

# The Investigation Narrative: An Argument for Limiting Prosecution Evidence

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## I. INTRODUCTION

A prosecutor, faced with the burden of proving the defendant's guilt beyond a reasonable doubt, wants to present a compelling narrative that will draw the jurors inexorably to a verdict of guilty.<sup>1</sup> To that end, prosecutors are often tempted to go beyond merely using admissible evidence to incrementally build the case against the defendant. Instead, they employ evidentiary tactics that provide shortcuts designed to prime the jury for conviction.<sup>2</sup> In addition, prosecutors seek to frame the defendant's actions through the lens of law enforcement, telling the jury why and how law enforcement identified and pursued the defendant. But this investigation narrative has little legitimate probative value and threatens to unfairly prejudice the defendant.<sup>3</sup> Nevertheless, the courts often give the prosecution license to present this narrative, priming the jury for conviction.

This Article focuses on four types of evidence admitted too readily by the courts and used by prosecutors to enrich and strengthen the case against the defendant. Prosecutors use each of these types of evidence to develop a narrative at trial that focuses the jury on the investigation and the law enforcement perspective, rather than simply on proof of the defendant's

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1. See *Old Chief v. United States*, 519 U.S. 172, 186–88 (1997).

2. Some of the tactics employed are beyond the scope of this Article. See, e.g., *United States v. Wiggan*, 700 F.3d 1204 (9th Cir. 2012) (holding that the prosecution improperly elicited testimony from a grand jury foreperson that the grand jury believed the defendant had lied to the grand jury); Josephine Ross, “*He Looks Guilty*”: *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227 (2004) (discussing a prosecutor's use of derogatory terms, thereby priming the jury to view the defendant as guilty).

3. See *infra* Part II.

criminal conduct—the investigation narrative. The four types of evidence prosecutors employ to develop this narrative are: (1) out-of-court statements about the defendant's criminal conduct that do not fall within any hearsay exception; (2) overview testimony that paints a comprehensive picture of the prosecution's case; (3) opinion testimony that instructs the jury how to view evidence with the eye of the investigator; and (4) profile testimony that invokes the lessons law enforcement claims to have learned from other cases to explain the criminal nature of the defendant's conduct. These types of evidence direct the attention of the jury to what law enforcement knew at various points in the investigation, what motivated them to target the defendant, the steps they took, and how the case against the defendant fits into the greater picture of criminal investigation. The evidence explains why law enforcement viewed—and the jury should view—the defendant's conduct as criminal.

Evidence in these categories should be admitted only rarely, if at all. Careful enforcement of the rules of evidence would generally preclude their use. But too often the courts fail to subject these four types of evidence to appropriate scrutiny. Instead, courts grant the prosecution unjustified license to use these types of evidence because they regard the investigation narrative as a legitimate part of the prosecution's case. It is not. The jury does not need to know—and should not know—about the investigation. The narrative of the case should focus exclusively on what the defendant did, not how law enforcement acted or what law enforcement believed.

Allowing the prosecution to develop the investigation narrative harms the defendant. Each of these types of evidence injects the risk of unfair prejudice to the defendant. The evidence has de minimis probative value, speaking only to the investigation narrative, and threatens to sway the jury improperly to convict. By admitting the evidence, courts inflate its probative value and discount the risk of harm to the defendant. Further, even when the courts condemn the use of such evidence, they often conclude the error was harmless and allow the resulting convictions to stand. As a result, these errors persist, condoned by the trial court and un-remedied on appeal.

In Part II, this Article discusses the role of narrative in the trial, both proper and improper, and criticize the prosecution's efforts to inject an investigation narrative into the criminal trial. In Parts III, IV, V, and VI, this Article examines examine four categories of evidence that should not be admitted at all but are allowed into evidence by courts persuaded that the prosecution should be permitted to develop the investigation narrative. Part III considers out-of-court statements to law enforcement inculcating the defendant, clearly inadmissible hearsay if used to prove their truth, but admitted by some courts to explain the course of the investigation. Part IV examines the prosecution use of overview witnesses to introduce the jury to the arc of the investigation. Part V considers law enforcement opinion testimony—both lay and expert—improperly admitted to draw the jury into

the investigation narrative. Part VI discusses testimony describing criminal profiles, used by the prosecution to encourage the jurors to filter the evidence through the biased lens of law enforcement. In Part VII, this Article suggests ways to attack the problem.

## II. THE INVESTIGATION NARRATIVE AND THE LIMITS OF NARRATIVE LICENSE

In many trials, the prosecution frames its case against the defendant as the fruit of professional investigation. The prosecution makes its case more appealing to the jury by advancing a narrative that conveys the reasons for law enforcement's focus on the defendant and the diligence of the investigation. I call this the "investigation narrative." To further this narrative, the prosecution presents testimony instructing the jurors how to view the evidence, sharing the law enforcement perspective on what might otherwise seem to be inconsequential or innocent action. The prosecution also uses out-of-court statements as background to introduce the investigation, overview witnesses to set out the arc of the investigation, and opinion and profile evidence to persuade the jury to attach the desired incriminatory significance to the evidence.

At trial, the prosecution must establish the case against the defendant beyond a reasonable doubt using specific items of admissible evidence. In most cases, no single witness has observed enough of the relevant conduct to be able to provide a comprehensive picture of the criminal activity based on personal knowledge.<sup>4</sup> Instead, each witness can testify to only a sliver of the criminal conduct and can sponsor only a few items of the evidence necessary to build the case against the defendant. The prosecution must develop its cases step by step, using circumstantial as well as direct evidence.

The fractured nature of the resulting presentation is a challenge that confronts all trial lawyers.<sup>5</sup> To persuade the jury, the lawyer must weave the testimony of the witnesses and the admissible evidence into a coherent story—a narrative.<sup>6</sup> The narrative developed throughout the course of the trial is

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4. Non-expert witnesses are limited to testifying to information as to which they have personal knowledge. FED. R. EVID. 602 ("A witness [who is not testifying as an expert witness] may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.").

5. See MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 235 (2d ed. 2008) (noting that evidence is "fragmentally presented throughout the trial," and that opening statements provide a narrative to help jurors assimilate the evidence); MICHAEL R. Fontham, TRIAL TECHNIQUE AND EVIDENCE 81 (4th ed. 2013) (stating that evidence "provides only piecemeal views of the facts," and the opening statement gives the jury an overview, like a picture for a puzzle); STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE 312 (3d rev. ed. 2013) (explaining that "evidence is often presented in a disjointed if not utterly discontinuous manner").

6. See THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS, AND THE NEW POWERS OF PERSUASION 116 (2d ed. 2009) (emphasizing that jurors need to have the facts assembled "into a coherent, engaging story"); Ross, *supra* note 2, at 255–56 (discussing the importance of narrative to juror



previewed in the opening statement and pulled together in the closing argument, where the lawyer can try to persuade the jury to view the evidence favorably.

Prosecutors are subject to the same limitations and challenges. In an opening, the prosecution weaves the story it expects to establish with the admissible evidence. Then, at the close of the case, the prosecution argues that the jury should draw the inferences that favor the prosecution and should therefore convict the defendant. But that narrative should be developed within the boundaries defined by the rules of evidence, using only admissible evidence and permitted argument. Moreover, just as some evidence is excluded as lacking probative value, the investigation narrative should be placed off limits.

In *Old Chief v. United States*, the Supreme Court discussed the interaction between the prosecution's freedom to determine its narrative and protection of the defendant through the rules of evidence.<sup>7</sup> The Court recognized that the prosecution is entitled to some latitude in determining how to establish guilt beyond a reasonable doubt.<sup>8</sup> The defendant cannot dictate the flow of the prosecution's presentation. At the same time, the Court recognized the limit of narrative license. In *Old Chief*, the defendant was charged with being a felon in possession of a firearm.<sup>9</sup> The prosecution had to prove that the defendant had been convicted of a felony. The defendant offered to stipulate that he was a convicted felon, but the prosecution declined to accept the stipulation, and the trial court permitted the prosecution to introduce proof that the defendant had been convicted of assault causing serious bodily injury.<sup>10</sup> The Court condemned this as an abuse of discretion.<sup>11</sup> By telling the

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decision-making); Nancy L. Neuffer et al., *Jury Persuasion Takes on Different Dimensions*, NAT'L L.J. (Apr. 12, 2010), [http://hawkparkers.com/files/jury\\_persuasion\\_takes\\_on\\_different\\_dimensions\\_nlj\\_complex\\_litigation041210.pdf](http://hawkparkers.com/files/jury_persuasion_takes_on_different_dimensions_nlj_complex_litigation041210.pdf) (emphasizing importance of presenting a coherent story).

7. *Old Chief v. United States*, 519 U.S. 172, 186–88 (1997).

8. *Id.* at 189 (“[T]he accepted rule that the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.”). The Court also recognized that “the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story.” *Id.* at 190.

9. *Id.* at 174–75.

10. *Id.* at 176–77.

11. *Id.* at 191 (stating that the court did not see a sufficient enough impact on the narrative process that would have benefited the prosecution’s argument: “Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant’s subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.”).

jurors that the defendant had been convicted of assault causing serious bodily injury rather than merely telling the jurors that he had been convicted of some unspecified felony, the attorney developed a more robust prosecution narrative. However, the Court held that the prosecution's freedom to craft its narrative—even using evidence that would normally be admissible—had to give way to protect the defendant from unfair prejudice.<sup>12</sup> The prosecution's desire to strengthen its narrative does not create a license to relax the rules of evidence.<sup>13</sup>

The law of evidence includes detailed rules controlling and limiting the use of hearsay, character, and opinion evidence, protecting the criminal defendant from being portrayed as someone with a criminal character or being condemned on the basis of statements that cannot be cross examined.<sup>14</sup> The investigation narrative undermines that protection by telling the jury why law enforcement focused on the defendant as a person of interest and comparing the defendant to other criminals: priming the jury to view all the evidence through the eyes of law enforcement. Of course, the narrative of a criminal trial is more compelling if it conveys an expansive story of a bad person who, acting consistently with her bad character, came to the attention of law enforcement. But that narrative is barred by the rules limiting character evidence.<sup>15</sup>

The investigation narrative also conveys the story of diligent, and sometimes brave, law enforcement officers building the case and interpreting the evidence against the defendant.<sup>16</sup> For example, the prosecution may want

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12. *Id.* at 189–92.

13. See *United States v. Benitez-Avila*, 570 F.3d 364, 369 (1st Cir. 2009) (“We recognize that prosecutors, in an effort to make the evidence of defendants’ guilt more lively and to captivate the jurors with the drama of the hunt for the solution to the crime, will often organize the presentation of the evidence of guilt in the form of a narrative of the investigation. We do not suggest that prosecutors are prohibited from organizing the legitimate evidence in a lively, appealing manner. But it does not follow that, by choosing a more seductive narrative structure for the presentation of the evidence of guilt, prosecutors expand the scope of the relevant legitimate evidence, so as to convert prejudicial and otherwise inadmissible evidence into admissible evidence.”).

14. 1 MCCORMICK ON EVIDENCE §§ 186–94 (Kenneth S. Broun ed., 7th ed. 2013) (discussing limitations on use of character evidence); 2 MCCORMICK ON EVIDENCE, *supra*, § 252 (discussing hearsay and the Confrontation Clause).

15. See FED. R. EVID. 404(b)(1). At one time, criminal trials focused heavily on the character of those involved, but the modern rules preclude that focus. See Daniel D. Blinka, *The Modern Trial and Evidence Law: Has the “Rambling Altercation” Become a Pedantic Joust?*, 47 GA. L. REV. 665, 669–70 (2013) (discussing the history of criminal trials).

16. See, e.g., *United States v. Lopez Garcia*, 672 F.3d 58, 62–63 (1st Cir. 2012); *United States v. Boros*, 668 F.3d 901, 910 (7th Cir. 2012) (holding that it was in error under Rule 403 to allow an expert to provide harmless but extensive “background” testimony concerning safe practices for prescribing controlled substances and the harmful effects of drugs sold without prescriptions); *United States v. Rivas*, 493 F.3d 131, 136 (3d Cir. 2007) (“Prosecutors often abuse their right to show the jury the context of police behavior by unnecessarily suggesting that the police had evidence (not presented to the jury) that led them to believe the defendant was

to introduce evidence of what the law enforcement officers were told so that the jury will understand why the officers followed the particular car, set up surveillance on the defendant, or otherwise turned an investigative eye toward the defendant.<sup>17</sup> Or the prosecution may want to use an overview witness to tell the jury about the arc of the investigation, explaining how law enforcement focused on the defendant and built the case against her. That information enhances the investigation narrative, giving it a “cops and robbers” feel.<sup>18</sup> Or the prosecution may hope to present the opinion of a law enforcement witness or profile testimony to persuade the jury to see the defendant’s actions through the prism of the investigators’ experience and bias. Prosecutors may use law enforcement witnesses to vouch for the credibility of certain witnesses, explaining how investigators identify and work with truthful witnesses.<sup>19</sup>

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involved in crime.”). In *Lopez Garcia*, the prosecution introduced testimony describing “the exciting way” the agents executed the search warrant using a SWAT team and “a ‘flash-bang’ device.” *Lopez Garcia*, 672 F.3d at 62. The witness further explained that the tactics were employed because drug dealers tend to be heavily armed and paranoid. *Id.* at 62–63. The court held that the evidence was sufficiently relevant that admitting the evidence was not plain error. *Id.* at 63.

17. See *United States v. Nelson*, 725 F.3d 615, 621 (6th Cir. 2013) (noting that in some cases otherwise inadmissible evidence may be necessary to provide “a coherent narrative” of the case); *United States v. Washington*, 461 F. App’x 215, 220–21 (4th Cir. 2012) (admitting informant’s statements to explain why officers followed a car, stopped it, and conducted a consent search); see also *infra* note 114 and accompanying text.

18. See, e.g., *United States v. Scott*, 677 F.3d 72, 76, 85 (2d Cir. 2012) (finding the prosecution improperly added to its narrative by having the law enforcement officers testify to their prior acquaintance with the defendant so the story of the trial would be that “‘two officers were on a routine patrol that day . . . [and] saw the defendant, a man they knew and had spoken to before’ engage in a drug transaction” (quoting the prosecutor’s opening statements)); *United States v. Cunningham*, 462 F.3d 708, 712–13 (7th Cir. 2006) (reversing a conviction where prosecution elicited detailed testimony about how investigators had applied for and obtained a wiretap warrant and characterizing testimony as intended to convey to the jury the opinion of various members of the federal bureaucracy that the defendants were involved in drug trafficking); *United States v. Reyes*, 18 F.3d 65, 71 (2d Cir. 1994) (“Prosecutors sometimes adopt a tactic of structuring the evidence in the form of the history of the investigation, because it makes the evidence more exciting and perhaps also because it suggests a guilty verdict as a logical, satisfying conclusion. It is not improper for prosecutors to use this tactic in presenting *relevant evidence*. But the fact that the prosecutor chooses this narrative device does not enlarge the scope of relevant evidence. The investigating agent’s state of mind, although perhaps important to the story of the investigation, nonetheless remains irrelevant to the issue being tried: The question of the defendant’s guilt.”); James L. Kainen & Carrie A. Tendler, *The Case for a Constitutional Definition of Hearsay: Requiring Confrontation of Testimonial, Nonassertive Conduct and Statements Admitted to Explain an Unchallenged Investigation*, 93 MARQ. L. REV. 1415, 1458 (2010) (criticizing admission of background statements as an effort to convince the jury that the prosecution “deserves a conviction”). Other act evidence may also be used improperly to round out the narrative by showing that the defendant is a repeat offender. See Stephen A. Saltzburg, *Rule 404(b) and Reversal on Appeal*, 23 CRIM. JUST. 47 (2008) (discussing a case in which the prosecution erroneously introduced a defendant’s prior convictions and the most likely use by the jury was to conclude the defendant was guilty because he was a repeat offender).

19. See *United States v. Moore*, 651 F.3d 30, 58–63 (D.C. Cir. 2011) (noting that agent’s testimony included the opinion that “cooperating witnesses would present truthful evidence

But the jury does not need—and should not be given—any of this information or perspective. The jury's only task is to determine whether the defendant committed the particular crime charged. To do its job, the jury does not need to know what motivated the law enforcement officers, how the case fits into the larger picture of their investigative efforts, or even how the particular investigation unfolded. Nor does the jury need to know how law enforcement interprets the evidence. The prosecutor's task at trial is to persuade the jury to view the facts as proof of crime.

Too many courts view the investigation narrative as an appropriate aspect of the prosecution's case and therefore accord the prosecution license to present otherwise inadmissible evidence to develop the investigation narrative. The evidence developing that narrative creates the likelihood that a guilty verdict will be based on law enforcement's knowledge that the defendant was involved in crime or law enforcement's necessarily biased view of the evidence, rather than solely on the admissible evidence of the defendant's criminal activity. The courts should not routinely admit prosecution evidence offered to provide background or to explain the investigation;<sup>20</sup> the negligible probative value of that evidence is overwhelmed by the risk of unfair prejudice. If courts properly enforce the rules of evidence, they will no longer allow the prosecution to develop the investigation narrative and will bar much of the evidence now used for that purpose.

The following four parts of this Article address four kinds of evidence offered to advance the investigation narrative and are improperly admitted for that purpose: (1) out-of-court statements to law enforcement inculcating the defendant; (2) prosecution overview witnesses; (3) opinion testimony; and (4) testimony describing criminal profiles.

### III. OUT-OF-COURT STATEMENTS: USING INADMISSIBLE HEARSAY AS BACKGROUND

Prosecutors often seek to introduce jurors to the case by having law enforcement agents testify to assertions about the defendant's actions or about surrounding incriminating information to explain what led them to the defendant.<sup>21</sup> This testimony is inadmissible hearsay if the jury uses the

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because they were insiders and were guilty themselves," but holding the error harmless). In *Moore*, he witness, an FBI agent, testified that "us[ing] cooperating witnesses . . . was 'the only way' to gain 'access to the inside information,'" and that those witnesses "know what's going on." *Id.* at 59. He also stated that his goal when he debriefed witnesses was to "[g]et[] complete and truthful information" and that part of his job was to verify the information. *Id.* (alteration in original).

20. The evidence should be admitted only when the defendant opens the door. See discussion *infra* Part III.A.4.

21. See *Nelson*, 725 F.3d at 621–22 (holding it was error to permit five law enforcement witnesses to recount statements of an anonymous caller to a dispatcher describing a person reported to have a gun). The testimony described in *United States v. Roy* is typical:

On September 16, 2008, Detective William J. Warner of the City of Middletown Police Department testified before the jury. The government asked Warner the

statements for the truth of the assertions.<sup>22</sup> Indeed, using the statements for their truth will often violate the defendant's right to confrontation.<sup>23</sup> To overcome the hearsay and confrontation objections, the prosecution must advance a non-hearsay purpose for the evidence, convincing the court that these out-of-court statements are relevant for something other than the truth of their assertions. Typically, the prosecution's rationale for introducing the statements is that they explain to the jury why the agents took the steps they did, that they establish the agent's state of mind, or merely that they act as background.<sup>24</sup>

Not all courts succumb to these prosecutions arguments. *United States v. Mazza* illustrates the type of hearsay evidence offered in the guise of background and also provides a model for the appropriate analysis of its inadmissibility.<sup>25</sup> The defendants in *Mazza* were charged with conspiracy.<sup>26</sup> At trial, the prosecution set the scene for the jury by having two DEA agents recount what their informant had told them about the defendants' criminal activities.<sup>27</sup> Through this testimony, the prosecution presented essentially its entire case in hearsay form.<sup>28</sup> The trial court held that the statements were

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following question: "Could you tell us, Detective, what was the general nature of the investigation as it was conveyed to you on March 9th of 2007?" Warner responded: "As it was conveyed to me, an individual had come forward and indicated that a John Roy living at 60 Church Street might be in possession of numerous handguns and assault-type weapons."

*United States v. Roy*, 444 F. App'x 480, 481 (2d Cir. 2011). Similar concerns are raised by using out-of-court statements made to non-law enforcement witnesses or statements of reputation, but those are beyond the scope of this Article. *See, e.g., United States v. Garrett*, 716 F.2d 257, 275 (5th Cir. 1983) (holding that the introduction of a statement about a defendant's reputation was error, albeit harmless).

22. FED. R. EVID. 801(c) ("Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."); *see also Moore v. United States*, 429 U.S. 20, 21 (1976) (reversing a conviction because an informant's statement identifying an apartment as belonging to the defendant was inadmissible hearsay); 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 246 (defining hearsay).

