Summer 2024 Update

Learning Evidence: From the Federal Rules to the Courtroom (fifth edition)

Deborah Jones Merritt
Ric Simmons

The fifth edition, published in late 2021, contains up-to-date rule language and judicial interpretations for most of the Federal Rules of Evidence. This update provides all the necessary edits to the fifth edition, including coverage of the Supreme Court decisions in *Hemphill v. New York* (2022), *Samia v. United States* (2023), *Diaz v. United States* (2024), and *Smith v. Arizona* (2024). The update also includes information about amendments to three rules that took effect on December 1, 2023, and amendments to five other rules that will take effect on December 1, 2024, if Congress does not act.

Chapter 2 – Types of Courtroom Evidence

On p. 11, add this section after section B.6:

7. Illustrative Aids. The Supreme Court has approved a new rule that will take effect on December 1, 2024, unless Congress acts to amend or block the rule.[1] This rule governs a category of evidence that the Advisory Committee terms "Illustrative Aids."

> **Rule 107. Illustrative Aids**
>
> **(a) Permitted Uses**. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.
>
> **(b) Use in Jury Deliberations**. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:
>
> **(1)** all parties consent; or
>
> **(2)** the court, for good cause, orders otherwise.
>
> **(c) Record**. When practicable, an illustrative aid used at trial must be entered into the record.
>
> **(d) Summaries of Voluminous Materials Admitted as Evidence**. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

[1] You will read more about the process for amending the Federal Rules of Evidence in Chapter 3. This Update includes two types of amended rules. Three took effect on December 1, 2023 (after the casebook was published) and are now part of the Federal Rules. The other five, like this one, are scheduled to take effect on December 1, 2024. Congress is very unlikely to interfere with any of these rules taking effect, so you may assume they will be in effect by the end of the fall 2024 semester.

The Committee specifically chose the phrase "illustrative aids," rather than "demonstrative evidence" for the trial materials covered by this rule. As courts develop familiarity with the new rule, it will become clear how these two categories of evidence relate to one another. For now, there are three points to note about Rule 107.

First, illustrative aids have become very common in the courtroom. Juries enjoy visual and audial evidence. Second, the rule makes clear that judges control use of this evidence. Rule 107(a) allows the judge to exclude an illustrative aid if negative effects of using the aid would substantially outweigh the aid's ability to assist the jury. As you will see in Chapter 7, this is a common standard that judges apply when deciding whether to admit evidence.

Finally, as Rule 107(b) makes clear, illustrative aids are not evidence. These aids usually are not sent into the jury room for jurors to consult during their deliberations. Instead, they are used in the courtroom to illustrate witness testimony and other types of evidence.

Chapter 15 – Examining Witnesses

Two amendments to Rule 615 took effect on December 1, 2023. The first amendment clarifies that a party who is not a natural person may designate only one person to attend the full trial as the party's representative. Multiple representatives will not be allowed.

The second amendment adds a new section to the rule, allowing judges to enter orders prohibiting excluded witnesses from accessing courtroom testimony in other ways.

Here is the amended rule, with the new language underlined:

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) one officer or employee of a party that is not a natural person if that officer or employee has been designated as the party's representative by its attorney;

(3) any person whose presence a party shows to be essential to presenting the party's claim or defense; or

(4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

Chapter 18 – Using Prior Statements to Impeach Witnesses

On pp. 230-231, replace subsection B.2. with the following:

2. Procedural Constraints on Extrinsic Evidence. The Federal Rules of Evidence allow extrinsic evidence of some prior inconsistent statements, but Rule 613(b) establishes procedural rules for admission of this evidence. If a party wants to offer extrinsic evidence of a prior inconsistent statement, they must first give the witness who made the prior statement an opportunity to explain the inconsistency, and give opposing counsel a chance to question the witness about that inconsistency.

> **Rule 613. Witness's Prior Statement**
>
> **(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after
>
> - the witness is given an opportunity to explain or deny the statement and
> - an adverse party is given an opportunity to examine the witness about it.[2]

These conditions are easy to satisfy. A lawyer will first introduce an impeaching statement while cross-examining the witness (that is, without using extrinsic evidence). The witness is on the stand and has an opportunity to explain or deny the statement immediately. Opposing counsel will have a chance to ask questions—and give the witness further opportunities to respond—on redirect. Many times the witness will concede that they made the inconsistent statement, which saves time because there is then no need to prove the statement with extrinsic evidence. It is only if the witness denies making the statement (or claims not to remember making the statement) that the attorney needs to bring in extrinsic evidence.

