony convictions were for crimes of deceit and which were not. Perhaps most of these prior convictions would be for state crimes, so it would be several penal codes that we would have to master. As the reporter observed, "Courts have had some difficulty

differentiating those crimes that are falsity-based from those that are not."[1]

Also, old convictions would have to be regarded separately, and age is typically measured from release of confinement, a date that may be difficult to reliably determine for state incarcerations.

As a practical matter, relating criminal histories to defendant decisions would be difficult. But previous researchers apparently have found prior-conviction data for criminal defendants. According to the reporter,

> 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 [citing Kalven & Zeisel, The American Jury at 144 (2d ed. 1971)]. By 2001, the National Center for State Courts reported that 76% of defendants had a felony record and only 50% testified.[2]

These studies are further described in Section 2 on psychological research. The researchers surveyed judges and court personnel. Replicating this research would require relying on very busy people to provide us with detailed information about specific cases.

Our concern is that even if the criminal-history approach were feasible, it would be a laborious way to collect findings that would be merely correlational, be duplicative of previous research, and fail to explore the impact of the evidence rule.

SECTION 2
PSYCHOLOGY STUDIES

Although Rule 609 applies to both civil and criminal cases, and it applies to witnesses who are or are not parties, our focus is application of the rule to criminal defendants. The psychology of making decisions is relevant to this Rule 609 focus in two respects: (1) the jury's decision resolving the case and (2) the defendant's decision whether or not to (a) take a plea to avoid trial and (b) testify if the case goes to trial.

Members of the defense community and some academics have criticized Rule 609's allowance of impeachment by prior conviction. Critics contend that the introduction of prior convictions discourages defendants from taking the stand so as to avoid introduction of their prior convictions.[3] Further, when such prior convictions are introduced, critics argue that juries are using them to draw inferences about the defendant's character or propensity to commit the current crime, rather than the allowed use of assessing the defendant's truthfulness, thereby leading to a greater chance of conviction in the current case. In some situations, critics contend that Rule 609 can lead defendants to plead guilty rather than face a trial in which they can either choose not to

1. Reporter's memorandum at 29.

2. *Id.* at 7.

3. *See* Theodore Eisenberg & Valerie P. 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) (noting that juries were significantly more likely to learn of a prior conviction if the defendant testified).

testify, giving up the opportunity to provide their side of the story, or to testify and have their prior convictions presented to the jury.

Breadth of the Research

The debate surrounding impeachment with prior-conviction evidence is not new and neither is research into its impact on jurors and defendants. Some of this research specifically references Rule 609 and the Federal Rules of Evidence and some does not. The different factors that can be tested in any one study also are quite varied. Some studies focus, for example, on how a prior conviction for a crime that is similar to the current case might impact jurors differently from how a prior conviction for a less similar crime does. Other studies look at the seriousness of the prior offense and what impact that might have.

Some of the research has been done with material—such as instructions or rules—that is closely tied to the American legal system, some has been done in other countries, and still other research has used materials that are more general and not specifically tied to any one system.

The studies also differ in who participated. Some studies asked individuals on the internet to read scenarios and make judgments alone; others had groups come into a lab and make judgments as a group. Some have asked questions of adults they approached on the street; law students have sometimes answered questions during their law-school classes; and still other studies have asked real judges and jurors about real trials. This last group highlights another important difference: some of the studies conduct experiments using specially designed materials while others analyze data obtained from real trials.

One literature review of studies looking at the impact of prior-conviction evidence identified eleven different moderators in three categories that had been tested or considered in the studies reviewed. These moderators had a considerable range. One category was characteristics of the prior conviction: similarity of the prior conviction, the number of prior convictions, whether the prior crimes would be considered admissible or not to different decision makers, and whether limiting instructions had been given. The second category of moderators was case characteristics: ambiguity of the evidence in the current case and the seriousness of the current case. The final category of moderators identified was methodological moderators: salience of the prior conviction evidence, whether experiments had a control condition or manipulation check, how the study subjects were chosen, whether decisions were made individually in or in a group, and the richness of the materials used.[4] All of these moderators, either alone or in varying combinations, have been tested in experiments.

The varied nature of the field can make comparisons and strong conclusions difficult. None of the studies presented material in the same way

4. Susanne Marie Schmittat, *Prior Conviction Evidence: Harmful or Irrelevant? A Literature Review*, 38 J. Police & Crim. Psychol. 20 (2023).

or asked the same questions. Thus, in this report we discuss broad topics and what different studies have found rather than try to directly compare studies one to another. First, we review findings that speak to the impact of prior conviction evidence on the defendant's decision to testify. Then we review findings that have sought to determine whether jurors, or mock jurors, use prior convictions to assess truthfulness or to make propensity judgments. Third, we review findings that go to how much weight this information is given when assessing guilt.

After discussing some of the findings in the literature, we review limitations of the research and end with suggestions for reform offered by the researchers.

Summary of Findings

Likelihood to Testify

One of the chief arguments of critics to the current structure of Rule 609 is that it discourages defendants from testifying in their own defense, so that they might avoid having their prior convictions brought to the attention of the jury. Eisenberg and Hans's analysis of real trial data collected by the National Center for State Courts (NCSC) found that juries learned of prior convictions in 52% of cases if the defendant testified and in fewer than 9% of cases if the defendant did not testify.[5] Thus, the concern that testifying will lead to the jury learning about convictions they would not have otherwise does seem to be borne out by data. Research, some of which is reviewed below, further shows that defendants with prior convictions do appear to testify less frequently than defendants without prior convictions.

A classic study by Kalven and Zeisel sent questionnaires to judges asking for specific information pertaining to cases that had been tried in their courts, including asking whether the defendant had a prior record and whether the defendant testified.[6] Kalven and Zeisel received completed questionnaires for 3,576 cases and found that, in their sample, defendants with a record elected to testify in 74% of the cases, and, defendants with no record testified in 91% of the cases.[7]

More recent research showed a similar pattern. Blume examined data on

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5. Eisenberg & Hans, *supra* note 3, at 1371. These data were collected in the Central Division, Criminal, of the Los Angeles County Superior Court, California (June 2000 to October 2000); the Maricopa County Superior Court (Phoenix), Arizona (November 2000 to October 2001); the Bronx County Supreme Court, New York (February 2001 to August 2001); and the Superior Court of the District of Columbia (April 2001 to August 2001). Data from over three hundred criminal trials are included. Court staff handed out questionnaire packets provided by the NCSC to judges and jurors asking questions about cases in which they had presided or served as factfinder. *See also* Harry Kalven & Hans Zeisel, The American Jury 147 (1966) (noting that when a defendant testifies, the jury learns about the defendant's record 72% of the time and when the defendant does not testify, the jury learns of the record only 13% of the time).

6. Kalven & Zeisel, *supra* note 4.

7. *Id.* at 146.

cases in which defendants were exonerated by the Innocence Project, specifically focusing his analysis on cases in which the person had been exonerated by DNA evidence.[8] This study found that thirty-two of thirty-five factually innocent defendants with prior records declined to testify (91%).[9]

Eisenberg and Hans's analysis of the NCSC data found that 62% of defendants without criminal records testified, but only 45% of defendants with records did so.[10] A further analysis of the NCSC data showed that even after statistically controlling for evidentiary strength—as rated by both judges and jurors—and other factors, a significant association existed between the existence of a criminal record and a defendant's decision to testify.[11] That is, defendants with a prior conviction were significantly less likely to testify than those without a prior conviction.

These data from actual trials suggests that defendants with prior convictions are less likely to testify than those without prior convictions. This lends some support to concerns expressed by Rule 609's critics that allowing prior convictions to be introduced if the defendant testifies deters defendants from taking the stand. However, as these were analyses of real cases, it was not possible to rule out a variety of other factors, such as the defendant's comfort or eloquence in public speaking or the defense's assessment of the need for the defendant's testimony, that might also impact the choice of whether or not the defendant testifies.

Truthfulness

The appropriate use of prior convictions admitted under Rule 609, according to the rule, is to help jurors assess the witness's "character for truthfulness." Thus, some research has tried to determine what impact prior-conviction evidence has on assessments of the defendant's tendency towards truthfulness in testimony.[12]

Wissler and Saks asked people to read four summaries of a criminal case that varied whether the defendant had a prior conviction and, if so, what the prior conviction was for: murder, auto theft, or perjury. The summaries contained testimony from the defendant and several other witnesses and asked for credibility ratings of all the witnesses.[13] The study found that the credibility rating of the defendant was significantly lower than the other witnesses in the case, regardless of condition. That is, the defendant's credibility was rated significantly lower even in the case in which the defendant was said to have no

8. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical L. Stud. 477 (2008).

9. *Id*. at 490.

10. Eisenberg & Hans, *supra* note 3, at 1371.

11. *Id*. at 1353.

12. While the rule itself uses the word "truthfulness," the research reviewed here invariably used the word "credibility" to assess whether or not a defendant was telling the truth on the stand. Thus, "credibility" is used in the descriptions of these studies to match their own usage.

13. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum. Behav. 37 (1985).

prior conviction.[14] Further, the credibility rating of the defendant did not significantly vary based on what their prior conviction was for: defendants with a prior conviction for perjury were not rated as significantly less credible than defendants with other prior convictions or no conviction at all.[15]

The NCSC research analyzed by Eisenberg and Hans also asked jurors for a credibility rating of the defendant, and their analysis found no effect of criminal-record knowledge on ratings of the defendant's credibility.[16] Defendants were not rated significantly less credible by jurors if those jurors found out that they had a prior conviction.

Greene and Dodge obtained different results. This study asked people who had recently been called for jury duty to read slightly varied summaries that were based on a real burglary case. The summaries varied whether the defendant had a prior conviction for breaking and entering or a prior acquittal for a breaking-and-entering charge or no information about the defendant's prior record was provided.[17] This study found that defendants with a prior conviction were rated as less credible than defendants who had previously been acquitted or for whom no conviction evidence was given.[18]

To summarize, two of the reviewed articles, one experimental and one a review of real-case data, found no evidence that prior-conviction evidence had any impact on credibility ratings. That is, they found no evidence that jurors (or mock jurors) were using the prior-conviction evidence to assess the defendant's "character for truthfulness." However, one study found exactly the opposite. The two experimental studies differed in important ways, and both of those obviously differ from the real-case data in perhaps even more important ways. As noted at the beginning of this section, this heterogeneity in the studies—what they tested for, what they controlled, and how—makes it difficult to explain why the studies obtained different results. All we can say for certain is that not all studies have found that prior-conviction evidence has any impact on assessments of the credibility of defendants' testimony.

Prejudicial Effect

Under Rule 609, prior convictions of a defendant must be admitted if they are more probative than prejudicial, and if it can readily be determined that the elements of the prior offense require proving "a dishonest act or false statement." As noted above, it is further stated that this evidence is only to be used to assess the defendant's "character for truthfulness."

While the studies reviewed do not provide clear evidence that jurors or mock jurors are using prior-conviction evidence to assess the defendant's truthfulness on the stand, critics of Rule 609 contend that the rule leads to impermissible and prejudicial inferences about character and propensity.

14. *Id*. at 41.

15. *Id*. at 43.

16. *Supra* note 3, at 1387.

17. Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 Law & Hum. Behav, 67 (1995).

18. *Id*. at 74.

They argue that when jurors hear that a defendant has been convicted for a previous crime, they are more likely to convict in the current case regardless of the other evidence presented. Several studies have sought to investigate this contention.

Wissler and Saks found that participants in their study were significantly more likely to say a defendant was guilty if that defendant was described as having any of three kinds prior convictions than if the defendant was described as having no prior conviction.[19] Further, they found that defendants who had previously been found guilty of a similar crime were convicted more frequently than defendants with dissimilar crimes, and this was true even when controlling for credibility ratings.[20] Wissler and Saks suggested this was evidence that mock jurors were using the information to form propensity or character inferences rather than make credibility judgments.

Similarly, Greene and Dodge found that mock jurors were significantly more likely to convict a defendant who was described as having a prior conviction than a defendant described as having a prior acquittal or than a defendant about whom no evidence of a prior record was given.[21]

Eisenberg and Hans's analysis of the NCSC data found a more nuanced result. Their data showed that a jury learning of a prior conviction was more likely to convict a defendant when the case evidence was weak. Specifically, when the evidence strength was rated as low middle (three on a seven-point scale), juries that learned of a prior conviction voted guilty 60% of the time, whereas juries in the same strength category who did not learn of a prior conviction almost never convicted.[22] Statistical models confirmed that a jury's knowledge of a prior conviction was significantly associated with conviction in weak cases but not significantly associated in strong cases.[23] The authors argued that their findings suggested that prior conviction evidence lowers the reasonable-doubt threshold, leading juries to convict in weaker cases.[24]

Another study presented people with thirty-three very short synopses of crimes that varied the type of crime and the presence and type of prior conviction, among other factors.[25] This study, due to the very short descriptions—only about three sentences—and a multitude of cases presented is the least similar to a real trial of those reviewed, but it did find that prior-conviction evidence raised the chance of conviction in the current case by approximately 10%; they described this as a "modest" effect.[26] Whether modest or not, many cases that go to trial are close cases, with evidence that is not clearly in either the prosecution's or defense's favor. In such cases, a 10%

19. Wissler & Saks, s*upra* note 13, at 41.

20. *Id*. at 42.

21. Greene & Dodge, *supra* note 17, at 73.

22. Eisenberg & Hans, *supra* note 3, at 1382.

23. *Id*. at 1383.

24. *Id*. at 1385.

25. John M. Pearson *et al.*, *Modelling the Effects of Crime Type and Evidence on Judgments About Guilt*, 2 Nature: Hum. Behav. 856 (2018).

26. *Id*. at 858.

effect could prove important.

A study by Macleod took the additional step of investigating how prior convictions would interact with the race of the defendant. He presented people with what appeared to be an excerpt of testimony from a trial. The only thing that varied between conditions was whether the name of the defendant was thought to be stereotypically Black (DeShawn) or stereotypically White (Dylan). The transcript was split into several parts, and likelihood-of-guilt ratings were taken after each part. The first rating was taken before there was any mention of a prior offense, the second after the existence but before the nature of the prior offense was revealed, and the last after the nature of the prior offense was described.[27] When no mention was made of prior convictions, both Black and White defendants were judged equally likely to be guilty. However, if the mock jurors found out that the defendant had a prior conviction, but not what it was for, they rated the Black defendant significantly more likely to be guilty than the White defendant. This disparity disappeared once the mock jurors were told that the nature of the prior offense was serious and violent: the guilt likelihood ratings of the White defendants rose to a greater extent after this revelation, leading them to no longer be significantly lower than the likelihood ratings of the Black defendants.[28] This study again paints a more nuanced picture, suggesting that race and the knowledge of the nature of a prior conviction—not just the existence of the prior conviction—can have an impact on the significance of prior-conviction evidence.

Another study asked law students to read a description of a case in which the facts were designed to be highly suggestive of guilt. This was done so that the defendant's testimony would lack credibility regardless of the presence or similarity of the prior crime, so any swing in assessment of guilt would likely be due to character or propensity assumptions. An instruction noting that the information about the prior crime was to be used only to assess credibility was included.[29] This study found that defendants who were described as having a prior conviction similar to the present crime were significantly *less* likely to be convicted than defendants described as having no prior conviction.[30] This surprising finding may be due in part to the unique study population—law students—and the presence of a limiting instruction.

Another issue to consider was offered in a study by Bellin. He presented people with a summary of a trial in which he varied whether or not the defendant testified and whether or not evidence of a prior conviction was introduced.[31] He found that the conviction rate of defendants who testified and were impeached with a prior conviction was the same as defendants who did not testify. He suggested that juries may make the assumption that innocent people would want to take the stand and defend themselves, thus

27. James A. Macleod, *Evidence Law's Blind Spots*, 109 Iowa L. Rev. 189 (2023).

28. *Id.* at 193.

29. David Crump, *Does Impeachment by Conviction Create Undue Prejudice? An Experiment and an Analysis*, 53 Akron L. Rev. 1 (2019).

30. *Id.* at 12.

31. Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395 (2018).

making silence tantamount to guilt.[32] These findings suggest that defendants with prior convictions are truly faced with two unappealing options as evidence suggests that being impeached with a prior conviction can be damaging while remaining silent also can carry a penalty.

The weight of these studies suggests that having a prior conviction makes it more likely that a defendant will be convicted in the current case. Some of the findings are nuanced, however, noting that the impact of prior convictions depends on the strength of the case, the race of the defendant, or the nature of the prior conviction. Further, one study found precisely the opposite. It is also true that not all of these studies assessed the defendant's credibility. It is therefore possible that in cases where the defendant had a prior conviction and testified, jurors or mock jurors used the prior-conviction evidence to assess the defendant's testimony as less credible, rather than making any specific propensity or character judgments, leading to a higher number of convictions. Again, the varied nature of the studies makes comparisons and drawing strong conclusions difficult.

Limitations

All studies, even studies of real-case data, have limitations. As we discussed above, the breadth of research approaches makes comparing the studies difficult and also limits the strength of conclusions we can draw.

Another limitation of the controlled experiments is that they are so unlike a real trial. These studies present necessarily abbreviated information about a crime and trial—whether based on a real case or entirely constructed for the experiment—and the experiments often have people make decisions alone, rather than in a group as a jury would. Whether the decisions are made in a group or alone, even the most detailed and well-constructed experiments lack the import and gravitas of a real trial. This leaves some question as to whether these findings would generalize to a real trial. All authors who conduct such experiments would likely agree that this is a limitation, and in fact they often explicitly acknowledge this limitation.

Another limitation of many of the experiments reviewed here is that the sample sizes were relatively small. That is, the number of people being considered in any of the groups was in some cases fewer than twenty individuals, and while statistics can account for such small sizes, general practice in social psychology is to prefer larger groups. Essentially, smaller groups have less variation and therefore may not be a good representation of the broader population.

Even the NCSC data used by Eisenberg and Hans, which concerned recent, real trials and as such is some of the best information we have about how these factors impact real trials, had low numbers in some individual groups. For instance, the vast majority of defendants had prior convictions, meaning that the variation in the group who did not is simply less, again perhaps making it more difficult to generalize.

32. *Id.* at 413.

An article by Laudan and Allen noted limitations in some of the prior research. They reviewed the same NCSC data reviewed by Eisenberg and Hans.[33] They noted one curious and important aspect of the data: jurors convicted defendants with prior convictions more frequently than those without prior convictions regardless of whether the jury was informed of the prior conviction.[34] While it is true that the acquittal rate for defendants whose prior convictions remained unknown was higher than the acquittal rate for defendants whose prior convictions were told to the jury,[35] the fact remains that all defendants with priors, regardless of the jury's explicit knowledge, fared worse. Laudan and Allen argued that juries may have a baseline assumption that defendants have prior convictions unless someone affirmatively states otherwise.[36] This analysis highlights that the real trial data, while more straightforward in some respects, can still present interpretational challenges due to the complexity of the material.

Others' Recommendations

Some critics of Rule 609 and some researchers have suggested that Rule 609 should be abolished altogether. For instance, Macleod suggested that no evidence of prior convictions should be admitted, in part due to the greater impact such evidence seems to have on Black defendants.[37] Other studies have offered suggestions for how the rule might be amended, based on the empirical research.

One group of suggestions aims to narrow the kinds of prior crimes that could be admitted under Rule 609. Simmons conducted a study in which he asked law students and federal judges[38] to rate the prejudicial nature and probative value of a range of crimes, to assess which might pass the balancing test of 609(a)(1)(B).[39] He found that of the twenty-three crimes rated, only two would be admitted by the majority of the students and only five by the majority of the judges.[40] Theft crimes were the only crimes admitted by the majority of both groups, and the author suggested that only theft crimes should be admitted to impeach a defendant's testimony.[41]

Blume suggested that as prior convictions are supposed to be used only to assess a defendant's "character for truthfulness," the only prior conviction that should be admitted is a conviction for perjury and even then, only if it passes the balancing test laid out in 609(b)(1). He also acknowledged that prior

33. Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. Crim. L. & Criminology 493 (2011).

34 *Id*. at 499.

35. *Id*. at 498.

36. *Id*. at 507–08.

37. Macleod, *supra* note 27, at 225.

38. Only forty-nine of the 864 federal judges who were invited to participate did so.

39. Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. Rev. 993 (2018).

40. *Id*. at 1023.

41. *Id*. at 1036.

convictions ought to be able to be used if the defendant presents evidence of their own good character.[42]

On the other end of the suggestion spectrum is Lauden and Allen. They argued that if, as their analysis of the NCSC data suggested, jurors are going to make assumptions about a defendant's criminal background, then all prior-conviction evidence should always be admitted to ensure that jurors have accurate information. They argued that accurate knowledge is preferable to inaccurate assumptions.[43]

Conclusion

There is a concern that psychological research often is conducted under artificial conditions. Research participants are often not actual jurors. Instead of actual trials, studies are often based on hypothetical cases. But the research is a significant advance over arm-chair reasoning.

The weight of empirical research and analysis of real-trial data suggests that admission of prior convictions may deter some defendants from testifying, may be used for reasons other than assessing truthfulness, and may lead to a greater likelihood of convictions. However, the dissimilarity of the studies makes it difficult to make strong statements based on this research. Considerably more research into this topic exists than has been reviewed here, and a longer review of this research could be conducted which might lend greater weight to these conclusions.

SECTION 3
DECISION AND OUTCOME CASE STUDIES

The key empirical inquiry is, what impact does Federal Rule of Evidence 609 have on criminal defendants' decisions how to plead and whether to testify?

We extensively explored comparing judges' Rule 609 decisions to defendants' trial decisions. This approach yielded much very interesting information, but as with the more expansive case-history approach, the results are correlational. And although the approach relates rule decisions to outcomes, it does not relate the outcomes to the rule itself.

Because Rule 609 decisions are heavily based on facts, we considered a case-study method: we examined defendant decisions in the context of the facts of specific cases. We began with the cases examined by the committee's consultant.

Outcomes in Cases Examined by the Committee's Consultant

The committee's consultant surveyed 112 recent district-court opinions electronically published on Westlaw, and she divided them into four groups:

I. decisions to admit all proffered convictions
II. decisions to sanitize proffered convictions

42. Blume, *supra* note 8, at 439.
43. Lauden & Allen, *supra* note 33, at 522.

III. decisions to exclude all proffered convictions

IV. decisions to admit some but exclude other proffered convictions

The committee's reporter provided additional thoughts on some cases in the consultant's case digest.

We examined case outcomes for forty of the consultant's cases, including the first in the report plus others selected at random totaling an equal number of cases in each group. In thirteen cases, the defendants pleaded guilty some time after the judge's ruling. Seven defendants testified. (It is not clear whether an additional defendant in group II testified.) One defendant was acquitted; two other defendants received mixed verdicts. Two indictments were voluntarily dismissed.

Group	Pleaded Guilty	Testified	Guilty Verdict	Acquitted	Mixed Verdict	Dismissed
I	3	2	10			
II	3	2	9		1	
III	6	1	7	1	1	1
IV	1	2	10			1
Total	13	7	35	1	2	2

It is difficult to draw correlational conclusions from such small numbers. The rulings in group I may be regarded as least favorable to defendants, the rulings in group III as most favorable, the rulings in group II as in between, and the rulings in group IV as mixed.

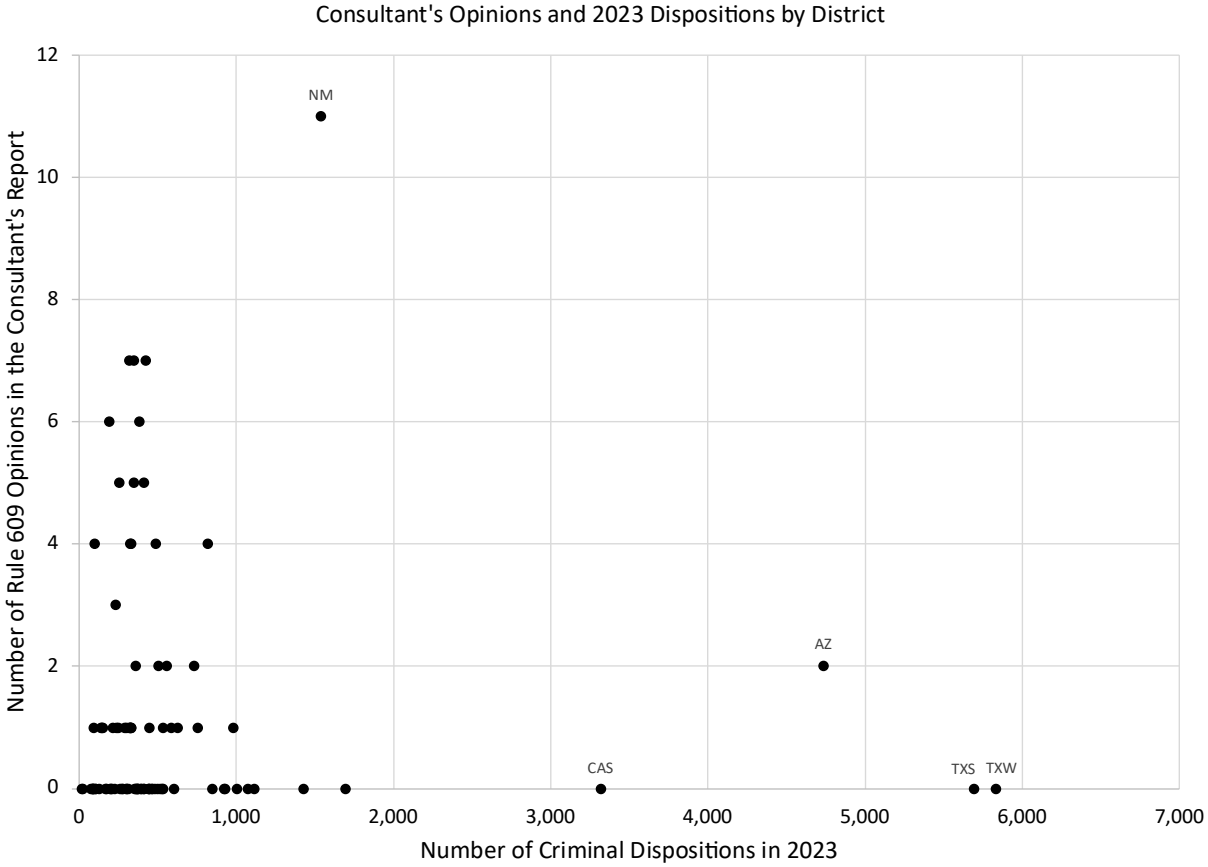
Perhaps an outcome such as a guilty plea is more likely to follow a less favorable ruling. Or perhaps a more favorable ruling increases the likelihood of a more favorable plea deal. On another hand, perhaps a more sympathetic defendant is more likely to receive both a more favorable ruling and a more favorable plea deal.

Among these cases, there were more guilty pleas following the ostensibly more favorable rulings in group III than following the less favorable rulings in groups I and II. Three of the five relatively favorable judgments—not guilty, mixed verdict, dismissal—were in group III, and the other two were in groups II and IV.

It is important to keep in mind that electronically published Rule 609 decisions may not be representative of Rule 609 decisions generally. There may be filed decisions not available on Westlaw. In addition, many such decisions are made orally without a written record outside of a transcript, which may or may not be produced and filed. Also, a published decision might not be the judge's final decision on the matter; the judge might reach a different result at the time of proffered testimony.

Some districts might be over- or underrepresented among the electronically published Rule 609 opinions. Comparing the number of opinions from each district among the consultant's summaries to the number of 2023 criminal dispositions in each district shows an especially large number of opinions issued in the District of New Mexico. All but four districts had fewer than two thousand criminal dispositions in 2023. All but one district had

seven or fewer Rule 609 opinions. The District of New Mexico had a high number of dispositions—1,538—but an especially high number of Rule 609 opinions: eleven. The District of Arizona had an especially high number of criminal dispositions in 2023—4,735—but only two Rule 609 decisions. The Southern and Western Districts of Texas had close to six thousand criminal dispositions each in 2023 but no Rule 609 opinion among those examined by the consultant. The Southern District of California also had more than three thousand criminal dispositions in 2023 but no Rule 609 opinion among the consultant's set.



Rule 609 Decisions in Other Cases

A substantial fraction of the cases examined by the committee's consultant have "609" in their docket sheets (40%).

There were 57,697 federal criminal cases terminated in 2023. Examining a random sample of 250, we found two cases with "609" in their docket sheets (0.8%). One of them had a Rule 609 ruling in the record.

For an earlier project, we downloaded all 2018 docket entries for all district courts. Examining a random sample of five district courts, we found forty-one cases referring to Rule 609 in their docket sheets, and we examined a random

sample of fourteen of these cases, up to five cases per court.[44] These cases had filings referencing Rule 609 but not decisions clarifying Rule 609's application.

Case Studies

In Section 3A, we present analyses by the consultant and the reporter combined with what we learned by examining the cases' files. Section 3B includes analyses of cases terminated in 2023 mentioning Rule 609 in their docket entries. Section 3C includes analyses of cases mentioning Rule 609 in their 2018 docket entries.

Although we found the case studies very interesting, we are not confident that this method yields information that can establish a causal connection between Rule 609 and decisions how to plead or whether to testify.

Section 3A
Cases Examined by the Committee's Consultant and Reporter

Of the 112 Rule 609 decisions examined by the Evidence Committee's consultant, we examined the case histories, including post-decision outcomes in a sample of forty: the first in the consultant's presentation and an otherwise random sample including an equal number of cases in each of the consultant's four groups of rulings:

I. decisions to admit all proffered convictions
II. decisions to sanitize proffered convictions
III. decisions to exclude all proffered convictions
IV. decisions to admit some but exclude other proffered convictions

We found that thirteen of the defendants (32%) pleaded guilty following the Rule 609 decision. Of those defendants who went to trial, seven testified (18%).[45] One defendant in the sample was acquitted by a jury, two defendants' cases were voluntarily dismissed by the government, and two defendants received mixed jury verdicts.

Group	District	Case Number	Plea	Testified?	Verdict
I	OKN	4:23-cr-311	guilty	x	x
I	INS	2:21-cr-6	not guilty	no	guilty
I	FLM	2:15-cr-48	guilty	x	x
I	DC	1:15-cr-25	guilty	x	x
I	IAN	6:15-cr-2038	not guilty	no	guilty
I	CAN	4:14-cr-168	not guilty	yes	guilty
I	ILC	2:09-cr-20025	not guilty	no	guilty
I	WIE	2:08-cr-307	not guilty	no	guilty
I	AK	3:09-cr-27	not guilty	yes	guilty
I	NM	2:05-cr-924	not guilty	no	guilty
II	PAM	3:21-cr-143	not guilty	no	guilty
II	NM	1:20-cr-1228	not guilty	no	guilty
II	NYE	1:19-cr-356	not guilty	?	guilty

44. Had we examined more cases per court, we would have been able to examine fewer courts.

45. In an additional case, it was not clear whether the defendant testified.

Group	District	Case Number	Plea	Testified?	Verdict
II	NM	1:18-cr-2665	guilty	x	x
II	NV	2:17-cr-113	guilty	x	x
II	CAE	1:13-cr-238	not guilty	no	guilty
II	AZ	3:12-cr-8080	not guilty	no	guilty
II	IAN	5:12-cr-4016	guilty	no	x
II	SD	4:11-cr-40012	not guilty	yes	mixed
II	NM	1:10-cr-3463	not guilty	yes	guilty
III	PAE	2:21-cr-224	guilty	x	x
III	PAW	3:21-cr-15	guilty	x	x
III	PAE	2:20-cr-208	guilty	x	x
III	OKN	4:20-cr-106	guilty	x	x
III	ILN	3:13-cr-50070	not guilty	no	mixed
III	OHS	2:13-cr-143	guilty	x	x
III	DC	1:13-cr-33	not guilty	no	dismissed
III	INS	1:12-cr-28	not guilty	yes	not guilty
III	MN	0:11-cr-324	not guilty	no	guilty
III	WVS	5:09-cr-216	guilty	x	x
IV	NYE	1:20-cr-483	not guilty	no	guilty
IV	INS	1:20-cr-96	not guilty	no	guilty
IV	PAM	3:19-cr-174	guilty	x	x
IV	GAN	1:16-cr-309	not guilty	yes	guilty
IV	GAN	1:15-cr-83	not guilty	no	dismissed
IV	ILN	1:10-cr-533	not guilty	no	guilty
IV	ILS	3:10-cr-30088	not guilty	no	guilty
IV	ILC	2:08-cr-20055	not guilty	no	guilty
IV	ILN	1:09-cr-152	not guilty	no	guilty
IV	ILC	2:08-cr-20063	not guilty	yes	guilty

Group I. The Court Admits All of Defendant's Felony Convictions Under Rule 609(a)(1)(B)

United States v. Walker, No. 4:23-cr-311 (N.D. Okla. Jan. 17, 2024), D.E. 100, 2024 WL 182285

Consultant's Summary. In a prosecution for kidnapping, the court found that the following convictions would be admissible to impeach the defendant: October 2009 criminal felony conviction for felon in possession of a firearm; March 2017 criminal felony conviction for possession of a controlled dangerous substance; and August 2018 criminal felony conviction for possession of controlled dangerous substance without tax stamp, possession of controlled dangerous substance with intent to distribute, and possession of controlled dangerous substance. The court conceded that the convictions "do not involve characteristics that go to Defendant Walker's capacity for truthfulness." However, the convictions were timely—two were a couple of years old, and the age of the firearm conviction was mediated by the fact that there were intervening convictions, indicating that his character was unchanged. The court heavily relied on the fact that the convictions were dissimilar to the kidnapping charge. This affected the next factor, which is the importance of allowing the defendant to testify. The court found that the defendant would not be deterred from testifying because the convictions were

dissimilar from the crime charged. Under this analysis, importance of the defendant testifying loses its independence as a factor, because it is directly determined by the similarity or dissimilarity of the convictions. Finally, the court found that credibility was important because the video and other evidence in the case was disputable. The court concluded that "the only factor that weighs against admissibility is factor one: impeachment value. Because all other factors weigh in favor of admissibility, the Court will allow the Government to introduce evidence of Defendants' prior convictions for purposes of impeachment under Fed. R. Evid. 609."

Reporter's Comment. So the only factor that weighed in favor of exclusion was that the convictions were at best minimally probative of the defendant's character for truthfulness. Shouldn't that be enough to exclude the convictions. And why are three convictions necessary?

Case History. An August 23, 2023, complaint charged defendant Walker with kidnapping in Indian Country. D.E. 1. A September 18 indictment added Myers as a second defendant. D.E. 15. The judge issued his Rule 609 decision on January 17, 2024. D.E. 100, 2024 WL 182285. According to the opinion, both defendants and two complaining witnesses had criminal histories, and the judge was asked to rule on the admissibility of the histories for impeachment. According to government notices, Walker had two Oklahoma convictions for possession of a controlled dangerous substance and one federal conviction for possession of a firearm by a felon, D.E. 93, and Myers had two Oklahoma convictions: burglary and unauthorized use of a vehicle, D.E. 94.

Five days before the judge's ruling, the government filed an information charging Myers with assault with a dangerous weapon. United States v. Myers, No. 4:24-cr-11 (N.D. Okla. Jan. 12, 2024), D.E. 2. One week after the judge's Rule 609 ruling, the government moved to dismiss the indictment. No. 4:23-cr-311, D.E. 105. Myers was sentenced on May 31 to four years and five months in prison. No. 4:24-cr-11, D.E. 32.

Outcome. One week after the judge's Rule 609 ruling, the government filed an information charging Walker with use of a firearm in relation to drug trafficking. No. 4:24-cr-26, D.E. 2. Also on that day, the government filed an information in the first case charging Walker with misdemeanor violent assault. No. 4:23-cr-311, D.E. 104. Plea agreements were filed in the two cases on February 21. No. 4:23-cr-311, D.E. 120; No. 4:24-cr-26, D.E. 27.

United States v. Vaughn, No. 2:21-cr-6 (S.D. Ind. Apr. 21, 2021), D.E. 52, 2021 WL 1561914

Consultant's Summary. This opinion is quick enough to include in its entirety. There is no indication of the crime charged or the convictions that are going to be admitted.

> The government has filed a motion in limine, seeking a ruling that Mr. Vaughn's prior convictions will be admissible for impeachment under Federal Rule of Evidence 609 if he testifies at trial. Dkt. 40. Mr. Vaughn has not responded.

> If Mr. Vaughn testifies, evidence of his prior convictions "must be admitted" for impeachment "if the probative value of the evidence outweighs its prejudicial effect." Fed. R. Evid. 609(a)(1)(B). Some of the factors that should be considered in weighing the probative value and prejudicial effect are: "(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." *Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002).
>
> Here, for the first factor, Mr. Vaughn's prior convictions have impeachment value. *See United States v. Rein*, 848 F.2d 777, 783 (7th Cir. 1988) ("[T]he fact that the defendant has been convicted of a prior offense may legitimately imply that he is more likely to give false testimony than other witnesses."). Second, all of the convictions raised in the motion are recent enough that they do not fall under Rule 609(b)'s additional limits on using evidence "if more than 10 years have based since the witness's conviction or release from confinement." Third, there may be some similarity between the current charges and prior convictions, but that is not dispositive when credibility is a key issue. *See Rodriguez*, 286 F.3d at 984. Fourth, the government has explained that if Mr. Vaughn testifies, that testimony will be central to his defense. *See* dkt. 40 at 4; *Rein*, 848 F.2d at 782–8. And fifth, credibility is central when the defendant's testimony is likely to contradict important eyewitness testimony, as would likely be the case here. *See Rein*, 848 F.2d at 782–83.
>
> Moreover, as addressed at the final pretrial conference, the Court will instruct the jury on the appropriate use of Mr. Vaughn's prior convictions, including that they may not be used as propensity evidence. *See United States v. Nururdin*, 8 F.3d 1187, 1192 (7th Cir. 1993) ("[T]he record demonstrates that any prejudicial effect that the instruction of the prior felony convictions could have had was overcome by the court's limiting jury instruction, which directed that this evidence could not be used to demonstrate a propensity to commit crime.").

Case History. A complaint was filed on January 13, 2021, for wrongful possession of a firearm, D.E. 1, and an indictment was filed on February 4, D.E. 17. Count 1 was for possession of a firearm in commerce by a person convicted of a felony, six Indiana convictions from 2007 to 2018 for drug and theft crimes. Count 2 was for possession of a firearm by a person convicted of domestic violence, a 2016 Indiana misdemeanor conviction. The court entered a plea of not guilty on the defendant's behalf on February 5. D.E. 25; *see* D.E. 29 (February 12 amended notice).

The government filed a Rule 609 motion in limine on April 2, seeking admission of the defendant's five most recent felony convictions as impeachment evidence should the defendant testify. D.E. 40. The brief points out that the jury would already be aware that the defendant was a convicted felon. The judge entered his order two days after an April 19 pretrial conference, which set the jury trial for April 26. D.E. 51 (minutes).

Outcome. The defendant was convicted on both counts by the jury on the third day of trial. D.E. 67. The defendant is not included in the list of witnesses

testifying. D.E. 63.

United States v. Warren, No. 2:15-cr-48 (M.D. Fla. Mar. 11, 2016), D.E. 54, 2016 WL 931100

Consultant's Summary. 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 firearm 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.

Case History. A one-count April 29, 2015, indictment charged the defendant with being a felon in possession of a handgun. D.E. 1. On February 11, 2016, the defendant filed a motion in limine: "the Defendant would respectfully request any evidence of prior convictions of the Defendant (other than the acknowledgement for purposes of the elements of the crime that the Defendant is a convicted felon) be excluded from trial, as the prejudicial effect substantially outweighs any probative value for the jury." D.E. 32 at 4. The judge denied the defendant's request on March 11. D.E. 54, 2016 WL 931100.

Outcome. Three days later, the defendant decided to plead guilty. D.E. 64 (Mar. 15, 2016, minutes). On August 8, the judge sentenced the defendant to three years and six months in prison. D.E. 79.

United States v. Ford, No. 1:15-cr-25 (D.D.C. Jan. 21, 2016), D.E. 189, 2016 WL 259640

Consultant's Summary. 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.

Case History. A March 3, 2015, nine-count indictment charged seven defendants with drug and firearm crimes. D.E. 1. A superseding indictment was filed on April 23. D.E. 40. On August 25, the government filed a motion to impeach five defendants with evidence of previous convictions. D.E. 87. Another defendant agreed to plead guilty on January 5, 2016. D.E. 194. He was sentenced on April 22 to five years in prison. D.E. 240. The judge partially granted the government's Rule 609 motion on January 21. D.E. 189, 2016 WL 259640. An information charging the other defendant not subject to the Rule 609 motion with unlawful possession was filed on February 12. D.E. 200. The defendant pleaded guilty that day. D.E. 205. He was sentenced on May 6 to three months in prison. D.E. 249.

Outcome. Each of the defendants who was a subject of the Rule 609 motion pleaded guilty to PCP-distribution conspiracy, a lesser included offense charged in the first count of the indictment. One pleaded guilty on March 10, D.E. 215, and was sentenced on May 26 to one year and nine months in prison, D.E. 265. A second defendant pleaded guilty on May 9, D.E. 251, and was sentenced on July 25 to one year and sixth months in prison, D.E. 304. The remaining three defendants pleaded guilty on June 23. D.E. 285, 287, 289. The third was sentenced on September 23 to two years and three months in prison. D.E. 326. The first was sentenced that day to ten years in prison. D.E. 328. The second defendant among the last three was sentenced on October 6 to three years and one month in prison. D.E. 340.

United States v. Rembert, No. 6:15-cr-2038 (N.D. Iowa Dec. 31, 2015), D.E. 85, 2015 WL 9592530

Consultant's Summary. The defendant was charged with being a felon in possession of a firearm and with possession of marijuana with intent to distribute. The defendant sought to preclude the government from impeaching him with a marijuana conviction and a theft conviction. 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.

Case History. A September 15, 2015, indictment charged one defendant with possession of a firearm by a felon and distribution possession of a controlled substance, and it charged another defendant with possession of a firearm by a drug user. D.E. 3. The second defendant filed an intent to plead guilty on December 8. D.E. 63. On June 3, 2016, she was sentenced to one year and nine months in prison. D.E. 140. The second defendant filed motions in limine on December 21, 2015, including a motion to exclude as impeachment evidence two previous Iowa convictions. D.E. 77.

Outcome. The codefendant who pleaded guilty testified, but the defendant on trial did not. D.E. 91 (minutes). On January 6, 2016, the jury found the defendant on trial guilty on both counts. D.E. 97. On March 23, 2017, the court of appeals denied relief from "admission of a Facebook video at trial, as well as the district court's application of the career-offender enhancement at sentencing." 8th Cir. No. 16-2695, 851 F.3d 836, 838, *cert. denied*, 583 U.S. ___, 138 S. Ct. 401 (2017).

United States v. Sleugh, No. 4:14-cr-168 (N.D. Cal. June 22, 2015), D.E. 112, 2015 WL 3866270

Consultant's Summary. The defendant was charged with robbery, drug possession, and 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.

Case History. Boyd and Sleugh were charged in a six-count March 27, 2014, indictment with marijuana, firearm, robbery, and murder crimes. D.E. 1. On June 5, 2015, the government filed motions to admit Sleugh's 2008 California conviction for robbing a liquor store at gunpoint as both an admissible bad act and for impeachment should the defendant testify. D.E. 91, 93. Sleugh filed a motion on June 17 to admit prior convictions to impeach two of the government's witnesses. D.E. 108. The judge denied this motion on June 23. D.E. 118. The judge's June 22 decision provisionally denying admission of Sleugh's prior conviction as an admissible bad act stated that she granted admission of the conviction as impeachment evidence for reasons stated at a pretrial conference. D.E. 112, 2015 WL 3866270. Following a guilty plea, Boyd was sentenced on December 14 to three years and one day in prison. D.E. 183.

Outcome. Sleugh testified. D.E. 141, 142 (minutes). He was found guilty on all counts on July 17. D.E. 146. He was sentenced on November 6 to life in prison. D.E. 175. The court of appeals affirmed the conviction on September 10, 2020. 9th Cir. No. 15-10547, D.E. 78, 827 F. App'x 645, *cert. denied*, 595 U.S. ___, 142 S. Ct. 191 (2021).

United States v. Campbell, No. 2:09-cr-20025 (C.D. Ill. Apr. 20, 2010), D.E. 16, 2010 WL 1610583

Consultant's Summary. 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.

Case History. A two-count indictment for crack distribution was filed on March 18, 2009. D.E. 1. On January 13, 2010, the defendant filed a motion to bar reference to any prior conviction should he testify at trial. D.E. 11. The judge denied the motion on April 20. D.E. 16, 2010 WL 1610583.

Outcome. The defendant did not testify. D.E. 60 at 4 (transcript). The jury found him guilty on both counts on May 12. D.E. 34. He was sentenced on August 26 to twenty years in prison. D.E. 50.

The court of appeals affirmed the conviction on September 26, 2011. 7th Cir. No. 10-3002, D.E. 28, 29, 659 F.3d 607, but the Supreme Court vacated the appellate decision in light of new law, 568 U.S. 802 (2012). So the court of appeals vacated the original sentence. 7th Cir. No. 10-3002, D.E. 40, 488 F. App'x 152. The defendant was resentenced on August 5, 2013, to ten years in prison. C.D. Ill. No. 2:09-cr-2025, D.E. 78.

United States v. Harper, No. 2:08-cr-307 (E.D. Wis. Apr. 14, 2010), D.E. 73, 2010 WL 1507869

Consultant's Summary. 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 declared 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. 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 it 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.

Case History. A November 18, 2008, indictment charged the defendant with being a felon in possession of a firearm. D.E. 1. On April 8, 2009, the government filed a motion in limine that included a request to use the defendant's four prior felonies as impeachment evidence should the defendant

testify. D.E. 18. The judge granted the government's motion on April 14, 2010. D.E. 73, 2010 WL 1507869.

Outcome. The defendant did not testify at the two-day trial. D.E. 76 (minutes). A stipulation stated that the defendant had been convicted of a felony. D.E. 77. The jury found the defendant guilty on April 20. D.E. 79. He was sentenced on August 13 to sixteen years and eight months in prison. D.E. 91. The court of appeals affirmed the conviction on December 6, 2011. 7th Cir. No. 10-3010, D.E. 32, 662 F.3d 958, *cert. denied*, 567 U.S. ___, 133 S. Ct. 45 (2012). Following a change in law, the defendant was resentenced on November 23, 2015, to eight years and six months in prison. E.D. Wis. No. 2:08-cr-307, D.E. 118 (opinion), 123 (amended judgment).

United States v. Williams, No. 3:09-cr-27 (D. Alaska Mar. 16, 2010), D.E. 366, 2010 WL 11537701

Consultant's Summary. 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, and 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.

Case History. A March 5, 2009, indictment charged three defendants with drug distribution possession. D.E. 2. A superseding indictment filed on May 21 expanded the charges to three counts, including one count against a new defendant only. D.E. 71. The third defendant agreed to plead guilty on July 17. D.E. 134. He was sentenced on Nov. 3 to one year and six months in prison. D.E. 261. The new defendant agreed to plead guilty on October 21. D.E. 215. He was sentenced on February 23, 2010, to five years in prison. D.E. 324.

On October 27, 2009, the judge agreed to sever the other two defendants' trials. D.E. 240. The third defendant was called to testify at the first defendant's trial, but he was found in contempt for refusing to do so. D.E. 344 (minutes), 354 (minutes). His sentence was expanded by six months on March 31, 2010. D.E. 377. The court of appeals affirmed the additional sentence on November 22, 2010. 9th Cir. No. 10-30096, D.E. 15. The first defendant did testify at his trial. D. Alaska No. 3:09-cr-27, D.E. 354 (minutes). On March 5, 2010, he was found guilty of both counts. D.E. 359, 360. He was sentenced on June 29 to thirteen years in prison. D.E. 468. On March 9, 2012, he was resentenced to

ten years in prison based on new sentencing guidelines. D.E. 591. The court of appeals affirmed the conviction and sentence on May 23, 2011. 9th Cir. No. 10-30204, D.E. 25, 434 F. App'x 585. The court of appeals again denied him relief on June 15, 2018. 9th Cir. No. 15-30233, D.E. 50, 727 F. App'x 341. He was sentenced to an additional three years in prison on September 16, 2022, for violations of supervised release. D.E. 1034.

The second defendant filed a motion on March 5, 2010, to preclude impeachment admission of his prior robbery conviction. D.E. 350. The judge denied the motion on March 16, 2010. D.E. 366, 2010 WL 11537701.

Outcome. The second defendant testified at his trial. D.E. 432 (minutes). On April 20, he was found guilty on both counts. D.E. 440. He was sentenced on January 7, 2011, to five years and four months in prison. D.E. 552. On June 28, 2012, the court of appeals remanded the case for resentencing in accordance with the Fair Sentencing Act. 9th Cir. No. 11-30005, D.E. 28. The defendant was resentenced on September 13, 2012, to four years in prison. D. Alaska No. 3:09-cr-27, D.E. 620. He was sentenced on March 30, 2015, to another year and a day for violation of release conditions. D.E. 709.

United States v. Lujan, No. 2:05-cr-924 (D.N.M. Apr. 27, 2005), D.E. 515, 2008 WL 11359114

Consultant's Summary. 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).

Case History. A two-count April 27, 2005, indictment charged a defendant with lethal kidnapping and witness tampering. D.E. 1. A June 29 superseding indictment added two defendants. D.E. 14. Additional superseding indictments were filed on August 23, 2005, and July 10, 2007. D.E. 40, 145. The government filed a notice on July 12 that it would seek the first defendant's execution. D.E. 146. On December 13, the judge decided to sever the capital defendant's trial from the other two defendants'. D.E. 220, 529 F. Supp. 2d 1315.

On October 14, 2008, the government moved for a pretrial ruling on the admissibility of the capital defendant's previous conviction for marijuana possession as impeachment evidence. D.E. 446. Six days later, the defendant filed a motion for "disclosure of any material pursuant to Rule 609 which the government intends to present in the liability phase of the trial." D.E. 464 at 2. In November, the defendant opposed the government's motion. D.E. 499. The judge concluded on November 19 that "the marijuana conviction bears a strong relation to the charge in this case and underscores the impeachment value of the conviction." D.E. 515 at 3, 2008 WL 11359114.

Outcome. The capital defendant apparently did not testify. The jury found him guilty of lethal kidnapping on August 9, 2011. D.E. 1192. On October 5,

the jury issued a verdict of life imprisonment, but it noted that the verdict was not unanimous. D.E. 1381. The capital defendant was sentenced to life in prison on April 9, 2012. D.E. 1417, 1438.

On guilty pleas, one of the other defendants was sentenced on April 2, 2012, to nine years in prison, D.E. 1413, 1437, and the other was sentenced on June 4 to seven years, D.E. 1425.

Group II. The Court Sanitizes Defendant's Felony Convictions Admitted Under Rule 609(a)(1)(B)

United States v. Johnson, No. 3:21-cr-143 (M.D. Pa. July 20, 2022), D.E. 131, 2022 WL 2835955

Consultant's Summary. In a narcotics prosecution, the court held that the defendant's two prior narcotics convictions were admissible for impeachment. It reviewed extensive authority in which courts allowed impeachment with prior drug convictions in drug prosecutions. It concluded as follows:

> No doubt that courts have allowed the government to refer to the nature of the defendant's prior felony convictions once they determined that the convictions were admissible for impeachment purposes under Rule 609(b)(1). However, as an additional safeguard in this particular case, the court will only allow the government to refer to the fact that Johnson was convicted of prior felonies without specifying the nature of his drug convictions. . . . [T]his court finds that the admission of Johnson's two stated prior drug offenses is too similar to the instant charges he faces, and that it is appropriate in this case for the government to sanitize the offenses by only referring to them as prior felony convictions. Thus, in light of the drug charges Johnson faces in the instant case, the court will not allow the government to impeach him with specific facts of his prior drug felonies or by referring to the nature of these offenses. Rather, the government must only indicate that Johnson had previously been convicted of other unspecified felonies.

Reporter's Comment. This was a case in which the court appeared to think it was bound by precedent to admit the convictions, and then decided to have mercy by sanitizing the convictions. But there is no precedent that *mandates* admissibility of drug convictions for impeachment of defendants in drug prosecutions. So the sanitization was more of an easy way out, an alternative to rejecting some of the case law head on.

Case History. A two-count indictment filed on May 18, 2021, charged two defendants with fatal drug distribution. D.E. 1. On July 5, 2022, the government filed a motion for impeachment admissibility of the first defendant's previous drug trafficking conviction. D.E. 110. The government argued, "Should the Court determine that the admission of the defendant's prior drug trafficking offense is *too* similar to the charges for which the defendant is on trial, the government should be able to 'sanitize' the offense by referring to it as a 'prior felony' conviction." D.E. 111 at 6. The judge agreed on July 20 to impeachment admission of two convictions without reference to the nature of the crimes. D.E. 131, 2022 WL 2835955.

Outcome. The defense did not call any witness. D.E. 184 at 164 (transcript). Both defendants were found guilty on August 3 on both counts. D.E. 154. The first defendant was sentenced on January 4, 2023, to twenty-five years in prison. D.E. 212. The other defendant was sentenced on February 6 to twenty years in prison. D.E. 220. Appeals are pending. 3d Cir. Nos. 22-2512 and 23-1316.

United States v. Barela, No. 1:20-cr-1228 (D.N.M. Nov. 3, 2021), D.E. 152, 2021 WL 5114406

Consultant's Summary. The defendant was charged with robbing a grocery store, and the government sought to impeach him with prior convictions for aggravated battery and trafficking in a controlled substance. In what appears to be a lawyer's error, defense counsel conceded that the convictions were admissible under Rule 609(a)(1), and sought only that the impeachment would be limited to the fact of the felonies, and the jury would not hear the names of the crimes. The government argued, correctly, that sanitization would rob the convictions of their probative value for impeachment. The court found that the convictions were not very probative and would be unduly prejudicial—the same arguments that would be made to exclude the convictions entirely. But because defense counsel did not ask for that, the court ruled that it would "allow the Government, if Defendant testifies, to cross-examine Defendant about his two prior felony convictions for the limited purpose of impeaching Defendant's character and testimony. However, the Court will permit the United States to introduce only that Defendant has two prior felony convictions and the dates of these convictions."

Case History. A March 24, 2020, complaint charged Julian Barela with interference with commerce by threats or violence. D.E. 1. A May 13 indictment described the crime as taking cigarettes from a Quick Track employee. D.E. 11. A September 10 superseding indictment added an interference count against Julian and Jesse Barela for an Albertsons robbery. D.E. 29. A plea agreement was executed for Julian on September 27, 2021. D.E. 131 (filed Oct. 6, 2021). He was sentenced on March 30, 2022, to a prison term of eight years and four months. D.E. 224.

The government filed a Rule 609 motion respecting Jesse's trial on September 30, 2021, identifying two prior felony convictions, noting release from incarceration for them less than ten years previously: two 2009 New Mexico convictions for (1) battery and shooting at or from a motor vehicle and (2) distribution possession of a controlled substance. D.E. 110. The defendant filed a September 30 motion to limit evidence of the convictions if he chose to testify:

> Mr. Barela submits that so long as he is willing to stipulate that, should he testify at trial, he has been convicted of two prior felonies involving dishonesty any attempt to introduce the name of the felonies—assault with a deadly weapon and possession of narcotics with the intent to distribute them—would have little additional probative value and would profoundly and unfairly prejudice him.

D.E. 118 at 2. The judge granted the defendant's motion on November 3, D.E. 152, 2021 WL 5114406.

Outcome. The defendant apparently did not testify. D.E. 196 (minutes). The jury returned a guilty verdict on December 1. D.E. 194. Jesse was sentenced on May 9, 2022, to a prison term of nine years and two months. D.E. 232. On April 30, 2024, the court of appeals ruled that the district court did not deny the defendant a speedy trial. No. 22-2060 (10th Cir.), 2024 WL 1882447.

United States v. Jackson, No. 1:19-cr-356 (E.D.N.Y. Dec. 2, 2020), D.E. 119, 2020 WL 7063566

Consultant's Summary. In a felon-firearm prosecution, the government sought to impeach the defendant with two prior narcotics convictions. The court found that the narcotics convictions were highly probative of credibility. While the convictions did not appear similar to the firearms charge, the court noted the connection between guns and drugs. But it said that the risk of prejudice "can be eliminated by prohibiting the government from inquiring into the nature or statutory name of the offense, while still allowing it to inquire into the other essential facts, namely the fact of the felony conviction, the date, and the length of the sentence."

Reporter's Comment. It makes no sense to spend time talking about how narcotics convictions have high impeachment value (which is wrong anyway) and then to give the conviction to the jury without any indication that it is a narcotics conviction.

Case History. A July 11, 2019, complaint charged the defendant with being a felon in possession of a semiautomatic pistol. D.E. 1. A one-count indictment followed on August 6. D.E. 11. Both the defendant and the government filed motions in limine on October 26, 2020. The defendant sought, "An order, pursuant to FRE 608(b) and 609(a) precluding the government from, if the defendant testifies at the trial, questioning . . . him about or introducing evidence of any prior conviction of the defendant or its underlying conduct, other alleged bad acts, and alleged gang affiliations." D.E. 78. The government argued in favor of impeachment admissibility. D.E. 75. According to a minute order issued on November 13,

> The government is directed to show cause by appropriate case law and documentation of the circumstances surrounding the convictions why the probative value of defendant's March 2016 conviction for criminal sale of a controlled substance in the third degree and his January 2016 conviction for criminal sale of a controlled substance in the fifth degree outweigh the prejudicial effect of introducing those convictions under Federal Rule of Evidence 609(a)(1)(B).

The government responded with a letter brief, D.E. 97, and the defendant followed that with a letter brief, D.E. 98. On December 2, 2020, the judge agreed to impeachment admissibility of one previous conviction for selling crack cocaine but ruled against the admissibility of a second less serous conviction, because with the admission of one conviction, "there is little

chance that the jury will be misled into thinking that he has not had any prior trouble with the police." D.E. 119 at 8, 2020 WL 7063566.

Outcome. It is not clear whether the defendant testified. The jury found the defendant guilty on June 4, 2021. D.E. 211. He was sentenced on March 20, 2023, to four years in prison. D.E. 248. An appeal is pending. 2d Cir. No. 23-6276.

United States v. Johnson, No. 1:18-cr-2665 (D.N.M. Jan. 24, 2020), D.E. 112, 2020 WL 406370

Consultant's Summary. In a felon-firearm prosecution, the government sought to impeach the defendant with two convictions for drug trafficking. The court found the convictions admissible on the grounds that they were probative of credibility (relying on the presumption in 609(a)(1) that all convictions are probative), and the prejudicial effect was minimized because the convictions were not similar to the crime charged. The court noted that the parties had agreed that the jury would only hear about the fact of the felonies; the court found that "this concession by the parties is proper."

Case History. A July 25, 2018, complaint charged the defendant with possession of a firearm and ammunition as a felon. D.E. 1. An indictment for the same charge was filed on August 15. D.E. 17. The government filed a Rule 609 motion in limine on September 6, 2019. D.E. 64. A superseding indictment was filed on September 24, adding an additional citation to the criminal code. D.E. 74. The Rule 609 decision was issued on January 24, 2020. D.E. 112, 2020 WL 406370.

Outcome. The defendant pleaded guilty on March 10, 2021, to the crime charged in the indictment. D.E. 143. He was sentenced on September 17 to four months in prison. D.E. 156.

United States v. Casarez, No. 2:17-cr-113 (D. Nev. July 6, 2018), D.E. 73, 2018 WL 3340871

Consultant's Summary. In a prosecution for carjacking with a firearm, the government sought to impeach the defendant with prior convictions for possession of a stolen vehicle, assault with a deadly weapon, being a felon in possession of a firearm, and robbery. The court concluded that "the prior convictions are substantially similar to the current charges" and that when that is so, "there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." Nor were the violence-based convictions very probative of character for truthfulness. But instead of excluding the convictions, the court sanitized them, and the jury was made aware only that the defendant had been convicted of "felonies."

Case History. An October 25, 2016, complaint charged the defendant with carjacking. D.E. 1. A two-count indictment filed on April 12, 2017, charged the defendant with carjacking and using a firearm during a crime of violence. D.E. 20. On February 22, 2018, the defendant filed a motion in limine asking

the court to preclude, among other things, any reference to his prior convictions, arguing that they would not be proper impeachment material. D.E. 64. On July 6, the judge issued his ruling allowing the government to impeach the defendant with prior convictions by only referring to them as felonies. D.E. 73, 2018 WL 3340871.

Outcome. On October 1, immediately following the seating of jurors, the defendant pleaded guilty. D.E. 102. He was sentenced on June 28, 2019, to six years, four months, and twenty-nine days in prison. D.D. 116. For violation of the provisions of his supervised release, he was sentenced on April 4, 3023, to an additional year and two months. D.E. 150.

United States v. Perez, No. 1:13-cr-238 (E.D. Cal. July 9, 2014), D.E. 36, 2014 WL 3362240

Consultant's Summary. 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."*

Case History. A two-count firearm indictment against the defendant was filed on June 6, 2013. D.E. 1. The defendant filed motions in limine on June 30, 2014, including an argument that the defendant's prior convictions should be excluded as impeachment evidence should he testify. D.E. 24. A three-count superseding indictment filed on July 3, 2014, added an ammunition charge. D.E. 29. The judge partially granted the Rule 609 motion on July 9:

> While the government may reference Perez's having been convicted of five felonies and argue why the jury may consider this fact in concluding credibility, it may not argue factual details of the convictions. If the defense discusses the nature of those convictions or why the jury should not consider them, then the defense opens the door for the government to inquire in detail.

D.E. 36 at 4, 2014 WL 3362240,

Outcome. The defendant was among the six potential witnesses identified by the defense fifteen days before trial. D.E. 44. But the defense called no witness at trial. D.E. 50 (minutes). The jury found the defendant guilty on all counts on August 13. D.E. 52. He was sentenced on November 19 to thirty years in prison. D.E. 65.

On June 22, 2016, the court of appeals vacated the sentence, finding the convictions for possession of the firearm and possession of the ammunition multiplicitous; moreover, a change in law required resentencing. 653 F. App'x 492 (9th Cir. 2016) (No. 14-10528, D.E. 44). The defendant was resentenced on December 20, 2016, to eight years and four months in prison. D.E. 97. The court of appeals affirmed the new sentence on May 29, 2019. 9th Cir. No. 16-10540, D.E. 25, 771 F. App'x 373, *cert. denied*, 594 U.S. ___, 141 S. Ct. 2787

(2021).

United States v. Swint, No. 3:12-cr-8080 (D. Ariz. Sept. 11, 2012), D.E. 63, 2012 WL 3962704

Consultant's Summary. The defendant was charged with assaulting a federal officer and claimed self-defense. The government sought permission to use the defendant's 2003 assault conviction under Rule 609 to impeach his veracity if he testified at trial. The defendant opposed the request, arguing that his past assault was not indicative of veracity and that its similarity to the charged offense would create an unfair propensity inference about his violent tendencies. The defendant sought exclusion of the conviction or, at least, sanitized reference to it. *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.*

Case History. A four-count March 22, 2012, complaint charged the defendant with being obnoxious to law enforcement in the Grand Canyon National Park. D.E. 1. A two-count indictment was filed on April 11. D.E. 13. The government provided notice on July 23 of three assault convictions in Michigan in 1991, 1992, and 2003 as potential Rule 609 impeachment evidence. D.E. 26. The defendant responded on July 30 that the recent conviction was excessively prejudicial and the other two were excessively old. D.E. 30. The judge ruled on September 11 that only the sanitized fact of the recent conviction could be admitted for impeachment, and the judge reserved ruling on the older convictions' admission. D.E. 63, 2012 WL 3962704.

Outcome. The defendant did not testify. D.E. 77 (minutes), 81 (witness list). On September 28, the jury found the defendant guilty on both counts. D.E. 87. On February 4, 2013, the defendant was sentenced to two years and nine months in prison. D.E. 98. The court of appeals affirmed the conviction on April 1, 2014. 9th Cir. No. 13-10046, D.E. 35, 566 F. App'x 618, *cert. denied*, 574 U.S. 892 (2014).

United States v. Saquil-Orozco, No. 5:12-cr-4016 (N.D. Iowa July 3, 2012), D.E. 47, 2012 WL 2576678

Consultant's Summary. The defendant was charged with possession of a firearm by a convicted felon and with being an undocumented person 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.

Case History. A two-count firearm and wrongful-immigration indictment was filed on February 22, 2012. D.E. 2. The defendant filed a motion in limine

on June 25, including a request that the defendant not be impeached with a prior drug felony. D.E. 26. The judge issued his ruling partially denying the Rule 609 motion on July 3. D.E. 47.

Outcome. On July 10, the second day of trial, the prosecution rested, the defense rested without calling a witness, and the parties notified the court that a plea agreement had been reached before the jury deliberated. D.E. 64 (minutes). On September 7, the defendant filed a pro se letter requesting renegotiation of his plea agreement. D.E. 72. Through counsel, he withdrew the pro se motion on October 9. D.E. 81. He was sentenced for both indictment charges on November 15 to eight years and four months in prison. D.E. 98. The court of appeals affirmed the judgment on June 5, 2013. 508 F. App'x 584 (8th Cir. 2013) (No. 12-3848).

United States v. Bruguier, No. 4:11-cr-40012 (D.S.D. Oct. 4, 2011), D.E. 98, 2011 WL 4708853

Consultant's Summary. 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.

Case History. A one-count indictment for sexual abuse was filed on February 8, 2011. D.E. 1. One week later, the defendant filed a request for notice of any intention by the government to impeach the defendant with older convictions pursuant to Rule 609(b). D.E. 10. A seven-count superseding indictment filed on May 10 included charges for sexual abuse of a minor, incest, and burglary. D.E. 29. On May 24, the government filed a notice that, court permitting, it would impeach the defendant with a 2008 South Dakota felony conviction for damage to property. D.E. 43. A six-count second superseding indictment filed on August 9 omitted the allegation of incest. D.E. 59.

Outcome. The defendant testified at trial. D.E. 137 at 357–430 (transcript). In her opinion denying a motion for acquittal, the judge described how the Rule 609 question was resolved during trial: "Once it was apparent that Bruguier would testify, the court heard argument and weighed the probative value of the evidence against its prejudicial effect under Rule 609 of the Federal Rules of Evidence." D.E. 98 at 7, 2011 WL 4708853. According to the judge's oral ruling, "Because credibility is such a pivotal matter in a case like this, I find the Government can put on the impeachment evidence that there was a prior felony. But it would be limited to when the felony was incurred and that it was a felony." D.E. 137 at 333. The defense attorney asked if he could inquire

on redirect whether the conviction was for other than a sexual offense, and the judge agreed with the prosecutor that such an inquiry would open the door for further inquiry by the government, so the defense attorney decided, "I'll keep that door shut. That is a door I have control over." *Id.* at 333–34. During cross-examination, the prosecutor asked the defendant, "Sir, weren't you convicted of a felony just three years ago in 2008?" *Id.* at 407. The defendant responded, "Yes," and then the questioning moved to a different topic. *Id.*

On August 25, the jury found the defendant guilty on four counts and not guilty on two counts. *Id.* at 1. He was sentenced on November 21, 2011, to thirty years in prison. D.E. 101.

On December 13, 2012, the court of appeals affirmed the conviction and sentence; a dissent was filed on December 21. No. 11-3634 (7th Cir.), 703 F.3d 393. On November 5, 2013, however, an en banc court remanded the case for a new trial on one count, finding that the jury instruction omitted a mens rea element. 735 F.3d 754.

The government decided not to pursue the remanded count. D.S.D. No. 4:11-cr-40012, D.E. 125 (status-conference minutes). The defendant was resentenced on March 31, 2014, to twenty-five years in prison. D.E. 135.

United States v. Chaco, No. 1:10-cr-3463 (D.N.M. Aug. 6, 2011), D.E. 95, 801 F. Supp. 2d 1217

Consultant's Summary. 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 was 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 was 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.

Reporter's Comment. Note that the court was going to exclude, whereupon the government offered the sanitization "compromise."

Case History. A December 29, 2010, indictment charged the defendant with three counts of sexual abuse of a child. D.E. 2. He filed a July 18, 2011, motion in limine to preclude reference to his criminal history should he testify. D.E. 31. The government's response four days later identified four prior New Mexico felonies. D.E. 33. The judge issued his ruling on August 6. D.E. 95, 801 F. Supp. 2d 1217.

Outcome. The defendant was the last witness to testify. D.E. 145 at 824–99 (transcript). His attorney asked, "we're not going to hide anything from the jury. You're a felon?" The defendant agreed, and the attorney asked, "Those four felony convictions do not involve sex crimes, do they?" Again, the defendant agreed.

The jury found the defendant guilty on all counts on August 10. D.E. 110. He was sentenced on April 18, 2012, to forty-three years in prison. D.E. 133. The court of appeals affirmed the conviction on April 2, 2013. 520 F. App'x 694 (10th Cir. 2013) (No. 12-2064).

Group III. The Court Excludes All of Defendant's Felony Convictions Under Rule 609(a)(1)(B)

United States v. Holmes, No. 2:21-cr-224 (E.D. Pa. Feb. 2, 2024), ___ F. Supp. 3d ___, 2024 WL 411727

Consultant's Summary. The defendant was charged with Hobbs Act robbery and firearms offenses. The government sought to impeach him with identical convictions. The court excluded the convictions. The court first noted that the government relied on case law stating that there is a presumption of admissibility of convictions when offered against the defendant under Rule 609(a)(1). Of course that is not true under the terms of the rule. At any rate, the court observed that the case law cited was from outside the Third Circuit. The court noted that in citing those cases, the government ignored an important decision from the Third Circuit which describes this portion of the Rule as "a heightened balancing test and a reversal of the standard for admission under Rule 403," creating "a predisposition toward exclusion." *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014). The court found that "there is no inherently strong or logical connection between Holmes' prior convictions—robbery and a firearms offense—and his veracity as a witness. Indeed, it is possible to commit these crimes brazenly, with no deception, despite the seriousness of the offenses." In contrast, because the crimes were virtually identical to those charged, "[a]llowing such evidence creates a great risk that a jury will draw the impermissible inference that Holmes has a propensity to commit robberies and firearms offenses, rather than considering it as evidence only relevant to his credibility as a witness." The court found that the factors of importance of the defendant's testimony and importance of his credibility canceled each other out.

Notably, the court also excluded theft convictions of a government witness under Rule 609(b).

Case History. A twelve-count indictment filed on June 3, 2021, charged

three defendants with theft and firearm crimes related to robberies of mobile phone stores. D.E. 1. A fourteen-count superseding indictment filed on October 20, 2022, omitted one defendant and added two others. D.E. 63.

The fourth defendant agreed to plead guilty on June 7, 2023. D.E. 121 (minutes). He was sentenced on September 12 to five years in prison. D.E. 144. The fifth defendant agreed to plead guilty on January 30, 2024, D.E. 184 (minutes), and the second defendant agreed to plead guilty on February 2, D.E. 190 (minutes). The fifth defendant was sentenced on June 21, 2024, to eight years in prison. D.E. 245.

According to Westlaw, the judge issued his Rule 609 opinion respecting the first defendant's prosecution—an opinion to be published in West's Federal Supplement—on February 2, 2024. 2024 WL 411727. The opinion filed that day in this case, however, is sealed. D.E. 193.

The third defendant was sentenced on May 2 to four years and two months in prison. D.E. 224.

Outcome. The first defendant pleaded guilty on February 6. D.E. 196 (minutes). He was sentenced on May 30 to thirty years in prison. D.E. 234.

United States v. Bennett, No. 3:21-cr-15 (W.D. Penn. Oct. 15, 2023), D.E. 146, 2023 WL 6810439

Consultant's Summary. The defendant was charged with distributing Fentanyl, and the government sought to impeach her with two Fentanyl convictions. The court applied the four-factor test applicable in the third circuit, i.e., "(1) the kind of crime involved; (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." The first factor counted in favor of the defendant, because the convictions were identical to the crime charged, and "these non-violent crimes are not crimes of dishonesty or deceit, and therefore have low impeachment value." The second factor favored the government "since these convictions occurred within the ten-year period in Rule 609(a)." [But then wouldn't that factor always favor the government?] The third factor favored the defendant because her testimony would be important in the case. The fourth factor favored the government, because her credibility would be important and so impeachment would be critical. (So the importance factor and the credibility factor crossed each other out.) The court concluded that because the factors were even at two apiece, and "the Government has the burden of proof, it has therefore failed to show that the probative value of the prior convictions outweighs their prejudicial effect."

Reporter's Comment. This is clearly the right result, because the convictions are not very probative of character for truthfulness, and they are identical to the crime charged. But getting to that conclusion with the four-factor test (a 2–2 tie), and treating those factors as all of equal weight, just has to be wrong. The second factor and the fourth factor, as applied by the court, are automatically on the government's side of the ledger. And these factors clearly should not be of equal weight to actually evaluating the probative value and prejudicial effect of the conviction.

Case History. An August 10, 2021, indictment charged two defendants with Fentanyl distribution possession. D.E. 1. One defendant pleaded guilty on February 23, 2022. D.E. 45. She was sentenced on June 29 to one year and three months in prison. D.E. 65. On October 13, 2023, the remaining defendant filed a motion to exclude evidence of two felony convictions. D.E. 142. The judge granted the defendant's motion on October 15, stating, "However, if Defendant testifies at trial, the Government may renew its request to introduce a 'sanitized' version of these prior convictions under Rule 609(a)." D.E. 146, 2023 WL 6810439.

Outcome. The defendant pleaded guilty to the crime charged on October 19. D.E. 151. She was sentenced on February 14, 2024, to a prison term of nine years. D.E. 172.

United States v. Bernard, No. 2:20-cr-208 (E.D. Pa. July 21, 2021), D.E. 47, 2021 WL 3077556

Consultant's Summary. In a prosecution for felon firearm possession, the government sought to impeach the defendant with 2017 convictions for narcotics and resisting arrest. The court excluded both convictions. The court stated that "while a felony conviction has some inherent impeachment value, the connection between [the] drug conviction and Bernard's likelihood of testifying truthfully is attenuated. The same goes for Bernard's conviction for resisting arrest. Nothing about that conviction calls into question Bernard's tendency to testify truthfully. And although the Government conclusorily says Bernard's conviction is probative of his credibility, it provides no specific argument as to why." The court also noted that the defendant's only evidence would be his testimony, so it was important to not discourage him from testifying. It concluded that the government had failed to meet its burden under Rule 609(a)(1)(B).

Case History. A one-count indictment filed on July 14, 2020, charged the defendant with being a felon in possession of guns and ammunition. D.E. 1. On June 11, 2021, the defendant filed a motion to protect him from having to "choose between testifying and permitting the jury to hear that he was previously convicted of serious felonies—the exact between-a-rock-and-a-hard-place scenario that 609 was designed to avoid." D.E. 40. The judge ruled against impeachment admissibility of the convictions on July 21. D.E. 47, 2021 WL 3077556.

Outcome. The defendant pleaded guilty on July 27. D.E. 51 (minutes). On February 14, 2023, he was sentenced to ten years in prison. D.E. 68.

United States v. Ahaisse, No. 4:20-cr-106 (N.D. Okla. June 4, 2021), D.E. 56, 2021 WL 2290574

Consultant's Summary. In a prosecution on murder and firearms charges, the government sought to impeach the defendant with a prior conviction for being an accessory after the fact to a different murder. The court found that the conviction had some probative value, because the statute required a showing of active concealment. The court also noted that the conviction was

dissimilar from the murder charge, as aiding and abetting did not involve violence. Nonetheless, the court found that admitting the conviction would be highly prejudicial because of the tie to murder. This had an impact on the "importance of defendant testifying" factor, as the court explained:

> Next, the Court must assess the likelihood this testimony will be chilled by allowing plaintiff to impeach defendant by prior conviction. Defendant's prior conviction for accessory after the fact to murder second degree is not inherently prejudicial (here, meaning that it is not particularly heinous on its face); however, the Court notes that the prior conviction, like one of the charged crimes, does involve a murder. Because those crimes are evocative of one another, defendant will likely waive his right to testify to avoid the high likelihood that the jury will associate him with a prior murder unrelated to the one with which he is charged. As a result, this factor weighs against admission of the prior conviction, as it is likely to prejudice the defendant by associating him with an unrelated murder.

The court ruled that the conviction was excluded, concluding as follows:

> Fundamentally, associating defendant with a prior murder while on trial for an entirely unrelated murder would be wholly inappropriate in this instance, especially in light of the fact that no other factors indicate there would be strong probative value in the admission.

Case History. A July 20, 2020, complaint charged the defendant with first-degree murder. D.E. 1. An August 4 indictment added two firearms charges. D.E. 14. The defendant filed a motion in limine on November 9 seeking exclusion as evidence of a prior Oklahoma conviction for second-degree accessory to a murder and an older Oklahoma conviction for assault and battery. D.E. 31. The court agreed on June 4, 2021, to exclude the accessory conviction as impeachment evidence. D.E. 56, 2021 WL 2290574.

Outcome. An information for second-degree murder was filed on June 14. D.E. 61. A June 15 plea agreement memorialized the defendant's guilty plea. D.E. 73. He was sentenced on October 5 to thirty-five years in prison. D.E. 79.

United States v. Washington, No. 3:13-cr-50070 (N.D. Ill. Mar. 26, 2015), D.E. 61, 2015 WL 1403887

Consultant's Summary. 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.

Reporter's 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.

Case History. A November 12, 2013, five-count indictment charged the defendant with drug and firearm crimes. D.E. 2. The government filed a motion in limine on March 11, 2015, seeking admission of a prior conviction for attempted aggravated discharge of a firearm to impeach the defendant should he testify. D.E. 50. The judge denied the government's motion on March 26. D.E. 61, 2015 WL 1403887.

Outcome. On March 30, the parties filed a stipulation that the defendant "had been convicted in a court of a crime punishable by a term of imprisonment of more than one year." D.E. 64. On the third day of trial, defense counsel informed the judge that the defendant did not wish to testify. D.E. 100 at 14–16. On April 1, the jury found the defendant guilty on four drug and firearm counts but not guilty on the charge of using a firearm in drug trafficking. D.E. 71 (sealed jury verdict), 72 (order). The defendant was sentenced on July 30 to eleven years in prison. D.E. 84. Reviewing the district judge's decision for plain error on November 21, 2016, the court of appeals denied the defendant's "appeal that the district court failed to instruct the jury that it could not return separate convictions unless it concluded that Washington stored the gun and ammunition at different times or in different places." 666 F. App'x 544 (7th Cir. 2016) (No. 15-2656, D.E. 50).

