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Fairness by Omission: Rule 106 and the Doctrine of (In)completeness

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FAIRNESS BY OMISSION: RULE 106 AND THE DOCTRINE OF (IN)COMPLETENESS

Blake R. Hills *

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I. INTRODUCTION

Consider a scenario in which a defendant is charged with distributing large quantities of narcotics. After he was arrested and waived his right to remain silent and be represented by counsel,[1] the defendant told a detective, "Yeah, I probably sold meth about a hundred times." The suspect then mumbled indecipherably to himself and stated, "Communist spies have been threatening to decapitate my entire family." At trial, the detective testifies that the defendant admitted to distributing methamphetamine on multiple occasions.[2] Unsurprisingly, the prosecutor does not elicit testimony about the second statement involving communist spies. During cross-examination, the defense seeks to introduce the statement about communists in order to further a possible compulsion defense, but the prosecutor objects that the statement is hearsay.[3] How should the court rule?

Whether the second statement is admissible depends on the court's interpretation of Rule 106 of the Federal Rules of Evidence,[4] which provides, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time."[5] The court's interpretation will depend on its location because the Supreme Court's failure to directly address this issue when it had the chance in *Beech Aircraft Corp. v. Rainey*[6] has led to a significant split between the circuit courts. The resulting system in which the interpretation of Rule 106 depends on location is untenable in a modern age when crimes and investigations frequently cross jurisdictional boundaries. Both defendants and prosecutors are entitled to consistent rules for this issue that is likely to be present in every case in which a defendant has made an inculpatory statement. Thus, the Supreme Court should provide consistency for the interpretation of Rule 106.

This Article proceeds in four parts. Part II examines the background of the doctrine of completeness. Part III examines the *Rainey* decision, with discussion on what the Supreme Court failed to address about Rule 106. Part IV surveys the split of authority in the case law. Part V provides a suggestion of how the Supreme Court should answer the questions it failed to answer in *Rainey* in order to provide clear guidelines for Rule 106 analysis.

II. DOCTRINE OF COMPLETENESS

The doctrine of completeness existed in the common law at least as far back as the early 1600s.[7] At its most basic, this doctrine can be stated as follows: "the opponent, against whom a part of an utterance has been put in, may in his turn complement it by

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1. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that appropriate procedural safeguards are to be used to protect a suspect's right against self-incrimination and to inform the suspect about the right to counsel).
2. Confessions by defendants are routinely introduced against them at trial. *See* FED. R. EVID. 801(d)(2) (providing that statements of an opposing party are admissible as non-hearsay when offered against that party).
3. *See* FED. R. EVID. 801(c)(2) (providing that hearsay is an out of court statement offered to prove the truth of the matter asserted); FED. R. EVID. 802 (providing that hearsay is generally not admissible).
4. Or the equivalent state Rule 106 for state prosecutions.
5. FED. R. EVID. 106.
6. 488 U.S. 153 (1988).
7. 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 601 (Chadbourn rev. 1978).

putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance."[8] Under this doctrine, the opponent was allowed to put in the remainder of the utterance because:

> the thought as a whole, and as it actually existed, cannot be ascertained without *taking the utterance as a whole* and comparing the successive elements and their mutual relations. To look at a part alone would be to obtain a false notion of the thought. The total—that is to say, the real—meaning can be got at only by going on to the end of the utterance. One part cannot be separated and taken by itself without doing injustice, by [producing] misrepresentation.[9]

Significantly, the doctrine had a trumping function that allowed for introduction of the remainder even though it would otherwise be inadmissible under rules of exclusion such as hearsay.[10]

However, this doctrine did not allow the opponent unfettered license to introduce any and all remainders. Indeed, there were two requirements for the introduction of a remainder. First, "*No utterance irrelevant to the issue is receivable.*"[11] Second, "*No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part,* is receivable."[12] As a further limitation, the remainder was not considered to be evidence itself, but was only an aid to help in the understanding of the utterance as a whole.[13]

Rule 106 was adopted in 1975 and was amended in 1987 and 2011.[14] As originally proposed, the rule would have stated:

> When a writing, statement, or conversation, or part thereof, is introduced by a party, an adverse party may require him at that time to introduce any other part or related writing, statement, or conversation relevant to that introduced. Nothing herein precludes any party from introducing on his own motion any other relevant part or related writing, statement, or conversation.[15]

Essentially, the proposed rule would have kept the common law doctrine but sped up the process of completing the statement.

The final draft departed from the common law doctrine by eliminating its application to oral statements and by injecting a concept of fairness: "When a writing or recorded statement or part thereof, is introduced by a party, he may be required at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered with it."[16]

Indeed, the advisory committee "abandoned any claim that the Proposed Rule

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8. *Id.* at 653. This doctrine applied to both oral and written statements. *Id.* at 595 n.1.

9. *Id.* at 595.

10. *See* Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 TEX. L. REV. 51, 54 (1996).

11. WIGMORE, *supra* note 7, at 656.

12. *Id.* This restriction existed "so that the opponent shall not, under cloak of this conceded right, put in utterances which do not come within its principle and would be otherwise inadmissible." *Id.*

13. *Id.* at 656, 659.

14. *See* FED. R. EVID. 106 advisory committee's notes to 1987 and 2011 amendments.