23. *See United States v. Walker*, 673 F.3d 649, 656–69 (7th Cir. 2012); *see also infra* Part III.A.2. In *Walker*, the defendants raised only confrontation objections, as both the majority and Chief Judge Easterbrook noted, relieving the court of the obligation to discuss the hearsay concern. *Walker*, 673 F.3d at 654–60. If the declarant testifies at some point in the trial, the confrontation clause is satisfied. *See infra* note 54 and accompanying text.

24. *See, e.g., United States v. Hernandez*, 750 F.2d 1256, 1257 (5th Cir. 1985); *Garrett*, 716 F.2d at 273 (noting that the government argued the statement about the defendant's reputation was relevant to explain why a cooperating witness approached him).

25. *See generally United States v. Mazza*, 792 F.2d 1210 (1st Cir. 1986). The opinion was written by Justice Breyer when he was a judge on the Court of Appeals for the First Circuit.

26. *Id.* at 1212.

27. *Id.* at 1214–15.

28. *Id.* at 1215.

admissible not as hearsay but to explain the background of the investigation and instructed the jury to consider the statements for that limited purpose.<sup>29</sup>

The First Circuit condemned the admission of the evidence. The court characterized the prosecution's need for the evidence as "virtually nonexistent" and emphasized the risk that the jury would consider the statements for their truth.<sup>30</sup> The court also recognized that when the informant later testified, the statements recounted by the agents could inject unfair prejudice by improperly bolstering the informant's testimony in two ways.<sup>31</sup> First, the agents' testimony recounting what the informant had told them presented inadmissible prior consistent statements.<sup>32</sup> Second, it backed the informant's credibility with that of the federal agents.<sup>33</sup> The court applied Rule 403 of the Federal Rules of Evidence, weighing the probative value against the risk of unfair prejudice.<sup>34</sup> Given the extensive scope of the improper evidence and its lack of any fair probative role, the court held that its admission was an abuse of discretion under the rules.<sup>35</sup>

Statements like those offered by the prosecution in *Mazza* are admissible for the non-hearsay purpose of establishing the background of the investigation only if the prosecution is allowed to develop the investigation narrative. Such statements always inject a substantial risk of unfair prejudice as the jury is likely to use them improperly as evidence of the defendant's conduct. Because the probative value is minimal and the risk of unfair prejudice great, the court should exclude the statements.

Nevertheless, despite some strong precedent condemning the introduction of out-of-court statements as background, this use of otherwise

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*; see also FED. R. EVID. 801(d)(1)(B) (a statement "is not hearsay" if "[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying"). There is no fair argument for admitting such statements until the credibility of the declarant (here, the informant) has been attacked and, even then, the statements are not necessarily admissible. See generally 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 251 (discussing admissibility of prior consistent statements).

33. *Mazza*, 792 F.2d at 1215.

34. *Id.* at 1215-16; see also FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

35. *Mazza*, 792 F.2d at 1216. Nevertheless, the court held that the error was harmless and affirmed the conviction. *Id.* The court went through the record in detail and discounted the value of the informant's testimony because it was bolstered by the improper hearsay. *Id.* at 1217. The court relied in part on *United States v. Bradshaw*, 719 F.2d 907, 919-20 (7th Cir. 1983), where the trial court had sustained an objection after the law enforcement witness blurted out that they had received information about the defendant, and the Seventh Circuit concluded that reversal was not warranted. *Mazza*, 792 F.2d at 1216.

inadmissible hearsay appears to be widely accepted.<sup>36</sup> Too many courts are persuaded that the prosecution is entitled to use these statements to develop the investigation narrative.<sup>37</sup>

#### A. THE PROBLEM WITH ADMITTING STATEMENTS AS BACKGROUND

When the prosecution introduces out-of-court statements reporting the defendant's activity, they must argue that the jury will not use the statements for their truth. The prosecution must persuade the court that the statements provide pertinent background. A careful assessment should lead a court to reject the prosecution argument and exclude the statements. The court should address two critical questions: (1) whether the ostensible non-hearsay purpose is relevant; and (2) whether the risk that the jury will misuse the statement for its truth is too great.<sup>38</sup> When out-of-court statements are offered

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36. See 23 FRANCIS C. AMENDOLA ET AL., CORPUS JURIS SECUNDUM: CRIMINAL LAW § 1164 (2006) (asserting that “[c]ertain out-of-court statements offered to explain the course of police conduct are admissible because they are offered not for the truth of the matters asserted but rather to show the information upon which the police acted”); LUBET, *supra* note 5, at 50–51 (describing a model examination of a police officer about arrest and assuming that the officer can properly testify that he had received a description of the perpetrator that matched the defendant); PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE r. 801, Westlaw (database updated Dec. 2014) (asserting that “statements offered to show reasonable reliance thereon by the hearer” are not hearsay and citing in support some decisions allowing police officers to provide information as non-hearsay background).

37. See, e.g., *Mendez v. Graham*, No. 11–CV–5492 (ARR), 2012 WL 6594456, at \*5 (E.D.N.Y. Dec. 18, 2012) (recounting a trial court’s agreement that the prosecution should be able to fill out its narrative with out-of-court statements); 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 249, at 193 (stating that law enforcement officers “should be [able] to provide some explanation for their presence and conduct” but do not need to give “historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay,” because this information is likely to be misused and is often not necessary); 6 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801:5, at 65–79 (7th ed. 2012) (opining that statements relaying general information may be admitted as background but more specific information is too likely to be misused for the truth of the matter asserted and should be excluded because its non-hearsay purpose is outweighed by the danger of unfair prejudice); 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:20, at 124–26 (4th ed. 2013) (taking the position that proof of investigative background should often be excluded because it generates risk that jury will use information as proof the defendant is a bad person and that the law enforcement agents’ motivation is normally irrelevant in criminal trials). But see 23 AMENDOLA ET AL., *supra* note 36, § 1164 (stating that “out-of-court statements offered to explain the course of police conduct are admissible because they are offered not for the truth of the matters asserted but rather to show the information upon which the police acted”); ROTHSTEIN, *supra* note 36 (stating generally that “statements offered to show reasonable reliance thereon by the hearer” are not hearsay).

38. In *United States v. Reyes*, the court identified the following points of analysis:

Questions involved in the determination of the relevance and importance of such evidence include: (i) Does the background or state of mind evidence contribute to the proof of the defendant’s guilt? (ii) If so, how important is it to the jury’s understanding of the issues? (iii) Can the needed explanation of background or state of mind be adequately communicated by other less prejudicial evidence or by

as non-hearsay background, the probative value is generally negligible; the prosecution has no legitimate rationale for admitting the statements. The agent's state of mind or reasons for acting are not relevant to the defendant's guilt or innocence, and the jury can fairly resolve the case without knowing this background.<sup>39</sup> Only the investigation narrative supports admitting this evidence. Conversely, the risk of unfair prejudice—that the jury will take the statements for their truth—is high, and it substantially outweighs this weak probative value.

### 1. The Negligible Probative Value

The treatment of this evidence as probative and fairly admissible reflects the widespread, unthinking acceptance of the investigation narrative. Even McCormick, who characterizes prosecution use of this evidence as a problem, advocates for the investigation narrative. In a frequently quoted passage, McCormick states: "In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon

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instructions? (iv) Has the defendant engaged in a tactic that justifiably opens the door to such evidence to avoid prejudice to the Government?

Questions involved in the assessment of potential prejudice include: (v) Does the declaration address an important disputed issue in the trial? Is the same information shown by other uncontested evidence? (vi) Was the statement made by a knowledgeable declarant so that it is likely to be credited by the jury? (vii) Will the declarant testify at trial, thus rendering him available for cross-examination? If so, will he testify to the same effect as the out-of-court statement? Is the out-of-court statement admissible in any event as a prior consistent, or inconsistent, statement? (viii) Can curative or limiting instructions effectively protect against misuse or prejudice?

United States v. Reyes, 18 F.3d 65, 70–71 (2d Cir. 1994) (footnotes omitted).

39. See United States v. Benitez-Avila, 570 F.3d 364, 371 (1st Cir. 2009) (describing the probative value of the evidence as "nil"); United States v. Johnson, 529 F.3d 493, 501 (2d Cir. 2008); United States v. Rivas, 493 F.3d 131, 137 (3d Cir. 2007) ("The absence of a legitimate reason for the question suggests the testimony was offered for an illegitimate one."); United States v. Hernandez, 750 F.2d 1256, 1257–58 (5th Cir. 1985); Kainen & Tendler, *supra* note 18, at 1417, 1453–72 (noting that the story behind law enforcement officers' investigations is largely irrelevant and should be excluded when it contains hearsay). In contrast, the victim's state of mind may be relevant. See *Johnson*, 529 F.3d at 501 ("We recognize that the government may be tempted to make its presentation to the jury more compelling, dramatic, and seductive by telling the exciting story of the investigation and how it progressed from suspicion to certitude, and how traps were set which resulted in the defendant's capture, red handed. But the issue to be tried is not how the investigation was conducted, but whether the evidence proves the defendant's guilt beyond a reasonable doubt. The agent's state of mind as the investigation progressed is ordinarily of little or no relevance to the question of the defendant['s] guilt. A prosecutor's tactical desire to tell the jury an exciting, captivating story does not justify expanding the scope of admissible evidence . . ."); United States v. DeVincent, 632 F.2d 147, 151 (1st Cir. 1980) (holding that an extortion victim's testimony that he was told that the defendant had been in jail for loansharking and was "a pretty bad guy," was admissible for its effect on the listener).



the scene; he should be allowed some explanation of his presence and conduct.”<sup>40</sup>

Although McCormick does not view this justification as supporting admission of the hearsay statements themselves but suggests that the law enforcement witness should be limited to testimony that she acted “on information received” or similar language, McCormick appears to endorse the propriety of the investigation narrative.

But what is “false” about presenting the facts observed by law enforcement without explaining to the jury how the investigation led the officers to that particular scene? The prosecution should focus its proof on the crime itself, and not the investigation of that crime. Further, the prosecution should not be permitted to justify the introduction of statements as background by anticipating possible juror concern about police action.<sup>41</sup> As one commentator pointed out, this approach “confuse[s] the importance of the story of the investigation with the story of the defendant’s criminality as told through admissible evidence.”<sup>42</sup> There is nothing false in a prosecution narrative that starts with the officer’s first observation of or dealing with the defendant rather than with the investigative background. If the prosecution is concerned about possible juror confusion, the court could give a cautionary instruction directing the jurors not to concern themselves with the background of the investigation. Relying on an instruction to prevent juror concern about irrelevant information (the investigation) is preferable to exposing the defendant to the risk of unfair prejudice inherent in the use of inadmissible statements as background.

Courts are too inclined to give the prosecution license to develop the investigation narrative and do not give enough weight to the counterarguments. In *United States v. Castro-Fonseca*, for example, the defendant was stopped at the border and cocaine was discovered in his car.<sup>43</sup> The only question at trial was whether the defendant knew the drugs were there. The trial court permitted the prosecution to present testimony from four Immigration and Customs agents about the tip they received that led

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40. This language first appeared in MCCORMICK ON EVIDENCE § 249, at 734 (Edward W. Cleary ed., Hornbook Ser. Lawyer’s ed., 3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE 1984], and has continued, with slight variation, through the current edition of the treatise. See 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 249, at 193 (“The officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence and conduct.”); see also *United States v. Cabrera-Rivera*, 583 F.3d 26, 33 (1st Cir. 2009) (quoting only the pro-prosecution, pro-narrative language from 2 MCCORMICK ON EVIDENCE § 249, at 103 (John W. Strong ed., 5th ed. 1999)).

41. *United States v. Nelson*, 725 F.3d 615, 620 (6th Cir. 2013) (“The Government suggests that, without hearing detailed testimony about the suspect’s appearance, the jury would have been confused about why the officers were questioning Nelson or, even worse, would have viewed the officers’ use of force in drawing their weapons on Nelson as excessive.”).

42. Kainen & Tendler, *supra* note 18, at 1470.

43. *United States v. Castro-Fonseca*, 423 F. App’x 351, 352 (5th Cir. 2011).

them to detain the defendant and discover the cocaine. The court stated that the evidence was admissible to explain to the jury the non-routine treatment of the defendant.<sup>44</sup> The evidence should not have been admitted. The information played no legitimate role in helping the jury determine whether the defendant knew the drugs were in the car. But it helped develop the investigation narrative, telling the jurors how the border authorities identified and apprehended a drug smuggler and enhancing the impression of the defendant's criminality, priming the jury to convict without careful assessment of the evidence of defendant's knowledge.<sup>45</sup>

Similarly, in *United States v. Price*, the Third Circuit was swayed by the prosecution's argument that it should be able to provide detailed context.<sup>46</sup> In *Price*, the defendant was charged with drug offenses and possession of a gun.<sup>47</sup> At trial, an officer was allowed to testify that he and his partner broke off their drug surveillance and responded to a call for backup, reporting that the defendant had a gun.<sup>48</sup> The prosecution argued, and the trial court agreed that the evidence was not hearsay but provided context as to why the officers broke off their surveillance, reasoning that the prosecution was permitted to give more detail because the action of the officers was not routine.<sup>49</sup> By introducing this evidence, the prosecution established the investigation narrative: conscientious law enforcement officers conducted a proper investigation and apprehended the defendant. But that narrative was not necessary to the case. The prosecution was entitled to establish what the officers saw and what they found,<sup>50</sup> but the officers' assignment at the time and the information they received should not be considered sufficiently germane to the questions before the jury. Testimony regarding the call for

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44. *Id.* at 354. The court allowed the testimony to explain "why they directed the defendant to stop his vehicle in an unusual place and why they immediately escorted the defendant to a holding cell." *Id.*

45. See *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987). In *Freeman*, the court allowed an agent to testify that a Kansas City police officer told him he had a reliable source with information about counterfeiters. *Id.* at 560. The agent testified that he met with the informant who named certain counterfeiters other than the defendant and said that those counterfeiters were "plann[ing] to meet with an unknown white male" at a certain time "for the purpose of passing counterfeit money." *Id.* The agent set up surveillance of the other counterfeiters and caught them passing the money to Freeman. *Id.* Even without naming the defendant, this testimony achieved the prosecution's overbroad narrative goals. The testimony placed that defendant in the context of broader criminal activity described to the officer by a "reliable source." *Id.* In addition, the testimony drew the jurors into the investigation, telling them the steps the officers took in the case to detect and catch the defendant. *Id.*

46. *United States v. Price*, 458 F.3d 202, 210 (3d Cir. 2006).

47. *Id.* at 204.

48. *Id.* The defendant argued that the officers could have limited their testimony to the fact that they received and responded to the call for back up and that it was not necessary for them to mention that the call included the assertion that the suspect had a gun. *Id.*

49. *Id.* at 210.

50. Another officer had observed the gun and could therefore testify that it belonged to the defendant. *Id.* at 208.

backup advanced the investigation narrative and also generated the risk that the jurors would take it as evidence that the defendant had a gun. Its probative value was de minimis, and the risk of unfair prejudice was great.<sup>51</sup>

## 2. The Risk of Unfair Prejudice

These out-of-court statements generate a substantial risk of unfair prejudice. Because the statements relate to why law enforcement took the actions it did, the jury is likely to be interested in the truth of the assertions. But the statements are not admissible for their truth, and using them for their truth is improper. Thus, the likelihood that the jury will do so makes the statements highly and unfairly prejudicial to the defendant.<sup>52</sup> They should, therefore, be excluded.

In addition to being inadmissible hearsay if taken for their truth, this use of the statements will often violate the defendant's right to confrontation.<sup>53</sup> The Confrontation Clause precludes the use of testimonial out-of-court statements unless the declarant is unavailable and was subject to cross-examination on the statement.<sup>54</sup> The statements used as background are almost invariably testimonial in nature. Typically, these are statements made to law enforcement accusing the defendant of criminal activity.<sup>55</sup> Assessment

51. See *United States v. Nelson*, 725 F.3d 615, 620 (6th Cir. 2013) (noting that "officers' background or state of mind was never at issue").

52. See *United States v. Reyes*, 18 F.3d 65, 70–71 (2d Cir. 1994) (discussing the risk of unfair prejudice); *United States v. Hernandez*, 750 F.2d 1256, 1257 (5th Cir. 1985) (describing the testimony of the agent that he had been told that the defendant was a drug smuggler as "invidious and prejudicial"). Another result of viewing the out-of-court statements as non-hearsay background is that the defendant is not able to impeach the declarant under Rule 806 of the Federal Rules of Evidence. See *United States v. Walker*, 673 F.3d 649, 653 (7th Cir. 2012) (reporting that the prosecution had persuaded the trial judge to bar impeachment of informant who did not testify in the prosecution's case-in-chief, but whose out-of-court statements were admitted against the defendants); see also 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 324.2 (discussing Rule 806).

53. See *Walker*, 673 F.3d at 656–69 (concluding that introduction of out-of-court statements violated the right to confrontation and rejecting the government's argument that the statements played a non-hearsay role); *Taylor v. Cain*, 545 F.3d 327, 331–37 (5th Cir. 2008) (granting habeas relief to a state prisoner because the court had allowed the detective to testify without limitation to what he had been told regarding who committed the crime and allowed the prosecutor to argue the truth of those statements); *United States v. Cromer*, 389 F.3d 662, 676 (6th Cir. 2004) (holding that statements from a confidential informant are inadmissible under the Confrontation Clause, unless such informant can be cross-examined); *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000) (holding that admitting a confidential informant's statements violated the right to confrontation but was harmless where there was overwhelming evidence). See generally *Kainen & Tendler*, *supra* note 18, (arguing that admission of such evidence violates the right to confrontation).

54. See 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 252 (discussing confrontation issues). Of course, there is no Confrontation Clause violation if the statements are admitted for another purpose, such as background, or if the declarant testifies. *United States v. Price*, 458 F.3d 202, 210 (3d Cir. 2006); see also *Cromer*, 389 F.3d at 676.

55. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that statements elicited by law enforcement officers in the course of investigation are testimonial and therefore subject

of the risk of misuse for the truth of the statements should lead a court to conclude that the Confrontation Clause bars their admission.<sup>56</sup>

Thus, the risk of unfair prejudice flowing from the introduction of statements about guilt as background is great, while their probative value is generally negligible. As a result, the trial court should recognize that the risk of unfair prejudice substantially outweighs the probative value and exclude the statements altogether.<sup>57</sup>

### 3. Ineffective Protections Against Misuse

When courts admit out-of-court statements as non-hearsay background, they often take steps to protect the defendant from their misuse, rationalizing that the defendant will therefore not suffer the threatened harm. Courts can redact the statements, give limiting instructions, and circumscribe the prosecution's use of the statements. The key to the defendant's protection is the effectiveness of these restrictions. There are two critical problems. First, redaction and limiting instructions are unlikely to effectively prevent improper use of the statements for their truth. Second, the prosecution sometimes disregards the limitations, improperly invoking the statements for their truth.

#### *i. Redaction*

Some courts and commentators argue that redacting direct references to the defendant content makes the statements admissible by protecting the defendant while still permitting the government to convey its version of the facts with sufficient narrative detail.<sup>58</sup> On closer consideration, this approach is problematic. First, while redaction reduces the prejudicial impact, it does not eliminate it. The statements generally still act as indirect or implicit hearsay and threaten to be taken for their truth and used as evidence implicating the defendant.<sup>59</sup> Second, the argument for allowing the prosecution to introduce redacted statements rests on the conviction that the

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to the limitations of the Confrontation Clause); *United States v. Logan*, 419 F.3d 172, 177 (2d Cir. 2005); *Cromer*, 389 F.3d at 670–71.

56. *Ryan v. Miller*, 303 F.3d 231, 252–53 (2d Cir. 2002) (rejecting the State's argument that statements were admissible as background and holding admitting the statements violated the right to confrontation, stressing the need for careful analysis).

57. *See Reyes*, 18 F.3d at 71–72 (holding that background evidence should have been excluded but asserting that in some cases the statements would have sufficient non-hearsay value to warrant admitting them).

58. *See, e.g., United States v. Nelson*, 725 F.3d 615, 620–22 (6th Cir. 2013) (stating that the less-detailed description of the call to the dispatcher would have explained why officers went to the scene); *United States v. Sallins*, 993 F.2d 344, 348 (3d Cir. 1993) (stating that a police radio call was not needed to explain why officers went to the scene as officer testimony was sufficient background).