United States v. Valueland Auto Sales, Inc., No. 2:13-cr-143 (S.D. Ohio Jan. 22, 2015), D.E. 92, 2015 WL 300469

Consultant's Summary. 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 fourteen years earlier and the defendant had been released from custody six 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 crossout factor seems to be material to the court's determination to exclude the evidence).

Case History. A June 12, 2013, twenty-six-count indictment charged a used-car dealership and an owner with money laundering. D.E. 1. A superseding indictment filed on October 28, 2014, added two counts against another officer of the dealership. D.E. 54. In October 2014 and January 2015, the defendants moved for preclusion of the third defendant's prior convictions, drug use, and residence in a rehabilitation facility. D.E. 49, 78, 82. On general principles of relevance and prejudice, the judge agreed on January 22, 2015, to preclude evidence of the defendant's prior drug use and residence at a rehabilitation facility; additionally considering Rules 404(b) and 609, the judge also precluded evidence of the defendant's prior convictions for money laundering and criminal facilitation. D.E. 92, 2015 WL 300469. The government voluntarily dismissed fourteen counts a week later. D.E. 113.

Outcome. Concurrent with a plea agreement, the government filed a misdemeanor superseding information against the third defendant on February 2. D.E. 115. Remaining counts against the second defendant, also charged against the dealership, were voluntarily dismissed that day. D.E. 114. The third defendant was sentenced on June 8 to six months of probation. D.E. 149. The government voluntarily dismissed the remaining eleven counts against the dealership on August 5. D.E. 152.

On April 28, 2017, the court of appeals affirmed a decision denying the dealership's recovery of attorney fees from the government. 6th Cir. No. 16-3984, D.E. 27, 687 F. App'x 503. The court of appeals rule on May 13, 2021, that precedent deprived the district court of jurisdiction over a motion to expunge for equitable reasons the criminal charges against the dealership. No. 20-3596, D.E. 19, 847 F. App'x 344, *cert. denied*, 595 U.S. ___, 142 S. Ct. 709 (2021).

United States v. Holland, No. 1:13-cr-33 (D.D.C. May 30, 2014), D.E. 36, 41 F. Supp. 3d 82

Consultant's Summary. 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. 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 found that limiting instructions designed to confine the

evidence to impeachment required "mental gymnastics" a jury cannot perform.

Case History. A five-count indictment was filed against the defendant on January 31, 2013, charging him with distribution of cocaine and heroin. D.E. 1. On January 24, 2014, the government filed a notice that it might impeach the defendant should he testify with a 2010 Maryland conviction for assault and theft. D.E. 16. A superseding indictment, also five counts for distribution of cocaine and heroin, was filed on January 30. D.E. 17. The judge issued his order excluding the impeachment evidence on May 30. D.E. 36, 41 F. Supp. 3d 82.

Outcome. The defendant is not listed among the witnesses at trial. On the fifth day of trial, the judge granted the government's motion to dismiss the indictment. D.E. 49.

United States v. Sparks, No. 1:12-cr-28 (S.D. Ind. Nov. 20, 2012), D.E. 58, 2012 WL 5878094

Consultant's Summary. 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.

Case History. A one-count indictment filed on February 23, 2012, charged the defendant with being a felon in possession of a firearm. D.E. 1. The defendant's November 9 motions in limine included a request that a 1995 conviction of being a felon in possession of a firearm be excluded as impeachment evidence. D.E. 40. On November 19, the parties agreed that the defendant's status as a felon would be proved by stipulation. D.E. 57 (filed Nov. 20, 2012). The judge ruled on November 20 that with respect to the defendant's two prior felonies, only the status of being a felon as stipulated would be admissible. D.E. 58, 2012 WL 5878094.

Outcome. The defendant testified. D.E. 61 (minutes). On November 27, the jury found the defendant not guilty.

United States v. Douglas, No. 0:11-cr-324 (D. Minn. Feb. 3, 2012), D.E. 58, 2012 WL 361694

Consultant's Summary. 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.

Case History. An October 4, 2011, indictment charged the defendant with being a felon in possession a firearm. D.E. 1. Among the defendant's motions in limine filed on January 6, 2012, was one "for an Order prohibiting the prosecution from introducing evidence that he is a convicted felon. Defendant will stipulate to his prior felony convictions and that it was unlawful for him to possess a firearm as of the date of the offense . . . ." D.E. 42. On January 26, the government filed a notice of intent to introduce as impeachment evidence nine convictions dating from 1997 through 2007. On February 2, the judge decided not to permit the impeachment evidence. D.E. 58, 2012 WL 361694.

Outcome. The defendant did not testify. D.E. 61 (minutes). The jury found him guilty on February 10. D.E. 64. He was sentenced on January 15, 2013, to twenty years in prison. D.E. 112.

On March 11, 2014, the court of appeals affirmed the conviction. No. 13-1231 (8th Cir.), 744 F.3d 1065. The district judge denied a habeas corpus motion on October 19, 2017, D.E. 179, 2017 WL 4737243, a decision the court of appeals affirmed on March 11, 2019. 8th Cir. No. 17-3422, 759 F. App'x 554, *cert. denied*, 589 U.S. ___, 140 S. Ct. 1134 (2020).

United States v. Hoffman, No. 5:09-cr-216 (S.D. W. Va. Apr. 5, 2010), D.E. 90, 2010 WL 1416869

Consultant's Summary. 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 court 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.

Case History. A two-count September 23, 2009, indictment charged the defendant with storage of hazardous waste at two locations without a permit. D.E. 1. On January 26, 2010, the defendant filed a motion to exclude as impeachment evidence a prior West Virginia conviction for causing injury while fleeing police. D.E. 38. The judge granted the motion on February 5:

> The Court finds that if one assumes that this conviction is probative of credibility, its probative value is minimal, at best, and any such value is outweighed by its prejudicial effect to the Defendant. Evidence of this conviction would likely give the jury a negative impression of the Defendant, and easily distract the jury from the Government's burden of proof in the case at bar.

D.E. 49, 2010 WL 532418.

On March 23, the government filed a motion for admission of a prior federal conviction for violating the Clean Water Act, D.E. 68, and the defendant moved to exclude admission of the conviction as either a "bad act" or for impeachment, D.E. 62. The judge granted the defendant's motion on April 5. D.E. 90, 2010 WL 1416869.

Outcome. The defendant pleaded guilty on April 15, to unpermitted storage of hazardous waste at one location, D.E. 101, and was sentenced on August 30 to two years and six months in prison, D.E. 118. On March 18, 2011, the court of appeals dismissed as beyond its jurisdiction an appeal challenging the judge's declining the defendant a downward departure from sentencing guidelines. 417 F. App'x 352 (4th Cir. 2011).

Group IV. The Court Admits Some, But Excludes Other Felony Convictions Under Rule 609(a)(1)(B)

United States v. Bracy, No. 1:20-cr-483 (E.D.N.Y. Dec. 19, 2022), D.E. 73, 2022 WL 17801133

Consultant's Summary. The defendant was charged with (1) conspiring to distribute and possess with intent to distribute a controlled substance; (2) possessing, brandishing, and discharging a firearm during a drug trafficking crime; and (3) being a felon in possession of a firearm and ammunition. The government sought to impeach him with two prior drug-related convictions. The court found that one of the convictions should be admitted because the jury was already going to hear about it, as it was a predicate for one of the charges. Thus, while the probative value was low, so was the prejudicial effect. But the court excluded the second conviction, which the jury would hear about only if allowed for impeachment. The court stated, "Once a prior felony has been presented to the jury, the incremental probative value of additional convictions may be diminished."

Case History. An October 28, 2020, three-count indictment charged the defendant with drug and firearm crimes. D.E. 1. On December 2, 2022, the government filed a brief arguing in favor of ten motions in limine, including a motion to admit evidence of the defendant's two prior felony convictions—New York convictions for selling drugs and conspiracy—if he were to testify at trial. D.E. 63. The district judge issued her ruling excluding one of the convictions on December 19. D.E. 73, 2022 WL 17801133.

Outcome. At trial, the defendant did not testify. D.E. 99 (minutes). On January 11, 2023, the jury found the defendant guilty on all three counts. D.E. 101. On August 4, the defendant was sentenced to thirteen years and six months in prison. D.E 117. An appeal is pending. No. 23-6905 (2d Cir. Aug.

11, 2023).

United States v. Tate, No. 1:20-cr-96 (S.D. Ind. Jan. 14, 2022), D.E. 728, 2022 WL 130821

Consultant's Summary. In a narcotics prosecution, the court held that the following convictions would be admissible for impeachment: robbery resulting in serious bodily injury, battery, possession of a firearm, failure to return to lawful detention, and unlawful possession of a syringe. But the court excluded two convictions: (1) a cocaine conviction from 2005, which was probably excluded under Rule 609(b) and (2) a conviction for possession of a controlled substance. As to those convictions, the determining factor, according to the court, was their similarity to the charged crime.

Case History. A complaint against three defendants for distribution possession of methamphetamine was filed on February 24, 2020. D.E. 2. An eight-count March 17 indictment added ten defendants and included a charge against one of them for possession of ammunition by a felon. D.E. 33.

One of the added defendants pleaded guilty on April 23. D.E. 195 (filed May 5, 2020), 370 (amended). He was sentenced on August 31 to seventeen years and eleven months in prison. D.E. 389. One of the original defendants pleaded guilty on June 29. D.E. 229 (filed June 30, 2020). She was sentenced on June 10, 2022, to two years and nine months in prison. D.E. 844 Two other new defendants pleaded guilty in 2020: one on July 5, D.E. 256 (filed July 21, 2020) and one on July 17, D.E. 249 (filed July 20). The first was sentenced on November 23 to seven years in prison, D.E. 491, and the second was sentenced on June 16, 2022, to three years and five months, D.E. 857. A nine-count superseding indictment against all thirteen defendants was filed on July 22, 2020. D.E. 262. Four more added defendants pleaded guilty on July 28, D.E. 335 (filed July 30, 2020), and 29, D.E. 334 (filed July 30, 2020), August 20, D.E. 398 (filed Sept. 8, 2020), and October 5, D.E. 439. The first was sentenced on November 23 to three years and one month in prison, D.E. 493; the second was sentenced on January 20, 2021, to two years in prison for the ammunition charge, D.E. 558; the third was sentenced on January 21 to seven years in prison, D.E. 561; and the fourth was sentenced on May 5 to five years and ten months in prison, D.E. 607.

A second superseding indictment against the remaining five defendants for methamphetamine distribution possession was filed on January 5, 2021. D.E. 514. One of the remaining defendants pleaded guilty on May 5. D.E. 610 (filed May 7, 2021). He was sentenced on July 28 to ten years and one month in prison. D.E. 651.

On December 22, the government filed a motion in limine for the admission of the defendants' prior convictions as impeachment evidence. D.E. 708. The judge granted the government's motion on January 14, 2022. D.E. 728, 2022 WL 130821. With respect to one defendant's criminal history beyond the Rule 609 evidence already ruled on, the judge ruled on the same day that "the Government and its witnesses SHALL NOT reference, mention, interrogate, attempt to convey, or otherwise inform the jury of [a moving

defendant's] prior criminal history related to his previous arrests, convictions, incarcerations and their length, as well as uncharged criminal conduct." D.E. 732.

Outcome. Other defendants pleaded guilty on January 15, D.E. 733 (filed Jan. 17, 2022), and February 2, D.E. 759. The first was sentenced on July 27, to twenty years and ten months. D.E. 889; *see* D.E. 906 (amended), and his appeal was dismissed on January 5, 2024, following his attorney's request to withdraw as counsel on the ground that the appeal was frivolous. No. 22-2360 (7th Cir. Jan. 5, 2024), D.E. 77, 2024 WL 65429. The second was sentenced on July 25, 2022, to ten years in prison, D.E. 886; *see* D.E. 974 (amended), and he voluntarily dismissed his appeal, No. 22-2373 (7th Cir. July 26, 2023), D.E. 42.

Trial began with two defendants on February 7, 2022. D.E. 769 (minutes). The defendants did not testify. D.E. 782 (minutes). Both were found guilty on February 17. D.E. 790. One was sentenced on June 14 to twenty-four years in prison. D.E. 849. On the same day, the defendant who moved for limits on his criminal history as evidence was sentenced to thirty-three years and four months in prison. D.E. 851. The court of appeals affirmed the convictions and sentences on April 3, 2024. 97 F.4th 541 (7th Cir. 2024) (Nos. 22-2060, 22-2124).

United States v. Jessamy, No. 3:19-cr-174 (M.D. Pa. June 1, 2020), D.E. 37, 464 F. Supp. 3d 671

Consultant's Summary. The defendant was charged with possession of contraband (a shank) in prison. The government sought to impeach him with a conviction for discharging a firearm and a conviction for reckless endangerment. The court reviewed the relevant factors and concluded that the majority of the factors weighed in favor of admissibility for the discharging-a-firearm conviction but against the admissibility of the reckless-endangerment conviction. The firearms conviction was about conduct unlike the shank incident in prison, whereas the reckless-endangerment conviction was precisely like the conduct underlying the charge in this case.

Case History. A two-count indictment filed on June 4, 2019, charged the defendant with unlawful possession of a shank in prison and using it to cut another prisoner. D.E. 1. On January 13, 2020, the defendant filed a motion to limit the government's reference at trial to his prior convictions. D.E. 27. The government argued for admissibility on February 24. D.E. 35. The judge ruled on June 1. D.E. 37, 464 F. Supp. 3d 671.

Outcome. On June 16, the defendant agreed to plead guilty. D.E. 40 (plea agreement filed July 6, 2020). He was sentenced on March 8, 2021, to two years and nine months in prison. D.E. 61.

United States v. North, No. 1:16-cr-309 (N.D. Ga. Nov. 9, 2017), D.E. 93, 2017 WL 5185270

Consultant's Summary. 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 conviction for aggravated assault, battery, and criminal interference with property; (2) a 1987 conviction for aggravated assault and being a felon in possession of a firearm; (3) a 1995 conviction for being a felon in possession of a firearm; (4) a 1998 conviction for armed robbery, aggravated assault, and being a felon in possession of a firearm; (5) a 2004 conviction for possession of cocaine with intent to distribute it; and (6) a 2013 conviction for possession of cocaine and heroin with intent to distribute them. The court 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.

Case History. A May 26, 2016, complaint charged the defendant with being a felon in possession of a firearm that he used in carjacking. D.E. 1. A three-count indictment followed on September 6, listing five aggravated-assault and drug-distribution-possession prior convictions. D.E. 13. The defendant filed a motion on October 16, 2017, to exclude evidence of prior convictions beyond a stipulation that he had one. D.E. 73. By separate motion, the defendant sought a limitation on the use of the convictions for impeachment. D.E. 74. The judge provided the defendant with partial relief on November 9. D.E. 93, 2017 WL 5185270.

Outcome. The defendant testified. D.E. 118 (minutes). On December 7, the jury found the defendant guilty on all counts. D.E. 120. He was sentenced on March 26, 2018, to twenty-five years in prison. D.E. 134. The court of appeals affirmed the conviction on March 4, 2019. No. 18-11476 (11th Cir.), 762 F. App'x 813.

United States v. Waller, No. 1:15-cr-83 (N.D. Ga. May 2, 2016), D.E. 80, 2016 WL 1746057

Consultant's Summary. 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.

Reporter's 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.

Case History. A March 11, 2015, indictment charged the defendant with being a felon in possession of a pistol. D.E. 1. On April 11, 2016, the defendant filed a motion to prevent impeachment of the defendant by any theft or firearm conviction in any of four previous cases. D.E. 66. The judge granted the motion as to some convictions and denied it as to others on May 2, 2016. D.E. 80, 2016 WL 1746057.

Outcome. The judge granted the government's voluntary dismissal of the case on October 17. D.E. 92.

United States v. Boyce, No. 1:10-cr-533 (N.D. Ill. Oct. 26, 2011), D.E. 85, 2011 WL 5078186

Consultant's Summary. 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.

Case History. A two-count June 22, 2010, indictment charged the defendant with being a felon in possession of a firearm and ammunition. D.E. 1. On November 3, the government filed motions in limine, including a motion to admit prior convictions as impeachment evidence should the defendant testify. D.E. 36. The judge granted admission of one conviction on October 26, 2011. D.E. 85, 2011 WL 5078186.

Outcome. The defendant chose not to testify. D.E. at 137 (transcript). On November 9, the jury found the defendant guilty on both counts. D.E. 92 (minutes). He was sentenced on January 3, 2013, to seventeen years and six months in prison. D.E. 142. The court of appeals affirmed the conviction on February 13, 2014. 7th Cir. No. 13-1087, D.E. 25, 742 F.3d 792, *cert. denied*, 572 U.S. ___, 134 S. Ct. 2321 (2014).

United States v. Wooten, No. 3:10-cr-30088 (S.D. Ill. Sept. 9, 2010), D.E. 32, 2010 WL 3614922

Consultant's Summary. 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.

Case History. A May 19, 2010, indictment charged Wooten with intent to distribute crack cocaine. D.E. 1. According to the court of appeals, the defendant

> was sitting in the passenger seat of a car driven by his girlfriend when a deputy U.S. Marshal recognized him as having an outstanding warrant for

his arrest. After arresting him, officers search Wooten, his girlfriend, and the car; they found 51.2 grams of crack cocaine, a digital scale, and $159 in small bills.

494 F. App'x 610, 611 (7th Cir. 2012) (No. 11-2566). The defendant filed a motion in limine on July 7 to prohibit introduction of 1996 and 1998 convictions so as to preserve the defendant's right to testify. S.D. Ill. No. 3:10-cr-30088, D.E. 20. The judge's September 9 ruling is not available on Pacer. D.E. 32.

Outcome. At trial, the defendant did not testify. D.E. 37 (minutes). On September 30, the fourth day of trial, the judge declared a mistrial because the jurors could not agree on a verdict. D.E. 39 (minutes). The defendant did not testify at the second trial either. D.E. 85–86 (minutes). The second jury found him guilty on March 29, 2011. D.E. 87. He was sentenced on July 11 to life in prison, D.E. 101, "[b]ecause of the drug quantity and Wooten's prior convictions," 494 F. App'x at 611. The court of appeals vacated the sentence on September 13, 2012, as inconsistent with the Fair Sentencing Act of 2010. 494 F. App'x 610. On November 29, 2012, the defendant was resentenced to a prison term of thirty years. S.D. Ill. No. 3:10-cr-30088, D.E. 137.

United States v. Blake, No. 2:08-cr-20055 (C.D. Ill. Aug. 2, 2010), D.E. 31, 2010 WL 3025584

Consultant's Summary. 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.

Case History. An October 31, 2008, complaint charged the defendant with distribution possession of crack cocaine. D.E. 1. A November 11 indictment charged the defendant with drug possession on three days in October plus a fourth count for firearm possession by a felon. D.E. 7. The government filed a notice on April 8, 2009, of two prior Illinois drug-possession convictions as possible qualifications for a sentencing enhancement. D.E. 13.On July 6, 2010, the defendant filed a motion to bar reference to the prior convictions should the defendant testify, stating, "it is contemplated that the parties will stipulate and agree as to any convictions that will be published at trial." D.E. 20. A superseding indictment filed on July 28, 2010, adding a count for distribution possession of crack cocaine on an additional day. D.E. 25.

Outcome. Trial began on August 23. Minutes. A stipulation filed that day stated that the defendant had been convicted in Illinois of a felony. D.E. 48. It

appears that the defense did not call any witness. Minutes; D.E. 81 (transcript). The jury found the defendant guilty on all counts on August 25. D.E. 54. The defendant was sentenced to life in prison on December 27. D.E. 65; *see* D.E. 69 (amended judgment). The court of appeals affirmed the sentence on October 24, 2011. No. 10-3971 (7th Cir.). Following a change in sentencing law, the defendant was resentenced on June 24, 2013, to seventeen years and six months in prison. D.E. 96.

United States v. Evans, No. 1:09-cr-152 (N.D. Ill. May 25, 2010), D.E. 146, 82 Fed. R. Evid. Serv. 847, 2010 WL 2104171

Consultant's Summary. 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 2000s 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.

Case History. A February 23, 2009, complaint charged three defendants with bank robbery. D.E. 1. An April 21 indictment added a charge for using a firearm in a crime of violence. D.E. 29. A superseding indictment filed on July 21 added a charge against one of the defendants for being a felon in possession of a firearm. D.E. 40. He and another defendant moved for exclusion of their prior convictions as impeachment evidence in May 2010. D.E. 109, 122. On May 25, the judge issued her ruling allowing impeachment use of some of the convictions. D.E. 146, 82 Fed. R. Evid. Serv. 847, 2010 WL 2104171. On May 27, the defendant not a subject of this ruling agreed to plead guilty. D.E. 152. He testified at trial, D.E. 206 (opinion), and was sentenced on August 30, 2011, to six years and seven months in prison. D.E. 278

Outcome. Neither defendant on trial testified. D.E. 271 at 464–68 (transcript). The jury found the two defendants guilty of all counts on June 17, 2010. D.E. 170 (minutes). The one charged with two counts was sentenced on May 13, 2011, to thirteen years and six months in prison. D.E. 232. The other was sentenced on June 9 to thirty-seven years in prison. D.E. 248. The court of appeals affirmed both judgments on October 4, 2012. 7th Cir. Nos. 11-2128, D.E. 54, and 11-2398, D.E. 42, 697 F.3d 625.

United States v. Hampton, No. 2:08-cr-20063 (C.D. Ill. Aug. 3, 2009), D.E. 28, 2009 WL 2431291

Consultant's Summary. 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.

Case History. A December 2, 2008, indictment charged the defendant with possession of a firearm by a felon. D.E. 1. On July 16, 2009, the defense filed a motion to bar reference to prior convictions should the defendant testify at trial, stating, "That the Defendant files only this skeleton motion with no supporting brief as it is contemplated that the parties will stipulate and agree as to any convictions that will be published at trial." D.E. 15. On July 23, the defense filed a motion to bar reference to one Kankakee County conviction for home invasion and two for aggravated battery on a police officer. D.E. 21. The judge issued his opinion allowing impeachment use of two of the prior convictions on August 3. D.E. 28, 2009 WL 2431291.

Outcome. The defendant testified at trial. D.E. 74 at 378–433 (transcript). His attorney asked about his felonies after stating, "I'd like to ask you a couple questions that I know you want the jury to know."

He was found guilty on August 4. D.E. 34. He was sentenced on February 25, 2010, to twenty-one years in prison. D.E. 54. On March 27, 2012, the court of appeals affirmed the conviction but remanded the case for resentencing, finding that the defendant did not qualify as an armed career criminal. 7th Cir. No. 10-1479, D.E. 42, 675 F.3d 720. The defendant was resentenced on September 10 to ten years in prison. C.D. Ill. No. 2:08-cr-20063, D.E. 92.

Section 3B
Cases Terminated in 2023
Referring to Rule 609 in Their Docket Sheets

We examined a random sample of 250 criminal cases terminated in 2023 and looked for references to Rule 609 in their docket sheets. We found two. Only one of them had a Rule 609 decision in the public record. We judged this method as not a promising way to study Rule 609 decisions and outcomes.

Case With a Rule 609 Decision

United States v. Dubose, No. 2:20-cr-453-3 (E.D. Pa. disp. May 8, 2023)

Case History. A twelve-count December 3, 2020, indictment charged two brothers with mail fraud, bank fraud, and conspiracy to commit money laundering. D.E. 1. A seventeen-count August 26, 2021, superseding indictment added a third brother as a defendant. D.E. 79. On September 6, 2022, the government filed motions in limine, including a motion to admit prior convictions of two of the brothers as impeachment evidence should either testify. D.E. 165.

By the time of the judge's November 8 ruling, only two previous convictions against one of the brothers, Zumar, were at issue: convictions in 2008 and 2017 for theft. D.E. 191, 639 F. Supp. 3d 503. The judge granted admission for impeachment of the more recent conviction.

Outcome. Trial transcripts indicate that the defense called no witness. D.E. 265 to 271, 273. On May 8, 2023, Zumar and one of his brothers were convicted by the jury on all charged counts; the other brother was convicted on some counts and acquitted on four. D.E. 254, 258. Zumar's brother convicted on all charged counts was sentenced on February 16, 2024, to two years in prison. D.E. 380. The brother acquitted on some counts was sentenced on March 15 to four years and nine months in prison. D.E. 405. Zumar was sentenced on March 18 to ten years and five months in prison. D.E. 407.

Case Without a Rule 609 Decision

United States v. Cruz-Pablo, No. 1:23-cr-00143 (D.N.D. disp. Sept. 28, 2023)

Case History. A July 31, 2023, complaint charged the defendant with unauthorized reimmigration. D.E. 1. The charge was expressed as an indictment on August 2. D.E. 13. That same day, the defendant filed a request for notice of impeachment convictions. D.E. 10.

Outcome. On August 10, the defendant agreed to plead guilty. D.E. 20. He was sentenced on September 28, 2023, to time served. D.E. 25.

Section 3C
Cases Referring to Rule 609 in Their 2018 Docket Entries

We selected six districts at random[46] and analyzed cases that mentioned Rule

46. California Southern, Delaware, Georgia Southern, Oklahoma Eastern, Pennsylvania

609 in their 2018 docket entries. If there were more than five such cases, we selected five at random. Two districts had no docket entry mentioning Rule 609.[47] We therefore examined nineteen cases.

References to Rule 609 in the docket sheets typically were references to notices or motions rather than decisions. We seldom found Rule 609 decisions in the public records for cases mentioning Rule 609 in their docket sheets. Two of the five cases selected from the Southern District of California had Rule 609 decisions, and the rest did not. The two decisions were not accompanied by extensive reasons. We judged this method as not promising as a way to study Rule 609 decisions and outcomes.

Cases With Rule 609 Decisions

United States v. Woods, No. 3:18-cr-3208 (S.D. Cal. indictment July 11, 2018)

Case History. A June 21, 2018, complaint charged the defendant with methamphetamine distribution possession. D.E. 1. A one-count indictment followed on July 11, D.E. 13, and a one-count superseding indictment followed on December 16, D.E. 32. On December 21, the government filed a motion in limine that included a request to admit as impeachment evidence a 2016 California guilty plea for false personation. D.E. 36. The defendant's January 25, 2019, response did not address the Rule 609 issue, D.E. 40, and the judge granted the Rue 609 request on February 1, D.E. 42 (minutes).

Outcome. The defendant does not appear to have testified. D.E. 52 (witness list). The jury was deadlocked. D.E. 50 (minutes). On February 27, the defendant agreed to prosecution by information. D.E. 60. On February 27 he was sentenced to time served. D.E. 64. He was sentenced to an additional term of five months on September 20 for violation of his supervised release. D.E. 75.

United States v. Rodriguez-Ruiz, No. 3:17-cr-3943 (S.D. Cal. information Nov. 21, 2017)

Case History. An October 26, 2017, complaint charged the defendant with unauthorized reentry into the United States. D.E. 1. An information followed on November 21. D.E. 8. The defendant pleaded not guilty. D.E. 10 (minutes). The defendant's motions filed on April 5, 2018, included a motion to preclude impeachment admission of four prior convictions. D.E. 26. Government motions filed that same day included a motion to admit Rule 609 impeachment evidence, stating that the three felony convictions and one misdemeanor conviction were recent and the misdemeanor conviction was for making a false statement to a police officer. D.E. 27. On April 19, the judge denied the defendant's motion and reserved judgment on the government's motion. D.E. 36 (minutes). But the judge stated that she was inclined to admit sanitized information about the convictions: "sanitized to the extent that it

Western, and Virginia Western.

47. Oklahoma Eastern and Virginia Western.

would just be to inquire that he has certain felony convictions." D.E. 56 at 2–3 (transcript).

Outcome. On August 8, the defendant pleaded guilty. D.E. 59 (minutes). He was sentenced on November 2 to four months in prison. D.E. 65.

Cases Without Rule 609 Decisions

Southern District of California

Among the district's 2018 docket entries, there were 198 in eighty-three cases mentioning Rule 609. We examined a random selection of five cases. Three did not include Rule 609 decisions in the public record.

United States v. Cabrera, No. 3:18-cr-3289 (S.D. Cal. information July 19, 2018)

Case History. A June 25, 2018, complaint charged the defendant with unauthorized reentry into the United States. D.E. 1. An information followed on July 19. D.E. 8. The defendant pleaded not guilty. D.E. 10 (minutes). Government motions filed on September 12 included a motion to admit Rule 609 evidence "Defendant . . . has two 2011 prior felony convictions which may be used as 609 impeachment evidence." D.E. 22.

Outcome. The district judge accepted a guilty plea from the defendant on February 21, 2019. D.E. 37. The defendant was sentenced on April 26 to one year, one month, and one day in prison. D.E. 46.

United States v. Mares-Herrera, No. 3:18-cr-2167 (S.D. Cal. information Apr. 30, 2018)

Case History. An April 4, 2018, complaint charged the defendant with unauthorized reimmigration. D.E. 1. An information followed on April 30. D.E. 9. On June 14, the government sought impeachment admission of previous felony convictions, D.E. 22, and the defendant sought preclusion of impeachment evidence of four misdemeanors. D.E. 21. The government responded to the defendant's motion,

> The defense seemingly misapprehends Defendant's criminal history (or mistakes someone else's for his). In the event it is necessary to limit potential prejudice associated with Defendant's prior illegal reentry offenses, the United States will limit its impeachment on those convictions to the mere fact that Defendant was convicted of two felonies and will redact the certified felony judgments accordingly.

D.E. 25.

A three-count indictment filed on June 19 added a charge of making a false statement to a federal officer, and it was given a separate case number. No. 3:18-cr-2954, D.E. 1. The information was voluntarily dismissed. No. 3:18-cr-2167, D.E. 31. The defendant filed motions in limine on July 14, stating that the defendant did not anticipate testifying in the new case. No. 3:18-cr-2954, D.E. 9. On July 16, the government's motions in limine stated that if the defendant were to testify it would seek admission of previous convictions. D.E.

12. Ruling on the parties' motions in limine, the judge deferred a ruling on Rule 609 evidence. D.E. 23 (minutes).

Outcome. On September 7, the jury found the defendant guilty of two counts of false statements, but it was unable to reach a verdict on unauthorized reimmigration. D.E. 24 (minutes), 25. The parties renewed their Rule 609 briefing in light of a possible retrial on the immigration charge. D.E. 34, 36. On February 26, 2019, the defendant was sentenced to three years and one month in prison. D.E. 48.

United States v. Carrasco, No. 3:17-cr-3938 (S.D. Cal. information Nov. 21, 2017)

Case History. An October 25, 2017, complaint charged the defendant with distribution possession of methamphetamine. D.E. 1. An information followed on November 21. D.E. 10. On June 15, 2018, the government moved for admission of Rule 609(a) evidence of a 2011 conviction for possession of a controlled substance. D.E. 34. At a motions hearing, the prosecutor stated that he would sanitize impeachment reference to the previous conviction. D.E. 50 at 6 (transcript). The judge reserved ruling on the Rule 609 motion. D.E. 37 (minutes).

Outcome. The defendant did not testify. D.E. 53, 54 (transcripts). On July 10, the jury found the defendant guilty. D.E. 47. He was sentenced on November 20 to ten years in prison. D.E. 66. The court of appeals affirmed the judgment on May 13, 2020. 9th Cir. No. 18-50417, D.E. 57, 813 F. App'x 275, *cert. denied*, 592 U.S. ___, 141 S. Ct. 411 (2020).

District of Delaware

There were nine 2018 docket entries in four cases mentioning Rule 609.

United States v. Cephas, No. 1:18-cr-19 (D. Del. indictment Mar. 6, 2018)

Case History. A January 29, 2018, complaint charged the defendant with unlawful possession of a firearm. D.E. 1. A March 6 indictment charged the defendant with one count of being a felon in possession of a firearm. D.E. 9. The defendant filed a motion on June 11 to require the government to produce any evidence it intended to introduce pursuant to Rules 404 or 609. D.E. 16.

Outcome. The defendant agreed to plead guilty on March 6, 2019. D.E. 38. He was sentenced on July 18 to three years and one month in prison. D.E. 50, 55. On April 15, 2020, the court of appeals affirmed the district judge's denial of a motion to suppress evidence. 3d Cir. No. 19-2755, D.E. 43, 808 F. App'x 122.

United States v. Riley, No. 1:18-cr-18 (D. Del. indictment Mar. 6, 2018)

Case History. A January 11, 2018, complaint charged the defendant was heroin delivery possession. D.E. 1. A two-count indictment was filed on March 6. D.E. 10. The defendant filed a motion on October 2 to require the government to produce any evidence it intended to introduce pursuant to Rules 404 or 609. D.E. 23. The government responded on November 9 that it

had not yet decided whether to seek admission of any of the defendant's prior criminal acts. D.E. 26.

Outcome. The defendant did not testify. Minutes. On May 7, the jury found the defendant guilty on both counts. D.E. 50. He was sentenced on August 28, 2020, to eight years and four months in prison. D.E. 94. The court of appeals affirmed the conviction and sentence on September 23, 2021. 3d Cir. No. 20-2803, D.E. 37, 2021 WL 4317135.

United States v. Wisher, No. 1:17-cr-45 (D. Del. indictment May 23, 2017)

Case History. A May 23, 2017, indictment charged one defendant with two counts of drug distribution possession and a second defendant with providing distribution real estate. D.E. 1. A superseding indictment was filed on February 15, 2018. D.E. 42. The first defendant filed a motion on August 30 to require the government to produce any evidence it intended to introduce pursuant to Rules 404 or 609. D.E. 69. The government responded on September 20 that it had not yet decided whether to seek admission of any of the defendant's prior criminal acts. D.E. 77. A second superseding indictment filed on February 5, 2019, expanded the charges to eleven counts, including firearm charges against the first defendant. D.E. 95.

The second defendant filed a motion on February 25 seeking admission of bad-act evidence against the first defendant. D.E. 102. The government moved for admission of bad-act evidence on the same day. D.E. 106. The judge granted this motion on March 13. D.E. 122. On March 7, the second defendant agreed to plead guilty to one count. D.E. 116 (filed Mar. 12, 2019). The first defendant agreed to plead guilty to two counts on March 18. D.E. 126. He was sentenced on July 8 to three years and one month in prison. D.E. 151. The second defendant was sentenced on September 23 to three years of probation. D.E. 159.

United States v. Campbell, No. 1:17-cr-26 (D. Del. indictment Apr. 4, 2017)

Case History. A three-count April 4, 2017, indictment charged the defendant with robbery and kidnapping. D.E. 2. The defendant filed a motion on December 6 to require the government to produce any evidence it intended to introduce pursuant to Rules 404 or 609. D.E. 33. The government responded on January 17, 2018, that if it decided to introduce Rule 609 evidence, it would file a motion in limine to do that. D.E. 44. Resolving various defendant motions on March 5, the judge ruled that the Rule 609 motion was moot because the government had already provided to the defendant the relevant evidence. D.E. 49.

Outcome. The defendant did not testify at trial (but his father apparently was a government witness). D.E. 84 (exhibit and witness list). The jury found the defendant not guilty on all counts on August 21. D.E. 83.

Southern District of Georgia

There were sixty-six 2018 docket entries in fourteen cases mentioning Rule 609. We examined a random selection of five cases.

United States v. Williams, No. 4:18-cr-264 (S.D. Ga. indictment Nov. 8, 2018)

Case History. A two-count indictment filed on November 8, 2018, charged the defendant with robbery and using a firearm during a crime of violence. D.E. 1. On November 23, the government filed notice of four convictions and one additional police report as admissible bad acts, also suitable for cross-examination should the defendant testify. D.E 5.

Outcome. The defendant pleaded guilty on February 7, 2019. D.E. 23. He was sentenced on May 7 to fifteen years in prison. D.E. 34.

United States v. McCloskey, No. 4:18-cr-260 (S.D. Ga. indictment Nov. 8, 2018)

Case History. An eighty-three-count indictment filed on November 8, 2018, charged forty-three defendants with drug and weapons crimes, including conspiracy. D.E. 4. On November 30, the government filed a notice of intent to use evidence of previous bad acts, including criminal convictions, against thirty-six of the defendants, requesting the right to amend the notice as it learned more. D.E. 176. The notice acknowledged that the government did not know the disposition of some of the previous charges.

Outcome. No defendant went to trial. The indictment against one defendant was voluntarily dismissed on May 2, 2019. D.E. 714. From December 18, 2018, to April 9, 2019, thirty-six defendants pleaded guilty. D.E. 233, 235, 343, 345, 347, 349, 352, 355, 429, 431, 451, 453, 461, 466, 481, 488, 490, 495, 500, 540, 542, 550, 552, 554, 560, 563, 565, 592, 594, 603, 607, 644, 648, 650, 605, 672. Notices of plea agreements by an additional four defendants were filed from January 10 to March 11, 2019. D.E. 328, 474, 514, 581. From April 29 to November 26, those forty-one defendants were sentenced to prison terms ranging from two years to twenty-three years and four months. D.E. 703, 729, 734, 736, 788, 808, 872, 874, 876, 921, 995, 997, 1008, 1009, 1010, 1088, 1094, 1095, 1097, 1109, 1100, 1118, 1124, 1126, 1131, 1162, 1170, 1174, 1176, 1177, 1200, 1202, 1231, 1232, 1233, 1234, 1244, 1263, 1271, 1278, 1297. One of the sentences was appealed and affirmed. 11th Cir. No. 19-13898 (Jan. 11, 2022), 2022 WL 104274. Another defendant pleaded guilty on July 17, 2019, D.E. 969, and was sentenced on August 20 to time served, D.E. 1160.

Because of retroactive changes in sentencing guidelines, the sentences for four defendants were later reduced. D.E. 1525 (from twelve years and one month to ten years and nine months), 1528 (from seventeen years and six months to fifteen years and eight months), 1529 (from seven years and six months to six years and eight months), 1530 (from thirteen years and five months to twelve years).

United States v. Miller, No. 4:18-cr-169 (S.D. Ga. indictment July 12, 2018)

Case History. A July 12, 2018, indictment charged the defendant with being a felon in possession of a firearm. D.E. 1. On November 23, the government filed a notice of bad acts that it could use as evidence and for impeachment should the defendant testify: three convictions, a criminal warrant, and an

indictment. D.E. 17. The government filed an amended notice on March 22, 2019, adding a police report. D.E. 36.

Outcome. The defendant did not testify. D.E. 67 (minutes). On April 29, the jury found him guilty. D.E. 73. He was sentenced on December 20 to nine years and seven months in prison. D.E. 87. The court of appeals affirmed the conviction on January 11, 2023. 11th Cir. No. 20-10194, D.E. 55, 2023 WL 155212.

United States v. Griffin, No. 4:18-cr-147 (S.D. Ga. indictment June 6, 2018)

Case History. An indictment filed on June 6, 2018, charged fourteen defendants with a drug distribution possession conspiracy and one of them with maintaining drug-involved premises. D.E. 1. A superseding indictment filed on August 8 expanded the charges to twenty-eight, adding firearm charges. D.E. 187. On August 27, the government filed four notices of bad acts that could be used as evidence and for impeachment against four defendants. D.E. 202 to 205.

Outcome. One of the subjects of previous-crime notices pleaded guilty on November 6, 2018. D.E. 286. He was sentenced in 2020 to eight years in prison. D.E. 516. Notices of pending plea changes were filed on November 14, 2018, and April 1, 2019, for two others. D.E. 222, 374. One of those pleaded guilty on May 31, 2019, D.E. 433, and was sentenced on October 31 to eleven years in prison, D.E. 495. Another was sentenced on August 5, 2019, on a related information to three years and one month in prison. D.E. 457 (S.D. Ga. No. 4:18-cr-211). Two of the other ten defendants pleaded guilty in November 2018. D.E. 284, 295. They were sentenced in 2019, one to four years and eight months in prison and the other to seven years in prison. D.E. 359, 455. Notices of plea changes were filed for five of the other ten from September 2018 through April 2019. D.E. 235, 237, 326, 379, 394. One pleaded guilty on January 22, 2019, D.E. 329, and was sentenced on July 30 to ten years in prison, D.E. 454. Two pleaded guilty on June 6, 2019, D.E. 430, 435, and were sentenced on November 5, one to two years and six months in prison and the other to three years and six months in prison, D.E. 497, 498. The other two were sentenced on April 1 on related informations to five years in prison. D.E. 372 (S.D. Ga. No. 4:18-cr-223), 416 (S.D. Ga. Nos. 4:18-cr-224).

A second superseding indictment filed on May 8, 2019, charged the four defendants who had not agreed to plead guilty with five counts. D.E. 399. A similar third superseding indictment was filed on July 10. D.E. 437. One of these four defendants was one of the four subjects of previous-crime notices; he and the government filed a stipulation on October 23 listing four previous felony convictions. D.E. 485. He was sentenced on September 29, 2020, on a related information to twenty years in prison. D.E. 583 (S.D. Ga. No. 4:19-cr-177).

On May 14, 2020, the government filed its first previous-crime notice on one of the four defendants in the third superseding indictment. D.E. 545. A fourth superseding indictment filed on July 8, 2020, against the three defendants who had not agreed to plead guilty added a charge of money

laundering. D.E. 565. The subject of the recent previous-crime notice pleaded guilty on October 9. D.E. 634. He was sentenced on March 2, 2021, to twenty years in prison. D.E. 619.

The case remains pending against two defendants; the government has filed previous-crime notices for neither.

United States v. Kelly, No. 2:18-cr-22 (S.D. Ga. indictment May 2, 2018)

Case History. A four-count indictment filed on May 2, 2018, charged seven defendants with destruction of property on a naval base. D.E. 1. On June 6, the government filed a notice of previous convictions for five of the defendants. D.E. 74.

Outcome. As jury selection began, five defendants appeared pro se. D.E. 696 (minutes). At trial, all but one defendant, a defendant appearing pro se, testified. D.E. 698 (minutes). On October 24, 2019, the jury found all defendants guilty on all counts. D.E. 704 to 710.

A counseled defendant who testified and had a previous federal conviction for destruction of national-defense material was sentenced on June 9, 2020, to time served. D.E. 850. The other defendants were sentenced from October 20, 2020, to April 12, 2021, to prison terms ranging from ten months to two years and nine months. D.E. 934, 935, 980, 982, 988, 1062. The court of appeals affirmed three defendants' convictions and sentences on November 22, 2021. 11th Cir. No. 2014341, D.E. 81, 18 F.4th 1275, *cert. denied*, 597 U.S. ___, 142 S. Ct. 2871. The court affirmed two other defendants' convictions and sentences on May 26, 11th Cir. No. 21-11226, D.E. 42, 2022 WL 1679259, and June 6, 2022, 11th Cir. No. 20-13996, D.E. 43, 2022 WL 1929068.

Western District of Pennsylvania

There were 134 2018 docket entries in twenty-three cases mentioning Rule 609. We examined a random selection of five cases.

United States v. Hoffert, No. 2:18-cr-73 (W.D. Pa. indictment Mar. 20, 2018)

Case History. A five-count March 20, 2018, indictment charged the defendant with false liens against five property owners. D.E. 1. On April 5, the circuit's chief judge reassigned the case to a judge in the Middle District of Pennsylvania. D.E. 9. Western District judges were among the victims alleged in the indictment. D.E. 26 (defense motion).

On October 1, the defendant filed a motion to exclude prior convictions as Rule 609 impeachment evidence, stating a willingness to stipulate that he had a prior felony conviction in Pennsylvania. D.E. 55. The government responded that (1) a stipulation should acknowledge conviction on four felony counts and (2) the length of the sentence should remain fair game. D.E. 62. The judge resolved the motion by text order without further information for reasons stated on the record. D.E. 65.

Outcome. The defendant testified. D.E. 71 (witness list), 86 at 41–101 (transcript). He was found guilty on all counts. D.E. 72. He was sentenced on March 18, 2019, to four years in prison. D.E. 99. The court of appeals affirmed

the judgement on February 11, 2020. 3d Cir. No. 19-1720, D.E. 60, 949 F.3d 782, *cert. denied*, 592 U.S. ___, 141 S. Ct. 393.

United States v. Brooks, No. 2:17-cr-250 (W.D. Pa. indictment Sept. 19, 2017)

Case History. An August 22, 2017, complaint charged the defendant with being a felon in possession of a firearm and ammunition. D.E. 1. A similar indictment was filed on September 19. D.E. 15. On September 29, the defendant filed a motion to compel the government to produce evidence it intended to use under Federal Rules of Evidence 404(b) and 609. D.E. 37. On February 12, 2018, the government stated that it would produce such evidence by two weeks before trial. D.E. 43.

Outcome. The defendant pleaded guilty on January 17, 2019. D.E. 107. On the following day, he was sentenced to one year and five months in prison. D.E. 106.

United States v. Heinrich, No. 1:17-cr-13 (W.D. Pa. indictment June 13, 2017)

Case History. A May 25, 2017, complaint charged a defendant with creating and possessing child pornography. D.E. 1. An indictment filed on June 13 expressed the charges as nine counts. D.E. 7. A similar ten-count superseding indictment was filed on June 12, 2018. D.E. 36. On September 12, the defendant filed a motion to compel the government to produce evidence it intended to use under Federal Rules of Evidence 404(b) and 609. D.E. 49. The government responded that it was unaware of any conviction falling within the ambit of Rule 609(b), but should it become aware of such evidence it would provide the defendant with notice by ten days before trial. D.E. 57.

A December 11 second superseding indictment expanded the charges to sixteen counts. D.E. 66. Ruling on discovery motions, the judge agreed on March 12, 2019, with the government that advance notice was not required for Rule 609(a) impeachment evidence of recent felonies. D.E. 91, 2019 WL 1128541.

Outcome. The defendant pleaded guilty on April 1. D.E. 108. He was sentenced on August 19 to fifteen years in prison. D.E. 125. On June 18, 2020, the court of appeals vacated the judgment and remanded the case for the district court to reconsider admissibility of expert evidence proffered by the defendant, because the evidentiary ruling was made by a law clerk. 3d Cir. No. 19-3035, D.E. 71, 971 F.3d 160. On remand, the district judge denied admissibility of the expert evidence. D.E. 139, 2021 WL 630962. On September 1, 2021, the judge again sentenced the defendant to fifteen years in prison. S.D. Ga. No. 2:18-cr-22, D.E. 148. The court of appeals affirmed the judgment on January 4, 2023. 3d Cir. No. 21-2723, D.E. 61, 57 F.4th 154.

United States v. Kelly, No. 2:16-cr-31 (W.D. Pa. indictment Feb. 23, 2016)

Case History. A February 23, 2016, indictment charged the defendant with two counts of bank robbery. D.E. 1. Resolving pretrial motions on February 26, 2018, the judge's text order stated, "The Court will . . . hold the Government to its representation that it will provide Defendant with notice of

evidence to be introduced under Federal Rules of Evidence 404(b) and 609 at least two weeks before trial." D.E. 63. An order issued on September 11 specified January 7, 2019, as the deadline. D.E. 71.

Outcome. The defendant pleaded guilty on December 17, 2018, D.E. 76, and was sentenced on June 26, 2019, to twelve years and seven months in prison. D.E. 93. An appeal will be heard on November 8, 2024. 3d Cir. No. 19-2604.

United States v. Bell, No. 2:15-cr-97 (W.D. Pa. indictment May 12, 2015)

Case History. An April 20, 2015, complaint charged three defendants with drug distribution possession. D.E. 3. A four-count May 12 indictment included an additional defendant and a firearm charge. D.E. 36. On October 18, 2016, the first defendant filed a motion to compel the government to produce evidence it intended to use under Federal Rules of Evidence 404(b) and 609. D.E. 199. On September 7, 2018, the judge ordered disclosure one week before trial. D.E. 335, 336, 339, 393.

The new defendant pleaded guilty on June 2, 2017. D.E. 252. He was sentenced on July 17, 2019, to eleven years and eight months in prison. D.E. 435. One of the original defendants pleaded guilty on January 31, 2018. D.E. 292. She was sentenced on September 28, 2018, to two years and six months in prison. D.E. 356. Another original defendant pleaded guilty on February 25, 2019. D.E. 397. She was sentenced on June 19, 2019, to six years in prison. D.E. 422.

Outcome. The first defendant pleaded guilty on May 17, 2019. D.E. 413. He was sentenced on September 11, 2019, to fifteen years in prison. D.E. 449.

SECTION 4
A SURVEY OF DEFENSE ATTORNEYS

Key to a consideration of Rule 609 amendment are the incentive structures for a criminal defendant's (1) going to trial rather than accepting a plea agreement and (2) testifying at trial. These two decisions are made by the defendant in consultation with the defense attorney.

We are unlikely to be able to study decision making by criminal defendants directly. More feasible sources of information about their decisions are their attorneys. Attorneys additionally have the perspective of more cases and perhaps a better understanding of how the rules of evidence relate to the likelihood of outcomes.

The federal-defender member of the Evidence Rules Committee presented very interesting results from a survey of other federal defenders. Fifty-two out of eighty-three responded (63%). Fifty (96%) responded "yes" to this question: "In your experience, does Rule 609(a)(1)(B) impact your client's decision to take the stand to testify on their own behalf?" It is not completely clear whether the client in the question is a specific client, a typical client, or a hypothetical client but if the client has a previous conviction for a serious crime, then the rule has to be taken into account, which means that it "impacts" a decision

whether to testify. Unless, of course, there is no way that the client would testify for other reasons. Or perhaps the client wants to testify regardless of the risks. For the most part, the answer to the question is known before it is asked. It is possible that the two defenders who did not answer "yes" understood the question differently from how the others did.

Additional questions generated interesting data, but the questions did not explore the richness of defense decisions much beyond whether to weigh pros and cons. Much more useful would be data on how Rule 609 compares with other specific factors in plea and testimony decisions.

In addition to quantitative response data, the federal defender's report included summary opinions about the rule from each of the respondents. As they are heads of offices, all comments can be expected to be filtered through policy preferences. We are exploring a broader survey of attorneys, including defender, panel, and retained attorneys.

One way to get a sample that is representative of practice in federal court is to use a termination cohort of all criminal cases terminated in 2023, for example, the last year for which there is full data; select cases at random; and then interview (or ultimately survey) the defense attorneys on those cases. (Note that for many data purposes, each defendant in a criminal case counts as a separate case.)

We began our exploration by speaking with three federal defenders plus, selected at random, two assistant defenders and six attorneys in private practice, opening our conversations by asking the attorneys to tell us what factors they and their clients consider when deciding how to plead and whether to testify. After further conversation, we identified a few promising lines of questioning for additional interviews and possible written survey questionnaires:

(1) How does Rule 609 compare with other factors in a defense decision how to plead and whether to testify?
(2) Do different judges apply Rule 609 similarly?
(3) How predictive is a recent prior conviction for a felony that did not involve deceit of whether a criminal defendant will testify truthfully?

We are optimistic that an interview-and-questionnaire survey of criminal defense attorneys will generate useful information about the effect of Rule 609 on plea and testimony decisions.

TAB 4

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: Artificial Intelligence, Machine-Learning, and Possible Amendments to the Federal Rules of Evidence
Date: October 1, 2024

Beginning in Fall 2023, the Committee has been considering the challenges posed by the development of Artificial Intelligence and its possible impact on evidence offered at a trial. The Committee has convened two separate panel discussions to obtain information from experts in the field. The Committee has focused on two separate concerns: 1) the problem of "deepfakes" and how to assure that the Evidence Rules on authenticity will work to prevent hard-to-detect fake video and audio evidence from being admitted at trial and 2) The problem of machine learning and how to assure that machine learning output is reliable, if such evidence is admitted without the testimony of an expert.

While recognizing the legitimate concerns posed by AI and machine-learning, Committee members have expressed the concern that, given the length of the rulemaking process, there is a risk that any proposed amendments to deal with AI could become outmoded before they even go into effect --- and that any amendment written in terms so general as to avoid being outmoded might add little to the already general and flexible language in the Federal Rules of Evidence. On the other hand, the unprecedented interest in the Committee's work on AI, even at this preliminary stage, counsels against inaction unless it is clear that a rule will not be helpful.

This memorandum is in four parts. Part One discusses some of the recent cases and developments since the last meeting, including the public focus on the Committee's work. Part

Two presents a discussion of possible amendments suggested by various experts and scholars.[1] Part Three provides background information on the problem of deepfakes, the rules on authenticity, and prior Committee review of authentication of social media evidence.[2] Part Four sets forth two specific proposals for addressing AI and machine learning --- really a mix and match of the best parts of the proposals considered in Part Two.

It should be noted that there is no action item, for this meeting, on any of the matters discussed in this memo.

I. New Information

Here is a list of new information and data points that have come to my attention since the last meeting.

A. Articles and Reports

● **Law Review Article:** Myhand, *Once the Jury Sees it, the Jury Can't Unsee it: The Challenge Trial Judges Face When Authenticating Video Evidence in the Age of Deepfakes,* 29 Widener L. Rev. 171 (2024):

The author, like many others, sounds an alarm about deepfakes and considers the problem to be qualitatively different from that imposed by forgeries in the past. In his view, no amendment to the Evidence Rules will solve the problem, because neither judges nor juries are in any position to assess whether an item is a deepfake.

He recommends that all proponents of video evidence be required to submit with their proffered evidence an Affidavit of Forensic Analysis (AFA) from a qualified expert. An AFA would be used to assist the trial judge in performing the gatekeeping function under Rule 104(b). He describes the procedure as follows:

> Before the trial or hearing, a party offering video evidence must submit an affidavit from an expert whose testimony regarding forensic video analysis would be admissible at the trial or hearing under Federal Rule of Evidence 702. The expert's affidavit must state an opinion regarding the authenticity of the proffered video evidence, the method used to analyze the video, and the chain of custody of the video as reported by the proffering party.

[1] Some of this section was included in the AI memo for the Spring meeting, but there are revised proposals, and the Committee has never gone through these proposals one by one.

[2] But for a few changes, this section was included in the AI memo for the Spring meeting.

The AFA would be provided only as a tool to assist the trial judge in deciding whether there is sufficient evidence to support a reasonable jury's finding that the video evidence is what the proponent purports it to be. The AFA would not be admissible at trial.

The proposal is modeled after the Affidavit of Merit statutes that some states have required in professional malpractice claims, purportedly to screen out fraudulent claims.

> **Reporter's Comment:** The biggest problem with this proposal is expense and delay. Proponents will need an expert affidavit for *every piece of video evidence*. And that affidavit must itself comport with Rule 702, which means a potential *Daubert* hearing for every affidavit. The rule probably needs to be further extended to *audio* evidence as well, thus adding to the delay and expense imposed by the proposal.
>
> The other problem is that this affidavit is not presented to the jury --- so the jury remains ill-equipped to root out a possible deepfake.
>
> If this proposal is thought promising, it would have to be implemented through a change to Rule 901 (or maybe a new freestanding rule 901(c) or (d). Congress likely won't impose such a rule, and the courts are unlikely to do so en masse. So if the Committee is interested in this proposal, it can be considered as a possible amendment to Article 9 at the next meeting.

● **Article: Daniel Seng, *Artificial Intelligence and Evidence,* 33 Singapore Law Journal 241 (2024):**

The author describes a good process for regulating allegations of deepfakery:

> [The opponent] should be required to provide advance warning to the trial judge that the authenticity of identified aspects of the evidence will be questioned, and to set out the grounds upon which the challenge is made. If this first hurdle is overcome, it will be for the trial judge to decide whether a trial within a trial is necessary, and if so, to set out the scope and perameters of the hearing, including the standard of proof, for which a ruling is required.

The author also discusses potential advancements in the means to detect deepfakes:

> While software tools are readily available to allow an end user to test various hypotheses in the analysis of image manipulation, it remains, for the time being, the domain of the expert to interpret the test results and form a conclusion. One day, technologies might

be available to perform a set of tests, which can be weighted, and used to draw informed conclusions about the image being manipulated.

He finally concludes that the evidentiary principles needed to cover deepfakes are already in place:

> [T]he evidential treatment of the issue of manipulated digital data is no different from any other electronic evidence that needs authentication. * * * [I]ssues with digital data that is manipulated requires the court to develop a set of clear procedures for managing authentication issues, a healthy appreciation of the limits of the presumption of reliability, and a robust approach towards disclosure of discovery.

Finally, the author analyzes and summarizes the controversy over disclosure of source codes to the opponent, when the proprietor of the software invokes trade secret protection. He notes the "brouhaha" involving breathalyzers, where defense lawyers sought inspection of their codes and were rebuffed, until discovery was granted in a particular case and it was determined that there were calibration and calculation errors in the coding of the machines that resulted in results that were 20% to 40% too high. He also notes coding errors discovered by adversaries in cases involving Toyotas that cause sudden acceleration, and in the environmental sensors in Uber self-drive cars. The author concludes that it is important to provide disclosure of source codes, and that access by the adversary can be controlled by in camera proceedings and protective orders. He notes that Professor Imwinkelried has suggested that an alternative to disclosure of source codes is for the opponent to be given access to the validation studies that support the AI process. He states, however, that validation studies are unlikely to be useful "for complex systems such as those used in AI systems, and their use may raise additional questions such as the number of validation tests required, the assumptions made as to the number of such tests, the procedures used to conduct the tests and how these can be conducted within a practical period of time."

> **Reporter's Comment:** The source codes controversy is a hot button topic. It is arguably better placed in the civil and criminal discovery rules. Although there are of course notice requirements in the Evidence Rules, none of them require the disclosure of anything like source codes and metadata. One would probably look in the civil and criminal rules for regulations on disclosure of information like a source code. That is especially true because the provision would probably have to provide for a balancing process and procedural regulations, all of which seems to go beyond admissibility of evidence.
>
> If anything is to be done about source codes in the Evidence Rules, it should probably be by way of a suggestion in a Committee Note, as was done in the Committee Note to the 2000 amendment to Rule 701 (providing that the Rule needed to be amended to assure that the expert disclosure requirements in the Civil and Criminal Rules would not be evaded).

• Short Article: Laura Lorek, *Artificial Intelligence: Real Problem* » ABA Journal, September 2024: Besides going over the now well-trod scares about AI wreaking havoc with the legal system, the article does add two points:

1) It quotes the Vice President of a global intelligence program as predicting "a new class of video verification experts" that will be part of virtually every case; and

2) Contrarily, it reports that "Google is creating watermarks to identify deepfake videos and has placed information in the metadata of photos and documents that reveal AI created them."

Reporter's Comment: As to the second point, it is at least possible that sometime in the future, watermarking and related security efforts will make it very difficult or impossible to sneak in a deepfake. And if that is so, it would not be ideal if a rule addressed to deepfakes comes into effect just as, or after, the problem has been substantially diminished.

• Article: Law360.com, *Deepfake Proposals Navigate Perfect Evidentiary Storm*

This is an article about the Advisory Committee's Work on Deepfakes. Here are some excerpts:

As federal judiciary officials explore how to handle evidence faked by artificial intelligence, attorneys are divided over the need to change evidence rules, with some worried that current rules are not up to the challenges posed by deepfakes, and others fearful that altering them might do more harm than good. The current rules don't contemplate the ease with which AI can now fake photographs, audio and video, and are more intended to decide admissibility rather than authenticity, say some attorneys, who warn of the "evidentiary storm" this issue has created.

But the rules, which have long been able to handle false evidence, are perfectly capable of handling AI-generated photos and recordings as well, other experts say. Changing those rules could harm courtroom efficiency and access to justice, and the better approach may be to give judges more education and resources so they can apply the existing rules to deepfakes, those experts contend.

The Judicial Conference's Advisory Committee on Evidence Rules is now wading into the issue, having met in April to hear from both sets of academics and consider potential rule changes to handle the possibility of AI-generated evidence being introduced in court. The panel is expected to issue a report on those proposals, but is unlikely to come to any decisions and probably won't for several years, experts told Law360. Some

of those scholars say that caution is for the best, while others worry that delay will create serious problems, given that disputes over allegedly fake evidence are already finding their way into court. * * *

The Coming "Evidentiary Storm"

Generative AI's ability to create realistic-seeming photographs, audio and video, often referred to as "deepfakes," makes it urgent to change the federal rules of evidence now, say some experts. That's because the current rule governing evidence authentication, Rule 901(a), dictates that the party seeking to introduce that evidence must only show enough proof "to support a finding that the item is what the proponent claims it is," a standard the committee itself called low. Litigants hoping to introduce a voicemail or photograph into court only have to offer proof that the voice on the recording or the person in the image is the person it's said to be, according to experts.

"And that was not particularly difficult or challenging for the courts or for juries to understand," said Loyola Law School, Los Angeles professor Rebecca Delfino, who has recommended a rule change being considered by the evidence rules committee. "But the whole concept of AI generative technology and deepfakes has sort of upended this because the prior modes of having evidence authenticated and presented really don't work as easily as they used to," Delfino told Law360. Those methods were designed for traditional evidentiary disputes, when parties agree on the nature of the evidence — that something is a voicemail or a photograph — and are only at odds over its admissibility.

"We disagree on whether the evidence should come in, but we're not disagreeing about what it is," said Former Federal Judge Paul Grimm, who posed several rule changes currently before the committee. But once alleged deepfakes come into court, "now you've got a dispute about the very nature of what the evidence is."

The fact that deepfakes can now be created so easily, cheaply and convincingly, and that the technology has improved to the point that even computer experts have difficulty discriminating between real and fake, creates a "perfect evidentiary storm," according to Grimm. That storm is already coming ashore, according to Delfino, who points out that Tesla lawyers recently claimed in court that videos of CEO Elon Musk making statements about the safety of the company's self-driving cars could be deepfakes in an attempt to shield Musk from being deposed in a wrongful death suit. "That's not an argument he could have made five years ago," Delfino said. * * * "The number of cases where the underlying claim will be deepfakes — something about a deepfake — that's coming," Delfino said. "There's going to be new tort claims that didn't previously exist, new crimes that didn't previously exist."

So federal courts should change the rules of evidence now, both Grimm and Delfino insist. “For this particular type of evidence, which has the unique ability to so dramatically affect the outcome of a case, the evidence rules just simply don’t seem to work,” Grimm said.

Proposed Changes

Grimm, along with professor Maura Grossman, who teaches at the University of Waterloo and Osgoode Hall Law School in Canada, have proposed a new rule — Rule 901(c) — which would govern “potentially fabricated or altered electronic evidence,” according to the committee. * * * “The existing rules of evidence, which are technology-agnostic, make it too easy to get this kind of high-technology evidence introduced to a jury, because it only has to be more likely than not that it is what it purports to be,” Grimm said.

Delfino instead suggests changing Rule 901 to mandate that evidence’s authenticity be decided by judges rather than juries. Under the current evidentiary rules, a judge makes an initial assessment about whether or not a reasonable jury could find that a piece of evidence is authentic. Once the court determines that a jury can find something authentic, the ultimate decision about whether it actually is real goes to the jury, Delfino explained. But juries aren’t equipped to make that determination, she said. A study done by the Max Planck Institute in 2021, for instance, found that even after people are taught to detect deepfakes, they still aren’t able to. The study found that people generally lean toward thinking deepfakes are authentic and overestimate their ability to detect faked images, Delfino said.

“People are really susceptible to being influenced by deepfake content and can’t really figure out what is real and what is not,” Delfino said. But judges spend years dealing with evidence and questions of admissibility and authenticity, so they are “slightly better” able to make those decisions, according to her. “This is what they do. This is their job. This is why they’ve been appointed to the bench, is that they’re really good at sort of holding at bay any of those biases that everybody else applies,” Delfino said.

Not everyone agrees with those changes, or with changing the rules of evidence at all. It places too much of a burden on judges to expect them to decide questions of authenticity, as Delfino’s proposed rule would, according to Bruce Hedin, president of Hedin B Consulting and a legal technology expert. What courts could be doing is providing judges with more resources and education about AI, said Hedin, who envisions

a “resource hub” or “help desk model” for judges making evidentiary decisions. Judges could also turn to special masters or consultants in some cases, according to Hedin. “If they were given greater access to resources and encouraged to draw on experts when they were confronted with these technical questions, then they would be in a position to make better decisions,” Hedin said. He isn’t opposed to changing the rules of evidence, but says any modifications are likely to take far longer than educating judges would. * * *

Changes in the rules aren’t even necessary, according to Riana Pfefferkorn of the Stanford Internet Observatory, who is a former associate in the internet strategy and litigation group at Wilson Sonsini. The existing rules of evidence are perfectly capable of handling deepfakes, she said. “The courts have had hundreds of years to develop their immune system against fake evidence, since well before the codification of the federal evidence rules, and it’s endured through successive generations of new technologies,” Pfefferkorn said. Attorney ethics rules, which forbid the introduction of evidence a lawyer suspects is false, offer “another speed bump” to deepfakes in court, Pfefferkorn added. “Lawyers have their own skin in the game when it comes to keeping deepfakes out of evidence,” she said. Raising the authentication bar could actually do more harm than good by slowing the courts, creating more work for litigants and judges, and putting litigants with fewer resources at a disadvantage, affecting access to justice, according to Pfefferkorn. “The trend has been to streamline authentication, not to throw up more roadblocks,” Pfefferkorn said. “Absent a compelling showing of an epidemic of litigants trying to sneak deepfakes into evidence, I don’t see a need to reverse that trend.”

At Least a Few Years Away

Experts may disagree about whether changes to the rules of evidence are necessary, but they agree that any potential shifts aren’t likely soon. “If everybody in the room raised their hand and agreed, ‘Let’s change the rule,’ we’re talking three to five years,” Grimm said. He pointed out that changes made to the rule governing expert evidence that went into effect in December 2023 were 20 years in the making. * * * Members of the committee evaluating the proposals are likely concerned that any change they make will quickly become obsolete as the technology evolves, Delfino said.

The judiciary is more likely to take a wait-and-see approach, allowing courts to use the existing rules to make decisions that will then be appealed. From those appeals will come a body of common law the judiciary can look to in deciding if new rules are necessary, according to Delfino. “I think this is what the committee thinks,” Delfino said. “The common law will develop, it will point the way where the need actually is, and then maybe the rule change will follow.”

That caution in the face of evolving technology is warranted, according to Hedin, who said, "We want these rules to be robust and durable and long-lasting." But Delfino worries that delay could create a patchwork of different interpretations of the rules of evidence in different courts. "My personal opinion is we should be changing these rules now," said Delfino, who indicated that she's encountered skepticism about the urgent need for rule changes from judiciary officials, who don't seem to agree with her.

The committee hasn't said no to any of the proposed rule changes, according to Grimm. "They just said, 'We're not ready to do it now,'" so changes could still be coming, he said.

But federal courts will have to take action in the near future, whether that action involves rule changes or other approaches, according to Hedin.

● **New York State Bar Association Task Force on AI, April 2024** (excerpt on use of AI-generated evidence, discussing, among other things, the Advisory Committee's work):

Judges face challenges in evaluating the admissibility of AI-generated or compiled evidence. Concerns include the reliability, transparency, interpretability and bias in such evidence. These challenges become even more pronounced with the use of generative AI systems. A discussion follows regarding two recent proposals to address these challenges.

Federal Law --- a Proposal to Amend Rule 901(b)(9)

* * *

The Advisory Committee for the Federal Rules of Evidence is considering a proposal by former U.S. District Judge Paul Grimm and Dr. Maura R. Grossman of the University of Waterloo to amend Fed. R. Evid. 901(b)(9). That proposal initially changes the "accurate" standard as it currently exists for any evidence about a process or system and replaces it with a requirement that the proponent provide evidence that the process or system produces a "reliable" result. For evidence generated by AI, the proponent must also (a) describe the software or program that was used and (b) show that it has produced reliable results in the proposed evidence.

New York: Proposed Amendments to the Criminal Procedure Law and CPLR

New York State Assemblyman Clyde Vanel has introduced a bill, A 8110, which amends both the Criminal Procedure Law and the CPLR, regarding the admissibility of evidence created or processed by artificial intelligence. As stated in the bill, evidence is

"created" by AI when AI produces new information from existing information. Evidence is "processed" by AI when AI produces a conclusion based on existing information.

Simplified greatly, the bill requires that evidence "created" by AI would not be received at trial unless independent admissible evidence establishes the reliability and accuracy of the AI used to create the evidence. Evidence "processed" by AI similarly requires the proponent of the evidence to establish the reliability and accuracy of the AI used. The bill does not yet have a cosponsor in the Assembly and does not have a sponsor in the Senate.

The goals of both the proposal to amend Fed. R. Evid. 901 and the Vanel bill are laudable. The "black box" problem of AI is of great concern to lawyers and judges and has significant due process concerns in the criminal justice area. These proposals thus attempt to address AI-generated "deepfakes" that could be passed off as authentic evidence. *Nevertheless, given the intricacies and time involved in the legislative and rule-amending processes, it may well be that the common law at the trial court level provides at least an interim roadmap for how judges should consider these issues. Indeed, this approach was largely employed to develop the law regarding discovery and admissibility of social media evidence when those issues first took hold.* (emphasis added)

Reporter's Comment: The New York proposed legislation is complicated and detailed, much more so than what one would find in the Federal Rules of Evidence. One aspect of complication is that the statute distinguishes between evidence "created" by AI and evidence "processed" by AI, even though the standards of admissibility are basically the same for both types of evidence.

• **Short Article: Sherman & Howard**, ***Addressing Challenges of Deepfakes and AI - Generated Evidence,*** JDSupra.com, September 18, 2-24

This article describes and evaluates the Grimm-Grossman proposal to amend Rule 901 to regulate deepfakes. That proposal is set forth, as modified, later in this memo.

The driving force behind these proposed changes is the fear that the existing rules may be inadequate for handling the unique issues posed by AI and machine learning. Unlike traditional manufactured evidence, deepfakes are harder to detect, making it easier to pass off fabricated content as real. Furthermore, the low threshold for authenticity under FRE 901(a) only requires "evidence sufficient to support a finding." This standard might allow deepfakes to be admitted without scrutiny.

The [Advisory] committee recognized that as AI technologies evolve, they will be used to create evidence for both legitimate and illegitimate purposes. Therefore, it is

essential to update the rules to ensure that AI-generated evidence meets higher standards of reliability and authenticity before being presented in court.

What's Next

The committee has not formally adopted these proposed changes, and discussions are ongoing about whether they should be applied only to AI-generated evidence or more broadly to other forms of digital content. The proposal to modify Rule 901(b)(9) and introduce 901(c) represents a proactive approach to addressing the potential misuse of AI and deepfakes in the courtroom. It will be interesting to see how the legal industry evolves to address the rapid advancements in AI, particularly as courts and practitioners adapt to new challenges in evidence authentication.

• **Article: Ralph Losey,** ***The Problem of Deepfakes and AI-Generated Evidence: Is it Time to Revise the Federal Rules of Evidence?***

This is an article about the Grimm-Grossman proposal to amend Rule 901 to address deepfakes. It is a stinging, and hopefully misguided, critique of the Reporter's memo to the Committee on AI that was submitted at the last meeting. Excerpts follow:

> From the record it appears that Grimm and Grossman were not given an opportunity to respond to [the Committee's] criticisms. So once again the Committee followed Professor Capra's lead and all of the rule changes they proposed were rejected. Again, with respect, I think Dan Capra missed the point again. Authentic evidence can already be withheld as too prejudicial under current Federal Evidence Rule 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons). But the process and interpretation of existing rules is what is too complex. That is a core reason for the Grimm and Grossman proposals.
>
> Moreover, in the world of deepfakes things are not as black and white as Capra's analysis assumes. Often authenticity of audio visuals is a gray area question, a continuum, and not a simple yes or no. It appears that the Committee's decisions would benefit from the input of additional technology advisors, independent ones, on the rapidly advancing field of AI image generation.
>
> The balancing procedure Grimm and Grossman suggested is appropriate. If it is a close question on authenticity, and the prejudice is small, then it makes sense to let it in. If authenticity is a close question, and the prejudice is great, say even outcome determinative, then exclude it. And of course if the proof of authenticity is strong, and the probative value strong, even outcome determinative, then the evidence should be allowed. The other side

of the coin, if that if the evidence is strong that the video is a fake, it should be excluded, even if that decision is outcome determinative.

* * *

Capra's Questionable Evaluation of the Danger of Deepfakes

Naturally the Committee went with what they were told was the cautious approach. But is doing nothing really a cautious approach? In times of crisis inaction is usually reckless, not cautious. Professor Capra's views are appropriate for normal times, where you can wait a few years to see how new developments play out. But these are not normal times. Far from it.

We are seeing an acceleration of fraud, or fake everything, and a collapse of truth and honesty. Society has already been disrupted by rapid technical and social changes, and growing distrust of the judicial system. Fraud, propaganda and nihilistic relativism are rampant. What is the ground truth? How many people believe in an objective truth outside of the material sciences? How many do not even accept science? Is it not dangerous under these conditions to wait longer to try to curb the adverse impact of deepfakes?

There is little indication in Professor Capra's reports that he appreciates the urgency of the times, nor the gravity of the problems created by deep fakes. The "Deepfake Defense" is more than a remote possibility. The lack of published opinions on deepfake evidence should not lull anyone into complacency. It is already being raised, especially in criminal cases.

Consider the article of Judge Herbert B. Dixon Jr., Senior Judge with the Superior Court of the District of Columbia. *The "Deepfake Defense": An Evidentiary Conundrum* (ABA, 6/11/24). Judge Dixon is well known for his expertise in technology. For instance, he is the technology columnist for The Judges' Journal magazine and senior judicial adviser to the Center for Legal and Court Technology

Judge Dixon reports this defense was widely used in D.C. courts by individuals charged with storming the Capitol on January 6, 2021. The Committee needs more advisors like Judge Dixon. He wants new rules and his article The "Deepfake Defense" discusses three proposals: Grimm and Grossman's, Delfino's and LaMonica's. [These proposals are all discussed in Part Two of this memo.] Here is Judge Dixon's conclusion in his article:

> As technology advances, deepfakes will improve and become more difficult to detect. Presently, the general population is not able to identify a deepfake created

> with current technology. AI technology has reached the stage where the technology needed to detect a deepfake must be more sophisticated than the technology that created the deepfake. So, in the absence of a uniform approach in the courtroom for the admission or exclusion of audio or video evidence where there are credible arguments on both sides that the evidence is fake or authentic, the default position, unfortunately, may be to let the jury decide.

Judge Herbert B. Dixon Jr., The "Deepfake Defense."

Professor Capra addressed the new issues raised by electronic evidence decades ago by taking a go-slow approach and waiting to see if trial judges could use existing rules. That worked for him in the past, but that was then, this is now.

Courts in the past were able to adapt and used the old rules well enough. That does not mean that their evidentiary decisions might have been facilitated, and still might be, by some revisions related to digital versus paper. But Capra assumes that since the courts adapted to digital evidence when it became common decades ago, that his "wait and see" approach will work once again. * * * Professor Capra will only say that the past decision to do nothing is "not necessarily dispositive" on AI. That implies it is pretty close to dispositive. The Professor and Committee do not seem t0 appreciate two things:

1) The enormous changes in society and the courts that have taken place since the world switched from paper to digital. That happened in the nineties and early turn of the century. In 2024 we are living in a very different world. 2) The problem of deepfake audio-visuals is new. It is not equivalent to the problems courts have long faced with forged documents, electronic or paper. The change from paper to digital is not comparable to the change from natural to artificial intelligence. AI plays a completely different role in the cases now coming before the courts than has ever been seen before.

Is it really prudent and cautious for the Evidence Rules Committee to take the same approach with AI deepfakes as they did many years ago with digital evidence? AI now plays a completely new role in the evidence of the cases that now come before them. The emotional and prejudicial impact of deepfake audio-visuals is an entirely new and different problem. Plus, the times and circumstances in society have dramatically changed. The assumptions made by Committee Reporter Capra of the equivalence of the technology changes is a fundamental error. With respect, the Committee should reconsider and reverse its decision.

The assumption that the wait and see approach will work again with AI and deepfakes is another serious mistake. It is based on wishful thinking not supported by the

evidence that the cure for deepfakes is just around the corner, that new software will soon be able to detect them. It is also based on wishful thinking that trial judges will again be able to muddle through just fine. Judge Grimm who just recently retired as a very active District Court trial judge disagrees. Judge Dixon who is still serving as a reserve senior trial judge in Washington D.C. disagrees. So do many others. The current rules are a muddled mess that needs to be cleaned up now. With respect, the Committee should reconsider and reverse its decision.

* * *

What are the consequences of continued inaction? What if courts are unable to twist existing rules to screen out fake evidence as Professor Capra hopes? What will happen to our system of justice if use of fake media becomes a common litigation tactic? How will the Liar's Dividend pay out? What happens when susceptible, untrained juries are required to view deep fakes and then asked to do the impossible and disregard them? How can courts function effectively without reliable rules and methods to expose deepfakes? Should we make some rule changes right away to protect the system from collapse? Or should we wait until it all starts to fall apart?

If we cannot reliably determine what is fake and what is true in a court of law, what happens then? Are we not then wide open and without judicial recourse to criminal and enemy state manipulation? Can law enforcement and the courts help stop deepfake lies and propaganda? Can we even have free and fair elections? How can courts function effectively without reliable rules and methods to expose deepfakes? Should we make some rule changes right away to protect the system from collapse? Or should we wait until it all starts to fall apart?

I expect the Rules Committee will follow Capra's advice and do nothing. But 2024 is not over yet and so there is still hope.

What Comes Next?

The next Advisory Committee on Evidence Rules is scheduled for November 8, 2024 in New York, NY and will be open to the public both in-person and online. While observers are welcome, they may only observe, not participate. In addition, we have just learned that Paul Grimm and Maura Grossman have submitted a revised proposal to the Committee, which will be discussed first. This was presumably done at the request of Professor Daniel Capra after some sort of discussion, but that is just speculation.

[This revised proposal is set forth in Part Two of this memo, infra. Obviously, Mr. Losey author favors adoption of the proposal at the earliest possible opportunity.]

Conclusion

The upcoming Evidence Committee meeting is scheduled for November 8th, three days after election day on November 5th. What will our circumstances be? What will the mood of the country be? What will the mood and words be of the two candidates? Will the outcome even be known in three days after the election? Will the country be calm? Or will shock, anger and fear prevail? Will it even be possible for the Committee to meet in New York City on November 8th? And if they do, and approve new rules, will it be too little too late?

Reporter's comment: If only the Reporter had the power that the overheated author subscribes to him. But it is good to know that an immediate amendment to Rule 901 is sufficient to prevent the end of litigation as we know it.