15. 21A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE § 5071 (2d ed. 2018).

16. *Id.*

codified the common law."[17] The Department of Justice wanted to add "which is otherwise admissible," but the advisory committee rejected this proposal.[18] The advisory committee rejected this proposal based on an explanation that "the 'fairness' standard implicitly required that completing evidence be admissible."[19] However, when the Department of Justice subsequently made this same request when the proposed rule was before the Senate for consideration, the advisory committee "neither admitted nor denied the assumption that the Rule as drafted allowed the use of inadmissible for completion."[20]

The version of the rule that was adopted in 1975 read as follows: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[21] The advisory committee note remained silent as to whether a remainder had to be otherwise admissible in order to be introduced under this rule. The 1987 amendment simply removed gendered pronouns from the rule and the 2011 amendment was only stylistic.[22] The advisory committee notes continued to remain silent on whether inadmissible evidence could be used for completeness.

III. *BEECH AIRCRAFT CORP. V. RAINEY*

Beech Aircraft Corp. v. Rainey was a product liability case that was filed after a Navy flight instructor and her student were killed when the aircraft lost altitude and crashed.[23] Because there were no survivors and the aircraft was severely damaged, the cause of the crash could not be determined with exactness.[24] The plaintiffs alleged that the crash was caused by an equipment malfunction, while the defendants claimed that pilot error was the cause.[25] This was the only seriously disputed question at trial.[26]

One of the plaintiffs was John Rainey, a Navy flight instructor who was the husband of the deceased pilot.[27] A few months after the crash, Rainey wrote a letter in which he took issue with an investigative report and outlined his own theory that the crash was caused by equipment malfunction.[28] Rainey did not testify in the plaintiffs' case in chief, but was called as a witness by the defense.[29] During direct examination, the defense asked Rainey about statements in the letter that tended to suggest that pilot error was the cause of the crash, and he admitted making the statements.[30] During cross-examination, Rainey's counsel asked him whether he had also stated in the letter that the primary cause

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17. *Id.* (citation omitted).
18. *Id.* at § 5078.1.
19. *Id.*
20. WRIGHT ET AL., *supra* note 15, § 5078.1.
21. *Id.* § 5071.
22. *See* FED. R. EVID. 106 advisory committee's notes to 1987 and 2011 amendments.
23. 488 U.S. 153, 156 (1988).
24. *Id.*
25. *Id.* at 156–57.
26. *Id.* at 157.
27. *Id.* at 159.
28. *Beech Aircraft Corp.*, 488 U.S. at 159.
29. *Id.*
30. *Id.* at 159–60.

of the crash was equipment malfunction.[31] Before Rainey could answer, the judge sustained a defense objection and further questioning along that line was cut off.[32]

The jury found in favor of the defendants, but the Eleventh Circuit reversed.[33] The court held that under Rule 106, it was reversible error to prohibit cross-examination about the parts of Rainey's letter that would have put the admissions he made on direct in context.[34]

The Supreme Court began its analysis of this issue by noting that Rule 106 had "partially codified the doctrine of completeness."[35] Unfortunately, the Court did not explain which part of the doctrine was codified. The Court also stated that, "[c]learly the concerns underlying Rule 106 are relevant here," but the Court declined to "explor[e] the scope and meaning of Rule 106."[36] Instead, the Court held that Rainey should have been allowed to testify about the portion of his letter attributing the crash to equipment malfunction because "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402."[37]

The Supreme Court's failure to address Rule 106 is puzzling, given that the Court essentially admitted that the principle supporting Rule 106 was directly applicable to the case. It may be that the Court felt that because Rainey actually testified on direct and was asked about the letter containing his opinion, he should have been able to testify on cross-examination about his entire opinion directly, rather than using Rule 106 to get his opinion before the jury. Regardless of the Court's reason, its failure to address Rule 106 has resulted in a system in which the meaning and scope of the rule depend on where the court addressing the issue is located.

IV. THE CIRCUIT SPLIT

It is not surprising that, left to their own interpretations, the circuit courts have taken a variety of positions on the scope and meaning of Rule 106. Indeed, the decisions of the circuit courts are far from uniform on whether Rule 106 has a trumping function that allows for remainders that are otherwise inadmissible or is a rule that controls only the timing of introduction.[38]

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31. *Id.* at 160.
32. *Id.*
33. *Beech Aircraft Corp.*, 488 U.S. at 160.
34. *Id.* at 160–61.
35. *Id.* at 172.
36. *Id.*
37. *Id.*
38. By its express terms, Rule 106 does not apply to oral statements that are not recorded. However, many courts have held that the principles and guidelines of Rule 106 apply to oral statements pursuant to Rule 611, which states: "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: make those procedures effective for determining the truth . . . ." FED R. EVID. 611(a)(1). *See, e.g.*, United States v. Pacquette, 557 F. App'x 933, 936 (11th Cir. 2014) (stating that the principles of Rule 106 apply to oral statements under Rule 611); United States v. Lopez-Medina, 596 F.3d 716, 734 (10th Cir. 2010) (stating that the doctrine of completeness in Rule 106 is applicable to oral statements by virtue of Rule 611); United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987) (stating that the principles of Rule 106 apply to oral statements under Rule 611).