59. *See Reyes*, 18 F.3d at 69 (recognizing that evidence can be hearsay even if the declarant's statements are not repeated in court).

prosecution is entitled to present an investigation narrative. Redaction should render the statements admissible only if it removes all risk that the jury will use the statements as more than general background.

McCormick recognizes the risk of misuse and suggests that it is sufficient for the jury to be told only that law enforcement “acted ‘upon information received.’”<sup>60</sup> However, courts often allow more information to be conveyed to the jury through imperfect redaction. For example, some courts allow the law enforcement witness to testify that she spoke with the informant and then describe the actions targeting the defendant that she took after that conversation.<sup>61</sup> That juxtaposition of testimony implicitly but clearly conveys to the jury that the information the witness received incriminated the defendant. For example, in *United States v. Walker*, the agent testified that he received a phone call from the informant.<sup>62</sup> Then, without recounting the phone conversation, the agent testified that he went to a particular intersection and met with the defendant for the first time.<sup>63</sup> The Eighth Circuit rejected the argument that this constituted hearsay, failing to recognize that the agent’s testimony about his actions transmitted to the jury the content of the call as effectively as direct testimony recounting that content.<sup>64</sup> Evidence presented in this form conveys to the jury that the unrecounted out-of-court statement implicated the defendant. If the jury is told that the police received specific information and then arrested the defendant or placed the defendant under surveillance, the only possible inference is that the information implicated the defendant.<sup>65</sup> Thus as some courts have recognized, even redacted statements act as indirect or implicit hearsay.<sup>66</sup>

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60. 2 MCCORMICK ON EVIDENCE, *supra* note 14, § 249, at 195.

61. See, e.g., *United States v. Johnson*, 529 F.3d 493, 500 (2d Cir. 2008) (stating that removing allegations against the defendant by name would solve the problem); *United States v. Cromer*, 389 F.3d 662, 676 (6th Cir. 2004) (stating that the testimony arguably did not introduce any hearsay statements); *Vachet v. West*, No. 04-CV-3515JG., 2005 WL 740640, at \*10 (E.D.N.Y. Mar. 24, 2005) (suggesting that the problem would have been avoided had the witness testified that, after the conversation with the girl who made the out-of-court statements, “the officers focused their attention once again on [the defendant]”). But see *United States v. Reynolds*, 715 F.2d 99, 103–04 (3d Cir. 1983) (holding that the co-defendant’s statement, “I didn’t tell them anything about you,” was inadmissible hearsay).

62. *United States v. Walker*, 636 F.2d 194, 194 (8th Cir. 1980).

63. *Id.* at 195.

64. *Id.*

65. Kainen & Tendler, *supra* note 18, at 1453–56.

66. See *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir. 2002) (stating that testimony which indirectly accuses the defendant may qualify as hearsay); *United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994) (recognizing that witness’s testimony about the conversation with the declarants and her subsequent action “clearly conveyed the substance of what [the declarants] had said”).

ii. *Limiting Instructions*

While courts generally assume that juries follow limiting instructions,<sup>67</sup> that assumption is subject to question.<sup>68</sup> Moreover, in some instances, the risk that the jury will not follow the instructions is so great and the likely harm to the defendant if the limiting instructions fail is so significant that the courts' assumption about jury instructions should not be given its customary weight. The Supreme Court has held that, in some circumstances, limiting instructions are insufficient to protect a defendant's constitutional rights.<sup>69</sup> Limiting instructions are particularly unlikely to be effective when the statement is not probative for any non-hearsay purpose, as in cases where it is admitted as background to set out the investigation narrative.<sup>70</sup>

iii. *Prosecution Misuse*

In some cases, despite a court's ruling admitting the statements for the limited purpose of establishing background and the use of limiting instructions to restrict the jury's consideration of these statements accordingly, the prosecution nevertheless uses the statements for their truth.<sup>71</sup>

67. See, e.g., *Gray v. Maryland*, 523 U.S. 185, 200 (1998) (Scalia, J., dissenting) (discussing cases relying on the assumption that jurors follow limiting instructions); *United States v. Garcia-Guia*, 468 F. App'x 544, 548–49 (6th Cir. 2012) (rejecting a Confrontation Clause challenge on grounds that the jury presumably followed limiting instructions); *United States v. Brown*, 110 F.3d 605, 609–10 (8th Cir. 1997) (relying in part on the use of limiting instructions).

68. See Meredith Allison & C.A. Elizabeth Brimacombe, *Alibi Believability: The Effect of Prior Convictions and Judicial Instructions*, 40 J. APPLIED SOC. PSYCHOL. 1054, 1059–60, 1076–77 (2010) (discussing ineffectiveness of limiting instructions); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 70, 76–77 (1995) (discussing limiting instructions); Kainen & Tendler, *supra* note 18, at 1456–57 (noting that limiting instructions that direct the jury not to consider the testimony for the truth of the matter asserted are not adequate to prevent the testimony being used in impermissible ways); Kamala London & Narina Nunez, *The Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence*, 85 J. APPLIED PSYCHOL. 932, 934–37 (2000) (discussing the effectiveness of limiting instructions).

69. See, e.g., *Bruton v. United States*, 391 U.S. 123, 136–37 (1968) (holding that limiting instructions were ineffective to prevent the jury from using a co-defendant's confession against a defendant in violation of his right to confrontation); *Jackson v. Denno* 378 U.S. 368, 388–89 (1964) (questioning whether a jury could follow instructions directing it to disregard an involuntary confession).

70. See *United States v. Nelson*, 725 F.3d 615, 622 (6th Cir. 2013) (recognizing that limiting instructions were ineffective where statements were not admissible and went to the heart of the case); *United States v. Forrester*, 60 F.3d 52, 62 (2d Cir. 1995) (concluding that limiting instructions would not have been effective to protect the defendant from the risk that the jury would use out-of-court statements for their truth); *Reyes*, 18 F.3d at 71–72 (concluding that limiting instructions were not effective to protect defendant where statements spoke to the heart of the case and did not have a relevant, non-hearsay use in the case); Kainen & Tendler, *supra* note 18, at 1456–57.

71. See, e.g., *Jones v. Basinger*, 635 F.3d 1030, 1040–42 (7th Cir. 2011) (granting relief where the trial court had admitted out-of-court statements as non-hearsay to explain the investigation, but then repeatedly used the statements for their truth, violating the defendant's

*United States v. Collins* illustrates the problem of prosecution misuse.<sup>72</sup> In *Collins*, law enforcement officers found evidence in the defendant's girlfriend's apartment that was used at trial to connect the defendant to the crime.<sup>73</sup> During the trial, the court allowed a detective to testify to information he received connecting the defendant to the apartment, admitting it as background to explain the investigation.<sup>74</sup> As the trial progressed, the defense sought to raise a reasonable doubt by implying that someone other than the defendant might have left the incriminating items at the apartment.<sup>75</sup> To refute that claim, the prosecutor argued in closing that the detective had told the jury why he went to that location.<sup>76</sup> This argument invited the jurors to rely on the truth of the background statements in violation of the court's ruling and the limiting instructions.<sup>77</sup> The prosecution's failure to respect the limitation constitutes error and, in many cases, a violation of the defendant's right to confrontation. Even more troubling, it suggests that the prosecution does not understand the limited theory on which the evidence is admitted.

#### 4. The (Rare) Legitimate Non-Hearsay Use of Background Statements

In rare cases, the specific contest at trial increases the probative value of these statements as background. The evidence then plays a legitimate role in the investigation narrative and should be admitted.<sup>78</sup> Generally, the circumstances warranting admission of the statements arise from choices made by the defense.<sup>79</sup>

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right to confrontation); *Mason v. Allen*, 605 F.3d 1114, 1122–23 (11th Cir. 2010) (recognizing that if the prosecution relies on the truth of the out-of-court statements, they are hearsay and their use may violate the defendant's right to confrontation); *United States v. Cabrera-Rivera*, 583 F.3d 26, 34–36 (1st Cir. 2009) (concluding that there was a violation of the right to confrontation); *United States v. Hearn*, 500 F.3d 479, 484 (6th Cir. 2007) (finding error where the prosecution argued the truth of the statements); *United States v. Becker*, 230 F.3d 1224, 1229 (10th Cir. 2000) (noting that the prosecution relied on the truth of the statements in both opening and closing remarks); *United States v. Sallins*, 993 F.2d 344, 346–47, 349 (3d Cir. 1993) (reversing where the prosecutor relied on the truth of the statements in the closing argument, arguing that it was not coincidence that the defendant fit the description contained in the statements admitted only as background); *United States v. Hernandez*, 750 F.2d 1256, 1257–58 (5th Cir. 1985) (condemning the prosecution's closing argument that argued a statement for its truth); *United States v. Figueroa*, 750 F.2d 232, 238–39 (2d Cir. 1984) (characterizing the prosecution's non-hearsay argument as "disingenuous").

72. *United States v. Collins*, 996 F.2d 950, 952 (8th Cir. 1993).

73. *Id.*

74. *Id.* at 953–54.

75. *Id.* at 952.

76. *Id.* at 954.

77. *Id.*

78. See *United States v. Forrester*, 60 F.3d 52, 60–61 (2d Cir. 1995) (discussing circumstances warranting admission of hearsay).

79. See *United States v. Brown*, 669 F.3d 10, 23–24 (1st Cir. 2012) (concluding that the defense's opening statement alleging unreasonable government investigation opened the door for the government to introduce hearsay evidence to show reasonableness of investigation, even

The defendant may open the door to such “background” information by raising particular defenses or using particular strategies at trial.<sup>80</sup> For instance, if the defendant alleges bad faith or caprice in the investigation, the information received by law enforcement then has critical relevance.<sup>81</sup> In *United States v. Hunt*, for example, the defendant staked out the position that the government had no reason to investigate him and alleged “‘outrageous government investigative conduct’ in violation of his due process rights.”<sup>82</sup> That claim opened the door to testimony concerning the reports from outside sources that one agent had received and relayed to the undercover agents. Similarly, in *United States v. Howell*, defense counsel opened the door by asking the agent in charge about the reason for the investigation on cross-examination.<sup>83</sup>

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though the trial court did not permit the defendant to develop a defense based on lack of reasonableness at trial). In addition, when the out-of-court statements constitute the third party’s portion of the conversation with the defendant, they may be admitted to put the defendant’s statements in context. *See* *United States v. Walker*, 673 F.3d 649, 657 (7th Cir. 2012). The court cited four earlier decisions in which audio recordings of the defendant speaking with an informant were admitted and the defendant argued that admission of the informant’s statements was error. *Id.* In each instance, the court concluded that the informant’s statements were necessary to put the defendant’s statements in context. *Id.* (citing *United States v. Gaytan*, 649 F.3d 573, 580 (7th Cir. 2011); *United States v. York*, 572 F.3d 415, 427 (7th Cir. 2009); *United States v. Nettles*, 476 F.3d 508, 517–18 (7th Cir. 2007); *United States v. Van Sach*, 458 F.3d 694, 701 (7th Cir. 2006)); *see also* *United States v. Gajo*, 290 F.3d 922, 930 (7th Cir. 2002) (admitting a non-conspirator’s statements to provide context to a co-conspirator’s statements). *But see* *United States v. Collins*, 575 F.3d 1069, 1073–74 (10th Cir. 2009) (questioning whether all statements in a recording of an interrogation were relevant to put a defendant’s responses in context).

80. A mere general attack on the government’s case should not be viewed as opening the door. *See* *Jones v. Basinger*, 635 F.3d 1030, 1046–48 (7th Cir. 2011).

81. *See* *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) (acknowledging that the defense could open the door by raising an accusation that the agents had improperly targeted the defendant); *United States v. Webster*, 649 F.2d 346, 347–48 (5th Cir. 1981) (The court identified the limited circumstances in which otherwise inadmissible hearsay might become admissible: “Only in special circumstances may the government prove what its agents have been told about the defendant as evidence of good faith, reasonableness or proper motive of the government and then only to rebut contrary assertions by the defendant.”).

82. *United States v. Hunt*, 749 F.2d 1078, 1083 (4th Cir. 1984); *see also id.* at 1082–84 & n.8.

83. *United States v. Howell*, 664 F.2d 101, 105 (5th Cir. 1981); *see also* *United States v. Jimenez*, 564 F.3d 1280, 1288 (11th Cir. 2009) (holding statements were admitted to rehabilitate an officer’s credibility after cross-examination that challenged the course of investigation); *United States v. Shipp*, No. 92-2497, 1993 WL 181396, at \*3 (7th Cir. May 28, 1993) (justifying the use of the statements because defense counsel had asked several times whether anyone else in the car was searched or arrested and “[a] juror might [have] reasonably wonder[ed]” why the defendant was the only occupant of the car searched); *United States v. Hawkins*, 905 F.2d 1489, 1495 (11th Cir. 1990) (allowing the agent to testify to the complaints that prompted the investigation in order to rebut the defendants’ claim that the investigation was unfounded harassment). The government has sometimes argued that the defendant opens the door to otherwise inadmissible hearsay by raising an entrapment defense. *See, e.g., Webster*, 649 F.2d at 349–50 (holding that the government was not allowed to use of out-of-court statements to refute a claim of entrapment and rejecting the government’s argument that the hearsay statements in the case were properly admitted because the defendant had opened the door). The entrapment



In some cases, the defense strategy puts issues before the jury that would otherwise fall within the exclusive province of the court. In *United States v. Brown*, on cross examination of a narcotics officer, defense counsel challenged the officer's belief that she received valid consent to search from the defendant.<sup>84</sup> Counsel's questions implied that the defendant lacked authority to consent. As a result, the Eighth Circuit concluded that additional statements relating to the defendant's relationship to the premises were admissible to establish the officer's reasonable belief that the defendant had authority to consent to a search of the apartment.<sup>85</sup> Thus, the defense's tactics injected the consent issue—normally only a question for the court to address in ruling on a motion to suppress—into the case before the jury.

It must be stressed, however, that such instances are rare. In the vast majority of the cases permitting the use of this evidence, the defense has not opened the door, but the court concludes that the prosecution is allowed to use the statements to show the background of the investigation.

#### B. THE EVOLUTION OF THE LAW: ACCEPTING THE PROSECUTION NARRATIVE

How did the use of inadmissible hearsay to advance the investigation narrative evolve to the point that it is often viewed as accepted practice? At one time, courts were generally cautious about permitting the prosecution to use otherwise inadmissible hearsay as background. A survey of the relevant decisions of the past few decades suggests that the practice has changed and that, over time, courts have come to accept the prosecution argument based on the investigation narrative with less scrutiny, admitting out-of-court statements that would previously have been excluded.<sup>86</sup>

Interestingly, this trend appears to be traceable in large part to careless citation of a lightly reasoned and poorly supported decision that states that out-of-court statements are admissible as background. In the following Subparts, this Article will show the troubling development of the current rule without overwhelming the reader with excessive detail. But it is important to recognize what happened: the courts that admit out-of-court statements to law enforcement as "background" have shown an unhealthy willingness to hold in favor of the government on little or no authority. While some courts

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defense injects latitude concerning what the prosecution may prove, but not concerning the competent evidence to prove it.

84. *United States v. Brown*, 110 F.3d 605, 609–10 (8th Cir. 1997).

85. *Id.*

86. *See, e.g., United States v. Garcia-Guia*, 468 F. App'x 544, 548–49 (6th Cir. 2012) (citing no precedent yet finding no error where two witnesses testified to out-of-court statements incriminating the defendant). In *Garcia-Guia*, one agent testified over objection that the agency had "received information from several sources that [the defendant] was a drug trafficker in the . . . area." *Id.* at 546. Another agent testified that he "became aware of the involvement of a[n] individual named Mario Medina in the delivery of drugs that were the subject of a controlled drug buy" because a fellow agent told him. *Id.* The court overruled the defendant's objection and admitted the statements as non-hearsay to "explain[] the direction of the agent's investigation." *Id.*

continue to caution against admitting such evidence without scrutinizing the role it will play in the case, many decisions reveal an absence of careful analysis.<sup>87</sup> The decisions include frequent citations to precedent that is weak or inapposite.

### 1. Older Cases (1980s): The Law Before *Love*

The older precedents either rejected out of hand the prosecution argument that out-of-court statements could be used as background or approached the admissibility of such evidence with caution. It appears that before the mid-1980s none of the Circuit Courts of Appeals routinely allowed the prosecution to use out-of-court statements as background to explain the investigation.<sup>88</sup> Although McCormick identified this as an “area of apparently widespread abuse” and cautioned against admitting these hearsay statements as early as 1984, at that time, he cited only state decisions permitting the practice.<sup>89</sup> Only after the mid-1980s was there a shift in federal case law to allow use of out-of-court statements as background evidence in criminal cases.

Before that time, several circuits held simply and clearly that out-of-court statements could not be used as background or context in criminal cases.<sup>90</sup> Some circuits conveyed somewhat mixed signals, but, on balance, discouraged the use of out-of-court statements to law enforcement as background.<sup>91</sup> The

87. See, e.g., *Jones v. Basinger*, 635 F.3d 1030, 1044–48 (7th Cir. 2011); *United States v. Reyes*, 18 F.3d 65, 71 (2d Cir. 1994); *United States v. Sallins*, 993 F.2d 344, 348 (3d Cir. 1993).

88. See *United States v. Figueroa*, 750 F.2d 232, 240–41 (2d Cir. 1984); *United States v. Pedrosa*, 750 F.2d 187, 200 (2d Cir. 1984).

89. MCCORMICK ON EVIDENCE 1984, *supra* note 40, § 249, at 734.

90. See, e.g., *United States v. Bettelyoun*, 892 F.2d 744, 746 (8th Cir. 1989) (rejecting the government’s argument that the content of a police dispatch was admissible as non-hearsay to establish the sequence of events, stating that the prosecution had other adequate evidence of the timing and order of events and that the dispatch was relevant only for the truth of the assertions); *United States v. Mazza*, 792 F.2d 1210, 1215 (1st Cir. 1986) (disapproving the use of out-of-court statements as background); *United States v. Jannotti*, 729 F.2d 213, 219 (3d Cir. 1984) (noting that “[t]he government, however, has cited no authority for a ‘background’ exception to the hearsay rule”); *Figueroa*, 750 F.2d at 238–39 (characterizing as “disingenuous” the prosecution’s argument that the statements could be admitted as non-hearsay); *United States v. Escobar*, 674 F.2d 469, 473–76 (5th Cir. 1982) (condemning as impermissible hearsay the investigating officer’s testimony explaining that he ran the defendant’s name through the computer and learned that he was a suspected drug smuggler); *United States v. Ziegler*, 583 F.2d 77, 81 (2d Cir. 1978); *United States v. Mancillas*, 580 F.2d 1301, 1310 (7th Cir. 1978) (holding that the admission of an agent’s testimony recounting the information he had received was error, albeit harmless). Oddly, *Mancillas* has frequently been cited since then as authority for admitting such out-of-court statements. See, e.g., *United States v. Mejia*, 909 F.2d 242, 247 (7th Cir. 1990); see also *infra* text accompanying notes 95–98 (describing the court’s approval of the introduction of out-of-court statements in *United States v. Love*, 767 F.2d 1052 (4th Cir. 1985)).

91. See, e.g., *United States v. Peaden*, 727 F.2d 1493, 1499–502 (11th Cir. 1984) (citing no authority allowing non-hearsay use of such statements but holding that it was not plain error to allow a federal agent to testify to statements made by arrestees informing the agent that the defendant was involved in the local drug trafficking in order to explain why the agent was

Second Circuit, for example, held a firm line limiting the government's use of out-of-court statements as non-hearsay background,<sup>92</sup> but included language in some opinions acknowledging the possibility that out-of-court statements could be admissible as background.<sup>93</sup> However, the basis for that assertion was weak and the circumstances permitting use of such evidence quite limited.<sup>94</sup> No Second Circuit authority at that time supported a prosecution license to introduce otherwise inadmissible statements as background to advance the investigation narrative.

Only two circuits established authority supporting this use of out-of-court statements.<sup>95</sup> The most significant decision turned out to be the Fourth

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particularly attentive when he received a phone call from the defendant and could recall the conversation accurately).

92. See *Pedroza*, 750 F.2d at 199–201 (rejecting the argument that testimony relating the kidnapping victim's out-of-court statements was admissible over a hearsay objection, regardless of whether the declarant testified to the statements later in the trial, and noting there is no "background" exception that would allow the statements to be introduced as non-hearsay); see also *Figueroa*, 750 F.2d at 240 (recognizing the impropriety of admitting the agent's testimony about the informant's telephone calls and reversing the conviction). The admission of the statements in *Figueroa* was aggravated by the fact that the trial court did not give a limiting instruction and the prosecutor argued the statements for their truth.