Article: Grimm, Grossman, et. al., ***Deepfakes in Court: How Judges: How Judges Can Proactively Manage Alleged AI-Generated Material in National Security Cases, Northwestern Law & Econ Research Paper No. 24-18, Northwestern Public Law Research Paper No. 24-26, available at https://ssrn.com/abstract=4943841 or http://dx.doi.org/10.2139/***

The authors provide a step-by-step approach for judges to follow when they grapple with the prospect of alleged deepfakes. They recommend that judges go beyond a showing that the evidence is merely more likely than not what it purports to be. Instead, judges must balance, under Rule 403, the risks of negative consequences that could occur if the evidence turns out to be fake. They recommend that courts schedule a pretrial evidentiary hearing far in advance of trial, where both proponents and opponents can make arguments on the admissibility of the evidence in question. They recommend that a judge order a "science day" for experts to school the judge about AI and deepfakes. They conclude that the judge should only admit evidence, allowing the jury to decide its disputed authenticity, after considering under Rule 403 whether its probative value is substantially outweighed by danger of unfair prejudice to the party against whom the evidence will be used. They conclude: "Our suggested approach thus illustrates how judges can protect the integrity of jury deliberations in a manner that is consistent with the current Federal Rules of Evidence and relevant case law."

An article in JDSupra summarizes the Grimm et. al. article with the following points:

1. "While technological solutions such as watermarking have been proposed, they need to be more reliable. AI experts warn that adversaries, including state actors, are creating deepfakes sophisticated enough to evade current detection

methods. For cybersecurity professionals, this presents a direct challenge: ensuring the authenticity of digital content in legal proceedings becomes a more intricate, ongoing battle."

2. "The paper emphasizes the role of expert witnesses in helping courts distinguish between real and AI-generated evidence. However, given the current limitations in AI detection technologies, human experts may still struggle to accurately authenticate evidence."

3. "A concept known as the "Liar's Dividend" presents another critical challenge for the judiciary and eDiscovery experts. As the public becomes more aware of the existence of deepfakes, there is a growing risk that individuals will claim genuine evidence is fake to avoid accountability. This phenomenon, where real evidence is dismissed as AI-generated manipulation, complicates efforts to authenticate digital materials in court."

4. "To mitigate the risks posed by deepfakes, the authors suggest that legal professionals, alongside cybersecurity and eDiscovery specialists, must adopt a more collaborative and technologically informed approach. This risk mitigation includes * * * investing in AI forensics [and] ongoing training.

5. "Cybersecurity experts, legal scholars, and AI researchers must work together to refine best practices for authenticating evidence in a world where deepfakes are increasingly common."

6. "The paper concludes that while AI technology presents new challenges for the legal system, it also offers an opportunity for the courts, supported by cybersecurity and eDiscovery professionals, to evolve. By implementing robust frameworks and staying vigilant, the judicial system can preserve the integrity of trials in the face of rapidly advancing technology."

Reporter's Comment: The obvious question is, if this can be handled under existing rules, how do amendments improve the situation?

• **Article:** ***Courts Remain Skeptical About Lawyers' Use of ChatGPT in Litigation,*** Bloomberg News, September 20, 2024:

Generative artificial intelligence is making a bad first impression in the courts. Manhattan federal judge Edgardo Ramos recently described ChatGPT as an "unreliable resource," and he's not alone in expressing such concern about AI. The recent decisions

addressing use of generative AI by lawyers in New York federal courts demonstrate a persistent skepticism of the technology among the judiciary.

US District Judge Kevin Castel sanctioned lawyers in Mata v. Avianca last year for "abandon[ing] their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT." The case made national headlines.

Since that time, some Manhattan federal judges have shone a bright line against any use of ChatGPT, repeatedly underscoring its purported unreliability beyond the context of basic legal research and citations.

For example, in the aforementioned case of *Z.H. v. N.Y.C. Dep't of Educ*., Judge Ramos admonished a law firm for submitting questions and answers posed to and generated by ChatGPT as evidence of reasonable attorney hourly rates in support of an application by the firm for attorneys' fees.

Ramos afforded no weight to the ChatGPT Q&A and noted that US Magistrate Judge Robyn Tarnofsky in *D.S. v. N.Y.C. Dep't of Educ.* Declined to credit a similar submission by the same lawyers "because ChatGPT has been shown to be an unreliable resource."

Tarnofsky, in turn, supported her conclusion by citing to a line of cases where ChatGPT generated fake legal authorities, among which was *Park v. Kim*, a recent medical malpractice dispute, where the US Court of Appeals for the Second Circuit described how certain technologies that "may produce factually or legally inaccurate content" shouldn't replace "the lawyer's most important asset—the exercise of independent legal judgment."

In JG. V. NYC. Dep't of Educ. Earlier this year, US District Judge Paul Engelmayer took exception to the lawyers' failure to identify the "inputs on which ChatGPT relied" or to address "whether ChatGPT anywhere considered" key legal precedents.

Courts aren't inclined to impose a bright-line rule prohibiting attorneys' use of generative AI. In *Sillam v. Labaton Sucharow*, US Magistrate Judge Ona Wang expressed skepticism about attorneys' use of generative AI tools for brief writing, but maintained that attorneys have a "gatekeeping role" to "ensure the accuracy of their filings." Wang was also critical of the quality of the writing produced by generative AI tools, noting they resulted in "repetitive language" that "only restates general principles of law without making argument."

Likewise, in *Mata,* Judge Castel rejected the application of a bright-line rule against generative AI tools, noting that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance."

● **Article: *Fake Cases, Real Consequences,* ABA Journal, October/November 2024, at 13:**

The article is about generative AI hallucinating cases, citations, etc. It notes that a study conducted at Stanford found that "hallucination rates are alarmingly high for a wide range of verifiable legal facts." Moreover, "these models often lack self-awareness about their errors and tend to reinforce incorrect beliefs, the study found. They exhibit contrafactual bias --- the tendency to assume that a premise in a query is true even if it is flatly wrong."

B. Case Law

● **New Case Rejecting AI-Enhanced Video *Washington v. Puloka*,** No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024). The defendant wanted to present a video that was AI-enhanced. The source video had "motion blur" and the defense expert used a Topaz Labs AI program to increase its resolution, add sharpness and definition, and smooth out the edges of the video images. The trial judge excluded the enhanced video. The court found that the expert was not a forensic video technician and conceded that he was not sure whether the Topaz Labs AI program was used in the forensic video analysis community. The expert could not point to any testing, publications or discussions within the group of users he identified that evaluated the reliability of Topaz. The expert testified that Topaz's AI used machine learning to enhance videos based on images in its training library, but "did not know what videos the AI-enhancement models are 'trained' on, did not know whether such models employ 'generative AI' in their algorithms, and agreed that such algorithms are opaque and proprietary."

The prosecution's expert, a certified forensic video analyst, testified that his focus is on image integrity, rather than the smoothness or attractiveness of the image, and that Topaz added approximately sixteen times the number of pixels than contained in the original source image. The expert demonstrated that Topaz creates "false image detail" which changed the meaning of portions of the video, including altering the shape and color of certain objects. He testified that Topaz removed information from the source video and replaced it with information not contained in it, which prevented the ability to forensically analyze the video. He further noted that Topaz "used an algorithm and enhancement method unknown to and unreviewed by any forensic video expert."

The court stated that, given the "novelty" of the technique, the proponent of the party using such an AI tool must make a "showing that the expert's opinion or theory is based on a methodology accepted in the relevant community" (because Washington is a *Frye* state) and, in this case, the AI technology is not generally accepted by that community. The court stated that the AI-enhanced video "does not show with integrity what actually happened but uses opaque methods to represent what the AI 'thinks' should be shown."

> ***Reporter's Comment:*** The court is obviously not saying that "AI is inadmissible." Rather, AI, to be admissible, must be properly validated like any other expert evidence. The big problem here was that the software was being used for a purpose for which it was not really intended --- a problem called "function creep." There is ample authority in Rule 702 to exclude such misapplied expertise. There are many cases in which an expert has been excluded when applying a methodology to an inquiry for which the methodology was not intended. *See, e.g.*, *Braun v. Lorillard, Inc.*, 84 F.3d 230 (7th Cir. 1996) (expert testimony properly excluded where the expert applied tests to human tissues when the test was designed to detect asbestos in building materials).

● **Cases Rejecting ChatGPT-based Evidence:**

A number of recent courts have rejected evidence that was generated by ChatGPT. For example, the court in *J.G. v. New York City Dept. of Educ.*, 2024 WL 728626 (S.D.N.Y. Feb. 22, 2024) rejected the use of AI to substantiate hourly rate data in order to support an attorneys' fee application, stating:

> In claiming here that ChatGPT supports the fee award it urges, the Cuddy Law Firm does not identify the inputs on which ChatGPT relied. It does not reveal whether any of these were similarly imaginary. It does not reveal whether ChatGPT anywhere considered a very real and relevant data point: the uniform bloc of precedent, canvassed below, in which courts in this District and Circuit have rejected as excessive the billing rates the Cuddy Law Firm urges for its timekeepers. The Court therefore rejects out of hand ChatGPT's conclusions as to the appropriate billing rates here. Barring a paradigm shift in the reliability of this tool, the Cuddy Law Firm is well advised to excise references to ChatGPT from future fee applications.

See also S. v. New York City Dept. of Educ., 2024 WL 2159785 at *6 (S.D.N.Y. Apr. 29, 2024), (report and recommendation) ("Specifically, CLF references the artificial intelligence tool "ChatGPT." CLF relies on ChatGPT's feedback to demonstrate what a client's search may provide when attempting to determine hourly rates for IDEA litigation. Here, CLF's reliance on ChatGPT is inappropriate, because ChatGPT has been shown to be an unreliable resource.").

• **Copyright Case Applying Rule 702 to AI:** ***Bertuccelli v. Universal City Studios LLC***, 2020 WL 6156821 (E.D. La. Oct. 21, 2020). This is a case in which facial recognition technology was used to determine whether competing Mardi Gras masks were substantially similar. The court allowed the AI-based testimony.

> The Court also finds Dr. Griffor is qualified to testify as an expert. Dr. Griffor is the Associate Director for Cyber-Physical Systems at the National Institute of Standards and Technology (NIST) in Washington, DC, and holds a Ph.D. in Mathematics from the Massachusetts Institute of Technology, and a Habilitation/European Doctor's Degree in Electrical Engineering and Mathematics from the University of Oslo. Dr. Griffor has experience with algorithmic reasoning for artificial intelligence-enabled driving systems, including facial recognition technology and is considered an expert in the field of facial target recognition. The Court finds Dr. Griffor's methodology reliable given that he conducted an artificial intelligence assisted facial recognition analysis of the King Cake Baby and Happy Death Day mask to determine whether the use of mathematics and target facial recognition algorithms comparing the two works would find that human perception would view the works as substantially similar. Accordingly, the Court finds Dr. Griffor is qualified to testify as an expert in this case.

● **Court Rejects Deeper Inquiry into AI Program:** ***United States v. Nelson*****, 533 F. Supp. 3d 779, 798 (N.D. Cal. 2021)**: In a racketeering case, the defendant challenged an expert's testimony on cell-site location. The particular program used was called "Enterprise Sensor Processing Analytic" (ESPA). The defendant argued that he was entitled to a more detailed description of, and access to, the software. The court rejected the challenge. It stated that "the apparent absence of any inaccuracies in Ms. Sparano's presentation strongly suggests that even if ESPA operates like a 'black box,' the defendants have not been harmed by their lack of direct access to the program." It concluded that the demand for more information about the AI program would essentially open the floodgates:

> Informing the Court's conclusion are the sweeping and counterintuitive implications of Defendants' position on the ESPA issue. If courts required expert witnesses to possess expert knowledge of "the software used to generate" demonstrative exhibits such as maps, as Defendants suggest they should, then law-enforcement and intelligence officials would almost always be barred from relying on such commonplace exhibits at trial. Similarly, anyone who testifies using any basic software such as Excel to provide financial analysis would be required to be an expert in the algorithms by which Excel codes its formula and calculations. As a result, no expert utilizing any technological tools would be permitted to testify without also being an expert software engineer. The Federal Rules of Evidence do not mandate such an absurd result.

II. Proposals for Rule Amendments

There are several proposals for AI-related rules amendments for the Committee's consideration. Some of these have already been set forth in the memo for the Spring meeting; but because they were not formally and specifically considered, they are included here again. Others are revisions in response to the Committee's prior review of the proposal.

The question for the Committee is whether any or these proposals merits further development and formal presentation with a proposed Committee Note at a later meeting.

A. REVISED Proposed Modification of Current Fed. R. Evid. 901(b)(9) for AI Evidence and Proposed New Fed. R. Evid. 901(c) for Alleged "Deepfake" Evidence

Submitted by Paul W. Grimm and Maura R. Grossman

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

(9) *Evidence about a Process or System*. For an item generated by a process or system:

(A) evidence describing it and showing that it produces ~~an accurate~~ **a valid and reliable** result; and

(B) if the proponent acknowledges that the item was generated by artificial intelligence, additional evidence that:

(i) describes the training data and software or program that was used; and

(ii) shows that they produced valid and reliable results in this instance.

Proposed New Rule 901(c) to address "Deepfakes":

901(c): ***Potentially Fabricated or Altered Evidence Created By Artificial Intelligence.***

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [3], the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

Supporting Statement by Grimm and Grossman

Amendment to Rule 901(b)(9)

Given the complexities and challenges presented by using AI-generated evidence, rule changes that set a standard for what is sufficient to authenticate such evidence would be extremely helpful. Because AI-generated evidence is, by definition, evidence produced by a system or process, the proposal adds a subsection (B) to existing Fed. R. Evid. 901(b)(9) to set a standard for authenticating evidence that the proponent acknowledges is AI-generated. The proposed revision substitutes the words "valid" and "reliable" for "accurate" in existing Rule 901(b)(9), because evidence can be "accurate" in some instances but inaccurate in others (such as a broken watch that "accurately" tells the time twice a day, but is otherwise not a reliable means of ascertaining the time). In addition, the terms "valid" and "reliable" are less vague and ambiguous than the term "accurate," and are the terms used in the relevant scientific community. Similarly, "reliability" of scientific, technical, and specialized methodology is the standard required by Fed. R. Evid. 702 for admissibility of expert evidence.

[3] "There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience." ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 512. Generative Artificial Intelligence Tools, July 29, 2024, at note 1 (internal citations omitted). Generative AI "(GAI) . . . can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions." *Id* at 1 (citing George Lawton, *What is Generative AI? Everything you Need to Know*, TechTarget (July 12, 2024), https://techtarget.com/searchenterpriseai/definition/generative-AI).

For acknowledged AI-generated evidence, the proposed rule change would identify a sufficient means for authentication of that evidence. It would require the proponent to (i) describe the training data and software or program that was used to create the evidence, and (ii) show that it produced *valid* and *reliable* results in the particular case setting in which it is being offered. *Valid* evidence is evidence that produces accurate results, meaning that the AI system or process measures or predicts what it is designed to measure or predict, and *reliable* evidence is that which produces consistently accurate results when applied to similar facts and circumstances. Both are necessary to ensure authenticity of AI-generated evidence, but the terms "accurate" or "reliable" alone do not clearly convey that.

Addition of New Rule 901(c)

A separate, new rule is required to address the relatively recent phenomenon of AI-generated "deepfakes," which, due to rapidly improving generative AI software applications, are capable of altering existing or producing fabricated images, videos, audio recordings, or audiovisual recordings that are so realistic that it is becoming increasingly difficult to differentiate between authentic evidence and altered or fabricated evidence. A separate, new rule is needed for such altered or fake evidence, because when it is offered, the parties will disagree about the fundamental nature of the evidence. The opposing party will challenge the authenticity of the evidence and claim that it is AI-generated material, in whole or in part, and therefore, fake, while the proponent will insist that it is not AI-generated, but instead that it is simply a photograph or video (for example, one taken using a "smart phone"), or an audio recording (such as one left on voice mail), or an audiovisual recording (such as one filmed using a digital camera). Because the parties fundamentally disagree about the very nature of the evidence, the proposed rule change for authenticating acknowledged AI-generated evidence will not work.

Our proposal creates a new Fed. R. Evid. 901(c), as opposed to an addition to Rule 901(b)(9). The proponent of evidence challenged as AI-generated material may choose to authenticate it by many means other than Rule 901(b)(9), which focuses on evidence generated by a "system or process." For example, the proponent might choose to authenticate an audio recording under Fed. R. Evid. 901(b)(5) (opinion as to voice) or Fed. R. Evid. 901(b)(3) (comparison of evidence known to be authentic with other evidence the authenticity of which is questioned). The new Rule 901(c) would cover all deepfake disputes regardless of how the item is purportedly authenticated.

The proposed new rule does not use the word "deepfake," because it is not a technical term, but rather describes evidence that is either "computer-generated" (which encompasses AI-generated evidence) or "electronic evidence," which encompasses other forms of electronic evidence that may not be AI-generated (such as digital photographs or recordings).

The proposed new rule places the burden on the party challenging the authenticity of computer-generated or electronic evidence as AI-generated material to make a showing to the court that a jury reasonably could find (but is not required to find) that it is either altered or fabricated, in whole or in part. This approach recognizes that the facts underlying whether the evidence is authentic or fake may be challenged, in which case the judge's role under Fed. R. Evid. 104(a) is limited to preliminarily evaluating the evidence supporting and challenging authenticity, and determining whether a reasonable jury could find by a preponderance of the evidence that the proffered evidence is authentic. If the answer is "yes" then, pursuant to Fed. R. Evid. 104(b), the judge ordinarily would be required to submit the evidence to the jury under the doctrine of relevance conditioned upon a finding of fact, *i.e.*, Fed. R. Evid. 104(b).

But because deepfakes are getting harder and harder to detect, and because they often can be so graphic or have such a profound impact that the jury may be unable to ignore or disregard the impact even of generative AI shown to be fake once they have already seen it, a new rule is warranted that places more limits on what evidence the jury will be allowed to see. *See generally* Taurus Myhand, *Once The Jury Sees It, The Jury Can't Unsee It: The Challenge Trial Judges Face When Authenticating Video Evidence in The Age of Deepfakes*, 29 Widener L. Rev. 171, 174-5 (2023) ("The dangerousness of deepfake videos lie in the incomparable impact these videos have on human perception. Videos are not merely illustrative of a witnesses' testimony, but often serve as independent sources of substantive information for the trier of fact. Since people tend to believe what they see, 'images and other forms of digital media are often accepted at face value.' 'Regardless of what a person says, the ability to visualize something is uniquely believable.' Video evidence is more cognitively and emotionally arousing to the trier of fact, giving the impression that they are observing activity or events more directly.") (Internal citations omitted).

If the judge is required by Fed. R. Evid. 104(b) to let the jury decide if image, audio, video, or audiovisual evidence is authentic or fake when there is evidence supporting each outcome, the jury is then in danger of being exposed to evidence that they cannot "un-remember," even if the jurors have been warned or believe it may be fake. This presents an issue of potential prejudice that ordinarily would be addressed under Fed. R. Evid. 403. But Rule 403 assumes that the evidence is "relevant" in the first instance, and only then can the judge weigh its probative value against the danger of unfair prejudice. But when the very question of relevance turns on resolving disputed evidence, the current rules of evidence create an evidentiary "Catch 22" --- the judge must let the jury see the disputed evidence on authenticity for their resolution of the authenticity challenge (*see* Fed. R. Evid. 104(b)), but that exposes them to a source of evidence that may irrevocably alter their perception of the case even if they find it to be inauthentic.

The proposed new Fed. R. Evid. 901(c) solves this "Catch 22" problem. It requires the party challenging the evidence as altered or fake to demonstrate to the judge that a reasonable jury could find that the challenged evidence has been altered or is fake. The judge is not required to make the finding that it is, only that a reasonable jury could so find. This is similar to the approach that the Supreme Court approved regarding Fed. R. Evid. 404(b) evidence (*i.e.*, other crimes, wrongs, or acts evidence) in *Huddleston v. United States*, 108 S. Ct. 1496, 1502 (1988) and the Third Circuit approved regarding Fed. R. Evid. 415 evidence (*i.e.*, similar acts in civil cases involving sexual assault or child molestation) in *Johnson v. Elk Lake School District*, 283 F. 3d 138, 143-44 (3d. Cir. 2002).

Under the proposed new rule, if the judge makes the preliminary finding that a jury reasonably could find that the evidence has been altered or is fake, the judge would be permitted to exclude the evidence (without sending it to the jury), *but only if the proponent of the evidence cannot show that its probative value exceeds its prejudicial impact*. The proponent could make such a showing by offering additional facts that corroborate the information contained in the challenged image, video, audio, or audiovisual material. This is a fairer balancing test than Fed. R. Evid. 403, which leans strongly towards admissibility. Further, the proposed new balancing test already is recognized as appropriate in other circumstances. *See, e.g.*, Fed. R. Evid. 609(a)(1)(B) (requiring the court to permit a criminal defendant who testifies to be impeached with a prior felony conviction only if "the probative value of the evidence outweighs its prejudicial effect to that defendant").

The proposed new rule has other advantages as well. While it requires the party challenging the evidence as a deepfake to demonstrate facts (not conclusory or speculative arguments) from which the judge could find that a reasonable jury *could* find the evidence to be altered or fake, this does not require them to persuade the judge that it actually has been altered or is fake, which lessens the burden on the challenging party to make a sufficient initial challenge. Under an approach already recognized in *Huddleston* and *Johnson*, the proposed new rule only requires the judge to determine whether a jury reasonably could find that the evidence was altered or fake, at which time the proponent would then be required to show that the probative value of the evidence is greater than its potential prejudicial impact. This determination would be made by the judge.

Finally, the proposed new rule also has the benefit of not imposing any initial obligation on the proponent of the evidence to authenticate the evidence in any particular way. The proponent can choose from any of the authentication methods illustrated in Fed. R. Evid. 901(b) and 902, or any other means of showing that the evidence is what it purports to be. If, under the new proposed rule, the party challenging the evidence as a deepfake then succeeds in making the showing that the trier of fact reasonably could find the challenged evidence to be altered or fake, the proponent would then have an opportunity to corroborate or bolster the authenticating

evidence, and the judge would then apply the new balancing test. This fairly allocates the competing burdens on the proponent and challenging parties and outlines the role of the judge in screening for unfair prejudice without the need to send the disputed facts and potentially misleadingly prejudicial evidence to the jury.

Reporter's Comment on the Grimm/Grossman Revised Proposal:

The proposal addresses the two major evidentiary concerns posed by AI: 1. The proposal to amend Rule 901(b)(9) addresses the reliability of machine learning output; and 2. New Rule 901(c) provides a process for dealing with deepfakes, and gives the court a means for handling a blanket "it's a deepfake" claim for every audio and video. If the Committee decides to address AI, the Grimm/Grossman proposal has a lot of merit. It is concise, it sets forth a structure, and it is well-crafted. It is, at the very least, a great starting point.

There are some questions to answer in reaching agreement on this rule, however:

1) General Point About Coverage. There is a problem in defining the coverage of the proposal. Originally the proposal was written to cover all "computer-generated" evidence. My response to that proposal was that it would cover a lot of evidence that is not deepfake-related or machine-learning created. For example, over the last 20 years there have been hundreds of examples of litigants arguing that "somebody hacked into my Facebook account"; "somebody faked my text", etc. *See, e.g.*, *United States v. Recio*, 884 F.3d 230 (4th Cir. 2018) (Facebook posts found authentic over an unsubstantiated claim by the defendant that his account was hacked); *United States v. Peterson*, 945 F.3d 144 (4th Cir. 2019) (defendant may not demonstrate to the jury how easy it is to fake a text, where there was no indication that the defendant was a victim of text manipulation). All of the social media/text/email evidence is "computer-generated" and charges of "faking" have been well-handled by the courts. It could be disruptive to apply a new standard to social media-type evidence when the goal is to address AI deepfakes. That is true both for Rule 901(b)(9) and 901(c) --- but especially for 901(c), which would apply an extra step of having to find that probative value outweighs prejudice, which the courts are definitely not doing for claims of Facebook hacking.

That means that the coverage of the rule should be specifically addressed to AI-generated evidence. But that creates a new problem, because there is some dispute about what the term "Artificial Intelligence" covers --- and the term is dynamic. It's an umbrella term that may cover different processes in the future. (For example, what we have now is "Narrow AI" developed as an aid to human thought. But what is in the offing is "Artificial General Intelligence" which greatly exceeds the cognitive performance of humans.)

The problem of describing proper coverage is not fatal, though. AI could be defined well enough in a Committee Note, and the term "artificial intelligence" is used sufficiently frequently

in discourse, that it may be workable for a rule. The fact that computer nerds might quibble with the term does not mean it is unworkable for courts and litigants. In the end, it seems important to limit the amendment to AI-generated evidence, as opposed to all computerized evidence, as that broader term is likely to be disruptive of existing case law. Whether the term "artificial intelligence" is used, and whether an alternative term is better, is the kind of question that might well benefit from public comment.

It is notable that the proposed AI legislation in New York uses the term "artificial intelligence" throughout. It also uses, as a kind of equivalent, the term "automated system." Perhaps that is an alternative that can be used if the Committee goes forward with an amendment (although "automated system" would seem to cover social media as well).

The proposed amendments set forth below use the term "artificial intelligence" as an alternative, with an explanation in the Committee Note of what is intended by the term.

2) Rule 901(b)(9): The proposal to amend Rule 901(b)(9) essentially seeks to impose reliability guarantees on machine learning outputs. One problem with adding reliability requirements to *authentication* standards is that you are stuck with the low Rule 104(b) standard --- unless you want to specifically change it, which Grimm and Grossman do not suggest. More importantly*, authenticity is not about reliability*. It is about whether the item is what you say it is. If I wanted to admit a document that is probative *because* it is false and unreliable, I would authenticate by showing that it was prepared in an unreliable manner. If I wanted to admit a ChatGPT transmission *because* it was a hallucination, I would not be trying to show a system that leads to reliable results.

When we think of reliability problems inherent in machine learning, the better analog is surely Rule 702. There, the proponent must satisfy a preponderance standard. And Rule 702-type principles are obviously pertinent because the jury will treat machine learning output as the equivalent of expert testimony. And those 702-type standards are the ones being applied by courts to machine learning evidence today.[4] That 702 analysis works well when there is a live expert testifying to the machine learning output. While Rule 702 refers to "witnesses" and machines are not really witnesses, the solution for admitting machine-learning evidence without witness accompaniment could be to have an independent rule specifically about machine learning that incorporates the reliability requirements of Rule 702. That alternative --- a new Rule 707 --- is discussed below.

Thus, it seems like amending Rule 901(b) is not the optimal solution for machine learning evidence. It could be argued, though, that the specific reliability requirements of the Grimm-

[4] *See, e.g.*, *Washington v. Puloka*, No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024) (applying expert reliability requirements to machine learning outputs).

Grossman proposal might be useful as a kind of belt and suspenders regulation of machine learning evidence. Though it seems complex to have two separate reliability requirements covering the same piece of evidence, one applying Rule 104(a) and the other applying Rule 104(b).

But let's assume that Rule 707 is not proposed, and let's assume the Committee wants to propose a rule to regulate machine-learning evidence. If all that is so, then some reliability standards to cover machine evidence could be placed in Rule 901(b)(9). The Grimm-Grossman proposal is a good starting point because it helpfully requires a description of the software and a demonstration of how it reached a reliable result in this instance.

But some questions remain. First, the proposal distinguishes the terms "validity," "reliability," and "accuracy." Those distinctions are complicated. As to validity and reliability, the current rules --- most importantly Rule 702 --- use the term reliability. Certainly there are those who can draw a distinction between validity and reliability, but is it worth it? As Grimm and Grossman describe it above, the term "validity" is just a subset of "reliability" and there would be little payoff in making that distinction.

The term "validity" is used in the Evidence Rules only in the context of "validity of the claim" as in Rule 408. In this proposal, validity is used as a scientific term and it does not appear that it adds much to the rule. Thus the Committee may wish to *delete the reference to validity* and stay with "reliability."

As to "accuracy," the proposal rejects the term, but in fact there is a good deal of material on machine learning that emphasizes "accuracy." *See, e.g.*, https://www.evidentlyai.com/classification-metrics/accuracy-precision-recall ("Accuracy is a metric that measures how often a machine learning model correctly predicts the outcome. You can calculate accuracy by dividing the number of correct predictions by the total number of predictions. In other words, accuracy answers the question: how often the model is right?"). Grimm and Grossman say that a broken clock is accurate twice a day, but all that means is that it has a low rate of accuracy. That doesn't seem on its own to be a reason to delete the term "accuracy" from the existing text. It is notable that the definition of "validity" and "reliability" propounded by Grimm and Grossman above both use the term "accurate."

On the other hand, using "accuracy" and "reliability" as different terms in the same rule may well result in confusion. The goal is to describe the requirement in a way that is basically correct and commonly understood by lawyers and judges. The whole area is complicated enough without adding distinctions that may not make a difference.

Probably the best result is to stick with the single term "reliable" throughout. That is certainly the best connection to Rule 702-type principles. That is the solution employed in the drafting alternatives at the end of this memo.

3) The Need for Rule 901(c): The proposed Rule 901(c) addresses an important problem: how to regulate an automatic objection "it's a deepfake" for every offered audio or visual presentation. The question is whether those blanket claims present a problem that might be handled by the courts under the existing Rule 901. As discussed below, a similar concern arose during the rise of texts and social media: the concern that every opponent would argue "my Facebook post was hacked, my text was hacked" and so on. It turned out that courts handled that wave of objections by holding that something more than a mere assertion was necessary before an inquiry would be taken into the authenticity of texts and social media. Courts have specifically rejected blanket claims like "my account was hacked" --- because such an argument can always be made. Thus, courts have consistently held that "the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents."[5] Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information.[6] The opponent has a burden of going forward.

The question is whether courts will similarly be able to handle blanket claims of "it's a deepfake" under the existing rule. There are good arguments on both sides. The argument for no change is that courts handled the previous wave just fine, so there is no need to be concerned about such blanket arguments when it comes to deepfakes. The argument for a new rule is that deepfakes are extremely hard to detect, and while hacking Facebook posts might be a rare occurrence, the potential use of deepfakes could well be broader and wider. Moreover, a concrete standard for justifying an inquiry --- such as that set forth in the proposal --- could be more useful to the court than the general standards that can be found only in the case law. Grimm and Grossman set forth a specific standard necessary to trigger a deepfake enquiry (i.e., a prima facie case of AI distortion); the courts currently do not use a specific uniform standard to trigger an enquiry into fakery.

One could argue that resolving the argument about the necessity of the rule should be delayed until courts actually start dealing on a regular basis with deepfakes. At that point it can be determined how necessary a rule amendment really is. Moreover, the possible prevalence of deepfakes might be countered in court by the use of watermarks and hash fingerprints that will assure authenticity. Again, the effectiveness of these countermeasures will only be determined after a waiting period.

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[5] *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

[6] *See* Grimm, Capra and Joseph, *Authenticating Digital Evidence,* 69 Baylor L. Rev. 1, 3-5 (2017) (reviewing the showing necessary for an inquiry into falsification of digital evidence).

That said, the slowness of the rulemaking process might ironically be a factor that would justify action at the next meeting. The Committee could propose a rule for public comment at the next meeting, and it would be another whole year before the Committee would revisit the rule. If there was no significant deepfake activity in the courts by then, that would be a reason to pause. If courts were having trouble with deepfakes during that year, that could be a reason to keep going. And the public comment on an AI proposal is sure to be massive and hopefully helpful. So there is much to be said for agreeing upon language and putting out a proposal at the next meeting.

4) The Rule 901(c) Trigger: Assuming that courts could use help to deal with blanket claims of "deepfake," the *first step* provided by Grimm and Grossman is a very good one: the opponent must provide evidence sufficient for a reasonable person to find that the item is a deepfake. That prima facie standard is part of the revision of the proposal previously submitted to the Committee. At the last meeting, the proposal required the proponent to show *more likely than not* that the item is a deepfake, and the Committee found that that standard was too high. Reducing the standard to a prima facie case makes sense as an accommodation between the parties. It means that enquiries will not be automatic, but also that they will not be too hard to trigger. That's a big step forward.

5) The Rule 901(c) Balancing Test: The balancing test in the proposal --- applied when the burden-shifting trigger is met --- is that the "probative value" must outweigh the "prejudicial effect." It seems, though, that importing this standard confuses authenticity with the probative value and prejudicial effect attendant to the item itself. Authenticity is a question of conditional relevance, whereas probative value is about assessing how far the content of the item advances the case *once it has been found authentic*. If a picture shows a defendant punching a victim, in an assault prosecution, it is undeniably highly probative and not prejudicial at all. What about if it is fake? That is a question of authenticity, which is one of *conditional relevancy.* It is relevant only if it is authentic. Does it work to then make this question of conditional relevance dependent on a showing that probative value substantially outweighs the prejudice? It arguably confuses matters. Put another way, the probative value of the evidence can only logically be assessed *after* it is determined to be authentic. Having authenticity depend on probative value is a pretty complicated endeavor. A court should not have to balance probative value and prejudicial effect as part of the deepfake inquiry, and then apply Rule 403 to the content of the item.

In fact it is hard to see what the court is to consider when balancing probative value and prejudicial effect at the authenticity level. What exactly would be prejudicial? Presumably it would be something independent of the content of the item. Perhaps the prejudice is that the jury would find something to be authentic when in fact it was a deep fake. But isn't that exactly what the court is determining when it decides that the item is authentic? Maybe the response would be that the decision is made at the low Rule 104(b) level. But surely the more direct solution is to ratchet up the standard of proof so as to reduce the "prejudice," not to worry about prejudicial effect that will

occur when the jury sees the evidence and thinks it is authentic when it is not. And what exactly is the probative value that is evaluated at the authenticity level? It is not about the content itself, as that would be a separate Rule 403 question. Rather it must be the strength of the inference that the item is not a deepfake. But again, this is what is to be decided at the authenticity level; there is no point in talking about "probative value" in this way, independent of the content of the item.

At any rate, there is nothing in the text of the proposal which helps the court to figure out what probative value and prejudicial effect is supposed to mean at the authenticity level. So a Committee Note will have to try to explicate what is a very complicated, two-level use of probative value and prejudicial effect --- once as to authenticity and then once as to the content of the item.

An alternative that stays within the confines of authenticity is to provide that once the opponent makes a showing sufficient to justify an inquiry, i.e., "enough for the jury to find that the item was generated by artificial intelligence" then the proponent has the burden of showing the court, under Rule 104(a), that it is *more likely than not that the item is authentic.* Such a proposal would read as follows:

> **If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.**

This burden-shifting alternative on the question of authenticity --- once the opponent has made a prima facie case, the proponent has to establish authenticity more likely than not --- may be questioned because it imports a Rule 104(a) standard for an authenticity question, while all other authenticity questions are decided under Rule 104(b). But that differentiation may be justified by the problems inherent in detecting deepfakes. And heightening the standard makes sense after the opponent has provide a prima facie case of fakery. After that triggering requirement is met, the proponent should have to show *something* more than the Rule 104(b) standard of authenticity. The logical conclusion is that the proponent must show authenticity by a preponderance of the evidence. Note that the Rule 104(a) standard only applies if the opponent makes the initial showing of fakery. If that showing is not made, then the proponent authenticates under the Rule104(b) standard.

B. Professor Roth's Proposed Amendments to Address Machine Learning Evidence

At a Committee meeting last year, Professor Andrea Roth proposed changes to the Federal Rules to give courts the tools to regulate machine-learning output. In broad summary, her basic

concern is that now many machines are thinking like people, and are making out of court statements like people would. For real people, the solution to such out of court statements is cross-examination. But the hearsay rule does not work well for machine-based outputs, because machines cannot be cross-examined. So in the absence of hearsay regulation, what can be added to the rule that would regulate the reliability problems inherent in machine-generated information? (Those problems include subjective selection and interpretation of data, contextual bias, applying learning to areas not originally envisioned, and inaccessibility to source codes and data collection practices).

Professor Roth initially proposed an addition to Rule 702, as seen below. After discussions with the Reporter, another alternative was put forth --- a new Rule 707. Both proposals are discussed immediately below.

1. Proposed amendment to Rule 702 (and in the alternative, a free-standing rule incorporating Rule 702 standards for machine-learning).

Professor Roth recommends as one alternative an addition to Rule 702. It would be a new subdivision, independent from the current rule. This would require some stylistic reconstruction of the existing rule. The proposed addition is as follows:

> 2) Where the output of a process or system would be subject to part (1) if testified to by a human witness, the proponent must demonstrate to the court that it is more likely than not that:
>
> (A) The output will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (B) The output is based on sufficient and pertinent inputs and data, and the opponent has reasonable access to those inputs and data;
>
> (C) The output is the product of reliable principles and methods; and
>
> (D) The output reflects a reliable application of the principles and methods to the facts of the case, based on the process or system's demonstrated reliability under circumstances or conditions substantially similar to those in the case.

(3) The output of basic scientific instruments and tools are not subject to the requirements of this rule.

Reporter's Comment

1. The proposal addresses what appears to be a gap in the rules. Expert witnesses must satisfy reliability requirements for their opinions, but it is a stretch, to say the least, to call machine learning output an "opinion of an expert witness." Machine output is explicitly regulated today, as a matter of authenticity, by Rule 901(b)(9): the proponent must show that evidence of a machine process "produces an accurate result." But that authenticity standard is the mild one of Rule 104(b). And nothing in Rule 901(b) specifically requires the kind of showing on reliability that must be made with respect to a human expert under Rule 702. The goal of the proposal is to apply *Daubert*-like requirements to machine learning evidence.

2. Professor Roth's proposal basically applies the existing Rule 702 to machine learning. The additions are that: a) facts or data is now "inputs and data"; b) the opponent must have reasonable access to those inputs and data; and c) the reliable application prong must be evaluated "based on the process or system's demonstrated reliability under circumstances or conditions substantially similar to those in the case." There is a good argument that these are helpful tweaks, but perhaps they are sufficiently well-placed in the Note if the payoff is a less complicated drafting solution. See possible Rule 707 below for the simpler alternative. (Also, as discussed elsewhere in this memo, a requirement of reasonable access to inputs and data may raise questions of jurisdiction with the Criminal and Civil Rules Committees.)

3. There is a rulemaking problem in amending Rule 702 so soon after the 2023 amendment. Generally it is a bad idea to keep tinkering with a rule. That could be explained here by the fact that AI-related evidence is a concept that exploded only recently --- after the 2023 amendment had been proposed for public comment. All that said, if the Committee is interested in a Rule 702-type solution to AI evidence, then the better path is probably to add a completely new rule to govern machine-learning evidence. *See* draft Rule 707, below.

4. The new rule alternative would incorporate the Rule 702 standards whenever a machine makes a statement that would be expert testimony if coming from a human. The basis for such a rule would be that the concerns about machine-learning are reliability-based. Ben Studdard, in the Georgia Handbook on Criminal Evidence, puts it this way:

> The issues implicated in AI-generated evidence are remarkably similar to those raised by Rule 702, which governs the admissibility of expert opinion testimony. * * * It would seem logical for courts to apply a similar analysis to AI-generated evidence. Perhaps in the future an analogous rule will be written to cover what will undoubtedly become a common category of evidence.

Here is what a new rule could look like:

Rule 707. Machine-generated Evidence

> Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

Reporter's Comment:

It doesn't help to restate all the Rule 702 requirements in this new rule. And if different standards were articulated, questions would be created about how to handle an overlap. Thus a simple absorption of Rule 702 avoids difficult textual problems of either repeating or subtly changing the Rule 702 requirements as applied to machine-learning.

You could add guidance in the Committee Note to describe just how the machine data should be evaluated at a *Daubert* hearing --- including, if Committee members agree, a statement that the opponent must get reasonable access to the inputs and data.

The last sentence of the text is to assure that the rule is not needed when the output is simple machine data, (e.g., an altimeter) or basic software (e.g. Excel). Though it might be sufficient to make that statement in the Committee Note rather than text, because it seems extremely unlikely for a court to look at this rule and say, "yes, let's do a *Daubert* hearing on the thermometer reading."

Here is a draft Committee Note for the Rule 707 alternative.[7]

Draft Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information, from software-driven blood-alcohol concentration results to probabilistic genotyping software. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where an expert relies on such a method, the method – and the expert's reliance on it – will be scrutinized pursuant to Rule 702. But if machine or software output is presented on its own, without the accompaniment of a human expert, Rule 702 is not obviously applicable. Yet

[7] Thanks to Professor Andrea Roth and Dr. Timothy Lau for their assistance in correcting my mistakes in the first draft of this Note.

it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered directly, it is subject to the requirements of Rule 702 (a)-(d).

It is anticipated that a Rule 707 analysis will involve the following, where applicable:

• Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

• [Ensuring that the opponent has been provided sufficient access to the program, and that independent researchers have had sufficient access to the program, to allow both adversarial scrutiny and sufficient peer review beyond simply validation studies conducted by the developer or related entities. Where a developer has declined to make a research license or equivalent access widely available to independent researchers, courts should be wary of allowing output from such a process.]

• Considering whether the process has been validated in circumstances sufficiently similar to the case at hand. For example, if the case at hand involves a DNA mixture of several contributors, likely related to each other, and a low quantity of DNA, the software should be shown to be valid in those circumstances before being admitted.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over machine output that is regularly relied upon in commercial contexts outside litigation and that, as a result, is not likely to render output that is invalid for the purpose it is offered. Examples might include the results of a mercury-based thermometer, battery-operated digital thermometer, or automated averaging of data in a spreadsheet, in the absence of evidence of untrustworthiness.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

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2. Proposed amendment to Rule 806. Professor Roth suggests that Rule 806 be amended to allow opponents to "impeach" machine output in the same way as they would impeach hearsay testimony from a human witness. She proposes an additional subsection to Rule 806:

(2) When output of a process or system has been admitted in evidence, and would be a hearsay statement if uttered by a human declarant, the output's accuracy may be attacked, and then supported, by any evidence that would be admissible for those purposes if the output had been uttered by a human declarant. The court may admit evidence of the process or system's inconsistent output, or prior false output where probative of the admitted output's accuracy, for these purposes as well.

Reporter's Comment: The goal here is to treat machine learning --- which is thinking like a human --- the same way that a human declarant may be treated. But not all forms of impeachment are properly applicable to machine learning. For example, it would seem that a machine doesn't have a character for truthfulness; prior convictions and bad acts of a machine do not exist. Presumably the machine could make a prior inconsistent statement. A machine output could be contradicted. A machine output can definitely be impaired by bias, at least speaking broadly, if it is relying on data that is affected by bias. And finally, it seems unlikely that a machine can be impeached by incapacity (ability to recall and relate).

The question is whether a confusing signal is given by applying Rule 806 wholesale to machine-learning evidence, when in fact not all the forms of impeachment are workable as applied to machines. There is a good argument that any type of "impeachment" of machines that can occur is already governed as to human witnesses by Rule 403. If, for example, the opponent wants to admit prior inconsistent or false output of a machine, that is certainly relevant evidence and the court doesn't need a special rule to admit it. (It's not barred by the hearsay rule because it is offered to show inconsistency or falsity, not underlying truth.) And impeachment of a witness for bias and contradiction are already covered by Rule 403 anyway, and so, by analogy, that rule should apply to bias and contradiction evidence with respect to machine learning. In sum, it seems that Rule 403 provides all the necessary tools to impeach machine output, as all the methods that are applicable to machines would be the ones currently governed by Rule 403. Moreover, it is not ideal to place the rules on impeaching machines in Article 8 as the whole point is that the hearsay rule is not directed to machine-based evidence, because you can't cross-examine a machine.

3. Rule 901(b)(9). Professor Roth suggests adding standards to the basic authentication rule for machine-based evidence.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces a ~~an accurate~~ reliable result, including, with the exception of basic scientific instruments, all of the following:

(A) that the opponent had fair pretrial access to the process or system;

(B) in a criminal case, the proponent has disclosed all previous output of the process or system that, if the process or system were a human witness, would be disclosable under 18 U.S.C. §3500;

(C) that the process or system has been shown through testing by a financially and otherwise independent entity to produce an accurate result under conditions substantially similar to the instant case;

(D) that the process or system, or a license to use it, is accessible to independent research bodies, including the National Institute of Standards and Technology and accredited educational institutions, for purposes of conducting audits of the process or system;

(E) that the process or system is either open source or the proprietor has given the National Institute of Standards and Technology access to its source code;

(F) that, in a criminal case, the proponent has not invoked a trade secrets privilege to block access or disclosure to the process or system or its source code.

Reporter's Comments:

1. If Rule 702 is applied to machine learning evidence, the admissibility factors will have to be shown by a preponderance of the evidence. If that happens, it should make it unnecessary to add the same or similar standards at the authenticity level, which is governed by the Rule 104(b) standard. It should be noted that Professor Roth is not necessarily suggesting changes to Rule 901(b)(9) *in addition to* Rule 702 --- rather that if Article 7 changes somehow don't work out, changes to Rule 901(b)(9) could be usefully considered. In other words, if changes are made to require a *Daubert*-like review of machine data, *then there is no need to add anything to Rule 901(b)(9)* to cover machine learning evidence.

2. Several of the requirements are about accessibility --- e.g., the provisions on trade secrets, pretrial access, and the Jencks Act alternative. As discussed above, such disclosure requirements are probably within the jurisdiction of the Criminal and Civil Rules Committees, not the Evidence Rules Committee. If anything is done about source codes in the Evidence Rules, it should probably be by way of a suggestion in a Committee Note, as was done in the Committee Note to the 2000 amendment to Rule 701 (providing that the Rule needed to be amended to assure that the expert disclosure requirements in the Civil and Criminal Rules would not be evaded). Moreover, in terms of the politics of rulemaking, these disclosure obligations are likely to be a flashpoint. It would be unfortunate if a good rule faltered because of controversy over a disclosure requirement.

3. Rule-drafting concerns exist with respect to two provisions. Subdivision (B) includes the citation to the Jencks Act. But proper rulemaking does not include citations in text --- for fear that the citation will change and then the rule would need to be amended. So if that provision were to be approved, it should say something like "under federal statute" and then the Committee Note could refer to the Jencks Act. *See* the 1998 amendment to Rule 615, adding "by statute" to the text, and referring to a specific statute in the Note. Another rule-drafting concern is the reference to NIST. A more general reference would be preferable.

C. Proposal Giving the Trial Court the Sole Responsibility to Review Deepfake Challenges

Professor Rebecca Delfino argues that the danger of deepfakes demands that the judge decide authenticity, not the jury.[8] She contends that "[c]ountering juror skepticism and doubt over the authenticity of audiovisual images in the era of fake news and deepfakes calls for reallocating the factfinding authority to determine the authenticity of audiovisual evidence." She contends that jurors cannot be trusted to fairly analyze whether a video is a deepfake, because deepfakes appear to be authentic, and "seeing is believing." Professor Delfino suggests that Rule 901 should be amended to add a new subdivision (c), which would provide:

> **901(c). Notwithstanding subdivision (a), to satisfy the requirement of authenticating or identifying an item of audiovisual evidence, the proponent must produce evidence that the item is what the proponent claims it is in accordance with subdivision (b). The court must decide any question about whether the evidence is admissible.**

She explains that the new Rule 901(c) "would relocate the authenticity of digital audiovisual evidence from Rule 104(b) to the category of relevancy in Rule 104(a)" and would "expand the gatekeeping function of the court by assigning the responsibility of deciding authenticity issues solely to the judge."

The proposed rule would operate as follows: After the pretrial hearing to determine the authenticity of the evidence, if the court finds that the item is more likely than not authentic, the court admits the evidence. The court would instruct the jury that it *must accept as authentic* the evidence that the court has determined is authentic. The court would also instruct the jury not to

[8] Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery,* 74 Hastings L.J. 293 (2023).

doubt the authenticity, simply because of the existence of deepfakes. This new rule would take the jury out of the business of determining authenticity, "thereby avoiding the problems invited by juror distrust and doubt." (Her concern is about the "liar's dividend" --- that juries will mistrust even authentic items given the prevalence of deepfakes.) Finally, "the court would address the threat of counsel exploiting juror doubts over the authenticity of evidence using the deepfake defense by ordering counsel not to make such arguments."

Reporter's Comment:

The Delfino proposal applies to *all* audiovisual evidence --- including the video evidence that courts have been dealing with for more than 100 years. Query whether the threat of deepfakes warrants such a dramatic change with respect to all video (and audio) evidence. Assuming that any amendment is necessary, the better remedy is to set out procedures, and higher standards, *only after the opponent specifically brings a credible deepfake argument.* That is what is done in the Grimm-Grossman proposal.

Another concern is about how the jury will react when it is instructed to presume authenticity. Given the presence of deepfakes in society, it may well be that jurors will do their own assessment, regardless of the instruction --- and under this proposal, that juror assessment will be done without the foundation for authenticity laid by the proponent in the admissibility hearing. It could become especially confusing when the jury is told that authenticity is a question primarily for jurors when it comes to telephone calls, diaries, and physical evidence, but when it comes to videos and audios --- hands off.

One can argue that the Delfino proposal could be improved by applying the Rule 104(a) standard to the authenticity of visual and audio evidence, but then, if the court finds authenticity, allow the jury to make its own assessment. In other words, to treat the authenticity of visual evidence the same way we treat expert testimony. Delfino would object, though, due to her belief that jurors will not be able to assess the genuineness of the evidence, given that deepfakes are getting harder and harder to detect. But this half-proposal would at least address arguments that deepfakes will be too easily admitted under the mild standard that now exists for showing authenticity to the court, and it would not set up artificial constructs to try to keep the jury from assessing authenticity.

One broader concern that is spurred by the Delfino proposal: Some of the AI apocalypse believers maintain that at some point deepfakes will be *impossible* to detect. If that is so, then it would seem that no rule of authenticity can do an adequate job of regulating deepfakes. Giving all the authority to the judge seems quite empty if *nobody* can detect a deepfake. Indeed *no rule can provide a solution if deepfakes are undetectable.*

One final point on the Delfino proposal. Delfino's idea is that the court is to use the Rule 104(a) standard --- a preponderance of the evidence. Assuming that is appropriate, it should be

added to the text of the rule. That is a lesson learned by the Committee in the amendment to Rule 702. This means that the last sentence of the proposal should read something like:

"The court must decide whether it is more likely than not that the item is authentic."

Such an explication is especially important because the proposal does not actually explicitly say that admissibility is governed by Rule 104(a). It states that "the proponent must produce evidence that the item is what the proponent claims it is in accordance with subdivision (b)." But the illustrations of subdivision (b) are, as discussed above, decided on the less rigorous, prima facie proof standard of Rule 104(b).

The Delfino proposal is usefully compared to the Reporter's proposed modification of the Grimm-Grossman proposal discussed above. The Reporter's proposal would read as follows:

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

The differences between the two proposals are: 1. The Delfino proposal applies the preponderance of the evidence standard to every item of audiovisual evidence, whereas the above proposal applies that higher standard only when there has been a prima facie showing of fakery; and 2) The Delfino proposal takes the authenticity question completely away from the jury, whereas the above proposal does not. It seems that the above proposal gets the better of both of these differences.

D. The Proposal to Add a Corroboration Requirement for Possible Deepfakes

John Lamonica argues for a more stringent standard of authenticity with respect to deepfakes.[9] He contends that the traditional means of authentication --- by a person with knowledge under Rule 901(b)(1) --- will no longer work with deepfakes because a witness cannot reliably testify that the video accurately represents reality. He states that "[b]ecause witnesses will no longer be able to meet the legacy standard of Rule 901(b)(1)'s knowledgeable witness by attesting that a video is a fair and accurate portrayal, courts need to look elsewhere for a sufficient finding that photographic evidence is what its proponent claims it is." He argues for a proposed new Rule 901(b)(11) that would specifically govern "the unique challenges that digital photography in the modern age present."

[9] John P. Lamonaca, *A Break from Reality: Modernizing Authentication Standards for Digital Video Evidence in the Era of Deepfakes,* 69 Am. U.L. Rev. 1945, 1984 (2020).

The new Rule 901(b)(11) would provide:

Before a court admits photographic evidence under this rule, a party may request a hearing requiring the proponent to corroborate the source of information by additional sources.

Lamonaca explains that the new rule "essentially codifies an existing means of authentication and requires it for photographic evidence." There is no proposal to change the existing allocation of authority between the court and the jury. Rather, what it essentially does is 1) change the "distinctive characteristics" ground of Rule 901(b)(4) into a foundation *requirement*; and 2) state that the classic ground of authentication under Rule 901(b)(1) --- that the video accurately represents what it purports to show --- is never a sufficient ground of admissibility. Lamonaca concludes that "a preliminary hearing process [requiring corroboration] would bolster the confidence in video evidence for a jury to consider, rather than allowing all photographic evidence to pass the foundational stage with a testimonial witness who lacks the requisite personal knowledge to attest to the evidence's validity."

This is an interesting proposal, in that one of the major ways that deepfakes can be *debunked* is actual evidence casting doubt on what is portrayed --- e.g., "the video shows me at the bank but I was in the hospital that day." So it might not be asking too much for a proponent to provide some corroboration of the event --- but only *if there is a legitimate question of authenticity*, and the Lamonica proposal does not require that. So a major problem is that, like the Delfino proposal, it applies to *all* visual evidence, including video evidence that has been well-handled by the courts for 100 years. It seems unwarranted to require the proponent to go to the expense of providing corroboration for every surveillance video and every wedding photograph, simply because of the potential risk of deepfakes. Courts have not required an advance showing of corroboration for digital evidence, and while deepfakes present new challenges, the case has not been made as yet to justify an automatic corroboration requirement for all audio visual evidence.

The better solution is that the court should enter a deepfake inquiry only when the opponent provides some evidence indicating the possibility of a deepfake: either some electronic analysis or a showing through evidence that the event presented is implausible. And then, at that point, the proponent might be required to provide corroboration or some other additional showing before the court can find it authentic. That solution is essentially the modification to the Grimm Grossman proposal, discussed above. That solution is essentially employed today with regard to electronic evidence --- the "it is hacked" claim is not treated seriously until the opponent comes up with something to indicate that an inquiry is warranted.[10] And that solution --- placing the burden of

[10] *See* Grimm, *et al*., *Authentication of Social Media Evidence*, 36 Am. J. of Trial Advoc. 433, 459 (2013) ("A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it 'might' have been created.").

going forward on the opponent --- is what was employed in one of the few court cases that have discussed the deepfake possibility. The Colorado state appeals court in *People v. Gonzales*, 2019 COA 30, ¶ 29 opined that while software has made it easy for laypeople to manipulate recordings, "the fact that the falsification of electronic recordings is always possible does not, in our view, justify restrictive rules of authentication that must be applied in every case *when there is no colorable claim of alteration*."[11] The court explained that "[w]hen a plausible claim of falsification is made by a party opposing the introduction of a recording, the court may and usually should apply additional scrutiny" to determine whether a reasonable jury could conclude that the item is what it purports to be.

Three more rulemaking points about the Lamonica proposal:

1. It should not be placed as a new Rule 901(b)(11). Rule 901(b) provides examples of authenticated items. This new provision is requiring an extra admissibility requirement for evidence that will be offered under an existing provision --- such as 901(b)(9). It is not a new example of authentication. So it is better placed as separate subdivision, such as Rule 901(c), as is the Grimm-Grossman proposal.

2. The proposed rule refers to "photographic" evidence, which seems too narrow to cover all deepfakes. A term such as "audiovisual" is preferable. The Grimm-Grossman proposal simply ties into Rule 901(b)(9) --- items resulting from a process or system, which is probably the best tie-in to deepfakes.

3. The proposal as written is not actually a rule of admissibility. All it specifically requires is a hearing. So it should probably read as follows:

Before a court admits photographic evidence under this rule, ~~a party may request a hearing requiring~~ the proponent must ~~to~~ corroborate the source of information by additional sources.

In essence, a solution that requires a foundation from the opponent and then a showing by the proponent is what has been discussed above at several points:

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

This proposal differs from a corroboration requirement in this sense: it is more flexible, because the proponent can establish authenticity in any way, not just by corroboration. As such,

[11] *See also* Shannon Bond, *People Are Trying To Claim Real Videos Are Deepfakes. The Courts Are Not Amused,* https://www.npr.org/2023/05/08/1174132413/people-are-trying-to-claim-real-videos-are-deepfakes-the-courts-are-not-amused (noting that courts in the January 6 prosecutions have rejected out of hand broad, unsupported claims that videos could be deepfakes).

the above proposal seems to be a better approach. It also, importantly, requires a preliminary showing, which the Lamonica proposal does not.

III. The Problem of Deepfakes

A deepfake is an inauthentic audiovisual presentation prepared by software programs using artificial intelligence. Of course, photos and videos have always been subject to forgery, but developments in AI make deepfakes much more difficult to detect.[12] Software for creating deepfakes is already freely available online and fairly easy for anyone to use.[13] As the software's usability and the videos' apparent genuineness keep improving over time, it will become harder for computer systems, much less lay jurors and judges, to tell real from fake.[14]

Generally speaking, there is an arms race between deepfake technology and the technology that can be employed to detect deepfakes. Deepfakes involve machine learning algorithms that are simultaneously pitted against one another.[15] One of these programs is a generative model that creates new data samples; the other, known as a discriminator model, evaluates this data against a

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[12] Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security,* 107 Calif. L. Rev. 1753, 1760 (2019). Some of the famous deepfakes are pretty easy to root out with minimal inquiry. The Nancy Pelosi video was debunked simply by playing it slower. The Pope picture, upon scrutiny, shows up as a fake because his medal is not sitting on his chest, and his fingers are not accurate. But it is very likely that future developments will make deepfakes harder to detect.

[13] *See 12 Best Deepfake Apps and Websites That You Can Try for Fun,* https://beebom.com/best-deepfake-apps-websites.

[14] MIT has provided a checklist that can be used to help detect a deepfake, though MIT makes no promises:

> When it comes to AI-manipulated media, there's no single tell-tale sign of how to spot a fake. Nonetheless, there are several DeepFake artifacts that you can be on the lookout for:
>
> 1. Pay attention to the face. High-end DeepFake manipulations are almost always facial transformations.
> 2. Pay attention to the cheeks and forehead. Does the skin appear too smooth or too wrinkly? Is the agedness of the skin similar to the agedness of the hair and eyes? DeepFakes may be incongruent on some dimensions.
> 3. Pay attention to the eyes and eyebrows. Do shadows appear in places that you would expect? DeepFakes may fail to fully represent the natural physics of a scene.
> 4. Pay attention to the glasses. Is there any glare? Is there too much glare? Does the angle of the glare change when the person moves? Once again, DeepFakes may fail to fully represent the natural physics of lighting.
> 5. Pay attention to the facial hair or lack thereof. Does this facial hair look real? DeepFakes might add or remove a mustache, sideburns, or beard. But, DeepFakes may fail to make facial hair transformations fully natural.
> 6. Pay attention to facial moles. Does the mole look real?
> 7. Pay attention to blinking. Does the person blink enough or too much?
> 8. Pay attention to the lip movements. Some deepfakes are based on lip syncing. Do the lip movements look natural?

https://www.media.mit.edu/projects/detect-fakes/overview/

[15] Chris Nicholson, *A Beginner's Guide to Generative Adversarial Networks (GANs),* PATHMIND, https://pathmind.com/wiki/generative-adversarial-network-gan [https://perma.cc/JEY9-K283].

training dataset for authenticity. The discriminator model estimates the probability that the sample came from the generative model (a machine creation) or sample data (a real-world original). These two models operate in a cyclical fashion and learn from each other. The generative model program is learning to create false data, and the discriminator model is learning to identify whether the data is artificial. The generative model constantly improves its ability to create data sets that have a lower probability of failing the detection algorithm as the discriminator model learns to keep up, a process that continuously improves the apparent genuineness of the creation. So anytime new software is developed to detect fakes, deepfake creators can use that to their advantage in their discriminator models. A New York Times reporter reviewed some of the currently available programs that try to detect deepfakes. The programs varied in accuracy. None was accurate 100% of the time.[16]

It is important to note that various digital tools have been introduced for authenticating video recordings that a party has prepared. These tools allow the proffering party to vouch for video recordings' authenticity through an electronic seal of approval. [17] While the use of such methods increases the costs of litigation, they do appear, generally, to answer most "deepfake" claims from the opponent. While watermarks can be evaded, Professor Hany Farid states that the use of watermarks together with an identifying fingerprint is an effective way to combat the threat of deepfakes.[18] The limitation on the software is that the electronic stamp of genuineness occurs

[16] *See How Easy Is it to Fool A.I. Detection Tools?* https://www.nytimes.com/interactive/2023/06/28/technology/ai-detection-midjourney-stable-diffusion-dalle.html?smid=nytcore-ios-share&referringSource=articleShare. *See also Another Side of the A.I. Boom: Detecting What A.I. Makes*, https://www.nytimes.com/2023/05/18/technology/ai-chatgpt-detection-tools.html ("Detection tools inherently lag behind the generative technology they are trying to detect. By the time a defense system is able to recognize the work of a new chatbot or image generator, like Google Bard or Midjourney, developers are already coming up with a new iteration that can evade that defense. The situation has been described as an arms race or a virus-antivirus relationship where one begets the other, over and over.").

[17] *Ticks or It Didn't Happen: Confronting Key Dilemmas in Authenticity Infrastructure for Multimedia*, at 6, WITNESS (December 2019), https://lab.witness.org/ticks-or-it-didnthappen/ ("The idea is that if you cannot detect deepfakes, you can, instead, authenticate images, videos and audio recordings at their moment of capture."); Riana Pfefferkorn, *Deepfakes in the Courtroom,* 29 Public Interest L.J. 245, 259 (2020) ("So-called verified media capture technology can help to ensure that the evidence users are recording is trusted and admissible to courts of law. For example, an app called eyeWitness to Atrocities allows photos and videos to be captured with information that can firstly verify when and where the footage was taken, and can secondly confirm that the footage was not altered, all while the company's transmission protocols and secure server system create a chain of custody that allows this information to be presented in court. That information, paired with the app-maker's willingness to provide a certification to the court or send a witness to testify if needed, could satisfy a court that the video is admissible, even if the videographer is unavailable.").

[18] *See* Hany Farid, *Artificial Intelligence: A Primer for Legal Practitioner*s at 17 ("Therefore, in addition to embedding watermarks, a creator can extract an identifying fingerprint from the content and store it in a secure centralized ledger. . . . The provenance of a piece of content can then be determined by comparing the fingerprint of any image or video to the fingerprint stored in the ledger. Both watermarks and fingerprints can be made cryptographically secure, making it difficult to forge.").

during the process in which the video is being generated; it does not work with videos, say, taken off the internet.[19]

Besides the challenge of determining whether a video or audio is faked, many commentators are concerned about a "reverse CSI effect." Jurors, knowing about deepfakes, "fake news," etc., may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake.[20] The other concern expressed is that over time, skepticism over video evidence may undermine the use of perfectly authentic videos --- called "the Liar's Dividend" --- though how that concern is to be addressed in an Evidence Rule remains a mystery.

A. Basic Rules on Authenticity

Under Rule 901(a), the standards for authenticity are low. The proponent must only "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Under the rule, the question of authenticity is one of conditional relevance --- an item of evidence is not relevant unless it is what the proponent purports it to be. (For example, a sexually harassing statement in an email, purportedly sent from the plaintiff's supervisor, is probative only if it is the supervisor who sent it.) As a question of conditional relevance, the admissibility standard under Rule 901 is the same as that provided by Rule 104(b): Has the proponent offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. This is a mild standard --- favorable to admitting the evidence. The drafters of the rule believed that authenticity should generally be a jury question because, if a juror finds the item to be inauthentic, it just drops from the case, so no real damage is done; Rule 901 basically operates to prevent the jury from wasting its time evaluating an item of evidence that clearly is not what the proponent claims it to be.

The structure of the Rule is as follows: 1) subdivision (a) sets the general standard for authenticity --- enough admissible evidence for a juror to believe that the proffered item is what the proponent says it is; 2) subdivision (b) provides examples of sufficient authentication; if the standard set forth in any of the illustrations is met, then the authenticity objection is overruled and any further question of authenticity is for the jury; and 3) the illustrations are not intended to be independent of each other, so a proponent can establish authenticity through a single factor or combination of factors in any particular case. Finally, it should be noted that Rule 902 provides

[19] *See, e.g.*, *A New Tool Protects Videos from Deepfakes and Tampering,* https://www.wired.com/story/amber-authenticate-video-validation-blockchain-tampering-deepfakes/ ("Called Amber Authenticate, the tool is meant to run in the background on a device as it captures video. At regular, user-determined intervals, the platform generates 'hashes'—cryptographically scrambled representations of the data—that then get indelibly recorded on a public blockchain. If you run that same snippet of video footage through the algorithm again, the hashes will be different if anything has changed in the file's audio or video data—tipping you off to possible manipulation.").

[20] Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery,* 74 Hastings L.J. 293 (2023).

certain situations in which the proffered item will be considered self-authenticating --- no reference of any Rule 901(b) illustration need be made or satisfied if the item is self-authenticating.

In order for the trier of fact to make a rational decision as to authenticity, the foundation evidence must itself be admissible. If the opponent still contests authenticity at trial, the proponent will need to present admissible evidence of the authenticity of the challenged item. This means that the judge's role when an authentication issue arises differs from the judge's role when other issues arise involving the admissibility of evidence at a Rule 104(a) hearing (under which the rules of evidence other than privilege are inapplicable). When authentication evidence is offered, a jury must be provided sufficient admissible evidence for it to find that it is what the proponent claims, or the requirement of authentication is not satisfied. A judgment as to whether a reasonable jury will find evidence to be authentic can only be made by examining the evidence that the jury will be permitted to hear.[21]

Applying the current authentication rules to deepfakes raises at least two concerns: 1. Because deepfakes are hard to detect, many deepfakes will probably satisfy the low standards of authenticity; and 2. On the other hand, the prevalence of deep fakes will lead to blanket claims of forgery, requiring courts to have an authenticity hearing for virtually every proffered video.

B. Prior Committee Decision on Special Authentication Rules for Electronic Evidence.

The rise of deepfakes is not the only technological advancement that has challenged the existing rules on authentication. In 2014, the Advisory Committee undertook a project to consider whether rules should be added to Article 9 to address digital communications and social media postings. The proposal considered was to have special rules on authenticating emails, texts, social media postings, and so forth. After significant discussion, the Committee decided not to proceed with the project. According to the Minutes of the Fall 2014 meeting, the reasons for rejection were as follows:

1. The current rules are flexible enough to handle questions about the authenticity of digital communications. For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person's voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence

[21] *See United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception); *Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534, 537 (D. Md. 2007) ("Because, under Rule 104(b), the jury, and not the court, makes the factual findings that determine admissibility, the facts introduced must be admissible under the rules of evidence.").

describing a process or system of showing that it produces an accurate result). These rules give the court all the tools it needs to determine the authenticity of digital evidence.

2. Any rules directed specifically toward digital communications would likely overlap with the provisions already in Rule 901(b). Certainly distinctive characteristics would be important for authenticating digital evidence; and authentication of, say, email would use analogous principles of authenticating telephone conversations. This overlap, between new and old rules, would likely cause confusion.

3. Listing factors relevant to authentication would run the risk of misleading courts and litigators into thinking that all of the listed factors can or should be weighed equally, when in fact a case-by-case approach is required.

4. Given the deliberateness of rulemaking --- three years minimum --- there was a risk that any rule on digital communications could be dead on arrival. I called it the MySpace problem.[22]

In hindsight, it is fair to state that the Committee's decision to forego amendments setting forth specific grounds for authenticating digital evidence was the prudent course. Courts have sensibly, and without extraordinary difficulty, applied the grounds of Rule 901 to determine the authenticity of digital evidence.[23] Courts have specifically rejected blanket claims like "my account was hacked" --- because such an argument can always be made. Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information. Thus, courts have consistently held that "the mere allegation of fabrication

[22] It should be noted that the Committee did propose two new rules to deal with authenticating digital evidence --- Rules 902(13) and (14), which became effective in 2017. But these rules do not add or change any grounds of authentication for digital evidence. Rather they allow the existing grounds to be established by a certificate of a person with knowledge, thus dispensing with the requirement of in-court testimony.

[23] *See, e.g.*, *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)); *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence"); *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); *United States v. Needham*, 852 F.3d 830, 836 (8th Cir. 2017) ("Exhibits depicting online content may be authenticated by a person's testimony that he is familiar with the online content and that the exhibits are in the same format as the online content. Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content. . . [The witness] testified that he personally viewed the [webpages] and that the screenshots accurately represented the online content of both sites. Thus, the district court did not abuse its discretion by admitting the screenshots."); *United States v. Recio*, 884 F.3d 230 (4th Cir. 2018) (the government sufficiently tied the "Facebook User" to the defendant by showing that: (1) the user name associated with the account was Larry Recio; (2) one of the four email addresses associated with the account was larryrecio20@yahoo.com; (3) more than 100 photos of Recio were posted to the account, and (4) one of the photos posted to the user timeline was accompanied by the text "Happy Birthday Larry Recio").

does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents."[24]

It is true that litigators have to know what they are doing when they try to authenticate digital evidence, and it is also true that authenticating digital evidence can be costly, but no rule of evidence would change that.[25] Moreover, some costs of proving authenticity can be saved by the affidavit procedures established for authentication of digital evidence in Rules 902(13) and (14).[26]

The fact that the Committee decided not to promulgate special rules on digital communication is a relevant data point, but it is not necessarily dispositive of amending the rules to treat deepfakes.[27] While a special rule setting forth the grounds for possible authentication of audiovisual evidence runs a similar risk of overlap, perhaps a rule of procedure (such as the requirement of a special showing made to the court), or a higher standard of proof, could be useful. And a rule may be necessary because deepfakes may present a true watershed moment and might require a new approach.

C. Arguments Against an Amendment for Deepfakes

Not all commentators believe that a change to the rules is necessary for dealing with deepfakes. Riana Pfefferkorn notes that the courts have previously handled technological changes under the existing rules, and deepfakes can be handled in the same way.[28] She asserts that the courts are "no stranger to doctored photographs" and that "generations of technologies with truth-subversive potential have become commonplace in society over the years. While the resulting fakes have inevitably gained traction at times in the public consciousness, the sky has not fallen." She states that "[t]he existence of the mere possibility of manipulation, without more, does not call for a high bar of authentication today any more than it did 150 years ago." She concludes that "the nation's courts are robust institutions that have shown themselves capable of handling each new variant of the age-old problem of fakery" and that the courts' "track record of resilience should

[24] *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

[25] *See* Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age,* 108 Nw. U.L. Rev. 1137, 1157 (2014) ("Although much is made of [the authentication] hurdle in the Information Age, it is … an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.").

[26] Tara Vassefi, "*A Law You''ve Never Heard of Could Help Protect Us From Deceptive Photos and Videos,"* UC Berkeley School of Law Human Rights Center (Nov. 30, 2018), https://medium.com/humanrightscenter/a-law-youve-never-heard-of-could-help-protect-usfrom-fake-photos-and-videos-df07119aaeec (noting that Rules 902(13 and (14) "streamlin[e] authentication for those with limited legal resources").

[27] For one thing, it is not stare decisis. The Committee has proposed amendments to rules that it rejected in the first instance. The amendments to Rule 106 and new Rule 107 are just two examples. Also, perhaps the dangers of fakery are greater with respect to deepfakes than were presented by digital evidence in 2014.

[28] Riana Pfefferkorn, *Deepfakes in the Courtroom,* 29 Public Interest L.J. 245, 259 (2020).

assuage" much of the concerns about deepfakes.[29] Pfefferkorn's view is that the rise of deepfakes will probably increase the costs of authentication, perhaps by requiring expert testimony in more cases than previously. But that does not mean that the rules need to be amended.

Similarly, Grant Fredericks, the president of Forensic Video Solutions and a pioneer in the field of deepfake technology, is confident that fake videos will be kept out of evidence, both because they can be discovered using the advanced tools of his trade and because the video's proponent would be unable to answer basic questions to authenticate it (who created the video, when, and with what technology).[30]

Finally, Professor Rebecca Wexler, in her presentation to the Committee last Fall, made a compelling presentation arguing that the courts have extensive experience with forgeries, and that no special rule is needed to deal with deepfakes.

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[29] *See also* Russell Brandom, Deepfake Propaganda is not a Real Problem, THE VERGE (Mar. 15, 2019), https://www.theverge.com/2019/3/5/18251736/deepfake-propaganda-misinformation -troll-video-hoax ("We've had the tools to fabricate videos and photos for a long time. . . . AI tools can make that process easier and more accessible, but it's easy and accessible already. . . . [D]eepfakes are already in reach for anyone who wants to cause trouble on the internet. It's not that the tech isn't ready yet. It just isn't useful."); Jeffrey Westling, *Deep Fakes: Let's Not Go Off the Deep End*, TECHDIRT (Jan. 30, 2019), https://www.techdirt.com/articles/20190128/13215341478/deep-fakes-lets-not-gooff-deep-end.shtml.

[30] Mark J. Pescatore, *Forensic Video Experts: Fake Videos Not Threat to Courtroom Evidence*, PIPELINE COMM. (June 24, 2019), https://www.pipecomm.com/2019/06/24/forensic-video-experts-fake-videos-not-threat-to-courtroom-evidence/.

IV. Conclusion and Drafting Alternatives

This memo has covered a number of possible changes to address deepfakes and machine learning. Assuming, again, that any change is necessary, the most straightforward and effective changes are the following:

1. *Changes to Rule 901(b):* [ASSUMING NO ADDITION OF RULE 707]

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

(9) *Evidence about a Process or System*. For an item generated by a process or system:

(A) evidence describing it and showing that it produces ~~an accurate~~ **a reliable** result; and

(B) if the proponent acknowledges that the item was generated by artificial intelligence, additional evidence that:

(i) describes the training data and software or program that was used; and

(ii) shows that they produced reliable results in this instance.

2. Proposed New Rule 901(c) to address "Deepfakes":

901(c): *Potentially Fabricated or Altered Evidence Created By Artificial Intelligence [By an Automated System].*

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

Draft Committee Note

This new subdivision is intended to set forth guidance and standards when the opponent alleges that an audio or video item is a "deepfake" --- i.e., that it has been altered by artificial intelligence so that it is not what the proponent says it is.

The term "artificial intelligence" can have several meanings, and it is not a static term. In this rule, "artificial intelligence" means software used to perform tasks or produce output previously thought to require human intelligence.

The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent must set forth enough information for a reasonable person to find that the item has been altered by the use of artificial intelligence. Thus, a broad claim of "deepfake" is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated by artificial intelligence. Second, assuming that the opponent has shown enough to merit the enquiry, the proponent must show to the court that the item is more likely than not genuine. While that Rule 104(a) standard is higher than ordinarily required for a showing of authenticity, it is justified given that any member of the public has the capacity to make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect. It is therefore reasonable for the court to require a showing, by a preponderance of the evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

3. New Rule 707

Rule 707. Machine-generated Evidence

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

Draft Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information, from software-driven blood-alcohol concentration results to probabilistic genotyping software. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where an expert relies on such a method, the method – and the expert's reliance on it – will be scrutinized pursuant to Rule 702. But if machine or software output is presented on its own, without the accompaniment of a human expert, Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered directly, it is subject to the requirements of Rule 702 (a)-(d).

It is anticipated that a Rule 707 analysis will involve the following, where applicable:

• Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training

data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

• [Ensuring that the opponent has been provided sufficient access to the program, and that independent researchers have had sufficient access to the program, to allow both adversarial scrutiny and sufficient peer review beyond simply validation studies conducted by the developer or related entities. Where a developer has declined to make a research license or equivalent access widely available to independent researchers, courts should be wary of allowing output from such a process.]

• Considering whether the process has been validated in circumstances sufficiently similar to the case at hand. For example, if the case at hand involves a DNA mixture of several contributors, likely related to each other, and a low quantity of DNA, the software should be shown to be valid in those circumstances before being admitted.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over machine output that is regularly relied upon in commercial contexts outside litigation and that, as a result, is not likely to render output that is invalid for the purpose it is offered. Examples might include the results of a mercury-based thermometer, battery-operated digital thermometer, or automated averaging of data in a spreadsheet, in the absence of evidence of untrustworthiness.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

TAB 5

TAB 5A

University of Oklahoma College of Law
300 Timberdell Rd., Norman OK. 73019

Liesa L. Richter
George Lynn Cross Research Professor
Floyd & Martha Norris Chair in Law
liesarichter@ou.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Evidence of an Alleged Victim's Prior False Accusations
Date: October 4, 2024

Some courts have struggled with whether and how to admit evidence of prior false accusations made by alleged victims in criminal cases, primarily in cases involving sexual assault. At the Fall 2023 meeting of the Evidence Advisory Committee, Professor Erin Murphy presented a proposal to amend the Federal Rules of Evidence to add a new Rule to admit prior false accusations evidence in appropriate cases. The Committee expressed an interest in studying the possibility of amending the Federal Rules of Evidence to address such evidence at its Fall 2023 meeting.

An agenda memorandum presented at the Spring 2024 Advisory Committee meeting examined the admissibility of prior false accusations evidence in federal court and the many Federal Rules of Evidence implicated in evaluating such proof.[1] The Spring 2024 memo questioned the need for a specialized provision in the Federal Rules dedicated to prior false accusations evidence for several reasons:

- Although limited, the studies that have been done suggest an extremely low incidence of false accusation in the context of sexual assault.[2]

- The vast majority of sexual assault prosecutions in which such evidence is proffered occur outside of federal court in state and military tribunals.[3]

[1] The Spring 2024 memorandum is attached hereto for reference.
[2] Erin Murphy, *Impeaching with an Alleged Prior False Accusation*, 92 FORDHAM LAW REVIEW 2535 , n. 2 (2024) (citing David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) Violence Against Women 1318 (2010) (finding 5.9% of reports to be false) and Cassia Spohn & Katherin Tellis, *Policing and Prosecuting Sexual Assault* 102, 140, 164 (2014) (finding roughly 7.6% of initial reports false)) (hereinafter *Impeaching with an Alleged Prior False Accusation*). *See also* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 126 (1998) ("studies that have shown that the frequency of rape reports proven false, approximately two percent, mirrors the false reporting rates for other crimes.").
[3] United States Sentencing Commission, Statistical Information Packet for Fiscal Year 2023, Figure 2 (showing that only 2.2% of federal sentencings nationwide were for sexual abuse offenses).