On pp. 236-238, delete subsections B.6 and B.7, and change subsection B.8 to subsection B.6.

On p. 241, replace the last sentence of the third paragraph of the *Quick Summary* with the following:

Second, before a party offers extrinsic evidence of a prior inconsistent statement, the party must give (a) the affected witness an opportunity to explain or deny the statement, and (b) opposing counsel a chance to examine the witness about the statement.

Chapter 24 – Rule of Completeness

As mentioned on p. 298, the Advisory Committee was considering two amendments to Rule 106. Those amendments survived the rulemaking process and took effect on December 1, 2023. Here is the amended rule:

[2] This language includes amendments that will go into effect on December 1, 2024, unless Congress acts. The underlined words highlight key parts of the rule, not the amended language. A final sentence of Rule 613(b) provides an exception for statements of an opposing party that are governed by Rule 801(d)(2). We will examine that exception when we explore Rule 801(d)(2) in Chapters 53–55.

> **Rule 106. Remainder of or Related Statements**
>
> If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

The underlined language highlights the two amendments. The single word "statement" replaces the phrase "writing or recorded statement," signifying that the rule includes oral statements as well as written or recorded ones. The sentence added to the end of the rule makes clear that the rule is not simply one of timing. If a statement satisfies other elements of the rule, it is admissible over any hearsay objection.

Chapter 51 – Hearsay Exception—Statements Against Interest

The Supreme Court has approved an amendment to Rule 804(b)(3)(B) that will take effect on December 1, 2024, unless Congress acts. On p. 642, substitute this language for the language of Rule 804(b)(3)(B):

> **(B)** if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

This language makes clear that courts must consider a wide range of evidence when determining whether a statement against interest is trustworthy when offered in a criminal case.

The material on pp. 647-49, discussing this corroboration requirement, remains accurate. The Advisory Committee amended the rule to endorse decisions like the ones described on those pages.

Chapter 53 – Statements by an Opposing Party

On pp. 661-62, replace subsection C.1 with the following material:

1. Opponents. Rule 801(d)(2) establishes a very broad exemption from the hearsay rule, allowing introduction of most out-of-court statements by parties. The rule, however, contains one very important limit: Parties cannot introduce evidence of their own statements under this rule—they can only offer evidence of an **opponent's** statements.

This limit forces parties to testify live in court rather than relying upon out-of-court statements. As one court of appeals observed, allowing parties to introduce their own out-of-court statements would "effectuate an end-run around the adversarial process by, in effect, testifying without swearing an oath, facing cross-examination, or being subjected to firsthand scrutiny by the jury."[3] Rule 801(d)(2) avoids this self-serving strategy by allowing introduction of extrajudicial statements only **against** a party-opponent.

[3] United States v. McDaniel, 398 F.3d 540, 545 (6th Cir. 2005).

Rule 801(d)(2), in sum, is a single-edged sword: It allows parties to introduce out-of-court statements made by opposing parties, but not to introduce their own statements. In this sense, Rule 801(d)(2) is similar to Rule 801(d)(1), which is more generous in allowing prior inconsistent statements than consistent ones.[4] The Rules of Evidence attempt to limit the use of cumulative or self-serving testimony in the courtroom.

This rule might seem unfair at first: it allows parties to introduce opponent's statements that advance their own case and ignore the others. There are two responses to this. First, any party who is confronted with their out-of-court statement under this rule is free to take the stand and explain or clarify those statements. But under the hearsay rule, they cannot "testify" by asking another witness to relay their statements.

Second, recent amendments to Rule 106 (the Rule of Completeness),[5] add an important caveat to the operation of Rule 801(d)(2) and allow an opposing party to admit their own statement in response to an 802(d)(2) statement under limited circumstances. If a litigant introduces portions of an opposing party's statement and "fairness" requires consideration of other portions of that statement, then the opposing party may introduce those other portions without violating the hearsay rule.