A. Rule of Admissibility

One interpretation is to treat Rule 106 as a rule of admissibility that allows for the introduction of otherwise inadmissible remainders. The First, Tenth, Eleventh, and D.C. Circuits take this position.

1. First Circuit

The First Circuit addressed the scope and meaning of Rule 106 in *United States v. Bucci*, in which the defendant had been convicted of various drug and firearm offenses that occurred as part of a plan to rob a drug dealer.[39] At trial, the prosecution introduced redacted portions of a recorded conversation between the drug dealer and a cooperating witness who both testified at trial.[40] The defendant moved under Rule 106 to have the prosecution introduce other portions of the redacted recording, but the trial court denied the motion.[41] The defendant argued on appeal that the remainder of the recording should have been admitted at the same time because it undermined the credibility of the witnesses and because the redacted excerpts were fragmented and confusing.[42] The defendant conceded that the remainder would be inadmissible hearsay if he had independently offered it for admission into evidence.[43]

The First Circuit began its analysis by stating that its position was that Rule 106 "codifies the common law doctrine of completeness."[44] The court then stated that its "case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence."[45] However, the court ruled that the trial court's refusal to require the remainder did not prejudice the defendant because his attorney was able to use the remainder to essentially destroy the credibility of the witnesses on cross-examination and because the prosecution itself clarified any misapprehension that resulted from the recording being redacted.[46] In essence, the court found that there was no prejudice because the content of the remainder was disclosed to the jury.

2. Tenth Circuit

The Tenth Circuit addressed the scope and meaning of Rule 106 in *United States v. Lopez-Medina*, in which the defendant was convicted of possession of methamphetamine with intent to distribute.[47] During trial, the defense introduced the fact that a co-defendant had already pled guilty to the crimes that defendant was charged with in order to support an argument that the guilty party had already been convicted and the defendant was just

39. 525 F.3d 116, 120–21 (1st Cir. 2008).
40. *Id.* at 133.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Bucci*, 525 F.3d at 133.
45. *Id.* (citing United States v. Simonelli, 237 F.3d 19, 28 (1st Cir. 2001); United States v. Awon, 135 F.3d 96, 101 (1st Cir. 1998)). The court recognized that "[o]ther circuits have held differently," but stated that it would "adhere to [its] own precedent." *Id.*
46. *Id.* at 134.
47. 596 F.3d 716, 722 (10th Cir. 2010).

an innocent bystander.[48] The prosecution was then allowed to introduce that factual basis that was included in the co-defendant's plea statement, specifically the co-defendant's statement that he had aided and abetted the defendant in jointly possessing methamphetamine with intent to distribute.[49] The defendant argued on appeal that his right to confrontation was violated when the court admitted the co-defendant's factual allocution.[50]

The Tenth Circuit began its analysis by noting that the co-defendant's factual allocution would have been inadmissible if the prosecution had attempted to introduce it by itself.[51] However, the court held that the evidence was properly introduced under Rule 106 "[e]ven if the fact allocution would [have] be[en] subject to a hearsay objection . . . ."[52] This is because "the purpose of Rule 106 is to prevent a party from misleading the jury by allowing into the record relevant portions of a writing or recorded statement which clarify or explain the part already received."[53]

The Tenth Circuit then held that evidence must satisfy a four-part test in order to be admissible under Rule 106: the relevant portion of a writing must operate so that "(1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) insures fair and impartial understanding of the evidence."[54] The court held that the factual basis in the co-defendant's allocution satisfied this test because it placed the co-defendant's plea in context in that it avoided misleading the jury into believing that the co-defendant had accepted sole responsibility for possessing the methamphetamine himself.[55]

3. Eleventh Circuit

The Eleventh Circuit addressed the scope and meaning of Rule 106 in *United States v. Baker*, in which eleven defendants were convicted of conspiracy to distribute cocaine.[56] At trial, the prosecution had a detective testify about inculpatory statements that one defendant made when questioned after arrest.[57] The defendant sought to question the detective about the exculpatory portions of his post-arrest statements, but the trial court denied his motion to do so.[58]

The Eleventh Circuit held that the trial court had erred.[59] The court stated that under Rule 106, "the exculpatory portion of a defendant's statement should be admitted if it is

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48. *Id.* at 724.
49. *Id.* at 725.
50. *Id.* at 733.
51. *Id.* at 730–31.
52. *Lopez-Medina*, 596 F.3d at 735*; see also,* United States v. Lemon, 714 F. App'x 851, 860 (10th Cir. 2017) (stating that Rule 106 allows inadmissible hearsay evidence if otherwise appropriate).
53. *Lopez-Medina*, 596 F.3d at 735 (quoting United States v. Moussaoui, 382 F.3d 453, 481 (4th Cir. 2004)).
54. *Id.* (quoting United States v. Li, 55 F.3d 325, 330 (7th Cir. 1995)).
55. *Id.*
56. 432 F.3d 1189, 1199–1200 (11th Cir. 2005), *abrogated on other grounds by* Davis v. Washington, 547 U.S. 813 (2006).
57. *Id.* at 1222.
58. *Id.*
59. *Id.*

relevant to an issue in the case and necessary to clarify or explain the portion received."[60] Because the defendant's statement was relevant to his involvement in the conspiracy and was necessary to clarify the other statements he made to the detective, he should have been allowed to introduce the remainder.[61]