- Federal courts have admitted prior false accusations evidence through the existing Evidence Rules in cases in which the evidence suggested an alleged victim's modus operandi to falsely accuse for purposes of retribution or in furtherance of other aims.[4]

- A criminal defendant's constitutional rights to present a defense and to confront the witnesses against him ensure the admissibility of prior false accusations evidence in appropriate cases even without a bespoke evidence rule designed to admit such evidence.[5]

The Spring 2024 memo also identified potential risks posed by a new Federal Rule of Evidence designed to admit prior false accusations evidence:

- Encouraging the expanded use of this evidence through rulemaking threatens to undermine important protections for sexual assault victims achieved by Rule 412 (the rape shield rule) and risks deterring victims from reporting and cooperating in prosecutions.

- Defining the burden of proof required to prove falsity in rule text in a manner that appropriately balances the rights of the defendant and of the victim could prove challenging. If the burden of proving falsity is set too low, the rights of alleged victims are compromised and vulnerable victims (often children who have been the subject of repeated sexual abuse) will be routinely harassed with allegations of prior unfounded accusations. Conversely, setting the defendant's burden of proving falsity too high could provoke constitutional challenges to the provision.

- A new rule admitting prior accusations of sexual assault on a showing of falsity also threatens to embroil district courts in time consuming minitrials regarding the truth or falsity of *other* accusations of sexual assault not charged in the instant case.

As a result of these concerns, the Spring 2024 agenda memo recommended that the Committee not proceed with a proposal to add a prior false accusations provision to the Federal Rules of Evidence before examining the handling of such evidence by the state and military courts where the overwhelming majority of sex offense prosecutions are processed.

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[4] *See, e.g.*, United States v. Stamper, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991), *aff'd sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992) (finding evidence of similar prior accusation of sexual assault that victim had conceded to be false admissible to show victim's method of manipulating custody situation to avoid discipline); Secretary for the Florida Department of Corrections v. Baker, 406 F. App'x 416, 424–25 (11th Cir. 2010) ("The evidence that D.A. had habitually lied about sexual assaults by family members had "strong potential to demonstrate the falsity of [her] testimony" in this case.").

[5] *See* Stamper, *supra* n. 4 ("In order to confront the complainant effectively, to elucidate the facts and legal issues here in question fully, and to present a defense in a constitutionally viable trial, Defendant must be allowed to set before the jury the proffered evidence of ulterior motives of the complainant.").

This memo reports on the approaches taken by the military and state courts to evidence of an alleged victim's prior false accusations of sexual assault in three parts. Part I describes the handling of such evidence in state and military tribunals, identifying the slight variations between jurisdictions, as well as the significant similarities shared across jurisdictions with respect to prior false accusations evidence. Part II highlights potential drafting alternatives for a Federal Rule of Evidence governing prior false accusations, reminding the Committee of the draft provision explored at the Spring 2024 meeting and identifying an alternative amendment possibility based upon state approaches to such evidence. Part III closes by once again weighing the potential risks and benefits of a federal provision, recommending that the Committee not proceed with an amendment governing prior false accusations evidence at this time.

I. Military and State Approaches to Prior False Accusations Evidence

A majority of jurisdictions have held that prior false accusation evidence may be used by the defense in a sex offense prosecution under certain circumstances and trial courts are occasionally reversed for excluding such evidence. [6] But state and military courts routinely exclude prior false accusation evidence in particular cases where it has been proffered by the defense.[7] Although military and state courts take very similar approaches to the admissibility of prior false accusations evidence, there are slight variations in the rules and processes applied to such evidence across jurisdictions. Most jurisdictions have no statutory or rule text that governs prior false accusations evidence expressly. These jurisdictions regulate prior false accusations evidence using existing evidence rules, as well as common law and constitutional frameworks. The few jurisdictions that do regulate prior false accusations evidence expressly in statutory or rule text include such evidence as part of their respective rape shield rules or as part of their versions of Rule 608 governing witness impeachment with prior dishonest acts.

A. Burdens of Proof for Establishing Falsity

Almost every jurisdiction that permits defendants to admit evidence of a victim's prior false accusations requires the defense to prove to the trial judge that the victim actually made a prior accusation, and that the accusation was "false" or "knowingly false" in order to gain admission. Although different jurisdictions use slightly different language to describe the defense burden of proof, all hold the defense to the burden of proof and routinely reject defense evidence of falsity as insufficient.

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[6] *See, e.g.* Abbott v. State, 138 P.3d 462 (Nev. 2006) (trial judge committed plain error by denying defense request to admit victim's prior false accusations); State v. Long, 140 S.W.3d 27 (Missouri 2004) (reversing conviction due to trial court's error in excluding prior false accusation); People v. Diaz, 988 N.E.2d 473 (N.Y. App. 2013) (reversing because trial judge refused to allow defendant to call victim's family member to testify that she had falsely accused him of sexual assault to show a pattern of false allegations against family members); State v. Cox, 468 A.2d 319 (Md. App. 1983) (trial judge erred in refusing to allow defendant to cross-examine victim about a prior assault allegation that she had recanted).

[7] *See, e.g.*, Pustay v. State, 221 So.3d 320 (Miss. App. 2017) (trial judge properly excluded prior false accusations where defendant failed to show that accusations were made or that ones that were made were false); State v. Thompson, 341 S.W.3d 723 (Missouri App. 2011) (trial judge did not err in excluding false accusations evidence where family services records produced by defendant did not show that accusations were false).

Many jurisdictions require the defense to prove falsity by a "preponderance of the evidence." For example, the military courts treat prior false accusations evidence as admissible under the rape shield rule's exception allowing the defense to prove a victim's other sexual conduct when its exclusion would violate the defendant's constitutional rights.[8] In order to admit prior false accusations evidence through that exception, military courts require the defense to prove that a victim made a prior accusation and that it was false by a preponderance of the evidence.[9] The military courts have found that the defense failed to meet its burden of proving falsity where the victim denies having made a prior accusation, where the prior accused denies any sexual assault, where other witnesses testify that there was no prior assault, and even where the prior accused has been acquitted of the prior assault.[10] Many other state jurisdictions also require the defense to prove to the trial judge that a victim made a prior accusation and that it was false by a preponderance of the evidence.[11]

Other jurisdictions appear to impose similar preponderance-level burdens on the defense using varying linguistic formulas. Some jurisdictions demand "demonstrated falsity" or allegations by the victim that are "demonstrably false."[12] Others have required the defense to

[8] *See, e.g.*, United States v. Tinsley, 81 M.J. 836 (Army Crim App. 2021) (holding that defendant must prove falsity by a preponderance of the evidence to admit false accusations evidence under Military Rule of Evidence 412(b)(3) exception).
[9] Id.
[10] *See* Id. (defendant could not present evidence of victim's prior false accusation where he called no witnesses at the Rule 412 hearing to meet his burden of proving falsity); United States v. Chege, 2023 WL 6784169 (N.M. Ct. Crim App. 2023) (upholding trial court's exclusion of prior false accusation evidence where victim conceded consensual nature of prior encounter and defendant failed to prove that she had made any accusation of assault); United States v. Erikson, 76 M.J. 231 (Ct. App. Armed Forces 2017) (military judge properly excluded prior false accusation where prior accused was acquitted in prior proceeding because acquittal does not "show" falsity of accusation; military judge found victim more credible than prior accused even though another witness who was present denied seeing any sexual assault); United States v. McElhaney, 54 M.J. 120)(Ct. App. Armed Forces 2000) (trial judge did not err in denying cross-examination of victim regarding prior false accusation where defense evidence of falsity consisted only of "unsurprising denial" by prior perpetrator; falsity not proven).
[11] *See, e.g.*, State v. Chambers, 465 P.3d 1076 (Idaho 2020) (requiring defendant to show falsity by a preponderance of the evidence); State v. Alberts, 722 N.W.2d 402 (Iowa 2006) (defendant must show falsity by preponderance of the evidence to remove false accusation evidence from rape shield protection); Abbott v. State, 138 P.3d 462 (Nev. 2006) (defendant must prove that an accusation was made and that it was false by a preponderance of the evidence); State v. Tarrats, 122 P.3d 581 (Utah 2005) (allegations of prior false rape claims are inadmissible under rape shield statute unless their falsity can be demonstrated by a preponderance of the evidence); State v. Thompson, 341 S.W.3d 723 (Missouri App. 2011) (defendant must first establish by a preponderance of the evidence that victim knowingly made false accusations); Morgan v. State, 54 P.3d 332 (Ak. App. 2002) (a defendant must prove to the trial judge by a preponderance that a victim knowingly made another, factually untrue accusation using victim testimony or other extrinsic evidence); State v. West, 24 P.3d 648, 655 (Hawaii 2001) (preponderance standard); State v. Boiter, 396 S.E.2d 364 (S.C. 1990) (trial judge should first determine whether prior accusation was false in determining admissibility).
[12] *See, e.g.*, Perry v. Commonwealth, 390 S.W.3d 122 (Ky. 2012) (prior accusations only admissible if they are "demonstrably false," meaning that the proponent has shown a "distinct and substantial probability" that they are false); State v. Most, 815 N.W.2d 560 (S.D. 2012) (prior accusation must be "demonstrably false" before it can be admissible on cross-examination of victim); Peeples v. State, 681 So. 2d 236, 238 (Ala. 1995) ("demonstrated falsity is the sine qua non of admissibility of this species of evidence"); State v. Walton, 715 N.E.2d 824 (Ind. 1999) (requiring defense to show that prior accusations were "demonstrably false"); Morgan v. State, 54 P.3d 332 (Ak. App. 2002) (noting that state jurisdictions "subscribe to the same underlying principle" that requires proof of falsity to the trial judge despite the variations in burdens of proof). *See also* Colorado Rev. Stat. § 18-3-407 (2024)

show a "reasonable probability of falsity."[13] Like the "preponderance" jurisdictions, these courts also reject defense evidence that charges were never brought or that the prior accused denies the accusation as insufficient to demonstrate falsity.[14]

The Alaska Court of Appeals has explained that the burden on the defense is essentially identical across jurisdictions despite their use of slightly different language to describe the defendant's burden of proof:

> But despite these variations, all of these courts subscribe to the same underlying principle: It is not sufficient for the defendant to show that the prior accusation is "arguably false" or that the matter is reasonably debatable. Rather, the defendant will not be allowed to present this matter to the jury unless the defendant first convinces the trial judge that the complaining witness has knowingly made a false complaint of sexual assault.[15]

A few jurisdictions impose higher or lower standards of proof on the defense. Some jurisdictions require proof of falsity by "clear and convincing evidence"[16] or have required "strong and substantial proof of falsity."[17] Some courts have expressed reluctance to set the defense burden of proof too high for fear of violating the defendant's rights.[18]

(defendant must "articulate facts that would, by a preponderance of the evidence, demonstrate that the victim or witness has made a report of unlawful sexual behavior that was demonstrably false or false in fact").

[13] Vallejo v. State, 865 S.E.2d 640 (Ga. App. 2021) (evidence that prior accused denied molestation, that step-mother saw no evidence of molestation, and that the prior accusation was not prosecuted sufficient to show "possibility" of false accusation but not sufficient to show "reasonable probability"); Clinebell v. Commonwealth, 368 S.E.2d 263 (Va. 1988) (holding that a defendant in a sexual offense case is entitled to impeach the victim with a prior false accusation after a threshold determination that there is a "reasonable probability of falsity;" pre-Rules decision). *See also* State v. Swindle, 915 N.W.2d 795 (Neb. 2018) (defendant must establish by the "greater weight of the evidence" that prior accusation was "in fact made, in fact false," and more probative than prejudicial).

[14] *See, e.g.*, Hicks v. Commonwealth, 835 S.E.2d 95 (Va. Ct. App. 2019) (mere denial by person previously accused of sexual assault is self-serving and fails to establish falsity); Brownlee v. State, 197 So. 3d 1024 (Ala Crim. App. 2015) (fact that alleged perpetrators denied accusations and that authorities had yet to prosecute them insufficient to show "demonstrated falsity" of victim's prior accusation); State v. Most, 815 N.W.2d 560 (S.D. 2012) (mere denial insufficient under demonstrably false standard and prior acquittal may be inadequate); State v. Leggett, 664 A.2d 271 (Vt. 1995) (victim's prior accusation of sexual assault not admissible through rape shield exception for false allegations where defendant failed to show that allegation was false; police report declining to pursue charges did not show falsity).

[15] Morgan v. State, 54 P.3d 332, 337 (Ak. App. 2002) (defendant may examine victim and may present witnesses and other extrinsic evidence in pretrial hearing to prove falsity; it is not required that victim concede falsity or that another tribunal adjudicate falsity as conditions of admissibility).

[16] *See, e.g.*, Az. Rev. Stat. § 13-1421 (providing "standard for admissibility of evidence… by clear and convincing evidence"); State v. Bailey, 1996 WL 587721 (Del. Sup. Ct. 1996) (adopting "majority rule" that evidence of prior false accusation is admissible despite rape shield rule when the defendant shows falsity by clear and convincing evidence). *See also* State v. Miller, 921 A.2d 942 (N.H. 2007) (trial court must constitutionally permit cross-examination regarding prior accusations that are "demonstrably false by clear and convincing evidence," but may allow cross on such accusations if Rule 403 is satisfied).

[17] *See* State v. Jones, 742 S.E.2d 108 (W.V. App. 2013) (affirming exclusion of prior false accusations by victim where defendant failed to show strong and substantial proof of falsity).

[18] *See* State v. Chambers, 465 P.3d 1076, 1085 (Idaho 2020) (any standard higher than clear and convincing "poses a true risk of infringing upon the defendant's constitutional right to present a defense").

A few jurisdictions treat the falsity of a prior accusation as a matter of conditional relevance, leaving the ultimate determination of falsity to the jury so long as the defense presents evidence sufficient for a reasonable jury to so find. Louisiana allows the jury to consider false accusations evidence when the defense has offered evidence "from which a jury might reasonably conclude that the complaining witness had made a false accusation."[19] Oregon courts have held that there is a right to cross examine the victim about prior false accusations before the jury when there is "some evidence" that they are false so long as the trial court concludes that the probative value of the prior accusations is not substantially outweighed by the risk of prejudice, confusion, embarrassment, or delay.[20] The Wisconsin Supreme Court has expressly held that the falsity of a victim's prior accusation is a matter of conditional relevance under its counterpart to Rule 104(b).[21] Nonetheless, the court has applied that standard with rigor. In *State v. Ringer*, the Wisconsin Supreme Court found that the trial judge had erred in finding that the defendant had presented evidence from which a reasonable jury could find the victim's prior accusation of sexual assault against her father to be false.[22] The court explained that the victim had never recanted, that her father did not deny inappropriate touching and only denied intent, and that the prosecutor declined to charge the father due to concerns about sufficient proof. Based on this record, the Wisconsin Supreme Court held that the trial judge erred in concluding that a "reasonable" jury could find falsity.[23]

B. Statutory and Rule-Based Standards Covering Prior False Accusations

As noted above, most jurisdictions do not address prior false accusations evidence specifically in rule text or statute. The few jurisdictions that regulate this type of evidence expressly typically do so as part of their rape shield laws. For example, the following jurisdictions specifically include prior false accusations as an exception to the prohibition on evidence of a victim's other sexual conduct:

- **Arizona**: Rape shield statute includes a specific exception allowing "evidence of false allegations of sexual misconduct made by the victim against others" to be admitted if it is relevant and material and the "inflammatory or prejudicial nature of the evidence does not outweigh" its probative value.[24]

[19] State v. Smith, 743 So.2d 199, 203 (La. 1999); State v. Bolden, 325 So.3d 602 (La. App. 2021) (trial judge must determine whether defendant has presented evidence from which a reasonable jury could find falsity).
[20] State v. Leclair, 730 P.2d 609, 613-16 (Or. 1986); *see also* Walker v. State, 841 P.2d 1159 (Okla. Ct. Crim. App. 1992) (allowing defense to cross-examine victim regarding prior false accusations where defense has proof "reasonably supporting the falsity" of the prior accusations); State v. Oliveira, 576 A.2d 111 (R.I. 1990) (holding that a victim's prior allegations of sexual assault may be admitted to challenge credibility "even if the allegations were not proven false or withdrawn. The defendant's inability to prove that prior accusations were in fact false does not make the fact that prior accusations were made irrelevant."); State v. Pottebaum, 2006 WL 1222710 (Tenn. Ct. Crim. App. 2006) (requiring only a reasonable, "good faith" factual basis for cross-examination of victim regarding an allegedly false prior accusation).
[21] State v. Ringer, 785 N.W.2d 448 (Wis. 2010). *See also* State v. DeSantis, 456 N.W.2d 600, 606-07 (Wis. 1990) (conditional relevance).
[22] Ringer, 785 N.W.2d at 460-61.
[23] Id.
[24] Az. Rev. Stat. § 13-1421 (2024).

• **Colorado**: Rape shield statute provides procedure for offering evidence "that the victim or witness has at least one incident of false reporting of unlawful sexual behavior prior to or subsequent to the alleged offense."[25]

• **Idaho**: Idaho Rule 412 provides that evidence of "an alleged victim's prior false allegations of sex crimes made at an earlier time" may be admitted subject to a reverse Rule 403 balancing standard.[26]

• **Mississippi**: Mississippi Rule of Evidence 412 permits a court to admit "false allegations of sexual offenses made at any time before trial by the victim" if the probative value of the evidence outweighs the danger of unfair prejudice.[27]

• **Vermont**: Vermont's rape shield statute provides that a court may admit "evidence of specific instances of the complaining witness's past false allegations of violations of this chapter" where it "bears on the credibility of the complaining witness" or is "material to a fact in issue" provided its probative value outweighs its "private character."[28]

• **Wisconsin**: The Wisconsin rape shield rule exempts "evidence of prior untruthful allegations of sexual assault made by the complaining witness" from its general prohibition on evidence of "the complaining witness's prior sexual conduct."[29]

Rhode Island, Virginia, and New Jersey address false accusations evidence in their versions of Rule 608. Rhode Island permits cross-examination of a witness, in the discretion of the trial judge, about "prior similar false accusations."[30] Virginia's version of Rule 608 provides that, "except as provided by other evidentiary principles, statutes, or Rules of Court, a complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct."[31] Like other jurisdictions, the Virginia courts have held that the trial judge must make a threshold finding that a "reasonable probability of falsity exists" by a preponderance of the evidence before allowing such cross-examination.[32] New Jersey's version of Rule 608 allows the defendant in a criminal case to admit evidence "that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged"

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[25] Colo. Rev. Stat. § 18-3-407 (2024).
[26] Idaho R. Evid. 412(b)(3).
[27] Miss. R. Evid. 412(b)(2).
[28] 13 V.S.A. § 3255.
[29] Wis. Stat. § 972.11(2)(b)(3) (2024). Uniform Rule of Evidence 412, published in 1974, also contained an express exception for false accusations by the victim. Uniform Rule 412, Uniform Rules of Evidence (1974 Uniform Law Commission) (excepting evidence of "(ii) false allegations of sexual offenses").
[30] R.I. Ev. Rule 608(b) (prohibiting extrinsic evidence of specific instances of dishonest conduct by a witness and of prior similar false accusations but permitting cross-examination). *See also* State v. Chadha, 253 A.3d 372 (R.I. 2021) (affirming trial court's denial of cross of victim regarding alleged prior accusation that was fundamentally different from accusation in instant case); State v. Oliveira, 576 A.2d 111 (R.I. 1990) (trial court erred in denying defense efforts to cross-examine victim about prior accusations of sexual abuse).
[31] VA. S. Ct. Rule 2:608(e).
[32] *See* Hicks v. Commonwealth, 835 S.E.2d 95 (Va. Ct. App. 2019) (requiring threshold finding and holding that trial judge did not err in refusing to allow cross-examination based upon uncorroborated testimony by family member that victim had falsely accused family member and others of sexual assault in the past).

so long as the trial judge first determines by a preponderance of the evidence that the witness "knowingly made the prior false accusation."[33] Thus, New Jersey's admission of prior false accusation evidence is not limited to sex offense cases.[34]

C. Admission of Prior False Accusations Through General Evidence Rules/Common Law/Constitutional Frameworks

Many jurisdictions consider the admissibility of prior false accusations evidence under rape shield and other evidence rules, evaluated in conjunction with a defendant's constitutional rights to present a defense and confront his accusers. For example, the military courts evaluate prior false accusations evidence through the lens of Military Rule of Evidence 412 – the rape shield rule. That provision excludes evidence of a victim's prior sexual conduct except as set forth in enumerated exceptions, including a general catchall exception that allows such evidence when its exclusion would undermine a defendant's constitutional rights.[35] The military courts have held that prior false accusations evidence is admissible under the constitutional exception only when the defense proves falsity by a preponderance of the evidence and when the evidence is "vital" to the defense.[36]

Many state jurisdictions similarly rely upon a combination of general rules of evidence and constitutional principles to determine the admissibility of false accusations evidence. Some states have applied evidence rules to allow or to prohibit false accusations evidence.[37] Others have found a constitutional right for the defense to present prior false accusations evidence despite evidentiary prohibitions.[38] Many have held that evidentiary restrictions on defense use of

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[33] N.J. R. Evid. 608(b)(1).

[34] *See* State v. Guenther, 845 A.2d 308 (N.J. 2004) ("We see no reason why prior false accusation evidence should be limited to cases in which the witness is the victim of a sexual crime.").

[35] M.R.E. 412(b)(3).

[36] *See* United States v. Erikson, 76 M.J. 231 (Ct. App. Armed Forces 2017).

[37] *See e.g.*, State v. Burns, 829 S.E.2d 367 (Ga. 2019) (rejecting a constitutional requirement to admit prior false accusation evidence in sex offense cases and instructing courts to apply evidence rules to determine admissibility; trial court erred in rejecting prior false accusation evidence pursuant to Rule 403 where victim conceded that accusation she made against another at the same time she accused defendant was false); Lopez v. State, 18 S.W.3d 220 (Tx. Crim. App. 2000) (declining to create per se evidentiary exception to Rule 608(b) prohibition on non-conviction other acts evidence for false accusations and finding that Constitution did not require cross of victim with very different allegation that was not proved to be false); State v. Rickman, 876 S.W.2d 824 (Tenn. 1994) (rejecting a sex offense exception to Rule 404(b) prohibition on other acts used to show propensity).

[38] *See, e.g.*, State v. Hansen, 515 P.3d 799 (Mont. 2022) (prior false accusations are admissible to protect defendant's constitutional rights when trial court finds that prior accusations were made, were false, and are more probative than prejudicial); State v. Long, 140 S.W.3d 27 (Missouri 2004) (evidence rule banning extrinsic evidence of witness's prior bad acts must yield to defendant's constitutional right to present a complete defense); State v. Goldenstein, 505 N.W.2d 332 (Minn. 1993) (exclusion of prior false accusation violated defendant's constitutional right to present a complete defense); *Ex Parte* Lloyd, 580 So. 2d 1374, 1375-76 (Ala. 1991) (notwithstanding prohibition on evidence of victim's other sexual conduct in rape shield rule, it is "well settled" that a victim's prior false allegations may be admitted to show "a pattern by the victim" of making false allegations); State v. Walton, 715 N.E.2d 824 (Ind. 1999) (a victim's prior false accusation is admissible in a sex offense case notwithstanding the Rule 608(b) prohibition on extrinsic evidence of prior dishonest acts; evidentiary limits must yield to constitutional concerns where a victim's prior accusations are "demonstrably false"); State v. Barber, 766 P.2d 1288 (Kan. App. 1989) (defendant has a constitutional right to examine victim about prior false accusations after demonstrating falsity and to present evidence of false accusations if victim denies them despite evidentiary limitations on such character evidence); State v. Leclair, 730 P.2d 609, 613-16 (Or. 1986) (Oregon Constitution requires that defendant

prior false accusations evidence does not violate constitutional rights to present a complete defense and to confront accusers.[39]

A few jurisdictions spell out *how* prior false accusations evidence may be used at trial when it is admissible. For example, Alaska, Kansas, Oregon, and Texas typically exclude extrinsic evidence of a witness's specific dishonest acts pursuant to their counterparts to Federal Rule of Evidence 608(b) but permit extrinsic evidence of a victim's prior false accusations when evidence of the prior false accusation is strong enough due to the "special relevance" of such evidence.[40] Other jurisdictions reject extrinsic evidence of a victim's prior false accusation and permit only cross-examination of the victim about prior false accusations that have been proven false.[41]

Because the Florida Evidence Code contains no counterpart to Federal Rule of Evidence 608(b) (that permits cross-examination on non-conviction acts of dishonesty), the Florida Supreme Court has denied even cross-examination with prior false accusation evidence. In *Pantoja v. State*, the Florida Supreme Court rejected a rule requiring admission of a victim's prior false accusations in sex offense cases in which the defendant claims mistake or fabrication.[42] The court found that such evidence constitutes an attack on the victim's general credibility and is not constitutionally required where it does not suggest the victim's motive to accuse the current defendant.[43] Thus, the court found that the prior false accusation evidence was excluded by Florida's evidence rules and could not be used.

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be permitted to cross-examine victim before jury about other accusations where: 1)she has recanted them; 2) the defendant demonstrates to the court that those accusations were false; or 3) there is "some evidence" that the victim has made prior accusations that were false, unless probative value is substantially outweighed by risks of unfair prejudice, confusion, embarrassment, or delay); Commonwealth v. Bohannon, 378 N.E.2d 987 (Mass. 1978) (defendant should have been permitted to cross-examine victim regarding alleged prior false rape accusation despite evidence rule prohibiting such impeachment because of defendant's constitutional right to present a full defense).

[39] *See, e.g.*, Sparks v. State, 440 P.3d 1095 (Wy. 2019) (no constitutional or evidentiary error in excluding evidence of victim's prior, admittedly false accusations on anonymous on-line apps); State v. Lee, 396 P.3d 316 (Wash. 2016) (court's refusal to allow defense to identify prior false allegation as one of "rape" did not violate defendant's constitutional rights in sex offense prosecution where the prior false accusation was an attack on general credibility and of minimal probative value and where there was a valid state interest in protecting the victim from prejudice and where defense was permitted to ask victim whether she had made a prior "false accusation" against someone else).

[40] *See* Morgan v. State, 54 P.3d 332 (Ak. App. 2002) (describing approaches to extrinsic evidence and stating that "prior false complaints of sexual assault constitute a special kind of prior falsehood that has particular relevance above and beyond the fact that it may indicate the witness's general character for dishonesty"). *See also* State ex rel. Mazurek v. District Court, 922 P.2d 474 (Mont. 1996) (extrinsic evidence of a prior false accusation may be admitted if the victim denies making it on cross-examination); State v. Swindle, 915 N.W.2d 795 (Neb. 2018) (same); Abbott v. State, 138 P.3d 462 (Nev. 2006) (victim's prior fabricated sexual assault allegations are highly probative of credibility and defendant has a right to cross-examine victim and to present extrinsic evidence if victim denies prior false accusation).

[41] State v. Boggs, 588 N.E.2d 813 (Ohio 1992) (the defense may not offer extrinsic evidence of a victim's prior false accusation as it is wholly collateral); State v. Scott, 828 P.2d 958, 963 (N.M. App. 1991) (same); State v. Cox, 468 A.2d 319, 323-24 (Md. 1983).

[42] Pantoja v. State, 59 So. 3d 1092 (Fla. 2011).

[43] Id. *See also* People v. Cookson, 830 N.E.2d 484 (Ill. 2005) (holding that cross-examination to show bias, interest, or motive to testify falsely is a matter of right but finding that alleged false allegation against another did not show victim's potential bias against or motive to lie about abuse by *this* defendant).

D. Processes for Evaluating Falsity of a Victim's Prior Accusations

Several jurisdictions have well-developed procedures in place to be utilized by trial judges considering the admissibility of prior false accusations evidence. Most jurisdictions rely upon a pretrial notice, motion, and in camera hearing procedure like the one set forth in Federal Rule of Evidence 412(c) for consideration of prior false accusations evidence.[44] Some jurisdictions prescribe methods for conducting such pretrial inquiries into prior false accusations. For example, in the District of Columbia, a defendant is entitled to conduct a limited voir dire of the victim regarding a prior false accusation if the defendant has a "good faith basis" or "reasonable suspicion" regarding the veracity of a prior false accusation.[45] The defense is entitled to trial cross-examination of the victim about the prior accusation only after showing "convincingly" that it was false.[46] In Oklahoma, the defense must offer "sufficient facts to provide a reasonable basis" for proposed cross-examination of the victim regarding prior false accusations in an in camera hearing. The prosecution must then be allowed to show that the accusations were true. If the defense has proof "reasonably supporting the falsity" of the prior accusations, the defense is entitled to trial cross-examination regarding those accusations.[47]

II. Drafting Alternatives for a Federal Rule of Evidence Governing an Alleged Victim's False Accusations

There are several alternatives for amending the Federal Rules of Evidence to permit the admission of an alleged victim's prior false accusations. One alternative would be a new, free-standing rule of admissibility covering evidence of false accusations in Article IV. Another alternative embraced by several states would be to amend Rule 412(b)(1), the rape shield rule, to make false accusations evidence an enumerated exception to Rule 412(a)'s prohibition on evidence of a victim's other sexual conduct in criminal cases.

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[44] *See, e.g.*, United States v. Tinsley, 81 M.J. 836 (Army Crim App. 2021) (trial judge held Rule 412 hearing to consider admissibility of prior false accusation evidence); Brownlee v. State, 197 So. 3d 1024 (Ala Crim. App. 2015) (evaluating false accusations evidence in a pretrial hearing); Morgan v. State, 54 P.3d 332 (Ak. App. 2002) (requiring defense to present evidence of falsity to trial judge in hearing outside the presence of the jury); Colo. Rev. Stat. § 18-3-407 (2024) (setting forth pretrial motion and in camera hearing process for false accusations evidence); State v. Wright, 2023 WL 2850008 (Idaho App. 2023) ("Before admitting [false accusation evidence], the trial court must conduct an in-camera hearing at which the parties may call witnesses, including the alleged victim, and offer relevant evidence."); State v. Boggs, 588 N.E.2d 813 (Ohio 1992) (trial court must hold pretrial hearing to determine whether prior incident actually involved any sexual conduct; if so, conduct may not be inquired into pursuant to rape shield statute; only if prior accusation "totally false and unfounded" may defense ask victim about it on cross).

[45] Garibay v. United States, 72 A.3d 133 (D.C. Ct. App. 2013) (trial judge erred in denying defense limited voir dire of victim regarding a prior accusation that was found to be "unsubstantiated;" finding was sufficient to entitle defense to examine victim but not sufficient by itself to show convincingly that accusation was false). *See also* In the Interest of GH, 518 P.3d 1158 (Hawaii 2022) (court should follow pretrial procedures only in cases where "truth or falsity" of victim's prior accusation is unclear).

[46] Id.

[47] Walker v. State, 841 P.2d 1159 (Okla. Ct. Crim. App. 1992) (describing guidelines for allowing cross-examination regarding prior false accusations). *See also* People v. Butler, 6 N.W.3d 54 (Mich. 2024) (once defendant makes a sufficient offer of proof of falsity, trial court must hold in camera evidentiary hearing; hearing is not optional).

A. A New Rule 416

The Committee could propose a new, free-standing Rule 416 to cover false accusations evidence. Such a provision could take many forms. The amendment alternative most closely resembling Professor Murphy's proposal would adopt a new Federal Rule of Evidence 416 that would allow evidence of a victim's false accusation to be admitted in a sex offense case whether or not the victim testifies based upon a finding of falsity, as follows:

> **Rule 416. False Accusation in Sex Offense Cases.**[48]
>
> **(a) Admissibility.** Evidence of a victim's false accusation involving other alleged sexual misconduct may be admitted to show the falsity of a current accusation involving sexual misconduct if:
>
> ***(1) Proof of Falsity.*** The falsity of the other accusation, and the victim's awareness of its falsity, have both been established by a preponderance of the evidence. The court may consider the fact that the other accusation was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsity or awareness of falsity by a preponderance of the evidence.
>
> ***(2) Nature of the False Accusation.*** The false accusation is similar in nature or of equal or greater magnitude to the current accusation.
>
> **(b) Notice and Procedure.** The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the evidence of the false accusation may prove that an alleged victim engaged in other sexual behavior, the proponent must comply with the procedure to determine admissibility provided by Rule 412(c).
>
> **(c) Extrinsic Evidence.** Extrinsic evidence of the false accusation is admissible if the victim does not testify or testifies and denies having made the false accusation or denies its falsity.

This amendment alternative distinguishes circumstances in which the victim testifies from circumstances in which the victim does not testify -- but ultimately allows false accusation evidence to be admitted in either circumstance. It also somewhat anomalously provides for the admission of "evidence" in subsection (a) and for the admission of "extrinsic evidence" in subsection (c). Finally, this version of a proposed Rule 416 attempts to guide a trial judge's familiar Rule 403 balancing process in rule text by limiting admissibility to other false accusations that are "similar in nature" and of "equal or greater magnitude" when compared to the instant allegations.

[48] This draft provision was modified from Professor Murphy's proposal to conform to other Evidence Rules, to limit its application to sex offense cases, to clarify its application to both criminal and civil cases, and to provide for its application to any false accusations made prior or *subsequent* to the instant accusations.

A simpler amendment might avoid awkward distinctions between "evidence" and "extrinsic evidence" and testifying and non-testifying victims, and could leave Rule 403 balancing to the discretion of the trial judge, as follows:

> **Rule 416. False Accusation in Sex-Offense Cases.**
>
> **(a) Admissibility.** Evidence of a victim's false accusation involving other alleged sexual misconduct may be admitted to show the falsity of a current accusation involving sexual misconduct.
>
> **(b) Proof of Falsity and Awareness of Falsity.** The falsity of the other accusation, and the victim's awareness of its falsity, must be established by a preponderance of the evidence. The court may consider the fact that the other accusation was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsity or awareness of falsity by a preponderance of the evidence.
>
> **(c) Notice and Procedure.** The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the evidence of the false accusation may prove that an alleged victim engaged in other sexual behavior, the proponent must comply with the procedure to determine admissibility provided by Rule 412(c).[49]

The Advisory Committee note to this alternative could make clear that Rule 403 applies to the admission of false accusation evidence. The note could direct courts to consider the *need* for the evidence in light of a victim's testimony and denial on cross-examination, as well as the nature of the prior accusation, its similarity and recency in determining admissibility.

B. Amending Rule 412 to Admit False Accusations Evidence

As shown above, the states that have specifically addressed prior false accusations evidence in statutory or rule text have most often included it in their rape shield provisions. Another alternative for amending the Federal Rules of Evidence would be to add false accusations evidence as an enumerated exception to the Rule 412(a) prohibition on evidence of an alleged victim's other sexual conduct in criminal cases. Rule 412(b) might be amended as follows:

> **Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition**
>
> **(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
> **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or

[49] In a case in which a defendant claims that the victim had consensual sex on another occasion and then falsely accused her partner of sexual assault, such evidence would ultimately show "other sexual conduct" (as well as lying) by the victim. Any other sexual conduct by a victim in a sex offense case may only be admitted after pre-trial written notice and a hearing as required by Rule 412(c). Therefore, Rule 416 would need to incorporate that notice and hearing requirement for any false accusations evidence that would ultimately show other sexual conduct by a victim.

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions:

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor;

(C) evidence of a victim's false accusation involving other alleged sexual misconduct if the falsity of the other accusation, and the victim's awareness of its falsity are established by a preponderance of the evidence; and

(D) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes and alleged victim.

Adding prior false accusations evidence to Rule 412 offers some advantages over a stand-alone Rule 416. First, this evidence is utilized almost exclusively in sex offense cases in which Rule 412 must be followed. And most states that have expressly included prior false accusations in statutory or rule text have chosen their respective rape shield statutes as the optimal place for such a provision. Locating the exception within Rule 412 which already includes detailed motion and hearing requirements avoids a cross-reference to those necessary procedures in a stand-alone provision.

Further, Rule 412(b)(1) provides that the court "may admit" evidence within its enumerated exceptions. Thus, adding prior false accusations evidence to the enumerated exceptions would pave the way for its admission in criminal cases, allowing the trial court to identify in pretrial proceedings whether cross-examination and/or extrinsic evidence concerning such prior false accusations would be permitted in a given case. Such evidence could be admitted in civil cases through the balancing test in Rule 412(b)(2).

This placement raises other issues, however. First, Rule 412 is a rule of exclusion, and it could be argued that including an "exception" for prior false accusations would not make such evidence *admissible*. Instead, the exception would simply serve to save such evidence from Rule 412 exclusion and prior false accusation evidence would need to satisfy other evidentiary standards (such as Rule 404 and 608) before being utilized.[50] On the other hand, Rule 412(b)(1) specifically provides that the court "may admit" evidence within the enumerated exceptions. And it appears that the existing Rule 412 (b)(1) exceptions typically operate to admit evidence within them and that courts rarely look to other evidence rules to determine admissibility once finding evidence to be covered by an express exception.[51] Further, an Advisory Committee note could clarify that evidence satisfying a new false accusations exception is "admissible" in a sex offense case under the specified circumstances.

Second, it is necessary to include the "preponderance" standard of proof in rule text to ensure that the defense is required to prove falsity before admitting prior accusations evidence. The other Rule 412(b)(1) exceptions (for prior consensual encounters with the defendant, for example) do not include a specific standard of proof, however. It may seem anomalous to include a standard of proof in one Rule 412(b)(1) exception but not in others. On the other hand, Rule 702 was recently amended to add the preponderance standard of proof to rule text -- even though that standard was already required by Rule 104(a) and even though it is not expressly included in other rules to which it applies -- given that some federal courts were applying a lower

[50] *See, e.g.*, State v. Quinn, 490 S.E.2d 34 (W.Va. App. 1997) (holding that the falsity of a victim's prior accusation does not make it admissible, but merely saves it from exclusion under rape shield rule).

[51] *See, e.g.*, United States v. Barrett, 2023 WL 4536351, at *8 (E.D. Cal. July 13, 2023) ("One exception to this rule permits "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct ... if offered by the prosecutor." Fed. R. Evid. 412(b)(1)(B). Defendant did not acknowledge this argument in his opposition to the Government's motion. At the hearing, he simply stated a general objection to admission of testimony from S.F., J.V., and E.B. on the grounds that it would be cumulative. As discussed above, the Court disagrees with this assessment. Because the Government's request aligns with an explicit Rule 412 exception, the Court will grant its motion.").

standard in admitting expert testimony.[52] In light of the important policy of protecting victims from evidence of their prior sexual conduct unless and until the defense proves the falsity of a past accusation, the Committee could justify adding a standard of proof to an amended Rule 412(b)(1)(C) even though standards of proof are not included in other parts of the Rule.

Covering false accusations evidence in Rule 412 makes it more difficult to include descriptions of the types of evidence that are *not* sufficient to prove falsity in rule text and to limit the evidence to prior accusations of a similar nature and of equal magnitude to the charged offense. Such a lengthy description of the prior false accusations evidence in rule text would be at odds with the spare descriptions of the evidence covered by the other Rule 412(b)(1) exceptions and could disrupt the flow of the existing provision. Such elaboration on the evidence that a court should consider in evaluating a defense proffer could be addressed in a Committee note to an amendment, however. A consideration of the factors a court should consider and of the showing necessary to satisfy the rule seems appropriately placed in a note.

Finally, the amendment outlined above would alter slightly the existing numbering of the Rule 412(b)(1) exceptions – a result the Committee typically tries to avoid so as not to disrupt expectations and legal research. The broad constitutional exception to the Rule 412(a) prohibition on evidence of a victim's other sexual conduct is currently located in Rule 412(b)(1)(C). This amendment alternative makes prior false accusations evidence the Rule 412(b)(1)(C) exception and moves the constitutional exception to a new Rule 412(b)(1)(D) in order to have all specific enumerated exceptions articulated before the general constitutional catchall exception. If the Committee were drafting on a clean slate, this listing of the specific before the general would undoubtedly be preferred. But because the Committee would be proposing to modify an existing Rule and might be unwilling to disrupt familiar numbering, the prior false accusations provision could be added to the end of existing Rule 412(b)(1) and become Rule 412(b)(1)(D). This would maintain the current numbering of the existing exceptions and tack a new one on at the end. The stylists could be consulted about optimal placement of a new exception within Rule 412(b)(1) should the Committee decide to proceed with a Rule 412 amendment.

III. Reasons Not to Amend the Federal Rules of Evidence to Cover False Accusations Evidence Expressly

Although there are multiple alternatives for amending the Federal Rules of Evidence to expressly admit prior false accusations evidence, it appears unnecessary, and even ill-advised, to add a rule of admissibility for such evidence.

First, as explained above, only 2.2% of sentencings in federal court in 2023 arose out of sex offense cases. Because the federal courts do not routinely adjudicate sex offense cases, there is no pressing need for a *federal* rule directed specifically at prior false accusations evidence. The state and military courts that do adjudicate the overwhelming majority of sex offense cases have been dealing successfully with prior false accusations evidence for many decades. Most

[52] Fed. R. Evid. 702 (proponent must "demonstrate[] to the court that it is more likely than not that" Rule 702 requirements are satisfied).

jurisdictions have well-developed standards applicable to such evidence. These jurisdictions do not need a federal *model* to guide the admission of prior false accusations evidence given their significant experience in handling it. Furthermore, the significant caselaw and varied standards and processes already developed in state jurisdictions suggest that the states are unlikely to scrap their longstanding precedent in favor of a new federal model rule.

Second, only a handful of jurisdictions have adopted an evidence rule or statute tailored specifically to false accusations evidence. Most jurisdictions successfully evaluate such evidence using traditional evidentiary concepts of relevance, probative value, prejudice, and impeachment. Many jurisdictions rely upon a defendant's constitutional rights to present a defense and to confront witnesses in ruling on the admissibility of prior false accusations evidence. Thus, the overwhelming majority of state jurisdictions – that handle the overwhelming majority of sex offense cases in which prior false accusations evidence is most relevant – regulate this evidence effectively without a bespoke provision providing for the admissibility of a victim's prior false accusations.

Third, despite slight variations in the language and standards applied, the states consistently impose a relatively high burden of proof on the defense to demonstrate the knowing falsity of a victim's prior accusation. In order to admit prior false accusations evidence, jurisdictions demand that the defense prove falsity by "clear and convincing evidence," that defendants show prior accusations to be "demonstrably false," or that defendants show that a victim's prior accusation was "more likely than not" knowingly false. A new Federal Rule 416 would likewise require the defense to prove knowing falsity by a preponderance of the evidence.

As demonstrated above, the state courts have consistently found that a denial of the offense by the person previously accused is inadequate to prove the falsity of the prior accusation.[53] Similarly, an actual acquittal of the person previously accused has routinely been found to be inadequate to prove falsity because an acquittal demonstrates only that the government failed to meet its burden of proof in the prior case and *not* that the prior accusation was false.[54] Courts have also found law enforcement authorities' refusal or failure to file charges arising out of prior assault accusations or dismissal of prior charges at a preliminary hearing inadequate to prove falsity.[55] A charging decision may result from resource deficiencies or concerns about the ability to prove allegations and not necessarily from findings of falsity. In addition, courts have found that the defense failed to prove falsity even when the defense presented witnesses other than the person previously accused to testify that a prior assault did not occur.[56] Finally, courts have

[53] *See, e.g.*, United States v. McElhaney, 54 M.J. 120 (Ct. App. Armed Forces 2000) (trial judge did not err in denying cross-examination of victim regarding prior false accusation where defense evidence of falsity consisted only of "unsurprising denial" by prior perpetrator; falsity not proven).
[54] *See, e.g.*, United States v. Erikson, 76 M.J. 231 (Ct. App. Armed Forces 2017) (rejecting acquittal as proof of falsity).
[55] *See, e.g.*, Morgan v. State, 54 P.3d 332, 338 (Ak. App. 2002) (noting that dismissals of charges at the preliminary hearing stage have been found inadequate to prove falsity "because such dismissals occur for reasons unrelated to the credibility of the complaining witness."); People v. Weiss, 133 P.3d 1180 (Colo. 2006) (fact that charges were not filed after victim's prior report insufficient to establish that report was false).
[56] United States v. Erikson, 76 M.J. 231 (Ct. App. Armed Forces 2017) (rejecting testimony by defense witness who "was present in the room at the time of the alleged incident and who denied seeing any sexual assault occur").

rejected defense efforts to show falsity even in cases in which the victim has officially *recanted* a prior accusation at some point, where the victim now claims that the accusation was true and accurate and that she recanted out of fear or for some other reason.[57]

The courts permit the defense to present evidence of falsity in many forms, and it is theoretically possible for a defendant to prove the falsity of a prior accusation with witnesses or other extrinsic evidence that disproves any previous assault.[58] Still, given the reality that most sexual assaults are perpetrated in isolation, placing the burden of proving falsity on the defendant means that prior false accusations evidence is likely to be admitted only when the victim now *concedes* that she knowingly made a prior accusation that was false or when there has been some finding of falsity, such as a prior conviction of the victim for falsely reporting.[59] Because cases in which a victim concedes falsity or has previously been found to have falsely accused another are truly exceptional, the vast majority of proffered prior false accusations are excluded.[60] It makes little sense to add a new provision to the Federal Rules of Evidence providing for the *admissibility* of prior false accusations evidence when they should typically be excluded from evidence. If the Committee elected to add a provision covering prior false accusations, it would be more consistent with the caselaw to add a rule of exclusion (akin to Federal Rule of Evidence 404(a)) that states a general *prohibition* on such evidence with limited exceptions for the unusual case in which a defendant can prove that a prior accusation was knowingly false.

Furthermore, given the realities of the evidence available to the defense, false accusations evidence would be admissible under a new Rule 416 only in compelling and egregious cases when such evidence is likely to be admitted already under existing rules.[61] The defense would be permitted to admit prior false accusations evidence under the new rule if another court has affirmatively found the prior accusation to be false, such as when a victim has been prosecuted for false reporting. Of course, a victim's prior conviction for false reporting is already automatically admissible under Rule 609(a)(2) as a crime of dishonesty in a federal proceeding if the victim testifies. A new Rule 416 would also likely allow the defense to prove a prior

[57] *See, e.g.*, State v. McDonald, 956 P.2d 1314 (Id. App. 1998) (excluding evidence of victim's prior accusation that she formally recanted where victim testified that she recanted due to family situation, but that prior accusation had been true); Bond v. State, 288 S.W.3d 206 (Ark. 2008) (trial judge properly excluded victim's prior accusation that she had recanted; trial judge found accusation true despite recantation due to photographic evidence of abuse).
[58] *See* Morgan v. State, 54 P.3d 332, 337 (Ak. App. 2002) (allowing defense to prove falsity with witnesses and other extrinsic evidence; rejecting any requirement that the victim conceded falsity or that the prior accusation have been adjudicated to be false).
[59] *See* Dennis v. Commonwealth, 306 S.W.3d 466 (Ky. 2010) (stating that victim's "recantation," "an investigation that establishes facts wholly inconsistent with the allegation, or circumstances strongly suggesting that the victim had a motive to fabricate the prior and current allegations" could "potentially" allow defense to use prior false accusation evidence).
[60] Morgan, *supra* n. 58 (noting that "[u]nless the person named in the prior accusation brought and won a slander suit against the complaining witness, or unless the prior false accusation eventually led to the complaining witness's conviction for perjury, it will be rare that a tribunal will have directly adjudicated the truth or falsity of a prior accusation").
[61] *See* Perry v. Commonwealth, 390 S.W.3d 122 (Ky. 2012) (sheer number and variety of sexual assault accusations made by child created a distinct probability of their falsity when considered as a whole).

accusation when the victim now *concedes* having made an accusation that was false.[62] Rule 608(b) would certainly allow the victim who concedes the falsity of a prior accusation to be effectively cross-examined about it by the defense. Furthermore, a prior conviction for false reporting (or even a concession of prior false reporting that is "similar and of equal magnitude" to the current case) could potentially be admitted through Rule 404(b)(2) in a federal case to show the victim's motivation for making the current accusation even in the absence of trial testimony by the victim.[63] Finally, evidence of a prior false accusation that reveals the alleged victim's motivations in accusing the defendant in the instant case must be admitted to preserve the defendant's constitutional rights.[64] Thus, it makes little sense to add a new rule of *admissibility* that will result in the routine *exclusion* of the evidence it covers and that will only admit evidence that would be otherwise admissible through existing provisions or protections.

Finally, it is clear from the caselaw that capable criminal defense counsel can and regularly do investigate and proffer prior accusations that have been made by alleged victims using existing evidentiary standards. That said, a new Federal Rule of Evidence that provides for the admissibility of prior false accusations evidence specifically could be viewed as a green light that encourages heightened scrutiny of a victim's past and incentivizes the proffer of false accusations evidence. This could impose unintended consequences on federal courts handling these cases, as well as on alleged victims with no corresponding benefit to criminal defendants.

Defendants seeking to admit prior false accusations must be given an opportunity to prove falsity.[65] This threatens to tax district court judges with additional in camera evidentiary hearings to resolve questions of admissibility with respect to unrelated events, thus consuming valuable time and resources. And when such evidence is excluded by the district court, as it is likely to be in the vast majority of cases due to the difficulty in showing falsity, the exclusionary decision (and the handling of the pretrial proceedings) will create new appellate issues for the Circuit Courts reviewing these convictions. A specialized rule of admissibility for prior false accusations could also have the unintended consequence of deterring and harassing sexual assault victims. The state cases reveal pretrial proceedings used to evaluate prior false accusations evidence that require often vulnerable victims (such as children in dangerous environments where they have been subjected to sexual abuse by multiple actors) to relive and defend prior accusations of sexual assault.[66] State courts routinely exclude prior false

[62] *See* State v. Baker, 679 N.W. 2d 7 (Iowa 2004) (reversing trial court's refusal to allow cross-examination of victim regarding prior accusation of sex with neighbor that she admitted was false).
[63] *See* Fed. R. Evid. 404(b)(2) (allowing evidence of other crimes, wrongs, or acts for purposes such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").
[64] *See* State v. Alberts, 722 N.W.2d 402 (Iowa 2006) (where victim falsely accused another person of sexual assault when she was caught skinny dipping by her boyfriend's brother, it would show her motive to claim assault against defendant to boyfriend after another consensual encounter).
[65] *See* State v. Quinn, 490 S.E.2d 34 (W.Va. App. 1997) (explaining that trial court must hold pretrial, in camera hearings under rape shield statute to determine falsity of a victim's prior accusation because the prior accusation constitutes "other sexual conduct" by the victim if it is true, even if that conduct is involuntary).
[66] *See* Commonwealth v. McFarlane, 225 N.E.3d 812 (Mass. 2024) (Cypher, J. concurring) (urging reversal of rule allowing prior false rape allegations to be used to impeach a victim's credibility because it is "rooted in the misogynist belief that women are prone to lying about sexual assault," because "falsity is a complicated aspect to

accusations evidence due to insufficient proof of falsity but only after the victim has been forced to testify about and explain other sexual assaults she has endured.[67] Thus, a new Federal Rule of Evidence 416 that encourages defendants to offer prior false accusations evidence may not actually increase the admissibility of such evidence at trial due to the standard of proof required but may multiply pretrial proceedings that require victims to defend past assault allegations. The prospect of having to testify routinely -- even in camera -- about prior incidents of sexual assault could deter victims considering whether to pursue sexual assault allegations. [68]

In sum, when examined closely, a new Federal Rule of Evidence 416 that admits prior false accusations evidence in appropriate cases offers few benefits. The states prosecute the vast majority of the cases to which such a provision would apply and the state and military jurisdictions that handle these cases have well-developed approaches to false accusations evidence. They appear to need no guidance from a federal provision to assist in sifting the admissible from the inadmissible. In the compelling and unusual cases in which a new Rule 416 would admit false accusations evidence, existing evidentiary rules and constitutional protections offer avenues of admissibility that appear sufficient to protect the interests of criminal defendants. Conversely, a new rule of admissibility could impose unintended consequences and costs on courts and victims. Federal courts may have to evaluate, and victims may have to address such evidence much more frequently to navigate an evidentiary provision that ultimately will not increase defense access to trial evidence.

prove," and because "[t]he rules of evidence should not be used …as a second assault, subjecting the witness to rehash sexual experiences on the witness stand.").

[67] *See* State v. Wright, 2023 WL 2850008 (Idaho App. 2023) ("Before admitting [false accusation evidence], the trial court must conduct an in-camera hearing at which the parties may call witnesses, *including the alleged victim*, and offer relevant evidence.") (emphasis added).

[68] *See* Advisory Committee's note to 1995 amendment to Fed. R. Evid. 412 ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment, and sexual stereotyping that is associated with public disclosure of intimate sexual details. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and participate in legal proceedings against alleged offenders.")

TAB 5B

University of Oklahoma College of Law
300 Timberdell Rd., Norman OK. 73019

Liesa L. Richter
George Lynn Cross Research Professor
Floyd & Martha Norris Chair in Law
liesarichter@ou.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Evidence of an Alleged Victim's Prior False Accusations
Date: March 25, 2024

Courts have struggled with whether and how to admit evidence of prior false accusations made by alleged victims in criminal cases, primarily in cases involving sexual assault. At the Fall 2023 meeting of the Evidence Advisory Committee, Professor Erin Murphy presented a proposal to amend the Federal Rules of Evidence to address the admissibility of prior false accusations evidence. The Committee unanimously decided to consider the possibility of amending the Federal Rules of Evidence to address such evidence.

In considering amendments to the Federal Rules, it is important to keep in mind that the vast majority of sexual assault cases, in which false accusation evidence is most commonly proffered, are prosecuted at the state level. According to the U.S. Sentencing Commission's Statistical Information Packet for Fiscal Year 2022, only 2.3 percent of federal sentencings nationwide were for sexual abuse-related offenses.[1] The federal prosecutions that are pursued primarily involve alleged assaults in Indian territory, with the occasional prosecution of a civilian for an assault on a military base.[2] It is also important to keep in mind that "empirical research has produced strong evidence that undermines the claim that sexual assault is a complaint especially likely to be fabricated."[3] Professor Murphy cites research suggesting that the percentage of sexual assault reports that are false is quite small, ranging somewhere between 2-8% of total cases.[4]

[1] United States Sentencing Commission, Statistical Information Packet for Fiscal Year 2022, Figure A.

[2] *See, e.g.*, United States v. Frederick, 683 F.3d 913, 916 (8th Cir. 2012) (prosecution for sexual abuse of a minor on an Indian reservation); United States v. A.S., 939 F.3d 1063, 1072 (10th Cir. 2019) (prosecution of juvenile civilian for sexual assault on a military base).

[3] Erin Murphy, *Impeaching with an Alleged Prior False Accusation*, __ FORDHAM LAW REVIEW __ (forthcoming 2024) (hereinafter *Impeaching with an Alleged Prior False Accusation*).

[4] *Id.* at n. 2 (citing David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) Violence Against Women 1318 (2010) (finding 5.9% of reports to be false) and Cassia Spohn & Katherin Tellis, *Policing and Prosecuting Sexual Assault* 102, 140, 164 (2014) (finding roughly 7.6% of initial reports false)). *See also* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 126 (1998) ("studies that have shown that the frequency of rape reports proven false, approximately two percent, mirrors the false reporting rates for

This memorandum proceeds in four parts. Part I describes how evidence of an alleged sexual assault victim's prior false accusations may be evaluated under the existing Rules. Part II examines the amendment to the Rules proposed by Professor Murphy to admit prior false accusations evidence and potential amendment alternatives. Part III evaluates the merits and demerits of amending the Federal Rules to admit evidence of a victim's prior false accusations. Part IV briefly concludes by recommending further study, including a fifty-state survey of rules regulating false accusation evidence, should the Committee wish to proceed with consideration of a new federal provision.

I. Existing Federal Standards Governing Admission of an Alleged Victim's Prior False Accusations

When a defendant seeks to offer extrinsic evidence of an alleged sexual assault victim's prior false accusations, Federal Rules of Evidence 104, 404(b), 403, and 412 are implicated. Federal Rule of Evidence 608(b) governs a defendant's right to impeach a testifying victim with a prior false accusation. Both Rules 403 and 412 are also implicated in evaluating the propriety of Rule 608(b) impeachment. Finally, in a criminal case, the defendant may assert a constitutional right to admit evidence of an alleged victim's prior false accusation, or to impeach a testifying victim with a prior false accusation.

A. Rule 404(b): Extrinsic Evidence of an Alleged Victim's Prior False Accusations

When a defendant offers evidence that an alleged victim has previously falsely accused someone of a crime, such as testimony of a witness describing the victim's past conduct or documentation of a prior false accusation, such evidence is currently governed by Federal Rule of Evidence 404(b). Rule 404(b) regulates evidence of a person's "other crimes, wrongs, or acts."[5] A victim's accusation made in a prior case or circumstance certainly counts as an "other act" and, if it was knowingly false, qualifies as a "crime" and a "wrong" as well.

Rule 404(b)(1) provides that a person's other crime, wrong, or act may not be admitted to show her character to suggest her conduct on a particular occasion.[6] Rule 404(b)(1) thus prohibits evidence of a person's prior acts when offered to suggest the person's propensity to behave in certain ways to show that the person likely behaved consistently on a disputed occasion. Evidence that an alleged victim previously accused someone falsely of an offense against her certainly relies on a propensity inference when offered to show that she is falsely accusing a different defendant in the instant case. The prior false accusation suggests that this alleged victim is the sort of person

other crimes.") (proposing a new Rule of Evidence to allow extrinsic evidence of prior false accusations of sexual assault upon a requisite showing of falsity).

[5] Fed. R. Evid. 404(b).

[6] Fed. R. Evid. 404(b)(1).

who would falsely accuse a person in an effort to show that she is acting in accordance with her tendencies and is falsely accusing a new defendant in the instant action. If an alleged victim's prior false accusation is viewed as showing the victim's propensity for false accusation to suggest her false accusation of the current defendant, evidence of that prior false accusation should be excluded under Rule 404(b)(1). Professor Murphy has described false accusation evidence as demonstrating a "propensity or character to falsely accuse."[7]

There are very few federal cases analyzing the admissibility of extrinsic evidence of a victim's prior false accusations under Federal Rule of Evidence 404(b). The Ninth Circuit recognized the relevance of Rule 404(b)(1) to prior false accusation evidence in affirming the denial of a habeas petition in *Hughes v. Raines*.[8] In *Hughes*, the Ninth Circuit affirmed the district court's denial of a habeas petition alleging a violation of the defendant's confrontation rights due to the trial court's refusal to allow cross-examination of the victim regarding a prior accusation of rape. In rejecting the confrontation clause challenge, the Ninth Circuit explained that:

> Even if the jury reasonably could conclude that the prior charge was false, the relevance of that conclusion to this case is slight. The inference the jury would be asked to draw is that because the complaining witness made a false accusation of attempted rape on a prior occasion, her accusation in this case was false. Our rules of evidence reflect a general reluctance to draw an inference that because a person may have acted wrongfully on one occasion, he or she also acted wrongfully on the occasion at issue. See Fed.R.Evid. 404(b).[9]

But evidence of prior false accusations may be more specific than the generic character evidence typically excluded by Rule 404(b)(1). As Professor Murphy notes, "[t]here is simply a sharp conceptual and practical distinction between using a random, generic act of dishonesty to impugn a person's honesty under oath at trial, and using evidence of a prior false accusation to impugn the credibility of the complainant's present accusation."[10] Prior false accusation evidence is far more particularized than evidence showing that an alleged victim has a tendency toward dishonesty generally, such as evidence that she previously lied on an employment application or in some other lesser or distinct context.[11] Prior false accusation evidence may reveal that the alleged victim has accused another person of sexual assault in circumstances very similar to those present in the instant case and that the victim's prior similar accusation was false. Federal Rule of Evidence 404(b)(2) allows a person's other crimes, wrongs, or acts to be admitted for a permitted

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[7] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 10.

[8] 641 F.2d 790, 793 (9th Cir. 1981).

[9] *Id.*

[10] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 9.

[11] *See, e.g.*, United States v. Howard, 774 F.2d 838, 844-45 (7th Cir. 1985) (witness lying on employment application).

purpose, such as showing her "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[12]

An alleged victim's prior false accusation cannot be seen as part of a common plan or scheme in the typical case in which the victim previously accused one person of wrongdoing and is now accusing a separate defendant of wrongdoing arising out of a distinct interaction. It would often be inappropriate to characterize two separate events as comprising part of a single plan by the victim. Similarly, prior false accusation evidence may be insufficiently distinctive to show the victim's "modus operandi" and the question of the *victim's* "identity" typically revealed by such modus operandi evidence is unlikely to be at issue. Nor would prior accusation evidence appear relevant to show absence of mistake or lack of accident. Sadly, particularly for vulnerable populations, numerous sexual assault accusations by a single victim would not implicate the doctrine of objective chances. Nor would a prior false accusation demonstrate the alleged victim's knowledge in the typical case.

But one could argue that some prior false accusation evidence can demonstrate the alleged victim's intent or motive in accusing the defendant in a manner similar to the intent and motive evidence routinely admitted against criminal defendants under Rule 404(b)(2). For example, when a defendant in a criminal drug prosecution argues that he was not planning to distribute drugs on a charged occasion in which he is apprehended in proximity to drugs or drug distribution, prosecutors often admit evidence of the defendant's prior intentional drug distribution or even possession to suggest his intent on the occasion in question and his motivation for being in close proximity to drug dealing.[13] When an alleged victim denies making a false accusation in the instant case and insists that an encounter with the defendant involved a sexual assault, for example, the accused might try to show the victim's previous false accusation in a very similar circumstance to show her intent and motive for making the accusation in the current situation.

Professor Murphy suggests the following scenario:

> A defendant is charged with sexually assaulting a woman at an in-patient drug treatment program. The defendant uncovers evidence that the woman previously accused employees of sexual assault at two different programs, allegedly in order to get out of the program.[14]

On these facts, a defendant could argue that the two prior false accusations reveal the alleged victim's motivation and intent in falsely accusing him. Indeed, such prior false accusations suggest something of a *modus operandi* of the victim in extracting herself from an in-patient setting. Rather than simply suggesting the victim's general propensities to fabricate or falsely accuse, past false accusations made in unique and similar contexts may reveal the victim's motivation in accusing the instant defendant.

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[12] Fed. R. Evid. 404(b)(2).

[13] *See, e.g.*, United States v. Smith, 741 F.3d 1211 (11th Cir. 2013) (affirming admission or prior possession offenses to show defendant's intent to distribute drugs).

[14] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 4.

A federal district court accepted a similar argument in *United States v. Stamper*.[15] In that case, a teenage girl was sent to live with her mother and her mother's live-in boyfriend after her parents divorced. After disciplinary difficulties arose with her mother, the teenage girl accused the live-in boyfriend, as well as two other family members frequently in her mother's home of sexual assault. As a result of these allegations, the teenage girl was sent to live with her father. Shortly thereafter, the girl wrote a letter to a friend in which she stated that her allegations of sexual assault were "not true." The investigations into those allegations were then halted. Disciplinary difficulties soon arose between the teenage girl and her father. Shortly thereafter, the girl accused Stamper, a co-worker and friend of her father's who was frequently at her father's home of sexual contact. Prior to trial, the defendant Stamper sought permission to present extrinsic evidence of the prior false accusations of sexual assault. In finding the evidence admissible, the district court explained the proper purpose for admission of the past accusations:

> Defendant, a law enforcement dispatcher before these charges were brought, seeks to offer exculpatory evidence that the complainant's charges against him were motivated by the bias and ulterior motive of a willful adolescent from a broken home bent on manipulating those who had custody of her and control of her activities. Defendant's proffered evidence goes beyond the general provisions of Rule 404(b), for the Defendant does not wish to show that the prior false allegations of sexual abuse, under similar circumstances, establish a mere propensity to fabricate. Rather, Defendant seeks to put forth these allegations as proof of a contrived ulterior motive and plan. In that sense the Court should give, at least if requested by the Government, an instruction that the prior falsehoods by the alleged victim, if so found by the jury, would not in themselves prove falsity in the instant case, but could be considered on the question of motive or plan, if any, behind the accusations in the case at hand. Defendant is entitled to offer the evidence necessary to prove his theory of the case by showing that complainant's charges against him did not evince a single isolated instance of manipulative behavior, but rather were part of an ongoing scheme or, at least, a scheme revealed by the like motives and *modus operandi* of schemes past.[16]

[15] United States v. Stamper, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991), *aff'd sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992).

[16] *Id.* ("The admissibility of the proffered evidence demonstrating the defense theory of complainant's scheme of fabricating sexual abuse allegations is expressly contemplated by the Rule 404(b) list of material issues, which is itself not "exhaustive, but merely illustrative.""); s*ee also* Sec'y, Fla. Dep't of Corr. v. Baker, 406 F. App'x 416, 424–25 (11th Cir. 2010) (affirming grant of habeas on constitutional grounds where state court excluded evidence that victim had repeatedly falsely accused family members of sexual assault: evidence that victim had habitually lied about sexual assaults by family members "not only spoke to her general character for truthfulness, but particularly attacked her truthfulness and motivation for testifying as they related directly to her allegation against Baker."). State courts have accepted similar arguments. *See, e.g.,* Phillips v. State, 545 So. 2d 221, 223 (Ala. Crim. App. 1989) (evidence of prior false allegations was admissible as exposing victim's corrupt state of mind); People v. Hurlburt, 333 P.2d 82, 86-87 (Cal. Dist. Ct. App. 1958) (false rape allegations are admissible as showing the complainant's animosity towards the defendant); People v. McClure, 356 N.E.2d 899, 901 (Ill. App. Ct. 1976) (since false rape allegations concerned motivation in bringing current charge, evidence of these false charges should have been admitted); State v. Anderson, 686 P.2d 193, 198-201 (Mont. 1984) (evidence of prior false rape accusations should be admitted as probative of the state of mind of the complainant). Of course, Rule 403 still applies in a 404(b)(2) context and a trial court should weigh the probative value of the prior act in showing motive or intent against the jury's potential pure propensity use.

Even in the rare circumstance in which an alleged victim's prior false accusation serves a permitted purpose under Rule 404(b)(2), there may be serious questions as to whether prior accusations made by the victim were, in fact, false. A victim may deny having made prior false accusations and may insist that any prior accusations were also true and accurate. According to the Supreme Court's decision in *Huddleston v. United States*, the question of whether a person committed a prior crime, wrong or act for purposes of Rule 404(b)(2) is one of conditional relevance that is governed by Rule 104(b).[17] A person's prior act is only relevant in resolving disputed issues in the current case if, in fact, the person engaged in the prior conduct. In *Huddleston*, the Supreme Court held that the prosecution must offer sufficient evidence from which a reasonable jury could find that the defendant "more likely than not" committed the prior act in order for Rule 404(b)(2) evidence to be admitted against him.[18] Thus, in a criminal case in which the prosecution offers evidence of the defendant's prior acts to show intent or knowledge and the defendant denies committing the prior acts, the prior acts evidence may be admitted so long as the prosecution has sufficient evidence to support a jury finding by a preponderance that the defendant committed the prior act.

If an alleged victim's prior false accusations are admitted through Rule 404(b)(2), the *Huddleston* standard would also appear to apply. If the victim denies having made a prior false accusation, the question of whether she did is one of conditional relevance – her prior false accusation is only helpful in evaluating her accusation in the instant case if, in fact, she made the prior false accusation. According to *Huddleston*, the defendant would need evidence sufficient for a reasonable jury to find that the victim made a prior accusation and that she knew it was false by a preponderance of the evidence.[19] Testimony from a person previously accused by the alleged victim denying any wrongdoing and claiming a false accusation could be sufficient to satisfy the *Huddleston* standard. If believed by the jury, such testimony could be sufficient to show a prior false accusation by a preponderance.

In sum, evidence of an alleged victim's prior false accusation should be excluded under Rule 404(b)(1) when offered to show that the victim is making a false accusation in the instant case unless the trial court finds that the prior false accusation is offered for a purpose permitted by Rule 404(b)(2). If the court finds a proper Rule 404(b)(2) purpose, the defendant will need evidence at least sufficient to show by a preponderance that the alleged victim made a prior false allegation.

B. Impeachment of a Testifying Victim with a Prior False Accusation

Even when extrinsic evidence of an alleged victim's prior false accusation is not admissible through Rule 404(b)(2), a victim may be impeached with inquiries about her prior false accusations on cross-examination if she takes the stand against the defendant. Federal Rule of Evidence

[17] Huddleston v. United States, 485 U.S. 681, 685 (1988).

[18] *Id.*

[19] *See* Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709 (2016) (arguing that *Huddleston* standard should apply to false accusation evidence).

404(a)(3) permits character evidence regarding testifying witnesses as provided by Rules 607, 608 and 609.[20] In a circumstance in which a victim does not testify at trial, however, impeachment with prior false accusations is unavailable.[21]

In the unlikely event that an alleged victim had previously been convicted of falsely accusing someone of a crime, her prior conviction would be automatically admissible to impeach her trial testimony under Rule 609(a)(2). Rule 609(a)(2) requires the trial court to permit impeachment of any witness with a prior conviction "if the court can readily determine that establishing the elements of the crime required proving – or the witness admitting – a dishonest act or false statement."[22] A conviction of an alleged victim for falsely reporting a crime or falsely accusing a person of a crime would require proof of her false statement. Thus, if an alleged victim testifies against a defendant and has a prior conviction for false reporting, that conviction would be admissible to impeach her trial testimony.

In the typical scenario in which an alleged victim has never been *convicted* of false reporting, she may be impeached with prior false accusations through Rule 608(b) if she testifies against the defendant. Under Rule 608(b), the defendant may inquire about "specific instances of a witness's conduct in order to attack … the witness's character for truthfulness."[23] A testifying victim's prior false accusations arising out of a separate incident could certainly count as prior acts of "dishonesty" about which a witness could be cross-examined. Still, a trial judge has discretion to prohibit questioning about acts of dishonesty under Rule 403 if the judge determines that the probative value of the act to impeach is substantially outweighed by unfair prejudice.[24] If a testifying victim's prior false accusation occurred many years earlier and in a highly distinct context, therefore, a trial judge could foreclose cross-examination about it even if the false accusation qualifies as a prior act of "dishonesty" for purposes or Rule 608(b).[25]

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[20] Fed. R. Evid. 404(a)(3).

[21] *See* Fed. R. Evid. 608 (applying only to a "witness's" character for untruthfulness).

[22] Fed. R. Evid. 609(a)(2).

[23] Fed. R. Evid. 608(b).

[24] *See* United States v. Frederick, 683 F.3d 913, 919 (8th Cir. 2012) ("The district court under Rule 608(b) may determine if evidence is probative of truthfulness and under Rule 403 may exclude evidence, even though probative, if the probative value is outweighed by the prejudicial effect.").

[25] *See* United States v. Meschino, 643 F.3d 1025, 1029 (7th Cir. 2011) (district court properly denied defendant cross of victim regarding alleged prior false accusation where there was insufficient indication that it was false and "it was reasonable for the district court to conclude that even if there was some reason to doubt Victim A's accusation against her stepbrother, this line of inquiry had little bearing on her testimony against Meschino because it was so dissimilar, concerned a different abuser, very different circumstances, and a singular event that took place six years after Meschino's decade-long abuse had stopped. This was a reasonable exercise of discretion.").

In order to inquire about a witness's prior acts of dishonesty under Rule 608(b), a cross-examiner needs only a "good faith" basis for the inquiry.[26] Applying that standard requirement to an alleged victim's prior false accusations, a defendant would need only a "good faith basis" for believing that the victim had levied a prior accusation and that it was false before inquiring about it on cross-examination. Evidence that a prior accusation was not timely reported or was ultimately not prosecuted would not seem sufficient to provide even a good faith basis for an inference of *falsity* in this context. Many sexual assaults are not timely reported and, those that are, may go unprosecuted for reasons unrelated to the falsity of the accusation, including a lack of sufficient evidence.[27] Information suggesting that the alleged victim recanted a prior accusation would seem to provide a "good faith basis" for inferring that the original accusation was untrue, however.[28] Importantly, extrinsic evidence of prior acts of dishonesty is not admissible to impeach the character of a testifying witness pursuant to Rule 608(b).[29] Therefore, even if the trial court permits a defendant to inquire about prior false accusations during cross-examination of the testifying victim, the defendant could not offer evidence to prove the prior false accusation if the victim denies making it or denies that it was false when asked about it on cross-examination.[30]

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[26] *See* Michelson v. United States, 335 U.S. 469, 481 (1948) (foreclosing "groundless" questions).

[27] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 16-17.

[28] *See* United States v. Stamper, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991), *aff'd sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992) (victim wrote to friend that prior accusation was "not true.").

[29] Fed. R. Evid. 608(b) ("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.").

[30] *See* United States v. A.S., 939 F.3d 1063, 1072 (10th Cir. 2019)("[a]n attorney cross-examining" the witness under Rule 608(b) can "only ask about the alleged dishonest act" and then is " 'stuck with' his answer, even a denial."); Ellsworth v. Warden*,* 333 F.3d 1, 8 (1st Cir.2003) (en banc) ("[t]he theory, simple enough, is that evidence about lies not directly relevant to the episode at hand could carry courts into an endless parade of distracting, time-consuming inquiries."). Some state courts have made an "exception" to the limitation on extrinsic evidence with respect to evidence of a victim's prior false accusation of sexual assault and have allowed the admission of extrinsic evidence to refute the victim's denial of the prior false accusation during cross-examination. *See, e.g.* Miller v. State, 779 P.2d 87 (Nev. 1989); People v. Mikula, 269 N.W.2d 195 (Mich. Ct. App. 1978). These state decisions fail to explain their authority to deviate from the statutory limitation on extrinsic evidence contained in their counterparts to Federal Rule 608(b). Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform,* 24 J. Legis. 125, 139 (1998) (noting that these state courts have "failed to explain [their] logic for circumventing the statutory prohibition against extrinsic evidence.").

In the extremely unlikely event that a testifying victim proclaimed on direct examination that she had never falsely accused anybody, a defendant could admit extrinsic evidence of the victim's prior false accusation to contradict her. *See* United States v. Velarde, 485 F.3d 553, 562–63 (10th Cir. 2007) ("In United States v. Magallanez*,* 408 F.3d 672 (10th Cir.2005), on which Mr. Velarde relies, we held that the government was properly allowed to call a rebuttal witness to contradict a false statement made by a witness on direct examination. Accordingly, if, on direct examination, L.V. were to testify that she had never made a false accusation of sexual abuse, *Magallanez* would support the introduction of the evidence (assuming it exists) regarding her false accusations against her teacher and vice principal. If, however, the issue did not arise on direct, the defense would be permitted to cross-examine her regarding the supposed false accusations at school, but *Magallanez* would not permit Mr. Velarde to introduce extrinsic evidence regarding such accusations.").

Therefore, if an alleged victim testifies against a defendant, Rule 608(b) permits a defendant to inquire about her non-conviction prior false accusations on cross-examination so long as the prior false accusations survive Rule 403 balancing and so long as the defendant has a "good faith basis" for such questions. But Rule 608(b) will not permit the defendant to offer extrinsic evidence to prove the victim's prior false accusations. And Rule 608(b) authorizes no inquiry into a victim's prior false accusations if the victim does not testify.

C. Rule 412: Application of the Rape Shield Rule

If a court finds that extrinsic evidence of a victim's prior false accusation is admissible under Rule 404(b)(2) or that a defendant has the requisite good faith basis for inquiring about a victim's prior false accusation on cross-examination, the court must also consider the application of Rule 412 in a sexual assault case.[31] It is important to note that Rule 412 does not authorize the admission of any evidence. It is a rule of exclusion that prohibits evidence of an alleged victim's sexual predisposition or prior sexual conduct in any criminal or civil case involving alleged sexual misconduct, subject to certain exceptions.[32] Congress directly enacted Rule 412, known as the "rape-shield statute" in the late 1970's shortly after the enactment of the Federal Rules of Evidence.[33] Rule 412 was amended through the rulemaking process in 1995 to clarify the provision and to "expand the protection afforded to victims of sexual misconduct."[34] The Advisory Committee's note to the 1995 amendments to Rule 412 explained their purpose:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.[35]

To the extent that prior false accusation evidence or inquiries suggest prior sexual conduct by a victim, they could be regulated by Rule 412.[36] On the other hand, to the extent that prior false

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[31] Fed. R. Evid. 412 (regulating evidence of a victim's sexual behavior or predisposition in sex-offense cases).

[32] Fed. R. Evid. 412(a).

[33] Edward J. Imwinkelried, *The Golden Anniversary of the "Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts": Mission Accomplished?*, 57 Wayne L. Rev. 1367 (2011) (describing the original adoption of Rule 412 as "direct Congressional intervention on a 'politically-charged evidentiary issue.'").

[34] Advisory Committee's note to 1995 amendment to Fed. R. Evid. 412.

[35] *Id.*

[36] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 5 ("when sexual activity is conceded, and the alleged "falsehood" is solely as to whether the activity was consensual, then arguably Rule 412 properly governs an alleged PFA.").

accusations evidence is offered to show prior *lying* behavior by an alleged victim, it would not appear to be covered by the Rule 412 exclusionary rule.[37] The Advisory Committee note to Rule 412 contemplated this possibility, explaining that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404."[38] In keeping with this Committee note, most courts have found that an alleged victim's prior false accusations of sexual assault are not excluded by Rule 412 because the prior acts are offered to show the victim's past lying behavior rather than her past sexual conduct.[39]

Excluding a victim's prior accusations from Rule 412 protection thus requires a finding that those accusations were knowingly false.[40] Although Rule 412(c) prescribes a procedure to determine admissibility of evidence that includes pre-trial notice, motion, and hearing, it does not address findings of falsity or set a standard or proof by which a victim's prior acts must be established.[41] The standard of proof applied to a finding of falsity will have a direct impact on the level of protection afforded by Rule 412. As noted above, to admit extrinsic evidence of a prior false accusation under Rule 404(b)(2), courts would ordinarily apply the traditional Rule 104(b) *Huddleston* standard of proof.[42] To allow cross-examination of a testifying victim pursuant to

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[37] *See, e.g.*, United States v. Frederick, 683 F.3d 913, 917 (8th Cir. 2012) (observing "that 'there is a question whether Rule 412 reaches the use of a prior false accusation of rape for impeachment purposes' and that it ha[s] been suggested by legal commentators that such evidence [i]s 'more properly analyzed under Rule 608(b)'"); United States v. Stamper, 766 F. Supp. 1396, 1399 (W.D.N.C. 1991), *aff'd sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992) ("A threshold question might be whether demonstrably false past allegations of rape or sexual abuse lodged by the alleged victim are evidence of "past sexual behavior." Several courts have excluded such evidence from the definition of "past sexual behavior.""").

[38] Advisory Committee's note to Fed. R. Evid. 412.

[39] Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 136 (1998) ("Trial judges and appellate courts generally agree that prior false rape allegations do not constitute sexual behavior within the meaning of rape shield statutes.").