> **Example:** Derek Donnell was on trial for murder. The murder weapon, left at the scene, was an unusual knife with the initials "DD" engraved on the hilt. Police interrogated Donnell at length, and the prosecution introduced a portion of that interrogation in which Donnell admitted: "Yes, I recognize that knife. My uncle gave it to me as a gift." Defense counsel immediately moved to introduce another portion of the interrogation in which Donnell stated, "I sold that knife several years ago when I was short on cash." The prosecution objected to admission of the latter statement as hearsay.

Analysis: The trial judge overruled the prosecution's objection and admitted Donnell's statement about selling the knife. This statement was hearsay, and Donnell could not introduce his own statement under Rule 801(d)(2). But Rule 106 allowed Donnell to correct the misleading impression created by the prosecution's selective evidence. Amended Rule 106 specifically allows a party to introduce portions of a statement "that in fairness ought to be considered . . . over a hearsay objection."

This example draws upon one offered by the Advisory Committee in its Note to amended Rule 106. The unfairness in this example is manifest. As the Advisory Committee observes, "admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said." Other fact patterns will create closer questions, requiring the courts to balance the policies underlying Rule 801(d)(2) with those informing Rule 106.

On p. 671, add this material before Section D:

[4] See Chapter 39 for further discussion of Rule 801(d)(1), which admits some out-of-court statements by witnesses.
[5] See Chapter 24, in both the fifth edition and this update, for further discussion of Rule 106.

10. Standing in the Shoes of a Declarant. The Supreme Court has approved an addition to Rule 801(d)(2) that will take effect on December 1, 2024, unless Congress acts. That language, added to the end of the rule, reads:

> If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

An Advisory Committee Note explains that this language "provide[s] that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party." The Note then offers this example: "if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate."

Chapter 54 – Statements by Opposing Parties in the Context of Multiple Parties

On pp. 682-84, replace subsection D.2. with the following material:

2. Redacted Statements. After *Bruton*, prosecutors began looking for ways to admit a defendant's out-of-court confession that implicated a codefendant. In one post-*Bruton* case, *Gray v. Maryland*,[6] the prosecutor simply replaced the codefendant's name with the word "deleted" when the police detective read the confession to the jury, and replaced the codefendant's name with a blank line when the written confession was admitted into evidence.

The Supreme Court held that this redaction was insufficient, since "[a] juror somewhat familiar with criminal law would know immediately that the blank refers to [the codefendant]. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to [the codefendant], sitting at counsel table, to find what will seem the obvious answer…."[7] In other words, such a blatantly obvious redaction still "directly implicates" the codefendant, and therefore violates the codefendant's Confrontation Clause rights if the confessing defendant does not take the stand.

However, if the prosecutor redacts the confession in a way that only "indirectly" refers to the codefendant, the confession will be admissible:

> **Example:** Adam Samia, Joseph Hunter, and Carl Stillwell were charged with killing Catherine Lee as part of a murder-for-hire scheme. The government tried the three men jointly, arguing that Hunter had arranged for Samia and Stillwell to shoot Lee while transporting her in a van. Stillwell had confessed that he was driving that van when Lee was killed but claimed that Samia was the one who shot her. At trial, the prosecutor had a police detective recount Stillwell's confession. Throughout that testimony, the detective referred to an "other person" rather than naming Samia. Here is the most damaging part of the colloquy between the prosecutor and the detective:

[6] 523 U.S. 185 (1998).
[7] *Id.* at 193.

Q. Did Stillwell say where the victim was when she was killed?

A. Yes. He described a time when the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving.[8]

Stillwell did not take the stand, so he was not subject to cross-examination by counsel for his codefendants.

The trial judge instructed the jury that the detective's testimony was only admissible as to Stillwell and should not be considered as to Samia or Hunter. Samia was convicted and he appealed, arguing that the jury could easily infer from other prosecution evidence that Samia was the "other person" mentioned in Stillwell's confession. For example, the evidence showed that Samia and Stillwell lived together at the time Lee was killed, and that Samia owned a gun like the one that killed Lee. Thus, Samia contended that the detective's recounting of Stillwell's confession, even as modified, violated the *Bruton* rule.