4. D.C. Circuit

The D.C. Circuit addressed the scope and meaning of Rule 106 in *United States v. Sutton*, in which two defendants were convicted of various conspiracy and bribery charges.[62] During the trial, the prosecution had introduced portions of taped conversations between one of the defendants and a witness that could be used to show the defendant's consciousness of guilt.[63] The defendant attempted to introduce other exculpatory portions of a conversation, but the trial court sustained the prosecution's objection on hearsay grounds.[64]

The D.C. Circuit began its analysis by noting that "every major rule of exclusion in the Federal Rules of Evidence contains the proviso, 'except as otherwise provided by these rules.'"[65] Because Rule 106 does not contain this language, the court concluded that it should not be construed in a restrictive manner.[66] Thus, the court held:

> Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.[67]

The court held that under Rule 106, the prosecution should be allowed to introduce inculpatory statements and the defense can then argue that the statements are misleading because they are presented out of context.[68] The trial court then permits "such limited portions to be contemporaneously introduced as will remove the distortion that otherwise would accompany the prosecution's evidence."[69]

The court then examined the disputed statements. Because the remainder of the statements rebutted the prosecution's claim that the other statements indicated that the defendant had the required guilty mental state, the court held that the defendant should have been allowed to enter the remainder into evidence.[70]

B. Rule of Timing Only

Another interpretation treats Rule 106 as only a rule of timing that does not allow

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60. *Id.*
61. *Baker*, 432 F.3d at 1222; *see also,* United States v. Pacquette, 557 F. App'x 933, 936–37 (11th Cir. 2014) (holding that Rule 106 applies to exculpatory statements).
62. 801 F.2d 1346, 1348–49 (D.C. Cir. 1986).
63. *Id.* at 1366–67.
64. *Id.* at 1367.
65. *Id.* at 1368 (quoting WRIGHT ET AL., *supra* note 15, § 5078).
66. *Id.*
67. *Sutton*, 801 F.2d at 1369.
68. *Id.*
69. *Id.*
70. *Id.* at 1370.

for the introduction of otherwise inadmissible remainders. The Fourth, Sixth, Eighth, and Ninth Circuits take this position.

1. Fourth Circuit

The Fourth Circuit addressed the scope and meaning of Rule 106 in *United States v. Hassan*, in which three defendants were convicted of offenses related to terrorism.[71] At trial, the prosecution presented a training video posted on the internet that one of the defendants made in which the defendant made several statements that could be interpreted as calling for a violent jihad.[72] The defendant then sought to introduce postings he made in response to critical comments from other users of the internet site.[73] Specifically, the defendant sought to introduce a specific post in which he claimed that he did not support terrorists.[74]

The Fourth Circuit noted that under Rule 106, a trial court "may allow into the record 'relevant portions of otherwise excluded testimony which clarify or explain the part already received,' in order to 'prevent a party from misleading the jury' by failing to introduce the entirety of the statement or document."[75] However, the court stated that Rule 106 "does not 'render admissible . . . evidence which is otherwise inadmissible under the hearsay rules.'"[76] Nor does Rule 106 "require the admission of self-serving, exculpatory statements made by a party which are being sought for admission by that same party."[77] The court held that the remainder of the defendant's statements were properly excluded because they were inadmissible hearsay.[78]

2. Sixth Circuit

The Sixth Circuit addressed the scope and meaning of Rule 106 in *United States v. Shaver*, in which the defendant was convicted of mail fraud.[79] During an interview with a postal inspector, the defendant admitted to acts that constituted elements of the offense.[80] However, the defendant also claimed that he had acted innocently and had only followed his mother's instructions.[81] The postal inspector testified at trial about the defendant's admissions, but the trial court refused to allow cross-examination about the defendant's exculpatory statements.[82] The defendant argued on appeal that he should have been able to introduce his exculpatory statements under the doctrine of completeness.[83]

The Sixth Circuit began its analysis by stating that, as codified, Rule 106 merely

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71. 742 F.3d 104, 110 (4th Cir. 2014).
72. *Id.* at 134.
73. *Id.*
74. *Id.*
75. *Id.* (quoting United States v. Bellin, 264 F.3d 391, 414 (4th Cir. 2001)).
76. *Hassan*, 742 F.3d at 134 (quoting United States v. Lentz, 524 F.3d 501, 526 (4th Cir. 2008)).
77. *Id.* (quoting *Lentz*, 524 F.3d at 526).
78. *Id.*
79. 89 F. App'x 529, 531 (6th Cir. 2004).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 532.

controls the order in which evidence is introduced and does not "make inadmissible evidence admissible."[84] The court then held: "Completeness, a common-law doctrine, does not outweigh the hearsay rules, because '[h]earsay is not admissible except as provided *by these rules* or other rules prescribed by the Supreme Court pursuant to statutory authority.' Exculpatory hearsay may not come in solely on the basis of completeness."[85] Because the remainder of the defendant's statements was inadmissible hearsay, the court held that it was properly excluded.[86]

3. Eighth Circuit

The Eighth Circuit addressed the scope and meaning of Rule 106 in *United States v. Ramos-Caraballo*, in which the defendant was convicted of possession with intent to distribute cocaine.[87] During the trial, the defense attorney attempted to impeach an officer during cross-examination by bringing up inconsistencies between the officer's grand jury testimony, suppression hearing testimony, and police report.[88] The prosecution then moved, and was allowed, to introduce the complete grand jury testimony, the complete testimony at the suppression hearing, and the complete police report under Rule 106.[89] The defendant argued on appeal that this was erroneous.[90]