[40] *See, e.g.*, United States v. Crow Eagle, 705 F.3d 325, 329 (8th Cir. 2013)(the district court did not abuse its discretion or violate Crow Eagle's Sixth Amendment rights by excluding witnesses' prior sexual-assault allegations where the defense produced no evidence of the falsity of the prior allegations except the length of time before reporting and the failure of prosecution); United States v. Barrett, 2023 WL 7528606, at *4 (E.D. Cal. Nov. 13, 2023)(rejecting use of prior false accusations to show victim pattern of engaging in consensual sex while drunk and later claiming it to be assault due to lack of evidence that prior accusations were false: "The fact that a sexual assault victim has previously accused others of assault is only relevant insofar as "it [can] be shown convincingly that the other charge was false." Even if a defendant can show that a prior assault allegation against a third party was false, the admissibility of that accusation depends on its similarity to the facts of the charged assault.") (citing Fed. R. Evid. 404(b)); United States v. Tail, No. CR.04-50026-01-KES, 2005 WL 2114224, at *2 (D.S.D. Aug. 31, 2005), *aff'd,* 459 F.3d 854 (8th Cir. 2006) ("If Tail fails to establish falsity, the evidence is governed by Fed. R. Evid 412, not Fed.R.Evid. 608(b), because it is evidence of sexual behavior rather than a prior false allegation.").

[41] Fed. R. Evid. 412(c).

[42] *See* United States v. Stamper, 766 F. Supp. 1396, 1406 (W.D.N.C. 1991), *aff'd sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992) (treating question of falsity as a 104(b) question ultimately to be resolved by the jury: "There is sufficient relevant evidence, going to the issues of the falsity of the three prior allegations of sexual abuse and the bias or motive of the complainant in making such allegations, to warrant the submission of such evidence

Rule 608(b), courts traditionally require only a "good faith basis" for a witness's prior dishonest acts. Applying these standards of proof to a finding of falsity with respect to prior accusations of sexual assault could provide insufficient protection for victims, however, and a higher standard of proof may be necessary to place evidence of a victim's past conduct outside of Rule 412 protections.[43] Under the *Huddleston* standard, for example, a defendant might simply call a previously accused person to testify that he had consensual sex with the victim and that she falsely accused him of rape thereafter as prima facie proof of falsity. This standard could thus open the door to the liberal admission of evidence of a victim's prior sexual encounters and undermine Rule 412 protections. To offer more protection to alleged victims of sexual assault, a court might evaluate evidence of prior falsity under Rule 104(a) and allow such prior accusation evidence only if the *court* is satisfied by a preponderance that the prior accusation was indeed false.[44] Upon an appropriate showing of falsity to remove the victim's prior acts from Rule 412 protection, a court could permit a defendant to offer evidence of a victim's prior false accusations pursuant to Rule 404(b)(2) or to cross-examine a testifying victim about prior false accusations pursuant to Rule 608(b).

D. A Criminal Defendant's Constitutional Right to Present Evidence of or to Cross-Examine a Victim about Prior False Accusations

Of course, a criminal defendant possesses constitutional rights to present evidence critical to his defense and to confront the witnesses against him.[45] In rare circumstances, the Supreme Court has found the right to present a complete defense violated by the exclusion of defense evidence.[46]

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to the jury. Thus, it becomes the jury's province in this case to determine the veracity of these previous allegations and the weight such allegations may be accorded in their final determination of Defendant's guilt or innocence.").

[43] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 17 (arguing for a higher standard of proof to prevent undermining rape shield protection).

[44] *See, e.g.*, United States v. Erikson, 76 M.J. 231, 236 (C.A.A.F. 2017) (Judge decides falsity per 104(a) "At trial, Appellant was required to establish the falsity of SPC BG's previous sexual assault accusation in order for it to be admissible under an M.R.E. 412 exception *or* for it to be admissible under any other rationale such as evidence of a modus operandi, motive, or character evidence for lack of truthfulness."). There are very few federal sexual assault prosecutions and even fewer opinions addressing the proper standard of proof for a finding of falsity. Many state courts have required more than a good faith basis or even evidence by a preponderance of falsity before allowing cross-examination on prior sexual assault allegations on the theory that the rape shield rule protects the victim from such cross absent evidence of falsity. Some state jurisdictions have required clear and convincing evidence and others have required evidence that the prior accusations are "demonstrably false." *See* White v. Coplan, 399 F.3d 18 (1st Cir. 2005) (discussing New Hampshire requirement of clear and convincing evidence of "demonstrable falsehood").

[45] *See* Nevada v. Jackson, 569 U.S. 505 (2013) (""[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.") and Olden v. Kentucky, 488 U.S. 227 (1988). *See also* Edward J. Imwinkelried & Norman M. Garland, Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence 59 (5th ed. 2015).

[46] *See* Holmes v. South Carolina, 547 U.S. 319 (2006) (rule of exclusion did not rationally serve any discernible purpose); Rock v. Arkansas, 483 U.S. 44, 61 (1987) (rule arbitrary); Chambers v. Mississippi, 410 U.S. 284, 302–303

The Court has also found that certain evidentiary limitations on a defendant's right to cross-examine a testifying witness violate his Sixth Amendment right of confrontation.[47] Rule 412 carves out a broad exception to the prohibition on evidence of a victim's prior acts in criminal cases when their "exclusion would violate the defendant's constitutional rights."[48]

Defendants have argued that the exclusion of extrinsic evidence of a victim's prior false accusations of sexual assault violated their right to present a defense and that a court's refusal to permit cross-examination of a victim regarding prior false accusations of assault undermined their right to confrontation. Many federal courts have rejected such constitutional challenges to the exclusion of prior false accusation evidence and impeachment.[49]

In *Nevada v. Jackson*, the Supreme Court held that the Nevada Supreme Court did not unreasonably apply Supreme Court precedent when it found that the exclusion of extrinsic evidence of an alleged victim's prior false accusations of sexual assault did not violate the

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(1973) (State did not even attempt to explain the reason for its rule); Washington v. Texas, 388 U.S. 14, 22 (1967) (rule could not be rationally defended).

[47] *See, e.g.,* Olden v. Kentucky, 488 U.S. 227, 231 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 678–679 (1986) ("[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of *bias* on the part of the witness ....") (emphasis added).; Davis v. Alaska, 415 U.S. 308, 315–316 (1974).

[48] Fed. R. Evid. 412(b)(1)(C).

[49] *See, e.g.*, Hughes v. Raines, 641 F.2d 790, 793 (9th Cir. 1981) (affirming denial of habeas petition alleging a violation of the defendant's confrontation rights due to the trial court's refusal to allow cross-examination of the victim regarding a prior accusation of rape "to attack the general credibility of the witness on the basis of an unrelated prior incident."); United States v. Bartlett, 856 F.2d 1071, 1089 (8th Cir.1988) (refusal to allow cross-examination of victim regarding prior allegedly false allegation of rape to attack her general credibility is constitutional and proper under Rules 412 and 608(b)); United States v. Payne, 944 F.2d 1458, 1569 (9th Cir.1991) ("We have found ... that a trial court's limitation of cross-examination on an unrelated prior incident, where its purpose is to attack the general credibility of the witness, does not rise to the level of a constitutional violation of the defendant's confrontation rights."); Quinn v. Haynes, 234 F.3d 837, 844–48 (4th Cir.2000) (upholding on habeas review exclusion of impeachment evidence regarding alleged victim's prior accusations of sexual assault, where that evidence went to "general credibility" rather than motive to fabricate); Boggs v. Collins, 226 F.3d 728, 737 (6th Cir. 2000) ("When faced with alleged prior false accusations of rape, federal courts have ... [found] cross-examination constitutionally compelled when it reveals witness bias or prejudice, but not when it is aimed solely to diminish a witness's general credibility."); United States v. Frederick, 683 F.3d 913, 916 (8th Cir. 2012)("We find that Frederick's rights under the Confrontation Clause were not violated by the district court's decision to disallow him from asking the girls about prior instances of sexual abuse because the probative value of the evidence was minimal, in large part because Frederick's offer of proof failed to demonstrate that the prior accusations were false."); United States v. A.S., 939 F.3d 1063, 1075 (10th Cir. 2019) (Assuming that Rule 412 applied to bar evidence of prior assault of victim, constitution did not require exception where prior encounter was not shown to be false and did not reveal victim bias to concoct allegations against defendant); Dennis v. Mazza, 814 F. App'x 28, 33 (6th Cir. 2020)(Kentucky courts did not violate clearly established Supreme Court precedent in denying cross of victim regarding prior false allegations under state evidence rules where "Kentucky's rape-shield law does not bar evidence of a prior false allegation; rather, defendants accused of sex crimes may attack the alleged victim's credibility by showing "that there is a distinct and substantial probability that the prior accusation was false." Defendant failed to show that the prior allegation was demonstrably false and therefore was denied cross.).

defendant's federal constitutional right to present a complete defense.[50] Most federal courts have also rejected defense arguments that extrinsic evidence of prior false accusations is constitutionally mandated.[51] Under unique circumstances, lower federal courts have found a constitutional right to present evidence of a victim's prior false accusations, however.

In an unpublished opinion in *Secretary for the Florida Department of Corrections v. Baker*, the Eleventh Circuit affirmed the grant of habeas corpus because the state trial court excluded evidence that the victim in a sexual assault case had repeatedly falsely accused family members of sexual assault:

> D.A.'s truthfulness was key to the prosecution, and the evidence of her prior false accusations not only spoke to her general character for truthfulness, but particularly attacked her truthfulness and motivation for testifying as they related directly to her allegation against Baker. The evidence that D.A. had habitually lied about sexual assaults by family members had "strong potential to demonstrate the falsity of [her] testimony" in this case, and "a reasonable jury might have received a significantly different impression of [her] credibility had defense counsel been permitted to pursue his proposed line of cross-examination." Furthermore, the trial court only limited the testimony in light of the state's rules of evidence regarding impeachment, rather than out of concerns such as harassment, prejudice, confusion, or a policy of protecting sexual-assault victims. Supreme Court precedent clearly indicates that the exclusion of the false-accusation evidence violated Baker's rights under the Sixth and Fourteenth Amendments. Thus, failure to find a Confrontation Clause violation would constitute an unreasonable application of federal law.[52]

In *United States v. Stamper*,[53] a district court held that evidence of an alleged sexual assault victim's prior false accusations was constitutionally mandated. In that case, the victim had written

[50] Nevada v. Jackson, 569 U.S. 505 (2013).

[51] *See, e.g.*, United States v. Tail, 459 F.3d 854, 860 (8th Cir. 2006) (finding no constitutional right to present evidence of victim's alleged prior false accusations of others where "[t]he evidence of falsity is weak, and there is no substantial showing that J.H.'s allegations against Tail are part of a broader scheme involving contrived allegations against Ortega and Frank Johnson, or that they shared a common motivation. Admission of this evidence would have triggered mini-trials concerning allegations unrelated to Tail's case, and thus increased the danger of jury confusion and speculation.) (citations omitted); United States v. Coriz, 861 F. App'x 190, 199 (10th Cir. 2021) (rejecting defense argument that exclusion of victim's accusation of sexual assault against another violated his constitutional right to present a defense because the defendant "had only weak evidence of falsity. We agree with the district court that in light of such weak evidence of falsity, the probative value of these allegations was low and was substantially outweighed by the risk of confusing the jury and turning Coriz's trial into a mini-trial on C.T.'s allegations against D.Y.").

[52] 406 F. App'x 416, 424–25 (11th Cir. 2010)(citations omitted).

[53] 766 F. Supp. 1396, 1400 (W.D.N.C. 1991), *aff'd sub nom.* In re One Female Juv. Victim, 959 F.2d 231 (4th Cir. 1992).

a letter to a friend stating that her prior accusations were "not true," and the defendant sought to introduce evidence of the prior false accusations to show the victim's motive to falsely accuse him. The court agreed that the prior false accusation evidence was constitutionally required:

> Defendant offers evidence of complainant's prior allegations to show that, because she previously made false allegations of sexual abuse and fondling, the complainant is now making false accusations of a similar nature, with the same intent, motivation and plan to move her residence from one parent to another and to divert attention from herself and place it on an alleged perpetrator to show her motivation, intent and plan in this case … In order to confront the complainant effectively, to elucidate the facts and legal issues here in question fully, and to present a defense in a constitutionally viable trial, Defendant must be allowed to set before the jury the proffered evidence of ulterior motives of the complainant. The sixth amendment and *Davis* mandate that the proffered evidence be admitted." Defendant, a law enforcement dispatcher before these charges were brought, seeks to offer exculpatory evidence that the complainant's charges against him were motivated by the bias and ulterior motive of a willful adolescent from a broken home bent on manipulating those who had custody of her and control of her activities … While it is true that the complainant now contends that she did not mean what she said in her letter, and withdrew her allegations of sexual abuse solely to keep Candi in her home, what her actual behavior and motivations might have been are for the jury to determine.[54]

Therefore, in rare cases, federal courts have found that the Constitution mandates evidence or impeachment regarding a victim's prior false accusations of sexual assault.

II. A New Federal Rule of Evidence Regulating Prior False Accusation Evidence

[54] *Id. See also* White v. Coplan, 399 F.3d 18, 26 (1st Cir.2005) (on habeas, concluding that prisoner was entitled to cross-examine complainants regarding prior accusations but noting that court is "not endorsing any open-ended constitutional right to offer extrinsic evidence"); Sussman v. Jenkins, 636 F.3d 329, 356 (7th Cir. 2011)(finding in habeas case that trial court ruling excluding victim's prior false accusation against his father "would have" violated defendant's confrontation rights if counsel had timely moved for its admission because it would have revealed a specific bias to manufacture the same allegations as levied in the instant case.); Redmond v. Kingston, 240 F.3d 590, 591–92 (7th Cir. 2001) (granting habeas on grounds that defendant's confrontation rights were denied by trial court's refusal to allow him to question alleged victim about false, recanted accusation of rape by another only eleven months prior to charged offense: "the fact that the girl had led her mother, a nurse, and the police on a wild goose chase for a rapist merely to get her mother's attention supplied a powerful reason for disbelieving her testimony eleven months later about having sex with another man, by showing that she had a motive for what would otherwise be an unusual fabrication.").

To provide explicitly for the admissibility of evidence of an alleged victim's prior false accusations, Professor Erin Murphy has proposed the adoption of new Federal Rule of Evidence 416. The Committee unanimously decided to consider the proposal at its Fall 2023 meeting.

A. Professor Murphy's Proposal

Modified slightly to conform to the style of the Federal Rules of Evidence, Professor Murphy's proposed new rule would provide as follows:

Rule 416. Prior False Accusation.

> **(a) Admissibility.** Evidence of a person's alleged prior false accusation may be admitted to attack the person's credibility if the following requirements are met:
>
> > ***(1) Proof of Falsehood and Awareness of Falsehood.*** The falsehood of the prior accusation, and the person's awareness of its falsehood, have both been established by a preponderance of the evidence. The court must consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsehood or awareness of falsehood by a preponderance of the evidence.
> >
> > ***(2) Nature of the False Claim.*** The prior accusation is similar in nature or of equal or greater magnitude to the charged offense.
>
> **(b) Notice.** The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the prior false accusation relates to an act of alleged sexual misconduct, the notice must comply with Rule 412(c).
>
> **(c) Extrinsic Evidence.** Extrinsic evidence of the prior false accusation is admissible if the person does not testify or testifies and denies having made the prior accusation or denies its falsehood.

It is important to note several features of this proposed new rule. First, the provision applies to all false accusations, including those outside the sexual assault context. Although the cases dealing with a victim's prior false accusations arise primarily in the sexual assault or abuse context, the possibility of false accusation could arise in other classes of cases, such as domestic violence.[55] The proposed rule would permit admission of prior false accusations in such cases and treat all such evidence similarly.[56]

[55] *See, e.g.*, Shelnutt v. State, 564 S.E.2d 774 (Ga. Ct. App. 2002) (precluding evidence of prior false accusations in a domestic violence case).

[56] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 3 ("it is important to note that the logic behind the rule, and thus the rule itself, applies to *all* case types and to *all* witnesses, not just sexual assault complainants.").

If it were inclined to pursue a new Rule 416, the Committee might consider whether to narrow the provision to prior false accusations of sexual misconduct. It is in this class of cases that courts have primarily struggled with prior false accusations evidence. And, of course, Federal Rules of Evidence 412-415 are narrowly tailored to such cases. As discussed below, Professor Ed Imwinkelried has suggested that admission of prior false accusations is uniquely necessary in sexual assault cases to deal with the frequent credibility issues inherent in those cases and to create needed symmetry between treatment of a defendant's prior acts of sexual misconduct and a victim's prior false accusations.[57] Rather than invite unforeseen consequences in other contexts, the Committee could decide to limit the amendment to the sexual misconduct context in which prior false accusation evidence has plagued the courts.

If the Committee were inclined to narrow the proposed provision to sexual misconduct cases, it could also consider changing the reference to a "person's" alleged prior false accusations to a "victim's" prior false accusations. Although Professor Murphy suggests that the proposed rule would apply to "*all* witnesses" who might accuse, it is primarily designed to address evidence that an accuser has previously made false accusations and would seem to be aimed primarily at victims. Rule 412 covers criminal and civil cases "involving alleged sexual misconduct" and references a "victim's" other sexual behavior or sexual predisposition. Swapping the term "person" for the term "victim" in a new Rule 416 would thus make the provision consistent with Rule 412.

Second, this proposed provision requires a trial court to find the knowing falsity of the person's prior accusation by a preponderance of the evidence under Rule 104(a). Thus, it provides protection to victims by converting the question of the commission of the prior act from one of conditional relevance for the jury to a preliminary question of admissibility exclusively for the court. The provision goes one step further, specifying showings that are insufficient to satisfy the Rule 104(a) preponderance standard. The proposed rule states that an accused's denial of the prior accusation and the failure of the accuser or law enforcement to pursue the accusation are insufficient to support a trial court's finding of falsity. Rule 104(a) typically leaves it to a trial judge to decide which information to utilize to find admissibility requirements satisfied and to weigh that information.[58] Thus, the proposed provision limits to some extent the discretion typically enjoyed by a trial judge in determining preliminary questions.

There is some precedent in the Rules, however, for prescribing the information necessary to support a Rule 104(a) finding. In establishing the requirements for admission of agent and co-conspirator hearsay, Rule 801(d)(2) provides that a hearsay statement "must be considered but

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[57] *See* Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709 (2016).

[58] Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether … evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on a privilege.").

does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E)."[59] Rule 801(d)(2) thus tells trial judges which information they should utilize in making a Rule 104(a) finding and specifies information that is insufficient to support the finding. Proposed Rule 416 would impose a similar limitation on the information sufficient to support a finding of falsity under Rule 104(a).

Proposed Rule 416 also imposes a limitation on the nature of the prior accusations it admits, requiring a prior accusation that "is similar in nature or of equal or greater magnitude to the charged offense." On the one hand, requiring similarity between a victim's prior false accusation and a current accusation makes eminent sense and is consistent with the treatment of evidence of a person's "other crimes, wrongs, or acts" under Rule 404(b)(2) and with federal courts' Rule 403 analysis in evaluating Rule 608(b) impeachment. This similarity requirement in proposed Rule 416 presents several concerns, however.

First, proposed Rule 416 is not limited to use in criminal cases. The Federal Rules of Evidence apply equally in criminal and civil cases except as explicitly provided.[60] Nothing in the admissibility provision of proposed Rule 416(a) limits its application to criminal cases. Yet the limitation on the nature of the prior accusation seems to contemplate use of Rule 416 only in criminal cases by comparing the prior accusation to the "charged offense." The Committee could consider limiting application of Rule 416 to criminal cases, especially in light of the constitutional concerns applicable to important defense evidence like a victim's prior false accusations in criminal cases. Limiting proposed Rule 416 in this manner would be inconsistent with the other provisions in Article Four of the Federal Rules dealing with sex offense cases, however. The rape shield rule applies in both civil and criminal cases. And while Rules 413 and 414 apply only in criminal cases, Rule 415 creates an analog in civil cases raising allegations of sexual assault or child molestation. If Rule 416 is to apply to civil and criminal cases, the prior false accusation should not have to be similar to the "charged offense." If it retains the limitation on the nature of the false accusation in the text of the provision, the Committee could consider a requirement that the prior false accusation be similar to "conduct alleged in the instant case" or to a "current accusation" in an effort to cover both criminal and civil cases.

Second, a textual requirement that the prior false accusations be "similar" and "of equal or greater magnitude" would necessitate difficult line-drawing and could invite costly litigation over prior false accusations. It would seem that the "similarity" required by proposed Rule 416 would not be of the type necessary to establish admissibility under Rule 404(b)(2) but would be satisfied on some lesser showing. If a prior false accusation involved rape by an acquaintance, for example,

[59] Fed. R. Evid. 801(d)(2).

[60] *Compare* Fed. R. Evid. 404(a)(1) (imposing broad prohibition on evidence of character to prove conduct that applies in both civil and criminal cases) *with* Fed. R. Evid. 404(a)(2) (making exceptions to character prohibition in criminal cases only).

would that be sufficiently "similar" to an accusation of rape by a stranger in the instant case? The requirement of a false accusation of "equal or greater magnitude" would pose similar concerns. Would a prior false accusation of attempted sexual assault be of "equal magnitude" in a case alleging rape? Rather than including a limitation on the nature of the prior false accusation in rule text that could invite error and litigation, the Committee could consider including a reference to Rule 403 in an accompanying Committee note, describing the trial court's discretion to weigh the probative value of a prior false accusation against its tendency to cause unfair prejudice and citing factors such as the similarity of the prior accusation and remoteness in time as considerations.[61]

The purpose identified for admitting prior false accusation evidence under proposed Rule 416 also raises concerns. In its opening clause, proposed Rule 416 provides that evidence of a person's prior false accusation is admissible "to attack the person's credibility." This is problematic for two reasons. First, Article Six of the Federal Rules of Evidence governs "Witnesses" and contains provisions relating to impeachment and to attacks on credibility. It appears inconsistent with the organization of the Rules to place a provision regulating an "attack" on "credibility" in Article Four of the Rules relating to "Relevance and its Limits." Where evidence of character otherwise regulated by Rule 404 is important to the impeachment of testifying witnesses, Rule 404(a)(3) depends upon Rules 607, 608, 609 to regulate those impeaching attacks. Second, proposed Rule 416(c) permits evidence of a prior false accusation to be admitted even if the accuser *does not testify*. If the person does not testify, it is difficult to see how the person's prior false accusations are being offered to "attack credibility."[62]

If the Committee is inclined to proceed with consideration of Rule 416, it may make sense to remove this limitation on the purpose of the false accusation evidence so that the rule simply provides that "Evidence of a person's prior false accusation may be admitted if…." This would spell out *no purpose* and leave the purpose for admitting false accusations to case-by-case consideration. If the Committee concludes that it is important to include a stated purpose for this evidence in a new rule, the proposed rule could be modified to allow a prior false accusation to be admitted "to show the falsity of a current accusation if…" The policy behind the proposed new rule is that an accuser's prior false accusation should be admissible to suggest a false accusation in a pending case if that prior false accusation is established by a preponderance of the evidence and is sufficiently similar. If this is so, perhaps the provision should expressly articulate this purpose.

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[61] Omitting any similarity requirement from rule text would also eliminate the need to compare the prior false accusation to "the charged offense."

[62] It is possible that prior false accusations could be used to attack the credibility of a non-testifying victim whose hearsay statements are admitted for their truth. *See* Fed. R. Evid. 806 ("When a hearsay statement …. has been admitted in evidence, the declarant's credibility may be attacked, … by any evidence that would be admissible for those purposes if the declarant had testified as a witness."). But proposed Rule 416 is not limited to circumstances in which the person's statements are admitted either.

Proposed Rule 416 also characterizes the admissible evidence as a "prior" false accusation by a person. The use of the word "prior" may suggest a temporal requirement that the allegedly false accusation precede the events giving rise to the instant action. Rule 404(b) instead regulates admissibility of a person's "other" crimes, wrongs, or acts to avoid any timing limitation. Courts have found acts committed subsequent to the charged acts admissible under Rule 404(b)(2).[63] It may be possible for a victim's false accusation to *follow* the events and accusation giving rise to the current action. Although subsequent false accusations may not be typical, it would seem optimal to remove the modifier "prior" from proposed Rule 416.

Finally, proposed Rule 416(c) allowing "extrinsic evidence" to be admitted seems superfluous where Rule 416(a) would admit "evidence" of a person's alleged false accusation. Presumably, if Rule 416(a) provides that "evidence" is admissible, it necessarily means that "extrinsic evidence" is admissible. All the evidence admitted through Article Four would be characterized as "extrinsic evidence." The distinction between "extrinsic evidence" and cross-examination questions is only pertinent in the context of impeachment regulated under Article Six of the Rules. The reference to "extrinsic evidence" in proposed Rule 416(c) is designed to distinguish between circumstances in which the person who made the false accusation testifies at trial and circumstances in which she does not, allowing extrinsic evidence only if the person *does not testify* or *testifies but denies the false accusation*. The Committee may wish to explore drafting alternatives that eliminate the overlapping references to "evidence" and "extrinsic evidence" in the proposal.

B. Drafting Possibilities for a New False Accusation Rule

Professor Murphy's proposal could be modified only slightly to limit the amendment to the sex offense context, to remove any temporal requirement of a "prior" accusation, and to state a purpose for false accusation evidence other than an "attack on credibility" as follows:

Rule 416. ~~Prior~~ False Accusation in Sex Offense Cases.

(a) Admissibility. Evidence of a ~~person's~~ victim's false accusation [involving other alleged sexual misconduct] may be admitted ~~to attack the person's credibility~~ [to show the falsity of a current accusation involving sexual misconduct] if the following requirements are met:

> ***(1) Proof of Falsity[64]~~ehood~~ and Awareness of Falsity~~ehood~~.*** The falsity~~ehood~~ of the prior accusation, and the ~~person's~~ victim's awareness of its falsity~~ehood~~, have both been established by a preponderance of the evidence. The court ~~must~~ may consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these

[63] *See* United State v. Grady, 88 F.4th 1246, 1258 (8th Cir. 2023) (Rule 404(b) embraces not only prior acts, but subsequent acts as well).

[64] It seems that the word "falsehood" is typically a noun that would be inappropriate in modifying the term "accusation." The modifier "falsity" seems more appropriate grammatically but perhaps the stylists can suggest the optimal grammatical choice.

facts do not alone or together establish falsity~~ehood~~ or awareness of falsity~~ehood~~ by a preponderance of the evidence.

(2) Nature of the False ~~Claim~~ Accusation. The ~~prior~~ false accusation is similar in nature or of equal or greater magnitude to the ~~charged offense~~ current accusation.

(b) Notice and Procedure. The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the ~~prior~~ [evidence of] the false accusation [may prove that an alleged victim engaged in other sexual behavior] ~~relates to an act of alleged sexual misconduct~~, the [proponent must comply] ~~notice must comply~~ with [the procedure to determine admissibility provided by] Rule 412(c).

(c) Extrinsic Evidence. Extrinsic evidence of the ~~prior~~ false accusation is admissible if the ~~person~~ victim does not testify or testifies and denies having made the ~~prior~~ false accusation or denies its falsity~~ehood~~.

These modifications would retain the textual limitation on the nature of the false accusation and the subsection (c) reference to "extrinsic evidence," however.

A more drastic modification of the proposal could relegate the nature of the false accusation to a Committee note, directing courts to consider Rule 403 in admitting false accusation evidence, and could create separate subsections distinguishing cases in which victims testify from those in which they do not to avoid overlapping subsections (a) and (c) that admit "evidence" and "extrinsic evidence." Such a rule might provide as follows:

Rule 416. False Accusation.

(a) When A Victim Does Not Testify. Evidence of a victim's false accusation involving other alleged sexual misconduct may be admitted to show the falsity of a current accusation involving sexual misconduct when the victim does not testify if the falsity of the accusation, and the victim's awareness of its falsity, have both been established by a preponderance of the evidence. The court may consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsity or awareness of falsity by a preponderance of the evidence.

(b) When a Victim Testifies. Extrinsic evidence of a victim's false accusation involving other alleged sexual misconduct that is established by a preponderance of the evidence is admissible if the victim testifies and denies having made the accusation or denies its falsity.

(c) Notice and Procedure. The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the evidence of the false accusation may prove that an alleged victim engaged in other sexual behavior, the proponent must comply with the procedure to determine admissibility provided by Rule 412(c).

This proposal would still have the anomalous effect of regulating impeachment in Article Four of the Rules, however. To protect the structural and terminological integrity of the Rules, the Committee could consider *two amendments*. An Article Four amendment (perhaps new Rule 416 or perhaps an amendment to Rule 404(b)) could allow "evidence" (and not "extrinsic evidence") of a person's false accusation to be admitted only *if the person does not testify* on the showing of falsity required by Professor Murphy's proposed provision. This provision could reference Rule 608 for circumstances in which the accuser testifies. This would be consistent with Rule 404(a)(3)'s existing cross-reference to the impeachment provisions. A defendant could thus admit evidence of a victim's false accusations under the Article Four provision even in cases in which the victim declines to take the stand. Regulation of impeachment of a testifying witness would be left to Article Six where it belongs. A second amendment to Rule 608 – perhaps a new Rule 608(c) -- could regulate the impeachment of *a testifying witness* with false accusation evidence, allowing cross-examination on such conduct upon a heightened showing of falsity and explicitly authorizing admission of "extrinsic evidence" if a witness denies making the false accusation.

Alternatively, should the Committee decide to pursue an Article Four amendment to admit "extrinsic" evidence of a false accusation, it could choose to avoid regulating impeachment altogether. If evidence of a false accusation is admissible even *without testimony* as proposed Rule 416 provides, it would seem unnecessary to amend Rule 608(b) to allow for "extrinsic evidence." The Advisory Committee note to a new Rule 416 could make clear that Rule 403 applies to the admission of false accusation evidence. Along with the nature of the prior accusation, its similarity and recency, courts could consider the *need* for the evidence in light of a victim's testimony and denial on cross-examination. Such an amendment might simply eliminate the textual requirement regarding the "nature" of the false accusation and subsection (c) altogether, as follows:

Rule 416. False Accusation in Sex-Offense Cases.

(a) Admissibility. Evidence of a victim's false accusation involving other alleged sexual misconduct may be admitted to show the falsity of a current accusation involving sexual misconduct.

(b) Proof of Falsity and Awareness of Falsity. The falsity of the prior accusation, and the victim's awareness of its falsity, must be established by a preponderance of the evidence. The court may consider the fact that the complaint was not pursued, and that the accused denied the accusation, but these facts do not alone or together establish falsity or awareness of falsity by a preponderance of the evidence.

(c) Notice and Procedure. The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the evidence of the false accusation may prove that an alleged victim engaged in other sexual behavior, the proponent must comply with the procedure to determine admissibility provided by Rule 412(c).

In sum, should the Committee proceed with a false accusation amendment, there are several possible amendment avenues that could be further explored.

III. The Merits and Demerits of a False Accusation Rule

An amendment to the Federal Rules of Evidence covering false accusations could offer some benefits and improvements over the existing regulating scheme. There are some drawbacks and pitfalls inherent in a false accusations rule, however, that the Committee should carefully consider. If the Committee is inclined to pursue such an amendment, further study – including a fifty-state survey on false accusation evidence – would be advisable.

A. Benefits of an Amendment

A Federal Rule of Evidence governing false accusations could be beneficial for several reasons. First, as illustrated above, the path that must be followed through the existing Rules to evaluate the admissibility of false accusation evidence is a tortured one involving Rules 104, 403, 404, 412, and 608.[65] Courts and litigants rarely chart a clear course through the existing Rules when dealing with false accusation evidence. Evidence scholars have long called for reform and have repeatedly advanced proposals for admitting false accusations.[66] Therefore, an amended rule could address the complexity inherent in dealing with this evidence under existing Rules and respond to a longstanding call for clarification.

The provisions that currently apply to false accusation evidence are not only complex; they may lead to outcomes that some may perceive as both over-- and under-- inclusive. For example, in cases in which a victim does not testify at trial, Rule 404(b) severely curtails evidence that a victim previously falsely accused a person in order to suggest a false accusation on the occasion in question. Only if the victim's prior act fits within one of the "permitted purposes" defined by Rule 404(b)(2) will such evidence be admissible in a case in which the victim does not become a witness. Professor Murphy's proposed amendment would admit false accusations without a Rule 404(b) analysis even in cases in which a victim does not testify. Further, complex questions regarding the applicability of Rule 412 to false accusation evidence that *is* otherwise admissible pose another obstacle to admissibility. A new rule clarifying the admissibility of "false" accusations would clearly place such evidence outside Rule 412.

Even where false accusation evidence appears to be admissible under existing provisions, the standard of proof for showing falsity remains unclear. The *Huddleston* standard applies to Rule 404(b)(2) evidence, suggesting that a defendant would need only prima facie evidence of a false

[65] Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 142 (1998) ("The rules surrounding prior false rape accusations are a judicial morass.").

[66] *Id.* (proposing a new federal provision).

accusation. It is unclear, however, whether prima facie evidence of falsity is sufficient to remove a victim's prior false accusation involving sexual misconduct from the protection of Rule 412.[67] An amended rule clarifying that the judge must find falsity by a preponderance under Rule 104(a) whenever false accusation evidence is offered would resolve this conundrum.

Under existing rules, in a case in which a victim *does* take the stand, Rule 608(b) typically requires only a "good faith basis" to inquire about a witness's prior dishonest acts – a standard that seems inadequately protective for prior false accusation evidence offered in a sexual assault case. An amendment requiring that a trial judge find falsity by a preponderance of the evidence under Rule 104(a) would ensure proper vetting of prior false accusations even if they are used only on cross-examination and further protect alleged sexual assault victims from inquiries into past sexual conduct in keeping with Rule 412. Existing Rule 608(b) forbids extrinsic evidence of a victim's false accusation when a victim denies having made it during cross-examination. As Professor Murphy has suggested, this limitation may eliminate any benefit to the defense from raising even substantiated prior false accusations. If the defense is stuck with a victim's denial of the false accusation, a jury may assume that there was no prior false accusation when extrinsic evidence fails to appear and may hold an unwarranted attack on the victim against the defense. Allowing extrinsic evidence of a substantiated false accusation to be admitted when a testifying victim denies having made it could ensure the effectiveness of this impeachment technique.

As noted above, distinguished evidence scholar and expert on "other acts" evidence, Ed Imwinkelried, has made a compelling case for the admissibility of evidence of a victim's similar prior false accusations in sexual assault cases:

> The premise of the rape sword laws is that the outcome of the typical rape prosecution turns largely on the jurors' assessment of the credibility of the alleged victim. Based on that premise, the rape sword laws allow the prosecution to bolster the alleged victim's credibility by presenting corroborating evidence sufficient to prove that in the past, the accused has committed similar sexual crimes. Positing the same premise, the rape shield laws should be construed to enable the defense to attack the alleged victim's credibility by presenting evidence sufficient to prove that in the past, the alleged victim has made similar, false accusations. Proof of the alleged victim's prior false accusations is just as corroborative of the accused's claim that the alleged victim is falsely accusing him as proof of the accused's prior sexual assaults is corroborative of the alleged victim's claim that he assaulted her. In this setting, formulating symmetrical evidentiary rules is an important step toward ensuring the fairness of the adversary trials in rape prosecutions.[68]

[67] *Id.* at 144-45 (pre-trial notice and hearing necessary for PFA's because may constitute protected victim sexual history if *not* false).

[68] Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709, 738–39 (2016).

Finally, as described above, the exclusion of some false accusation evidence offered by the defense in a criminal case, albeit narrowly defined by the federal courts, could violate the defendant's constitutional rights to present a defense or to confront his accuser. Amending the Federal Rules of Evidence to pave the way for false accusation evidence presented by the defense in a criminal case could decrease the likelihood that the Evidence Rules are applied in a manner that violates constitutional protections.

B. Potential Downsides to a False Accusation Amendment

There are several potential downsides to amending the Federal Rules of Evidence to specifically address false accusation evidence, however.

First, although the path through the existing Rules may be tortured, the Federal Rules of Evidence *have been* applied to admit evidence of a victim's prior false accusations under appropriate circumstances. While the Rules may not provide expressly or fully for the admissibility of false accusation evidence, there are avenues of admissibility currently available. Even if false accusations evidence should be admissible in certain circumstances, it may be unnecessary to add a rule to cover evidence that can be admitted under existing provisions.

It might make sense to cover false accusation evidence specifically if federal courts were routinely encountering this evidence and struggling to ascertain its admissibility. This evidence has predominantly been offered in sexual assault cases, however. As noted above, very few sexual assault cases are prosecuted in federal court with only 2.3% of federal sentencings in 2022 arising out of such prosecutions. Where sexual assault cases are primarily prosecuted at the state level, there may be little need for a *federal* rule covering prior false accusation evidence. It is true that Federal Rules of Evidence 412-415 are specifically designed to apply to sexual misconduct cases notwithstanding state jurisdiction over most cases. It has been suggested that Rules 412-415 were enacted as important models for the states in developing their own evidentiary rules regarding the prosecution of sexual misconduct cases. As Professor Murphy points out, the states have been dealing with prior false accusation evidence for a very long time due to their primary role in sexual misconduct enforcement and many have developed standards and provisions covering this evidence.[69] Where the states are ahead of the federal system on the issue of false accusation evidence, it is not clear that a federal "model" would be helpful or influential.

An amendment would reverse limitations on "other act" evidence that currently exist in Rule 404(b)(1) and on "extrinsic evidence" currently found in Rule 608(b). The Committee may be concerned that there is insufficient data supporting a departure from the important policies reflected in those existing limitations for false accusation evidence. Rule 404(b)(1) prohibits evidence of a person's other crimes, wrongs or acts to show a propensity for certain behavior. Only when the other acts show something other than pure propensity, such as a person's intent or

[69] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at n. 14 (listing state statutes governing false accusation evidence).

motive, may they be admitted through Rule 404(b)(2). Amending the Rules to allow a victim's prior acts of false accusation to be admitted is necessary only if those prior acts are only useful to prove the victim's propensities to falsely accuse and are, thus, inadmissible under existing Rule 404(b)(1). Indeed, Professor Murphy describes prior false accusation evidence as revealing "a character or propensity to falsely accuse" and characterizes false accusation evidence as "propensity-credibility evidence, not non-propensity motive or scheme evidence."[70] Therefore, proposed Rule 416 would pave the way for victim propensity evidence currently banned by the Rules. Professor Murphy argues that false accusations are more probative than generic propensity evidence because they "show a demonstrated willingness to directly harm *another* by making a false accusation."[71] Still, the Committee may want to proceed cautiously in exempting a victim's propensities to falsely accuse from the time-honored ban on character evidence.[72]

The legislative history underlying Rules 413-415 suggested that propensities for sexual misconduct are more predictive than other propensities to justify their removal from the Rule 404(b)(1) prohibition.[73] This assumption met with a great deal of criticism and some empirical evidence undermining it.[74] Before removing a victim's propensity to falsely accuse from the general prohibition of Rule 404(b)(1), it is important to consider any evidence that this particular propensity is deserving of special treatment. The empirical evidence cited by scholars suggests an extremely low rate of false accusation of sexual misconduct. Further, scholars cite no data regarding the likelihood that a person who has falsely accused someone will do so again (at least at a rate higher than recidivism in other areas). Therefore, there may be inadequate justification for removing a victim's propensity to falsely accuse from the Rule 404(b)(1) ban.

The limitation on extrinsic evidence of a testifying witness's prior acts of dishonesty is also time-honored. The Rule 608(b) limitation on extrinsic evidence is designed to prevent inefficient distractions caused by proof of unrelated prior acts of dishonesty of a testifying witness. Although rigid, the limit on extrinsic evidence forecloses time-consuming detours into unrelated events that are valuable only in assessing credibility. Even with a requirement that a trial judge find a prior accusation false by a preponderance of the evidence, it is likely that victims and defendants will debate the falsity of prior accusations and seek to present evidence of the circumstances surrounding them. It is unclear that prior false accusations useful only to undermine the credibility

[70] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 10.

[71] *Id.* at 12.

[72] *See* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 126 (1998) ("studies that have shown that the frequency of rape reports proven false, approximately two percent, mirrors the false reporting rates for other crimes.").

[73] *See* Floor Statement of Representative Susan Molinari (Cong. Rec. H8991-92, August 21, 1994).

[74] *See, e.g.*, Imwinkelried, UNCHARGED MISCONDUCT § 4.16 (1994) (recidivism is not higher among those convicted of sexual assault than among those convicted of other crimes); Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994).

of a current accusation are so different from all other dishonest acts of testifying witnesses that they necessitate the potentially costly admission of extrinsic evidence.[75]

In the federal sexual misconduct cases that do exist, a new Rule expressly covering prior false accusations would undoubtedly invite increased attempts to rely on such evidence, perhaps even generating defense fishing expeditions into a victim's sexual history. Notwithstanding the proposed requirement that a court find a victim's prior accusations false by a preponderance of the evidence, a new rule paving the way for admission of a victim's prior accusations of sexual misconduct could be seen as undermining the important and hard-won protections for victims in sexual assault cases. Even litigation over the admissibility of such prior accusations could deter a victim from reporting or pursuing sexual assault charges. And, an amendment could be viewed as assuming that victims of sexual assault are particularly likely to fabricate in a time when the #MeToo movement in a series of well publicized cases has called for the public to "believe women."[76] The Federal Rules of Evidence, as currently configured, have corrected the harmful history of treating alleged victims of sexual assault with skepticism and opprobrium.[77] Although well intentioned, adding a rule to allow evidence of a victim's prior false accusations and to exempt such acts from otherwise well-accepted prohibitions on propensity and extrinsic evidence could be perceived as turning back the clock on protections for sexual assault victims.[78] Given the tiny fraction of federal cases raising these issues, this risk may seem unjustified, particularly where the Constitution gives the defense the right to use this evidence in appropriate cases.

On the other side of the coin, drafting a provision that explicitly addresses the requirements for defendants seeking to admit false accusation evidence risks violating the rights of criminal defendants. Courts have noted the delicate balancing act involved in dealing with a victim's history in sexual misconduct cases in analyzing Rule 412:

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[75] *See* Nevada v. Jackson, 569 U.S. 505, 511 (2013) ("The admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial.").

[76] *Impeaching with an Alleged Prior False Accusation*, *supra* n. 2 at 3 (positing reluctance of legal actors "to take a side in what feels like a binary debate between those who 'believe all women' and those who, like Lord Hale, view rape as an accusation 'easily to be made …. and harder to be defended.'").

[77] *See* 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (Chadbourn rev. 1970) ("Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.").

[78] *See* Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus*, 7 Yale J.L. & Feminism 243, 253 (1995) (quoting Wigmore treatise and decrying "rape mythology" that allowed liberal impeachment with prior false allegations of sexual assault by a victim).

> The rule "pits against each other two exceedingly important values—the need 'to safeguard the alleged [sexual assault] victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details,' and the need to ensure that criminal defendants receive fair trials.[79]

Calibrating an amendment that specifically addresses false accusation evidence in a manner that accommodates the rights of both victim and defendant poses a serious challenge. As explained above, the Supreme Court held in *Huddleston* that the question of whether a person committed a prior act is one of conditional relevance. The act possesses probative value in evaluating the person's conduct in the instant case only if, in fact, the person committed it. In admitting a *defendant's* prior acts through Rules 404(b)(2) and 413-415, therefore, the prosecution need only present prima facie evidence that the defendant committed the prior act. Testimony by a witness with personal knowledge claiming that the defendant committed the prior act is sufficient to satisfy this standard. Analytically, the question of whether a victim made a prior false accusation is one of conditional relevance as well.[80] The victim's prior false accusation tends to suggest the falsity of her current allegation only if, in fact, she made the prior accusation, it was false, and she knew it was false.

To protect sexual assault victims and to reinforce Rule 412, the proposed amendment forces these questions into the Rule 104(a) category, requiring the trial judge to find by a preponderance that the victim made the accusation, that it was false, and that the victim knew it was false.[81] It explicitly states that testimony by a prior accused with personal knowledge claiming falsity as insufficient. Thus, the proposal would create a double standard. To show a criminal defendant's prior wrongful acts, only prima facie evidence is necessary, and the jury makes the decision about whether the defendant engaged in the prior misconduct. But to show an alleged victim's prior *wrongful* conduct, a more stringent standard would apply which prevents the jury from hearing about the prior false accusation unless the trial judge is satisfied by a preponderance that it occurred and restricts the information upon which a trial judge may rely in finding the prior false accusation. Such a distinction may be necessary and defensible to serve the important public policy of protecting sexual assault victims but may invite defense constitutional challenges.[82]

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[79] United States v. A.S., 939 F.3d 1063, 1076 (10th Cir. 2019).

[80] *See* Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. Pac. L. Rev 709, 732 (2016) ("In principle, it seems correct to apply Rule 104(b)'s conditional relevance standard here. If the jury decides that the alleged victim did not make another report or that the report was truthful, the jurors will naturally treat the defense questioning about the supposedly false report as irrelevant.").

[81] *But see* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 142 (1998) (proposing rule admitting false accusations upon a finding by clear and convincing evidence that prior false accusations were made).

[82] *See* White v. Coplan, 399 F.3d 18, 26 (1st Cir. 2005) (reversing earlier holding that New Hampshire's requirement of clear and convincing evidence of "demonstrable falsehood" per se violated the Constitution but nonetheless holding

Importantly, Rule 412 recognizes a criminal defendant's constitutional right to admit certain evidence regarding victim history but makes no attempt to define the evidence constitutionally required with any specificity.[83]

If federal courts were routinely grappling with prior false accusation evidence, attempting to craft a Federal Rule of Evidence that walks the fine line between the rights of criminal defendants and those of sexual assault victims might be justified. Given that the federal courts are not the primary forum for addressing sexual assault allegations, however, there are significant risks inherent in striking the proper balance between the rights of victims and defendants in a specific rule.

IV. Conclusion

If the Committee wishes to proceed with consideration of an amendment to address a victim's prior false accusations in sexual misconduct cases, further study is warranted. First, the Committee could explore additional amendment alternatives as described above. A new Rule 416 could simply allow evidence of a victim's prior false accusations without any distinction drawn between testifying and non-testifying victims. If evidence of false accusations is admissible regardless of impeachment, it becomes less necessary to regulate the impeachment process. Or the Committee could explore the possibility of multiple amendments in order to appropriately address distinctions between the admission of false accusations through Article Four of the Federal Rules without regard to the victim's testimony and impeaching use of a testifying victims' prior false accusations under Rule 608(b). Because the states have made significant progress in crafting rules regarding prior false accusation evidence, a fifty-state survey analyzing the many distinctions in state handling of false accusation evidence would also be helpful in formulating an optimal new federal provision.

that application of the standard violated the defendant's rights in the instant case); Ellsworth v. Warden, 333 F.3d 1, 6 (1st Cir. 2003) (Ellsworth argues for the first time that the state standard for the admission of such evidence—that prior false accusations be not only false but "demonstrably" so—is itself too demanding and therefore unconstitutional); Abram v. Gerry, 672 F.3d 45, 50 (1st Cir. 2012)("we determined that although New Hampshire's "demonstrable falsity" standard was "generally defensible," *id.*, *White* represented an "extreme case" in which application of this standard violated the Confrontation Clause.").

[83] Fed. R. Evid. 412(b)(1)(C) (exempting "evidence whose exclusion would violate the defendant's constitutional rights" from prohibition).

TAB 6

TAB 6A

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: 973-975-5298
e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra
Re: Possible Amendment to Rule 404(b)
Date: October 1, 2024

At the Symposium held by the Committee in Fall 2023, Professor Hillel Bavli made a presentation on a proposal to amend Rule 404(b). He argued that courts have misread Rule 404(b) to allow for evidence of a defendant's character so long at is probative to show a proper purpose under the rule—even if the only reason it is probative for the proper purpose is that the defendant has the propensity to commit the charged crime.

At the meeting after the Symposium, there was some discussion about the merits of an amendment that would require the government to show that the probative value of the bad act evidence did not proceed through a propensity inference. [To take an example, it is improper to use Rule 404(b) to prove motive if the asserted motive (reason) to do the crime is that the defendant has a propensity to do it.] But the DOJ representative pointed out that Rule 404(b) was amended in 2020 to require the prosecution to give notice of the non-character purpose for which bad act evidence is going to be offered, and "the reasoning that supports the purpose." And the Committee Note to the 2020 amendment elaborates that the prosecution must "articulate a non-propensity purpose for with the evidence is offered and the basis for concluding that the evidence is relevant in light of that purpose." The DOJ representative argued that consideration of any amendment regarding bad acts that are probative only through character inferences should be held off until it was determined whether the 2020 amendment had remedied the problem. A majority of the Committee agreed with the DOJ suggestion.

Attached is a memo from Professor Bavli that directly addresses whether the new notice requirement has been useful in prohibiting the admission of bad act evidence where its probative value is dependent on propensity inferences. His conclusion about the post-2020 case law is that "approximately 48% (34/71) of evidentiary admissions under Rule 404(b) improperly rely on character reasoning." He cites a number of cases making that error, and my independent research has uncovered other specific examples.[1]

Post-2020 cases that arguably or certainly rely on character reasoning in admitting bad act evidence:

● *United States v. Lindsey*, 3 F.4th 32 (1st Cir. 2021): The court, affirming a conviction for possession with intent to distribute cocaine, fentanyl, and methamphetamine, found no abuse of discretion in admitting text messages that indicated the defendant had been selling drugs before and around the time he was arrested in possession. The evidence tended to make it more likely that he possessed the charged drugs with intent to distribute.

● *United States v. Reichberg*, 5 F.4th 233 (2d Cir. 2021): The court, affirming convictions for bribing police officers, found no abuse of discretion in admitting evidence of uncharged schemes in which the defendants sought influence (including with the mayor of New York City) and bribed other officials to get preferential treatment. The evidence of "similar efforts to obtain results from public officials by currying financial favor" undercut the defendant's argument that "the benefits he provided NYPD officers were simply gifts, motivated purely by friendship and given with no expectation of receiving anything in return."

● *United States v. Graham*, 51 F.4th 67 (2d Cir. 2022): The court, affirming a conviction for conspiracy to commit fraud, held that evidence that the defendant participated in a different scheme that purported to eliminate debts by writing checks against a zero-balance checking account was properly admitted. Evidence of the other scheme—which occurred concurrently with

[1] I don't intend to claim that courts always get it wrong. *See, e.g.*, *United States v. McLellan*, 44 F.4th 2000 (4th Cir. 2022): The government brought a forfeiture action, alleging that money seized from the defendant's car was tied to drug activity. The trial court granted summary judgment for the government, but the court of appeals reversed, finding that the connection with drug activity was a triable issue of fact. One of the pieces of evidence that the government offered to establish the connection was that McLellan had been previously convicted of drug activity. The court of appeals held that the conviction could not be considered, because the government did not attempt to show how the conviction was relevant to a proper purpose, nor did it "explain how that evidence fits into a chain of inferences . . . that connects the evidence to each proper purpose, no link of which is a forbidden propensity inference."

the charged fraud and included the same conspirators, with some of the same hallmarks—helped establish the defendant's intent.

● *United States v. Naidoo*, 995 F.3d 367 (5th Cir. 2021): The court affirmed the defendant's conviction for possession of child pornography and held that the trial judge did not abuse discretion in admitting evidence that the defendant's tablet device was used to visit a website containing written stories describing minors involved in sexual acts with adults. The court found the stories properly admitted to prove intent—such materials were probative to show that the possession of the illegal material "was unlikely an accident."

● *United States v. Valenzuela*, 57 F.4th 518 (5th Cir. 2023): In a drug smuggling prosecution, the government argued that a state conviction for possession of marijuana, 15 years before the charged crime, was properly admitted to show "motive, opportunity, intent, plan, knowledge, and lack of mistake."

● *United States v. Emmons*, 8 F.4th 454 (6th Cir. 2021): The court affirmed convictions for making illegal campaign contributions to a U.S. Senate candidate. It found no abuse of discretion in admitting evidence that the defendants made improper contributions to the same candidate when she twice ran for state Secretary of State. The evidence was relevant to show the defendants' intent to cause unlawful corporate contributions in this case.

● *United States v. Howard*, 977 F.3d 671 (8th Cir. 2020): The court affirmed the defendant's conviction for being a felon in possession of a firearm and ammunition. It held that the trial judge did not abuse discretion in admitting evidence that the defendant had pawned a firearm, four months before the firearm and ammunition in the instant case were found. It reasoned that the evidence tended to show that he knowingly and intentionally possessed a firearm and ammunition four months later.

● *United States v. LaRoche*, 83 F.4th 682 (8th Cir. 2023): The court affirmed the defendant's conviction for forcible assault on a federal officer involving physical contact. It held that the trial judge did not abuse discretion in admitting evidence of the defendant's four prior convictions for assaulting law enforcement officers, as the convictions were properly offered to prove intent. There was no indication how the bad acts showed intent other than by assuming that the defendant had a propensity toward violence.

● *United States v. Jones*, 74 F.4th 941 (8th Cir. 2023): Affirming drug convictions, the court found no error in admitting evidence of prior drug activity. It 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 admissible under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." The court cited pre-2000 case law for its proposition.

● *United States v. Shedlock*, 62 F.3d 214 (8th Cir. 2023): The defendant appealed his conviction of forcibly assaulting or interfering with a Deputy United States Marshal. The incident occurred in the vicinity of a Planned Parenthood office, when the defendant rushed at a Marshal, yelling at him. The trial court admitted evidence of an incident 29 days later, in which the defendant rushed at two Planned Parenthood employees at the same office, yelling at them. The defendant argued that evidence of the other act was inadmissible under Rule 404(b), but the court of appeals disagreed. It concluded as follows:

> As a general rule, evidence of other acts committed by a defendant may be admitted to prove intent or absence of mistake. Intent is a required element of the crime of assaulting or interfering with a Deputy U.S. Marshal, and Shedlock's intent was a major issue at trial. We have previously permitted the admission of later acts to demonstrate a party's previously held intent. *See, e.g.*, *United States v. Johnson*, 934 F.2d 936, 940 (8th Cir. 1991) (in drug conspiracy case, court admitted later drug transactions to show intent). As in *Johnson*, Shedlock's behavior on September 15 helps show Shedlock's intent in his confrontation with Deputy Palmer.

● *United States v. Bragg*, 44 F.4th 1067 (8th Cir. 2022): The court affirmed the defendant's conviction for being a felon in possession of a firearm. It held that the trial judge did not abuse discretion in admitting the defendant's two prior armed robbery convictions and his prior conviction for willful injury. The court concluded that the prior offenses were relevant as evidence that the defendant knowingly used the gun.

● *United States v. Drew*, 9 F.4th 718 (8th Cir. 2021): In a felon-firearm prosecution involving constructive possession, the trials court admitted *six* prior convictions involving firearms. The court held it was bound by 8th Circuit precedent to assume that prior convictions were properly admitted to show knowledge and intent—recognizing that other courts have held that intent is not an element of a possession case, and that prior offenses with firearms should be excluded under Rule 404(b). Judge Kelly, concurring (on grounds of harmless error) stated that "the record here offers no satisfying explanation of how Drew's prior convictions help prove to the jury that he knowingly possessed the firearm at issue. The government's argument seems to be that the convictions made it more likely that Drew was aware there was a gun in the car with him and that he knowingly possessed that gun. But I do not see how his criminal record would have any bearing on his knowledge, other than through the unspoken inference it asks the jury to make: that because Drew possessed firearms in the past, he was more likely to have knowingly possessed the firearm in this case."

● *United States v. Saelee*, 51 F.4th 327 (9th Cir. 2022): The court, affirming a conviction for drug trafficking, found no abuse of discretion in admitting evidence that the defendant had

offered to sell Ecstasy a few days before he was scheduled to receive a shipment of Ecstasy from Germany, as it helped to establish his intent to distribute.

● *United States v. Veneno*, 107 F.4th 1103 (10th Cir. 2024): The defendant was charged with assaulting his girlfriend in a jealous rage. The court found no error in admitting the defendant's prior assaults of the girlfriend that were motivated by jealousy. The court stated that the prior assault "supported the government's assertion that jealousy motivated Defendant's attacks arising from his suspicion that his girlfriend was cheating on him." But the only way that one jealously motivated attack tends to prove that another attack was jealously motivated is to assume that the defendant is the kind of person who gets jealous and flies into a rage.

● *United States v. Tennison*, 13 F.4th 1049 (10th Cir. 2021): The court affirmed a conviction for possession of methamphetamine with intent to distribute. It found no abuse of discretion in admitting evidence that a year later the defendant was arrested in possession of a kilogram of methamphetamine and distribution paraphernalia. The evidence was found probative of his intent to distribute.

● *United States v. Veneno*, 80 F.4th 1180 (10th Cir. 2023): The court affirmed the defendant's convictions for domestic assault by a habitual offender in Indian Country and assault in Indian Country resulting in serious bodily injury. It held that the trial judge did not abuse discretion in admitting evidence of the defendant's assault on his then-girlfriend two days before the charged assault of the victim, where the evidence was offered for and relevant to prove the defendant's motive. The court stated that the evidence was also probative to prove identity and to rebut the defendant's assertion that the girlfriend was so drunk that her identification of the defendant as the perpetrator was unreliable. Yet the evidence was probative for each of these purposes only it is assumed that the defendant had a propensity to commit assault.

● *United States v. Boudreau*, 2023 WL 4197169 (D. Mont. June 27, 2023): Boudreau was charged with attempted coercion and enticement of a minor and possession of child pornography. He sought to exclude evidence related to an order of protection obtained by a 17-year-old female against him. The court held that the evidence was admissible to prove "motive" —but the only way that the protection evidence is probative of showing a motive to commit the charged crime is an assumption that he had a propensity to commit acts of sexual misconduct. The court also found that it was admissible for "lack of mistake by showing that because he knew that it was wrong to harass a minor into sending him nude photos, it would also be wrong to meet up with a minor to engage in activity that may be deemed sexual." But the defendant was not arguing that he didn't know that the charged conduct was wrong.

● *United States v. Harding*, 104 F.4th 1291 (11th Cir. 2024): The court held that evidence of the defendant's participation in an unrelated drug conspiracy was admissible to prove intent to commit the charged crime of distribution. (Notable, though, that the court reversed because the trial court refused to provide a limiting instruction even though the defendant requested one.)

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Cases Applying the Notice Requirement

It is also instructive to consider directly how the courts have been applying the new notice requirement—particularly the requirement that the prosecution articulate a non-propensity purpose and explain how the bad act is probative of that purpose without relying on a propensity inference. It is fair to state that while most courts are enforcing the articulation requirement, others are not. For example, see the following:

● *United States v. Patel*, 2023 WL 2643815 (D. Conn. Mar. 27, 2023) (finding notice to be sufficient, noting that "the Government describes each category of evidence, includes permissible purposes and the reasoning that supports each purpose, and offers examples of relevant evidence that has been produced to Defendants").

● *United States v. Brown*, 2023 WL 1067540 (W.D. Pa. Jan. 27, 2023) (requiring the government to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose").

● *United States v. Padilla-Gallarza*, 2022 WL 1153465 (D.P.R. Apr. 18, 2022): Relying on the amendment, the court finds that the uncharged misconduct is insufficiently identified*:*

> While the government states the purposes for admitting the evidence and its supporting rationale, it fails to specify the acts sufficiently for Padilla-Galarza to assess, investigate independently, and adequately prepare for cross-examination. Regarding the first witness, the government merely states broadly that he and Padilla-Galarza engaged in criminal activities without identifying details. This lack of specificity, particularly given the government's assertion of a lengthy criminal history for the defendant, prevents both the court and Padilla-Galarza from determining which specific acts the government intended to present. The second witness is similarly unidentified regarding the acts he will testify about.

● *United States v. Agrawal*, 2022 WL 1109427 (E.D. Ky. Apr. 13, 2022) (noting that the government provided a substantial explanation of how bad act evidence was admissible to prove a mental state).

● *United States v. Zastrow*, 2024 WL 3498772 (E.D. Mich. July 22, 2024) (after notice was given that bad acts were probative of knowledge and intent, the court excluded the evidence, on the ground that knowledge and intent would be evident from the charged acts themselves if the government proved them, and therefore the bad acts were insufficiently probative for a non-propensity purpose).

● *United States v. Giacomini*, 2022 WL 393194 (N.D. Cal. Feb. 9, 2022) (the defendant was charged with abusive sexual conduct and claimed consent; the government provided proper notice that other instances of sexual harassment and retaliation were probative of "knowledge of

and lack of mistake as to the meaning of consent regarding a relationship or romantic advances in the workplace").

All the above cases show a faithful application of the notice requirement under the 2020 amendment. But Compare:

United States v. Castro, 2022 WL 4359273 (D. Nev. Sept. 20, 2022) (prosecution "need only provide a generalized notice provision apprising Defendants of the general nature of the evidence of extrinsic acts").

United States v. Umoren, 2021 WL 5763057 (D. Nev. Dec. 3, 2021) Where defendant was charged with filing false tax returns and stealing the refunds, the government provided notice that evidence of uncharged tax returns was probative of "knowledge, intent, willfulness, common plan or scheme, modus operandi, identity, and absence of mistake"; the court finds this notice sufficient and admits the evidence for all these purposes).

United States v. Ward, 638 F. Supp. 3d 686 (S.D. Miss. Oct. 31, 2022) (notice requirement found met in a drug prosecution, where the court cited pre-2020 authority and there was no indication that the government, in the notice, articulated a non-propensity purpose).

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Possibility of an Amendment

One possible inference of all these cases is that the courts are generally properly applying the new notice requirements, *but many are still finding bad acts to be probative through character inferences.*

Assuming that there is a significant number of cases indicating that courts are admitting bad acts that are dependent on propensity, even after the 2020 amendment, the question is whether the Committee should pursue an amendment to Rule 404(b). The amendment might look something like this:

(b) Other Crimes, Wrongs, or Acts.

(1) ***Prohibited Uses.*** Evidence of any other crime, wrong, or 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 <u>--- unless its probative value as to the permitted purpose is dependent on an assumption that the opponent had a propensity to commit the other crime, wrong, or act</u>.

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

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Assuming that there is still a significant problem of courts misapplying Rule 404(b), there remain at least two reasons for some caution in preparing an amendment:

1. An amendment working its way through the rulemaking process, without delays, would go into effect on December 1, 2027 (if approved for public comment at the next meeting). That would be a seven-year gap between amendments to the same rule. In rulemaking terms, that is a relatively short period. The shortest period for amending a single Evidence Rule is six years—that happens to be Rule 404(a), which was amended in 2000 and again in 2006.

As discussed in the memo on Rule 702, continuous amendment of a single rule is problematic, because it gives the inference that the Committee is not being careful, or confident, in its proposals. It seems skittish. It is jarring to practitioners or courts, who just learned the new rule and then have to turn around and relearn the rule.

It would be for the Committee to determine whether a seven-year period between amendments is sufficient. One possible explanation for working on an amendment: In 2020, the Committee recognized that courts were misapplying Rule 404(b), but compromised with the notice-based solution, in the hope that it would help courts to zone in on the need for a proper purpose that doesn't rely on propensity inferences. But if the Committee finds that the notice-based solution is not working to prevent erroneous application of Rule 404(b), the solution of waiting for it to work is weakened. Seven years is a lot of time for determining whether a rule is working—especially where the rule is one that is applied almost every day in the federal courts.

2. Rule 404(b) is a flashpoint rule, and any work on the amendment promises to be difficult in light of the position that will probably be taken by the Justice Department. If the prior amendment is any indication, it is fair to say that any new amendment to Rule 404(b), going beyond notice, will be hard-fought. The response to that concern is that if an amendment to an important rule warranted, it shouldn't matter that the road to the amendment is difficult.

All these considerations are dependent on whether the Committee believes that Rule 404(b) needs to be improved—whether an amendment is necessary to ensure that bad acts are not admitted when their probative value is dependent on the actor's propensity. The question for the Committee at this meeting is whether it wishes to consider an amendment to Rule 404(b) at the next meeting. If so, the Reporter will prepare a full report, with a proposed amendment and committee note.

TAB 6B

CORRECTING FEDERAL RULE OF EVIDENCE 404(b)(2) – EMPIRICAL FOLLOW-UP

Hillel J. Bavli

I. Introduction and Background

During the Fall 2023 Meeting of the Advisory Committee on Evidence Rules, I presented a proposal to amend Federal Rule of Evidence 404(b)(2) to correct its widespread misinterpretation as an *exception* to Rule 404(b)(1). Although Rule 404(b)(2) is intended only to clarify that other-acts evidence may be admitted for *noncharacter* purposes, courts have incorrectly interpreted it as allowing character reasoning so long as the evidence is offered to prove knowledge, intent, or another purpose listed in Rule 404(b)(2). Therefore, I proposed modest modifications to the language of Rule 404(b)(2) to correct the ambiguity in the current rule to clarify that other-acts evidence is admissible only if it does not involve character reasoning.[1]

After the presentations, during the Advisory Committee's discussion of my proposal, various members of the Committee expressed an interest in better understanding the extent of the problem after Rule 404 was amended in 2020 to incorporate Rule 404(b)(3)'s notice provision. As I discussed in my proposal, while Rule 404(b)(3) is beneficial with respect to notice and an important step in the right direction, it does not resolve the courts' widespread misinterpretation of Rule 404(b)(2). Although Rule 404(b)(3) requires prosecutors to articulate a permitted purpose, courts and prosecutors continue to misinterpret Rule 404(b)(2) as *permitting* character reasoning if the other-acts evidence is offered to prove knowledge, intent, or another purpose enumerated in the rule. Therefore, prosecutors frequently give notice that articulates a purpose listed in Rule 404(b)(2) but that incorrectly relies on character reasoning. And relying on this misinterpretation—frequently well embedded in the common law—courts generally approve of such notice. In other words, because courts misinterpret Rule 404(b)(2) as an *exception* to the rule against character evidence, courts approve of Rule 404(b)(3) notice that relies on character reasoning but articulates a purpose listed in Rule 404(b)(2).

Therefore, as I argued in my proposal, even after the enactment of Rule 404(b)(3)'s notice requirement (and Rule 404(b)(3)(B)'s "permitted purpose" language in particular), fulfilling the intended effects of Rule 404(b)—to exclude character reasoning—requires amending Rule 404(b)(2) to clarify the inadmissibility of evidence that relies on character reasoning. That is, it requires clarifying that evidence is admissible under Rule 404(b)(2) only if it involves "a propensity-free chain of reasoning."[2]

II. Empirical Study Analyzing Post-2020-Amendment Cases

After the Advisory Committee's discussion in the Fall 2023 Meeting, I conducted an empirical study to analyze cases adjudicated after the 2020 amendment to Rule 404 (and the enactment of Rule 404(b)(3) in particular). My study involved two parts. In Part I, I analyzed 100 randomly selected cases involving Rule 404(b) determinations that were made after the 2020 amendment to Rule 404. For each case, I determined whether the other-acts evidence analyzed under Rule 404(b) relied on character reasoning or only a non-character chain of inferences for the purpose for which the evidence was

[1] *See* Hillel J. Bavli, *Correcting Federal Rule of Evidence 404 to Clarify the Inadmissibility of Character Evidence*, 92 FORDHAM L. REV. 2441, 2442-59 (2024).

[2] United States v. Gomez, 763 F.3d 845, 856 (7th Cir. 2014) ("Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence. In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning." (citations omitted)).

offered. In other words, I determined whether the evidence constituted inadmissible character evidence. I then cross-referenced my determination with the court's determination to conclude whether the court incorrectly admitted character evidence. I then tallied the incorrect admissions.

I find that approximately 48% (34/71) of evidentiary admissions under Rule 404(b) improperly rely on character reasoning. Moreover, of the *total* 100 cases (including cases in which the court excluded the evidence on grounds of Rule 404) I find that approximately 34% (34/100) involve incorrect admissions of character evidence.

In Part II of the study, I sought to test my conclusions against those of evidence experts on various law faculties throughout the U.S. To do this, I recruited approximately ten top evidence experts.[3] I then used a sample of 60 cases (a subset of the 100-case sample in Part I) to create simplified fact patterns (cases)—similar to those that might be found on a multiple-choice evidence exam—that closely reflect the fact patterns in the 60-case sample. After excluding the cases in which the court excluded the evidence on character grounds, I distributed each remaining case (43) to the experts. Each expert received four or five cases, as well as instructions and basic information regarding Rule 404 and Rule 403. For each case, the expert was asked: "Does the evidence either rely on impermissible character reasoning under [Rule] 404 or involve an undue risk of unfair prejudice arising from character reasoning—one that outweighs the probative value of the evidence—under [Rule] 403?"[4] Once I received all responses from the experts, for each case, I cross-referenced the expert's determination with the court's determination—again to conclude whether the court incorrectly admitted character evidence. I then tallied the incorrect admissions.

Based on the determinations by evidence experts on law faculties throughout the U.S., an even higher rate (relative to Part I) of sampled evidentiary admissions under Rule 404(b) improperly rely on character reasoning or involve an unacceptable risk of unfair prejudice arising from character reasoning (i.e., one that outweighs the probative value of the evidence). Specifically, the data suggest a rate of error in sampled evidentiary admissions of approximately 69% based on the *expert* determinations compared to a rate of error of approximately 53% based on *my* determinations for this sample of 43 cases that were distributed to the experts. Moreover, tallying cases for which *my* finding of an incorrect admission coincides with an *expert* finding of impermissible character reasoning under Rule 404 or an unacceptable risk of unfair prejudice (arising from character reasoning) under Rule 403, I find that, of the 43 cases for which experts rendered a determination, approximately 44% (using the more conservative approach to character evidence employed in my analysis in Part I) to 53% (using a less conservative approach) of sampled evidentiary admissions under rule 404(b) improperly involve character reasoning.

III. Illustrations

The drug context is illustrative of the problem. In *United States v. Hudson*[5]—a case from the sample—the District Court for the Southern District of New York granted the Government's motion *in limine*, which incorrectly treated Rule 404(b)(2) as an exception to Rule 404(b)(1). Specifically, the Government argued that "[i]n narcotics cases in particular, where a defendant claims that he lacked

[3] I recruited experts from leadership positions in the evidence academy—for example, from the Executive Committee of The Association of American Law Schools (AALS) Section on Evidence and a recent recipient of the highly competitive AALS Section on Evidence John Henry Wigmore Lifetime Achievement Award. I thank the evidence experts who volunteered to participate in my study.

[4] Experts were also asked to rate their level of confidence in their response, and they were given the option of providing an explanation regarding their response.

[5] No. 496-01, 2021 WL 839438 (S.D.N.Y. March 4, 2021).

the knowledge, intent, or motive to distribute or possess with intent to distribute narcotics, the Government is permitted to introduce evidence of the defendant's other narcotics convictions and narcotics activity."[6] The Government explained:

> These [1989 weapons and 1993 narcotics] convictions arise out of the defendant's possession of a firearm and possession of large quantities of narcotics. Should the defendant put his knowledge and intent at issue, the Government will seek to introduce the fact of these convictions at trial. His weapons conviction supports the inference that he knowingly and intentionally possessed firearms during the course of the narcotics conspiracy. . . . His narcotics convictions support the inference that the defendant intended to enter into drug business with his co-conspirators and intended to distribute the narcotics that he possessed."[7]

The Government relied on the misinterpretation of Rule 404(b)(2) discussed in my proposal—that Rule 404(b)(2) permits character reasoning so long as the evidence is offered to prove knowledge, intent, or another purpose enumerated in the rule. Following this misinterpretation, the district court granted the Government's motion.[8]

For similar examples that arose from my sample, see *United States v. Duggan*, No. 19-3220, 2021 WL 5745686, at *1-2 (3rd Cir. Dec. 2, 2021) (upholding admission—based on a misinterpretation of Rule 404(b)(2)—of evidence regarding the defendant's 2008 conviction for drug distribution to prove the defendant's knowledge and intent), and *United States v. Hull*, No. 22-30156, 2023 WL 8166777, at * 1-2 (9th Cir. Nov. 24, 2023) (upholding admission of character evidence based on a misinterpretation of Rule 404(b)(2)).

IV. Conclusion

Based on my extensive review of cases involving post-2020-amendment evidentiary decisions under Rule 404(b) and on Parts I and II of my empirical study described above, I conclude that notwithstanding the advances made by the 2020 amendment and Rule 404(b)(3)'s notice requirement, a high proportion of evidentiary decisions—and admissions in particular—under Rule 404(b) are in error. These incorrect admissions are very commonly based on the courts' misinterpretation of Rule 404(b)(2) described above and in the proposal that I prepared for the Fall 2023 meeting of the Advisory Committee. In light of the frequency of such admissions and the high stakes involved, I believe that the judicial misinterpretation of Rule 404(b)(2) is among the most significant problems in evidence law.

I hope that the Advisory Committee decides to consider this problem further. If it does, I would be very interested in assisting the Advisory Committee on the matter, including following up with additional analysis that the Advisory Committee would find helpful and recommending a straightforward way to address the problem based on my Fall 2023 proposal.

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[6] Government's Motions in Limine at 19 (citing cases), *Hudson*, 2021 WL 839438.
[7] *Id.* at 20-21.
[8] *See Hudson*, 2021 WL 839438, at *7.

TAB 7

TAB 7A

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: 973-975-5298
e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra
Re: Possible Amendment to Rule 702, regarding peer review
Date: October 1, 2024

Attached to this memo is an article by two lawyers, Jeffrey Gross and Robert LaCroix, suggesting an amendment to Rule 702 to address the relevance of peer review in determining the reliability of an expert's methodology. They have formally submitted the proposal to the Advisory Committee.

As we all know, one of the *Daubert* factors is "whether the technique or theory has been subject to peer review and publication." Advisory Committee Note to the 2000 amendment. Gross and LaCroix argue that considering peer review is problematic because many peer-reviewed studies cannot be replicated. And replication of results is a critical requirement for a reliable methodology. They also argue that courts take different approaches to the peer review factor --- some courts relying upon peer review as a critical factor, while other courts give it less or no credence. Their poster child problem is the Zantac litigation, in which the same expert was allowed to testify in one court but not another, in part of the basis of the court's consideration of peer review.

Gross and LaCroix do not propose language for an amendment, nor do they explicitly state what position the amendment would take. Presumably they are not asking for a textual addition that would specifically prohibit a court from relying on the fact that the methodology has been vetted in a peer-reviewed publication. The authors admit that a large proportion of peer-reviewed studies have been replicated. The authors are probably thinking of language along the lines of "the fact that the methodology has been published in a peer-reviewed publication is relevant only if the results have been replicated."

There are many reasons not to proceed with this proposal:

1. Most importantly, the ink is hardly dry on the last amendment to Rule 702. It became effective less than a year ago. One of the foundational principles of the rulemaking Committees is

that constant tinkering with a particular rule is to be avoided. The shortest period between amendments of a single Evidence Rule is 6 years. Rule 404(a) was amended in 2000 and 2006. And even in that situation, one of those amendments was essentially demanded by Congress. So, at a minimum, this proposed amendment needs to be tabled for a few years.

2. It would be unusual to add anything to the text of Rule 702 on a matter so specific as peer review. Rule 702 is written in general terms, as it is intended to cover all experts. (That is one reason why the Committee decided not to add anything to the text to cover forensic experts specifically). The peer review factor is *not* applicable to all experts. The Court in *Kumho* stated that while the gatekeeping function applies to all experts, the *Daubert* factors have to be applied more flexibly for non-scientific experts. Specifically the Court was thinking about the silliness of asking an expert car mechanic whether his methods have been vetted in a peer-reviewed journal.

3. Adding something about peer review would be a definite drafting challenge. The peer review factor is about methodology, so the language would have to be shoehorned into Rule 702(c). Maybe something like this:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent establishes to the court that it is more likely than not that:
>
> > **(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 <u>--- but to the extent that showing is made on the basis of peer-reviewed publication, the results must be replicated</u> ; and
> > **(d)** the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

For such an awkward amendment to be justified, it must be solving an important problem.

4. On the merits, the need for an amendment is questionable. The fact that some courts weigh the peer review factor differently than others is simply a recognition that courts have substantial discretion in exercising the gatekeeper function. Moreover, as the authors recognize, the peer review factor is rarely if ever dispositive. The authors, while complaining about replicability, do not provide instances of courts giving too much credence to shoddy peer review. And there is little reason to be concerned. A number of cases indicate that courts are able to discount a peer reviewed study where necessary. See, e.g., *United States v. Adams*, 2020 U.S. Dist. LEXIS 45125 (D. Ore.) (AFTE Journal gets no credit as a peer review journal for ballistics as it is "a trade publication meant only for industry insiders, not the scientific community, whose purpose is not to review the methodology for flaws but to review studies for their adherence to the methodology."). And in *General Electric v. Joiner,* 522 U.S. 136 (1997), the Supreme Court held that a peer-reviewed study of infant mice could not support an expert's opinion *where the study could not be replicated* in adult mice.

The authors in some way seem to want an amendment that would say that peer review is not *necessary* for a finding that the methodology is reliable. But there are plenty of courts that have so held, as indicated in the cases cited in the article. And there appear to be few if any cases that have relied solely on the absence of peer review to exclude an expert's opinion. Adding language such as "but peer review is not required" is simply restating the Committee Note to the 2000 amendment, and *Daubert* itself, in saying that peer review is simply one factor among many.

Conclusion

For all these reasons, it appears prudent to refuse to proceed at this point with any amendment to Rule 702 regarding peer review.

TAB 7B

Expert Witness Standards Must Consider Peer Review Crisis

By **Jeffrey Gross and Robert LaCroix** (August 1, 2024)

Jeffrey Gross

Robert LaCroix

—The recent amendment to Rule 702 of the Federal Rules of Evidence, effective since Dec. 1, 2023, was the rule's first substantive amendment in two decades.

It followed years of criticism that courts had not followed the rule or its intent regarding the standard of proof that applies when evaluating the reliability of expert testimony.[1]

A 2022 report from the Advisory Committee on Evidence Rules concluded that courts had been confused about the standard of proof, which led to the 2023 amendment.[2]

But the committee's narrow focus on the standard of proof ignored other inconsistencies in how courts apply Rule 702, and the U.S. Supreme Court's landmark 1993 decision in Daubert v. Merrell Dow Pharmaceuticals Inc.

One issue stands out: The Daubert decision lists, as one of several nonexhaustive factors for evaluating reliability, whether the expert's methodology "has been subjected to peer review and publication."[3] Just what to make of the peer-review factor has bedeviled courts ever since, as recent decisions following Daubert continue to illustrate.