93. See *Figueroa*, 750 F.2d at 240 (remarking that the evidence went "beyond background material"); *Pedroza*, 750 F.2d at 200 (stating that statements may sometimes be admitted "to show the circumstances surrounding the events, providing explanation for such matters as the understanding or intent with which certain acts were performed").

94. Both *Pedroza* and *Figueroa* cited *United States v. Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975) as an example of a situation in which statements were properly admitted as background. See *Figueroa*, 750 F.2d at 239–40; *Pedroza*, 750 F.2d at 200. However, the statements in *Lubrano* did not include assertions about the defendant's past activities or criminal reputation, but consisted only of an agent's general instructions to an undercover informant as he sent the informant off to attempt to purchase drugs from the defendant. See *Lubrano*, 529 F.2d at 637. *Lubrano* in turn relied on two decisions, neither of which provides strong support for the use of out-of-court statements as background. See *id.* (citing *United States v. Ruggiero*, 472 F.2d 599, 607 (2d Cir. 1973); *United States v. Manfredonia*, 414 F.2d 760, 765 (2d Cir. 1969)). The import of *Manfredonia* is not clear; conversations between two agents were held admissible but were not detailed in the opinion, and it was not clear whether they implicated the defendant. *Manfredonia*, 414 F.2d at 765. One of the two agents in *Manfredonia* was about to deal with the defendant undercover, and the court treated their conversation as setting the scene for the meeting between the undercover agent and the defendant. *Id.* *Ruggiero* is even less supportive of the government's position that statements should be admitted as background. *Ruggiero* addressed the admissibility of testimony about conversations among the defendant's confederates in a bribery scheme, which the court characterized as operative facts in the crime or co-conspirators' statements, not merely informational background. *Ruggiero*, 472 F.2d at 607. Thus, while the Second Circuit suggested that the background argument would apply in some cases, those circumstances do not include a broad rule allowing the prosecution to introduce out-of-court statements to explain the officers' actions or provide background information about the defendant.

95. The development of the law by the Fourth Circuit is discussed below at some length. See *Love*, 767 F.2d at 1052. The Ninth Circuit also stated that background use of out-of-court statements was admissible. See *United States v. Echeverry*, 759 F.2d 1451, 1456–57 (9th Cir. 1985) (accepting the government's argument that testimony recounting an informant's statements that he had developed a drug source were not hearsay, but admissible background).

Circuit's decision in *United States v. Love*.<sup>96</sup> *Love*, a 1984 Fourth Circuit decision permitting the use of statements as background, appears to have had a pervasive impact: providing the foundation, albeit a weak one, for the development of the modern shift to admitting this evidence. In *Love*, the court approved the introduction of out-of-court statements—not detailed in the opinion—to explain the agents' preparations in anticipation of the defendant's arrest.<sup>97</sup> The court stated that "an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken."<sup>98</sup> As discussed below, the decision in *Love* is cryptic and poorly supported, but it has been cited repeatedly.

The foundations of *Love* are worth examining, given the extensive impact of the decision. The Fourth Circuit cited three cases.<sup>99</sup> Scrutiny of these decisions reveals that they provide little support for a broad rule allowing non-hearsay use of statements to provide background. The main case cited in *Love* was *United States v. Scott*.<sup>100</sup> In *Scott*, the Fifth Circuit conceded that the non-hearsay argument had some support but held only that the error, if any, was harmless.<sup>101</sup> Furthermore, the *Scott* court based the assertion that there was some support on a citation to *United States v. Vitale*.<sup>102</sup> In *Vitale*, a detective testified at trial that he had received "information of possible criminal activity conducted at this particular bar."<sup>103</sup> The Fifth Circuit held that the out-of-court report could be admitted to explain the officers' presence at the particular location but specifically noted that the statements could be

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96. *Love*, 767 F.2d at 1052.

97. *Id.* at 1063–64. In a companion decision, *United States v. Brown*, the Fourth Circuit adopted a position limiting such background evidence. The trial court had permitted an FBI agent to testify to information he had received related to the defendant's theft of shrimp and had instructed the jury that the statements were admitted only for background, not to be taken for their truth. *United States v. Brown*, 767 F.2d 1078, 1083–84 (4th Cir. 1985). The Fourth Circuit did not approve the admission of the statements. *Id.* The court noted that the first of the statements—the informant's report to the agent that stolen shrimp would be arriving at the gate in a truck, which was described—"might well be admissible as background even as hearsay," pointing out that it did not connect the defendant to the criminal activity. *Id.* at 1084. However, the other statements, each of which connected the defendant to the theft, were not admissible as background, but instead impermissibly bolstered the prosecution's case. *Id.* The court condemned "the strategy of overkill pursued by the government, with little regard to countervailing concerns of undue prejudice" and held that the limiting instructions did not provide sufficient protection. *Id.* The *Brown* court cited two earlier decisions, neither of which addressed the argument that the statements were admissible background. *See Brown*, 767 F.2d at 1084; *United States v. Carvalho*, 742 F.2d 146 (4th Cir. 1984); *United States v. Melia*, 691 F.2d 672 (4th Cir. 1982).

98. *Love*, 767 F.2d at 1063.

99. *See id.* (citing *United States v. Hunt*, 749 F.2d 1078 (4th Cir. 1984); *United States v. Scott*, 678 F.2d 606 (5th Cir. 1982); and *United States v. Mancillas*, 580 F.2d 1301 (7th Cir. 1978)).

100. *See Love*, 767 F.2d at 1063 (citing *Scott*, 678 F.2d at 606).

101. *Scott*, 678 F.2d at 612.

102. *See id.* (citing *United States v. Vitale*, 596 F.2d 688, 689 (5th Cir. 1979)).

103. *Vitale*, 596 F.2d at 689 (quoting a state police detective's testimony).

admitted as background only if they did not point to the defendant.<sup>104</sup> The second decision cited in *Love* was *United States v. Hunt*.<sup>105</sup> *Hunt* held only that the defendant had opened the door to the evidence.<sup>106</sup> *Hunt* provided no support for *Love*'s broad assertion allowing such use of out-of-court statements in the government's case in chief. The third decision cited in *Love* was *United States v. Mancillas*.<sup>107</sup> Rather than condoning the use of out-of-court statements as background, *Mancillas* actually condemned it, but held that the error was harmless in the particular case.<sup>108</sup> Thus, none of the precedents on which *Love* relied support the court's broad statement of a general rule admitting out-of-court statements to law enforcement as background.

The impact of *Love*'s weakly supported assertion has been amplified in particular by the Tenth Circuit's opinion in *United States v. Freeman*.<sup>109</sup> *Freeman* cited only *Love* for the proposition that "out of court statements are not hearsay when offered for the limited purpose of explaining why a Government investigation was undertaken."<sup>110</sup> Like *Love*, *Freeman* is frequently cited, often in tandem with *Love*, to support the use of out-of-court statements as background.<sup>111</sup> It is this shaky foundation that provides the basis for many of the subsequent decisions allowing these statements to be used as non-

104. *Id.* ("This suggestion of a cloud of criminality enveloping the defendant is best not used. There is little legitimate justification for it save to show that the police official was on business, not a vigilante, and, when necessary, such evidence can readily be supplied in some other fashion less prejudicial to the defendant. Yet we have previously allowed police agents to testify in a similar fashion for the limited purpose of explaining why they were at a particular location."). The *Vitale* court in turn cited *United States v. Gomez*, where the court concluded only that the introduction of the out-of-court statements was harmless error. *Vitale*, 596 F.2d at 689 (citing *United States v. Gomez*, 529 F.2d 412, 416 (5th Cir. 1976)).

105. See *Love*, 767 F.2d at 1063 (citing *United States v. Hunt*, 749 F.2d 1078, 1084 (4th Cir. 1984)).

106. *Hunt*, 749 F.2d at 1084; see also discussion *infra* Part VI.B.4.

107. See *Love*, 767 F.2d at 1063–64 (citing *United States v. Mancillas*, 580 F.2d 1301 (7th Cir. 1978)).

108. *Mancillas*, 580 F.2d at 1311. *Mancillas* presented a typical instance of the use of out-of-court statements as background. A DEA agent testified that the defendant was on his way back to Chicago and, on arrival, would go to a particular motel to receive a shipment of drugs. *Id.* at 1309. The Seventh Circuit acknowledged the *theoretical* validity of the non-hearsay argument and cast the issue as one of relevance. *Id.* at 1309–10. The court then pointed out that the statements had negligible probative value in the case and should have been excluded because the risk of unfair prejudice (misuse as substantive evidence of the defendant's criminal activity) substantially outweighed the probative value. *Id.* at 1309–11.

109. See *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987); see also *supra* note 45 and accompanying text.

110. *Id.* The court also cited *Mancillas* and held that the statements should be assessed by balancing the risk of unfair prejudice against the probative value. *Id.*

111. See *United States v. Martin*, 897 F.2d 1368, 1371 (6th Cir. 1990) (citing *Freeman*, 816 F.2d at 558; *Love*, 767 F.2d at 1052).

hearsay background.<sup>112</sup> The cryptic and lightly supported statement in *Love* is central to the modern shift toward allowing more use of such evidence.

## 2. Recent Cases: The Power of *Love*

In more recent years, courts have become more inclined to admit out-of-court statements as background, treating the development of the investigation narrative as a legitimate purpose at trial.<sup>113</sup> However, the support for that assertion is shaky and is often traceable back to *Love*. This line of precedent illustrates what happens when courts simply cite a broad principle without considering the basis for applying the principle or the specific concerns raised in the cases before them and demonstrates the potential ripple effect of a single bad decision. Not surprisingly, the Fourth Circuit follows *Love*, even stating that out-of-court statements to law enforcement are “routinely” admitted to explain or provide context for the actions of law enforcement.<sup>114</sup>

More concerning is the impact of that decision in other circuits, several of which manifest the influence of *Love*.

**Second Circuit:** The Second Circuit has been swayed by *Love* to apply a broad rule admitting out-of-court statements as background. In *United States v. Roy*, for example, the Second Circuit held that the detective’s testimony about the information he received was properly admitted, even though it mentioned the defendant by name.<sup>115</sup> Resting its holding on *Love*, the court embraced the use of out-of-court statements to enhance the investigation narrative, stating that statements may be offered “as background evidence to ‘furnish an explanation of the understanding or intent with which certain [law enforcement] acts were performed.’”<sup>116</sup>

112. See, e.g., *United States v. Fox*, 495 F. App’x 290, 292 (4th Cir. 2012) (citing *Love*, 767 F.2d at 1052); *United States v. Washington*, 461 F. App’x 215, 220–21 (4th Cir. 2012); see also discussion *infra* Part III.B.2.

113. Kainen & Tendler, *supra* note 18, at 1453–56.

114. See *Washington*, 461 F. App’x at 220–21 (asserting that admission of such evidence is routine and rejecting the argument under Rule 403); see also *United States v. Mack*, 495 F. App’x 359, 366 (4th Cir. 2012); *United States v. Galloway*, 459 F. App’x 232, 233 (4th Cir. 2011); *United States v. Hines*, 407 F. App’x 732, 735 (4th Cir. 2011); *United States v. Wackman*, 359 F. App’x 413 (4th Cir. 2010) (holding that an officer’s testimony concerning out-of-court statement was admissible to explain why he got search warrant was not plain error); *United States v. Obi*, 239 F.3d 662, 668 (4th Cir. 2001).

115. *Roy v. United States*, 444 F. App’x 480, 482 (2d Cir. 2011).

116. *Id.* (quoting *United States v. Reifler*, 446 F.3d 65, 92 (2d Cir. 2006)). Instead of advancing such a broad rule, the court should have simply noted, as it did later in the opinion, that the defendant’s claim that the government manipulated the evidence and framed him opened the door to the non-hearsay use of the statements. See discussion *supra* Part III.A.3; see also *United States v. Johnson*, 529 F.3d 493, 501 (2d Cir. 2008) (agreeing with the government that out-of-court statements may be used as background, but limiting the rule to those instances in which “the hearsay statement does not assert matter of significant importance to the question of the defendant’s guilt”).

**Third Circuit:** The Third Circuit now routinely allows background use of out-of-court statements.<sup>117</sup> At one time, the court enforced a protective rule.<sup>118</sup> However, in *United States v. Price*, the court built on the *Love*-derived proposition that the statements could be admitted for a non-hearsay purpose.<sup>119</sup> Doing so, the court endorsed the government's claimed need to establish an investigation narrative.<sup>120</sup>

**Fifth Circuit:** The Fifth Circuit's law in this area, although scant, has also been shaped by *Love*, authorizing background use of out-of-court statements.<sup>121</sup>

**Eighth Circuit:** The Eighth Circuit has also followed *Love* and adopted a rule admitting out-of-court statements as background. In *United States v. Brown*, citing only *Love*, the court held that the detective could properly testify to his conversation with his informant to provide background concerning "why a police investigation was undertaken."<sup>122</sup> *Brown* then became the basis of further Eighth Circuit holdings allowing statements to be used as background.<sup>123</sup> More recently, in *United States v. Brown*, the court held that the officer's testimony recounting the tip that prompted him to run two

117. See, e.g., *United States v. Muhammad*, 512 F. App'x 154, 163 (3d Cir. 2013) (holding that the testimony of three officers recounting the content of dispatch calls providing information about the bank robbery was relevant as non-hearsay evidence of context); *United States v. LaBoy*, 505 F. App'x 182, 184 (3d Cir. 2012) (holding a detective's testimony relating out-of-court statements was admissible non-hearsay to provide background and explain the detective's motivation); *United States v. Merchant*, 376 F. App'x 172, 178 (3d Cir. 2010) (allowing introduction of statements as background).

118. See, e.g., *United States v. Lopez*, 340 F.3d 169, 174-77 (3d Cir. 2003) (reversing the defendant's conviction because the trial court had permitted a government witness to testify over objection that he had received information that the defendant had drugs on his person or in his prison cell); *United States v. Sallins*, 993 F.2d 344, 347-48 (3d Cir. 1993) (holding that the use of statements in a 911 call and a police dispatch as background was error).

119. See *United States v. Price*, 458 F.3d 202, 205-07 (3d Cir. 2006). The *Price* court cited *Sallins*, even though that decision did not allow out-of-court statements that incriminated the defendant to be admitted as background. *Id.* at 207-11; see also *Sallins*, 993 F.2d at 346. *Sallins* provided support for the rule adopted in *Price* because the *Sallins* court noted that some other circuits had admitted statements for the limited purpose posited by the prosecution, citing two decisions that rested on *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1995): *United States v. Brown*, 923 F.2d 109, 111 (8th Cir. 1991), and *United States v. Mejia*, 909 F.2d 242, 247 (7th Cir. 1990). *Sallins*, 993 F.2d at 346.

120. *Price*, 458 F.3d at 210 (recognizing "[t]he legitimate non-hearsay evidentiary purpose asserted for the challenged testimony in this case is to explain why [the officers] approached the car").

121. See *United States v. Castro-Fonseca*, 423 F. App'x 351, 352-54 (5th Cir. 2011) (rejecting that use of a tip to law enforcement violated defendant's right to confrontation, asserting that statements may be admitted as non-hearsay to provide background or explain the actions of law enforcement and citing *United States v. Brown*, 560 F.3d 754, 764 (8th Cir. 2009), and *United States v. Gibbs*, 506 F.3d 479, 486 (6th Cir. 2007).

122. *Brown*, 923 F.2d at 111.

123. See *Garrett v. United States*, 78 F.3d 1296, 1306 (8th Cir. 1996) (stating that the circuit had "consistently held" the statements to be admissible, citing *Brown*, 923 F.2d at 111, and cases relying on that decision); *United States v. Collins*, 996 F.2d 950, 953 (8th Cir. 1993).

nicknames through a law enforcement database did not violate the defendant's right to confrontation but was admissible to explain the officer's investigation.<sup>124</sup>

**Eleventh Circuit:** Also influenced by *Love*, the Eleventh Circuit states that it has “long recognized” that statements to law enforcement are admissible as non-hearsay to explain the investigation.<sup>125</sup>

Some circuits have been less influenced by *Love*.

**First Circuit:** The First Circuit has two lines of precedent: decisions admitting out-of-court statements as background trace their roots to *Love*, while those excluding the evidence are free of that influence. In *United States v. Colón-Díaz*, for example, the First Circuit approved the admission of two sets of out-of-court statements.<sup>126</sup> The court held that the testimony was admissible non-hearsay, allowing the prosecution to develop the investigation narrative.<sup>127</sup> The support for the holding leads back to *Love*.<sup>128</sup>

124. *Brown*, 560 F.3d at 764 (citing *United States v. Johnson*, 934 F.2d 936, 942 (8th Cir. 1991) (relying on authority derived from *Love*, 767 F.2d at 1052)). In other circumstances, however, the Eighth Circuit has been more reluctant to allow statements simply as background. See *United States v. Wright*, 540 F.3d 833, 843 (8th Cir. 2008) (holding statements from the victim of a sexual assault identifying the defendant as the perpetrator offered as background not admissible over a hearsay objection, but holding the error harmless); *United States v. Brown*, 110 F.3d 605, 609 (8th Cir. 1997) (accepting an argument that out-of-court statements could be admitted to explain the course of the investigation, but holding that the out-of-court assertion that someone with the defendant's nickname was dealing drugs in the area was only relevant for its truth, not as background, and should not have been admitted); *United States v. Azure*, 845 F.2d 1503, 1507 (8th Cir. 1988) (rejecting the argument that testimony was admissible “to explain why the investigation focus[ed] on [the defendant]” but holding that the error was not so substantial as to require a reversal).

125. *United States v. Florez*, 516 F. App'x 777, 780 (11th Cir. 2013); see also *United States v. Padgett*, 503 F. App'x 884, 886 (11th Cir. 2013); *United States v. Aguila-Urbay*, 480 F. App'x 564, 568 (11th Cir. 2012). These decisions cited *United States v. Jiminez*, 564 F.3d 1280, 1288 (11th Cir. 2009). In *Jiminez*, the court cited *United States v. Valencia*, 957 F.2d 1189, 1198 (5th Cir. 1992), *United States v. Hawkins*, 905 F.2d 1489, 1495 (11th Cir. 1990), and *Love*, 767 F.2d at 1052. *Jiminez*, 564 F.3d at 1288.

126. *United States v. Colón-Díaz*, 521 F.3d 29 (1st Cir. 2008). First, the court concluded that a DEA agent's testimony recounting his directions to the informant—telling the informant to purchase drugs at “[Colón's] yellow point”—were admissible for the limited purpose of explaining the informant's motive, despite the fact that the probative value of the evidence did not depend on naming Colón as the person selling at the yellow point. *Id.* at 33–34 (alteration in original). Second, and more troubling, the court allowed the testimony of a different DEA agent whose unit had targeted the drug trafficking operation led by the defendant off and on during 2002. *Id.* at 34–35.

127. *Id.* at 34 (“[I]t provided background and context for understanding the investigative steps of the task force, and an explanation for why the task force focused its efforts on Colón, as opposed to someone else.”).

128. In *Colón-Díaz*, the court cited a First Circuit decision that provided little support. *Id.* at 34–36; see also *United States v. Castellini*, 392 F.3d 35, 52 (1st Cir. 2004) (admitting statements that qualified co-conspirator's statements and were therefore admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence). The court in *Colón-Díaz* also cited the Eighth Circuit decision in *Collins*, 996 F.2d at 953, which cited *Brown*, 923 F.2d at 109, which cited *Love*, 767 F.2d at 1063. See *Colón-Díaz*, 521 F.3d at 34; see also *United States v. Castro-Lara*, 970 F.2d 976, 981 (1st Cir.



By contrast, in a line of cases uninfluenced by *Love*, the First Circuit takes a protective stance. In *United States v. Benitez-Avila*, for example, the court held that the trial court had committed error by admitting the agent's testimony recounting the tip that "Twin" committed the crime and his reason for believing the defendant was "Twin."<sup>129</sup> The court rejected the government's argument that the evidence was not hearsay but merely demonstrated that the agent "had a reasonable basis for focusing his investigation on [the] Defendant."<sup>130</sup> The court noted that the agent's reason for targeting the defendant was not relevant<sup>131</sup> and that the evidence injected a substantial risk of unfair prejudice.<sup>132</sup> The court declined to give the prosecution broad narrative latitude.<sup>133</sup>

**Sixth Circuit:** Like the First Circuit, the Sixth Circuit has two lines of precedent. One line of decisions is unreceptive to the argument that

1992) (holding an out-of-court statement admissible to establish context or background, citing *United States v. Freeman*, 816 F.2d 588, 563 (10th Cir. 1987), *Love*, 767 F.2d at 1063, and, oddly, *United States v. Mazza*, 792 F.2d 1210, 1215 (1st Cir. 1986), which condemned this use of out-of-court statements).