The Eighth Circuit began its analysis by stating that under Rule 106, "the party urging admission of an excluded conversation must specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains portions already admitted."[91] The court then stated that:

> "Rule 106, the rule of completeness, which is limited to writings," does not "empower a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception." Furthermore, the rule does not come into play when "a few inconsistencies between out-of-court and in-court statements are revealed through cross-examination; rather, it operates to ensure fairness where a misunderstanding or distortion created by the other party can only be averted by the introduction of the full text of the out-of-court statement."[92]

The court determined that rather than trying to clear up a misunderstanding that resulted from the defendant only putting some of the officer's statements into evidence, the prosecution was actually attempting to improperly bolster its witness.[93] Because Rule 106 "permits nothing more than setting the context and clarifying the answers given on cross-examination; it is not proper to admit all prior consistent statements simply to bolster

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84. *Shaver*, 89 F. App'x at 532.
85. *Id.* at 533 (quoting Fed. R. Evid. 802).
86. *Id.* at 535; *see also* United States v. Adams, 722 F.3d 788, 826 (6th Cir. 2013) (stating that "[e]xculpatory hearsay may not come in solely on the basis of completeness") (quoting *Shaver*, at 526).
87. 375 F.3d 797, 799 (8th Cir. 2004)
88. *Id.* at 802.
89. *Id.* at 801. There were some redactions that were agreed upon.
90. *Id.* at 802.
91. *Id.* at 803 (quoting United States v. King, 351 F.3d 859, 866 (8th Cir. 2013)).
92. *Ramos-Caraballo*, 375 F.3d at 803 (internal citations and alterations omitted).
93. *Id.*

the credibility of a witness who has been impeached by particulars."[94] Thus, the court held that the trial court's decision to admit the entire statements was erroneous.[95]

4. Ninth Circuit

The Ninth Circuit addressed the scope and meaning of Rule 106 in *United States v. Collicott*, in which the defendant was convicted of possession of a controlled substance with intent to distribute.[96] At trial, the prosecution called a witness who was present during a drug transaction conducted by the defendant.[97] The defense asked the witness about statements she made to a police officer, but she stated that she could not remember making the statements.[98] The prosecution then called the police officer and was allowed, over objection, to introduce the witness' entire statement through the officer.[99] The defendant argued at trial and on appeal that this constituted the improper admission of hearsay evidence.[100]

The Ninth Circuit began its analysis by holding that the witness' statement was hearsay.[101] The court then addressed the government's argument that the evidence was admissible under Rule 106. In doing so, the court was guided by the general rule that "Rule 106 does not compel admission of otherwise inadmissible hearsay evidence."[102] The court then held that because the witness' out-of-court statements to the officer did not fall within any exception to the hearsay rule, they were inadmissible regardless of Rule 106 and the trial court erred by allowing them to be introduced into evidence.[103]

C. Discretionary Admissibility

A minority of circuits view Rule 106 as a rule of admissibility that provides a court with discretion to allow the introduction of otherwise inadmissible remainders if necessary for the ascertainment of truth. The Second and Seventh Circuits take this approach.

1. Second Circuit

The Second Circuit addressed the scope and meaning of Rule 106 in *United States v. Gonzalez*, in which two defendants were convicted of various drug and conspiracy crimes.[104] At trial, the government introduced the statement of defendant number one that a murder victim had robbed drug dealers in order to prove that the murder was tied to the drug conspiracy involving the defendants.[105] Both defendants argued on appeal that the

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94. *Id.* (quoting United States v. Simonelli, 237 F.3d 19, 28 (1st Cir. 2001).
95. *Id.*
96. 92 F.3d 973, 975 (9th Cir. 1996).
97. *Id.* at 976.
98. *Id.*
99. *Id.* at 976–77.
100. *Id.* at 978.
101. *Collicott*, 92 F.3d at 978–84.
102. *Id.* at 983 (quoting Phoenix Associates III v. Stone, 60 F.3d 95, 103 (2d Cir. 1995)).
103. *Id.*; *see also*, United States v. Meraz, 663 F. App'x 580, 581 (9th Cir. 2016) (holding that Rule 106 "does not compel admission of otherwise inadmissible hearsay evidence") (quoting *Collicott*, 92 F.3d at 983).
104. 399 F. App'x 641, 644 (2d Cir. 2010).
105. *Id.* at 645.

trial court should have admitted the remainder of defendant one's statement under Rule 106.[106] Specifically, the excluded part of defendant one's statement was that defendant two had tried to keep him out of the drug business in order to protect him.[107]

The Second Circuit began its analysis by stating that Rule 106 "permits a defendant to introduce the remainder of a statement not otherwise admissible if it is 'necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion.'"[108] However, Rule 106 "does not 'require introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages.'"[109] Thus, it is within the trial court's discretion to determine whether a remainder should come in as necessary for completeness or should be excluded to prevent an opponent bypassing hearsay rules to introduce self-serving evidence.[110]