For instance, the Zantac products liability litigation has yielded conflicting results in cases considering nearly identical expert testimony, as discussed in greater detail below.

And just last month, the Michigan Supreme Court, over a sharply worded dissent, held in Danhoff v. Fahim that the lower courts had focused too "strictly on plaintiffs' inability to support [their expert's] opinion with published literature," and reversed the decision to exclude the expert.[4]

Including peer review as a factor seemed uncontroversial at the time Daubert was decided. But between the Daubert decision in 1993 and today, the so-called replication crisis has upended how the scientific community views the reliability of studies.

The crisis began in the mid-2000s, after independent researchers discovered they could not replicate — that is, repeat — many experimental results. Researchers also could not reproduce the published results of earlier research using the source data. The crisis undermined public trust in scientific studies, including those published in peer-reviewed journals.

Many have described the crisis in stark terms: Alvaro de Menard, a participant in a Defense Advanced Research Projects Agency initiative on replication, who surveyed studies that could not be replicated, lamented that the crisis left him with "a sense of Lovecraftian awe at the sheer magnitude of it all."[5]

Given these revelations regarding the soundness of peer-reviewed studies, courts and

rulemakers should reevaluate whether or when peer review should receive any weight when assessing the reliability of expert testimony.

The Replication Crisis and Peer Review

Broadly speaking, "peer review" refers to the practice of many academic journals inviting critiques from other researchers in a study author's field before publication of the study.[6]

Theoretically, peer review can root out errors before publication. But that theory is questionable for many reasons. Reviewers may not have the right background to find the errors. Reviewers also may lack sufficient financial or reputational incentives to review rigorously. Or they may not want to challenge an author directly.[7]

In 2005, Stanford University professor John Ioannidis published a groundbreaking essay, "Why Most Published Research Findings Are False," which exposed what is now called the replication crisis.

He found that, "for most study designs and settings, it is more likely for a research claim to be false than true." He also concluded that, "for many current scientific fields, claimed research findings may often be simply accurate measures of the prevailing bias."[8]

Further studies and analyses concluded that peer review did not prevent serious errors.[9]

The revelations were deeply unsettling. Research on replication studies has found that fewer than 30% of studies in social psychology, and approximately 50% in cognitive psychology, were able to be replicated.[10]

Even among the studies published in some of the highest-profile American scientific publications, Nature and Science, only about 67% of studies were able to be replicated.[11]

Even if corrective measures in recent years — such as preregistration of hypotheses and study plans, more enforcement of requirements to share the data underlying experimental results, and other norms of open scholarship — may have reduced the problem, research has found that some high-profile peer-reviewed articles still contain apparently manipulated data.[12]

In Daubert parlance, we now see that there is a high known error rate for peer-reviewed studies, which should cause us to reconsider whether peer review is a trustworthy proxy for reliability.

The development of artificial intelligence could further undermine peer review if authors use it inappropriately in their published studies — for instance, by using a large language model to mass produce low quality work, or by failing to check for hallucinations in AI-generated text.[13]

Nowadays, many scientists do not automatically assume that peer-reviewed work is a bellwether of reliability. Scientists seriously consider many sources that are not peer-reviewed, such as conference papers and preprints of articles submitted to, but not yet accepted for publication by, academic journals.[14]

And many of the most celebrated scientific findings in history were not peer-reviewed. Indeed, only one of Albert Einstein's papers was peer-reviewed. The peer-review process so infuriated him that he moved the article to another journal.[15]

It is time for peer review to be seriously reconsidered by courts and the advisory committee, including whether it is an outmoded shibboleth for identifying reliable science in a courtroom.

Courts' Inconsistent Treatment of Peer Review After Daubert

The Supreme Court's decision in Daubert explained that whether a particular technique or methodology had been published in a peer-reviewed journal is a "relevant, but not dispositive consideration."[16] The court noted that some propositions were too new or of limited interest, such that publication was unlikely.

But on remand to the U.S. Court of Appeals for the Ninth Circuit, in a passage that would become influential, the court ruled that "peer review [was] a significant indication" that research "meets at least the minimal criteria of good science."[17]

Courts proceeded inconsistently in how they applied Rule 702 after Daubert. Some courts followed the Ninth Circuit's view in Daubert that peer review was a strong signal of reliability, but other courts gave it little weight.[18]

The inconsistent treatment persisted, even when some courts noted the shifting views in the scientific community.[19]

Because courts rarely explained why they decided peer review deserved either substantial importance or minimal importance for a particular expert's work, many decisions appeared to reach a tentative conclusion about admissibility first, and then addressed peer review as an afterthought.

The disparate weight courts give peer review is illustrated by a recent pair of cases involving identical expert testimony in two different courts, each purporting to apply Daubert.

The cases were part of multidistrict litigation — In re: Zantac (Ranitidine) Product Liability Litigation, and related litigation in Delaware state court, In re: Zantac (Ranitidine) Litigation — involving claims that the antacid drug Zantac and its generic counterparts caused cancer.

The first court to rule, the U.S. District Court for the Southern District of Florida, excluded one expert's testimony on causation, finding in 2022 that the expert had "designed and conducted novel experiments for this litigation that did not follow any preexisting, peer-reviewed experimental designs, much less designs established to assess drug stability."[20]

But the lack of peer review was just one of the factors considered by the court, and the decision did not state how strongly it weighed that factor.

Yet in a separate lawsuit involving the same expert's proposed testimony, the Delaware Superior Court concluded in late May that the "lack of peer review ... is fodder for cross-examination, not exclusion."[21]

The different results in these nearly identical cases support the view that the overall gestalt has mattered more than careful analysis of the significance of peer review.

Further, no matter what courts have said about peer review, data suggests that peer review has not been a strong predictor of whether courts will admit expert testimony.

In the years after the Supreme Court's Daubert decision, many states adopted Daubert — including its recognition of peer review as a relevant indicator of reliability — but many did not.[22]

A large 2022 study of appellate decisions in criminal cases, published in the journal Psychology, Public Policy and Law, found no statistically significant difference in exclusion rates between federal court decisions before and after Daubert, nor between courts in states that chose to follow Daubert and those that did not.[23]

Role of Peer Review After December 2023 Rule 702 Amendment Still Uncertain

The December 2023 amendment to Rule 702 clarified that the "preponderance of the evidence" standard applies to establishing the reliability of expert testimony. But the amendment did not address peer review.

Today, courts approach peer review the same as they did before the amendment: Some courts treat a lack of peer review as a serious shortcoming, but others do not.[24] And because courts rarely explain why they gave some or substantial weight to peer review, these decisions cannot be explained simply by the fact that Daubert lists it as a possible, but not essential, factor for assessing reliability.

This unresolved issue is important, because Rule 702 requires courts to act as gatekeepers for expert testimony. But the rules for determining what expert testimony passes muster for admission at trial should be clear.

More broadly, when courts rely on illustrative lists of factors that can support passing a legal test, reasoned opinions should give guidance to future courts about how and why the factors support particular decisions.

The jurisprudence under Rule 702 over the last few decades suggests that more guidance would be useful, including updated analysis of whether the replication crisis and current views in the scientific community should affect whether peer review belongs as a factor that helps identify reliable expert testimony.

Jeffrey Gross is a partner and Robert LaCroix is an associate at Reid Collins & Tsai LLP.

[1] See, e.g., David E. Bernstein & Eric G. Lasker, Defending Daubert: It's Time to Amend Federal Rule of Evidence 702, 57 Wm. & Mary L. Rev. 1, 8-12 (2015).

[2] Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

[3] 509 U.S. 579, 593-94 (1993).

[4] Danhoff v. Fahim, No. 163120, --- N.W.3d ----, 2024 WL 3333321, at *13-14 (Mich. July 8, 2024).

[5] Alvaro de Menard, What's Wrong with Social Science and How to Fix It: Reflections After Reading 2578 Papers, Fantastic Anachronism (Sept. 11, 2020), https://fantasticanachronism.com/2020/09/11/whats-wrong-with-social-science-and-how-to-fix-it/.

[6] See, e.g., Melinda Baldwin, In Referees We Trust?, 70 Physics Today 44, 44 (2017).

[7] Id. at 49.

[8] John P.A. Ioannidis, Why Most Published Research Findings Are False, PLoS Med (2005).

[9] Sara Schroter et al., What errors to peer reviewers detect, and does training improve their ability to detect them?, 101 J. Royal Soc. Med. 507 (2008).

[10] Stephan Lewandowsky & Klaus Oberauer, Low Replicability Can Support Robust and Efficient Science, 11Nature Communications 358, at 2 (2020) (citing Rolf A. Zwaan et al., Making Replication Mainstream, 41 Behavioral & Brain Scis. e120 (2018)).

[11] Id. (citing Open Science Collaboration, Estimating the Reproducibility of Psychological Science, 349 Science 1, 1-8 (2015)).

[12] See, e.g., Uri Simonsohn et al., [109] Data Falsificada (Part 1): "Clusterfake", DataColada (June 17, 2023), https://datacolada.org/109.

[13] Some, including the editors of the journal Science, claim that the advent of AI raises the risk of shoddy papers passing peer review. See LLMs Now Write Lots of Science. Good, The Economist (June 27, 2024), https://www.economist.com/leaders/2024/06/27/llms-now-write-lots-of-science-good.

[14] Cassandra L. Ettinger et al., A Guide to Preprinting for Early-Career Researchers, 11 Biol. Open 7 (2022).

[15] Andre Spicer & Thomas Roulet, Hate the peer review process? Einstein did too, The Conversation (June 2, 2014), https://theconversation.com/hate-the-peer-review-process-einstein-did-too-27405.

[16] 509 U.S. at 593.

[17] Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1318 (9th Cir. 1995).

[18] See, e.g., Baugh v. Cuprum S.A. de C.V., 845 F.3d 838, 845 (7th Cir. 2017) (lack of peer review no bar to admissibility because expert applied techniques well-established in industry); Primiano v. Cook, 598 F.3d 558, 566 (9th Cir. 2010) (reversing exclusion of non-peer reviewed opinion based on expert's "background and experience, and his explanation of his opinion"); Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1235 (10th Cir. 2005) (affirming admissibility of opinion that was "not susceptible to testing or peer review"); Danhoff, 2024 WL 3333321, at *13-14.

[19] Valentine v. Pioneer Chlor Alkali Co., 921 F. Supp. 666, 674 (D. Nev. 1996) (noting "some serious debate in the scientific community itself over the significance of publication per se and the adequacy of pre-publication evaluation of scientific writings").

[20] In re Zantac (Ranitidine) Prod. Liab. Litig., 644 F. Supp. 3d 1075, 1140 (S.D. Fla. 2022).

[21] In re Zantac (Ranitidine) Litig., C.A. No. N22C-09-101 ZAN, 2024 WL 2812168, at *34 (Del. Super. May 31, 2024).

[22] See Jennifer L. Groscup et al., The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases, 8 Psych., Pub. Pol. & L. 339, 342, 344 (2002).

[23] Id.

[24] Compare United States v. Ortiz, --- F. Supp. 3d ----, 2024 WL 2889873, at *9 (S.D. Cal. June 10, 2024) (excluding expert opinion on DNA testing methodology that had not been peer reviewed) with Teresko v. The 3M Co., No. 22-cv-1532-JPS, 2024 WL 2864402, at *19-20 (E.D. Wis. June 16, 2024) (excluding novel expert opinion with passing reference to lack of peer review) and Garcia v. Singh, Civ. No. 2:23-545-WJ-GJF, 2024 WL 2939126, at *3 (D.N.M. June 11, 2024) (excluding expert based on lack of record about Daubert factors, including peer review).

TAB 8

University of Oklahoma College of Law
300 Timberdell Rd., Norman OK. 73019

Liesa L. Richter
George Lynn Cross Research Professor
Floyd & Martha Norris Chair in Law
liesarichter@ou.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Supreme Court Interpretation of Fed. R. Evid. 704(b)
Date: October 1, 2024

In its most recent term, the Supreme Court interpreted and applied Federal Rule of Evidence 704(b) in *Diaz v. United States*, 602 U.S. ___, 144 S.Ct. 1727 (June 20, 2024). This memorandum updates the Committee with respect to the opinion and the Court's interpretation of Rule 704(b). Because the Court's interpretation and application of Rule 704 appears to be in keeping with the legislative intent of the provision, as well as the prevailing approach to Rule 704(b) in the majority of federal circuits, this memorandum does not recommend any amendments to the Federal Rules of Evidence as a result of the decision at this time.

This memorandum proceeds in four parts. Part I explains Federal Rule of Evidence 704, its origins and rationale. Part II describes the federal courts' interpretation of Rule 704(b) prior to the Supreme Court's holding in *Diaz*. Part III explains the issue in the *Diaz* case and the Supreme Court's interpretation and application of Rule 704(b). Part III also describes a vigorous dissent to the majority opinion penned by Justice Gorsuch. Finally, Part IV concludes that no amendments to the Federal Rules are necessary or feasible in response to the decision.

I. The Origins of Federal Rule of Evidence 704

At common law, courts largely followed the "ultimate issue" rule, which prohibited a witness from offering an opinion on an "ultimate issue" in a case.[1] This common law prohibition "categorically barred witnesses from 'stat[ing] their conclusions on' any 'ultimate issue' – *i.e.*, issues that the jury must resolve to decide the case."[2] It forbade opinions about issues such as causation, intent, and negligence.[3] The theory behind this exclusionary rule was

[1] *See* Mueller, Kirkpatrick & Richter, EVIDENCE § 7.12, p. 698 (Aspen 6th Ed. 2018) (explaining that "ultimate issue objection …essentially blocked witnesses from testifying directly to facts that the factfinder must determine.").

[2] Diaz v. United States, 602 U.S. ___, 144 S. Ct. 1727 (2024) (citing United States v. Spaulding, 293 U.S. 498, 506 (1935)).

[3] *See* Mueller, et. al., *supra* n. 1.

that decisions on ultimate issues in a case were for the fact-finder alone and that witnesses' opinions about such ultimate issues improperly invaded the province of the jury.[4]

When the Federal Rules of Evidence were enacted, the drafters chose to eliminate the prohibition on opinions on "ultimate issues." Rule 704(a) sweeps away the common law prohibition as follows:

> **Rule 704. Opinion on an Ultimate Issue**
>
> (a) **In General – Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.

In explaining the abolition of the ultimate issue prohibition, the original Advisory Committee stated that: "The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information."[5] The Committee emphasized the uneven application of the ultimate issue prohibition, as well as its capacity to stifle the testimony of witnesses.[6] The Advisory Committee explained that the limits on lay and expert opinion testimony in Rules 701 and 702, as well as the trial court's discretion to exclude evidence under Rule 403, provide ample protection against unhelpful testimony.[7] Thus, while expert and lay witnesses who offer opinion testimony must meet the admissibility requirements of Rules 701 and 702, Rule 704(a) eliminates any separate objection that witnesses are offering an opinion on an "ultimate issue."

In 1982, John Hinckley, Jr. was found not guilty by reason of insanity after his attempted assassination of President Ronald Reagan in a trial in which competing experts opined directly about whether Hinckley was "sane" at the time of the offense.[8] The verdict was met with a great deal of outrage and Congress responded by enacting the Insanity Defense Reform Act of 1984.[9] Section 406 of the Act amended Rule 704 of the Federal Rules of Evidence to prohibit certain

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[4] *See* Advisory Committee's note to Fed. R. Evid. 704 (noting that the basis for the ultimate issue prohibition was "to prevent witnesses from 'usurping the province of the jury.'").

[5] Advisory Committee's note to Fed. R. Evid. 704.

[6] *Id. See also* Diaz v. United States, 144 S. Ct. 1727 (2024) ("Many rejected the idea that ultimate-issue testimony usurps the jury's role, since a witness's 'credibility' and 'the soundness of his judgment' 'always remain for the jury's determination.'"); Mueller, Kirkpatrick & Richter, EVIDENCE § 7.12, p. 698 (Aspen 6th Ed. 2018) (ultimate issue prohibition "stood in the way of much that could be helpful, such as that someone was 'driving too fast' or that someone 'deliberately took aim and fired' because such testimony connected directly with issues like negligence and criminal intent.").

[7] Advisory Committee's note to Fed. R. Evid. 704 ("These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.").

[8] Diaz, 144 S.Ct. at 1733 (explaining that both the prosecution and defense offered competing testimony on the ultimate issue of Hinckley's sanity).

[9] Pub. L. No. 98-473 (1984).

ultimate expert opinion testimony concerning a criminal defendant's mental state. The original provision read as follows:

> Rule 704. Opinion on Ultimate Issue
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[10]

The Senate Report on the amended provision emphasized congressional intent to address expert "psychiatric testimony" with the Rule 704(b) prohibition, explaining that expert testimony regarding a defendant's "mental disease or defect" and the "characteristics of such disease or defect" would be permitted under the new rule, but that testimony "to the ultimate legal issue to be found by the trier of fact" would no longer be permitted.[11] Congress drew heavily on a statement by the American Psychiatric Association in crafting the ban. This ban on expert opinion testimony was designed to serve three related purposes. First, the prohibition eliminates "the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue."[12] While experts may agree about a defendant's medical condition and characteristics, they may offer diametrically opposed views of the defendant's relevant mental state that simply confuse the jury. This prohibition on testimony about a criminal defendant's mental state or condition that constitutes an element of a crime or defense also ensures that the jury will get details regarding a defendant's characteristics or mental facility, as opposed to generic conclusions about legal requirements.[13] Finally, the ban was designed to limit expert witnesses to their area of *psychiatric* expertise and to prohibit *legal* opinions that defendants "do or do not meet the relevant legal test for insanity."[14]

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[10] *See* Friedman & Deahl, Federal Rules of Evidence: Text and History, p. 300 (West 2015) (setting forth original congressional language and describing rationale for the amendment); *see also* Diaz v. United States, 14 S. Ct. 1727 (2024) (noting that Congress created the exception to the admission of ultimate issue testimony nine years after the original enactment of the Rule in the wake of the John Hinckley, Jr. trial).

[11] S. Rep. No. 225, 98th Cong., 2d Sess. 230-31 (1984).

[12] Advisory Committee's note to Fed. R. Evid. 704(b); *see also Diaz*, *supra* n. 8 (explaining that both the prosecution and defense experts in the Hinckley trial had offered competing opinions about the ultimate issue of Hinckley's sanity.). *See also* United States v. Turner, 61 F.4th 866, 868 (11th Cir. 2023) (error under Rule 704(b) to allow government's expert witness to opine in a felon-in-possession prosecution in which the defendant claimed insanity that at the time defendant possessed the firearms, he "understood the wrongfulness of his actions").

[13] *See* Mueller, Kirkpatrick & Richter, EVIDENCE § 7.13, p. 701 ("A second purpose is to ensure that juries get details because they need them and because experts who let themselves be used in criminal adjudication have a professional obligation to provide details rather than overarching conclusions.").

[14] Senate Committee Report, *supra* n. 11 ("When, however, 'ultimate issue' questions are formulated by the law and put to the expert witness who must say 'yea' or 'nay,' then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely

This congressionally enacted exception was not intended to prohibit all expert testimony about a criminal defendant's mental state, however. As the Senate Committee Report on Rule 704(b) explained, "Psychiatrists must be permitted to testify fully about the defendant's diagnosis, mental state, and motivation (in clinical and commonsense terms) at the time of the alleged act to permit the jury or judge to reach the ultimate conclusion about which they and only they are the expert."[15] In its Report on the amendment, the Senate noted that the prohibition "extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven" and that the prohibition was drafted to "reach all such ultimate issues, e.g., premeditation in a homicide case, or lack of predisposition in entrapment."[16]

Rule 704(b) was amended once in 2011 as part of the restyling project for the Evidence Rules. That amendment modified the congressional language, as follows:

> Rule 704. Opinion on an Ultimate Issue
>
> (b) Exception. In a criminal case, ~~No~~ an expert witness ~~testifying with respect to the mental state or condition of a defendant in a criminal case may~~ must not state an opinion ~~or inference as to~~ about whether the defendant did or did not have ~~the~~ a mental state or condition ~~constituting~~ that constitutes an element of the crime charged or of a defense ~~thereto~~. ~~Such ultimate issues are~~ Those matters are for the trier of fact alone.

The Advisory Committee's note to all restyled Rules emphasized that restyling changes were intended to be "stylistic only" and that there was "no intent to change any result in any ruling on evidence admissibility."[17] The note to restyled Rule 704(b) noted that the reference to "an inference" was deleted to make the Rule "flow better and easier to read" and because any prohibited "inference" by an expert witness is sufficiently covered by the "broader term 'opinion'."[18]

II. Federal Courts' Interpretation of Federal Rule of Evidence 704(b) Prior to *Diaz*

A. A Narrow View of Rule 704(b)

There are hundreds of reported federal opinions interpreting and applying Rule 704(b), revealing that it is a frequent basis for objection in federal criminal cases. The vast majority of

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the probable relationship between medical concepts and legal or moral constructs such as free will.") (quoting American Psychiatric Association Statement on the Insanity Defense, 1982).

[15] *Id.* (quoting APA Statement).

[16] *Id.*; *see also* United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) (en banc) ("The language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses *testifying with respect to the mental state or condition of a defendant*.").

[17] *See, e.g.*, Advisory Committee's note to 2011 amendment to Fed. R. Evid. 704(b).

[18] *Id.*

federal cases prior to the *Diaz* opinion interpreted the Rule 704(b) prohibition very narrowly. Federal courts have permitted experts to testify to a multitude of opinions designed to help jurors infer that the defendant did or did not possess the requisite mental state so long as they refrain from offering testimony that necessarily establishes that the specific defendant in the case at hand had the required *mens rea*. Most federal circuit courts have allowed experts to offer opinions from which a defendant's mental state may be inferred, so long as the expert leaves it to the fact finder to draw the final inference about the defendant's *mens rea*.

For example, the Tenth Circuit Court of Appeals has adopted the narrow interpretation of Rule 704(b) shared by the majority of federal circuits, explaining that: "Rule 704(b) only prevents experts from expressly stating the final conclusion or inference as to a defendant's actual mental state. The rule does not prevent the expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state."[19] Specifically, the Tenth Circuit has held that Rule 704(b) "do[es] not prevent an expert from drawing conclusions about intent, so long as the expert does not profess to know a defendant's intent,"[20] or whether the defendant "acted with the necessary mens rea."[21]

The Eleventh Circuit Court of Appeals has interpreted Rule 704(b) similarly. In *United States v. Akwuba*, the Eleventh Circuit explained: "Rule 704(b) does not preclude even expert testimony that supports an obvious inference with respect to the defendant's state of mind if that testimony does not actually state an opinion on this ultimate issue, and instead leaves this

[19] United States v. Richard, 969 F.2d 849, 854 (10th Cir. 1992); *see also* United States v. Goodman, 633 F.3d 963, 970 (10th Cir. 2011) ("It is only as to the last step in the inferential process—a conclusion as to the defendant's actual mental state—that Rule 704(b) commands the expert to be silent.").

[20] United States v. Schneider, 704 F.3d 1287, 1294 (10th Cir. 2013).

[21] United States v. Wood, 207 F.3d 1222, 1236 (10th Cir. 2000). *See also* United States v. Garcia-Martinez, 730 F. App'x 665, 682–83 (10th Cir. 2018) ("Rule 704(b) commands the expert to be silent" concerning only "the last step in the inferential process—a conclusion as to the defendant's actual mental state.").

inference for the jury to draw."[22] Other circuits, including the First,[23] Second,[24] Third,[25] Sixth,[26] Seventh,[27] Eighth,[28] and D.C. Circuits[29] have also interpreted Rule 704(b) to exclude only expert testimony that necessarily opines that the defendant possessed the mental state required for conviction during the charged offense.[30]

Interestingly, a panel of the Ninth Circuit adopted a broader interpretation of Rule 704(b) that was later overruled *en banc* in favor of this narrow view. In *United States v. Brodie,* a panel of the Ninth Circuit had held that Rule 704(b) precluded an expert from testifying to "predicate matters" from which the jury might "extrapolate" whether the defendants possessed the

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[22] 7 F.4th 1299, 1318 (11th Cir. 2021). *See also* United States v. Duldulao, 87 F.4th 1239, 1269 (11th Cir. 2023) ("An expert witness can give his opinion about an ultimate issue so long as he does not tell the jury what result to reach."); United States v. Gillis, 938 F.3d 1181, 1194 (11th Cir. 2019) ("However, an expert may, consistent with Rule 704(b), give testimony "that supports an obvious inference with respect to the defendant's state of mind if that testimony does not actually state an opinion on [the] ultimate issue, and instead leaves this inference for the jury to draw.").

[23] United States v. Peña–Santo, 809 F.3d 686, 694 (1st Cir. 2015) (Rule 704(b) bars a witness from characterizing the defendant's intent, but it "does not, however, apply to 'predicate facts from which a jury might infer such intent.'"); United States v. Soler-Montalvo, 44 F.4th 1, 14 (1st Cir. 2022) ("we have held repeatedly that testimony that a defendant's actions are consistent with the modus operandi of illegal activity, though allowing the jury to infer the defendant's state of mind, does not violate Rule 704(b)'s ultimate-issue prohibition.").

[24] United States v. DiDomenico, 985 F.2d 1159, 1164 (2d Cir. 1993) (The rule serves to "disable[ ] even an expert from expressly stating the final conclusion or inference as to a defendant's actual mental state at the time of a crime." "It is only as to the last step in the inferential process — a conclusion as to the defendant's actual mental state — that Rule 704(b) commands the expert to be silent.").

[25] United States v. Watson, 260 F.3d 301, 309 (3d Cir. 2001) ("It is only as to the last step in the inferential process – a conclusion as to the defendant's mental state – that Rule 704(b) commands the expert to be silent.").

[26] United States v. Jaffal, 79 F.4th 582, 603 (6th Cir. 2023) ("The ultimate question is therefore "whether the expert actually referred to the intent of the defendant, or, instead, simply described in general terms the common practices of those who clearly do possess the requisite intent, leaving unstated the inference that the defendant ... also possessed the requisite intent.").

[27] United States v. Foster*,* 939 F.2d 445, 454 (7th Cir.1991) (testimony "merely assisted the jury in coming to a conclusion as to [defendant's] mental state; it did not make that conclusion for them"); *see also* United States v. Tinsley, 62 F.4th 376, 384 (7th Cir. 2023)("Even still, an expert can "testify in general terms about facts or circumstances from which a jury might infer that the defendant intended to distribute drugs ... as long as it is clear that the opinion is based on the expert's knowledge of common criminal practices.").

[28] United States v. Vesey, 338 F.3d 913, 916 (8th Cir. 2003) ("Testimony that, when combined with other evidence, might imply or otherwise cause a jury to infer this ultimate conclusion, however, is permitted under the rule.").

[29] United States v. Dunn*,* 846 F.2d 761, 762 (D.C.Cir.1988) ("It is only as to the last step in the inferential process—a conclusion as to the defendant's actual mental state—that Rule 704(b) commands the expert to be silent.").

[30] The Fourth Circuit has echoed these holdings in an unpublished opinion. *See* United States v. Batts, 661 F. App'x 787, 790 (4th Cir. 2016) ("[E]ven if the testimony effectively was expert testimony, it was not excludable because neither Officer Lovell nor Detective Simpson expressed an opinion about whether Batts intended to distribute the crack. See Fed. R. Evid. 704(b).").

necessary *mens rea*.[31] Sitting *en banc*, the Ninth Circuit overruled that broad interpretation of Rule 704(b) in *United States v. Morales*, holding that Rule 704(b) "allows testimony supporting an inference or conclusion that the defendant did or did not have the requisite *mens rea,* so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not *necessarily* follow from the testimony."[32]

In *Morales*, the defendant was accused of willfully making false entries in a union bookkeeping ledger. At trial, she sought to offer testimony from an expert that she possessed weak bookkeeping skills to suggest that her faulty entries were unintentional. The trial court excluded the expert testimony, holding that it would not allow the defense expert to testify as to what the defendant did or did not understand because that was a question for the jury.[33] On appeal, the Ninth Circuit reversed, interpreting Rule 704(b) to "allow[] testimony supporting an inference or conclusion that the defendant did or did not have the requisite *mens rea,* so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony."[34] The court explained that the defense expert proffered by Morales would not have offered testimony *necessarily* opining as to the defendant's intent:

> Even if the jury believed Crosby's expert testimony that Morales had a weak grasp of bookkeeping knowledge (and there was evidence to the contrary), the jury would still have had to draw its own inference from that predicate testimony to answer the ultimate factual question—whether Morales willfully made false entries. Morales could have had a weak grasp of bookkeeping principles and still knowingly made false entries as charged. Thus, Crosby was not going to testify to an opinion or draw an inference as to the ultimate issue of Morales's *mens rea* within the meaning of Rule 704(b).[35]

In adopting a narrow reading of Rule 704(b), the Ninth Circuit explained the overbreadth of an interpretation that would foreclose all expert opinion testimony from which a defendant's mental state could be inferred or extrapolated:

> A contrary conclusion would favor a reading of Rule 704(b) that not only would exclude an expert's opinion as to whether a defendant did or did not have the requisite mental state, but would also exclude an expert's opinion on any matter

[31] 858 F.2d 492, 496 (9th Cir.1988).

[32] United States v. Morales, 108 F.3d 1031, 1037 (9th Cir. 1997) (en banc) (emphasis added).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1037.

from which the factfinder might infer a defendant's mental state. This is not what Rule 704(b) says.[36]

Therefore, prior to the Supreme Court's decision in *Diaz*, the overwhelming majority of federal courts had adopted a narrow interpretation of Rule 704(b) that permits experts to offer opinions from which the defendant's *mens rea* can be inferred so long as they refrain from expressing opinions that "necessarily" establish a defendant's *mens rea* (or lack thereof).

B. Application of Rule 704(b) in Drug Distribution Cases Prior to *Diaz*

Expert opinion testimony is prevalent in drug distribution prosecutions like *Diaz* and experts have frequently been permitted to testify about the tools, practices, and typical structure of drug distribution operations.[37] Often, the opinions offered by these experts are designed to aid the jury in determining the defendant's *mens rea,* and defendants commonly object that expert opinions offered in these types of cases violate Rule 704(b). The Circuit courts have routinely rejected these objections, holding that expert opinions offered to support inferences about a defendant's mental state do not violate Rule 704(b) so long as they refrain from commenting on the specific defendant's intent, knowledge, or understanding.[38]

For example, expert witnesses have consistently been permitted to testify over Rule 704(b) objections about the quantities of drugs typically carried or possessed for personal use as

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[36] *Id.*

[37] *See, e.g.*, United States v. Jaffal, 79 F.4th 582, 603 (6th Cir. 2023) ("law-enforcement officers are frequently allowed to offer expert testimony to explain various practices of drug trafficking."); United States v. Womack, 55 F.4th 219, 228–29 (3d Cir. 2022), *cert. denied sub nom*. Whitehead v. United States, 144 S. Ct. 1012, 218 L. Ed. 2d 176 (2024) ("[E]xperienced narcotics agent[s] may testify about the significance of certain conduct or methods of operation to the drug distribution business, as such testimony is often helpful in assisting the trier of fact understand the evidence."); United States v. Gonzalez-Rodriguez, 621 F.3d 354, 364 (5th Cir. 2010) ("An expert witness may explain to a jury the mechanics of a drug trafficking organization."); United States v. Garcia, 447 F.3d 1327, 1335 (11th Cir. 2006) (acknowledging the "well-established rule that an experienced narcotics agent may testify as an expert to help a jury understand the significance of certain conduct or methods of operation unique to the drug distribution business"). Similar modus operandi testimony is often permitted in other types of cases as well. *See, e.g.*, United States v. Primm, 63 F.4th 1186, 1190–91 (8th Cir. 2023) ("SA Kenney did not directly testify to Primm's mental state but rather to the modus operandi of tax evasion criminals. Therefore, the district court did not abuse its discretion by admitting SA Kenney's expert testimony."); United States v. Xu, 110 F.4th 841, 853 (6th Cir. 2024) ("After examining the dialogue as a whole, the context of Olson's testimony makes it clear that he did not opine on whether Xu possessed the requisite intent to steal trade secrets. Rather, Olson, as a former intelligence officer, explained how Xu's actions toward Zheng were "consistent with," "typical of," and "indicative of" a covert intelligence-gathering operation based on common tradecraft principles and techniques.").

[38] *See, e.g.*, United States v. Soler-Montalvo, 44 F.4th 1, 14 (1st Cir. 2022) ("In sum, we have held repeatedly that testimony that a defendant's actions are consistent with the modus operandi of illegal activity, though allowing the jury to infer the defendant's state of mind, does not violate Rule 704(b)'s ultimate-issue prohibition.").

opposed to quantities commonly associated with distribution.[39] These opinions are designed to demonstrate that the quantity of illegal drugs possessed by the particular defendant was a quantity commonly associated with distribution and not a quantity typical of a drug user, from which the jury may infer that the defendant possessed the drugs with the "intent to distribute" – the mental state required for conviction. So long as such opinions allow the jury to draw its own conclusions regarding a defendant's *mens rea* from the predicate facts, they have been found permissible under Rule 704(b). Similarly, federal courts have permitted prosecution experts to testify over objection to the packaging commonly used in distribution of drugs to aid the jury in finding that defendant intended amounts similarly packaged for sale.[40] Courts have also approved testimony from government experts regarding the meaning of terminology commonly used by drug distribution operations.[41]

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[39] United States v. Henry, 848 F.3d 1, 11 (1st Cir. 2017) (holding that "a qualified expert does not violate Rule 704(b) by expressing an opinion as to whether predicate facts are consistent with drug distribution rather than mere possession."); United States v. Valle, 72 F.3d 210, 216 (1st Cir. 1995) ("Here, the witness offered no testimony that directly characterized the appellant's intent to distribute controlled substances. Instead, DeAngelis merely explained that the quantity of crack found at the search site was consistent with distribution, as opposed to personal use. Because this evidence does no more than supply suggested predicate facts, allowing the jury to draw its own conclusions as to intent from those facts if it chooses to credit the testimony, it does not transgress Rule 704(b)."); United States v. Lipscomb, 14 F.3d 1236, 1240 (7th Cir.1994) (upholding the introduction of opinion testimony suggesting that a particular amount of crack indicated intended distribution, and distinguishing such testimony from testimony that the defendant intended to distribute crack); United States v. Watson, 260 F.3d 301, 308 (3d Cir. 2001) ("[e]xpert testimony concerning the *modus operandi* of individuals involved in drug trafficking does not violate Rule 704(b)."); United States v. Draine, 26 F.4th 1178, 1191 (10th Cir. 2022) (affirming admission of expert opinion testimony where officer testified that the amount of heroin indicated distribution because officer never offered a conclusion as to defendant's actual mental state); United States v. Ortiz-Santizo, 766 F. App'x 890, 896 (11th Cir. 2019) (district court did not abuse its discretion in allowing officer to testify that quantity of methamphetamine seized from defendant's car was consistent with distribution, not personal use where officer expressed no opinion about defendant's state of mind; jury was left to decide the ultimate issue of whether defendant had the requisite intent to distribute the methamphetamine seized from his car); United States v. Tingle, 880 F.3d 850, 855 (7th Cir. 2018) (no error to allow officer to testify that the quantity of drugs found in residence was "definitely for distribution" where officer compared the quantity of drugs found in the search with the amount of an average user's personal consumption); United States v. Skyers, 787 F. App'x 771, 775 (2d Cir. 2019) (not plain error to admit testimony that "1.5 kilograms of cocaine is related to distribution, rather than personal use"); United States v. Batts, 661 F. App'x 787, 790 (4th Cir. 2016) (permissible for officers to testify based on their experience that the crack in question was a distribution quantity).

[40] *See, e.g.*, United States v. Jaffal, 79 F.4th 582, 603 (6th Cir. 2023) (agent's opinion testimony about quantities and packaging of heroin as consistent with distribution admissible where agent "left unstated" the ultimate question of the defendant's mental state); United States v. Dunnican, 961 F.3d 859, 876 (6th Cir. 2020) (approving testimony that the marijuana discovered in the defendant's car "was packed for resale"); United States v. Henry, 848 F.3d 1, 11 (1st Cir. 2017) (allowing expert's opinion that the drugs at issue were "packaged for sale" since "the expert grounded his opinion that the drugs were packaged for sale on his general knowledge of criminal practices and the circumstantial evidence bearing on the issue of intent that was produced during the trial.").

[41] *See, e.g.*, United States v. Tinsley, 62 F.4th 376, 384 (7th Cir. 2023) (expert's testimony about the meaning of text messages did not violate Rule 704(b) where he did not testify directly to defendant's intent and focused on the meaning of drug dealing terminology used in the messages).

In cases strikingly similar to *Diaz*, the Eleventh Circuit has permitted experts to testify that drug distribution networks typically inform drug couriers that they are carrying contraband to counter a "blind mule" defense. In *United States v. Russell*, the defendant was charged with importation and possession with intent to distribute cocaine after he was apprehended driving a boat into United States' waters with 12 kilograms of cocaine hidden in the lining of a fishing cooler.[42] At trial, the prosecution called a DEA agent as an expert witness who testified that "unwitting drug smugglers" are "extremely rare," that he had "seen unwitting smugglers perhaps once or twice in his career in law enforcement," and that he had "not personally seen a case in which a smuggler gave $300,000 of cocaine to someone without first alerting them that they had that amount of contraband in their possession."[43] The Eleventh Circuit rejected the defendant's argument that the testimony violated Rule 704(b) because the agent "provided information about the typical conduct of drug smugglers that allowed, but did not require, the jury to draw the inference that Russell was himself aware of the contraband aboard his vessel."[44] In addition, the court noted that the agent's testimony did not amount to an express statement as to Russell's own state of mind at the time of the offense and so did not violate Rule 704(b).

Similarly in *United States v. Alvarez*, the Eleventh Circuit approved expert opinion testimony by a DEA agent that it would be "unlikely" that crew members aboard a vessel carrying a large quantity of contraband would be unaware of its presence.[45] Although the obvious inference that the prosecution sought to have the jury draw from this opinion testimony was that the defendants in the case *were aware* of the contraband discovered aboard their vessel, the Eleventh Circuit found that the testimony did not violate Rule 704(b) where the expert did not expressly state the inference and left the ultimate inference of knowledge for the jury to draw.[46]

Only when an expert strays from opining in general terms about drug distribution practices and about how the instant case compares to such practices and addresses the particular defendant's own knowledge or intent have most courts found a Rule 704(b) error. Although it found that the error was harmless, the Eighth Circuit held that the district court had committed a Rule 704(b) error in permitting the testimony of a government agent over a defense objection in *United States v. Cowley*.[47] In *Cowley*, the prosecutor asked the agent about the intent with which

[42] 799 F. App'x 747, 750 (11th Cir. 2020).

[43] *Id.*

[44] *Id.*; *see also* United States v. Lozano, 711 F. App'x 934, 940 (11th Cir. 2017) (per curiam) (unpublished) ("while Overstreet's testimony on cross-examination—that the blind mule theory, in his experience, did not have a factual basis in any of the cases he had investigated—may have created the inference Lozano was not a blind mule, Overstreet did not violate the prohibition on ultimate-issue testimony because he did not specifically state Lozano had knowledge or was willfully blind.").

[45] 837 F.2d 1024, 1031 (11th Cir. 1988).

[46] *Id.* at 1031.

[47] 34 F.4th 636 (8th Cir. 2022).

the cocaine depicted in two government exhibits "was possessed" and the agent responded that it "was possessed" with intent to distribute.[48] Testimony had already established that the defendant was the one who possessed the drugs shown in the government's exhibits. The Eighth Circuit found that this opinion violated Rule 704(b):

> The use of the passive voice does not change the fact that Blomgren explicitly gave his opinion about Cowley's intent, requiring no inference by the jury to reach the "ultimate conclusion." Therefore, Blomgren's opinion testimony was inadmissible under Rule 704(b).[49]

Similarly, the Eleventh Circuit found, in an unpublished opinion in *United States v. Boykins*, that the government had violated Rule 704(b) with the following colloquy that also utilized the passive voice to elicit opinions about the intent of the specific defendant on trial:

> Based on your training and experience and the evidence that you reviewed in relation to the Pleasant Grove case, do you believe that the 50-plus grams or more methamphetamine was possessed with the intent to distribute it?
>
> A. "Yes, sir, absolutely."
>
> Q. "In relation to the Homewood case, the 152 pills ... do you believe that that quantity, in relation to the quantity that was possessed was possessed with the intent to distribute?"
>
> A. "Yes, sir."[50]

The Third Circuit reversed a defendant's drug conviction due to a prejudicial Rule 704(b) error in *United States v. Watson*.[51] In that case, the prosecution's experts were permitted to testify that the defendant's mental state was "to distribute the cocaine base rather than to use the narcotics personally."[52] In reversing the conviction, the Third Circuit elaborated on the fine line that separates admissible from prohibited expert opinion testimony under Rule 704(b):

> There is, however, "a [fine] line" that expert witnesses may not cross. It is well established that experts may describe, in general and factual terms, the common practices of drug dealers. Expert testimony is admissible if it merely "support [s] an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the

[48] *Id.* at 639-40.

[49] *Id.*

[50] 834 F. App'x 515, 519 (11th Cir. 2020).

[51] 260 F.3d 301 (3d Cir. 2001).

[52] *Id.* at 305.

> testimony." It is only as to the last step in the inferential process - a conclusion as to the defendant's mental state - that Rule 704(b) commands the expert to be silent.
>
> Rule 704(b) may be violated when the prosecutor's question is plainly designed to elicit the expert's testimony about the mental state of the defendant, or when the expert triggers the application of Rule 704(b) by directly referring to the defendant's intent, mental state, or mens rea. Rule 704 prohibits "testimony from which it necessarily follows, if the testimony is credited, that the defendant did or did not possess the requisite mens rea." Of course, narcotics experts may testify about drug dealing, but they are in no way qualified to testify about a defendant's mental condition. Therefore, the District Court erred when it admitted the Government's expert testimony concerning Watson's mental state. That evidence went to the heart of the Government's case and plainly prejudiced defendant.[53]

In a case in which the defendant was charged not with drug offenses, but with attempting to have sex with a minor, the Eleventh Circuit found that the district court was right to exclude proffered defense expert testimony pursuant to Rule 704(b).[54] In *Stahlman*, the Eleventh Circuit held that the district court properly excluded testimony from a defense expert that "[t]he clinical evidence suggests that *Mr. Stahlman intended to act out a fantasy*, rather than have sexual contact with a minor."[55] In so holding, the Eleventh Circuit explained:

> In testifying that the clinical and behavioral evidence showed Stahlman intended to act out a fantasy with adults, rather than engage in sex with a minor, Dr. Carr would be doing more than providing testimony that supports an inference as to intent—he would, in effect, be telling the jury Stahlman did not intend to induce a minor to engage in sexual activity.[56]

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[53] *Id.* at 308-09 (citations omitted).

[54] United States v. Stahlman, 934 F.3d 1199 (11th Cir. 2019).

[55] *Id.* at 1220 (emphasis in original). *See also* United States v. Gillis, 938 F.3d 1181, 1195 (11th Cir. 2019) (district court did not abuse its discretion in excluding proposed defense testimony that the defendant was "not sexually attracted to prepubescent girls;" proffered testimony would do more than "leave[an] inference for the jury to draw," and instead veered into the impermissible territory of offering an opinion on defendant's mental state).

[56] *Id.* at 1221; *see also* United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (expert testimony in money-laundering case impermissible where expert opined that certain transactions were "done with an *intent to conceal*" because it "spoke directly to the core issue of the requisite *mens rea*.") (emphasis in original). Although they have narrowly construed Rule 704(b) to foreclose only testimony about the specific defendant's *mens rea*, the federal courts have taken a pragmatic view of proffered expert testimony and have found Rule 704(b) violations even where an expert witness cleverly seeks to avoid talking specifically about the defendant. For example, the D.C. Circuit has held that expert testimony opining that supposedly "hypothetical facts" -- that happen to mirror precisely the evidence offered regarding the particular defendant's conduct -- show an "intent to distribute" drugs violates Rule 704(b). *See, e.g.*, United States v. Boyd, 55 F.3d 667 (D.C.Cir.1995). Even where the expert carefully avoids the term "intent," some courts have found a Rule 704(b) error. *See, e.g.*, United States v. Smart, 98 F.3d 1379, 1385–86 (D.C. Cir. 1996) (forbidding expert testimony that "hypothetical" facts exactly mirroring alleged facts of defendant's arrest showed an individual "involved in a drug operation" and who "met the elements"). Such testimony violates

In sum, in the majority of federal circuits prior to *Diaz*, experts were permitted to offer opinions designed to assist the jury in determining a defendant's mental state and from which the required mental state of the defendant may be inferred. These courts found Rule 704(b) error only when an expert witness has gone beyond a description of the typical tools, practices, and modus operandi of drug distribution (or other) offenders and has necessarily offered an opinion about the specific defendants involved in the charged offense.

C. The Fifth Circuit's Prohibition on Drug Courier Profile Testimony As the "Functional Equivalent" of an Opinion on *Mens Rea*

Only the Fifth Circuit Court of Appeals had adopted a broader interpretation of the Rule 704(b) prohibition in drug cases prior to the Supreme Court's opinion in *Diaz*. Like other circuits, the Fifth Circuit permits expert testimony from qualified narcotics agents about the significance of certain conduct or methods of operation unique to the drug business.[57] In contrast to other circuits, however, the Fifth Circuit has prohibited testimony from such experts that "amounts to the 'functional equivalent' of an opinion that the defendant knew he was carrying drugs.'"[58] Applying this standard, the Fifth Circuit has excluded "drug courier profile" evidence consisting of a compilation of characteristics used by law enforcement officers to identify individuals who might be involved in the trafficking of narcotics "because profile evidence may amount to the functional equivalent of an expert opinion that the defendant knew he was carrying drugs."[59]

United States v. Gonzalez-Rodriguez exemplifies the Fifth Circuit's interpretation of Rule 704(b) in drug prosecutions. In that case, the Fifth Circuit held that the district court committed plain error when it permitted a prosecution narcotics expert to testify that: 1) drug couriers generally have no criminal history; 2) the "first thing" the agent wanted to know when conducting his investigation was whether the truck driven by the defendant was carrying a "legitimate load," such as "produce;" 3) a person who knew he was carrying illegal substances would want to falsify his logbook to hide his delay in reaching the checkpoint; and 4) the majority of people arrested at immigration checkpoints are couriers.[60] According to the Fifth Circuit, it was plain error to allow this testimony because it suggested that the defendant fit the profile of a drug courier and, thus, that the defendant *knew* he was carrying illegal drugs.[61]

In *United States v. Gutierrez–Farias,* the Fifth Circuit rejected testimony exactly like the testimony that would later be approved by the Supreme Court in *Diaz*.[62] In that case, the

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Rule 704(b) even under the narrow view because it "necessarily" tells the jury that the defendant had the requisite intent.

[57] *See* United States v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir. 2010).

[58] *Id.* at 363.

[59] *Id.* at 364.

[60] *Id.* at 366-67.

[61] *Id.* ("testimony implied that Gonzalez–Rodriguez was a drug courier, and therefore knew he was carrying drugs, *because* he was arrested at a checkpoint.").

[62] 294 F.3d 657, 663 (5th Cir. 2002).

defendant was convicted of conspiracy and possession with intent to distribute marijuana after border patrol agents discovered marijuana hidden in the tires of a tractor he was towing. At trial, the government presented expert testimony from a DEA agent. The agent did not specifically reference the defendant or his state of mind. Instead, his testimony "presented the jury with a simple generalization: In most drug cases, the person hired to transport the drugs knows the drugs are in the vehicle."[63] The Fifth Circuit found that this testimony violated the Rule 704(b) prohibition because it amounted to the "functional equivalent" of an opinion that the defendant "knew" he was carrying drugs.[64] The Fifth Circuit found that similar testimony violated Rule 704(b) in several other cases prior to the Supreme Court's decision in *Diaz*.[65]

III. Supreme Court's Opinion in *Diaz v. United States*

In June of 2024, the Supreme Court decided *Diaz v. United States* and provided an interpretation of the Rule 704(b) prohibition in the context of a drug courier prosecution.[66] In a 6-3 opinion, the Court approved prosecution expert testimony that "most drug couriers know" that they are transporting large quantities of illegal drugs where the expert did not opine with respect to the particular defendant's state of mind.

A. Factual Background and Lower Court Rulings

Delilah Diaz was arrested in August 2020 when she attempted to drive a vehicle with over 54 pounds of methamphetamine valued at $368,550 hidden in the doors and trunk into the United States from Mexico. Upon her arrest, Diaz waived her *Miranda* rights and agreed to an interview. She claimed that she was driving her boyfriend's car and had no idea that there were drugs hidden inside. Agents found her story suspicious when she stated that she did not know

[63] *Id.*

[64] *Id.* at 663-64.

[65] *See, e.g.,* United States v. Lara, 23 F.4th 459, 475 (5th Cir.), *cert. denied,* 142 S. Ct. 2790, 213 L. Ed. 2d 1022 (2022) ("Just like the agent in *Gutierrez-Farias*, Agent Huerta "described ... the extent to which those selected [to transport drugs] are aware of the drugs they are transporting," ultimately testifying that drug couriers "usually" know that they are transporting drugs. Although neither Agent Huerta nor Agent Afanasewicz expressly opined on the mental state of the defendant, both gave the "functional equivalent" of such testimony. And while Agent Huerta did acknowledge during cross-examination that not all couriers know they are transporting drugs, this statement is simply consistent with his testimony that couriers "usually" know."); United States v. Vedia, 288 F. App'x 941, 947–48 (5th Cir. 2008) (explaining that it was obvious error when an expert witness used "drug profiling" to imply that most drug couriers know that they are carrying drugs in their vehicle and thus the defendant likely knew he had drugs in his vehicle); United States v. Ramirez–Velasquez, 322 F.3d 868, 879 (5th Cir. 2003) (citing *Gutierrez-Farias* and holding that expert agent improperly "made the generalization, albeit not quite directly, that drivers know they are carrying drugs"). *But see* United States v. Ramos-Rodriguez, 809 F.3d 817, 826 (5th Cir. 2016) ("A careful reading of Agent Sanchez's testimony indicates that it was an explanation of the facts of the case, and it made no assertion or generalization regarding Ramos's knowledge. Thus, we conclude that Sanchez's testimony was not the "functional equivalent" of an opinion that Ramos knew he was transporting drugs.").

[66] Diaz v. United States, 602 U.S. ___, 144 S.Ct. 1727 (June 20, 2024).

her boyfriend's phone number or where he lived and when she claimed that an extra phone was given to her by a friend she would "rather not identify." She was charged under 21 U.S.C. §§952 and 960 with importing methamphetamine, which requires the government to prove that the defendant "knowingly" transported drugs.

Prior to trial, the prosecution provided notice of its intent to call a special agent from Homeland Security as an expert witness to testify about common practices of Mexican drug cartels. The special agent never interviewed Diaz and offered no evidence regarding Diaz personally. Instead, the special agent proposed to testify that "drug traffickers 'generally do not entrust large quantities of drugs to people who are unaware they are transporting them.'" Diaz objected to the expert testimony of the special agent, arguing that the testimony would violate the prohibition in Rule 704(b) if the agent testified in absolute terms that the cartels "*never* use unknowing couriers." According to the defense, such absolute testimony would functionally provide an opinion on Diaz's state of mind, which Rule 704(b) forbids. The district court granted in part and denied in part the defense motion to exclude the opinions of the special agent. The district court excluded any absolute testimony that *all* couriers knowingly transport drugs but allowed the special agent's opinion about the knowledge of "most couriers."

At trial, the special agent was permitted to testify that "in most circumstances, the driver knows they are hired … to take the drugs from point A to point B." The special agent explained the risks involved for the cartels in transporting a large quantity of drugs with an unknowing courier (also known as a "blind mule"), including the loss of the drugs and the inability to collect the drugs without detection. On cross-examination, the defense emphasized that the special agent was not involved in Diaz's case and got the agent to concede that drug-trafficking organizations do "sometimes use" unknowing couriers.

Following her conviction, Diaz appealed the district court's admission of the special agent's expert opinion, arguing that it violated Rule 704(b). Consistent with its prior narrow interpretation of Rule 704(b), the Ninth Circuit affirmed Diaz's conviction, holding that Rule 704(b) prohibits only "an 'explicit opinion' on the defendant's state of mind."[67] The Ninth Circuit held that the special agent's testimony did not violate Rule 704(b) because it did not offer an opinion about whether *Diaz* knowingly transported methamphetamine. Diaz filed a writ of certiorari to the United States Supreme Court, which was granted.

B. Supreme Court Majority Opinion and Justice Jackson's Concurrence

In a majority opinion penned by Justice Thomas, the Supreme Court affirmed Diaz's conviction. The Court noted that Rule 704(a) broadly permits opinions that "embrace[]" an ultimate issue and that Rule 704(b) provides a narrow exception to that rule of admissibility. The Court noted that Rule 704(b) applies only in criminal cases, only to expert opinions, only to expert opinions about the defendant, and only to expert opinions about whether the defendant did or did

[67] United States v. Diaz, 2023 WL 314309 *2 (9th Cir. January 19, 2023).

not have a mental state that constitutes an element of a charge or defense.[68] The Court reasoned that the testimony of the special agent was not about Diaz, the defendant, in particular, because it described practices of "most" couriers used by drug distribution networks and acknowledged that sometimes unknowing couriers are used.[69] Thus, the agent's testimony provided "evidence" that could be used to determine Diaz's mental state but did not offer an opinion about it directly. According to the Court, the "jury alone" drew the conclusion that Diaz "knowingly" transported drugs. Therefore, the agent's testimony did not run afoul of Rule 704(b).

Justice Thomas rejected defense arguments that the agent's testimony was the "functional equivalent" of an opinion about Diaz's state of mind. Justice Thomas acknowledged that an expert opinion (like the one rejected by the district court in Diaz's case) that "all" people in the defendant's position have a certain mental state would be the functional equivalent of an opinion on *mens rea* because it would place the particular defendant in a class in which all people possess the relevant mental state required to convict.[70] Justice Thomas contrasted such a case with the testimony offered against Diaz, as follows:

> [The agent] asserted that Diaz was part of a group of persons that *may or may not* have a particular mental state. Of all drug couriers—a group that includes Diaz—he opined that the majority knowingly transport drugs. The jury was then left to decide: Is Diaz like the majority of couriers? Or, is Diaz one of the less-numerous-but-still-existent couriers who unwittingly transport drugs? The ultimate issue of Diaz's mental state was left to the jury's judgment. As a result, Agent Flood's testimony did not violate Rule 704(b).[71]

Justice Jackson filed a concurrence fully endorsing the majority opinion.[72] She wrote separately to emphasize that Rule 704(b) creates a narrow prohibition that applies equally to the prosecution and to the defense in criminal cases. She characterized Rule 704(b) as forbidding only expert opinion testimony "about a particular person ('the defendant') and a particular ultimate issue (whether the defendant has 'a mental state or condition' that is 'an element of the crime charged or of a defense')." Because Rule 704(b) is so narrow, Justice Jackson noted that it permits mental state evidence that can be essential to the defense, as well as to the prosecution. She explained that Diaz had also offered expert opinion testimony at trial about her knowledge of the drugs hidden in the door panels and trunk of the vehicle she was driving. Justice Jackson explained

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[68] *Diaz*, 144 S.Ct. at 1733 ("Rule 704(b) thus proscribes only expert opinions in a criminal case that are about a particular person ("the defendant") and a particular ultimate issue (whether the defendant has "a mental state or condition" that is "an element of the crime charged or of a defense")).

[69] *Id.* at 1734 (noting that the prosecution's expert testimony left room for the jury to conclude that Diaz was or was not like "most" drug couriers).

[70] *Id.* (relying on a hypothetical opinion in an arson prosecution that "all people" in defendant's shoes set fires maliciously).

[71] *Id.* at 1734-35.

[72] *Id.* at 1735 (Jackson, J. concurring) (noting that "[b]oth the Government and the defense are permitted, consistent with Rule 704(b), to elicit expert testimony "on the likelihood" that the defendant had a particular mental state, "based on the defendant's membership in a particular group.") (citations omitted).

that a broad interpretation of the Rule 704(b) prohibition would also have barred the testimony by Diaz's automobile expert that "a driver of her particular car would almost certainly *not* know that it contained drugs." According to Justice Jackson, such defense testimony is admissible over a Rule 704(b) objection because the Rule permits testimony about the "likelihood that the defendant had a particular mental state based on the defendant's membership in a particular group." Such testimony permits the jury alone to "decide the last link in the inferential chain: whether Diaz herself had the requisite *mens* rea." And it "can play a pivotal role in a defendant's attempts both to disprove the *mens rea* in a number of serious crimes and to support a range of defenses, including duress and self-defense." She explained:

> Thus, far from disserving our criminal justice system, the type of mental-state evidence that Rule 704(b) permits can be of critical assistance to lay factfinders tasked with determining a defendant's mental state as an element of the alleged crime (or defense).[73]

In addition, Justice Jackson noted that the Court's narrow interpretation of Rule 704(b) is necessary to permit well-accepted testimony about the features of mental health issues, such as schizophrenia, and to allow expert witnesses to give jurors crucial information and context regarding a defendant's condition and its effect on mental state. Further, Justice Jackson pointed out that allowing testimony like that offered by the prosecution about "most drug couriers" does not open the door to "the spectacle of dueling experts on the defendant's actual mental state, which Congress sought to eliminate when it codified Rule 704(b)." Finally, Justice Jackson noted that district court judges have ample tools to protect against overreach by expert witnesses in Rules 401, 402, 403 and 702.

C. Gorsuch Dissent

Justice Gorsuch wrote a dissenting opinion that was joined by Justices Sotomayor and Kagan. The dissent opined that the expert testimony by the special agent regarding "most" drug couriers violated the Rule 704(b) prohibition based upon plain language, logic, and policy.

In arguing that testimony about what "most drug couriers know" violates the plain language of Rule 704(b), the dissent focused on the words "about" and "alone" in the text of the provision. Justice Gorsuch noted that the word "about" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of."[74] Accordingly, because Rule 704(b) forecloses testimony "about" a defendant's mental state, it prohibits any expert testimony "concerning" or "in regard to" that mental state:

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[73] *Id.* at 1737.

[74] *Diaz*, 144 S.Ct. 1741 (Gorsuch, J. dissenting) (citing Oxford English Dictionary (3d ed., June 2024).

> The word "about" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." Oxford English Dictionary (3d ed., June 2024); see Brief for Petitioner 18; see also American Heritage Dictionary 5 (def. 4a) (5th ed. 2011). So whether an expert's opinion happens to be definitive or probabilistic makes no difference. An expert may not state any opinion concerning, regarding, or in reference to whether the defendant, while committing a charged criminal act, had the requisite mental state to convict. Period. Lest any doubt remain, the Rule takes pains to emphasize, "[t]hose matters are for the trier of fact alone."[75]

Under Justice Gorsuch's reading of the Rule, testimony by the special agent that "most couriers know" when they are carrying a large quantity of drugs concerns is "in reference to" the defendant's mental state and is, therefore, proscribed. Justice Gorsuch also emphasized Rule 704(b)'s admonition that whether a defendant did or did not have a particular mental state is "for the trier of fact *alone*," arguing that testimony by an expert about the mental state of "most" drug couriers allows the agent to provide input on the defendant's mental state thereby undermining the jury's right to determine such matters "alone."[76]

In addition, Justice Gorsuch opined that there is no logical or practical distinction between testimony that is clearly prohibited under Rule 704(b) and the testimony approved in the case that "most drug couriers know" what they are carrying. Justice Gorsuch argued that such probabilistic testimony is no different from prohibited testimony that tells the jury that a particular defendant "had" the requisite mental state at the time of the offense, "most likely had" the requisite mental state or that "all" people in the defendant's position have that mental state. According to Justice Gorsuch, "[t]he only difference between the two opinions is that the first addresses the defendant 'explicitly' and the second a class that includes her."[77] He characterized the testimony of the special agent about "most drug couriers" as a "charade" and as a "clever way around" the Rule 704(b) prohibition.

Finally, from a policy perspective, Justice Gorsuch focused on the importance of the *mens rea* of a criminal defendant to the determination of her guilt and to ensuring justice in a free society. He emphasized the government's burden of proof, the unconstitutionality of shifting any burden to a criminal defendant, and the jury's obligation to determine the *mens rea* of a criminal defendant. He opined that Congress's enactment of Rule 704(b) in the wake of the John Hinckley, Jr. trial showed Congress's conclusion "that jurors need no help from experts" to determine the *mens rea* of criminal defendants and that it is jurors' "job alone" to ascertain *mens rea*. Justice Gorsuch also emphasized that the government does not need the help of expert testimony in proving *mens rea* and can rely on the circumstantial evidence regarding the defendant's behavior to help the jury draw an inference of knowledge. He noted the many strong circumstantial indicators of Diaz's knowledge that made the prosecution's reliance on the expert testimony by the agent unnecessary.

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[75] *Id.*

[76] *See* Fed. R. Evid. 704(b) (emphasis added).

[77] *Diaz*, 144 S.Ct. 1741 (Gorsuch, J. dissenting).

Justice Gorsuch closed by urging district court judges to exclude improvident government expert opinions regarding mental states of certain classes of actors under Rules 402, 403, and 702 notwithstanding the majority's narrow interpretation of Rule 704(b) to avoid having prejudicial "junk science" regarding mental state infect federal criminal trials.[78]

IV. Analyzing the Need for an Amendment to Rule 704(b)

It does not appear necessary or advisable to propose an amendment to Rule 704(b) in response to the Supreme Court's opinion in *Diaz*. To be sure, it is easy to understand Justice Gorsuch's concerns that the majority's narrow reading of the prohibition allowed the prosecution to evade Rule 704(b). But there appears to be no viable mechanism for outlawing testimony like that given in *Diaz* without also foreclosing helpful expert testimony needed by both the prosecution and defense in criminal cases.

As noted above, Congress intended to prohibit "the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue" in enacting Rule 704(b).[79] Rule 704(b) thus clearly prohibits an expert from testifying that, due to a schizophrenia diagnosis, the defendant "did not appreciate the wrongfulness of his actions" at the time of the offense because such testimony tracks the mental state necessary to prove an insanity defense and references the defendant specifically. As Justice Gorsuch suggests, allowing the same expert to testify that "most people with schizophrenia who are exhibiting the symptoms that the defendant was exhibiting do not appreciate the wrongfulness of their actions" could appear to violate the spirit of Rule 704(b).[80] Although the expert has cleverly avoided testifying that the defendant specifically *possessed* the requisite mental state, the expert does testify to the applicable legally required mental state – "the failure to appreciate the wrongfulness" of one's conduct and to the *likelihood* that this particular defendant possessed that mental state.

That is analogous to what was permitted in the *Diaz* case because the government had to prove that the defendant "knowingly" transported drugs in order to convict her and the prosecution expert testified that "most people know" that they are transporting drugs from point A to point B. Couching an opinion about the very mental state that is an element of a crime or defense in probabilities could be seen as an end run around the prohibition in Rule 704(b). It is questionable whether Congress would have approved testimony that John Hinckley, Jr. "*likely* failed to appreciate the wrongfulness of his actions" or that "most people" with mental issues like John Hinckley, Jr.'s "do not appreciate the wrongfulness of their actions." Indeed, Justice Gorsuch might have argued (though he did not) that the plain language of the original

[78] *Id.* at 1743.

[79] S. Rep. No. 225, 98th Cong., 2d Sess. 230-31 (1984).

[80] The government conceded that expert testimony that "all defendants" in the defendant's circumstances have the requisite mental state would be tantamount to opining on the defendant's mental state and would violate Rule 704(b). An expert who testifies that "most" people have the requisite mental state offers the same opinion expressed to a slightly lesser degree of certainty.

congressional text of Rule 704(b) that forbade "inferences" as well as "opinions" supports his view that such expert testimony – that invites jurors to "infer" the defendant's mental state -- was intended to be barred. Therefore, one can appreciate Justice Gorsuch's contention that *Diaz* adopted too narrow a view of the Rule 704(b) prohibition.

That said, the only way to address Justice Gorsuch's concerns and to overturn the holding in *Diaz* would be to broaden Rule 704(b) to exclude *more* expert testimony. Justice Gorsuch argues in dissent that Rule 704(b) forecloses expert opinion testimony "concerning, regarding, or in reference to whether the defendant, while committing a charged criminal act, had the requisite mental state to convict" to prevent the jury from getting "any help" from experts in determining *mens rea*. The Rule could be amended to include similar language to prohibit testimony like that given in *Diaz*, as follows:

> Rule 704. Opinion on an Ultimate Issue
>
> (b)Exception. In a criminal case, an expert must not state any opinion ~~about~~ in reference to whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Such an amendment would seem to exclude testimony like that offered by the government's expert in *Diaz* because he opined that "most" couriers "know" what they are carrying. Because "knowing" distribution was an element of the offense, the expert's testimony clearly was given to aid in determining the defendant's mental state and was "in reference to" the required *mens rea.* From information about what "most" drug couriers know, the prosecution sought to have the jury infer *Diaz's* knowledge of what she was carrying. As Justice Gorsuch pointed out, the jury in the *Diaz* case may not have needed expert help in deciding whether Diaz knew that she was transporting drugs in her vehicle. A driver's knowledge or awareness of the contents of her vehicle reflects a common experience that is well within the ken of the average juror. The circumstantial evidence regarding Diaz's behavior during and after the alleged crime was more than adequate for the jury to draw an inference of her knowledge without expert opinion testimony, as Judge Gorsuch noted. Thus, an amendment that prohibits such testimony would not appear to hamstring the prosecution's ability to prove *mens rea* in a case like *Diaz*.

But broadening Rule 704(b) to prohibit all expert opinion testimony "in reference to" a criminal defendant's required mental state would likely foreclose important expert opinion testimony that has routinely been admitted in cases in which jurors do not have experience and *do need help* in determining *mens rea*. For example, an expert opinion about the quantities of drugs commonly possessed for personal use would also seem to be foreclosed under such an amendment in a case in which a defendant claims that he lacked any intent to distribute drugs found in his possession. Such an opinion would be offered to "help" the jury determine the defendant's "intent" when he was apprehended with illegal drugs and would be "in reference to" the defendant's *mens rea*. A broader Rule 704(b) would keep this opinion from a jury who is likely to know little about typical user quantities of illegal drugs.

Furthermore, broadening the Rule 704(b) prohibition would also threaten to foreclose core expert psychological testimony that Congress clearly intended to be admissible. Congress made clear that an expert psychiatrist may testify that a defendant suffered from schizophrenia, or that schizophrenia causes certain symptoms, or even that the defendant was exhibiting certain symptoms at the time of the crime.[81] Indeed, Justice Gorsuch acknowledges in his dissent that "an expert may still testify that the defendant suffered from some diagnosable illness or syndrome at the time of the charged act and discuss its symptoms."[82] He explains that the jury might rely upon such testimony "to infer that the defendant did not have the requisite mental state to convict."[83] The symptoms of schizophrenia and their impact on a person's behavior would certainly be outside the common experience of a lay jury and a criminal defendant may need an expert to explain her condition to the jury in aid of a defense.

But this testimony, too, would certainly be "in reference to" the defendant's mental state. If testimony about what "most drug couriers" are told is forbidden because it is expert opinion testimony "about" the defendant's mental state, then such textual language would seem to also proscribe testimony "about" a specific defendant's diagnosis and symptoms.[84] Testimony about a defendant's diagnosis and symptoms would be offered solely to help the jury draw inferences about *mens rea*, and would likely be prohibited by a broadened rule that prohibits "any" testimony "in reference to" a defendant's required mental state. Justice Thomas expressed this concern in adopting the narrow view of Rule 704(b):

> The reading offered by Diaz and the dissent would have the exception swallow the rule. If Rule 704(b) were as broad as they suggest, it would be a standalone prohibition broader than Rule 704(a)—or even the original ultimate-issue rule. Even though the ultimate-issue rule and Rule 704(a) address opinions that include the ultimate issue itself, *Rule 704(b) would prohibit all opinions even related to the ultimate issue of a defendant's mental state.* Rule 704's text does not support such an expansion. The Rule as a whole makes clear that an opinion is "about" the ultimate issue of the defendant's mental state only if it includes a conclusion on that precise topic, not merely if it concerns or refers to that topic.[85]

It is also helpful to note that the original text of Rule 704(b) drafted by Congress contemplated continued expert testimony "about" or "in reference to" a defendant's mental state. Prior to the restyling, Rule 704(b) prohibited experts who are "testifying with respect to the mental state or condition of a defendant in a criminal case" from offering "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto."[86] This language makes clear that Congress expected experts to continue testifying "in reference to" a defendant's mental

[81] S. Rep. No. 225, 98th Cong., 2d Sess. 230-31 (1984).
[82] *Diaz*, 144 S.Ct. at 1740 (Gorsuch, J. dissenting).
[83] *Id.*
[84] *Id.* ("[Rule 704(b)] prohibits an expert from offering *any* opinion on the subject [of a defendant's mental state].").
[85] *Diaz*, 144 S.Ct. at 1735 (Thomas, J.) (emphasis added).
[86] Fed. R. Evid. 704(b) (1984).

state and did not intend to prevent jurors from having "any help" from experts with respect to a defendant's *mens rea*, contrary to Justice Gorsuch's suggestion.

Justice Jackson's concurrence reflected the concern that a broad Rule 704(b) prohibition would capture expert testimony that is helpful and routinely admitted in criminal cases, not only by the prosecution, but also on behalf of criminal defendants like Diaz. She emphasized that Rule 704(b) applies equally to the prosecution and to the defense and that a broad interpretation of the prohibition could hamstring criminal defendants in trying to present needed evidence. Indeed, Justice Jackson pointed out that Diaz had presented evidence from an automotive expert that "a driver of her particular car would almost certainly *not* know that it contained drugs."[87] Justice Jackson explained that a broad interpretation of Rule 704(b) would have prohibited this defense testimony, as well as the testimony by the prosecution expert. Prior to *Diaz*, federal courts had employed the narrow reading of Rule 704(b) to permit defense expert testimony, as well as testimony offered by the prosecution.[88] In dialing back a broad view of the Rule 704(b) prohibition that banned expert testimony regarding "predicate facts" from which a jury may "extrapolate" a defendant's *mens rea*, the Ninth Circuit cautioned that a broader reading of Rule 704(b) "would exclude an expert's opinion as to whether a defendant did or did not have the requisite mental state, but would also exclude an expert's opinion on any matter from which the factfinder might infer a defendant's mental state."[89] A narrow reading of the Rule 704(b) prohibition is thus important in protecting access to needed expert testimony.

Amending the Rule to broaden the prohibition would also be inconsistent with the interpretation of Rule 704(b) by the overwhelming majority of federal circuit courts that have authorized both prosecution and defense expert testimony that helps establish a defendant's *mens rea* so long as it does not offer conclusions about the specific defendant charged in the case. In adopting the narrow view of Rule 704(b) in *Diaz*, the Supreme Court has embraced the majority approach to the Rule and has overturned only the Fifth Circuit's broader interpretation of the

[87] *Diaz*, 144 S.Ct. at 1736 (Jackson, J. concurring).

[88] *See, e.g.*, United States v. Soler-Montalvo, 44 F.4th 1, 14–15 (1st Cir. 2022) (finding that district court erred in excluding defense expert where "testimony was limited only to whether certain facts were consistent with the pattern typically seen with individuals who were interested in having sex with minors." … We see no distinction between that testimony and a government-offered expert's testimony that the manner in which drugs were packaged was consistent with the m.o. of drug distributors where the issue was whether the defendant intended to distribute drugs."); United States v. Finley, 301 F.3d 1000, 1015 (9th Cir. 2002) (defendant's expert testimony about his own rigid belief systems in bank fraud prosecution did not "necessarily compel" a conclusion about the defendant's *mens rea*; jury could have accepted the atypical belief diagnosis and still concluded that Finley knowingly defrauded the banks); United States v. Rahm, 993 F.2d 1405, 1411–12 (9th Cir.1993) (reversing the district court's Rule 704(b) exclusion of a defense expert in a counterfeiting prosecution who sought to testify that the defendant had "poor visual perception and consistently overlooked important visual details;" drawing "a distinction between the ultimate issue—whether Rahm knew the bills were counterfeit—and the proffered testimony of the defendant's poor vision, from which the jury could, but was not compelled, to infer that she did not know the bills were counterfeit.").

[89] Morales, *supra* n. 16.

prohibition.[90] It would make little sense to amend Rule 704(b) to overturn the Supreme Court's interpretation of the prohibition and to adopt a distinct minority view of the Rule.

It may also be ill advised to use *Diaz* as the platform for modifying Rule 704(b) because the prosecution's expert opinion in the case was outside the paradigmatic circumstance that inspired the prohibition – cases like the prosecution of John Hinckley, Jr. in which a criminal defendant's mental illness or diagnosis are relevant to her *mens rea*. Although Justice Gorsuch characterized the government's expert in *Diaz* as a "mind reader," the expert arguably provided an opinion about the typical actions or modus operandi of drug distribution networks (a topic about which jurors may require aid and about which expert opinion testimony has been routinely permitted in federal court).[91] As the *Diaz* majority pointed out, the prosecution expert testified that drug distributors typically inform couriers of what they are transporting due to the risks of exposure or loss to the operation with so-called "blind mules." Therefore, the expert's opinion could be seen as focused more on the *conduct* of drug distribution networks than on the *mental state* of the defendant.[92] As noted above, expanding the Rule to correct the outcome on these facts could have unintended consequences in those paradigmatic cases in which Rule 704 (b) was designed to operate.

Finally, both Justice Jackson and Justice Gorsuch emphasized the role that Rules 401, 402, 403, and 702 play in policing unnecessary expert opinion testimony. Defendants accused of drug transportation and distribution like Diaz certainly may argue for exclusion of prosecution experts on the basis that testimony about a driver's "knowledge" of what is in her vehicle will not "help" the jury as required by Rule 702. Justice Gorsuch characterized the special agent's expert opinion in *Diaz* in very pejorative terms and described him as "someone who apparently has the convenient ability to read minds." He also emphasized that "[t]he problem of junk science in the courtroom is real and well documented" and that "perhaps no science is more junky than mental telepathy." The reliability of opinions offered by government experts is also regulated by Rule 702 (as recently amended) and Rule 704(b) need not be broadened to prevent the presentation of dubious opinions in federal criminal cases. The defense might also have lodged a Rule 403 objection, arguing that the probative value of the expert opinion about the

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[90] *See* United States v. Kissentaner, No. 23-20348, 2024 WL 3949071, at *3 (5th Cir. Aug. 27, 2024) ("The Supreme Court, however, recently addressed a similar question. The Supreme Court held testimony that "most" criminals have a particular mental state relative to crime at issue is not prohibited by Rule 704(b), because such testimony does not definitively address the defendant's mental state; thus, such testimony leaves room for the jury to determine whether the defendant herself had that mental state. *United States v. Diaz*, 144 S.Ct. 1727, 1733-35 (2024). Agent Meyer's testimony, i.e., his opinion why sting operations *often* fail, left room for the jury to decide whether Kissentaner had the requisite mental state; thus, the testimony did not violate Rule 704(b) under *Diaz.* Accordingly, there was no error, plain or otherwise.").

[91] United States v. Watson, 260 F.3d 301, 307 (3d Cir. 2001) ("Thus, the operations of narcotics dealers have repeatedly been found to be a suitable topic for expert testimony because they are not within the common knowledge of the average juror." "Expert testimony concerning the *modus operandi* of individuals involved in drug trafficking does not violate Rule 704(b).").

[92] *See Lipscomb*, *supra* n. 75 at 1242 (noting that expert law enforcement testimony in drug distribution case did not depend on a "psychiatric" or similar "medical" analysis of the defendant's mental processes targeted by Congress in Rule 704(b)).

knowledge of "most drug couriers" was scant given the considerable circumstantial evidence of Diaz's own knowledge and potentially unfair due to the weight the jury might give to testimony from a government agent. [93] Therefore, in light of alternative, existing mechanisms for challenging improper opinion testimony, broadening the Rule 704(b) prohibition in a manner that threatens both prosecution and defense access to crucial expert opinion testimony appears unnecessary and ill-advised.

[93] *Id.* (noting dangers of expert law enforcement "modus operandi" testimony that drugs separately packaged were "for street level distribution" but explaining that concerns may be addressed under Rules 702 and 403).

TAB 9

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: 973-975-5298
e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra
Re: Supreme Court Confrontation Decision and Federal Rule 703
Date: October 1, 2024

At the end of its last term, the Supreme Court decided *Smith v. Arizona,* finding that the defendant's right to confrontation was violated when an expert testified to the results of a forensic test that the expert did not conduct. The Court assumed, as did the parties and courts below, that the forensic report was testimonial.

If you haven't read the opinion, I include at the end of this memo a version edited for my casebook.

This memo considers whether the *Smith* decision justifies or necessitates some amendment to the Federal Rules of Evidence. The State in *Smith* argued that the forensic expert's testimony was permissible because Arizona Rule 703 allows an expert to rely on, and testify on the basis of, hearsay. The Court's decision in *Smith* could have an impact on the Federal Rules, because Federal Rule 703 allows an expert to rely on hearsay (while strictly limiting whether the basis hearsay can be disclosed at trial).

The Committee has usually taken the position that if a Federal Rule of Evidence is subject to an unconstitutional application on a regular basis, then the rule should be amended to accord with the constitutional standard. There are two reasons for this position: 1. It's just bad optics to have a rule that is subject to unconstitutional application on a regular basis; and 2. Failing to amend can result in a trap for the unwary, i.e., unschooled lawyers could assume that the rule is controlling when in fact its application against the client would be unconstitutional. An example of an amendment to prevent an unconstitutional application is the amendment to Rule 803(10), which instituted a notice-and-demand provision to comply with the Supreme Court's decision in

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).[1] Another example is Rule 412, which contains a constitutional safety valve because the defendant in a sexual assault prosecution may in some cases have a constitutional right to an effective defense that outweighs the interests supporting the Rule.

This memo briefly discusses the opinions in *Smith,* and then moves to whether consideration of an amendment to Rule 703 is warranted.

The Opinions in Smith:

The state in *Smith* argued that it was permissible to relate the results of the forensic test because those results were not offered for their truth --- rather they were offered only as part of the basis for the expert's own conclusions. Justice Kagan, writing for the Court, recognized that the Confrontation Clause does not apply if an out-of-court statement is not offered for its truth. But she found that offering the report for basis meant that it was actually being offered for truth. In her view, the findings of the out-of-court analyst could not actually be used as a basis for an opinion unless they were true.