129. *United States v. Benitez-Avila*, 570 F.3d 364, 368–72 (1st Cir. 2009). The court held the error was harmless. *Id.* at 372. The court acknowledged that a statement could be used in a non-hearsay fashion to establish the awareness of the listener, but cited only a decision in which the challenged statements were part of the crime—the instructions given to the witness to engage in particular criminal conduct. *Id.* at 368; see also *United States v. Murphy*, 193 F.3d 1, 5 (1st Cir. 1999). See generally *United States v. Cabrera-Rivera*, 583 F.3d 26, 34–35 (1st Cir. 2009) (rejecting the prosecution's context argument); *United States v. Maher*, 454 F.3d 13, 20–23 (1st Cir. 2006) (holding the introduction of statements violated the right to confrontation).

130. *Benitez-Avila*, 570 F.3d at 368.

131. *Id.* at 368–69. ("Whether government agents had a reasonable, good faith basis for investigating the defendant is a completely different question, which is not in issue unless the defendant puts it in issue.")

132. *Id.* at 371. The court discussed three of its prior decisions to explain its decision: *United States v. Rodriguez*, 525 F.3d 85, 101 (1st Cir. 2008), where the introduction of the hearsay statements was condemned as error but the degree of prejudice did not "warrant reversal"; *United States v. Vazquez-Rivera*, 407 F.3d 476, 472 (1st Cir. 2005), where the statements were admissible as prior consistent statements; and *United States v. Bailey*, 270 F.3d 83, 87 (1st Cir. 2001), where the "hearsay" included no incriminatory assertions.

133. *Benitez-Avila*, 570 F.3d at 369 (discussing the relationship between the evidence and the prosecution narrative and limiting the scope of narrative license). In some instances, the court recognizes both strains of reasoning. For example, in *United States v. Meserve*, the First Circuit cited cases that traced their roots to *Love* for the proposition that information received by law enforcement may be admissible as non-hearsay background. *United States v. Meserve*, 271 F.3d 314, 319–20 (1st Cir. 2001) (citing *Castro-Lara*, 970 F.2d at 981). But the court declined to accept the government's argument in the case before it, recognizing the limitation on the prosecution narrative. *Meserve*, 271 F.3d at 320. The court described the government's argument that the statements were offered only for background as "pretextual." *Id.* The court held that the statements—the robbery victim's description of her assailant and her statement that she thought it might be the defendant—were not properly admitted to show the detective's motivation because his motivation was irrelevant. *Id.* The court in *Meserve* nevertheless held the error was harmless. *Id.* at 324.

statements are offered simply for background.<sup>134</sup> Other Sixth Circuit decisions, with roots in *Love*, allow prosecution use of background statements.<sup>135</sup>

**Seventh Circuit:** The Seventh Circuit has remained largely uninfluenced by *Love*, implementing a protective rule.<sup>136</sup> In *Jones v. Basinger*, the court firmly repudiated a broad rule permitting the use of out-of-court statements to establish background.<sup>137</sup> The court returned to the position of its 1978 decision, *United States v. Mancillas*, holding that the course of the investigation

134. See, e.g., *United States v. Nelson*, 725 F.3d 615 (6th Cir. 2013) (holding the admission of information from a dispatcher was reversible error); *United States v. Hearn*, 500 F.3d 479, 483–84 (6th Cir. 2007) (holding prosecution reliance on statements was error); *United States v. Pugh*, 405 F.3d 390 (6th Cir. 2005) (rejecting the argument that the witness's out-of-court statement was admitted as background).

135. See, e.g., *United States v. Gibbs*, 506 F.3d 479, 486 (6th Cir. 2007) (citing *United States v. Martin*, 897 F.2d 1368, 1371 (6th Cir. 1990)); *United States v. Cromer*, 389 F.3d 662, 676 (6th Cir. 2004) (citing *Martin*, 897 F.2d at 1368, for the proposition that statements may be used as background, but concluding that statements in the case were used for their truth); *United States v. Clay*, No. 91-5409, 1994 WL 592823, at \*2 (6th Cir. Oct. 28, 1994) (affirming a conviction where the prosecution introduced an out-of-court statement that the defendant was dealing drugs); *United States v. Rudolph*, No. 93-2392, 1994 WL 592932, at \*5 (6th Cir. Oct. 27, 1994) (affirming where the prosecution used an out-of-court statement that drug dealing was going on at defendant's address); *Martin*, 897 F.2d at 1371 (stating that in some circumstances such statements may be admissible background, citing *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987), and *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985)).

136. See, e.g., *United States v. McGee*, 612 F.3d 627, 630 (7th Cir. 2010) (condemning prosecution use of hearsay as to which the defendant complained that the agent's testimony constituted "a narration of his guilt based on hearsay," but nevertheless finding no plain error); *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) (condemning the admission of the informant's out-of-court statements in strong language; recognizing the threat to the defendant's right to confrontation; and cautioning against permitting law enforcement officers "to narrate the course of their investigations," thereby presenting the jury with untested out-of-court assertions); *United States v. Godinez*, 110 F.3d 448, 456 (7th Cir. 1997) (holding that the introduction of the informant's statements was error but was not harmful).

137. See *Jones v. Basinger*, 635 F.3d 1030, 1055 (7th Cir. 2011) (granting habeas relief based on the improper use of out-of-court statements). The court characterized the State's argument that the out-of-court statements were admissible as non-hearsay to explain the investigation reflected an "egregious" misunderstanding of the law. *Id.* at 1045. The State of Indiana relied on two Seventh Circuit decisions that permitted such use of out-of-court statements—*United States v. Eberhart*, 434 F.3d 935, 939 (7th Cir. 2006), and *United States v. Akinrinade*, 61 F.3d 1279, 1283 (7th Cir. 1995)—but cited only *Akinrinade* for "the 'course of investigation' rule." *Id.* at 1045 & n.4. While in *Akinrinade*, the court appeared to accept non-hearsay role of statements to explain the investigation, none of the three decisions cited in support provided a solid foundation for such a rule. See *Akinrinade*, 61 F.3d at 1283; see also *United States v. Sanchez*, 32 F.3d 1002, 1005 (7th Cir. 1994) (citing only *Levine* as support for the holding that a law enforcement witness could testify to the information he received to explain why he proceeded as he did, and failing to discuss the contrary precedent or provide reasoning to support the holding); *United States v. Levine*, 5 F.3d 1100, 1107 (7th Cir. 1993) (allowing evidence of out-of-court statements to establish the defendant's state of mind); *United States v. Colston*, 936 F.2d 312, 316 (7th Cir. 1991) (holding that a lay witness could testify to information he received to explain his state of mind).

only rarely has significant probative value.<sup>138</sup> Even more recently, in *United States v. Walker*, the court held that the prosecution's extensive use of the hearsay reports of their informant violated the defendants' right to confrontation.<sup>139</sup> The trial court allowed the agents to testify to the informant's statements reporting his dealings with the defendants, admitting the statements as background information. The Seventh Circuit, holding that this was error, emphasized that permissible non-hearsay uses of statements are limited<sup>140</sup> and that the prosecution does not have a license "to 'narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination.'" <sup>141</sup>

**Tenth Circuit:** The Tenth Circuit also takes a more protective approach, despite having initially been swayed by *Love*. In *United States v. Cass*, the court acknowledged McCormick's position allowing an explanation of the investigation, limited to "acted 'upon information received.'" <sup>142</sup> In *Cass* and other later decisions, the court has concluded that the use of the out-of-court statements was error, rejecting the argument that the statements were admissible background.<sup>143</sup>

The circuits that have held that otherwise inadmissible hearsay may be used to establish the background of the investigation should recognize the lack of reasoned justification for that position. The investigation narrative is not a legitimate aspect of the prosecution's case, and these courts should follow the course set by the Seventh and Tenth Circuits.

138. *Jones*, 635 F.3d at 1045; see also *United States v. Mancillas*, 580 F.2d 1301, 1310 (7th Cir. 1978). In support, the *Jones* court cited the decisions of the Second Circuit in *United States v. Reyes*, 18 F.3d 65, 71 (2d Cir. 1994), and the Third Circuit in *United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993). *Jones*, 635 F.3d at 1045. The Seventh Circuit acknowledged that certain types of allegations could make the evidence relevant. *Id.* at 1045–46.

139. *United States v. Walker*, 673 F.3d 649, 656–69 (7th Cir. 2012). The defendants in *Walker* did not argue that the admission of the evidence was error under the rules of evidence, but instead relied exclusively on the confrontation argument. *Id.* The court remarked that "[t]he government's position displays a misunderstanding about the permissible use of an informant's out-of-court statements." *Id.* at 657.

140. *Id.* The court "explained that such statements are admissible as nonhearsay when offered to make a defendant's recorded statements intelligible for the jury (that is, for context), or when brief and essential to 'bridge gaps in the trial testimony' that might significantly confuse or mislead jurors." *Id.* at 657–58 (citations omitted) (quoting *Jones*, 635 F.3d at 1046).

141. *Walker*, 673 F.3d at 658 (quoting *Jones*, 635 F.3d at 1047). The *Walker* court further complained: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting [the informant] on the stand." *Walker*, 673 F.3d at 658. The court nevertheless found the error harmless. *Id.* at 658–59.

142. *United States v. Cass*, 127 F.3d 1218, 1223 (10th Cir. 1997) (citing 2 MCCORMICK ON EVIDENCE § 249, at 104 (John William Strong ed., 4th ed. 1992)).

143. See *Cass*, 127 F.3d at 1224; see also *United States v. Hinson*, 585 F.3d 1328, 1336–38 (10th Cir. 2009) (holding that use of statements was error, but not plain error); *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000) (holding use of statements was error but was harmless).

## IV. OVERVIEW WITNESSES

Another way in which courts permit the prosecution to advance the investigation narrative and prime the jury for conviction is through the presentation of overview testimony.<sup>144</sup> Unlike summary witnesses, who testify based on the admitted evidence,<sup>145</sup> the overview witness testifies near the beginning of the trial and tells the jury what is to come, encapsulating the investigation narrative. By allowing this testimony, the court gives the prosecution an additional—and unwarranted—opportunity to present a compact version of its narrative of the case.

The usual procedural rules enforced at trial permit the prosecution to present its overarching narrative twice: (1) in its opening statement, the prosecution may present a narrative explaining what it expects the evidence to show; and (2) in closing argument, the prosecution can seek to persuade the jury that the evidence establishes the promised narrative beyond a reasonable doubt. At these two points in the trial, the prosecution can address the jury and convey its narrative in a clear story-like fashion.<sup>146</sup> But the prosecutor's words are not evidence. The prosecution must back up its narrative account with admissible evidence, building the case incrementally. The prosecution's use of the overview witness circumvents the orderly trial process, presenting the investigation narrative as evidence, and often fails to conform to the rules of evidence.

A. *THE PROBLEM WITH OVERVIEW WITNESSES*

Prosecution overview witnesses pose several problems.<sup>147</sup> First, the overview witness presents a comprehensive version of the prosecution's case

144. *United States v. Valdivia*, 680 F.3d 33, 47 (1st Cir. 2012) (referring to prosecution use of overview witnesses as “a troubling trend”).

145. The use of summary witnesses also raises issues, but that subject is beyond the scope of this Article. *See* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 1006.04[3], Lexis (2015); *see also* *United States v. Flores-de-Jesús*, 569 F.3d 8, 18–19 (1st Cir. 2009) (discussing the caution necessary in presentation of summary witnesses).

146. The prosecution may also draft the indictment to convey the story of the case, but the jury will be told that the indictment represents only the government's allegations.

147. In *Casas*, the First Circuit expressed reservations about prosecution use of overview witnesses, identifying three areas of concern:

[T]his initial witness “overview testimony” is inherently problematic: such testimony raises the very real specter that the jury verdict could be influenced by statements of fact or credibility assessments in the overview but not in evidence. There is also the possibility that later testimony might be different than what the overview witness assumed; objections could be sustained or the witness could change his or her story. Overview testimony by government agents is especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government.

*United States v. Casas*, 356 F.3d 104, 119–20 (1st Cir. 2004) (citations omitted); *see also* *United States v. Meises*, 645 F.3d 5, 15–16 (1st Cir. 2011) (holding that testimony of an overview witness

as evidence, typically setting out the largely irrelevant investigation narrative rather than the more circumscribed narrative of the alleged crime itself.<sup>148</sup> Second, the overview witness generally testifies to matters as to which she does not have personal knowledge, often relying on inadmissible hearsay or surmise.<sup>149</sup> Third, testifying early in the proceedings, the overview witness may testify to facts that are ultimately not established by other evidence. Fourth, through repetition of key points, the overview testimony improperly bolsters both the prosecution's claims in opening statement and the testimony of all the later witnesses in the trial.<sup>150</sup> Finally, the witness may incorporate improper opinion into the overview.<sup>151</sup> Often, overview testimony entails more than one of these problems.<sup>152</sup> Nevertheless, despite these issues, overview evidence continues to be employed as a means to bolster the investigation narrative.

First, prosecution overview testimony tends to include evidence of tenuous relevance. The overview witness is generally a law enforcement agent closely identified with the investigation. The witness describes the investigation and summarizes the evidence to the jury, presenting an opening statement in evidentiary form. The only justification for the overview is to provide the jury with a basic understanding of the investigation and resulting evidence—to prime the jury by setting out the investigation narrative. In fact, even courts that condemn specific overview testimony sometimes endorse the use of an overview type witness to present the investigation narrative.<sup>153</sup> Instead, the courts should recognize that the overview witness provides

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not based on personal knowledge was error); *Flores-de-Jesús*, 569 F.3d at 16–17 (noting that the overview witness should be limited to personal knowledge).

148. See *United States v. Vázquez-Rivera*, 665 F.3d 351, 356 (1st Cir. 2011) (“The problematic form of this testimony consists of declarations by a witness—commonly a law enforcement officer involved in the investigation at issue—presented early during trial to describe the government’s general theory of the case.”); see also *United States v. Moore*, 651 F.3d 30, 58 (D.C. Cir. 2011) (condemning overview testimony that gave the prosecution “a second opening argument”); *United States v. García*, 413 F.3d 201, 214 (2d Cir. 2005) (“The law already provides an adequate vehicle for the government to ‘help’ the jury gain an overview of anticipated evidence as well as a preview of its theory of each defendant’s culpability: the opening statement.”).

149. This problem may be addressed as a lay opinion concern or as a hearsay concern, and may in some cases implicate the right to confrontation. See *Flores-de-Jesús*, 569 F.3d at 19–20.

150. See *id.* at 17–18 (characterizing this as “the imprimatur problem” and likening it to improper prosecution practice of vouching for the credibility of witnesses).

151. See *id.* at 24; *García*, 413 F.3d at 210 (holding that law opinion was inadmissible but “reversal is not warranted because . . . the agent’s opinion had no substantial influence on the jury verdict”); see also *infra* notes 164–69 and accompanying text.

152. See, e.g., *García*, 413 F.3d at 214.

153. In *Flores-de-Jesús*, the court stated that “[t]here may be value in having a case agent describe the course of his investigation in order to set the stage for the testimony to come.” *Flores-de-Jesús*, 569 F.3d at 19; see also *id.* at 26 (holding that a case agent could properly testify as an expert to “provide[] background and context on drug conspiracies and distribution in public housing projects in Puerto Rico”).

inappropriate testimony setting out the investigation narrative, providing information that primes the jury to convict without offering legitimate probative value on the question of guilt or innocence. Courts should limit each witness to testimony about the crime and not about the investigation.

Second, because the overview witness also pulls together all the information gathered in the investigation, overview witnesses typically testify to facts as to which they lack personal knowledge.<sup>154</sup> This violates Rule 602 of the Federal Rules of Evidence.<sup>155</sup> Equally problematic, the overview witness may not differentiate among facts gained through personal knowledge, testimony based on information from others,<sup>156</sup> and inferences based on speculation, which are not admissible as opinion testimony.<sup>157</sup> Enforcing the rules of evidence, the courts should bar most overview testimony, disallowing testimony about what other members of the law enforcement team did or learned or what information was obtained from the public.<sup>158</sup> The First Circuit condemned such testimony in *United States v. Rodriguez*, recognizing that the overview testimony combined law enforcement opinion with the presentation of improper hearsay, presenting what the witness had learned about the defendant or the criminal enterprise from the reports of others rather than personal knowledge.<sup>159</sup>

A third type of problem arises when the overview witness testifies to or bases testimony on evidence that is ultimately not admitted at trial.<sup>160</sup> The courts have recognized error when the prosecution's opening statement promises evidence that is never delivered.<sup>161</sup> Overview testimony that includes assertions ultimately not supported by evidence poses an even greater problem. The jury hears the factual claim without being instructed to treat it

154. See, e.g., *United States v. Vázquez-Rivera*, 665 F.3d 351, 356 (1st Cir. 2011) (noting that an overview witness's testimony included matters as to which she did not have personal knowledge); *United States v. Moore*, 651 F.3d 30, 58 (D.C. Cir. 2011) (pointing out that an agent testified to matters as to which he lacked personal knowledge); *Garcia*, 413 F.3d at 212–13 (noting that basis for opinion included information not within the witness's personal knowledge); *United States v. García-Morales*, 382 F.3d 12, 16 (1st Cir. 2004) (finding that an overview witness testified to a conversation at which he was not present).

155. See *supra* note 4 and accompanying text. See generally 1 MCCORMICK ON EVIDENCE, *supra* note 14, § 69 (discussing the personal knowledge requirement).

156. See *United States v. Ofray-Campos*, 534 F.3d 1, 14–15 (1st Cir. 2008) (stating that an overview witnesses based much testimony on second hand information); *United States v. Casas*, 356 F.3d 104, 119 (1st Cir. 2004) (remarking that a witness had failed to differentiate between testimony based on personal knowledge and testimony based on other sources of information); *United States v. Mazza*, 792 F.2d 1210, 1215 (1st Cir. 1986) (finding that agents who testified at the outset of the government's case recounted hearsay information obtained from a cooperating witness).

157. See discussion *infra* Part V.

158. Certain defenses may give that information particular probative value in the case and thereby open the door. See discussion *supra* Part III.A.

159. *United States v. Rodriguez*, 525 F.3d 85, 96 (1st Cir. 2008).

160. See, e.g., *United States v. Moore*, 651 F.3d 30, 58–59 (D.C. Cir. 2011).

161. See *United States v. Thomas*, 114 F.3d 228, 247 (D.C. Cir. 1997).

with caution. To the contrary, the information in the overview is presented as evidence. An instruction later in the case, once it is clear that the evidence will not be forthcoming, is unlikely to erase the impact of the initial claims used to set the stage and prime the jury during the overview testimony.

Fourth, overview testimony bolsters the testimony of witnesses who will testify later in the trial, putting the imprimatur of the government on their factual accounts.<sup>162</sup> The prosecution gains from this bolstering most significantly when the witness, who may be the only witness with personal knowledge of the facts, is weak or vulnerable to impeachment by the defense. Presenting the facts first through a law enforcement witness conditions the jury to credit the testimony of the later witness; it places both the overview witness's credibility and the power of repetition behind the witness's later testimony.<sup>163</sup>

Finally, when a witness pulls together an overview of the investigation, the testimony is likely to contain improper opinion.<sup>164</sup> For example, in *United States v. Vazquez-Rivera*, a pornography case, the agent who had posed as a teenager and engaged in online conversations introduced the case.<sup>165</sup> She asserted early in her testimony that both "IncestoPR" and "Secreto" turned out to be the defendant.<sup>166</sup> The point was central to the case and was not a fact of which she could claim personal knowledge.<sup>167</sup> Instead, the testimony was her opinion, based broadly on the investigation, but resting on unidentified information quite possibly including the opinion of others.<sup>168</sup>

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162. See, e.g., *United States v. Vázquez-Rivera*, 665 F.3d 351, 358 (1st Cir. 2011) (stating that a witness's testimony was presented as work of the entire law enforcement team); *United States v. Meises*, 645 F.3d 5, 17–18 (1st Cir. 2011) (discussing the imprimatur effect); *United States v. Flores-de-Jesús*, 569 F.3d 8, 18–19 (1st Cir. 2009) (discussing the bolstering effect of overview testimony).