The Second Circuit then held that the remainder of the statement was properly excluded because defendant two's self-serving statement that defendant one had attempted to minimize his role in the conspiracy did nothing to clarify or explain the statement that the murder victim robbed drug dealers.[111] In so holding, the court reinforced its prior decision that when determining whether a remainder should be admitted pursuant to Rule 106, "the overarching principle [is that] the trial court's responsibility [is] to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court's obligation to protect the interest of society in the 'ascertainment of the truth.'"[112]

2. Seventh Circuit

The Seventh Circuit addressed the scope and meaning of Rule 106 in *United States v. LeFevour*, in which a former state court judge was convicted of racketeering, mail fraud, and filing false income tax returns.[113] At trial, the prosecution played a taped conversation between the defendant and a police officer to show that the defendant knew who the officer's lawyer was.[114] The prosecution did not play a subsequent portion of the recording in which the officer told the FBI agents who had put the wire on him that he had "put on his best scare act" with the defendant.[115] The defense moved to admit this part of the taped conversation, but the trial court ruled that it was irrelevant and, thus, inadmissible.[116] The defendant argued on appeal that the remainder of the tape should have been admitted pursuant to Rule 106.[117]

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106. *Id.*
107. *Id.*
108. *Id.* (quoting United States v. Castro, 813 F.2d 571,576 (2d Cir. 1987)).
109. *Gonzalez*, 399 F. App'x 645 (quoting United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)).
110. *Id.*
111. *Id.*
112. *See* United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987) (quoting Fed. R. Evid. 611(a)).
113. 798 F.2d 977, 979 (7th Cir. 1986).
114. *Id.* at 980.
115. *Id.*
116. *Id.*
117. *Id.*

The Seventh Circuit noted that the trial court had implicitly treated Rule 106 as only a rule of timing, but the appellate court concluded that this "description is misleading."[118] The court stated that the rule is:

> If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too. The party against whom that evidence is offered can hardly care which route is taken, provided he honestly wanted the otherwise inadmissible evidence admitted only for the purpose of pulling the sting from evidence his opponent wanted to use against him. Rule 106 was not intended to override every privilege and other exclusionary rule of evidence in the legal armamentarium, so there must be cases where if an excerpt is misleading the only cure is to exclude it rather than to put in other excerpts.[119]

This approach emphasizes a trial court's discretion in determining whether otherwise inadmissible evidence should be admitted or whether the misleading portion of a statement should be excluded entirely. Ultimately, the court ruled that the remainder of the tape was not admissible, not because it was hearsay, but because the original portion of the tape was a complete statement that was not misleading.[120]

D. Unaddressed

The Third and Fifth Circuits have not addressed whether Rule 106 allows for the admission of otherwise inadmissible evidence or is a rule of timing only.

1. Third Circuit

The Third Circuit was faced with the issue of Rule 106's applicability in *United States v. Hoffecker.*[121] In that case, the defendant was convicted of various wire fraud and mail fraud charges after the prosecution played a portion of his recorded statement.[122] The defendant argued that the entire tape should have been admitted into evidence under Rule 106 because it was necessary to rebut his statements in another recording and to rebut other unrecorded statements to witnesses.[123]

The Third Circuit stated that under Rule 106, additional portions of a recording may be played "if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding."[124] However, "[t]he Rule does not require introduction of portions of a statement that are neither explanatory of nor relevant to the passages that have been admitted."[125] The court did not address whether Rule 106 would allow for the introduction

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118. *LeFevour*, 798 F.2d at 981.

119. *Id.*; *see also* United States v. Reese, 666 F.3d 1007, 1019 (7th Cir. 2012) (citing *LeFevour* for the proposition that "otherwise inadmissible evidence may be admissible under Rule 106 to correct a misleading impression or else the misleading evidence must be excluded").

120. *LeFevour*, 798 F.2d at 981–82.

121. 530 F.3d 137 (3d Cir. 2008).

122. *Id.* at 145, 192.

123. *Id.* at 192.

124. *Id.* (quoting United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)).

125. *Id.* (quoting *Soures*, 736 F.2d at 91).

of evidence that was otherwise inadmissible. This discussion was unnecessary because the defendant had failed to show that introduction of the entire tape was necessary to explain or place his entirely separate statements in context.[126]

2. Fifth Circuit

The Fifth Circuit was faced with the issue of Rule 106's applicability in *United States v. Branch*, in which six defendants were convicted of various crimes that arose out of a firefight that erupted when ATF agents attempted to execute a search and arrest warrant.[127] At trial, the prosecution introduced a portion of an interview that one of the defendants gave to a law enforcement officer.[128] The government filed a preemptive motion to prevent the defendant from introducing the other exculpatory portions of the interview into evidence, and the trial court granted the motion to a large degree.[129]

The Fifth Circuit began its analysis by stating that the purpose of Rule 106 is "to permit the contemporaneous introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading."[130] In addition, the court stated that the "fairness" standard of Rule 106 requires the remainder of the statement to "be relevant and 'necessary to qualify, explain, or place into context the portion already introduced.'"[131] The court did not address whether Rule 106 allows for the introduction of evidence that is otherwise inadmissible. It was unnecessary for the court to address this issue because the defendant had failed to show how the excluded remainder of his statement qualified, explained, or placed the admitted portions into context.[132]