Analysis: The Court rejected Samia's argument, finding first that Stillwell's confession "was not obviously redacted in a manner resembling the confession in *Gray*; the neutral references to some 'other person' were not akin to an obvious blank or the word 'deleted.'"[9] Second, the Court refused to extend *Bruton* to situations in which a redacted confession "[becomes] incriminating only when linked with evidence introduced later at trial."[10] That rule would burden the prosecution too heavily, the Court concluded, because "all evidence that supports the prosecution's theory of the case is, to some extent, mutually reinforcing."[11]

Samia gives prosecutors a relatively easy way to redact statements and avoid a *Bruton* problem. In addition, the opinion uses language that subtly calls into question the very foundation of *Bruton*'s holding. The Court, for example, noted that "[e]vidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction. And, our legal system presumes that jurors will attend closely the particular language of [such] instructions in a criminal case and strive to understand, make sense of, and follow them."[12] The Court also provided several examples of when limiting instructions are deemed sufficient even though the statements they refer to are "substantially more credible and inculpatory than a codefendant's confession."[13]

For now, however, *Bruton* is still good law. If prosecutors choose to admit confessions that mention codefendants, they must follow these guidelines:

1. A statement that explicitly names a codefendant and implicates that codefendant on its face violates *Bruton*. The statement cannot be admitted in this form.
2. A statement that simply replaces the codefendant's name with blanks or other obvious marks of deletion also violates *Bruton*. A statement in this form inevitably will tempt the jury to fill in the blanks with the codefendant's name.

[8] Samia v. United States, 599 U.S. 635, 642 (2023) (edited slightly for clarity).
[9] *Id.* at 653.
[10] *Id.* (internal quotations omitted).
[11] *Id.* at 654.
[12] *Id.* at 646 (internal quotations omitted).
[13] *Id.* at 646-47.

3. A statement that does not refer explicitly to a codefendant, and that contains no obvious omissions tempting the jury to fill in the gaps, satisfies *Bruton*. The prosecutor can admit statements that satisfy this condition in their initial form or that can be redacted to reach this form. These statements still are admissible only against the defendant who made the out-of-court statement, and the judge will instruct the jury not to consider these statements in connection with any codefendants. The form of the statement makes it plausible that the jury will follow those instructions, resolving the Sixth Amendment concerns raised by *Bruton*.

These guidelines, of course, apply only when the government tries the defendants jointly and the defendant who made the out-of-court statement fails to take the stand at trial. Most prosecutions raise no *Bruton* issues.

Chapter 58 – The Sixth Amendment and Hearsay

On p. 729, in subsection C.1.f, note that the Supreme Court recently reaffirmed that the Confrontation Clause "bars only the introduction of . . . out-of-court statements offered 'to prove the truth of the matter asserted,'" *Smith v. Arizona*, 144 S. Ct. 1785, 1792 (2024). We discuss *Smith* further in the update to Chapter 63 below.

On p. 755, replace the last paragraph with this material:

In January 2022, however, the Court reaffirmed *Crawford*'s approach to the Confrontation Clause. In *Hemphill v. New York*,[14] the Court held that the defendant had not waived his Confrontation Clause rights when he raised a defense that blamed the declarant for his crime. In reaching that result, the Court stressed "*Crawford*'s emphatic rejection of the reliability-based approach of *Ohio v. Roberts*."[15] "If *Crawford* stands for anything," the Court continued, "it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees."[16]

Eight Justices joined this opinion, and the only dissenter (Justice Thomas) took no issue with the Court's characterization of *Crawford.* Justice Thomas dissented only on the ground that the defendant had not preserved his claim in the lower court. *Hemphill*, therefore, offers a resounding endorsement of *Crawford*'s focus on cross-examination rather than reliability.

Hemphill did not require the Court to determine if the contested statement was testimonial; the State conceded that it was. It is possible that the Court's apparent consensus in *Hemphill* will fracture in a case presenting a more difficult determination of whether a statement is testimonial. For now, however, *Crawford* appears once again ascendant.

[14] 595 U.S. 140 (2022).
[15] *Id.* at 152.
[16] *Id.*

Chapter 61 – What Subjects Are Appropriate For Expert Testimony?

Two amendments to Rule 702 took effect on December 1, 2023. The first amendment clarifies that judges must use the standard contained in Rule 104(a) to determine whether the requirements of Rule 702 are met. In the words of the amended Rule 702, an expert witness may testify only "if the proponent demonstrates to the court that it is more likely than not that" each of the requirements of Rule 702 have been met. The Advisory Committee proposed this amendment to stress the gatekeeping function that judges play under Rule 702.