163. See, e.g., *United States v. Mazza*, 792 F.2d 1210, 1215 (1st Cir. 1986). In *Mazza*, the prosecution case relied heavily on the testimony of a "highly untrustworthy" cooperating witness. *Id.* Before the witness testified, the prosecution presented two agents as overview witnesses who recounted much of what they had been told by the cooperating witness. *Id.* Through this device, the prosecution presented the witness's version of the facts to the jury three times, twice through the highly credible overview witnesses. *Id.*

164. See *Meises*, 645 F.3d at 18 (condemning overview testimony that included lay opinions regarding the defendants, stating that it was unfair to present opinion testimony conveying that "an experienced government agent had rejected appellants' mere presence defense and concluded that they were participants in the conspiracy").

165. *Vazquez-Rivera*, 665 F.3d at 355.

166. *Id.* at 354.

167. *Id.* at 358.

168. *Id.* at 359. The agent also testified improperly on other matters, such as that the red pajamas she observed by webcam were the same ones seized in the search of the defendant's home. *Id.* at 360–61. The court declined to characterize the witness as an overview witness even though her testimony provided an overview of the investigation and case. *Id.* at 356.

Such overview testimony is not helpful to the jury since it merely dictates conclusions that may not be fully supported by the admissible evidence.<sup>169</sup>

### B. THE PERSISTENCE OF OVERVIEW TESTIMONY

Courts have condemned overview testimony because of these problems.<sup>170</sup> Nevertheless, despite repeated cautions, prosecutors continue to offer—and trial courts to admit—overview testimony.<sup>171</sup> Like the courts that admit out-of-court statements to establish background, those allowing prosecution overview testimony appear to be influenced by an overly broad view of the acceptable investigation narrative.

Interestingly, it appears that reliance on overview testimony is a relatively new practice. The first consideration of prosecution overview testimony appeared in *United States v. Griffin* in 2003.<sup>172</sup> In *Griffin*, a complex fraud case, the Fifth Circuit condemned the prosecution's use of overview testimony, contrasting it with summary testimony given after the evidence has been presented.<sup>173</sup> In *Griffin*, the second prosecution witness at trial was an FBI agent who testified broadly about the investigation, using a chart to outline the anticipated testimony and setting out the investigation narrative of the case.<sup>174</sup> The testimony included facts of which the witness lacked personal knowledge.<sup>175</sup> The prosecution expressly invoked the license to present an

169. See *United States v. Garcia*, 413 F.3d 201, 231 (2d Cir. 2005) (holding that overview testimony included inadmissible opinion). In *Garcia*, the trial court allowed an agent to testify at the outset of the case concerning investigative techniques as well as his conclusions based on those investigative techniques regarding the roles of various actors—including the defendant—in the criminal conspiracy. *Id.* at 207–09. The Second Circuit recognized that the testimony constituted inadmissible opinion testimony under Rule 701. *Id.* at 211–13.

170. See, e.g., *United States v. Meises*, 645 F.3d 5, 24 (1st Cir. 2011) (holding that overview testimony constituted reversible error); *Garcia*, 413 F.3d at 209.

171. See, e.g., *United States v. Rodríguez-Adorno*, 695 F.3d 32, 38–39 (1st Cir. 2012) (“The government’s first witness at trial was FBI agent Richard Gilbert, who was the agent in charge of the investigation. Among other things, his testimony described the course of the investigation. Appellant argues that portions of Gilbert’s testimony were impermissible overview testimony. In particular, he points to Gilbert’s characterization of the events of May 12, 2007, as a ‘carjacking’ and ‘murder.’ He also challenges the admissibility of Gilbert’s testimony identifying individuals appearing on the surveillance videos that were shown to the jury, as well as Gilbert’s testimony about who was involved in the altercation that morning. Finally, appellant notes that Gilbert also summarized the statements of others by testifying that seven or eight witnesses identified appellant as being involved in the altercation.”). The court held the error was harmless. *Id.* at 39; see also *United States v. Aviles-Colon*, 536 F.3d 1, 21–22 n.13 (1st Cir. 2008) (describing overview testimony improperly presented at trial).

172. *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003) (citing one earlier use of the term in *United States v. Cline*, 188 F. Supp. 2d 1287, 1299 (D. Kan. 2002)). In *Cline*, however, the defendant moved to preclude the prosecution’s use of what the defendant referred to as an “overview witness,” but the court held the motion was premature and did not address the merits of the issue. *Cline*, 188 F. Supp. 2d at 1302.

173. *Griffin*, 324 F.3d at 349.

174. *Id.* at 348–49.

175. *Id.* at 348.



investigation narrative, arguing that the overview testimony should be allowed in order “to give a broad version as to what the agents did during their investigation and why they did it.”<sup>176</sup> The trial court emphasized to the jury that the witness did not have personal knowledge of some of the facts to which he testified and, at times, was presenting the FBI’s point of view, but allowed the testimony and did not give an appropriate limiting instruction.<sup>177</sup> The Fifth Circuit condemned the use of such testimony.<sup>178</sup>

Consistent with *Griffin*, commentators and most other decisions addressing overview testimony agree that it is not admissible.<sup>179</sup> Yet its use persists. While condemning the use of overview witnesses, a number of courts admit testimony that effectively provides a prosecution overview.

For example, in *United States v. Rosado-Pérez*, the First Circuit referred to the restriction as prohibiting only “overly broad” overview testimony and characterized the rule as resting entirely on the requirement that witnesses testify from personal knowledge.<sup>180</sup> The court permitted the alleged overview testimony because the witness was the lead investigator and had engaged in extensive surveillance as well as controlled purchases of drugs.<sup>181</sup> In *United States v. Smith*, the D.C. Circuit held that brief overview testimony (that the defendant and his compatriot “were working together putting their money together and going to New York to buy heroin”) was permissible because it

176. *Id.* The prosecution also promised to substantiate the testimony with evidence as the trial progressed. *Id.*

177. *Id.* at 348–49.

178. *Id.* at 349 (The court explained “allowing that witness to give tendentious testimony is unacceptable. Allowing that kind of testimony would greatly increase the danger that a jury ‘might rely upon the alleged facts in the [overview] as if [those] facts had already been proved,’ or might use the overview ‘as a substitute for assessing the credibility of witnesses’ that have not yet testified.” (alteration in original) (quoting *United States v. Scales*, 594 F.2d 558, 564 (6th Cir. 1979))). On the facts of the case, the court held the error was harmless. *Griffin*, 324 F.3d at 351.

179. *See, e.g.*, *United States v. Moore*, 651 F.3d 30, 54–61 (D.C. Cir. 2011) (discussing erroneous admission of overview testimony but holding it harmless); *United States v. García*, 413 F.3d 201, 214 (2d Cir. 2005); *United States v. García-Morales*, 382 F.3d 12, 16–18 (1st Cir. 2004); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10:34, Westlaw (database updated Sept. 2015) (discussing the impropriety of overview witnesses); 6 WEINSTEIN & BERGER, *supra* note 145, at § 1006.08[4] (stating that “[i]t is improper, however, for a party to open its case with an overview witness who summarizes evidence that has not yet been presented to the jury”). *But see* *United States v. Smith*, 640 F.3d 358, 367 (D.C. Cir. 2011) (assuming but not deciding that overview testimony is improper).

180. *United States v. Rosado-Pérez*, 605 F.3d 48, 55 (1st Cir. 2010).

181. *Id.* at 55–56. The witness was allowed to explain how the activities in video and audio recordings fit into the broader conspiracy and

identified members of the conspiracy and their roles and related what they were doing and saying to the broader conspiracy. Second, they contest Chavez’s testimony translating for the jury how actions taken on the video and statements made in the recordings related to drug activity. Chavez identified drug activity and interpreted coded language.

*Id.* at 55.

rested on admissible statements, concluding that the rule disapproving overview testimony prohibited only testimony based on inadmissible hearsay.<sup>182</sup> Like others, these holdings rest on the belief that a law enforcement witness should be permitted to distill the fruits of the investigation into a brief investigation narrative outlining the defendants' criminality.

In other instances, courts endorse the use of such evidence by simply declining to characterize it as overview testimony. For example, in *United States v. Brown*, the First Circuit concluded that the challenged testimony was properly admitted because it was not inadmissible overview testimony.<sup>183</sup> The Browns were tax protesters.<sup>184</sup> Having been convicted and sentenced in an earlier trial, they did not surrender to the authorities and resisted being taken into custody.<sup>185</sup> As a result, the federal authorities brought additional charges.<sup>186</sup> At the trial, the prosecution used the United States Marshal who had been in charge of the efforts to arrest the Browns as an overview witness to provide the investigation narrative, explaining the course of the defendants' involvement with the law.<sup>187</sup> The witness testified to his involvement in the earlier trial, telling the jury about the defendants' "fail[ure] to appear at [that] trial, the outcome of the trial, and [one defendant's] violat[ion of] her conditions of release," all to provide background to explain why the arrest warrants at the center of the case were issued.<sup>188</sup> He also described the Marshals' plan and their efforts to execute the warrants, including an "unsuccessful . . . arrest attempt . . . [, the Marshal's] attempts to get the [defendants] to surrender," the development of a new plan to capture the defendants, and a brief "summary of the arrest."<sup>189</sup> The First Circuit rejected the argument that this was improper overview

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182. *Smith*, 640 F.3d at 367–68.

183. *United States v. Brown*, 669 F.3d 10, 24–26 (1st Cir. 2012).

184. *Id.* at 14.

185. *Id.* at 14–15.

186. *See id.* at 16 (They were charged and convicted of: "(1) [C]onspiring to prevent federal officers from discharging their duties; (2) conspiring to assault, resist or impede federal officers; (3) using or carrying a firearm or destructive device during and in relation to a crime of violence; and possessing a firearm or destructive device in furtherance of a crime of violence; (4) being a felon in possession of a firearm; (5) obstruction of justice; and (6) failing to appear at sentencing" (citations omitted)).

187. *Id.* at 24–25.

188. *Id.* at 25.

189. *Id.*

testimony.<sup>190</sup> The court viewed the evidence as serving a legitimate goal, namely providing the investigation narrative.<sup>191</sup>

Similar reasoning leads courts to differentiate between permissible use of an “introductory witness” and impermissible overview testimony.<sup>192</sup> Although imposing some limitations, the courts allowed the introductory witness to inform the jury about the arc of the investigation and present information as to which the witness lacks personal knowledge. This gives the prosecution wide latitude to use the introductory witness to set out the investigation narrative for the jury.

## V. OPINION TESTIMONY

Courts also relax the rules governing opinion testimony and improperly allow prosecutors to use law enforcement opinion testimony to establish the investigation narrative. Law enforcement officers testify to their opinions—sometimes lay, sometimes expert—ascribing criminal significance to the evidence against the defendant. These witnesses’ authority rests on their investigative experience and, in some instances, their role in the particular case. Their opinions present the inferences that underlie the investigation narrative as evidence rather than mere argument. In addition, this opinion testimony formally attaches the imprimatur of professional law enforcement to the investigation narrative.

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190. *Id.* at 26. Even though the witness testified to events at which he had not been present, the court was persuaded that he had sufficient basis in personal knowledge because he focused on “events he observed and orchestrated.” *Id.* at 25. The court also emphasized that the witness did not express an opinion as to the defendants’ guilt and that his testimony did not place “the ‘imprimatur of the government’ to the later [witness] testimony.” *Id.* (quoting *United States v. Casas*, 356 F.3d 104, 120 (1st Cir. 2004)).

191. *See Brown*, 669 F.3d at 25–26; *see also* *United States v. Valdivia*, 680 F.3d 33, 47–48 (1st Cir. 2012) (permitting the prosecution to develop the investigation narrative by declining to view the challenged evidence as overview testimony); *United States v. Fletcher*, 497 F. App’x 795, 804–05 (10th Cir. 2012) (approving the testimony of the first witness in a trial, who provided a comprehensive overview of the case “based on information he obtained from the wiretap, interviews he conducted, surveillance, and the controlled buy in which he participated”).

192. *See, e.g., United States v. Moore*, 651 F.3d 30, 61 (D.C. Cir. 2011); *United States v. Flores-de-Jesús*, 569 F.3d 8, 18–19 (1st Cir. 2009); *United States v. Goosby*, 523 F.3d 632, 638 (6th Cir. 2008). In *Moore*, the D.C. Circuit articulated its view of the line between proper and improper introduction in the following language:

[The witness] could properly describe, based on his personal knowledge, how the gang investigation in this case was initiated, what law enforcement entities were involved, and what investigative techniques were used. What he could not do was present lay opinion testimony about investigative techniques in general and opine on what generally works and what does not, as illustrated by informants who pled guilty. Neither could he anticipate evidence that the government would hope to introduce at trial about the charged offenses or express an opinion, directly or indirectly, about the strength of that evidence or the credibility of any of the government’s potential witnesses, including the cooperating co-conspirators.

*Moore*, 651 F.3d at 61 (citations omitted).

The rules of evidence set out strict requirements for opinion testimony.<sup>193</sup> As commentators have documented, courts too often allow prosecutors to introduce law enforcement opinion testimony without subjecting that testimony to appropriate scrutiny under the rules of evidence.<sup>194</sup> Law enforcement experts are allowed to testify without a showing of reliable methodology. Law enforcement witnesses are allowed to testify to lay opinion without demonstrating that their conclusions are rationally derived from their personal knowledge. The prosecution's license to present law enforcement opinion appears to flow from the courts' acceptance of the prosecution's ability to present the investigation narrative. Courts attach unwarranted value to having jurors share law enforcement's view of the facts, imbuing them with the mindset of the investigators as they consider the evidence against the defendant.

This reasoning persuades courts to allow law enforcement opinion witnesses to present claims about criminal practices or the particular defendant's behavior designed to pull together a convincing investigation narrative. This opinion testimony addresses inappropriate matters such as the defendant's culpability and the credibility of witnesses, matters that the jury is fully able to—and should—assess without the benefit of law enforcement opinion testimony.<sup>195</sup> Like the evidence discussed above, opinion testimony is often admitted as background to prime the jury and help the prosecution bolster its narrative.<sup>196</sup>

#### A. THE PROBLEM WITH EXPERT OPINION

The rules governing expert testimony allow expert witnesses not only to express opinion but also to base conclusions on information the jury will not hear.<sup>197</sup> A law enforcement witness who testifies as an expert can therefore fill

193. See discussion *supra* Part V.B.

194. See, e.g., Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363 (2012); Maxine D. Goodman, *A Hedgehog on the Witness Stand—What's the Big Idea?: The Challenges of Using Daubert to Assess Social Science and Nonscientific Testimony*, 59 AM. U. L. REV. 635 (2010); Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1 (2004); Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551 (2012); Mark Hansen, Dr. Cop on the Stand: Judges Accept Police Officers as Experts Too Quickly, Critics Say, ABA J., May 2002, at 31.

195. See, e.g., *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244 (9th Cir. 1997) (holding that opinion testimony that a defendant's actions "were consistent with a common criminal modus operandi" is generally admissible as expert testimony).

196. See *Goosby*, 523 F.3d at 638 (holding an investigator could properly provide background); Poulin, *supra* note 194, at 553–54. But see *United States v. Meises*, 645 F.3d 5, 14–18 (1st Cir. 2011) (condemning the use of an overview witness to testify to opinion regarding the criminal role of defendants, commenting that prosecution use of lay opinion "amounted to argumentative interpretation," and discussing "the imprimatur problem").

197. See FED. R. EVID. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would

in gaps in the narrative.<sup>198</sup> Although the rules of evidence require a demonstration of reliability before a witness is treated as an expert,<sup>199</sup> courts do not always enforce those requirements for law enforcement experts. Instead, courts accept law enforcement witnesses as experts without first requiring the prosecution to establish that the witness employed specialized methodology that would yield a reliable opinion, giving the prosecution the advantage of expert testimony without holding them to the requirements of the rule.<sup>200</sup>

Allowing the prosecution to present a law enforcement officer as an expert poses a number of problems. The jury is likely to see the witness as testifying from a strong knowledge base. Further, the jury will not be able to distinguish between those parts of the testimony based on investigation of the case and those parts in which the witness purports to apply her expertise (not necessarily based on any reliable principles) to draw conclusions.<sup>201</sup> In addition, the witness's credibility and stature may be enhanced in the eyes of

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reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”).

198. See Jack B. Weinstein, *Science, and the Challenges of Expert Testimony in the Courtroom*, 77 OR. L. REV. 1005, 1008 (1998) (“Much of the so-called expert testimony, such as that of police officers who opine that criminals keep revolvers in glove compartments, or that the mafia is a gang, seems useless. This information really does not help the jury, but rather amounts to preliminary summation.”).

199. See FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”); see also *id.* 702 Committee Notes on Rules—2000 Amendment (recognizing the admissibility of expert law enforcement testimony: “[W]hen a law enforcement agent testifies regarding the use of code words in a drug transaction, . . . [t]he method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.”). Consistent with this language, courts regularly permit law enforcement agents to testify regarding drug jargon and the significance of drug-related physical evidence. See, e.g., *United States v. Lopez*, 547 F.3d 364, 373–74 (2d Cir. 2008) (exemplifying credentials and scope of testimony for a law enforcement expert on narcotics trafficking practices); *United States v. Davis*, 397 F.3d 173, 177–79 (3d Cir. 2005) (approving credentials and scope of testimony of an officer regarding the significance of certain facts in a narcotics case).

200. See, e.g., *United States v. Solorio-Tafolla*, 324 F.3d 964, 965–66 (8th Cir. 2003); Poulin, *supra* note 194, at 597–606.

201. See *United States v. Dukagjini*, 326 F.3d 45, 52–56, 62 (2d Cir. 2003). In *Dukagjini* the court concluded that the prosecution expert improperly based portions of his testimony on what he had learned by talking to others in the investigation and the cooperating defendants, but held the error was harmless. *Id.* at 58–62.

the jurors if they know the court has accepted the witness as an expert.<sup>202</sup> Expert law enforcement testimony also invites the jury to defer to the officer's superior investigative powers and insights, casting the witness as someone trained to observe details and specially equipped to discern criminality in facts that might seem innocuous to the untrained jurors.<sup>203</sup>

When courts give the prosecution this inappropriate license to present law enforcement witnesses as experts, the prosecution sometimes exploits the advantage to promote the investigation narrative, using the law enforcement expert to express opinions that provide the underpinning of that narrative.<sup>204</sup> For example, in *United States v. Sanchez-Hernandez*, with no showing of reliable methodology, the Fifth Circuit allowed an agent to prime the jury to view the evidence through the eyes of law enforcement by giving far-ranging expert opinion testimony about how he interpreted what he observed during the investigation that led to the defendant's arrest.<sup>205</sup> His testimony included the expert opinion that the defendant's green duffle bag ("a type commonly used for narcotics smuggling") and the way in which he was carrying it suggested drug smuggling rather than illegal border crossing.<sup>206</sup> The opinion was

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202. See *United States v. Garcia-Guia*, 468 F. App'x 544, 549 (6th Cir. 2012) (recognizing the impact on the jury and stating that the trial court is not allowed to certify a witness as an expert in the presence of the jury); *Dukagjini*, 326 F.3d at 53 (noting that presenting the witness as an expert confers an "aura of special reliability and trustworthiness" (quoting *United States v. Young*, 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring))). In *Dukagjini*, the agent took on a broad role of interpreting the recorded conversations admitted in the case, instead of merely educating the jury on code words used in the drug trade. *Dukagjini*, 326 F.3d at 55. See also THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 2.09 cmt. at 17-18 (2015) (recommending that a witness not be referred to as an expert in the presence of jury).

203. See *United States v. Christian*, 673 F.3d 702, 709 (7th Cir. 2012); see also *United States v. Garza*, 566 F.3d 1194, 1198-200 (10th Cir. 2009) (holding that an officer was properly allowed to testify as an expert witness that the gun found in a bedroom was possessed in connection with a drug trafficking crime).