The court acknowledged "the danger inherent in the selective admission of post-arrest statements," but held that "[n]either the Constitution nor Rule 106 . . . requires the admission of the entire statement once any portion is admitted in a criminal prosecution."[133] In fact, the court stated that "[w]e do no violence to criminal defendants' constitutional rights by applying Rule 106 as written and requiring that a defendant demonstrate with particularity the unfairness in the selective admission of his post-arrest statement."[134]

V. FAIRNESS AND RELIABILITY

The failure of the Supreme Court in *Rainey* to establish clear guidelines for the Rule 106 analysis has led to a confused mixture of rules that depend on where a trial occurs. This situation is untenable in a modern age when crimes frequently cross jurisdictional

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126. *Hoffecker*, 530 F.3d at 137.
127. 91 F.3d 699, 709 (5th Cir. 1996).
128. *Id.* at 725.
129. *Id.* at 726.
130. *Id.* at 727 (quoting United States v. Jamar, 561 F.2d 1103, 1108 (4th Cir. 1977)).
131. *Id.* at 727.
132. *Branch*, 91 F.3d at 728–29; *see also*, United States v. Flores, 293 F. App'x 283, 285 (5th Cir. 2008) (stating that Rule 106 only allows the admission of a remainder of a statement that is relevant and necessary to qualify, explain, or place into context the portion already introduced but failing to address whether the rule allows for the introduction of otherwise inadmissible evidence).
133. *Branch*, 91 F.3d at 729 (citing WRIGHT ET AL., *supra* note 15, § 5077).
134. *Id.* (citing WRIGHT ET AL., *supra* note 15, § 5077).

boundaries. Both defendants and prosecutors are entitled to consistent rules. The time has come for the Supreme Court to establish clear guidelines based on the principles of fairness, reliability, and limited admissibility.

A. Fairness

Rule 106 allows an opponent to require the introduction of the remainder of a statement "that in fairness ought to be considered at the same time."[135] Does this vague notion of fairness mean that Rule 106 allows for the introduction of a remainder that is otherwise inadmissible? The Supreme Court should rule that it does, if the remainder satisfies requirements of relevance and reliability.

In determining whether otherwise inadmissible evidence can ever be introduced under Rule 106, it is essential to look at Rule 102 for the principles that guide interpretation of the rules. Rule 102 states, "[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[136]

The key principles that should guide the interpretation of Rule 106 are "fairness, the development of evidence law, truth, and justice."[137] These principles can only be honored if statements are presented in a way that allows a jury to understand their true meaning. Indeed, "[n]o one has ever explained how these standards [in Rule 102] would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, then assert an exclusionary rule to keep the other side from exposing his deception."[138]

Although the Supreme Court has not addressed the meaning and scope of Rule 106, guidance can be obtained from the Court's rulings in analogous cases. For instance, the Court has held that, although the government cannot introduce the statement of a defendant in its case in chief when the statement was taken in violation of the Sixth Amendment, the statement can be used to impeach the defendant's inconsistent testimony at trial.[139] The Court stated:

> If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal obligation to speak truthfully and accurately, and we have consistently rejected arguments that would allow a defendant to turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.[140]

This shows that the Court considers a "fair" process to be one in which otherwise

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135. FED. R. EVID. 106.

136. FED. R. EVID. 102.

137. Harold F. Baker, *Completing the Rule of Completeness: Amending Rule 106 of the Federal Rules of Evidence*, 51 CREIGHTON L. REV. 281, 290 (2018).

138. WRIGHT ET AL., *supra* note 15, § 5078.1.

139. Michigan v. Harvey, 494 U.S. 344, 351 (1980).

140. *Id.* (quoting Harris v. New York, 401 U.S. 222, 224 (1971)) (internal citation omitted); *see also* Kansas v. Ventris, 556 U.S. 586, 593 (2009) (stating that "it is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his untruths.") (quoting Walder v. United States, 347 U.S. 62, 65 (1954)).

inadmissible evidence can be used to correct a misrepresentation by a party.

However, this does not mean that Rule 106 creates a free-for-all in which an opponent can introduce every portion of a statement. Indeed, "when Rule 106 invokes 'fairness' as the standard for completeness, it does not do so in the sense of 'fair play' to an opponent required to mud wrestle a dirty proponent but only in the 'unfairness' that results from losing through inaccurate factfinding."[141] Fairness is the opportunity to correct a misleading impression of a statement, not the opportunity to introduce evidence at will. Thus, the remainder of the statement must be relevant to correcting the misleading impression.

The best method for determining whether a remainder is relevant to correcting a misrepresentation under Rule 106 is the four-part test of *United States v. Lopez-Medina*: "(1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) insures fair and impartial understanding of the evidence."[142] This method recognizes that "a remainder under the fairness test has to be explanatory of the portion that it completes, not just of the defendant's theory of the case."[143]

B. Reliability

In order for an otherwise inadmissible remainder to be "fairly" introduced under Rule 106, it must also have some indicia of reliability. Allowing an unreliable remainder to be introduced in an alleged attempt to correct a misunderstanding does not serve the end of ascertaining the truth and securing a just determination.