The second amendment alters the language of Rule 702(d) slightly to emphasize the importance of the rule's second reliability requirement. In the Note accompanying the amendment, the Advisory Committee offered this observation:

> The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Here is the amended rule, with the new language underlined:

> **Rule 702. Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if <u>the proponent demonstrates to the court that it is more likely than not that</u>:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the <u>expert's opinion reflects a reliable application of</u> the principles and methods to the facts of the case.

Chapter 63 – Bases of Expert Opinion

Beginning with the last paragraph on page 829, replace that paragraph and the text through the end of page 832 with the following:

The Supreme Court addressed this tension in the 2024 decision of *Smith v. Arizona*:

> **Example:** Police in Arizona executed a search warrant on a shed. Inside the shed, they found defendant Jason Smith and large quantities of drugs. The police sent the drugs to the state crime lab, where an analyst named Elizabeth Rast performed a series of tests and concluded that the drugs were marijuana and methamphetamine. Rast produced a signed written report, accompanied by typed notes, detailing her work and her conclusions.
>
> By the time Smith was tried, Rast was no longer working at the lab. The prosecutor called analyst Greggory Longoni, who had not done any of the testing in the case, to testify in Rast's place. Longoni reviewed Rast's report and accompany notes, and described them in detail at trial. He then provided his expert opinion, based on the data he reviewed in Rast's records, that the drugs were marijuana and methamphetamine. The prosecution argued that Longoni was merely using the information from Rast to show the basis of his opinion under Rule 703, and thus the records were not being admitted for the truth of the matter asserted. Smith argued that the records were being admitted for the truth of the matter and thus violated the Confrontation Clause, since Rast was not available for cross-examination. The trial judge rejected Smith's argument, and Smith was convicted. Smith appealed the ruling.

Analysis: The Court accepted Smith's argument, holding that Rast's records were admitted "for the truth of the matter asserted." In doing so, the Court found that, at least for the purposes of a Confrontation Clause analysis, there is no difference between using information "to show the basis of the in-court expert's independent opinion" under Rule 703, and using that information for the truth of the matter asserted. "The whole point of the prosecutor's eliciting such a statement," the Court concluded, "is to establish—because of the [statement's] truth—a basis for the jury to credit the testifying expert's opinion. 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 [t]here 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.'" [17]

As you remember from Chapter 58, the question of whether evidence violates the Confrontation Clause turns on whether it is admitted for the truth of the matter asserted and, if so, whether it is testimonial. The *Smith* Court clarified that the state cannot use Rule 703 as an end run around the "truth of the matter asserted" question: If an expert relies on information observed by someone else as a basis for their opinion, the expert is using that information for the truth of the matter asserted.

Unfortunately, the *Smith* Court did not reach the second, more difficult question in the case—whether this hearsay evidence was "testimonial." The opinion did "offer a few thoughts" on this question. For example, it stated that the lower court must first decide exactly which statements Longoni relied on formulating his opinion. Did he rely only on Rast's notes, or on both her notes

[17] Smith v, Arizona, 144 S. Ct. 1785, 1797-98 (2024) (internal quotes and citations omitted).

and final report? The lower court must then decide the "primary purpose" of those statements. Did Rast create the documents "to facilitate internal review and quality control" or "as reminders to self" (in which case they would not be testimonial) or with a "focus on court" (in which case they would be testimonial).[18]

But these musings were mere dicta. This means that the *Smith* Court did not resolve the central issue of the *Williams* case: How to determine whether a statement is testimonial. We will have to wait for further clarification from the Court to resolve that issue.

Nevertheless, *Smith* highlights the tension between **reliability** and **cross-examination**, two bedrock principles governing hearsay. Rule 703 rests heavily on reliability: The expert must testify that other experts reasonably rely on the type of evidence supporting their opinion, and the judge must agree that the reliance is reasonable. This is all that is necessary for evidence to be admissible under Rule 703 in a civil case, or in a criminal case if offered against the prosecutor.