204. See, e.g., *Christian*, 673 F.3d at 708-14 (allowing the prosecution to establish that an officer was trained to carefully observe a suspect's hands and to elicit the officer's opinion that defendant had discarded a weapon); *United States v. Rosa-Carino*, 615 F.3d 75, 80-81 (1st Cir. 2010) (finding an officer's testimony relevant and helpful to jury); *Solorio-Tafolla*, 324 F.3d at 965-66 (holding that a detective could properly testify as an expert concerning the number of aspects of drug conspiracies and investigation); *United States v. McSwain*, 197 F.3d 472, 482 (10th Cir. 1999) (allowing an agent to testify as an expert regarding the roles played by the defendants in the criminal enterprise); *United States v. Roy*, 843 F.2d 305, 308 (8th Cir. 1988) (stating the prosecution used an expert police officer to testify about how the jury should evaluate accomplices' statements inculcating the defendant, but holding the witness should not have been allowed to give his opinion on their truthfulness based on his experience as an investigator); Gallini, *supra* note 194, at 387-88 (criticizing a court's failure to require that the prosecution show a basis for opinion). In other cases, officers are properly allowed to testify concerning narrow questions such as the amount of drugs that would be possessed for personal use as distinct from the amount that would be possessed for distribution. See, e.g., *United States v. Robertson*, 387 F.3d 702, 704-05 (8th Cir. 2004).

205. *United States v. Sanchez-Hernandez*, 507 F.3d 826, 833 (5th Cir. 2007).

206. *Id.* at 828; see also *United States v. Cruz*, 363 F.3d 187 (2d Cir. 2004). In *Cruz*, the district court prompted the prosecution to elicit testimony from an agent testifying as an expert

admitted without any demonstration of a reliable basis.<sup>207</sup> Without that foundation, the opinion may represent simply the biased and possibly erroneous view of law enforcement.<sup>208</sup> But the court in *Sanchez-Hernandez* saw it as a permissible means to advance the investigation narrative, explaining to the jurors why they should reject the defendant's claim that he did not know what was in the bag.<sup>209</sup>

This "expert testimony" simply filters the facts through the perspective of law enforcement and presents as evidence the investigators' view of the evidence. The testimony is helpful to the jury only if it is helpful for them to understand the investigation narrative and to view the evidence through the eyes of law enforcement.<sup>210</sup>

Particularly troublesome, courts sometimes admit law enforcement opinion testimony as to the defendant's guilt. In *United States v. García-Morales*, for example, the agent in charge of the investigation, testifying as an expert, introduced his overview testimony with the statement that the defendant played the role of distributor in the narcotics smuggling operation.<sup>211</sup> In *United States v. Moore*, the trial court allowed the prosecution to elicit testimony from a law enforcement officer that no innocent person would be present at a drug transaction, creating the narrative that helped convict the driver of the car that picked up a drug courier at the bus station.<sup>212</sup> Although the Seventh Circuit questioned the admissibility of the evidence because the trial court had not subjected the testimony to appropriate scrutiny under Rule 702 and the record did not suggest that the witness's opinion was based on reliable information or methodology, the court nevertheless affirmed the conviction.<sup>213</sup>

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explaining the meaning of defendant's statement that he was there to watch his co-defendant's back, informing the jury that this signaled defendant's knowledge of drugs. *Id.* at 194. The Second Circuit held that this testimony went beyond the witness's expertise, but emphasized the prosecution's latitude to use law enforcement experts to explain the criminal significance of coded language. *Id.* at 197.

207. See Gallini, *supra* note 194, at 387–88 (discussing *Sanchez-Hernandez*).

208. See Poulin, *supra* note 194, at 591–96.

209. *Sanchez-Hernandez*, 507 F.3d at 833; see also *United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007) (allowing a law enforcement officer "to give his expert opinion that the conduct he observed amounted to drug trafficking and the defendant was 'in charge'"); *United States v. Turner*, 400 F.3d 491, 499 (7th Cir. 2005) (allowing an IRS agent to testify as an expert "that certain transactions seemed to be structured to avoid I.R.S. reporting requirements and" to describe "a 'typical money laundering conspiracy'").

210. See, e.g., *Rosa-Carino*, 615 F.3d at 81 (explaining that the agent's expert testimony about the nature of drug organizations was allowed in order to convey to the jury "how the government understood this particular conspiracy operated").

211. *United States v. García-Morales*, 382 F.3d 12, 16 (1st Cir. 2004).

212. *United States v. Moore*, 521 F.3d 681, 683 (7th Cir. 2008); see also Gallini, *supra* note 194, at 385 (discussing *Moore*).

213. *Moore*, 521 F.3d at 684–85. The court described the witness's approach by stating "[h]e assumes that everyone present is culpable and uses that assumption as the 'proof' of culpability."

## B. THE PROBLEM WITH LAY OPINION

Some courts also allow prosecutors to introduce lay opinion testimony to strengthen the investigation narrative without assuring compliance with the rules of evidence.<sup>214</sup> Accepting the legitimacy of the investigation narrative, the courts permit the prosecution to use lay opinion to strengthen this narrative by packaging the law enforcement perspective on the facts of the case as opinion testimony and presenting it to the jury as evidence.<sup>215</sup>

Rule 701 requires that lay opinion be rationally based on facts within the witness's personal knowledge and be helpful to the jury.<sup>216</sup> It is error to allow a witness to provide lay opinion that rests on information not within the personal knowledge of the witness.<sup>217</sup> But in some cases, the court admits opinion testimony without clarifying the basis or admits opinion that is not based on facts within the witness's personal knowledge.<sup>218</sup>

The rule also requires that lay opinion be helpful to the jury and not merely convey inferences within the competence of the jurors.<sup>219</sup> In *United*

*Id.* at 684; *see also* *United States v. Flores-de-Jesús*, 569 F.3d 8, 24–26 (1st Cir. 2009) (expressing concern about opinion testimony but ultimately affirming the convictions).

214. *See, e.g.,* *United States v. Hoffecker*, 530 F.3d 137, 170–72 (3d Cir. 2009) (allowing lay opinion from an informant that the defendant was engaged in a “scam”); *United States v. Yannotti*, 541 F.3d 112, 125–26 (2d Cir. 2008) (holding that a lay witness's opinion testimony interpreting conversations in the course of a conspiracy in which he was involved was properly admitted).

215. *See* *United States v. Rollins*, 544 F.3d 820, 830–33 (7th Cir. 2008) (holding that an agent was properly allowed to give lay opinion relating his “impressions” of the meaning of recorded conversations); *United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004) (noting that a law enforcement witness who provided an improper lay opinion “was presented to the jury with an aura of expertise and authority”).

216. FED. R. EVID. 701 (“If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”); *see also* Poulin, *supra* note 194, at 563–64.

217. *See, e.g.,* *United States v. Meises*, 645 F.3d 5, 13–18 (1st Cir. 2011) (condemning the use of lay opinion testimony by a police officer because portions of his opinion were not based on his personal knowledge); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (holding that the district court erred by allowing an agent to give his lay opinion not based on his perception); *United States v. Garcia*, 413 F.3d 201, 212–13 (2d Cir. 2005) (condemning law enforcement opinion testimony that went beyond inferences based on the witness's personal perception).

218. *See, e.g.,* *United States v. McDarragh*, 351 F. App'x 558, 561–63 (2d Cir. 2009); *Grinage*, 390 F.3d at 748–51 (holding that the district court erred by admitting an agent's lay opinion testimony after he testified that his opinion regarding the meaning of telephone conversations was “based on my knowledge of the entire investigation”). In *McDarragh*, an agent who had not been qualified as an expert testified that the defendant's behavior constituted grooming of a potential child victim. *McDarragh*, 351 F. App'x at 562. The testimony went beyond lay testimony. *Id.* The non-lay nature of the testimony was signaled in part by the witness's repeated use of the word “we,” which indicated an assessment by the law enforcement team rather than merely by the witness. *Id.*

219. *See* *Meises*, 645 F.3d at 16–17 (holding that the witness's opinion testimony was not helpful to the jury because the jury was equally able to draw the relevant inferences); *Garcia*, 413



*States v. Vázquez-Rivera*, the trial court permitted a law enforcement witness to testify to the lay opinion that the defendant was the person behind two screen names who approached her in an Internet chat room where she was posing as an underage girl.<sup>220</sup> The First Circuit condemned this opinion testimony as not helpful; the jury was as well-equipped as the officer to draw the inference.<sup>221</sup>

The decisions admitting law enforcement lay opinion that does not satisfy the requirements of the rule reflect the courts' acceptance of the investigation narrative.<sup>222</sup> For example, in *United States v. Oriedo*, the Seventh Circuit held that an agent could properly testify that he became concerned at one appointed drug transaction because the arrival of two cars, one following the other, signaled counter-surveillance looking for law enforcement.<sup>223</sup> The court emphasized that the agent testified only to his own state of mind.<sup>224</sup> But the agent's state of mind has significance only to the investigation narrative. Similarly, in *United States v. Ayala-Pizarro*, an officer was permitted to testify that the defendant was arrested at a "drug point" and to explain how drug points operated.<sup>225</sup> This testimony only explained the investigation. Given that the officers saw the defendant was trying to cock his gun and found over 153 foil-covered decks of heroin in his pocket, this testimony was unimportant as evidence of the crime charged, but served only to set the scene of the investigation narrative.<sup>226</sup>

## VI. TESTIMONY CONCERNING CRIMINAL PROFILES

Profile testimony is a particularly pernicious form of priming evidence. A profile is group of characteristics or behaviors that law enforcement associates with a particular criminal activity, such as drug smuggling. The prosecution

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F.3d at 214–15 (concluding that law enforcement opinion testimony that the defendant was a partner in the drug distribution business was not helpful to the jury, but instead threatened the jury's decision-making province); *Grinag*, 390 F.3d at 752 (holding that lay opinion usurped the jury's function rather than helping it).

220. *United States v. Vázquez-Rivera*, 665 F.3d 351, 357–58 (1st Cir. 2011).

221. *Id.* at 358 (noting that lay opinion on an ultimate issue will rarely be helpful because the jury is equally equipped to draw conclusions from the evidence).

222. *See United States v. Rollins*, 544 F.3d 820, 830–33 (7th Cir. 2008) (holding that an agent could testify to "impressions" of the meaning of conversations to help the jury understand their meaning).

223. *United States v. Oriedo*, 498 F.3d 593, 602 (7th Cir. 2007).

224. *Id.*; *see also United States v. Christian*, 673 F.3d 702, 709 (7th Cir. 2012) (noting that officers "were simply informing the jury of their state of mind while observing [the defendant]").

225. *United States v. Ayala-Pizarro*, 407 F.3d 25, 27–29 (1st Cir. 2005) (The officer testified: "Basically one individual loads the drug while the other one collects the money, and then you have [men] who are armed and just waiting around in the event other gangs might come by and take action, and then you have others as vigilantes to see if the cops come."). The officer also testified that they were in the area looking for a suspect in an unrelated crime, another fact relevant only to the investigation. *Id.* at 27.

226. *Id.*

uses profile testimony to prime the jury to take a pro-prosecution view of the facts. Profile testimony is offered to explain to the jury why law enforcement focused on the defendant; it arms the jury with a law enforcement prism through which to assess the evidence. The prevailing view is that profile testimony is not admissible to prove the defendant's guilt.<sup>227</sup> Nevertheless, some courts admit profile testimony, largely because they accept the prosecution's license to develop an investigation narrative.

#### A. THE PROBLEM WITH PROFILE TESTIMONY

The problem with profile evidence is that it rests solely on the anecdotal impressions of law enforcement rather than reliable and testable methodology.<sup>228</sup> The list of characteristics that constitute a law enforcement profile are drawn from those found to be engaged in criminal conduct, but law enforcement does not check the conclusions against a control group to determine whether many innocent people share the characteristics that law enforcement includes in the profile. Developed to justify stops and arrests, profiles are likely to sway jurors improperly to view evidence as signaling criminality and to reject innocent explanations. But the government has never demonstrated the validity of any profile as a predictor of who is violating the law.<sup>229</sup>

Despite statements that profile testimony is not admissible as evidence of guilt and the inherent problems with profile testimony, the courts have found several reasons to allow the prosecution to introduce profile testimony as proof of guilt.<sup>230</sup> Some courts have adopted a narrow view of what constitutes

227. See e.g., *United States v. Montes-Salas*, 669 F.3d 240, 248 (5th Cir. 2012); *United States v. Long*, 328 F.3d 655, 666 (D.C. Cir. 2003); *United States v. Webb*, 115 F.3d 711, 715 (9th Cir. 1997); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990); *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) ("Drug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers. . . . Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers in investigating criminal activity. Drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation. . . . [W]e denounce the use of this type of evidence as substantive evidence of a defendant's innocence or guilt."). But see *United States v. Teslim*, 869 F.2d 316, 324 (7th Cir. 1989) (approving the use of profile testimony as relevant evidence of guilt). See generally Gallini, *supra* note 194, at 385–86.

228. See *United States v. Mendoza-Medina*, 346 F.3d 121, 128–29 (5th Cir. 2003) (discussing problems with profile evidence). See generally Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417 (1987) (discussing the development of a drug courier profile).

229. See *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989) (gathering facts that make up a drug courier profile and demonstrating lack of substance); Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U. L. REV. 747, 771 (1997).

230. See Gallini, *supra* note 194, at 386–88 (discussing profile testimony and noting that, while courts generally state they disallow profile evidence, they nevertheless admit some

prohibited profile evidence. In addition, some permit the prosecution to use profile testimony as background or modus operandi evidence, as well as to use the evidence in rebuttal when the defendant opens the door.<sup>231</sup> Allowing the prosecution to use profile evidence to draw the jurors into the investigation narrative sways jurors to ascribe criminal significance to insignificant facts.

### B. ADMITTING PROFILE TESTIMONY

#### 1. Narrow Definition

There is not a bright line between permissible law enforcement testimony and impermissible profile evidence.<sup>232</sup> Some courts distinguish between testimony comparing the defendant's behavior to a law enforcement profile, which they will not admit, and testimony providing general information about what particular criminals typically do, which they will admit as non-profile evidence.<sup>233</sup> Taking this narrow view of what constitutes prohibited profile testimony leads the courts to admit evidence that acts as profile evidence, inviting the jury to compare the defendant's actions to those of criminal actors.

The courts also admit testimony about the organization of criminal enterprises, treating it as a permissible way to educate the jury rather than as profile testimony.<sup>234</sup> For example, in *United States v. Montes-Salas*, the Fifth Circuit asked "whether the agents' statements merely helped the jury interpret the evidence by providing background information about an

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testimony that smacks of profiling). *See generally* Kadish, *supra* note 229 (discussing theories for introducing profile testimony).

231. *See, e.g., Webb*, 115 F.3d at 715 (stating that one of two permissible purposes for profile evidence is to rebut defense claims). *See generally* Kadish, *supra* note 229 (cataloguing permitted uses).

232. *See United States v. Ogedengbe*, 187 F. App'x 715, 716 (9th Cir. 2006) (noting distinction); *United States v. Garcia*, 139 F. App'x 887, 889–90 (9th Cir. 2005) (stating that the evidence "was not impermissible drug trafficking organization 'structure or practice' evidence, but was instead permissible 'unknowing drug courier' testimony"). *See generally* Gallini, *supra* note 194, at 385–87 (discussing the line between inadmissible profile evidence and admissible criminal practices evidence).

233. *See, e.g., United States v. Vasquez*, 213 F.3d 425, 427 (8th Cir. 2000) (admitting testimony about what most drug traffickers do); *United States v. Cordoba*, 104 F.3d 225, 229–30 (9th Cir. 1997) (allowing "expert" testimony establishing "that drug traffickers do not entrust large quantities of drugs to unknowing transporters"); *Webb*, 115 F.3d at 715 (emphasizing that profile testimony was general and "was [not] admitted to demonstrate that [the defendant] was guilty because he fit the characteristics of a certain drug-courier profile"). *But see United States v. Espinosa*, 827 F.2d 604, 611–13 (9th Cir. 1987) (affirming where expert testimony specifically explained defendant's actions). Courts have sometimes viewed Rule 704(b) of the Federal Rules of Evidence as limiting prosecution testimony addressing the defendant's intent. *See, e.g., United States v. Watson*, 171 F.3d 695, 703 (D.C. Cir. 1999) (holding that expert testimony relating to modus operandi does not violate Rule 704(b) unless the testimony includes specific assertions about the defendant's mental state).

234. *See United States v. Morin*, 627 F.3d 985, 996 (5th Cir. 2010); *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831–32 (5th Cir. 2007).

unfamiliar business, or whether the agents offered opinions on the ultimate issues in the case.”<sup>235</sup> The court therefore held that the trial court properly permitted law enforcement witnesses to testify to the behaviors that they associated with smuggling undocumented immigrants, helping the jury to interpret the evidence against the defendant.<sup>236</sup> This role is precisely why profile testimony is objectionable.

Similarly, some courts decline to view testimony as profile testimony if the witness simply applies a profile to interpret the defendant’s action but does not expressly relate the defendant’s action to that of criminal actors in other cases.<sup>237</sup> Taking this approach, courts permit law enforcement witnesses to testify at length about how certain types of criminals generally act or conduct their business, priming the jury to view the defendant’s conduct as criminal.<sup>238</sup> This organizational testimony often includes a characterization of the role the defendant appears to play in the organization, a role that is determined by applying a profile to the defendant’s actions.<sup>239</sup> Even pointed testimony about how criminals behave that is narrowly aimed at the defendant may be admitted as non-profile testimony.<sup>240</sup> But all this testimony acts as

235. *United States v. Montes-Salas*, 669 F.3d 240, 248 (5th Cir. 2012); *see also Sanchez-Hernandez*, 507 F.3d at 832 (commenting that evidence was close to the line between inadmissible profile evidence and admissible opinion but concluding that testimony on the practices of alien smugglers was admissible).

236. *Montes-Salas*, 669 F.3d at 248–50.

237. *See, e.g., United States v. Diaz*, 637 F.3d 592, 600 (5th Cir. 2011) (holding that the trial court properly allowed an agent to “testify[] that [the defendant] was ‘a lookout,’” based on his actions).

238. *See, e.g., Montes-Salas*, 669 F.3d at 248–51 (finding that the evidence was not profile evidence because it “did not go to whether [the defendant] was in the play; it went to his role”); *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000) (stating that testimony describing characteristics of a methamphetamine cook would help the jury understand the significance of certain evidence and was not plain error). In *Becker*, the expert testimony

includ[ed] testimony describing the skills needed (or not needed) to be a methamphetamine cook, how many recipes cooks generally have in their home, and that cooks are gaunt and paranoid due to the effect of the chemicals on their nervous systems, are generally methamphetamine users, are violent, seek secluded locations due to the odor cooking produces, and only trust experienced cooks with their equipment.

*Id.* But *see United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 363–67 (5th Cir. 2010) (distinguishing between admissible and inadmissible evidence and holding that the trial court committed plain error).

239. *See United States v. Long*, 328 F.3d 655, 666, 668 (D.C. Cir. 2003) (holding that expert testimony describing the behavior of preferential sexual offenders was properly admitted). The *Long* court explained that the question is “whether [the evidence] is designed improperly to illuminate the defendant’s character or propensity to engage in criminal activity, or whether instead it seeks to aid the jury in understanding a pattern of behavior beyond its ken.” *Id.* at 666.

240. For example, a number of decisions approve prosecution testimony that drug traffickers do not entrust valuable drugs to unknowing couriers. *See, e.g., United States v. Garcia*, 139 F. App’x 887, 889–90 (9th Cir. 2005); *United States v. Vasquez*, 213 F.3d 425, 427 (8th Cir. 2000).

profile testimony, seeking to persuade the jury that the defendant is guilty because she meets a law enforcement template.<sup>241</sup>

## 2. Profile Testimony Admitted as Background

Courts also admit profile evidence on the basis that it serves as background.<sup>242</sup> In this context, background may be used for one of two things: (1) background to explain why law enforcement conducted their investigation in the manner they did; or (2) background information on the workings of a particular type of criminal operation.<sup>243</sup> This use of profile or near-profile testimony as background to explain the investigation raises the same problems that other types of inadmissible background do: its probative value relates only to the investigation narrative, and the jury is likely to misuse the evidence as proof of guilt.<sup>244</sup>

For example, in *United States v. Mendoza-Mendoza*, the court approved prosecution evidence from a border agent that he had observed vehicles that contained contraband and had cracked windshields similar to the defendant's.<sup>245</sup> Although this information explained why the agent targeted the defendant's car for secondary inspection, the jury did not need that information to determine the defendant's guilt or innocence. The jury may well have taken the profile testimony as evidence of the defendant's drug involvement and, therefore, his knowing transportation of the drugs in his car, despite the absence of any reliable indicators linking cracked windshields

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241. Kadish, *supra* note 229, at 768–69, 785–89 (noting problems with profile evidence and particularly its effect of asking the jury to infer guilt from the conduct of unrelated third parties).