Most of the time, a remainder of a statement is otherwise inadmissible because it is hearsay. Hearsay generally lacks a sufficient indicia of reliability to be admissible.[144] This is especially concerning if a defendant is "allowed to introduce otherwise inadmissible, self-serving exculpatory statements, without testifying, under the guise of completeness."[145] Indeed, "to allow introduction of self-serving exculpatory statements, without a guarantee of trustworthiness as prescribed by the rules of evidence, would undermine the adversary system in which the rules operate."[146]

Although it was not in the context of Rule 106, the Supreme Court has acknowledged the problem inherent in admitting exculpatory remainders. In *Williamson v. United States*, the Court was confronted with the question of whether the exception to the hearsay rule for statements against penal interest allows for only inculpatory statements, or also allows for the remainder that is not inculpatory.[147] The Court held that this exception only allows

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141. WRIGHT ET AL., *supra* note 15, § 5072.1.

142. 596 F.3d 716, 735 (10th Cir. 2010) (quoting United States v. Zamudio, 1998 WL 1666000, at *6 (10th Cir. Apr. 6, 1998)).

143. Michael A. Hardin, *This Space Intentionally Left Blank: What to do When Hearsay and Rule 106 Completeness Collide*, 82 FORDHAM L. REV. 1283, 1304 (2013).

144. *See* Baker, *supra* note 137, at 295 (noting that the rule against hearsay "strives to make inadmissible any evidence lacking adequate indicia of reliability").

145. *Id.* at 298.

146. *Id.*

147. 512 U.S. 594 (1994).

inculpatory statements.[148] The Court stated that the rule "is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."[149] However,

> This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. *One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature. . . . Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.*[150]

This commonsense notion is directly applicable to the Rule 106 analysis. Self-serving exculpatory remainders should be viewed with caution, and the trial court should only allow them to be introduced if there is an indicia of reliability.

C. Limited Admissibility

The fear about remainders that are otherwise inadmissible should be alleviated by an interpretation that allows them to be introduced for the limited purpose of providing context to correct a misunderstanding, and not as substantive evidence. Indeed, this was the practice under the common law, where "the exculpatory parts of [a] confession [could] only be used to negate the prosecution's truncated version, not to refute other evidence of guilt."[151]

Limited admissibility is a part of the rules of evidence.[152] For example, Rule 404(b) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[153] However, such evidence may be admitted "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[154] Similarly under Rule 412, evidence may not be admitted to prove that "a victim engaged in other sexual behavior" or to "prove a victim's sexual disposition."[155] However, evidence of sexual behavior may be admitted to prove that "someone other than the defendant was the source of semen, injury, or other physical evidence" or "to prove consent."[156] Further, Rule 105 states that "[i]f the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."[157]

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148. *Id.* at 600–01.
149. *Id.* at 599.
150. *Id.* at 599–600 (emphasis added).
151. WRIGHT ET AL., *supra* note 15, § 5072 n.21.
152. *See* Hardin, *supra* note 143, at 1287 (stating that "many of the Federal Rules of Evidence prohibit the use of evidence for one or more particular purposes but allow it for any other purpose").
153. FED. R. EVID. 404(b)(1).
154. FED. R. EVID. 404(b)(2).
155. FED. R. EVID. 412(a).
156. FED. R. EVID. 412(b)(1).
157. FED. R. EVID. 105.

The decision of the Supreme Court in *Rainey* supports the conclusion that otherwise inadmissible remainders have only limited admissibility. Indeed, when the Court held that the remainder of the plaintiff's letter should have been allowed, it stated that "[t]he defendants would, of course, have been entitled to a limiting instruction pursuant to Rule 105 had they requested it."[158] Under this reasoning, otherwise inadmissible remainders are not substantive evidence under Rule 106.

Some may argue that limiting instructions are not entirely effective.[159] However, jurors promise to follow instructions and there would be no purpose to providing them with instructions at all if the system did not trust them to keep their promise. In addition, "limiting instructions do constrain the attorneys."[160] There is value in knowing that "[i]n closing arguments, neither attorney may ask the jury to draw those forbidden inferences or make an argument using the evidence for an improper purpose."[161]

VI. CONCLUSION

Rule 106 was adopted over four decades ago, and it has been a source of confusion and inconsistency ever since. The Supreme Court should resolve the split amongst the circuits by providing a clear interpretation of the meaning of Rule 106. The interpretation that follows purpose of the rules of evidence and general notions of fairness is that an opponent may introduce a remainder, even if the remainder is otherwise inadmissible. However, the remainder must be necessary to place the original part of the statement in context. In addition, there must be an indicia of reliability in order for self-serving exculpatory remainders to be introduced. Finally, the remainder should be admitted only for the limited purpose of context, and the jury should be instructed accordingly. This interpretation means that in practice, many remainders will not be introduced at trial. Sometimes fairness will require Rule 106 to act as a rule of incompleteness.

Rule 106 is based on the concept of fairness in the presentation of evidence. However, no system in which the interpretation of the rule depends on the location of the court can possibly be fair. Indeed, inconsistency in this regard is the very definition of unfairness. It is time for the Supreme Court to eliminate this unfairness once and for all.

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158. Beech Aircraft Corp. v. Rainey, 488 U.S. 158, 173 n.17 (1988).

159. *See* Hardin, *supra* note 143, at 1288 (stating that "it is unclear how effective limiting instructions are at preventing juries from using evidence for prohibited purposes").

160. *Id.*

161. *Id.* (citing Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 FORDHAM L. REV. 1229, 1236 (2007)).