But for evidence offered against a criminal defendant, *Crawford* has shifted the focus of the Confrontation Clause from substantive reliability to the procedural right of cross-examination. In *Crawford*, *Melendez-Diaz*, and now *Smith*, the Court stressed that the Sixth Amendment gives criminal defendants "a procedural rather than a substantive guarantee." For a judge to decide that an expert has used "reliable" data, and that therefore it is unnecessary to cross-examine the individuals who provided that data, contradicts *Crawford*'s holding.

On p. 833, replace the last paragraph of the *Quick Summary* with the following:

In criminal cases, experts who rely on information observed by others are using that information "for the truth of the matter asserted" with respect to a Confrontation Clause analysis. If the information is testimonial, its admission could violate the Sixth Amendment.

Chapter 64—Limits on Opinion and Expert Testimony

On pp. 842-43, replace the material starting after footnote 9, and continuing through the end of section C.2, with this material:

The Supreme Court later confirmed these restrictive readings of Rule 704(b):

> **Example:** Border patrol officers found a substantial quantity of methamphetamine hidden in the door panels and trunk of a car driven by Delilah Diaz as she attempted to enter the United States from Mexico. Diaz claimed that the car belonged to her boyfriend and that she didn't know about the drugs. Other evidence pointed to Diaz's willing participation in drug running, and the government charged her with "knowingly" transporting the drugs in violation of federal law. To support the "knowingly" element of the offense, the government called an expert witness familiar with Mexican drug-trafficking operations. The expert testified that "in most circumstances, the driver knows they are hired . . . to take the drugs from Point A to Point B." The expert also explained the risks that organizations run if they attempt to use unknowing couriers. Diaz objected to this testimony as violating Rule 704(b).

[18] *Id*. at 1801-2.

Analysis: The Court rejected Diaz's claim, finding that the expert's testimony did not run afoul of Rule 704(b). That rule, the majority observed, "applies only to opinions about the defendant." The expert who testified against Diaz did not say anything about her mental state. "[I]nstead [he] testified about the knowledge of *most* drug couriers." If the expert had testified that all drug couriers know that they are carrying drugs, the majority conceded, that would have constituted an opinion about the defendant's mental state that violated Rule 704(b). But "an expert's conclusion that 'most people' in a group have a particular mental state is not an opinion about 'the defendant' and thus does not violate Rule 704(b)." [19]

Justice Jackson joined the Court's opinion but added a concurring opinion stressing that Rule 704(b) is "party agnostic." Diaz herself "could have offered expert testimony on the prevalence and characteristics of unknowing drug couriers." A woman charged with killing her abuser, similarly, could call an expert to testify about the typical mental states of those with battered woman syndrome."[20] Before *Diaz*, some lower courts held that Rule 704(b) precluded this type of defense testimony.[21] After *Diaz*, it appears that both the prosecution and defense may use expert testimony describing the mental state of many or most individuals sharing the defendant's circumstances—as long as they do not directly ascribe that mental state to the defendant.

Chapter 70—Best Evidence

On pp. 941-42, replace section B.8 with this material:

8. Summaries. Modern disputes can involve voluminous records. Producing all these documents in court would overwhelm the patience of the parties, the storage capacity of the courthouse, and the attention of the jury. **Rule 1006** recognizes this reality by allowing the parties to introduce summaries of writings, recordings, or photographs "that cannot be conveniently examined in court."

> **Rule 1006. Summaries to Prove Content**
>
> **(a) Summaries of Voluminous Materials Admissible as Evidence**. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.
>
> **(b) Procedures**. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.
>
> **(c) Illustrative Aids Not Covered**. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

[19] Diaz v. United States, 144 S. Ct. 1727, 1733-5 (2024).
[20] *Id.* at 1737 (Jackson. J., concurring).
[21] *E.g.*, United States v. Shaffer, 472 F.3d 1219, 1225 (10th Cir. 2007).

As the underlined phrases show, Rule 1006 allows summaries in any form, including a "chart" or "calculation." The rule prevents deception by requiring the party offering the summary to make the originals or duplicates available for examination and copying. The court, moreover, may direct the party to produce the originals or duplicates in court.

The version of the rule quoted above includes amendments that will take effect on December 1, 2024, unless Congress acts. Those amendments make clear that the summaries offered under this rule are substantive evidence that may be examined by the jury. In addition, the amended language refers to the new Rule 107 (Illustrative Aids) discussed in the update to Chapter 2.