Justice Kagan stated the Court's holding at several points in the opinion:

- "When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth. As this dispute illustrates, that will generally be the case when an expert relays an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission."

- "Because he had not participated in the Smith case, Longoni prepared for trial by reviewing Rast's report and notes. And when Longoni took the stand, he referred to those materials and *related what was in them,* item by item by item. * * * After thus t*elling the jury what Rast's records conveyed* about her testing of the items, Longoni offered an "independent opinion" of their identity. (emphasis added)

- "So there is no meaningful distinction between *disclosing* an out-of-court statement to explain the basis of an expert's opinion *and disclosing* that statement for its truth." (emphasis added)

[1] The proviso is that there must be a realistic possibility that the rule can be unconstitutionally applied on a regular basis. Theoretically, virtually every rule of evidence could be subject to an unconstitutional application if you think hard enough about it.

● "Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. So if the out-of-court statements were also testimonial, their admission violated the Confrontation Clause. Smith would then have had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records."

● "A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them."

Part Three of Justice Kagan's opinion provided some thoughts on whether the factual statements in the forensic report were testimonial. She applied the "primary motive" test from the Supreme Court's *Crawford* jurisprudence. Justice Thomas wrote separately to emphasize once again his belief that testimoniality should not be determined by "primary motivation" but rather by whether the statements are they are "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Justice Gorsuch also expressed some doubt about the "primary motivation" test.

Justice Alito, joined by Chief Justice Roberts, disagreed with Justice Kagan's primary point, that a testimonial statement related by the expert as a basis for the expert's opinion was actually offered for its truth. In his view, a limiting instruction that the analyst's statements could be used only to assess basis and not for their truth was no more problematic than a limiting instruction that the jury should consider an accomplice's confession only for the guilt of the accomplice and not that of the non-confessing defendant --- an instruction upheld as sufficient only two years earlier in a *Bruton* case. *Samia v. United States*, 599 U.S. 635, 646–647 (2023). Yet Justice Alito agreed with the majority's conclusion that the Confrontation Clause was violated in this case when the expert testified --- because the findings in the report were actually admitted to prove their truth, and not for basis:

> Under Rules 703 and 705, Longoni could have offered his expert opinion that, based on the information in Rast's report and notes, the items she tested contained marijuana or methamphetamine. In so answering, he would acknowledge that he relied on Rast's report and lab notes to reach his opinion. He could have also disclosed the information in the report, if the court found that the probative value of that information

substantially outweighed the risk of prejudice. See Fed. Rule Evid. 703. But he could not testify that any of the information in the report was correct—for instance, that Rast actually performed the tests she recorded or that she did so correctly. Nor could he testify that the items she tested were the ones seized from Smith.

As it happens, I agree with the Court that Longoni stepped over the line and at times testified to the truth of the matter asserted. The prosecution asked Longoni on several occasions to describe the tests that Rast performed or to swear to their accuracy, and Longoni played along. He stated as fact that Rast followed the lab's "typical intake process" and that she complied with the "policies and practices" of the lab. He also testified that Rast used certain "scientific method[s]" to analyze the samples, such as performing certain tests or running a "blank." By asserting these facts as true, Longoni effectively entered inadmissible hearsay into the record, thus implicating the Confrontation Clause. The Court could have said that—and stopped there.

What is the Effect of Smith on the Operation of Rule 703?

Justice Alito complains that the majority has "blow[n] up" Federal Rule 703 by rejecting the premise that relying on hearsay as basis is permissible. But it is fair to state that while Rule 703 allows experts to *rely* on hearsay, the drafters were acutely aware of the possibility that a party could abuse the hearsay rule by proffering an expert who discloses the hearsay to the jury as basis. That is why, in 2000, the rule was amended to add a strict balancing test: hearsay statements relied upon by an expert can be disclosed to the jury only if "their probative value in helping the jury evaluate the opinion *substantially outweighs their prejudicial effect*." The prejudicial effect is the risk that the jury will use the statements impermissibly, i.e., for their truth. The intent of the amendment is to all but prohibit the disclosure of the basis information on direct examination when it is hearsay; it's a reverse 403 test. The Committee thought it very unlikely that the hearsay's value in illustrating the expert's basis would substantially outweigh the risk of misuse.

So there is a good argument that what happened in *Smith* is unlikely to happen in any Federal court that correctly applies the strict balancing test. And, just as Justice Alito notes, Rule 703 is not a hearsay exception, and it never permits the hearsay statements to be offered for their truth, as occurred in *Smith.* It would appear, then, that an amendment to Rule 703 in response to *Smith* is unwarranted, especially at this early date. Put another way, *Smith* does not render Rule 703 unconstitutional as applied, because if *properly* applied, the hearsay relied on by the expert is never presented to the jury (even as basis) and the hearsay statements are never admissible for their truth.

Reliance v. Disclosure

There remains a possibility that needs to be monitored, depending on how *Smith* is read. Rule 703 distinguishes between *relying* on hearsay (which is permitted if other experts in the field

reasonably do so) and *disclosing* the hearsay to the jury (which is, as stated above, generally barred). The question is whether *Smith* follows the same distinction between reliance and disclosure when the hearsay is testimonial; i.e., reliance is permitted but disclosure is not. That is not entirely clear from Justice Kagan's opinion.

The bottom-line statements from Justice Kagan, bullet-pointed above, seem to say that disclosure is the problem, not reliance. She states that "[w]hen an expert *conveys an absent analyst's statements* in support of his opinion, and the statements provide that support only if true, then the statements *come into evidence* for their truth." She states that "the State used Longoni to *relay what Rast wrote down* about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. *He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained."* She states that the prosecution "may not *introduce* the testimonial out-of-court statements of a forensic analyst at trial" nor may it "*introduce* those statements through a surrogate analyst who did not participate in their creation" and that "nothing changes if the surrogate—as in this case—*presents* the out-of-court statements as the basis for his expert opinion."

But what about an expert who relies on testimonial hearsay, but does not present it at trial as the basis of her opinion? This can be done, because under Rule 705, an expert may give an opinion without disclosing its basis. And this has happened in many federal cases before *Smith.* Experts have been allowed to testify to conclusions based on testimonial hearsay, so long as they have reached their own conclusions, are not simply parroting the hearsay, and the hearsay is never disclosed to the jury. [2] Of course, it is not always possible for the expert to testify meaningfully

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[2] See, e.g., *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."); *United States v. Ramos-Gonzalez,* 664 F.3d 1 (1st Cir. 2011) ("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."); *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."); *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); *United States v. Rios,* 830 F.3d 403 (5th Cir. 2016) (in a prosecution of gang members 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); *United States v. Turner,* 709 F.3d 1187 (7th Cir. 2013) ("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

without disclosing a testimonial basis. But it is certainly possible in some cases, as seen in the above footnote. And if so, is mere *reliance* on the hearsay now a violation of the Confrontation Clause? If the answer to that is yes, then the constitutionality of Rule 703 is drawn into significant question whenever any expert relies on any testimonial statement. The rule would permit what the Constitution does not. And that would seem to be a problem that might need to be addressed by an amendment. Perhaps with language like this:

> If experts in the particular field would reasonably rely on those kinds of facts or data in formulating an opinion on the subject, they need not be admissible for the opinion to be admitted; but an expert may not rely on testimonial hearsay when testifying against a defendant in a criminal case, in the absence of cross-examination of the declarant.

There are a few instances in the Kagan opinion when she appears to focus on reliance as opposed to disclosure. In recounting the facts, she states that the witness "did come to the same conclusion, in reliance on Rast's records." But then she quickly shifts to the point that the expert "referred to those materials and related what was in them." Also, there is a passage in her opinion where she states that an expert could testify to various matters even though she didn't do the report --- such as the expert's personal knowledge of lab practices. None of the things she talked about included reliance on the testimonial hearsay. And nowhere does the opinion specifically draw the line that is drawn by Rule 703 --- between reliance and disclosure.

Post-Smith Case Law

There are only two Federal cases at this writing after *Smith* that address the distinction between reliance and disclosure:

1. *In United States v. Pascoe*, 2024 WL 3610362 (W.D. Kentucky, July 31, 2024), the court considered whether a government expert's expected testimony should be excluded, to the extent that it would "repeat the testimony of absent witnesses in violation of the Confrontation Clause." The expert's testimony would have covered whether certain data that the defendants had allegedly exported to China was data controlled by International Traffic in Arms Regulations. In giving this testimony, the government experts were expected to refer to "commodity-jurisdiction determinations" (CJDs) that were prepared by an office within the State Department. The defendants argued that the expert testimony referring to the CJDs would violate the defendants Confrontation Clause right, unless the defendants could cross-examine the officers who made

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on the data contained in those documents in forming his opinion."); *United States v. Huether,* 673 F.3d 789 (8th Cir. 2012) (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); *United States v. Holguin,* 51 F.4th 841 (9th Cir. 2022) (expert testimony on gangs relied on testimonial hearsay; but there was no confrontation problem, because the statements were the type of information upon which other experts in the field rely, and the expert "applied his training and experience to the sources before him and reached an independent judgment without directly repeating what someone told him").

those CJDs. The court, citing *Smith*, concluded that "[w]here the prosecution seeks to offer in-court expert testimony that is based on the expert's review of out-of-court testimony, the out-of-court statements are offered for their truth and the expert's testimony must be excluded." The court held that the expert testimony would be excluded unless the State Department officials testified. So, the *Pascoe* court is stating that the Confrontation Clause bars the *reliance* on testimonial hearsay, thus raising a clear conflict with Rule 703. But actually the case was about disclosure of the underlying hearsay as the experts were going to refer to the hearsay in their testimony.

2. In *United States v. Moore*, 2024 WL 3324817 (S.D. Ohio, July 2, 2024), a narcotics prosecution, the court considered whether a government expert witness's testimony should be excluded, where the expert was not the original analyst to test the drugs, but the expert had herself tested the drugs and was prepared to testify based on her personal knowledge of the tests and the results of those tests. The court relied on *Smith* to hold that, "[a]s presented, such expert evidence may be validly admitted at trial, so long as the proffered witness testifies only to her actions with respect to the evidence in question and does not *rely* on the prior analyst's work in doing so."

It should be noted that prohibiting even reliance on testimonial hearsay will call into question the admissibility of a good deal of law enforcement expert testimony about matters like the practices of drug conspiracies. Much of that testimony is based on interviews with arrestees, and that is testimonial hearsay. *See, e.g., United States v. Kamahele,* 748 F.3d 984 (10th Cir. 2014) (a government expert's testimony about the structure and operation of the gang, based in part on interviews with cooperating witnesses and other gang members, did not violate the Confrontation Clause where the expert "applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion"). It is not obvious that the *Smith* Court is intending to cover such reliance on testimonial hearsay.

It is fair to state that the provision of Rule 703 allowing an expert to rely upon testimonial hearsay is problematic after *Smith* . But the lack of case law applying *Smith* counsels against jumping in with some amendment to Rule 703.

Conclusion

After *Smith,* the prosecution cannot disclose testimonial hearsay to the jury, even if it is offered for the non-hearsay purpose of illustrating an expert's basis. But such disclosure is almost always prohibited anyway under Federal Rule 703, at least when its strict balancing test is properly applied. Therefore the practical effect of the *Smith* opinion in federal courts is limited, and there would appear to be no reason to amend Rule 703 to accommodate the *Smith* protection.

The more difficult question is whether *Smith* prohibits not only disclosure of testimonial hearsay but also reliance upon it. It does not appear that *Smith* extends that far, but if it does, the effect on Rule 703 would be dramatic, because that Rule provides no limitation on expert reliance on testimonial hearsay, if other experts in the field would rely upon it. The best course of action

would appear to be to monitor the federal case law to see how courts are applying *Smith.* So, expect a memo on the subject at the next meeting.

SMITH v. ARIZONA

|2024 WL 3074423

Justice KAGAN delivered the opinion of the Court.

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause bars the admission at trial of "testimonial statements" of an absent witness unless she is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). And that prohibition applies in full to forensic evidence. So a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

The question presented here concerns the application of those principles to a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony. This Court has held that the Confrontation Clause's requirements apply only when the prosecution uses out-of-court statements for "the truth of the matter asserted." Some state courts, including the court below, have held that this condition is not met when an expert recites another analyst's statements as the basis for his opinion. Today, we reject that view. When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth. As this dispute illustrates, that will generally be the case when an expert relays an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission.

I

A

* * * The Clause's prohibition "applies only to testimonial hearsay"—and in that two-word phrase are two limits. First, in speaking about "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements," a category whose contours we have variously described. Michigan v. Bryant, 562 U.S. 344, 358 (2011) (statements made to police "to meet an ongoing emergency" were "not procured with a primary purpose of creating an out-of-court substitute for trial testimony"). Second and more relevant here, the Clause bars only the introduction of hearsay—meaning, out-of-court statements offered "to prove the truth of the matter asserted." When a statement is admitted for a reason unrelated to its truth, we have held, the Clause's "role in protecting the right of cross-examination" is not implicated. Tennessee v. Street,

471 U.S. 409, 414 (1985). That is because the need to test an absent witness ebbs when her truthfulness is not at issue.

* * *

In Williams v. Illinois, 567 U.S. 50 (2012), state police sent vaginal swabs from a rape victim known as L. J. to a private lab for DNA testing. When the lab sent back a DNA profile, a state analyst checked it against the police department's database and found that it matched the profile of prior arrestee Sandy Williams. The State charged Williams with the rape, and he went to trial. The prosecution chose not to bring the private lab analyst to the stand. Instead, it called Sandra Lambatos, the state analyst who had searched the police database and found the DNA match. Lambatos had no first-hand knowledge of how the private lab had produced its results; she did not even know whether those results actually came from L. J.'s vaginal swabs (as opposed to some other sample). But she spoke repeatedly about comparing Williams's DNA to the DNA "found in [L. J.'s] vaginal swabs." So in addition to describing how she discovered a match, Lambatos became the conduit for what a different analyst had reported—that a particular DNA profile came from L. J.'s vaginal swabs. Williams objected * * *: He thought that * * * crucial evidence had been admitted through a surrogate expert, thus violating his right of confrontation.

But the Illinois Supreme Court rejected Williams's claim, holding that Lambatos's testimony about the private lab analyst's finding did not raise a Confrontation Clause issue. The court explained that under state evidence law, an expert can disclose "underlying facts and data" for "the purpose of explaining the basis for [her] opinion." And when she does so, the court held, the testimony is not subject to the Confrontation Clause because it is not admitted "for the truth of the matter asserted." Thus, Lambatos could relay the private lab's finding that L. J.'s vaginal swabs produced a certain DNA profile in order to "explain[ ] the basis for her opinion" that "there was a DNA match between [Williams's] blood sample and the semen sample recovered from L. J." The admission of the private lab report's contents for that "limited purpose," the court reasoned, would "aid the [factfinder] in assessing the value of [Lambatos's] opinion."

This Court granted Williams's petition for certiorari, but failed to produce a majority opinion. Four Members of the Court approved the Illinois Supreme Court's approach to "basis evidence," and agreed that Lambatos's recitation of the private lab's findings served "the legitimate nonhearsay purpose of illuminating the expert's thought process." But the remaining five Members rejected that view. Those five stated, in two opinions, that basis evidence is generally introduced for its truth, and was so introduced at Williams's trial. Justice THOMAS explained that "the purportedly limited reason for [the basis] testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entail[ed] an evaluation of whether [that] testimony [was] true": "[T]he validity of Lambatos'[s] opinion ultimately turned on the truth of [the private lab analyst's] statements." A dissent for another four Justices agreed: "[T]he utility of the [private analyst's] statement that Lambatos repeated logically depended on its truth." * * * Those shared views might have made for a happy majority, except that a different Confrontation Clause issue intruded. Justice THOMAS thought that the private lab report was not testimonial because it lacked sufficient formality, so affirmed the Illinois Supreme Court on that alternative ground. The bottom line was

that Williams lost, even though five Members of this Court rejected the state court's "not for the truth" reasoning.

Our opinions in *Williams* have sown confusion in courts across the country about the Confrontation Clause's application to expert opinion testimony Some courts have applied the Williams plurality's "not for the truth" reasoning to basis testimony, while others have adopted the opposed five-Justice view. This case emerged out of that muddle.

B

Like *Melendez-Diaz*, this case involves drugs. In December 2019, Arizona law enforcement officers executed a search warrant on a property in the foothills of Yuma County. Inside a shed on the property, they found petitioner Jason Smith. They also found a large quantity of what appeared to be drugs and drug-related items. As a result, Smith was charged with possessing dangerous drugs (methamphetamine) for sale; possessing marijuana for sale; possessing narcotic drugs (cannabis) for sale; and possessing drug paraphernalia. He pleaded not guilty, and the case was set for trial.

In preparation, the State sent items seized from the shed to a crime lab run by the Arizona Department of Public Safety (DPS) for a full scientific analysis. The State's request identified Smith as the individual "associated" with the substances, listed the charges against him, and noted that "[t]rial ha[d] been set." Analyst Elizabeth Rast communicated with prosecutors about exactly which items needed to be examined, and then ran the requested tests.

Rast prepared a set of typed notes and a signed report, both on DPS letterhead, about the testing. The notes documented her lab work and results. They disclosed, for each of eight items: a "[d]escription" of the item; the weight of the item and how the weight was measured; the test(s) she performed on the item, including whether she first ran a "[b]lank" on the testing equipment; the results of those tests; and a "[c]onclusion" about the item's identity. The signed report then distilled the notes into two pages of ultimate findings, denoted "results/interpretations." After listing the eight items, the report stated that four "[c]ontained a usable quantity of methamphetamine," three "[c]ontained a usable quantity of marijuana," and one "[c]ontained a usable quantity of cannabis." The State originally planned for Rast to testify about those matters at Smith's trial.

But with three weeks to go, the State called an audible, replacing Rast with a different DPS analyst as its expert witness. In the time between testing and trial, Rast had stopped working at the lab, for unexplained reasons. And the State chose not to rely on the now-former employee as a witness. So the prosecutors filed an amendment to their "final pre-trial conference statement" striking out the name Elizabeth Rast and adding "Greggory Longoni, forensic scientist (substitute expert)." Longoni had no prior connection to the Smith case, and the State did not claim otherwise.

Its amendment simply stated that "Mr. Longoni will provide an independent opinion on the drug testing performed by Elizabeth Rast." And it continued: "Ms. Rast will not be called. [Mr. Longoni] is expected to have the same conclusion."

And he did come to the same conclusion, in reliance on Rast's records. Because he had not participated in the Smith case, Longoni prepared for trial by reviewing Rast's report and notes. And when Longoni took the stand, he referred to those materials and related what was in them, item by item by item. As to each, he described the specific "scientific method[s]" Rast had used to analyze the substance (e.g., a microscopic examination, a chemical color test, a gas chromatograph/mass spectrometer test). And as to each, he stated that the testing had adhered to "general principles of chemistry," as well as to the lab's "policies and practices," so he noted, for example, that Rast had run a "blank" to confirm that testing equipment was not contaminated. After thus telling the jury what Rast's records conveyed about her testing of the items, Longoni offered an "independent opinion" of their identity. * * *

After Smith was convicted, he brought an appeal focusing on Longoni's testimony. In Smith's view, the State's use of a "substitute expert"—who had not participated in any of the relevant testing—violated his Confrontation Clause rights. The real witness against him, Smith urged, was Rast, through her written statements; but he had not had the opportunity to cross-examine her. The State disagreed. In its view, Longoni testified about "his own independent opinions," even though making use of Rast's records. So Longoni was the only witness Smith had a right to confront. See ibid.

The Arizona Court of Appeals affirmed Smith's convictions, * * * because, the Arizona courts have said, the "underlying facts" are then "used only to show the basis of [the in-court witness's] opinion and not to prove their truth." On that view, the Court of Appeals held, Longoni could constitutionally present his independent expert opinions as based on his review of Rast's work."

We granted certiorari to consider that reasoning, and we now reject it.

II

Smith's confrontation claim can succeed only if Rast's statements came into evidence for their truth. * * * So a court analyzing a confrontation claim must identify the role that a given out-of-court statement—here, Rast's statements about her lab work—served at trial. * * * If Rast's statements came in to establish the truth of what she said, then the Clause's alarms begin to ring; but if her statements came in for another purpose, then those alarms fall quiet.

In [Smith's] view, Rast's statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen. Or put more specifically, those statements were conveyed to show that she used certain standard procedures to run certain tests, which enabled identification of the seized items. The State sees the matter differently. * * * [T]he State argues that Rast's statements came into evidence not for their truth, but instead to "show the basis" of the in-court expert's independent opinion. And to defend that characterization, Arizona emphasizes that its Rule of Evidence 703 * * * authorizes the admission of such statements only for that purpose—i.e., to help the jury to evaluate the opinion testimony. See (ALITO, J., concurring in judgment) (arguing the same as to Federal Rule of Evidence 703).

Evidentiary rules, though, do not control the inquiry into whether a statement is admitted for its truth. That inquiry, as just described, marks the scope of a federal constitutional right. We therefore do not "accept a State's nonhearsay label at face value. Instead, we conduct an independent analysis of whether an out-of-court statement was admitted for its truth, and therefore may have compromised a defendant's right of confrontation."

We did just that in *Tennessee v. Street*—and in so doing showcased how an out-of-court statement can come into evidence for a non-truth-related reason. See 471 U.S., at 410–417. Street was charged with murder, based mostly on a stationhouse confession. At trial, he claimed that the confession was coerced, and in a peculiar way: The sheriff, he said, had read aloud an accomplice's confession and forced him to repeat it. On rebuttal, the State introduced the other confession (through the sheriff 's testimony) to demonstrate to the jury all the ways its content deviated from Street's. We upheld that use as "nonhearsay." The other confession came in, we explained, not to prove the truth of the accomplice's assertions about how the murder happened, but only to disprove Street's claim about how the sheriff elicited his own confession. * * * For that purpose, the truth of the accomplice's confession (and the credibility of the accomplice himself) was irrelevant.

But truth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. * * * Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion. So there is no meaningful distinction between disclosing an out-of-court statement to explain the basis of an expert's opinion and disclosing that statement for its truth. * * *

* * *

And if that explanation seems a bit abstract, then take this case as its almost-too-perfect illustration. * * * A recap of [the] exchange about one item will be enough; the rest followed the same pattern. Remember as you read that Longoni, though familiar with the lab's general practices, had no personal knowledge about Rast's testing of the seized items. Rather, as his testimony makes clear, what he knew on that score came only from reviewing Rast's records. With that as background:

Q Turn your attention to Item 26. I'm going to hand you what's been marked as State's Exhibit 98 [Rast's notes].... Did you review how [Item] 26 was tested in this case?

A Yes.

Q When you reviewed it, did you notice whether the [standard lab] policies and practices that you have just described were followed?

A Yes.

Q Were they followed?

A Yes.

.....

Q From your review of the lab notes in this case, can you tell me what scientific method was used to analyze Item 26?

A Yes.

Q And what was used?

A The microscopic examination and the chemical color test....

Q That was done in this case?

A Yes, it was.

Q Was there a blank done to prevent contamination, make sure everything was clean?

A According to the notes, yes.

.....

Q In reviewing what was done, your knowledge and training as a forensic scientist, your knowledge and experience with DPS's policies, practices, procedures, your knowledge of chemistry, the lab notes, the intake records, the chemicals used, the tests done, can you form an independent opinion on the identity of Item 26?

A Yes.

Q What is that opinion?

A That is a usable quantity of marijuana.

And then the prosecutor went on to Items 20A, 20B, and 28, asking similar questions, receiving similar answers based on Rast's records, and finally eliciting similar "independent opinions"—which were no more than what Rast herself had concluded. * * *

Rast's statements thus came in for their truth, and no less because they were admitted to show the basis of Longoni's expert opinions. All those opinions were predicated on the truth of Rast's factual statements. Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. * * * If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

[Under Arizona's view] a surrogate analyst can testify to all the same substance—that is, someone else's substance—as long as he bases an "independent opinion" on that material. And that is true even if, as here, the proffered opinion merely replicates, rather than somehow builds on, the testing analyst's conclusions. So every testimonial lab report could come into evidence through any trained surrogate, however remote from the case. And no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted. In short, Arizona wants to end run all we have held the Confrontation Clause to require. It cannot.

Properly understood, the Clause still allows forensic experts like Longoni to play a useful role in criminal trials. Because Longoni worked in the same lab as Rast, he could testify from personal knowledge about how that lab typically functioned—the standards, practices, and procedures it used to test seized substances, as well as the way it maintained chains of custody. * * * Or had he not been familiar with Rast's lab, he could have testified in general terms about forensic guidelines and techniques—perhaps explaining what it means for a lab to be accredited and what requirements accreditation imposes. Or * * * he might have been asked—and could have answered—any number of hypothetical questions, taking the form of: "If or assuming some out-of-court statement were true, what would follow from it?" (The State of course would then have to separately prove the thing assumed.) * * * The latter forms of testimony allow forensic expertise to inform a criminal case without violating the defendant's right of confrontation. And we offer these merely as examples; there may be others.

But as the United States acknowledged, the bulk of Longoni's testimony took no such permissible form. Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. He testified

to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. So if the out-of-court statements were also testimonial, their admission violated the Confrontation Clause. Smith would then have had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records.

III

* * * To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other. The latter, this Court has stated, focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding. See ibid. (noting varied formulations of the standard).5 A court must therefore identify the out-of-court statement introduced, and must determine, given all the "relevant circumstances," the principal reason it was made.

But that issue is not now fit for our resolution. * * * But we offer a few thoughts, based on the arguments made here, about the questions the state court might usefully address if the testimonial issue remains live. First, the court will need to consider exactly which of Rast's statements are at issue. In this Court, the parties disputed whether Longoni was reciting from Rast's notes alone, or from both her notes and final report. * * * Resolving that dispute might, or then again might not, affect the court's ultimate disposition of Smith's Confrontation Clause claim. We note only that before the court can decide the primary purpose of the out-of-court statements introduced at Smith's trial, it needs to determine exactly what those statements were.

In then addressing the statements' primary purpose—why Rast created the report or notes—the court should consider the range of recordkeeping activities that lab analysts engage in. After all, some records of lab analysts will not have an evidentiary purpose. The United States as amicus curiae notes, for example, that lab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control. Or some analysts' notes may be written simply as reminders to self. In those cases, the record would not count as testimonial. To do so, the document's primary purpose must have "a focus on court." * * *

IV

* * * A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained,

come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

That means Arizona does not escape the Confrontation Clause just because Rast's records came in to explain the basis of Longoni's opinion. The Arizona Court of Appeals thought otherwise, and so we vacate its judgment. To address the additional issue of whether Rast's records were testimonial (including whether that issue was forfeited), we remand the case for further proceedings not inconsistent with this opinion.

Justice THOMAS, concurring in part.

I join the Court in all but Part III of its opinion. * * * Today, the Court correctly concludes that "[w]hen an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth." But, a question remains whether that analyst's statements were testimonial. I agree with the Court that, because the courts below did not consider this question, we should remand for the Arizona Court of Appeals to answer it in the first instance. But, I disagree with the Court's suggestion that the Arizona Court of Appeals should answer that question by looking to each statement's "primary purpose."

I continue to adhere to my view that the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. The Confrontation Clause guarantees a criminal defendant "the right ... to be confronted with the witnesses against him." As I have previously explained, witnesses are those who bear testimony. And testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. This understanding is grounded in the history surrounding the right to confrontation, which was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. Rather than attempt to divine a statement's "primary purpose," I would look for whether the statement is similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent. In my view, the Arizona Court of Appeals should consider on remand whether the statements at issue have the requisite formality and solemnity to qualify as testimonial. If they do not, the Confrontation Clause poses no barrier to their admission.

Justice GORSUCH, concurring in part.

I am pleased to join the Court's opinion holding that, when an expert presents another's statements as the "basis" for his own opinion, he is offering those statements for their truth. I cannot join, however, the Court's discussion in Part III about when an absent analyst's statement might qualify as "testimonial." * * * [T]he Court's thoughts on the subject are in no way necessary to the resolution of today's dispute. What makes a statement testimonial, the Court notes, is an entirely separate issue.

Nor am I entirely sure about the guidance found in Part III. I cannot help but wonder whether [the primary purpose test] is correct.

Just consider a few other possibilities. In protecting the right to confront "witnesses," perhaps the Sixth Amendment reaches any "person who gives or furnishes evidence." Or perhaps the Amendment reaches all those who bear testimony. Perhaps, too, a statement "bears testimony" so long as it "explicitly or implicitly ... relate[s] a factual assertion or disclose[s] information." *Doe v. United States*, 487 U.S. 201, 210 (1988) (discussing what makes a statement "testimonial" for purposes of the Fifth Amendment), To my mind, all these questions (and maybe others too) warrant careful exploration in a case that presents them and, without more assurance, I worry that the Court's proposed "primary purpose" test may be a limitation of our own creation on the confrontation right.

I am concerned, as well, about the confusion a "primary purpose" test may engender. Does it focus, for example, on the purposes an objective observer would assign to a challenged statement, the declarant's purposes in making it, the government's purposes in procuring it, or maybe still some other point of reference? Even after we figure out a statement's purposes, how do we pick the primary one out of the several a statement might serve? * * * And if we fail to find some foothold in text and historical practice for resolving these questions, how can judges answer them without resort to their own notions of what would be best?

* * *

Justice ALITO, with whom the CHIEF JUSTICE joins, concurring in the judgment.

Today, the Court inflicts a needless, unwarranted, and crippling wound on modern evidence law. There was a time when expert witnesses were required to express their opinions as responses to hypothetical questions. But eventually, this highly artificial, awkward, confusing, and abuse-laden form of testimony earned virtually unanimous condemnation. More than a century ago, judges, evidence scholars, and legal reform associations began to recommend that courts abandon the required use of hypotheticals, and more than 50 years ago, the Federal Rules of Evidence did so. Now, however, the Court proclaims that a prosecution expert will frequently violate the Confrontation Clause when he testifies in strict compliance with the Federal Rules of Evidence

and similar modern state rules. Instead, the Court suggests that such experts revert to the form that was buried a half-century ago. There is no good reason for this radical change.

I

* * *

Expert testimony presents a challenge for a legal system like ours that restricts a fact-finder's ability to consider hearsay. This is so because an expert's opinion very often is based on facts that are not proved in court. * * * [E]xperts routinely rely on the reported data of fellow-scientists, learned by perusing their reports in books and journals. * * * Despite this problem, courts * * * long ago recognized the value of expert testimony and concluded that they must accept this kind of knowledge from scientific men, even if it meant allowing testimony based on facts of which the expert did not have firsthand knowledge. S. Greenleaf, Evidence § 430(l), p. 529 (rev. 16th ed. 1899) ("It would be absurd to deny judicial standing to such knowledge, because all scientific data must be handed down from generation to generation by hearsay, and each student can hope to test only a trifling fraction of scientific truth by personal experience").

* * *

Throughout the 19th and into the 20th century, experts generally testified in the form of an opinion in response to a hypothetical question. An attorney would ask an expert to assume that certain facts were true and would then query whether a particular conclusion could conceivably follow. See 3 S. Saltzburg, M. Martin, D. Capra, & J. Berch, Federal Rules of Evidence Manual § 703.02[1] (13th ed. 2023).

This procedure was highly artificial because it bore little resemblance to the way in which experts actually form opinions. And the procedure surely did not conform to the way lay jurors think and speak. The procedure's aim was to prevent a jury from jumping to the conclusion that the facts packed into the hypothetical were true, but it is questionable whether the practice achieved that objective. For instance, here is the question that defense counsel asked a psychiatric witness in Charles Guiteau's trial for murdering President Garfield:

> "Q. ... Assume it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar; also that at about the age of thirty-five years his mind was so much deranged that he was a fit subject to be sent to an insane asylum; also that at different times from that date during the next succeeding five years he manifested such decided symptoms of insanity, without stimulation, that many different persons conversing with him and observing his conduct believed him to be insane; also that during the month of June, 1881, at about the expiration of said term of five years, he honestly became dominated by the idea that he was inspired of God to remove by death the President of the United States; also that he acted upon what he believed to be such inspiration, and what he believed to be in accordance with the Divine will, in preparation for and in the accomplishment of

such purpose; also that he committed the act of shooting the President under what he believed to be a Divine command which he was not at liberty to disobey, and which belief amounted to a conviction that controlled his conscience and over-powered his will as to that act, so that he could not resist the mental pressure upon him; also that immediately after the shooting he appeared calm and as one relieved by the performance of a great duty; also that there was no other adequate motive for the act than the conviction that he was executing the Divine will for the good of his country—assuming all these propositions to be true, state whether in your opinion the prisoner was sane or insane at the time of shooting President Garfield?

"A. Assuming those to be true, I should say the prisoner was insane."

How likely is it that a jury hearing a question like that would keep in mind that all the facts loaded into the question were merely hypothetical and not necessarily supported by the evidence in the case?

The Guiteau example illustrates many other problems with hypothetical questioning. For one, hypothetical questions were difficult for the attorneys to frame, for the court to rule on, and for the jury to understand. Like the question above, the hypotheticals were often so built up and contrived that they were impossible for either the jury or the expert to follow. One case involved a hypothetical that extended over eighty-three pages of typewritten transcript, and an objection involved in fourteen pages more of the record. *Treadwell v. Nickel*, 194 Cal. 243, 266, 228 P. 25, 35 (1924). * * * For another, lawyers often used hypotheticals as a preview of their closing arguments. * * * As a result, experts either provided answers that were entirely disconnected from the actual case, or else they ignored the hypothetical altogether.

Because opposing counsel often disagreed for strategic reasons about which facts should be included in a hypothetical, constructing a hypothetical that the judge would permit was often a tricky and contentious business. If counsel did not include enough facts to satisfy opposing counsel, the hypothetical would be met with an objection, and its sufficiency would provide grist for an appeal. The threat of dragging out litigation led counsel to make their hypotheticals even longer and more confusing.

By the early-20th century, this form of testimony was scorned. Eventually, the use of hypothetical questions was nearly universally recognized as a practical disaster by lawyers, judges, and witnesses alike. This state of affairs sparked efforts to eliminate hypothetical questions as a requirement. See, e.g., 1 Wigmore 2d § 686, at 1094 ("The Hypothetical Question must go, as a requirement. Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice"). Change began first in the courts, which allowed experts to sit through trial and then provide their opinion upon the evidence. * * * What replaced hypotheticals was the procedure exemplified by the Federal Rules of Evidence. Rule 703 provides that an expert's opinion may be based on "facts or data in the case that the expert has been made aware of or personally observed." And "[u]nless the court orders otherwise," Rule 705 permits the expert to

"state an opinion—and give the reasons for it—without first testifying to the underlying facts or data."

These facts or data need not be "admissible" in evidence, and they are not admitted for the truth of what they assert. Fed. Rule Evid. 703. Instead, these facts or data may, under some circumstances, be disclosed to the jury for a limited purpose: to assist the jurors in judging the weight that should be given to the expert's opinion. However, this is not allowed unless the court determines that "their probative value in helping the jury evaluate the [expert's] opinion substantially outweighs their prejudicial effect." And to prevent the jury from improperly relying on basis testimony for the truth of the matters it asserts, a judge must instruct the jury upon request to consider such evidence only to assess the quality of the expert's testimony (i.e., to determine whether an expert's statements are reliable). See Advisory Committee's Notes on Fed. Rule Evid. 703.

This procedure is sensitive to the risk of jurors' mistakenly treating an expert's basis testimony as evidence of the truth of the facts of data upon which the expert relied. The Rules provide important safeguards against this danger, such as the stringent "probative value versus potential prejudice" test and the requirement that a limiting instruction be given upon request. Plus, of course, an expert's lack of personal knowledge of the "facts or data" that are called to his attention can be brought out in cross examination and stressed in a closing argument.

This modern system is more honest because it reflects how experts actually form opinions. See Advisory Committee's Notes on Fed. Rule Evid. 703, at 393 (describing the Rule as "designed to ... bring the judicial practice in line with the practice of the experts themselves when not in court"). It is simpler and less likely to confuse. And it avoids many of the pitfalls of the old procedure. It may not be perfect * * * but it is unquestionably better than the old regime it replaced.

II

In light of the woeful history of expert testimony by hypotheticals, why has the Court disinterred that procedural monstrosity? The Court reasons that * * * "the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion." Ibid. In other words, the Court seems to think that all basis testimony is necessarily offered for its truth.

This is just plain wrong. What makes basis evidence "useful" is the assistance it gives the fact-finder in judging the weight that should be given to the expert's opinion. See Advisory Committee's Notes on Rule 703 (basis testimony may be brought before a jury to help it "evaluate the ... opinion"). And a trial judge must, upon request, instruct the jury to consider it only for that purpose. If a judge rules that basis evidence is not admitted for its truth and so instructs the jury, where does the Court discern a Confrontation Clause problem?

The only possible explanation is that the Court believes that juries are incapable of following such an instruction, but that conclusion is inconsistent with commonplace trial practice and with a whole string of our decisions. It is a routine matter for trial judges to instruct juries that evidence is admitted for only a limited purpose. This Court acknowledged as much in *United States v. Abel*, 469 U.S. 45 (1984), when it noted that "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." In such instances, courts use limiting instructions. .

And this Court has repeatedly upheld that practice—even in "situations with potentially life-and-death stakes for defendants" and even with respect to statements that are "some of the most compelling evidence of guilt available to a jury," *Samia v. United States*, 599 U.S. 635, 646–647, 143 S.Ct. 2004, 216 L.Ed.2d 597 (2023). These decisions "credi[t] jurors by refusing to assume that they are either 'too ignorant to comprehend, or were too unmindful of their duty to respect, instructions' of the court." Id., at 647. Indeed, we have described the assumption that juries will follow the instructions given them by the trial judge" as "crucial" to "the system of trial by jury." *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983). * * * Most recently in *Samia,* we held that a limiting instruction was sufficient to defeat a Confrontation Clause claim. In that homicide case, evidence showed that Samia had traveled with his codefendant Stillwell to the Philippines to commit a murder for hire. The trial court admitted Stillwell's confession, which, as redacted, stated that he was in a van with some "other person " when that person shot the victim, but the court told the jury that the confession could be considered only for the purpose of determining whether Stillwell himself was guilty. Samia argued that admitting the confession even with the limiting instruction would inevitably prejudice him because "other evidence and statements at trial enabled the jury to immediately infer that the 'other person' described in the confession was Samia himself." . Nevertheless, we presumed that the jury was able to follow the limiting instruction, and we therefore affirmed Samia's murder conviction.

Our cases have recognized only one situation in which a limiting instruction is insufficient: where a defendant is directly incriminated by the extrajudicial statements of a non-testifying codefendant. *Bruton v. United States,* 391 U.S. 123 (1968). We have declined to extend that exception, see *Samia*, 599 U.S., at 654, 143 S.Ct. 2004, and the evidence in question in *Bruton* cases is worlds away from an expert's basis testimony. If the Court thinks otherwise, it needs to explain why basis testimony falls into the *Bruton* category and creates a greater risk of juror confusion than all the other situations in which the Court has assumed that jurors are capable of following limiting instructions.

III

The Court's assault on modern evidence law is not only wrongheaded; it is totally unnecessary. Today's decision vacates the Arizona court's judgment because the testifying expert's

testimony was hearsay. I agree with that bottom line, but not because of the majority's novel theory that basis testimony is always hearsay. Rather, I would vacate and remand because the expert's testimony is hearsay under any mainstream conception, including that of the Federal Rules of Evidence.

* * *

Under Rules 703 and 705, Longoni could have offered his expert opinion that, based on the information in Rast's report and notes, the items she tested contained marijuana or methamphetamine. In so answering, he would acknowledge that he relied on Rast's report and lab notes to reach his opinion. He could have also disclosed the information in the report, if the court found that the probative value of that information substantially outweighed the risk of prejudice. See Fed. Rule Evid. 703. But he could not testify that any of the information in the report was correct—for instance, that Rast actually performed the tests she recorded or that she did so correctly. Nor could he testify that the items she tested were the ones seized from Smith. Longoni did not have personal knowledge of any of these facts, and it is unclear what "reliable" scientific "methods" could lead him to intuit their truth from Rast's records. Fed. Rule Evid. 702(c) (defining a permissible expert opinion).

The strictures of the Federal Rules here track the requirements of our Confrontation Clause precedents. If Longoni testified to the truth of the fact that Rast actually performed the tests indicated in her report and notes and that she carried out those tests properly, he violated the Confrontation Clause—assuming, of course, that the notes were "testimonial," a question that the Court does not reach. But he would also violate the Federal Rules, which do not allow experts to testify to the truth of inadmissible hearsay. In other words, except for the question whether Rast's report was "testimonial," the Federal Rules and the requirements of the Confrontation Clause are the same. This case thus offers no occasion to blow up the Federal Rules.

As it happens, I agree with the Court that Longoni stepped over the line and at times testified to the truth of the matter asserted. The prosecution asked Longoni on several occasions to describe the tests that Rast performed or to swear to their accuracy, and Longoni played along. He stated as fact that Rast followed the lab's "typical intake process" and that she complied with the "policies and practices" of the lab. He also testified that Rast used certain "scientific method[s]" to analyze the samples, such as performing certain tests or running a "blank." By asserting these facts as true, Longoni effectively entered inadmissible hearsay into the record, thus implicating the Confrontation Clause. The Court could have said that—and stopped there.

For more than a half-century, the Federal Rules of Evidence and similar state rules have reasonably allowed experts to disclose the information underlying their opinion. Because the Court places this form of testimony in constitutional doubt in many cases, I concur only in the judgment.

TAB 10

Federal Judicial Center

Date: August 12, 2024

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Completed Research for Rules Committees

Local-Counsel Requirements for Practice in Federal District Courts

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes when and where federal district courts require local counsel to participate in litigation and attorney admissions (www.fjc.gov/content/385779/local-counsel-requirements-practice-federal-district-courts).

Fees for Admission to Federal Court Bars

Prepared for the Standing Rules Committee's subcommittee on admissions to the district courts' bars, this report summarizes fees charged for admission to federal court bars, including admission fees, pro hac vice fees, and fees charged by state and territory bars for certificates of good standing (www.fjc.gov/content/385023/fees-admission-federal-court-bars).

Current Research for Rules Committees

Broadcasting Criminal Proceedings

The Center is providing the Criminal Rules Committee with research support as it studies whether the proscription on remote public access to criminal proceedings should be amended.

Remote Participation in Bankruptcy Contested Matters

The Center is providing the Bankruptcy Rules Committee with research support as it studies remote participation in contested matters.

Prior Convictions as Impeachment Evidence for Criminal Defendants

At the request of the Evidence Rules Committee, the Center is conducting research on prior felony convictions as impeachment evidence against testifying criminal defendants.

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

The Need for Redacted Social Security Numbers in Bankruptcy Cases

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers in public filings.

Bankruptcy Judges' Use of "Special Masters"

At the request of the Bankruptcy Rules Committee, the Center will be gathering information from bankruptcy judges on how and whether they would use "special masters" if they had the authority to do that. It is acknowledged that there are concurrent proposals to discontinue use of the word "master" because of the word's historical association with involuntary servitude.

Default and Default-Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. Of particular interest was under what circumstances they are entered by clerks rather than judges. A completed report will be presented to the committee at its October 2024 meeting.

Complex Criminal Litigation Website

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Unredacted Social Security Numbers in Federal Court PACER Documents

At the request of the Committee on Court Administration and Case Management, as part of the Center's ongoing privacy study, the Center identified unredacted Social Security numbers in public filings apparently out of compliance with Federal Rules of Practice and Procedure: Appellate

Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. The Center found 22,391 unredacted Social Security numbers in a sample of 4.7 million filed documents (www.fjc.gov/content/387587/unredacted-social-security-numbers-federal-court-pacer-documents). Of those, 22% were exempt from the redaction requirement, and 6% belonged to pro se filers who waived the rules' privacy protection by disclosing their own Social Security numbers.

Current Research for Other Judicial Conference Committees

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

Case Weights for Bankruptcy Courts

The Center is collecting data for updated research on bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

Enhancing Efforts to Coordinate Best Workplace Practices Across the Federal Judiciary

This report, and the study of federal-judiciary workplace practices on which it is based, were undertaken by the Center and the National Academy of Public Administration pursuant to a House Committee recommendation under the Consolidated Appropriations Act of 2023 (www.fjc.gov/content/388247/enhancing-efforts-coordinate-best-workplace-practices-across-federal-judiciary).

JUDICIAL GUIDES

Completed

Mutual Legal Assistance Treaties and Letters Rogatory: Obtaining Evidence and Assistance from Foreign Jurisdictions

This guide, now in its second edition, provides an overview of the statutory schemes and procedural matters that distinguish mutual legal assistance treaties and letters rogatory (www.fjc.gov/content/386124/mutual-legal-assistance-treaties-letters-rogatory). It also discusses legal issues that arise when the prosecution, the defense, or a civil litigant seek to obtain evidence from abroad as part of a criminal or civil proceeding.

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Court Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Summer Institute for Teachers

In June 2024, the Center collaborated with the ABA to present a week-long professional-development conference for teachers focusing on three famous historical trials: The *Amistad* trial, *United States v. Guiteau*, and *United States v. Rosenberg*. The Center presents information about these and other famous federal trials on its website (www.fjc.gov/history/cases/famous-federal-trials).

Spotlight on Judicial History

Since 2020, the Center has posted twenty-two short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history).

Recent posts include "*Chy Lung v. Freeman*: Anti-Chinese Sentiment and the Supremacy of Federal Immigration Law" (www.fjc.gov/history/spotlight-judicial-history/chinese-immigration-restriction), "Eighth Amendment Prison Litigation" (www.fjc.gov/history/spotlight-judicial-history/eighth-amendment-prison-litigation), "The Certificate of Division" (www.fjc.gov/history/spotlight-judicial-history/certificate-division), and "NFL Television Broadcasting" (www.fjc.gov/history/spotlight-judicial-history/nfl-television-broadcasting).

A User Guide to the History of the Federal Judiciary Website

The Center recently added to its History website a user guide that provides brief descriptions of resources of interest to specific audiences, including the general public, judges and court staff, educators, students, and researchers (www.fjc.gov/history/user-guide).

Snapshots of Federal Judicial History, 1790–1990

The Center recently added to its History website extensive exhibits presenting data about the federal judiciary at various points in its evolution (www.fjc.gov/history/exhibits/snapshots-federal-judicial-history-1790-1990).

EDUCATION

Specialized Workshops

FJC–Center for Law, Brain & Behavior Workshop on Science-Informed Decision-Making

Participants at this three-day, in-person workshop on the incorporation of behavioral science into decisions made in criminal cases were judges and probation and pretrial services officers.

Judicial Seminar on Emerging Issues in Neuroscience

A two-day, in-person judicial seminar explored developments in neuroscience and the role that neuroscience can play in legal determinations, such as decisions about criminal culpability and the admissibility of evidence. The seminar was cosponsored by the American Association for the Advancement of Science and funded by a grant from the Dana Foundation.

Electronic Discovery Seminar

A two-day, in-person judicial workshop explored technologies, rules, and legal requirements related to the retrieval of electronically stored information. It was cosponsored by the Electronic Discovery Institute.

Employment Law Workshop

A two-day, in-person judicial workshop explored issues arising in employment-law litigation, including the use of experts, electronic discovery, case management, retaliation, implicit bias, big data, and the role of the whistleblower. The New York University School of Law's Institute of Judicial

Administration and Center for Labor and Employment Law cosponsored the program.

Ronald M. Whyte Intellectual Property Seminar

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual property law. It was cosponsored by the Berkeley Center for Law and Technology.

Antitrust Judicial Law and Economics Institute for Federal Judges

A three-day, in-person judicial workshop focused on antitrust law and economics fundamentals in the context of various procedural issues, including pleading an antitrust case after the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*; antitrust injury; class certification; and the use of experts at class certification, during damages analysis, and throughout trial. The program was a collaboration of the Center, the American Bar Association's Antitrust Section, the University of Chicago, and the University of California at Berkeley.

Distance Education

Court Web

A monthly webcast included as recent episodes "Generative AI and the Future of Legal Practice" (featuring Middle District of Florida Magistrate Judge Anthony Porcelli and Southern District of California Magistrate Judge Allison Goddard), "Election Litigation Update" (featuring Professors Richard Hasen and Derek Muller), "Hot Topics in Federal Sentencing" (featuring Northern District of Ohio Judge Benita Pearson and Alan Dorhoffer, director of the U.S. Sentencing Commission's Office of Education and Sentencing Practice), "Finding the Ripcords: Top Ten 'Safe Landing' Federal Practice Cases" (featuring attorney Jim Wagstaffe and discussing recent appellate cases addressing jurisdictional issues), "Best Practices for Serving Unrepresented Litigants in the Federal Courts" (featuring Northern District of California Judge Jacqueline Scott Corley and Western District of Missouri Judge Willie Epps), and "Below the Radar: Vital Civil Procedure Developments You Might Not Know" (featuring attorney Jim Wagstaffe and highlighting the most recent developments in federal jurisdiction and civil procedure).

Term Talk

The Center has presented periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes include "*Turkiye Halk Bankasi v. United States*; *Pugin v. Garland*" (discussing subject-matter jurisdiction over criminal prosecutions against foreign sovereigns) and "*Biden v. Nebraska*; *United States v. Texas*" (discussing state standing to sue

for losses suffered by a third party and standing to seek vacation of immigration guidelines).

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

Interactive Orientation for Federal Judicial Law Clerks

The Center provides term law clerks with online interactive training resources.

Customer Service in the Courts

Launched in 2023, this e-learning course discusses working with self-represented litigants, among other topics. The course objectives are to provide information and address concerns without crossing into legal advice.

General Workshops

National Leadership Conference for Chief Judges of United States District and Bankruptcy Courts

This is an annual conference. In addition to updates from various Judicial Conference committees, the 2024 workshop included a session on the evaluation of the interim recommendations of the Cardone Report.

National Workshop for U.S. District Court Judges

These three-day workshops are held in even-numbered years. Among the topics examined at the 2024 workshop were scientific evidence, artificial intelligence, employment-discrimination litigation, deferred sentencing, restorative justice, and managing mass litigation.

National Workshop for U.S. Magistrate Judges

These three-day workshops are held annually. Among the topics examined at the 2024 workshop were the impact of ChatGPT on court filings, including those by self-represented litigants, and the impact of "deepfakes" on evidence and procedure.

National Workshop for U.S. Bankruptcy Judges

These three-day workshops are held annually. Among the topics discussed in 2024 were sealing court records and healthcare bankruptcies.

Circuit Workshops for U.S. Appellate and District Judges

In 2023, the Center put on two- or three-day workshops for Article III judges in the Second, Ninth, and Eleventh Circuits.

National Conference for Appellate Staff Attorneys

The Center puts on biennial three-day educational conferences for appellate staff attorneys, now in odd-numbered years.

Wm. Matthew Byrne, Jr., Judicial Clerkship Institute for Career Law Clerks

Held in collaboration with Pepperdine University Caruso School of Law, this annual two-day program offers sessions on managing pro se litigation, bankruptcy appeals, and jurisdictional issues.

Federal Defender Capital Habeas Unit National Conference

This annual three-day conference is designed for attorneys, paralegals, investigators, and mitigation specialists.

National Seminar for Federal Defenders

This annual three-day seminar is designed for assistant federal defenders who have been practicing criminal law for a minimum of three years.

Orientation Programs

Orientation Programs for Judges

The Center invites newly appointed judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, judicial ethics, and opinion writing. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, case management, security, self-represented litigants, relations with the media, and ethics. Recent orientation programs for district judges have included updates on the Cardone Committee's recommendations and evaluation. Orientation programs for circuit judges include a program at New York University School of Law for both state and federal appellate judges.

Orientation Seminar for Assistant Federal Defenders

This week-long seminar is held every year.

FORDHAM
University School of Law

Lincoln Center, 140 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
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Rule 902(1) and Indian Tribes, update
Date: September 15, 2013

In *United States v. Alvirez,* 709 F.3d 1305 (9th Cir. 2013), the court held that documents bearing the seal of a federally-recognized Indian tribe are not self-authenticating under Evidence Rule 902(1), because tribes are not listed among the various governmental entities in that rule. At its last meeting, the Committee considered whether Rule 902(1) should be amended to include federally-recognized Indian tribes on the list of entities whose sealed documents are self-authenticating. The Committee's tentative resolution of that question is reflected in the minutes of the meeting, which state as follows:

> Committee members exchanged a number of ideas in the course of the discussion, among them:
>
> • It was possible that any attempt to amend the rule to affect Indian tribes could not proceed before a process of consultation.
>
> • Indian tribes might vary in their degree of rigor in maintaining public documents, but no rule of evidence should attempt to distinguish among Indian tribes.[1]
> •The absence of Indian tribes from the list in Rule 902(1) does not raise a significant

[1] If the courts are considered departments or agencies of the United States, it would be illegal to promulgate a rule that would provide a different evidentiary result for records of some tribes and not others. *See* 25 USC 476 (f) ("Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.").

problem in practice. All it means is that the proponent would have to: 1) provide an accompanying certificate by a custodian under Rule 902(4); 2) call a witness to authenticate; or 3) provide circumstantial evidence or other indication of authenticity under Rule 901.

•Because the problem for trial practice is not significant, the real issue is one of dignity — as was the case with the right to file amicus briefs. Though the contrary argument was also made that what was presented was a gap in the Rules and the Committee should consider whether to fill that gap as it would any other.

• If Indian tribes are added to the list in Rule 902(1), the Committee would also have to consider whether other public entities should be added to the list. That is, there should be a systematic inquiry.

• Any amendment would have to be limited to federally-recognized Indian tribes and the Committee would have to make sure that it crafted the right language to cover that classification.

• If there are issues of authenticity regarding tribal documents, a rule rendering all such documents self-authenticating might raise confrontation issues in criminal cases because the defendant may have difficulty in challenging such documents.

• There may well be many places in the national rules in which Indian tribes might be included, and it would be important to have uniform treatment across the rules. For example, Civil Rule 44, which parallels Rule 902 in many ways, makes no mention of Indian tribes.

• There may be other Evidence Rules that might warrant consideration of whether Indian tribal documents should be covered. One example is Rule 609, governing impeachment by prior convictions.

•The Committee might consider asking the FJC to do some research on the use of Indian tribal documents in federal litigation.

In the end, the Committee resolved unanimously that it would be unwise to proceed at this time with an amendment to Rule 902 that would cover tribal documents. The Committee unanimously determined that treatment of Indian tribal documents raised a question that spanned all the national rules, and therefore it would await the direction of the Standing Committee.

Since the Spring Committee meeting, there have been two developments that might affect consideration of any amendment:

1. *Alvirez* was vacated. The Ninth Circuit vacated the decision in order to decide a related question involving the government's burden to establish that a defendant is an Indian for purposes of federal jurisdiction under the Major Crimes Act. In that case, *United States v. Zepeda,* 705 F.3d 1052 (9th Cir. 2013), the court held that a tribal enrollment certificate was insufficient to establish that the defendant was an Indian. In that case, the government introduced no other evidence that the defendant's bloodline was derived from a federally recognized Indian tribe. The *Zepeda* court also found that the while the tribe's inclusion on the Interior Department list was the kind of fact that could be judicially noticed, the trial court could not dispose of the issue by way of judicial notice in a criminal jury trial.

It could be argued that the fact that *Alvirez* was vacated makes it less important to address the question of Indian tribes and 902. One counterargument to that is that in the Ninth Circuit, everyone is operating as if the case was still valid. That is, the government in these cases is not seeking to introduce sealed documents of Indian tribes, because prosecutors now see the riskiness of that venture. Another counterargument is that if the question is one of dignity, then that question is not solved by the vacating of *Alvirez*. The fact is that 902(1) recognizes various and sundry governmental entities, *but not federally-recognized Indian tribes.*

2. At the Standing Committee meeting in June, Judge Fitzwater reported on the Committee's determination about 902(1) and Indian tribes — i.e., to defer the matter in favor of a trans-rules effort. In the discussion, Judge Sutton stated that he had rethought the matter and saw no reason for the Evidence Rules Committee to wait for the other Committees.

In light of Judge Sutton's comments, this memo provides some more background and analysis of Indian Tribes' inclusion in the Federal Rules of Evidence.

The memorandum is in two parts: 1) a draft of an amendment to Rule 902(1) to include Indian Tribes; 2) a review of whether there are other rules that might warrant inclusion of a reference to Indian tribes. The memo does not consider whether any amendment would require a consultation process, as that is a question for the Department of Justice. Nor does it consider whether other sovereigns should be included in the 902(1) list. The focus is on Indian tribes.

I. Possible Amendment to Rule 902(1):

An amendment including Indian tribes on the list of government entities in 902(1) might look like this:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; a federally-recognized Indian tribe; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

Possible Committee Note

The rule has been amended to recognize the sovereignty of Indian tribes and the fact that a sealed document from a federally-recognized Indian tribe is entitled to the same presumption of authenticity as a comparable document from the government entities currently listed in Rule 902. *See* Fed. R. Crim. P. 6(e)(3)(A)(ii) and (iii), and 2002 Committee Note (amendments recognize "the sovereignty of Indian tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law."). [The term "federally-recognized Indian tribe" is properly defined as "an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. §479a–1." Fed.R.Crim.P. 6(i).]

Reporter's Comment: It turns out that the Federal Rules do recognize Indian Tribes in one rule: Criminal Rule 6. So the Committee Note is written with that in mind. Rule 6(i) actually defines Indian tribe but there are two reasons not to include such a definition in the text of Rule 902(1). First, it is balky, and odd, to define only one of the terms of a long list. Second, the Standing Committee has in the past frowned upon including references to specific statutes in the text of a rule — the rationale being that if the statute is ever amended, the rule would have to be amended as well. It is true that Criminal Rule (6)(i) suffers from that infirmity — but that is not an Evidence Rules problem.

It is a fair question whether the bracketed material in the note should be included. "Federally-recognized Indian tribe" seems self-explanatory. Using any definition other than that in Criminal Rule 6 risks confusion; but that definition suffers from the infirmity of being attached to a specific statute, which would be a problem not only for the text but also for the note. So perhaps it is best to leave the definition out.

One possible problem with the text of the amendment as set forth above is that it would extend not only to sealed documents of Indian tribes, but also to "a political subdivision of any of these entities; or a department, agency, or officer of any entity named above." So a document of a department or agency of the tribe is as self-authenticating as a document of the Tribe itself. It is unclear whether that is a problem. But if it is, it could be fixed by putting Indian tribes at the *end* of the list, like this:

> a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; ~~or~~ a department, agency, or officer of any entity named above; or a federally-recognized Indian tribe; and

II. Other Rules That Might Be Amended To Include Indian Tribes

In terms of "other rules" and Indian tribes it depends on what you are looking for. If the question is whether Tribe-related evidence should be admissible, you would probably add Indian tribes in a lot of places. If the question is whether Indian tribes are not mentioned while other sovereigns are, then there is only one rule that raises that issue: Rule 902(1).[2]

The difference between the narrow approach and the broad approach can be illustrated by Rule 609. Rule 609(a)(1) covers a crime that, "in the convicting jurisdiction, was punishable be death or by imprisonment for more than one year . . ." That rule is directed broadly to *any* jurisdiction. There is nothing in the rule that treats tribal convictions differently from convictions rendered by any other sovereign. Consequently it would not need amendment under the narrow view of "dignity-based" amendments regarding Indian tribes. Indeed, to amend Rule 609(a) to specifically *include* Indian tribes would be quite difficult and might actually serve to denigrate the tribe. For example, an amendment such as "in the convicting jurisdiction, <u>including a tribal court</u> . . ." would raise issues of whether Indian tribes are being improperly singled out.[3]

It is true that there are nice questions of whether information generated by Indian tribes is covered by certain rules.[4] Is a public report of an Indian tribe covered by Rule 803(8)? Is a conviction of a tribal court admissible under Rule 609? These are complex issues and it would seem an enormous and dubious project to work through all the case law to determine whether the rules are applied the same way to information from Indian tribes as they are with respect to other sovereigns. For one thing, it would not follow that if there were a difference in application, it should be changed by an amendment to a particular rule. There may be reasons why information from a tribe might be subject to different treatment.

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[2] Rule 902(1) also distinguishes among sovereigns but only because it feeds off of the list of sovereigns in 902(1). If 902(1) is changed to add Indian tribes, then the dignity issue is solved for 902(2).

[3] The same issues of general applicability to Indian tribes arise with Rule 801(d)(1)(A) (statements given at a prior "trial"); 803(8) (record or statement of a "public" office); 803(9) ("public" office); 803(10) ("public" record); 803(14) ("public" office); 803(22) (judgment of conviction); 803(23) (judgment regarding boundaries) 804(b)(1) (testimony at a trial); 901(b)(7) (public records); 902(4) (official record/public office); 902(5) (publication of a public authority);

[4] The Supreme Court applied the common law of attorney-client privilege to Indian tribes, under Rule 501, in *United States v. Jicarilla Apache Nation,* 131 S.Ct. 2313 (2011).

Consequently, other than Rule 902(1), there are no rules that on their face treat information from Indian tribes differently from information generated by other sovereigns. If the Committee does wish to undertake a rule-by-rule analysis to determine whether the case law under certain rules treats information from Indian tribes differently from that of other sovereigns, the Reporter will prepare a memorandum on the subject for the next meeting.

2024 WL 4376127
Only the Westlaw citation is currently available.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Elga Eugene HARPER, Defendant - Appellant.

No. 23-5091
|
FILED October 3, 2024

Synopsis

Background: In prosecution for offenses in Indian country, i.e., kidnapping, aggravated sexual abuse, and assault, the United States District Court for the Northern District of Oklahoma, John F. Heil, III., J., 2023 WL 396100, granted government's motion for ruling that location of charged conduct was within Indian country, denied defendant's motion to suppress all evidence obtained through search and arrest warrants issued by State, and denied reconsideration, 2023 WL 1765537, and jury convicted defendant of charged offenses. Defendant appealed.

Holdings: The Court of Appeals, Federico, Circuit Judge, held that:

[1] verification letter issued by Choctaw Nation of Oklahoma, certifying that defendant had Certificate of Degree of Indian Blood (CDIB) and that he was tribal member, was not a self-authenticating domestic public document;

[2] letter was not created in regular course of business, as would be required for admissibility under business records exception to hearsay rule;

[3] government, by failing to make letter's author available to testify as to letter's contents, failed to satisfy personal knowledge requirement for authentication; and

[4] items found in defendant's backpack did not establish his Indian status.

Reversed and remanded with instructions.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (30)

[1] **Criminal Law** Review De Novo

The Court of Appeals reviews legal interpretations of the Federal Rules of Evidence de novo.

[2] **Criminal Law** Reception and Admissibility of Evidence

Evidentiary decisions are reviewed by the Court of Appeals for abuse of discretion.

[3] **Criminal Law** Evidence

Appellate review of District Court decisions admitting statements contested as hearsay is especially deferential because hearsay determinations are particularly fact specific and case specific. Fed. R. Evid. 801(c), 802, 803.

[4] **Criminal Law** Reception and Admissibility of Evidence

Evidentiary rulings may constitute an "abuse of discretion" only if based on an erroneous conclusion of law, a clearly erroneous finding of fact, or a manifest error in judgment.

[5] **Criminal Law** Rulings as to Evidence in General

Even if the appellate court finds that an evidentiary ruling is erroneous, a new trial will be ordered only if the error prejudicially affects a substantial right of a party.

[6] **Criminal Law** Review De Novo

In conducting a harmless error review, the Court of Appeals reviews the record de novo.

[7] **Criminal Law** Presumption as to Effect of Error; Burden

The Government bears the burden of proving that a non-constitutional error was harmless.

[8] **Indians** Crimes by Indians in Indian country or on reservation

Indian status is an essential element of offenses charged and not a mere technicality under the General Crimes Act, also known as the Indian Country Crimes Act, which delineates the crimes that are within the exclusive jurisdiction of the United States and the crimes that are secured to the Indian tribes, respectively. 18 U.S.C.A. § 1152.

[9] **Indians** Who is an Indian; tribal status

For a criminal case to be within the exclusive jurisdiction of federal courts based on a crime committed by an Indian in Indian country, the fact finder must make factual findings that the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or by the federal government. 18 U.S.C.A. § 1153.

[10] **Indians** Weight and sufficiency

Ultimately, the burden falls on the Government to prove beyond a reasonable doubt a defendant's Indian status, for a criminal case to be within the exclusive jurisdiction of federal courts based on a crime committed by an Indian in Indian country. 18 U.S.C.A. § 1153.

[11] **Indians** Evidence

Generally, a Certificate of Degree of Indian Blood (CDIB) is a self-authenticating domestic public document and does not require extrinsic evidence of authenticity in order to be admitted as evidence because it is issued by the Department of the Interior and bears its seal. Fed. R. Evid. 902(1, 2).

[12] **Indians** Evidence

An Indian tribe's registration card or document bearing a tribal seal is not a self-authenticating domestic public document because it does not contain a seal of the United States or of any state, district, commonwealth, territory, or insular possession of the United States, and thus, extrinsic evidence of authenticity is required for a tribal card or document to be admitted into evidence. Fed. R. Evid. 902(1, 2).

[13] **Indians** Evidence

Verification letter issued by Choctaw Nation of Oklahoma, certifying that criminal defendant had a Certificate of Degree of Indian Blood (CDIB) and that he was a tribal member, was not a self-authenticating domestic public document, and accordingly, the Government was required to properly authenticate the letter with extrinsic evidence in order for the letter to be admissible to show defendant's Indian status, as required for the criminal case to be within the exclusive jurisdiction of federal courts based on a crime committed by an Indian in Indian country. 18 U.S.C.A. § 1153; Fed. R. Evid. 902(1, 2).

[14] **Criminal Law** Business records in general

Under the business records exception to the hearsay rule, the proposed document must (1) have been prepared in the normal course of business; (2) have been made at or near the time of the events recorded; (3) be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) indicate the sources, methods, and circumstances by which the record was made trustworthy. Fed. R. Evid. 602, 803(6).

[15] **Criminal Law** Business records in general

Not every item of business correspondence constitutes a business record, for purposes of the business records exception to the hearsay rule. Fed. R. Evid. 803(6).

[16] **Criminal Law** Business records in general

One who prepares a document in anticipation of litigation is not acting in the regular course of business, as would be required for the document to be a business record, for purposes of the business records exception to the hearsay rule, because such documents are dripping with motivations to misrepresent. Fed. R. Evid. 803(6).

[17] **Criminal Law** Business records in general

The rationale behind the business records exception to the hearsay rule is that such documents have a high degree of reliability because businesses have incentives to keep accurate records, and they are accurate because the information is part of a regularly conducted activity, kept by those trained in the habits of precision and customarily checked for correctness because of the accuracy demanded in the conduct of the nation's business. Fed. R. Evid. 803(6).

[18] **Criminal Law** Business records in general

For the business records exception to the hearsay rule, if any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails, just as it does when the person feeding the information does not have firsthand knowledge. Fed. R. Evid. 803(6).

[19] **Criminal Law** Business records in general

When introducing evidence under the business records exception to the hearsay rule, courts generally assume that the business "record" itself must be introduced, not solely testimony about the contents of a qualifying record. Fed. R. Evid. 803(6).

[20] **Criminal Law** Business records; books of entry

To be admissible under the business records exception to the hearsay rule, a business record must be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant. Fed. R. Evid. 602, 803(6).

[21] **Criminal Law** Business records; books of entry

Evidence to prove personal knowledge of the entrant, as element for admission of evidence under the business records exception to the hearsay rule, may consist of the witness's own testimony. Fed. R. Evid. 602, 803(6).

[22] **Criminal Law** Business records; books of entry

For the business records exception to the hearsay rule, the foundational requirement for the witness's personal knowledge is not difficult to meet, and the court considers only whether a rational juror could conclude based on the witness's testimony that he or she has personal knowledge of a fact. Fed. R. Evid. 602, 803(6).

[23] **Criminal Law** Business records; books of entry

For the foundational requirements for the business records exception to the hearsay rule, a trial court should exclude testimony for lack of the witness's personal knowledge only if in the proper exercise of the court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to. Fed. R. Evid. 602, 803(6).

[24] **Indians** Evidence

Verification letter issued by Choctaw Nation of Oklahoma, certifying that criminal defendant had a Certificate of Degree of Indian Blood (CDIB) and that he was a tribal member, was

not created in the regular course of business, as would be required for admissibility, under business records exception to hearsay rule, to show defendant's Indian status, as required for the criminal case to be within the exclusive jurisdiction of federal courts based on a crime committed by an Indian in Indian country, where letter was issued in anticipation of litigation, less than one month before trial commenced. 18 U.S.C.A. § 1153; Fed. R. Evid. 803(6).

[25] **Indians** Evidence

Testimony of manager of Certificate of Degree of Indian Blood (CDIB) and membership department for Choctaw Nation of Oklahoma did not establish that verification letter issued by Choctaw Nation of Oklahoma, certifying that criminal defendant had a CDIB and that he was a tribal member, was created in regular course of business, as foundational requirement for admissibility, under business records exception to hearsay rule, to show defendant's Indian status, as required for the criminal case to be within the exclusive jurisdiction of federal courts based on a crime committed by an Indian in Indian country, where manager's testimony was derivative of the letter itself, for which there was a preserved hearsay objection. 18 U.S.C.A. § 1153; Fed. R. Evid. 803(6).

[26] **Indians** Evidence

Government, by failing to make the author of the verification letter available to testify as to the contents of the letter, failed to satisfy personal knowledge requirement for authenticating, for admissibility under business records exception to hearsay rule, letter of membership issued by Choctaw Nation of Oklahoma certifying that criminal defendant had a Certificate of Degree of Indian Blood (CDIB) and that he was a tribal member, offered by government to show defendant's Indian status, as required for the criminal case to be within the exclusive jurisdiction of federal courts based on a crime committed by an Indian in Indian country. 18 U.S.C.A. § 1153; Fed. R. Evid. 602, 803(6)(A, D), 902(11).

[27] **Criminal Law** Rulings as to Evidence in General

If a party objects to a District Court's evidentiary ruling based solely on the Federal Rules of Evidence, the Court of Appeals reviews for nonconstitutional harmless error.

[28] **Criminal Law** Presumption as to Effect of Error; Burden

To show, on a defendant's appeal, that nonconstitutional error was harmless, the Government bears the burden of proving by a preponderance of the evidence that the substantial rights of the defendant were not affected.

[29] **Indians** Weight and sufficiency

Items found in backpack that contained defendant's Social Security card, i.e., handwritten note stating "[c]heck into how I can get [illegible] help for glasses from the tribe" and partially filled intake form from city's Indian clinic, did not establish defendant's Indian status, as would be required for the criminal case to be within the exclusive jurisdiction of federal courts based on a crime committed by an Indian in Indian country; note and intake form did not indicate that defendant had some Indian blood and that he was recognized as an Indian by a tribe or by federal government. 18 U.S.C.A. § 1153.

[30] **Criminal Law** Eyewitnesses

Circumstances mentioned in Tenth Circuit's decision in *United States v. Rodriguez-Felix*, 450 F.3d 1117, are not an exhaustive list or a line of hurdles that must all be cleared for the admissibility of expert testimony on the reliability of eyewitness identifications. Fed. R. Evid. 702.

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:22-CR-00170-SJM-1)

Attorneys and Law Firms

Jami Johnson, Assistant Federal Public Defender (Jon M. Sands, Federal Public Defender with her on the brief), Phoenix, Arizona, for Defendant – Appellant.

Leena Alam, Assistant U.S. Attorney (Clinton J. Johnson, U.S. Attorney, with her on the brief), Tulsa, Oklahoma, for Plaintiff – Appellee.

Before BACHARACH, MORITZ, and FEDERICO, Circuit Judges.

Opinion

FEDERICO, Circuit Judge.

***1** Elga Eugene Harper was tried before a jury and convicted of kidnapping and assaulting a single victim, E.F., in Indian country. The indictment, predicated on federal jurisdiction, alleged Harper is an Indian as defined under federal law. Harper was sentenced to life in prison and judgment was entered on July 27, 2023. Harper timely appealed and now raises four issues.

Harper argues that the district court erred by: (1) admitting a hearsay verification letter from the Choctaw Nation of Oklahoma to prove Harper's Indian status as it was inadmissible hearsay and not a business record; (2) excluding the expert testimony of Dr. Geoffrey Loftus on the issue of trauma and memory; (3) permitting the Government's forensic nurse to provide unnoticed expert testimony regarding the science of trauma and memory without expertise; and (4) failing to properly instruct the jury regarding kidnapping and asportation of the victim.

We have jurisdiction under 28 U.S.C. § 1291. Finding merit in the first issue on appeal, we reverse the convictions and sentence and remand for the district court to vacate the judgment and conduct further proceedings.

I

Harper was tried and convicted by a jury of kidnapping and sexually assaulting a 72-year-old semi-retired Episcopal nun in her home in Tulsa, Oklahoma. The victim, E.F., testified that she met Harper in 2021 when he asked if he could cut the grass in her yard. E.F. continued to hire Harper to make small repairs to her home because he needed work. Due to his unhoused status, E.F. and her neighbors would allow him into their homes to use the phone or restroom.

A few months before the sexual assault, E.F. hired Harper to repair a light fixture in her home, but he was unable to complete the task the same day and left. On the following Tuesday, Harper returned to E.F.'s home; however, E.F. informed Harper that he could not make the repairs in her home that night because she was teaching a class that evening and needed to prepare. E.F. testified that Harper became angry and stated that he needed to complete the task. E.F. and Harper argued about the date he was supposed to have returned, E.F. paid Harper for the work he previously performed, and Harper "stormed out." R.IIIA at 470–71.

On May 2, 2022, Harper returned to E.F.'s house at approximately 10:00 or 10:30 p.m. E.F. testified that Harper acted cheerful and as if the two had not argued. That evening, Harper asked E.F. to be his counselor; however, E.F. declined because they did not "get off to a good start" and Harper subsequently left. *Id.* at 471–72.

On May 4, 2022, at approximately 2:00 p.m., Harper returned to E.F.'s home, asked if she had any work for him, and requested to use the bathroom. E.F. informed Harper that she did not have any work for him but let him inside to use the bathroom. Soon after entering E.F.'s home, Harper attacked her, fashioned a noose out of a cord, placed the noose around her neck, and dragged her around the house. Over the next four hours, Harper tied E.F. up, sexually assaulted her multiple times, dropped her on her head and neck when moving her into the bathroom, and forced her to shower in scalding hot water. Due to being in shock, E.F. was temporarily paralyzed from her injuries. Harper moved E.F. to her bedroom where he proceeded to beat her while bound and ransacked her home for her vehicle's keys and title. Harper left E.F.'s home at around 6:00 p.m. E.F. testified that Harper picked up his shorts from the floor, but she did not see what else he was wearing when he left.

***2** After Harper left, E.F. proceeded to call 911. She described the assault, her injuries, and identified her attacker

as "Elga Harper." Supp. R.III at 5–6. E.F. identified Harper as Black during the 911 call.

After leaving E.F.'s home at around 6 p.m., Harper traveled to another neighbor's home wearing shorts and a purple robe. The neighbor permitted Harper to shower, shave, and wash his clothes at his house. Harper stayed at the neighbor's home for four hours before being asked to leave because he was acting nervous and jittery. The next morning—on May 5, 2022—the neighbor was approached by police officers at his home. He told police that he had noticed unfamiliar bags in the back of his truck, which he then retrieved and provided to the police. Police recovered a backpack that contained Harper's social security card, E.F.'s business card, a hand-written note that stated "[c]heck into how I can get [illegible] help for glasses from the tribe," and a partially filled intake form from the Oklahoma City Indian Clinic. Supp. R.II at 9–10; R.III at 373–74, 491, 495. The police also recovered from the neighbor's trash can a set of electric clippers that the neighbor had given to Harper to shave, the purple robe that Harper was wearing when he arrived at the neighbor's home, and E.F.'s car keys.

II

A

Harper was arrested on May 10, 2022, and interviewed by police. Harper denied assaulting E.F. but admitted that he had entered her home and found her already bleeding and bound. Harper stated that he began to assist her by cutting her bindings and looking for her phone to call 911, but then got scared and left. Harper suggested that E.F. knew his name because he had worked for her and that there were "multiple gentlemen in the area that may or may not be of my size, of my color, of my race." Supp. R.II at 57, 59. On June 7, 2022, the Government indicted Harper, claiming federal jurisdiction and alleging that Harper is an Indian, as defined by federal law.

B

Pretrial, the Government filed a motion to exclude the testimony of Harper's expert witness, Geoffrey Loftus, Ph.D. The defense proffered Dr. Loftus as an expert on eyewitness identification and how trauma may impact memory when making an identification. On January 18, 2023, the district court granted the Government's motion.

The district court determined that Dr. Loftus's qualifications were uncontested. Citing *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123–26 (10th Cir. 2006), the district court noted that eyewitness identification expert testimony is admissible in "narrow" and "limited circumstances" such as "cross-racial identification, identification after a long delay, identification after observation under stress, and such psychological phenomena as the feedback factor and unconscious transference." R.I at 379. The district court determined that while the case "implicat[ed] cross-racial identification and identification after observation under stress, the identifications in this case were not made after a long delay." *Id.* The district court, relying upon *Rodriguez-Felix*, determined that "[t]his situation is more akin to an 'evidentiary cornucopia' of identification where expert testimony on memory and perception is not helpful." *Id.*

C

***3** Harper's trial commenced on February 6, 2023. At trial, the Government presented and attempted to lay the foundation to admit into evidence Exhibit 1, a letter from the Choctaw Nation of Oklahoma verifying Harper's Indian status. The letter was on the letterhead of "Choctaw Nation of Oklahoma CDIB/Trial Membership," dated January 18, 2023, and signed by Terry Stephens, Director CDIB/Membership of the Choctaw Nation of Oklahoma. Supp. R.I at 2. The letter stated that Harper had a Certificate of Degree of Indian Blood (CDIB) issued by the Bureau of Indian Affairs in 2002 and, since 2011, was an enrolled member of the Choctaw Nation of Oklahoma. A form attached to the verification letter certified the authenticity of the letter as a "domestic business record[ ]." Supp. R.I at 3.

The Government elicited testimony from Tabitha Oakes, an employee at the Choctaw Nation of Oklahoma and manager of the CDIB and membership department. Oakes testified that she routinely prepares and oversees the certificates of enrollment—including researching Dawes records, birth records, and death records—to establish lineage and membership in the Choctaw Nation.

Oakes testified that the CDIB is issued by the Bureau of Indian Affairs, that an individual must have a CDIB to be

an enrolled member of the Choctaw Nation, and that the CDIB records are held in the Choctaw Nation's vault. Oakes noted that the enrollment records for the Choctaw Nation of Oklahoma are kept in the normal and ordinary course of business. Oakes recognized the Government's Exhibit 1 as (1) a verification letter by the Choctaw Nation of Oklahoma that was signed by Terry Stephens, the Director of CDIB/Membership, and (2) a Certificate of Authenticity that she prepared in her duties as an enrollment officer and that used the information and resources of her department. At this point, the Government moved to admit and publish Exhibit 1 to the jury; however, Harper objected arguing a lack of foundation and hearsay. The district court summarily overruled Harper's objection and Exhibit 1 was admitted into evidence.

Following the admission of Exhibit 1 into evidence, Oakes testified that the verification letter pertained to Defendant Elga Eugene Harper, stated that Harper has a Certificate of Degree of Indian Blood, and confirmed that Harper is an enrolled member of the Choctaw Nation of Oklahoma with a membership number and issuance date. Harper declined to cross-examine Oakes. The signatory of the verification letter—Director Terry Stephens—did not testify. The district court then took judicial notice that the charged events occurred within Indian country, that the geographic area was not at issue, and that the factual question of whether the crime occurred in Indian country was established.

Later during the trial, the Government called Kathryn Bell—a recently retired forensic registered nurse of the Tulsa Police Department—as a witness to testify about the injuries sustained by E.F. During the redirect examination, Nurse Bell testified about the science of memory and memory formation after trauma. Harper objected, arguing that Bell was not "established as an expert on the area of memory and that the testimony was not sufficient to qualify her as an expert." R.III at 418. The district court concurred, but then asked Bell, in the presence of the jury, "[i]s there anything in your description of memory that you just discussed that's relevant to the question of how [E.F.] remembered things closer to the event than she did perhaps when you interviewed her on the 17th of May?" *Id.*

The district court then permitted Bell to continue testifying on the process of memory formation and how memory is encoded by the amygdala. Again, Harper objected, noting that Bell did not have the expertise to give such testimony. The district court then noted that Harper could take up the issue during cross-examination and instructed the jury to weigh Bell's testimony as a "witness who does have some expertise study background and experience in these issues but you'll weigh her testimony as you do within the instructions I give you." *Id.* at 419. Harper proceeded to conduct recross-examination and elicited from Bell that she is not a doctor, psychologist, or head trauma surgeon and cannot give an opinion about E.F.'s memory.

D

***4** At the close of the trial, the district court declined to include Harper's proposed language in the jury instruction regarding kidnapping and opted to use the Tenth Circuit's pattern jury instruction. The district court rejected a portion of Harper's jury instruction that stated:

> To qualify as a "kidnapping," there must be more than a transitory holding and more than a detention that occurs during and is inherent in the commission of a separate offense. To qualify as a "kidnapping," a detention accompanying another crime must create a significant danger to the victim independent of that posed by the separate offense.

R.I at 404.

On February 9, 2023, Harper was convicted by the jury of four counts: kidnapping in Indian country, in violation of 18 U.S.C. §§ 1151, 1153, and 1201(a)(2); aggravated sexual abuse in Indian country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(a); and two counts of assault in Indian country, in violation of 18 U.S.C. §§ 1151, 1153, and 113(a)(3), (a)(6). Judgment was entered on July 27, 2023, and Harper was sentenced to life in prison as to Counts One and Two and ten years as to Counts Three and Four, running concurrently. Harper now timely appeals.

III

Regarding the four arguments or claims of error made by Harper on appeal, we start first by setting out the standards

of review we employ to consider and decide the issues before us. We then proceed to the merits of the claims, examining predominantly the first issue because it compels us to grant Harper relief.

A

Harper's first claim is that the district court erred by admitting into evidence Exhibit 1, the verification letter from the Choctaw Nation of Oklahoma offered to prove Mr. Harper's Indian status. Harper argues the letter was inadmissible hearsay and does not fall under the "business record" hearsay exception. We agree.

1

[1] **[2]** **[3]** We review legal interpretations of the Federal Rules of Evidence de novo while evidentiary decisions are reviewed for abuse of discretion. *United States v. Silva*, 889 F.3d 704, 709 (10th Cir. 2018). Because this claim involves a hearsay objection, "our review of decisions admitting statements contested as hearsay is especially deferential." *United States v. Hernandez*, 333 F.3d 1168, 1176 (10th Cir. 2003) (quoting *United States v. Edward J.*, 224 F.3d 1216, 1219 (10th Cir. 2000)). This Court is deferential to the district court because "hearsay determinations are particularly fact and case specific." *United States v. Channon*, 881 F.3d 806, 810 (10th Cir. 2018) (quoting *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005)).

[4] **[5]** **[6]** **[7]** Evidentiary rulings "may constitute an abuse of discretion only if based on an erroneous conclusion of law, a clearly erroneous finding of fact or a manifest error in judgment." *United States v. Keck*, 643 F.3d 789, 795 (10th Cir. 2011) (quoting *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1246 (10th Cir. 1998)). "Even if the court finds an erroneous evidentiary ruling, a new trial will be ordered 'only if the error prejudicially affects a substantial right of a party.' " *Id.* (quoting *Hinds v. Gen. Motors Corp.*, 988 F.2d 1039, 1049 (10th Cir. 1993)). "In conducting a harmless error review, we review the record *de novo*." *United States v. Flanagan*, 34 F.3d 949, 955 (10th Cir. 1994). The Government bears "the burden of proving that a non-constitutional error was harmless." *Id.*

2

***5** Before diving into the hearsay analysis, we first detour to discuss and consider the significance of Exhibit 1 as to the elements of the crimes charged. That is, how and why Harper's status as an Indian is a jurisdictional predicate to the entire case.

[8] **[9]** **[10]** The General Crimes Act, 18 U.S.C. § 1151, et. seq., delineates which crimes shall be within the exclusive jurisdiction of the United States and which crimes shall be secured to the Indian tribes, respectively. [1] According to the Act, Indian status is an essential element of offenses charged and not a mere technicality. *See* 18 U.S.C. § 1152; *United States v. Simpkins*, 90 F.4th 1312, 1317–18 (10th Cir. 2024); *United States v. Langford*, 641 F.3d 1195, 1200 (10th Cir. 2011). This Court has adopted a two-part test for determining whether a case is within the exclusive jurisdiction of federal courts when committed by an Indian in Indian country. *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) (*Prentiss II*). In order for a criminal defendant to be subject to § 1153, the fact finder "must make factual findings that the defendant '(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government.' " *Id.* (quoting *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995)). In this context, it was a question for the jury to make these findings. *United States v. Walker*, 85 F.4th 973, 982 (10th Cir. 2023). Ultimately, the burden falls on the Government to prove beyond a reasonable doubt Harper's Indian status. *United States v. Diaz*, 679 F.3d 1183, 1186 (10th Cir. 2012); *Prentiss*, 273 F.3d at 1283.

The Government attempted to meet its burden to prove Indian status by offering into evidence the verification letter through the testimony of the custodian, Oakes. Recall from above the verification letter was written shortly before trial and verified both that Harper had on file a CDIB and was a registered member of the tribe.

[11] **[12]** Generally, a CDIB is a self-authenticating domestic public document and does not require extrinsic evidence of authenticity in order to be admitted as evidence because it is issued by the U.S. Department of the Interior and bears its seal. *Walker*, 85 F.4th at 981–82. Conversely, a tribe's registration card or document bearing a tribal seal is not a

self-authenticating domestic public document because it does not contain a seal of the United States or any state, district, commonwealth, territory, or insular possession of the United States. Thus, extrinsic evidence of authenticity is required for a tribal card or document to be admitted. *Id.*

[13] Here, the Government did not proffer as evidence Harper's CDIB to prove his Indian status. Instead, the Government proffered a letter of membership issued by the Choctaw Nation of Oklahoma certifying that Harper had a CDIB that was issued on January 2, 2002, and that he was a tribal member as of July 29, 2011. Accordingly, the Government was required to properly authenticate the verification letter and establish its admissibility under the Federal Rules of Evidence. Because the objection was to hearsay, the Government had to prove either the letter was not hearsay or that it fell within an exception to the hearsay rule.

***6** While this appeal was pending, this Court revisited the issue of authentication of Indian tribal certificates and noted that Indian tribal certificates that include "the degree of Indian blood, or [that] membership in a tribe that will not accept members without a certain degree of consanguinity" satisfy the *Prentiss II* test. *United States v. Wood*, 109 F.4th 1253, 1257 (10th Cir. 2024) (quoting *Diaz*, 679 F.3d at 1187). An Indian tribal certificate, however, is not admissible without authentication. *Id.* (citing Fed. R. Evid. 902(1), (2)). In *Wood*, we noted two routes for authentication:

> a proponent proceeding under Rule 803(6) must demonstrate a tribal record of an "act, event[, or] condition" (1) "was made at or near the time by—or from information transmitted by—someone with knowledge"; (2) "was kept in the course [of the tribe's] regularly conducted activity"; and (3) "the making of the record was a regular practice of that activity." Fed. R. Evid. 803(6)(A)-(C). The proponent can make this showing through "the testimony of the custodian or another qualified witness, or by a certificate that complies with Rule 902(11)." Fed. R. Evid. 803(6)(D). To authenticate a tribal document under the Rule 902(11) certificate route, a proponent must give an opposing party reasonable pre-trial written notice sufficient to allow the opposing party "a fair opportunity to challenge" both the tribal record and certificate of authenticity. Fed. R. Evid. 902(11); *see also* Fed. R. Evid. 902 advisory committee's note to 2000 amendment (providing that this written notice requirement, which notice must be provided a reasonable time prior to trial, exists "to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration").

Id. at 1258 (footnote omitted).

3

[14] Harper argues on appeal that the verification letter was inadmissible hearsay and not subject to any recognized exception within the Federal Rules of Evidence. Specifically, Harper argues that the letter was offered as evidence to prove the truth of the matter asserted—his Indian status. *See* Fed. R. Evid. 801(c). "Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court." Fed. R. Evid. 802. Records of a regularly conducted activity, however, "are not excluded by the rule against hearsay." Fed. R. Evid. 803(6). Under this exception:

> the proposed document must "(1) have been prepared in the normal course of business; (2) have been made at or near the time of the events recorded; (3) be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) indicate the sources, methods and circumstances by which the record was made trustworthy."

United States v. Rogers, 556 F.3d 1130, 1136 (10th Cir. 2009) (quoting *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008)). Accordingly, the document will be admissible if:

> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

Rule 902(11) echoes this requirement for self-authenticating evidence:

> The original or a copy of a domestic record *that meets the requirements*

> *of Rule 803(6)(A)-(C)*, as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

***7** Fed. R. Evid. 902(11) (emphasis added). As we will address below, the record makes it clear that the Government did not properly establish the verification letter's foundation and trustworthiness under Rule 803(6). The Government did not address—either in its briefing or at oral argument—whether it gave Harper reasonable notice of its intent to offer the verification letter or make it available for inspection, but neither did Harper raise lack of notice as an alternative claim of error.

Harper submits that the verification letter is not an original and cannot be admitted under the business records exception because (1) it was created less than three weeks before trial, (2) was not made at or near the time of the events recorded, (3) the author of the letter (i.e., Director Terry Stephens) was not made available to testify as to the creation of the verification letter, and (4) the letter was not kept in the ordinary course of business.

"An 'original' of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it." Fed. R. Evid. 1001(d). "For electronically stored information, 'original' means any printout--or other output readable by sight-if it accurately reflects the information." *Id.* "Copies" are "produced by methods possessing an accuracy which virtually eliminates the possibility of error," and as such "are given the status of originals." Fed. R. Evid. 1001(d) advisory committee's notes to 1972 proposed rules. "Copies subsequently produced manually, whether handwritten or typed, are not within the definition." *Id.* As such, we are not persuaded that this analysis turns upon whether the verification letter was an original or a copy because it is a completely different document than the CDIB.

[15] [16] [17] [18] That being said, "[n]ot every item of business correspondence constitutes a business record." *Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1091 (10th Cir. 2001). "It is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business." *Id.* (quoting *Timberlake Const. Co. v. U.S. Fidelity & Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995)). Such documents are "dripping with motivations to misrepresent." *Id.* (quoting *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 204 n.2 (4th Cir. 2000)). "The rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records." *United States v. Gwathney*, 465 F.3d 1133, 1140 (10th Cir. 2006) (quoting *Timberlake Const. Co.*, 71 F.3d at 341). They are accurate "because the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because of the accuracy demanded in the conduct of the nation's business." *Timberlake Const. Co.*, 71 F.3d at 341 (quoting *United States v. Snyder*, 787 F.2d 1429, 1433–34 (10th Cir. 1986)). Consequently, "[i]f any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails, just as it does when the person feeding the information does not have firsthand knowledge." *United States v. McIntyre*, 997 F.2d 687, 699 (10th Cir. 1993) (quoting 2 *McCormick on Evidence*, § 290 at 274 (John William Strong, ed., 4th ed. 1992)).

***8 [19] [20] [21] [22] [23]** When introducing evidence under Rule 803(6), "courts generally assume that the business 'record' itself must be introduced, not solely testimony about the contents of a qualifying record." 30B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 6868 (2024). To be admissible, a business record must "be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant." *Rogers*, 556 F.3d at 1136 (quoting *Ary*, 518 F.3d at 786). "Evidence to prove personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602. "The foundational requirement for personal knowledge 'is not difficult to meet.' " *United States v. Duran*, 941 F.3d 435, 448 (10th Cir. 2019) (quoting *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th

Cir. 2014)). "The district court considers only whether 'a rational juror could conclude based on a witness's testimony that he or she has personal knowledge of a fact.' " *Id.* (quoting *Gutierrez de Lopez*, 761 F.3d at 1132). "A court should exclude testimony for lack of personal knowledge 'only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.' " *Walker*, 85 F.4th at 980–81 (quoting *Gutierrez de Lopez*, 761 F.3d at 1132).

Here, the Government attempted to cover its bases by including on the certificate of authenticity a declaration that the verification letter was a domestic business record and that the authentication satisfied both Rules 803(6) and 902(11). The Government counters that the district court did not abuse its discretion in admitting the verification letter because (1) the verification letter does not constitute inadmissible hearsay because it is derived from enrollment records kept in the normal and ordinary course of business per Rule 803(6), and (2) Oakes testified that (a) she had personal knowledge of the verification letter and the facts within it and (b) she personally prepared the certificate of authenticity that accompanied the verification letter.

Specifically, the Government argues, quoting *United States v. Channon*, 881 F.3d 806, 810–11 (10th Cir. 2018), that because the verification letter "reflected the information contained in the enrollment records, it qualified as an 'original' of the electronically stored information, and the fact that it was presented in a different form did not 'eliminate[ ] the business records exception.' " Resp. Br. at 33–34. According to the Government, the verification letter was created in the ordinary course of business and is an original because it "reflected the information contained in the enrollment records"; therefore, the Government argues that it did not need to provide the entirety of the Choctaw Nation's enrollment records or Harper's CDIB because it could present the information in the form of a letter. *Id.* at 33. These arguments are unavailing for several reasons.

In *Channon*, the computer-generated records were spreadsheets containing OfficeMax records maintained by a third party, reflecting information in OfficeMax's electronic database of enrollment and transaction activity for fraudulent customer rewards accounts. 881 F.3d at 809. The data in the spreadsheets was machine-generated and voluminous. *Id.* at 811. This Court determined that machine-generated non-hearsay fell outside the purview of Federal Rule of Evidence 801 because the declarant was not a human and the data in the spreadsheets accurately reflected the information in the database. *Id.* Thus, we held that the spreadsheets were considered originals under Rule 1001(d).[2] *Id.* at 810. This Court further opined that the records would be admissible under Rule 803(6) because the records at issue were prepared and transferred by OfficeMax daily and not for the purpose of litigation. *Id.* at 811.

***9** **[24]** **[25]** **[26]** Ultimately, the Government fails to persuade this Court that the Choctaw Nation of Oklahoma's tribal records were machine-generated and voluminous or that it could not present Harper's CDIB as evidence—nor can it make such an argument as prior caselaw establishes that the CDIB is self-authenticating. *See Walker*, 85 F.4th at 981–82. The Government also cannot establish that the verification letter was created in the regular course of business and not for the purpose of litigation. Indeed, the letter was issued on January 18, 2023, and the trial commenced on February 6, 2023. Nor did Oakes's testimony establish that the verification letter was a business record because her testimony was derivative of the letter itself, of which there was a preserved hearsay objection. Finally, Director Stephens was not present to testify at trial about the contents of the verification letter. At bottom, the district court abused its discretion in admitting the verification letter because the document was hearsay, not subject to any exception under the Federal Rules of Evidence, and not properly authenticated.

4

[27] **[28]** Having found the district court abused its discretion in admitting the verification letter into evidence, we next consider whether this error is harmless. "If a party objects to a district court's [evidentiary] ruling based solely on the Federal Rules of Evidence, we review for nonconstitutional harmless error." *Walker*, 85 F.4th at 982 (quoting *United States v. Ledford*, 443 F.3d 702, 707 (10th Cir. 2005)). The Government bears the burden of proving by a preponderance of the evidence that the substantial rights of the defendant were not affected. *Id.*; *see Flanagan*, 34 F.3d at 955.

[29] The Government argues that Harper cannot show that he was prejudiced by the district court's abuse of discretion because (1) Harper does not suggest that his CDIB and enrollment information in the verification letter was false or

questionable and (2) the evidence at trial included a partially completed medical history form from the Oklahoma City Indian Clinic and a page of handwritten notes referencing getting "help for glasses from the tribe." Resp. Br. at 35. The burden is upon the Government, not Harper, to prove Harper's Indian status beyond a reasonable doubt, and it is an essential element of each count of which he was convicted. *Prentiss*, 273 F.3d at 1283. The remaining evidence recovered in Harper's backpack does not satisfy *Prentiss II* because the form and notes do not establish that Harper has some Indian blood and is recognized as an Indian by a tribe or by the federal government. *Id.* at 1280. Accordingly, the Government's harmlessness arguments fail as a matter of law. Because the error applies to all four counts and negates an essential element in each count, the only proper remedy is for this Court to reverse the convictions because an element of each crime was not proved by legal and competent evidence beyond a reasonable doubt.

B

Because this Court reverses on the first issue, we decline to analyze in full the remaining arguments on appeal. However, we note two points about the other claims made by Harper in this appeal.

In his second claim, Harper argued the district court erred by excluding the expert testimony of Dr. Loftus, who was qualified to testify about the effect of trauma on the memory of eyewitnesses. More to the point, Harper argued the district court misread *Rodriguez-Felix* to convert "the narrow circumstances" it discusses that may lead to the admission of expert testimony about eyewitnesses into a multifactor test wherein the proponent must satisfy each element for the expert testimony to be admissible. 450 F.3d at 1124.

[30] In *Rodriguez-Felix*, we rejected a per se rule excluding expert testimony on the reliability of eyewitness identifications. Rather, we acknowledged the circumstances that have been "held sufficient to support the introduction of expert testimony" on eyewitness identification "have varied," and we went on to explain those circumstances. *Id.* at 1124. Without examining the district court's analysis or deciding how *Rodriguez-Felix* applies to the prospective testimony of Dr. Loftus, we simply acknowledge it as a guidepost of controlling law and note that, on its face, the circumstances it mentions are not an exhaustive list or a line of hurdles that must all be cleared for the expert's testimony to be admissible.

***10** In his fourth claim, Harper argues that the district court erred by relying upon our Pattern Criminal Jury Instruction § 2.55 for the federal offense of kidnapping. Subsequent to the trial, we decided *United States v. Murphy*, 100 F.4th 1184 (10th Cir. 2024). In *Murphy*, we held that "to sustain a kidnapping conviction under § 1201, the government must offer evidence showing that the defendant held the victim for an appreciable period of time." *Id.* at 1196. Our pattern jury instructions lag behind our decisions. We note that *Murphy*'s holding and analysis apply and should be incorporated into the jury instructions for kidnapping in cases going forward.

IV

We are mindful and sympathetic to the trauma endured by E.F. as the victim of these crimes. However, governing law dictates the decision reached in this case.

The district court erred by admitting hearsay documents into evidence to prove Harper's Indian status. This error was not harmless because, without the admission of this evidence, one jurisdictional element of each crime charged was lacking. We **REVERSE** the convictions and sentence and **REMAND** with instructions to the district court to vacate the judgment and conduct further proceedings consistent with this decision.

All Citations

--- F.4th ----, 2024 WL 4376127

Footnotes

1 For a period of time, 18 U.S.C. § 1152 did not have a descriptive title. *See* *United States v. Walker*, 85 F.4th 973, 979 n.2 (10th Cir. 2023). It is now interchangeably referred to as the General Crimes Act, *see* *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 638, 142 S.Ct. 2486, 213 L.Ed.2d 847 (2022), or the Indian Country Crimes Act, *see* *Walker*, 85 F.4th at 979 n.2.

2 Even if the verification letter was an original of electronically stored information, the Government would still be required to comply with Federal Rule of Evidence 1006 and "make the originals or duplicates available to the other party." *United States v. Channon*, 881 F.3d 806, 810 (10th Cir. 2018) (citing Fed. R. Evid. 1006). Presumably, that would still require the Government to produce the CDIB to the defendant before trial or produce the document in court.

109 F.4th 1253
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Craig Wallace WOOD, Defendant - Appellant.

No. 23-5027
|
FILED July 23, 2024

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of Oklahoma, John F. Heil, III., J., assault with dangerous weapon with intent to do bodily harm in Indian country and assault resulting in serious bodily injury in Indian country, and he appealed.

Holdings: The Court of Appeals, Murphy, Circuit Judge, held that:

Indian tribal certificate was not admissible without authentication to establish defendant's Indian status;

district court's decision to allow government to use authenticity certificate to authenticate Indian blood certificate was manifestly unreasonable; and

district court's error in admitting Indian blood certificate without proper authentication was not harmless.

Vacated and remanded.

Phillips, Circuit Judge, dissented and filed opinion.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

***1254 Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:21-CR-00484-JFH-1)**

Attorneys and Law Firms

Shira Kieval, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Denver, Colorado, for Defendant – Appellant.

Steven J. Briden, Assistant United States Attorney (Clinton J. Johnson, United States Attorney and Stacey P. Todd, Assistant United States Attorney, on the brief), Northern District of Oklahoma, Tulsa, Oklahoma, for Plaintiff – Appellee.

Before PHILLIPS, SEYMOUR, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

A grand jury indicted Craig Wood on charges of assault with a dangerous weapon with intent to do bodily harm in Indian ***1255** country, 18 U.S.C. §§ 113(a)(3), 1151, 1153, and assault resulting in serious bodily injury in Indian country, *id.* §§ 113(a)(6), 1151, 1153. [1] To obtain convictions on these charges, the government was obligated to prove Wood is an Indian. *See United States v. Prentiss*, 273 F.3d 1277, 1279-80 (10th Cir. 2001) ("*Prentiss II*") (so holding with respect to parallel provision of 18 U.S.C. § 1152); *id.* at 1280 n.2 (noting same definition of "Indian status" applies to both §§ 1152 and 1153). To do so, the government sought to introduce at trial a "Certificate of Indian Blood" (the "Indian Blood Certificate"), a purported tribal document of the Seneca-Cayuga Nation. *See* Fed. R. Evid. 803(6) (providing an exception to the rule against hearsay for records of regularly conducted activity if the proponent authenticates the record by establishing the existence of certain conditions precedent). To authenticate the Indian Blood Certificate, the government adduced a "Certificate of Authenticity" (the "Authenticity Certificate"). *See* Fed. R. Evid. 902(11) (allowing authentication of domestic records of regularly conducted activity "by a certification of the custodian or another qualified person"). [2]

1 The terms "Indian" and "Indian county" are used in portions of the United States Code applicable in this case. *See* 18 U.S.C. § 1151 (defining "Indian country"); *id.* § 1153 (providing that "[a]ny Indian who commits against the person or property of another ... [a listed offense] within the Indian country, shall be subject to the same law and penalties as all other persons committing any [listed offense] within the exclusive jurisdiction of the United States"). And, as set out below, this appeal involves the § 1153 requirement that the defendant be an "Indian." "For [these reasons] alone, we use the terms 'Indian' and 'Indian country' in this opinion." *See United States v. Wells*, 38 F.4th 1246, 1251 n.1 (10th Cir. 2022).

2 This court recognizes the procedure set out in Rule 902(11) is not the sole avenue for rendering Rule 803(6) records self-authenticating. *See*, *e.g.*, Fed. R. Evid. 902(13), (14). Importantly, the Authenticity Certificate only references Rule 902(11), the government did not undertake the steps necessary to render the Indian Blood Certificate or its component parts self-authenticating under any other provision of Rule 902, and the government does not reference any other portion of Rule 902 on appeal. Thus, the question in this appeal is limited to whether the government complied with Rule 902(11) in using the Authenticity Certificate to render the Indian Blood Certificate self-authenticating.

Wood objected to use of the Authenticity Certificate to satisfy Rule 803(6)'s conditions. He noted the government did not produce the Authenticity Certificate until after the jury was chosen and its members excused for lunch, leaving him without fair opportunity to examine and verify the document and its contents. *See* Fed. R. Evid. 902(11) (requiring written, reasonable pre-trial notice of intent to use a certificate of authenticity). Without addressing Rule 902(11)'s notice requirement, the district court overruled Wood's objection. Based exclusively on the fact the same individual signed both relevant certificates, it concluded the Authenticity Certificate authenticated the Indian Blood Certificate, allowing admission of the Indian Blood Certificate into evidence. Thereafter, a jury convicted Wood on both charges.

Wood appeals, contending the district court abused its discretion in allowing the government to use the late-produced Authenticity Certificate to authenticate the Indian Blood Certificate. This court agrees. In light of the facts and circumstances presented, the district court decision was manifestly unreasonable. Furthermore, the government has not carried its burden of demonstrating by a preponderance that the district court's evidentiary error was harmless. [3] Accordingly, exercising ***1256** jurisdiction pursuant to 28 U.S.C. § 1291, this court **remands** the matter to the district court to **vacate** Wood's convictions and to conduct any further necessary proceedings. [4]

3 Because Wood is entitled to appellate relief based solely on his claim of error relating to the admission of the Indian Blood Certificate, this court need not address the additional alleged evidentiary errors Wood raises on appeal.

4 This court's conclusion that the district court abused its discretion in admitting the Indian Blood Certificate, even when coupled with the decision that it is unnecessary to resolve whether other evidence in the record bearing on Wood's Indian status is independently sufficient to prove the status issue beyond a reasonable doubt, *see infra* n.13, does not impact the government's ability to retry Wood. Wood has not asserted on appeal a sufficiency challenge to either of his convictions. Even if he had done so, such claims would fail because the Indian Blood Certificate, standing alone, is sufficient evidence of Wood's Indian status. The Supreme Court has made clear that, in reviewing a conviction for sufficiency, a reviewing court "must consider all of the evidence admitted by the trial court, regardless of whether that evidence was admitted erroneously." *McDaniel v. Brown*, 558 U.S. 120, 131, 130 S.Ct. 665, 175 L.Ed.2d 582 (2010) (per curiam) (quotation omitted); *see also United States v. Tateo*, 377 U.S. 463, 465, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964) (holding the Double Jeopardy Clause "does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction").

II. BACKGROUND

A. Factual Background

In March 2021, Wood and his girlfriend, M.M., were staying together at the Hampton Inn in Broken Arrow, Oklahoma. In the evening, M.M. and Wood walked from the Hampton Inn to a nearby bar. M.M. left the bar early because she was not feeling well. Later that night, an intoxicated Wood returned to the room. Upon his return, Wood accused M.M. of "nodding" at other men and saying other men's names under her breath. Wood began biting and punching M.M. He grabbed a series of objects and used them to viciously strike M.M. After the assault, to keep her from seeking help, Wood told M.M. to change out of her clothes and get in bed with him. It was not until Wood fell asleep or passed out that M.M. could summon the courage to leave the hotel room and seek assistance.

After fleeing the hotel room, M.M. sought help from the front desk clerk. Recognizing M.M.'s fear and signs she had suffered a beating, the clerk contacted the police. Officers arrived shortly thereafter and spoke with M.M. An exceedingly fearful M.M. described the abuse she suffered at Wood's hands. An officer went to M.M.'s and Wood's hotel room and located Wood. The state of the room, together with the presence of objects described by M.M., corroborated M.M.'s statements to police about the abuse. Officers arrested Wood and had M.M. transported to the hospital by ambulance. Medical professionals at the hospital diagnosed M.M. with multiple fractures; widespread bruising, cuts, and abrasions; and bite marks on her arms. In the process of obtaining medical care, M.M. disclosed to medical professionals Wood's past and present abusive conduct.

A federal grand jury issued an indictment alleging, in Count One, that Wood, "an Indian, with intent to do bodily harm, assaulted M.M.... with a dangerous weapon, by repeatedly beating M.M. with a hairdryer, a hair straightener, and electric cord." *See* 18 U.S.C. §§ 113(a)(3), 1151, 1153. Count Two of the indictment further alleged Wood assaulted M.M., using the same objects, "resulting in serious bodily injuries, including, but not limited to, a closed fracture of nasal bone; acute, nondisplaced fractures of the left lateral seventh, ninth, and tenth ribs, soft tissue edema about the elbow; and bruising on the ***1257** face, back, legs, and upper extremities." *See id*. at §§ 113(a)(6), 1151, 1153.

B. Legal Background

"Criminal jurisdiction over offenses committed in 'Indian country,' 18 U.S.C. § 1151, is governed by a complex patchwork of federal, state, and tribal law." *Negonsott v. Samuels*, 507 U.S. 99, 102, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) (quotation

omitted). Generally, "offenses committed by one Indian against the person or property of another ... are subject to the jurisdiction of the concerned Indian tribe." *Id.* (quotation omitted). On the other hand, "states may exercise jurisdiction when the defendant and the victim are both non-Indians." *United States v. Prentiss*, 256 F.3d 971, 974 (10th Cir. 2001) (en banc) ("*Prentiss I*") (citing *United States v. McBratney*, 104 U.S. 621, 623-24, 26 L.Ed. 869 (1881) for the proposition that upon admission to the union, states "acquired criminal jurisdiction over non-Indians in Indian country within [their] borders"). Certain "Major Crimes"—those specifically listed in § 1153 [5] —are, however, within the exclusive jurisdiction of federal courts even when committed by an Indian in Indian county. *Negonsott*, 507 U.S. at 102-03, 113 S.Ct. 1119; *Keeble v. United States*, 412 U.S. 205, 205-06, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (holding that § 1153 "authorizes the prosecution in federal court of an Indian charged with the commission on an Indian reservation of certain specifically enumerated offenses"). [6] Thus, "identifying the statuses of the defendant and the victim is often essential in determining what court may hear the case." *Prentiss I*, 256 F.3d at 974. And, as particularly relevant to the issue Wood raises on appeal, to obtain convictions on the charges against Wood, the government is obligated to prove Wood is an Indian. 28 U.S.C. § 1153; *see Prentiss II*, 273 F.3d at 1279-80; *id.* at 1280 n.2; *see also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc); *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009). In the absence of a definition in the relevant statutes, this court applies "a two-part test for determining whether a person is an Indian for the purpose of establishing federal jurisdiction over crimes in Indian country." *Prentiss II*, 273 F.3d at 1280. To satisfy that test, the government must prove Wood "(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *Id.* (quotation omitted).

5 The following is the list of major crimes set out in § 1153: "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [crimes relating to 'sexual abuse' as defined at 18 U.S.C. §§ 2241 to 2248], incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title [stealing of property worth in excess of $1000]."

6 Another class of offenses—" 'interracial crimes,' those in which the defendant is an Indian and the victim is a non-Indian, or vice versa"—are governed by the jurisdictional provisions of § 1152. *See Prentiss II*, 273 F.3d at 1278.

One way of proving a defendant's Indian status under the *Prentiss II* test, and the method at issue in this appeal, is to adduce a tribal document containing such information. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) ("Evidence a person has an Indian tribal certificate that includes the degree of Indian blood, or membership in a tribe that will not accept members without a certain degree of consanguinity ... has been held to satisfy the *Prentiss* test."). Such documents without authentication are not, however, admissible. *See* Fed. R. Evid. 902(1), (2) (setting out classes of "Domestic Public Document" that are self-authenticating by signing and sealing or signing and certification, ***1258** which classes do not include tribal documents); *United States v. Walker*, 85 F.4th 973, 982 (10th Cir. 2023) (so holding); *United States v. Alvirez*, 831 F.3d 1115, 1122-23 (9th Cir. 2016) (same). Instead, to authenticate such a document, a proponent proceeding under Rule 803(6) must demonstrate a tribal record of an "act, event[, or] condition" (1) "was made at or near the time by—or from information transmitted by—someone with knowledge"; (2) "was kept in the course [of the tribe's] regularly conducted activity"; and (3) "the making of the record was a regular practice of that activity." Fed. R. Evid. 803(6)(A)-(C). The proponent can make this showing through "the testimony of the custodian or another qualified witness, or by a certificate that complies with Rule 902(11)." Fed. R. Evid. 803(6)(D). [7] To authenticate a tribal document under the Rule 902(11) certificate route, a proponent must give an opposing party reasonable pre-trial written notice sufficient to allow the opposing party "a fair opportunity to challenge" both the tribal record and certificate of authenticity. Fed. R. Evid. 902(11); *see also* Fed. R. Evid. 902 advisory committee's note to 2000 amendment (providing that this written notice requirement, which notice must be provided a reasonable time prior to trial, exists "to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration").

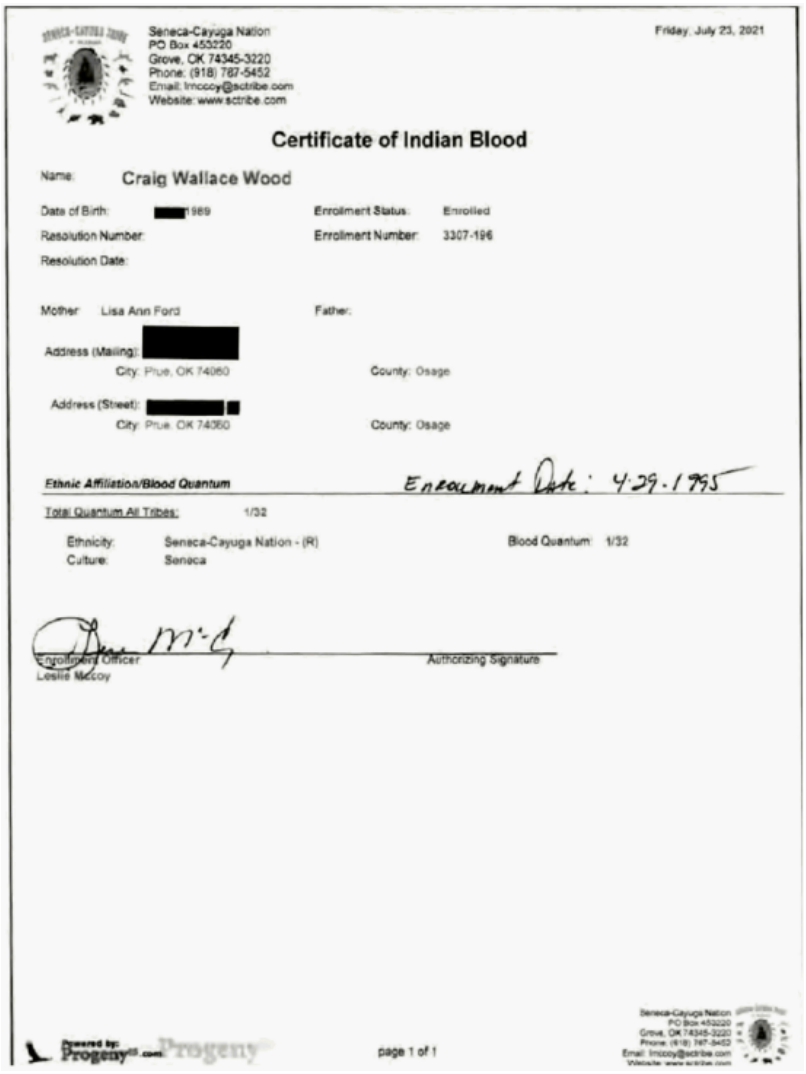
7 Historically, authentication of a record of a regularly conducted activity required testimony from a live foundation witness. 2 McCormick On Evid. § 229.1 (8th ed., updated July 2022). In 2000, however, the Federal Rules of Evidence

were amended to allow authentication to take place "under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses." Fed. R. Evid. 803 advisory committee's note to 2000 amendment. Paragraph (11) was added to Rule 902, creating a process for using a written certificate, disclosed pretrial, to demonstrate a document complies with Rule 803(6)(A)-(C) and is, therefore, admissible as a domestic record of a regularly conducted activity. Fed. R. Evid. 902 advisory committee's note to 2000 amendment.

C. Procedural History

The government disclosed the Indian Blood Certificate, a document of the Seneca-Cayuga Nation, during discovery:

***1259**



Seneca-Cayuga Nation
PO Box 453220
Grove, OK 74345-3220
Phone: (918) 787-5452
Email: lmccoy@sctribe.com
Website: www.sctribe.com

Friday, July 23, 2021

Certificate of Indian Blood

Name: Craig Wallace Wood

Date of Birth: [redacted]989 Enrollment Status: Enrolled

Resolution Number: Enrollment Number: 3307-196

Resolution Date:

Mother: Lisa Ann Ford Father:

Address (Mailing): [redacted]
City: Pryor, OK 74060 County: Osage

Address (Street): [redacted]
City: Pryor, OK 74060 County: Osage

Ethnic Affiliation/Blood Quantum Enrollment Date: 4-29-1995

Total Quantum All Tribes: 1/32

Ethnicity: Seneca-Cayuga Nation - (R) Blood Quantum: 1/32
Culture: Seneca

Enrollment Officer
Leslie McCoy

Authorizing Signature

Powered by: Progeny

page 1 of 1

Although the government disclosed this document pretrial, it did not disclose how it intended to establish the Indian Blood Certificate's admissibility. In its December 10, 2021, trial brief, which was filed ten days before the trial's scheduled start date, the government stated it had contacted Wood regarding the possibility he might stipulate to his Indian status. Wood declined the government's request to so stipulate on December 15. [8] Nevertheless, ***1260** the government failed to include any witness to authenticate the Indian Blood Certificate on the "final" pretrial witness list it filed on December 17.

8 Wood's declination of the request to stipulate to his Indian status was discussed at a hearing on December 17. The government noted that absent Wood's stipulation it would be necessary to call additional foundational witnesses, prolonging the trial. The district court stated the issue of stipulations was "something that I can't and don't need to be involved in," and noted it would accommodate as many foundational witnesses as the government needed to call. The government committed to filing a revised witness list by 5:00 p.m. that day, which it failed to do.

On the morning of trial, albeit untimely, the government announced it would use a live, unnamed, witness to authenticate the Indian Blood Certificate. Although Wood objected to the belated addition of a new witness, the district court overruled the objection and voir dire commenced. Thereafter, the district court recessed the proceedings to allow the government "to get the name" of the authentication witness so the district court could inquire whether any venire members knew that person. After the recess, the government disclosed three potential names for the witness and voir dire continued.

After the jury was selected and its members excused for lunch, the government stated it just received the Authenticity Certificate and was "now tendering a copy to defense counsel." The Authenticity Certificate is set out below:

***1261**

CERTIFICATE OF AUTHENTICITY
Pursuant to 28 U.S.C. § 1746
This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902(11).

I, Leslie McCoy, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

1) I am a United States citizen and I am over eighteen years of age.
2) I am employed by Seneca-Cayuga Nation.
3) My official title is Enrollment Officer.
4) I am a custodian of records for Seneca-Cayuga Nation.
5) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of Seneca-Cayuga Nation, and I am a custodian of the attached records.
6) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
7) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
8) Such records were kept in the course of a regularly conducted business activity of Seneca-Cayuga Nation.
9) Such records were made by Seneca-Cayuga Nation as a regular business practice.

The records are (include names, account numbers and/or phone numbers):

I declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct. I further state that this certification is intended to satisfy Rules 803(6) and 902(11), Federal Rules of Evidence.

12-2021
Date

Signature

The government averred as follows:

> In the eyes of the government this is a self-authenticating document attached to the Certificate of Authenticity, a certificate of Indian blood.
>
> Based on this new document, Judge, we believe that the defendant's Indian status would be satisfied by the self-authenticating document and no witness would be needed for trial, for in-person testimony ....

The district court gave Wood until the end of lunch to "look over" the Authenticity Certificate and "prepare[ ] to respond." After lunch, Wood formally objected to the use of the Authenticity Certificate to authenticate the Indian Blood Certificate. Wood noted he was not given the reasonable written notice required by Rule 902(11). Instead, Wood noted, he was "handed" the Authenticity Certificate only after the jury was empaneled, leaving him without "a fair opportunity ... to really look at it and ... be able to challenge it." Nor, Wood argued, was it clear the person who signed the Authenticity Certificate "ha[d] actually seen what [the signer was] authenticating." In that regard, Wood noted ***1262** the Indian Blood Certificate was dated July 23, 2021, while the Authenticity Certificate, which was handed to defense counsel as a standalone document during trial, was simply dated "12-20-21." Given that the government was scrambling to come up with an authentication witness on the first day of trial, Wood asserted this date discrepancy created real questions about the validity of the Authenticity Certificate.

Independent of the government's failure to follow the notice dictates of Rule 902(11), Wood claimed the newly disclosed Authenticity Certificate failed to address discrepancies in the Indian Blood Certificate. For example, Wood contended the unexplained presence of a "handwritten enrollment date" on the otherwise typewritten Indian Blood Certificate raised the following question: was the enrollment date part of an authentic record or was it, instead, added later to help the government prove that Wood was enrolled at the time the offense was committed? [9] Additionally, the Indian Blood Certificate was dated July 23, 2021, some four months after the crimes charged, raising questions about Rule 803(6)(A)'s close-in-time requirement. [10]

9 *See* Fed. R. Civ. P. 803(a)(6)(E) (providing that the exception set out therein does not apply if the opponent shows "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness"); Fed. R. Evid. 803 advisory committee's note to 2014 amendment ("The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that the record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.").

10 *See* Fed. R. Evid. 803(6)(A) (excepting from the rule against hearsay a record of "an act, event, condition, opinion, or diagnosis" if, inter alia, "the record was made at or near the time" of the act, event, condition, opinion, or diagnosis). On appeal, Wood does not affirmatively allege the Indian Blood Certificate fails to comply with the requirements of Rule 803(6)(A). He simply notes there was reason to doubt its compliance and the district court's admission of the late-filed Authenticity Certificate prevented him from exploring the issue, let alone making a record as to compliance questions. For this reason, it is unnecessary to explore the exact nature of the Indian Blood Certificate—whether, for example, it and/or its component parts are actually copies of tangible records produced by the Seneca-Cayuga Nation at, or near, the time of Wood's enrollment or, instead, some other kind of document created at the request of the government from digital and/or non-digital tribal records. *See supra* n.2. It is likewise unnecessary to explore whether other authentication avenues set out in Rule 911 are more proper avenues for admitting a document such as the Indian Blood Certificate. *Id.*

The district court overruled Wood's objection. It ruled the Authenticity Certificate authenticated the previously disclosed Indian Blood Certificate and preadmitted the Indian Blood Certificate. It did not mention Rule 902(11)'s notice requirement or address most of the concerns set out in Wood's objection. Instead, it simply stated as follows:

> The [Authenticity Certificate] reflects by declaration that Leslie McCoy is familiar with the document that it's attached. She's also not only signed the [Authenticity Certificate], but she signed the [Indian Blood Certificate], so the court is satisfied that she has seen the document to which she was declaring that she had seen and was part of the record. She indicates that she is the custodian of records, she is the enrollment officer, and she's employed by the Seneca-Cayuga Nation. I think it satisfies Rule 803 and Rule 902, and the court will find it's admissible.

Early on the second day of trial, the government published the Indian Blood Certificate ***1263** to the jury, asked a prosecution witness about its contents, and referenced the document during closing arguments. The jury convicted Wood on both counts set out in the indictment.

III. ANALYSIS

A. Error

Wood objected to the use of the Authenticity Certificate to authenticate the Indian Blood Certificate, preserving the issue for appellate review. This court "review[s] legal interpretations of the Federal Rules of Evidence de novo"; evidentiary decisions are reviewed for abuse of discretion. *United States v. Silva*, 889 F.3d 704, 709 (10th Cir. 2018). As particularly relevant here, this court will disturb a trial court's decision regarding the appropriateness of using a 902(11) certificate to authenticate Rule 803(6) records only if that decision amounts to an abuse of discretion. *See Stenson v. Edmonds*, 86 F.4th 870, 879-80 (10th Cir. 2023). "A district court abuses its discretion when it renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Silva*, 889 F.3d at 709 (quotation omitted).

Considering all the facts and circumstances in this case, we conclude the district court's decision to allow the government to use the belated [11] Authenticity Certificate to authenticate the Indian Blood Certificate was manifestly unreasonable. In so concluding we note the district court essentially ignored Rule 902(11)'s notice requirement, rendering a nullity one of the critical elements of the rule. As noted above, *supra* Section II.B., the kinds of records subject to Rule 803(6) were, prior to 2000, generally admissible only upon the testimony of a live foundation witness. To save the time and expense of producing such witnesses, the rules committee innovated by creating the certificate system set out in Rule 902(11). To ensure this resource-saving endeavor did not serve to unfairly disadvantage litigation opponents, however, the rules committee required the introducing party provide timely, written pretrial notice and access to such certificates. Thus, opponents could do at pre-trial what they would have previously done by cross-examining foundation witnesses during trial. By essentially treating Rule 902(11)'s notice requirement as a nullity, and by doing so in a case where Wood raised nonfrivolous questions as to whether the Indian Blood Certificate was a valid Rule 803(6) document, the district court erred as a matter of law. [12]

11 The parties argue at length as to whether the timing of the government's disclosure of the Authenticity Certificate—after the jury was seated but before it was sworn—amounts to pretrial notice. This court need not resolve this difficult question. The government's actions here, whether technically pretrial or not, do not amount to written notice provided a reasonable time before trial as required by Rule 902(11).

12 In his appellate briefing, Wood asks this court to treat Rule 902(11)'s notice requirement as hard-and-fast, requiring exclusion of any Rule 803 records supported solely by an untimely Rule 902(11) certificate. We decline to read Rule 902(11) as creating such a rule. There may be circumstances in which exclusion based on a notice violation would not

be appropriate. For instance, a notice violation may be so entirely technical and non-prejudicial that a trial judge could reasonably allow the untimely certificate to authenticate Rule 803(6) documents. *See United States v. Komasa*, 767 F.3d 151, 155-56 (2d Cir. 2014). Alternatively, the government and district court may take all the necessary steps, in the face of a timeliness objection, to make sure an opponent is not prejudiced by a late-filed Rule 902(11) notice. *See United States v. Daniels*, 723 F.3d 562, 579-81 (5th Cir. 2013). Thus, while this court is comfortable concluding a district court abuses its discretion when it fails to even consider the implications of an untimely Rule 902(11) certificate, we see no indication in the Rule's text, its history, or in relevant precedent for concluding district courts have no discretion to tailor appropriate remedies when faced with such untimely certificates. It is worth noting, however, "that parties fail to comply with ... Rule 902(11)'s written notice requirements at their own risk." *Komasa*, 767 F.3d at 156; *see also Stenson*, 86 F.4th at 880 ("By providing the [902(11)] certification just prior to trial, Plaintiff deprived Defendants of their opportunity to meaningfully inspect and challenge it. And, where the proponent of evidence does not provide an opportunity to inspect the certification, the district court may exclude the records." (footnote omitted)).

***1264** In response, the government offers unconvincing arguments. Notably, it does not ground any argument in the text, purpose, or history of the Rule. It argues Wood could not have been surprised it pursued authentication by certificate, since that was one of two available avenues for authentication of the tribal records. This argument belies the government's own declaration, as late as the morning trial proceedings began, that it would use a live witness to authenticate the Indian Blood Certificate. It is also inconsistent with discussions the parties engaged in with the district court at the pre-trial hearing. *See supra* n.8. In any event, the assumption, absent timely notice to the contrary, is that Rule 803(6) records will be admitted by the testimony of a live foundation witness. *See supra* Section II.B. It is upon the filing of a timely Rule 902(11) certificate that an opponent becomes aware it must examine pretrial whether a proper foundation exists to treat records as admissible under Rule 803. The government does not identify anything in the record indicating Wood's counsel was unprepared to explore the admissibility of the Indian Blood Certificate through cross-examination at trial, consistent with the government's declaration the morning trial proceedings began that it would rely on a live foundation witness. As Wood correctly notes in his appellate briefing, a live foundation witness from the Seneca-Cayuga Nation could have provided significantly more information than that set out in the Authenticity Certificate. A live witness might have explained the exact nature of the tribal record, digital or analog; when and how it was created given the three different dates on its face; and why crucial information was handwritten onto an otherwise-typewritten document. Unfortunately, Wood could not explore these questions once the government, with the district court's imprimatur, reversed its decision to rely on a live witness in favor of the late-filed Authenticity Certificate.

Nor is the government correct in asserting the district court acted reasonably in allowing the untimely Authenticity Certificate to authenticate the Indian Blood Certificate because Wood failed to request a continuance to (1) question the signator McCoy outside of court or (2) call McCoy as a witness. "The notice requirements of Rule 902(11) are in place precisely to ensure that evidence to be accompanied by an affidavit can be vetted for objection or impeachment in advance." *United States v. Brown*, 553 F.3d 768, 793 (5th Cir. 2008). The government offers no support for the notion the burden fell on Wood to remedy any prejudice flowing to him from the government's own failure to follow the pre-trial notice dictates of Rule 902(11). Indeed, the extant case law suggests just the opposite. *Daniels*, 723 F.3d at 580 ("[T]he district court suggested two possible solutions to the lack of timely written notice ... : first, [it] stated that it could grant *instanter* subpoenas to have the record custodians come and testify and could attach an order to the subpoenas if necessary; second, [it] stated that it could grant a full day's continuance to allow defense counsel to evaluate the attestations and obtain witnesses."); *id.* ("After further discussion, the Government proposed that it would restructure its case so as not to use ***1265** the attestations until three days after the defense raised its objection ...."). [13]

13 The dissent strains to justify the government's procedural failures in this case. In the process, it adopts the government's efforts to shift the burden to Wood to cure his own prejudice. The government unapologetically failed to notify Wood before trial that it would utilize Rule 902(11) to lay a foundation for the Indian Blood Certificate. To the contrary, it stated in open court—at a Friday hearing two days before the trial was to start on a Monday morning—that it would use a live foundation witness and would disclose that witness before the end of the day. It failed to do so. During

> voir dire, it provided the district court with names of three potential foundation witness. Then, a mere one hour before opening statements it changed tack and submitted the Authenticity Certificate in an attempt to lay the foundation for the Indian Blood Certificate. Consequently, Wood was never allowed a meaningful opportunity to address the multiple discrepancies in the Indian Blood Certificate or to create a fully developed record. Rather than address these government derelictions, the dissent suggests Wood is at fault for not correcting the government failures. The approach embraced by the dissent stands on its head the government's burden to prove Wood's Indian status by complying with the provisions of Rules 803(6) and 901(11). By upending the fair and balanced process set out in Rule 901(11), the dissent rewrites the rule in a way that is intended to obligate every non-proponent to assume in every case that Rule 803(6) materials will be admitted via Rule 902(11). Rule 902(11), however, is predicated on the historically accepted notion that, absent special notice on the part of the proponent, the non-proponent will be entitled to cross-examine at trial a live witness whose testimony is intended to establish foundation for 803(6) materials. By accepting the government's argument and inverting this carefully tailored scheme, the dissent places untoward power in the hands of federal prosecutors.

There is simply no doubt the government provided Wood with untimely notice of the Authenticity Certificate by presenting that certificate after the jury was already seated. Upon Wood's objection, the government did not state cause, let alone good cause, for its failure to comply with the dictates of Rule 902(11). Nor did the government offer any possible methods of remedying prejudice to Wood flowing from the late notice. Wood's objection raised nonfrivolous issues as to whether the Indian Blood Certificate complied with Rule 803(6)(A)-(C). In denying Wood's objection, the district court failed to consider the issue of timeliness. Under these circumstances, the district court's decision to disregard the issue of timeliness was manifestly unreasonable. Because the district court erred in allowing the government to use the untimely Authenticity Certificate to authenticate the Indian Blood Certificate, it was correspondingly error for the district court to admit into evidence the Indian Blood Certificate.

B. Harmlessness

"If a party objects to a district court's evidentiary ruling based solely on the Federal Rules of Evidence, we review for [non-constitutional] harmless error." *Walker*, 85 F.4th at 982 (quotation and alterations omitted). "In non-constitutional harmless error cases, the government bears the burden of demonstrating, by a preponderance of the evidence, that the substantial rights of the defendant were not affected." *Id.* (quotation omitted). This standard, derived from the Supreme Court's decision in *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), asks whether the verdict was "substantially swayed by the error .... The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." If the answer to that question is yes, or "if one is left in grave doubt," this court must set aside the conviction. *Id.* The question then is not whether, setting aside the improperly admitted evidence, the remaining ***1266** evidence was sufficient to convince a reasonable jury to convict. *Id.*; *United States v. Lane*, 474 U.S. 438, 449, 450 n.13, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986). Rather, the "*Kotteakos* standard requires a reviewing court to examine the entire record, focusing particularly on the erroneously admitted statements." *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995). Having done so, this court must determine whether the improperly admitted evidence "substantially influenced the outcome of the trial, or whether we are left in grave doubt as to whether it had such an effect." *Id.* (quotations omitted).

Despite this somewhat demanding standard, the entirety of the government's argument as to harmlessness is the following: "Even if it was error to allow the [Authenticity Certificate] to lay the foundation for Wood's tribal status record, any error was harmless because M.M. also testified, based on their long relationship, that Wood is an Indian." Gov't Response Br. at 49. This argument suffers from the very defect identified above: collapsing the concepts of evidentiary sufficiency and non-constitutional harmlessness without any effort to explore the significance of the erroneously omitted Indian Blood Certificate on the jurisdictional requirement of Indian blood quantum and membership in a federally recognized tribe. Accordingly, the government's harmlessness argument fails as a matter of law and operates as a waiver of the required *Kotteakos* analysis.

In any event, even if this court were to disregard the government's wholesale waiver of the required analysis and undertake the required *Kotteakos* inquiry sua sponte, *see United States v. Samaniego*, 187 F.3d 1222, 1224-26 (10th Cir. 1999), we would still conclude the admission of the Indian Blood Certificate was not harmless. The government's assessment of M.M.'s testimony is not quite accurate. As set out above, to prove Wood's status as an Indian, the government had to present evidence demonstrating Wood "(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government." *Prentiss II*, 273 F.3d at 1280 (quotation omitted); *see generally*, *supra*, Section II.B. (describing the definition of the term "Indian" as used in the Major Crimes Act). The government overreaches in asserting M.M. "based" her testimony as to Wood's status on their "long relationship." At the beginning of its direct examination of M.M., the government asked her how she knew Wood. M.M. said he was her "boyfriend." Next, the government asked M.M. how long Wood had been her boyfriend. She responded, "Almost five years." The government then asked M.M. to identify Wood. After she did so, the government engaged in the following colloquy with M.M.:

Q. M.M., do you know if Mr. Wood is Native American?

A. Yes

Q. Do you know what tribe?

A. Quapaw and Seneca.

Q. Is that Seneca-Cayuga?

A. Yes.

Thus, in contrast to the government's assertion, the government did not ask and M.M. did not provide any basis, specifically including her long association with Wood, for M.M.'s knowledge Wood was a "Native American" of the Seneca-Cayuga "tribe." Although the government could have asked the jury during closing arguments to draw such an inference, it completely failed to do so. Indeed, the government's extremely limited examination gave the jury precious little basis to evaluate the bases of M.M.'s knowledge. It did not for instance, ask M.M. whether Wood (1) was an enrolled member of the Seneca-Cayuga Nation; (2) had received benefits from the federal government or from the tribe that are only available to members of federally ***1267** recognized tribes; or (3) was socially accepted as someone affiliated with a recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe. R. Vol. 1 at 143 (jury instruction defining term Indian); *cf.*, *e.g.*, *Zepeda*, 792 F.3d at 1114. Thus, although Wood did not object to the foundation for M.M.'s exceedingly limited testimony, the absence of such information surely diminishes the weight of that limited testimony.

Additional qualitative differences in the weightiness of the Indian Blood Certificate and M.M.'s testimony as to the relevant *Prentiss II* inquiries leave this court in grave doubt as to whether the improperly admitted Indian Blood Certificate substantially influenced the jury's verdict. [14] The Indian Blood Certificate was the only direct evidence of Wood's alleged blood quantum and official recognition by the Seneca-Cayuga Nation. While M.M. responded "yes" to the question whether Wood was "Native American," a term otherwise undefined in the trial record, the Indian Blood Certificate specifically states Wood is 1/32 "ethnic" Seneca-Cayuga by blood. *See Prentiss II*, 273 F.3d at 1280-81 (holding that, pursuant to binding Supreme Court authority, "the fact that the defendant had been recognized as an Indian by a tribe was not sufficient to prove his Indian status; some evidence of Indian blood was also necessary"). Furthermore, although M.M. identified Wood as Quapaw and Seneca-Cayuga, she did not testify Wood was actually a recognized member of those tribes. The controlling question under *Prentiss II* is whether Wood is recognized as an Indian by a tribe or the federal government, not whether his girlfriend says he is "Native American."

14 In undertaking this *Kotteakos* harmlessness analysis, this court need not, and does not, resolve whether M.M.'s meager testimony, in response to just two questions, standing alone, would have been sufficient to prove Wood had some quantum of Indian blood and was an enrolled member of the Seneca-Cayuga Nation.

Ultimately, having reviewed the entire record with a focus on the improperly admitted Indian Blood Certificate, this court is left in grave doubt as to whether the jury would have found Wood to be an Indian, in accord with the relevant jury instruction and the test set out in *Prentiss II*, absent admission of the Indian Blood Certificate. [15] The Indian Blood Certificate definitively resolved the question of Wood's Indian status. It set out Wood's specific blood quantum and stated Wood was an enrolled member of the Seneca-Cayuga Nation. *See* R. Vol. I at 143. M.M.'s testimony, assuming it was sufficient, required the jury to make meaningful inferences—that being "Native American" means Wood has "some Indian blood" and that being of the Quapaw and Seneca and Seneca-Cayuga tribe means Wood is an enrolled member of the Seneca-Cayuga Nation.

15 The relevant jury instruction, consistent with this court's holding in *Prentiss II*, provided that to "determine [Wood] is Indian," the jury "must find" Wood has "some Indian blood" and "was, at the time of the offense, recognized as an Indian by a federally recognized tribe or by the federal government." R. Vol. I at 143. The instruction further set out a list of considerations the jury could consider in determining whether the government had satisfied the second part of the *Prentiss II* test. *See supra* at 1265-66. The instruction provided that the first consideration on that list, enrollment in a federally recognized tribe, is dispositive if satisfied and, importantly, that the "Seneca-Cayuga Nation is a federally recognized tribe." R. Vol. I at 143.

In concluding the admission of the Indian Blood Certificate was not harmless, this court notes specifically the Ninth Circuit's decision in *United States v. Alvirez*, 831 F.3d 1115, 1120-24 (9th Cir. 2016). Like the instant case, *Alvirez* involves an assault-resulting-in-serious-bodily ***1268** injury prosecution under 18 U.S.C. §§ 113(a)(6), 1153. *Alvirez* concluded an error in admitting an improperly authenticated tribal Indian-status record was not harmless. *Id*. at 1124. It reached this conclusion even though a government agent testified the defendant lived "on the Hualapai reservation" and the victim testified the defendant was "a member of the Hualapai reservation." *Id.* at 1122. According to *Alvirez*, the limited nature of the agent's testimony made it "questionable whether the government would have established [his] Indian status to the satisfaction of the jury" without the tribal record. *Id.* at 1124. Thus, faced with the same kind of qualitative differences in the weightiness of the improperly and properly admitted evidence as to a defendant's Indian status, the Ninth Circuit concluded "it was more likely than not that the [improper] admission of the Certificate materially affected the verdict. *Id.* Similarly, the error here was not harmless even though M.M. testified Wood was Seneca-Cayuga.

IV. CONCLUSION

For those reasons set out above, the judgment of the United States District Court for the Northern District of Oklahoma is hereby **REVERSED**. The matter is **REMANDED** to the district court to **VACATE** Wood's convictions and to conduct any further necessary proceedings.

PHILLIPS, J. dissenting.

I would affirm Wood's conviction and hold that the district court did not abuse its discretion in admitting the Indian Blood Certificate as a self-authenticated business record. [1]

[1] I see no plain error on Wood's other issues raised on appeal and do not address them individually, because the majority reverses on the Rule 902(11) issue instead.

Several weeks before trial, in its initial discovery, the government provided Wood a copy of the Indian Blood Certificate. The majority fails to consider and account for Wood's having a full and "fair opportunity to challenge" the Indian Blood Certificate. *See* Fed. R. Evid. 902(11). Indeed, Wood *did* challenge the Indian Blood Certificate on hearsay grounds in the district court.

The morning of trial, the government made available for Wood's inspection a second document, the Certificate of Authenticity. Wood challenges the timeliness of this disclosure. Wood did not (and does not) challenge the Certificate of Authenticity apart from his challenges to the written contents of the Indian Blood Certificate. So even if the government had also produced the Certificate of Authenticity several weeks before trial, Wood would have been in the same position. In my view, the majority errs by lumping the two separate certificates into a solitary notice category and not analyzing them separately. That makes a difference.

We should affirm under the deferential standard governing evidentiary rulings, which becomes even more deferential for hearsay rulings. *See United States v. Merritt*, 961 F.3d 1105, 1111 (10th Cir. 2020) ("A district court has broad discretion to determine the admissibility of evidence, and we review the district court's ruling for abuse of discretion.") (internal citations omitted); *United States v. Rosario Fuentez*, 231 F.3d 700, 708 (10th Cir. 2000) (noting that on hearsay rulings, the district court is granted even "greater deference"). For reference purposes, I begin by quoting the two evidentiary rules at issue in making this case.

I. Federal Rules of Evidence 803(6) and 902(11)

Working together, Rules 803(6) and 902(11) set the conditions for self-authentication ***1269** of business records. For ease of reference, I quote the pertinent portions of the two rules below.

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

....

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Rule 902. Evidence That Is Self-Authenticating

> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> ....
>
> **(11) Certified Domestic Records of a Regularly Conducted Activity.** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

I begin with Rule 902(11). The Certificate of Authenticity checks all the boxes of Rule 902(11)'s first sentence: The Indian Blood Certificate is a copy of a domestic record; Leslie McCoy identified herself as the records custodian and enrollment officer for the Seneca-Cayuga Nation; Ms. McCoy certified that the Indian Blood Certificate met the requirements of Rule 803(6)(A)–(C), tracking the language from those subsections; and in accordance with the governing statute, 18 U.S.C. § 1746, Ms. McCoy certified, verified, and stated under the penalty of perjury that the contents of the Certificate of Authenticity were true.

II. The Majority's Disposition

The majority opinion reverses Wood's conviction based on Rule 902(11)'s second sentence. It correctly recites that the government, as the proponent of the Indian Blood Certificate, "must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them." Fed. R. Evid. 902(11); *see* Maj. Op. at 1257-58. Then it rules that the government untimely made the Certificate of Authenticity available for Wood's inspection by its delaying ***1270** doing so until after jury selection. *Id.* at 1259-60. But the majority stops there, too soon. It fails to analyze whether the government's alleged untimeliness in making the certification available for inspection deprived Wood of a "fair opportunity to challenge" either the Certificate of Authenticity or the Indian Blood Certificate. *See* Fed. R. Evid. 902(11).

III. The Dissent's Disposition

Did the alleged untimeliness of the Certificate of Authenticity deprive Woods of the fair opportunity to challenge the Indian Blood Certificate? No. Wood's Rule 803(6)(E) challenges to the Indian Blood Certificate came from its written contents, not from anything in the Certificate of Authenticity, and, indeed, the Certificate of Authenticity contained nothing by which to challenge the Indian Blood Certificate. And we must remember that Wood had the Indian Blood Certificate for weeks before the start of the trial. So in attacking the Indian Blood Certificate, it would not have mattered if the government had produced the Certificate of Authenticity weeks earlier, as it had the Indian Blood Certificate. The Indian Blood Certificate supplied all of Wood's cannon fodder for his Rule 803(6)(E) challenge.

I acknowledge that sometimes it will matter if a business-records proponent is untimely in making available for inspection the certificate of authenticity. For instance, an opponent might challenge admission of the underlying business record based on the legitimacy or availability of the custodian of records or on the validity of the custodian's signature. But Wood makes no such challenges. Nothing forestalled Wood from having a fair opportunity to challenge the certificate this way, for instance by calling a Nation representative on the telephone to verify information, hiring a handwriting expert, or subpoenaing witnesses. Nor does he claim so.

The majority opinion faults the district court for "essentially ignor[ing]" the Rule 902(11) notice requirements, especially, it says, because Wood has stated "nonfrivolous issues" about whether the Indian Blood Certificate satisfies the requirements of Rule 803(6)(A)–(C). Maj. Op. at 1263, 1265. Though I question whether Wood's actual objection went beyond Rule 803(E), which requires him to show that "the sources of information or the method or circumstances of preparation indicate a lack of trustworthiness," I'll assume for argument's sake that the majority is correct about the scope of his objection. Even then, I see no merit to any of Wood's actual objections, let alone anything egregious enough to qualify as an abuse of discretion on a hearsay ruling.

In assessing Wood's arguments, we should try to put ourselves in the district court's shoes. In deciding whether the Certificate of Authenticity self-authenticated the Indian Blood Certificate, the district court gave defense counsel a full opportunity to state objections. To be precise about those objections, we must plow through a lengthy block quote:

> THE COURT: Do you have an objection to the document?
>
> [DEFENSE COUNSEL]: Yes, Your Honor, I do have an objection to the Certificate of Authenticity. Mainly, in 803 – Federal Rule of Evidence 803(6)(E), it states that all five of those factors (A), (B), (C), (D), and (E) must be included, and (E) is "the opponent does not show the source of information or the method or circumstances of preparation to indicate a lack of trustworthiness."
>
> The document here is not notarized in any way. It was signed today, but the document that's trying to get entered into evidence is from July of this year, July 23 of this year. I think that's one of ***1271** the issues about being in time and close to when it's being authenticated.
>
> Also, on the main document itself, there's just a handwritten note for the enrollment date. And that raises an eyebrow for me as far as authenticity, because for the tribal status he needs to be enrolled at the time the offense was committed, and just having a handwritten enrollment date, I don't think that is authentic. I don't think that's what the Certificate of Authenticity would show.
>
> Also, I don't know that he's actually seen this document in the last seven months, the person – or five months, the person that's signed this. Not that he couldn't go back and look at the record on his own computer, but this particular document, I don't know. I really question that.
>
> And then next, it says it's authentic under 902(11), Federal Rule of Evidence 902(11). Your Honor, part of that, the second half of that one says that, Before trial, the proponent must give an adverse party reasonable notice to offer the record, and must make the record and certification available for inspection.
>
> This was handed to me after the jury was impaneled, which I would believe that would mean the trial had already started and there wouldn't be a fair opportunity for me to really look at it and raise any – be able to challenge it. Thank you.
>
> THE COURT: All right. [AUSA], do you wish to respond, sir?
>
> [AUSA]: Thank you, Your Honor. Your Honor, we're asking this court to move – to enter Exhibit 35 under a self – as this is a self-authenticating document.
>
> Your Honor, just to lay some procedural posture for the court. The Certificate of Indian Blood was filed as part of the government's original discovery packet to defense counsel, so he's been aware of that since the inception of this case.
>
> In regards to the other dates that matter, we were made aware on Saturday that the defense was going to object –
>
> THE COURT: You can go to the podium if you want, [AUSA], that might be easier.

[AUSA]: We were made aware over the weekend that the defense was not going to be stipulating to the defendant's Indian status despite our requested emails on, I believe it was December 13 and December 14 or 15th thereafter. So, Your Honor, we believe that this should be entered in as an exhibit as a self-authenticating document, specifically the Certificate of Indian Blood would be the exhibit itself.

The exhibit within the binder in the packet is redacted to exclude the addresses, but the document itself is the same. The Certificate of Authenticity is signed by Leslie McCoy. The Certificate of Indian Blood is signed by Leslie McCoy, and the remaining fall under 902(11), Your Honor.

If the court has any further inquiry, I'll be happy to answer.

THE COURT: [Defense Counsel], the Certificate of Indian Blood document indicates it was signed by Leslie McCoy. On the front page of the Certificate of Authenticity, looks like it was signed by Leslie McCoy today. Do you see that declaration?

[DEFENSE COUNSEL]: Yes, I do, Your Honor.

THE COURT: So what was your concern about whether the person had seen the document or not?

[DEFENSE COUNSEL]: I was concerned whether the person, Leslie McCoy, had seen this particular document today when they signed that letter of authenticity, because the document, the date on it says – of the Certificate of Indian Blood – says Friday July 23, ***1272** 2021. Now, as we know from a few hours ago, there was not a witness lined up. And so there was a rush to get a witness here. There – so being in that rush, I don't know if McCoy has actually seen what he's authenticating.

I did receive a couple emails from the government beginning I believe was December 8 on whether or not we were going to stipulate to the tribal status and the blood quantum. And at one point – I don't remember the date of that email, but it was a few days later, I said I don't believe that we are. And I think there's been plenty of time to get this into evidence, to get the correct Certificate of Authenticity or have a witness here.

THE COURT: All right. Well, the document – the Certificate of Authenticity reflects by declaration that Leslie McCoy is familiar with the document that it's attached. She's also not only signed the Certificate of Authenticity, but she signed the Certificate of Indian Blood, so the court is satisfied that she has seen the document to which she was declaring that she had seen and was part of the record. She indicates that she is the custodian of records, she is the enrollment officer, and she's employed by the Seneca-Cayuga Nation. I think that satisfies Rule 803 and Rule 902, and the court will find that it's admissible.

Anything else?

[DEFENSE COUNSEL]: No, Your Honor.

App. vol. II, at 15–19.

I address Wood's arguments in the order he presented them to the district court—first, the Rule 803(6) arguments; second, the Rule 902(11) notice arguments.

A. Wood's Hearsay Arguments

Examining the district court's rulings on Wood's hearsay-related arguments, I see no error or abuse of discretion.

As seen, Wood's counsel began his objection by relying on Rule 803(E), which he acknowledged puts a burden on him to "show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." In doing so, he pointed to what he saw as irregularities causing him to be suspicious about the trustworthiness of the Indian Blood Certificate.

First, Wood argued that the Certificate of Authenticity "was signed today, but the document that's trying to get entered into evidence is from July of this year, July 23 of this year. I think that's one of the issues about being in time and close to when it's being authenticated." App. vol. II, at 15–16. This is confused. The sole close-in-time requirement in Rule 803(6) is in subsection (A), which requires that "the record was made at or near the time by—or from information transmitted by—someone with knowledge." That's a long way from Wood's objection. But even if we thought it reasonable to require the district court to extrapolate and refashion Wood's objection into one under subsection (A), Wood would at best be arguing that the July 23, 2021 date on the face of the Indian Blood Certificate is the date the record first came into existence and not simply the date it was generated from a database as part of the unfolding prosecution. The district court would not abuse its discretion in rejecting that argument. I am unsure if this is one of Wood's arguments that the majority deems "nonfrivolous." *See* Maj. Op. at 1263.

Second, Wood argued that the Indian Blood Certificate contained "just a handwritten note for the enrollment date." App. vol. II, at 16. Indeed, the Certificate of Indian Blood form lacks a space for the ***1273** computer entry of that information. *See* Supp. App. vol. I, at 53. In making this objection, Wood makes a bare-naked claim that the government conspired with Ms. McCoy to write "Enrollment Date: 4-29-1995" to make Wood eligible for federal prosecution as an Indian. *Id.* Again, the district court would not abuse its discretion by discrediting this theory, especially because the form has significant indicia of trustworthiness, including the insignia and contact information for the Seneca-Cayuga Nation, the date of Wood's birth, his own enrollment number, his mother's name, and his address. *Id.* Again, I am unsure if this is one of Wood's arguments that the majority deems "nonfrivolous." *See* Maj. Op. at 1263.

Third, Wood's counsel argued that he wasn't sure whether the person signing the Certificate of Authenticity had seen the Indian Blood Certificate in the last five months (presumably the time between its being copied from a database in July and the start of trial in December). This argument was odd enough that the district court took pains to ensure that it had understood the argument correctly. After recounting that Ms. McCoy had signed both documents, the court asked: "So what was your concern about whether the person had seen the document or not?" App. vol. II, at 18. This led to the defense counsel repeating his argument that "I don't know if McCoy has actually seen what he's authenticating." *Id.* The district court had good reason to be nonplussed. Obviously, Ms. McCoy would have seen the Indian Blood Certificate when she signed it, and presumably she would have seen it again when self-authenticating it. And again, I am unsure if this is one of Wood's arguments that the majority deems "nonfrivolous."[2] *See* Maj. Op. at 16.

2 On appeal, Wood raises another argument—that the Certificate of Authenticity contains spaces by which to identify the business record being self-authenticated but that the custodian failed to identify the Indian Blood Certificate as that document. But all discussions in the district court show that everyone understood that the Indian Blood Certificate was the business record at issue. In fact, no other record was ever spoken of. And the government referred to the Indian Blood Certificate being attached to the Certificate of Authenticity, which Wood never challenged. So I see no abuse of discretion here. I am unsure of the majority opinion's basis in describing the Certificate as a "standalone document." Maj. Op. at 1261-62. I am also unsure whether this is one of Wood's arguments that the majority deems "nonfrivolous." *See* Maj. Op. at 1263.

B. Wood's Notice Arguments: Rule 902(11)

As seen from the transcript above, Wood argued that the government's Certificate of Authenticity was untimely, because, in his words, Rule 902(11) requires that "[b]efore trial, the proponent must give an adverse party reasonable written notice to offer the

record, and must make the record and certification available for inspection." [3] He neglected to recite the rest of the sentence: "so that the party has a fair opportunity to challenge [the record and certificate of authenticity]." [4]

3 As I understand his objection in the district court, Wood argued that the Certificate of Authenticity "is not notarized in any way." App. vol. II, at 15. But under Rule 902(11), the certification of the custodian is proper if it complies with the requirements of a federal statute. Here, the applicable statute is 18 U.S.C. § 1746, which does not require notarization. I am unsure if this is an argument that the majority deems "nonfrivolous." *See* Maj. Op. at 1263.

4 The majority rejects Wood's favored interpretation of a per se violation of Rule 902(11) by the government's only making the Certificate of Authenticity available for his inspection after trial had allegedly begun. Op. Br. at 27–28. Based on the text of the rule, I acknowledge that Wood has an argument that "before trial" provides a clear line. Under that bright-line rule, a certificate produced before trial began would per se permit the opponent a full and fair opportunity to challenge the record and certificate; and a certificate produced after trial began, would not. But our cases reject this approach. *See Stenson v. Edmonds*, 86 F.4th 870, 880 (10th Cir. 2023) (ruling that the district court did not abuse its discretion in declining to self-authenticate business records even though plaintiff provided "the certification just prior to trial" because that timing still "deprived Defendants of their opportunity to meaningfully inspect and challenge it"); *United States v. Jenkins*, 540 F. App'x 893, 901 (10th Cir. 2014) (unpublished) (finding "nothing improper whatsoever" with allowing admission of cell-phone records under Rule 902(11) even though the certification was not provided until the second day of trial because the defendant had long had the underlying record and the government alleged that the witness was unavailable) (Minutes – Jury Selection, *Jenkins*, No. 12-CR-00061 (D. Wyo. Sept. 24, 2012), ECF No. 44; Notice Regarding Certification of Records by USA, *Jenkins*, No. 12-CR-00061 (D. Wyo. Sept. 25, 2012), ECF No. 46); *United States v. Lewis*, 594 F.3d 1270, 1278–80 (10th Cir. 2010) (ruling that the district court did not abuse its discretion by allowing self-authentication under Rule 902(11) when the government had notified the defendant twelve days before trial that it would authenticate business records by certification and the business records had long been available for inspection). As seen, our cases put the focus on whether the opponent had a fair opportunity to challenge the record or certificate rather than relying exclusively on when it was produced.

***1274** The majority opinion states that the district court "failed to consider," the timeliness issue, Maj. Op. at 1265, and "essentially ignored" the notice issue, *id.* at 1263-64. But the district court need not discuss an issue to have considered it. The district court may well have noted that Wood had never asserted a challenge from anything contained in the Certificate of Authenticity but had done so exclusively from the written contents of the Indian Blood Certificate. The district court may well have understood that Wood would have been in the same position had the government made the Certificate of Authenticity available for inspection weeks earlier. In that circumstance, the district court would have been hard pressed to say that the delay in producing the Certificate of Authenticity had deprived Wood of a fair opportunity to challenge the Indian Blood Certificate or the Certificate of Authenticity itself. The district court did not abuse its discretion in its evidentiary determination.

What is the effect of today's ruling? If the witnesses are still available, Wood may be retried. And this time, Ms. McCoy's Certificate of Authenticity will obviously have been made available for inspection long before the retrial. The retrial will be a repeat performance, making allowances for witnesses and evidence lost in the years since the conviction. I doubt that the drafters of Rules 803(6) and 902(11) envisioned such a result. By the text of their rules, Wood needed to show that the government deprived him of a fair opportunity to challenge the Indian Blood Certificate or the Certificate of Authenticity itself by the government's not timely making the Certificate of Authenticity available for his inspection. Wood failed to show that here. The record shows that Wood had a fair and full opportunity to challenge the Indian Blood Certificate (as he did) and the Certificate of Authenticity with information from the Certificate of Authenticity (such as the legitimacy of Ms. McCoy as the Nation's record custodian, which he did not challenge). Interestingly, he did not contend during closing arguments that the Indian Blood Certificate or the Certificate of Authenticity was untrustworthy. Nor did he call Ms. McCoy on the telephone or subpoena her as a witness. He had an opportunity to do both.

Because in my view the district court appropriately exercised its discretion and ***1275** rendered a reasonable decision, I would affirm.

All Citations

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