242. *See, e.g.*, *United States v. Mendoza-Mendoza*, 267 F. App'x 365, 366 (5th Cir. 2008). Of course, if the evidence is not restricted to the limited purpose, its use may be error. *See, e.g.*, *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992) (finding error where profile evidence had not been limited to use as background). In *Williams*, the agent had testified to the profile and then pointed out the ways in which the defendant fit the profile; the trial court had not limited its use, and the prosecution had argued the profile in closing. *Id.*

243. *See, e.g.*, *Mendoza-Mendoza*, 267 F. App'x at 366 (stating that profile evidence is admissible as background); *United States v. Vazquez*, 117 F. App'x 571, 572 (9th Cir. 2004) (holding drug-courier profile testimony was properly admitted because it was admitted as background information to explain to the jury “how the investigation unfolded on the day of the seizure”); *United States v. Gomez-Norena*, 908 F.2d 497, 501 (9th Cir. 1990); Kadish, *supra* note 229, at 766–70 (discussing background use of profile evidence). In *Gomez-Norena*, the Ninth Circuit held that testimony that the defendant fit the drug courier profile was properly admitted as background “to provide the jury with a full and accurate portrayal of the events as they unfolded” and concluded that, used for this limited purpose, profile evidence did not generate the risk of unfair prejudice. *Gomez-Norena*, 908 F.2d at 501.

244. Thus, the court must rely on limiting instructions to protect the defendant against the likelihood that the jury will use the profile evidence as proof of guilt. *See* Kadish, *supra* note 229, at 766–69 (discussing use of profile evidence as background).

245. *Mendoza-Mendoza*, 267 F. App'x at 366.

to drug smuggling.<sup>246</sup> Such testimony informs the jury that law enforcement attaches significance to certain facts and is, therefore, likely to induce the jurors to value those facts as well.

*United States v. Morin* illustrates the latitude prosecutors receive with such background testimony.<sup>247</sup> In *Morin*, the prosecutor elicited lengthy testimony from two agents about drug smuggling and the compartmentalization of roles within drug trafficking networks.<sup>248</sup> The court regarded as admissible background testimony that those arrested at the border tended to be the middle men, reasoning that the testimony did not particularly focus on the defendant's role.<sup>249</sup> Only when the second agent responded to leading questions concerning her theory of what the defendant was doing did the court view the testimony as having crossed the line into prohibited profile testimony.<sup>250</sup> But all this purported background evidence promoted law enforcement's view of certain evidence, seeking to sway the jury to that view.

### 3. Profile Testimony Admitted as Proof of Modus Operandi

Courts also permit evidence that has the characteristics of profile evidence to be introduced to show modus operandi, stating that the evidence

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246. See *United States v. Valme*, No. 98-1340, 1999 WL 519232, at \*6-7 (6th Cir. July 16, 1999) (approving the use of profile testimony to explain why agents followed, stopped, and sought consent to search defendant's car for drugs).

247. See *United States v. Morin*, 627 F.3d 985, 995-98 (5th Cir. 2010).

248. *Id.* at 991-93. When the testimony of the second agent witness took on an excessively narrative character, with the agent simply talking about her understanding of the drug trade, the court allowed the prosecutor to lead aggressively, asking three pointedly leading questions that homed in on the essence of the prosecution's case:

Q: So they dropped off the trailer. They pulled up and then this Avalanche [the white vehicle] comes up and there's a meeting between everyone at the pumps and then Morin and Hernandez back up and get the trailer already loaded?

A: Yes, right.

Q: In your experience, this would be fairly common of how a drug organization would work?

A: Yes.

Q: And was there any indication in this—in your investigation that there was any legitimate load of cabbage on that trailer?

A: No.

*Morin*, 627 F.3d at 993 (alteration in original). The trial court overruled the initial defense objection to leading on the ground that the prosecutor was just trying to finish up with the witness. *Id.* at 993-94. The defense then did not object further to these three questions. *Id.*; see also *United States v. Montes-Salas*, 669 F.3d 240, 248-50 (5th Cir. 2012) (allowing testimony concerning how alien smuggling operations work).

249. See *Morin*, 627 F.3d at 996.

250. *Id.* at 1000-01. The *Morin* court called on "trial judges to rein in [the] practice" of permitting prosecutors to rely on opinion testimony that is unacceptable profile evidence." *Id.* at 1000 (quoting *United States v. Mendoza-Medina*, 346 F.3d 121, 125 (5th Cir. 2003)). The *Morin* court, however, held it was not plain error. *Id.* at 1001.

is not profile evidence.<sup>251</sup> Allowing to prosecution to use profile evidence to establish modus operandi poses serious problems.<sup>252</sup>

For example, in *United States v. Hernandez-Silva*, the defendant was charged with possession of marijuana with intent to distribute it as well as conspiracy.<sup>253</sup> The evidence established that the defendant “was found hiding, proximate to over 64 pounds of marijuana, in a remote section of the Arizona desert.”<sup>254</sup> Other circumstantial evidence linked the defendant to the drugs; he had burlap fibers on his clothes, consistent with having carried the burlap-wrapped marijuana, and the footprints around the drugs were consistent with his shoes.<sup>255</sup> The prosecution introduced profile testimony to bolster its case, presenting “expert testimony that individuals commonly transport drugs from Mexico using burlaps sacks, and then guard those sacks until they are picked up and passed further along the drug distribution chain.”<sup>256</sup> The court held the profile testimony was admissible as proof of modus operandi, noting that the trial court’s limiting instruction told the jury that the expert was not testifying specifically about the defendant’s case.<sup>257</sup> Other decisions approve expert testimony ascribing knowledge to drug couriers because “drug-trafficking organizations do not use unknowing drug couriers” as admissible modus operandi evidence.<sup>258</sup>

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251. See, e.g., *United States v. Gutierrez-Castro*, 341 F. App’x 299, 301 (9th Cir. 2009) (recognizing longstanding Ninth Circuit authority permitting the use of such testimony to establish modus operandi); *United States v. Hernandez-Silva*, 32 F. App’x 856, 859–60 (9th Cir. 2002); *United States v. Murillo*, 255 F.3d 1169, 1176–78 (9th Cir. 2001) (stating that evidence was not merely profile evidence and was admissible to prove modus operandi); *United States v. Goode*, No. 97-2163, 1999 WL 520553, at \*3 (6th Cir. July 14, 1999) (approving admission of testimony about common practices of drug traffickers to establish modus operandi); *United States v. Doe*, 149 F.3d 634, 636–37 (7th Cir. 1998); *United States v. Webb*, 115 F.3d 711, 715 (9th Cir. 1997) (stating that one of two permissible purposes for profile evidence is to establish modus operandi); *United States v. Pearce*, 912 F.2d 159, 163 (6th Cir. 1990) (approving as proof of modus operandi expert testimony about the link between firearms and crack houses); *United States v. White*, 890 F.2d 1012, 1014 (8th Cir. 1989) (holding “there was no clear abuse of discretion” to admit drug courier profile testimony for the limited purpose of “explaining the modus operandi of the crimes defendants were charged with”); *United States v. Daniels*, 723 F.2d 31, 32–33 (8th Cir. 1983) (approving testimony that drug dealers often used front people to register cars and apartments as proof of modus operandi evidence admissible under Rules 702, 704, and 403). This use of “modus operandi” reasoning should be distinguished from the admissibility of the defendant’s own prior conduct admissible under Rule 404(b) of the Federal Rules of Evidence to establish modus operandi.

252. See Kadish, *supra* note 229, at 772–75 (discussing how profile evidence inherently constitutes substantive evidence of guilt).

253. *Hernandez-Silva*, 32 F. App’x at 857–58.

254. *Id.* at 858.

255. *Id.* at 858–59. In addition, the defendant “told the arresting officers that he was going to visit his sick mother, he was unable to provide his mother’s address.” *Id.* at 858.

256. *Id.* at 859.

257. *Id.* at 859–60.

258. *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013); see also *United States v. Murillo*, 255 F.3d 1169, 1176–78 (9th Cir. 2001).

This use of the profile testimony directly invites the jurors to compare the defendant's conduct or state of mind with that of criminal actors in other cases and to conclude that the defendant's conduct must have the same significance.<sup>259</sup> Some courts caution only that the trial court must assess the particular relevance of the evidence in the case, given the charges and the contested issues, and not merely accede to the prosecution's claim that the evidence plays an appropriate role.<sup>260</sup> Instead, courts should recognize that *modus operandi* evidence merely advances the investigation narrative, explaining why law enforcement views the defendant's conduct as criminal. It plays no legitimate role.

#### 4. Admitting Profile Evidence to Rebut the Defense

Courts have also held that certain defense claims, such as innocent presence or arguments based on the defendant's apparent poverty, open the door to profile evidence, allowing the prosecution to refute the defense claims by using profile evidence to convey to the jury the likelihood that the defendant was involved in the criminal conduct.<sup>261</sup> Although some defense claims legitimately open the door, the courts apply this reasoning too broadly.

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259. See *United States v. Vallejo*, 237 F.3d 1008, 1016 (9th Cir. 2001) (reversing where the trial court stated merely that "the rationale is pretty clear for [admitting this] kind of evidence" and did not explain its relevance to the particular case). In *Vallejo*, the court condemned the evidence:

[The evidence] portrayed [the defendant] as a member of an enormous international drug trafficking organization and implied that he knew of the drugs in his car because of his role in that organization. This expert testimony connected seemingly innocent conduct to a vast drug empire, and through this connection, it unfairly attributed knowledge—the sole issue in the case—to [the defendant], a single individual, who was not alleged to be associated with a drug trafficking organization in even the most minor way. As a result, the introduction of this evidence created the same prejudice that has made drug courier profiles inadmissible.

*Id.* at 1017. The Ninth Circuit stated that *modus operandi* evidence was not admissible unless the defendant is charged with conspiracy rather than simply knowing possession of drugs, but later decisions declined to implement a *per se* approach, directing courts to assess relevance and conduct a Rule 403 balance on a case-by-case basis. *Id.* at 1016; see also *United States v. Sepulveda-Barraza*, 645 F.3d 1066, 1070 (9th Cir. 2011).

260. See, e.g., *United States v. Varela-Rivera*, 279 F.3d 1174, 1179 (9th Cir. 2002); *Vallejo*, 237 F.3d at 1016.

261. See, e.g., *Sepulveda-Barraza*, 645 F.3d at 1070 (discussing ways in which the defendant may "open[] the door"); *United States v. Webb*, 115 F.3d 711, 714 (9th Cir. 1997) (allowing profile evidence about concealing weapon in the engine compartment of a car admissible to refute a defendant's claim that he was unaware a weapon was in the car); *United States v. Baron*, 94 F.3d 1312, 1320–21 (9th Cir. 1996) (allowing profile testimony to rebut the suggestion that nothing about the car defendant was driving signaled that it contained drugs); *United States v. Beltran-Rios*, 878 F.2d 1208, 1210–11 (9th Cir. 1989) (allowing profile evidence to rebut the defense's suggestion that the defendant was not involved in drug trade because he was poor).



In *United States v. Montes-Salas*, for example, the defendant claimed he was an undocumented immigrant who was being smuggled rather than part of the smuggling operation.<sup>262</sup> The court treated that defense as opening the door to detailed testimony about the likely significance of his behavior and his position in the truck.<sup>263</sup> The court allowed the agent to testify that a vehicle carrying undocumented immigrants will have a driver and a guide, that the guide will ride in the front as passenger or driver in order to be able to escape easily.<sup>264</sup> The agent also testified that the driver and guide “normally know each other,” that those being transported into the country will be crowded in the back of the vehicle and will not be visible to those outside the vehicle, and that smugglers will sometimes break into two groups if they know law enforcement agents are following them in order to increase the likelihood of escape.<sup>265</sup> This profile testimony ascribed incriminatory significance to the fact that the defendant rode in the front of the truck and that he ran from the truck early in the law enforcement pursuit. But it is grounded in nothing other than the law enforcement witness’s anecdotal sense of how smuggling operates.

Defense claims of innocence should not generally be viewed as opening the door to profile evidence. Rather than offering peculiar probative value to rebut claims such as innocent presence, the profile testimony merely provides the jury with law enforcement’s view of the facts, reinforcing the investigation narrative without adding any specific evidence pointing to the defendant. Moreover, presenting profile testimony to counter these routine defense claims increases the risk that the jury will defer to the law enforcement judgment that the circumstances support conviction.

Instead, profile evidence should be allowed in rebuttal only if the defendant actually challenges the basis for the law enforcement officers’ action. In *United States v. Ward*, for example, defense counsel suggested on cross-examination that the defendant had been stopped in the airport because of her race.<sup>266</sup> The trial court then properly allowed the law enforcement witness to testify concerning the aspects of the defendant’s appearance and behavior that drew the attention of law enforcement.<sup>267</sup> Used in that context—to explain why the officers stopped the defendant and rebut her allegation of race-based selection—the profile testimony had a legitimate role. Generally, however, those questions arise only in litigation of motions to suppress; they rarely play a role in the trial itself.

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262. *United States v. Montes-Salas*, 669 F.3d 240, 251 (5th Cir. 2012).

263. *Id.*

264. *Id.* at 244.

265. *Id.* at 248–49.

266. *United States v. Ward*, Nos. 96–5731, 96–5892, 1998 WL 45491, at \*4 (6th Cir. Jan. 27, 1998).

267. *Id.* The witness did not use the word profile, but relied on aspects of the drug courier profile. *Id.*

## VII. ADDRESSING THE PROBLEMS

These four types of priming evidence—out-of-court statements, overview testimony, opinion testimony that does not conform to the rules of evidence, and profile testimony—have no proper role to play at trial. Nevertheless, the courts continue to admit them, exposing defendants to the unfair prejudice such evidence brings to the trial. The courts do so to allow the prosecution to develop its investigation narrative. Moreover, even when an appellate court recognizes that it was error to admit one of these types of evidence, the court frequently goes on to find the error harmless.<sup>268</sup>

Some courts have expressed frustration with the prosecution's persistent reliance on evidence that is not properly admissible.<sup>269</sup> In *United States v. Hernandez*, the Fifth Circuit expressed its frustration, noting: "We have repeatedly warned prosecutors that it is their duty to refrain from adducing inadmissible evidence and to abstain from exaggeration in closing argument."<sup>270</sup>

268. See, e.g., *United States v. Rodríguez-Adorno*, 695 F.3d 32, 37 (1st Cir. 2012) (affirming despite introduction of improper overview evidence); *United States v. McDarrah*, 351 F. App'x 558, 561–63 (2d Cir. 2009) (holding the introduction of opinion testimony to be harmless error); *United States v. Farrell*, 563 F.3d 364, 377–78 (8th Cir. 2009) (holding opinion testimony to be error but harmless); *United States v. Garcia*, 413 F.3d 201, 217–18 (2d Cir. 2005) (holding admission of overview testimony to be error but harmless); *United States v. Garica-Morales*, 382 F.3d 12 (1st Cir. 2004) (holding error harmless); *United States v. Dukagjini*, 326 F.3d 45, 52–56, 62 (2d Cir. 2003) (holding introduction of opinion evidence to be harmless error); *United States v. Brown*, 110 F.3d 605, 609–10 (8th Cir. 1997) (holding erroneous introduction of out-of-court statements harmless); see also *United States v. Vazquez*, 555 F.3d 923, 930–31 (10th Cir. 2009) (holding admission of profile testimony was not plain error); *United States v. Williams*, 277 F. App'x 472, 474 (5th Cir. 2008) (holding harmless without addressing merits of defendant's claim).

269. See, e.g., *United States v. McGee*, 612 F.3d 627, 631–32 (7th Cir. 2010); *United States v. Rodriguez*, 525 F.3d 85, 95–96 (1st Cir. 2008); *United States v. Hernandez*, 750 F.2d 1256, 1259 (5th Cir. 1985). In *McGee*, the Seventh Circuit condemned the continued improper use of hearsay as non-hearsay background. *McGee*, 612 F.3d at 631–32 ("[W]e are dismayed by the prosecutor's conduct and disappointed by the district judge's failure to intervene. The extensive hearsay did not slip in by accident, in the heat of the moment; the prosecutor must have carefully planned this line of testimony. The proper way to introduce jurors to forthcoming wiretap evidence ought to be featured in the United States Attorney's Manual. The United States has not attempted to defend the propriety of the prosecutor's tactics. Waiver and the plain-error doctrine may insulate judgments from reversal, but recurrence of an episode such as this may lead to the opening of a disciplinary proceeding for the lawyers involved.") The court nevertheless affirmed the conviction. *Id.* at 636.

270. *Hernandez*, 750 F.2d at 1259; see also *United States v. Benitez-Avila*, 570 F.3d 364, 369 (1st Cir. 2009) (stating that the court had repeatedly warned prosecutors against the "misguided use" of hearsay testimony" (quoting *United States v. Casas*, 356 F.3d 104, 117–18, 120 (1st Cir. 2004))); *United States v. Flores-de-Jesús*, 569 F.3d 8, 17 (1st Cir. 2009) (expressing concern that the government continued to use overview witnesses in violation of the court's rulings); *Rodriguez*, 525 F.3d at 95 (expressing frustration that the prosecution continued "the practice of having a case agent make conclusory statements about a defendant's culpability at the beginning of the prosecution's case" despite repeated cautions from the court).

In *Hernandez*, the court also took corrective action; it reversed the conviction because the prosecution not only introduced impermissible “background” hearsay but aggravated the error by arguing it for the truth of the matter in closing.<sup>271</sup> Despite clear admonitions and occasional reversals, prosecutors continue to offer this forbidden evidence, trial courts continue to admit it, and appellate courts allow the error to go without redress.

This ineffective policing permits prosecution’s improper use of inadmissible evidence to develop the investigation narrative to proliferate.<sup>272</sup> Addressing a problem that is generally viewed, at worst, as harmless error poses a challenge. Furthermore, when trial courts admit improper evidence to establish the investigation narrative and the resulting conviction is allowed to stand, the investigation narrative gains legitimacy as an aspect of the prosecution’s case. Over time, courts and prosecutors come to view the improper evidence offered to establish that narrative as properly admissible. Courts should take steps to correct misimpressions, placing the investigation narrative off limits and finding effective ways to bar the use of improper evidence.

The courts should initiate three steps. First, courts should recognize the illegitimacy of the investigation narrative as well as both the inadmissibility and the power of these types of priming testimony. Second, courts should promote better education of all actors in the system on these issues. Third, appellate courts should emphatically reject arguments based on the investigation narrative and should approach harmless error analysis cautiously, reversing more convictions on these grounds. Whenever evidence falling in these prohibited categories is admitted and the investigation narrative laid out for the jury, the appellate court should strongly consider reversal.

#### A. REASSESS AND PRECLUDE EVIDENCE OF THE INVESTIGATION NARRATIVE

Courts should revisit their rulings allowing the prosecution to use these four kinds of evidence to establish the investigation narrative. The courts should recognize that the evidence does not warrant admissibility under the rules of evidence, that the investigation narrative plays no legitimate role in most cases, and that this evidence injects a substantial risk of unfair prejudice into the trial.

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271. *Hernandez*, 750 F.2d at 1256.

272. Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 335–36, 369 (2007) (commenting that courts encourage prosecutorial misconduct “by issuing empty, repetitive warnings to prosecutors that the courts are unwilling to enforce”); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 427 (1992) (asserting that development of harmless error doctrine frees “prosecutors from the restraining threat of appellate reversal”); Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 115–17 (1999) (discussing the effect of appellate disapproval of misconduct when not backed up by reversals).

Careful application of the rules of evidence should lead courts to exclude the evidence discussed above. If courts revisit the foundation for the rulings admitting out-of-court statements as background, they will find no reasoned support. Enforcing the rules governing opinion testimony and the personal knowledge requirement will bar use of the types of law enforcement opinion testimony discussed above, overview testimony, and profile testimony. Courts should break the habit of applying relaxed rules of evidence to law enforcement testimony.

Of course, a key aspect of this reassessment is the recognition that the prosecution should not be entitled routinely to develop the investigation narrative. The courts should acknowledge that the jury has no need to understand the course of the criminal investigation or law enforcement's perspective on how to interpret the facts. Instead, the task of the jury is to determine the defendant's guilt or innocence based on evidence that speaks appropriately to the criminal charges.

In addition, the courts should acknowledge the force of this priming evidence. The types of evidence discussed above shape the jury's overall view of the case and understanding of the evidence. Framing the evidence against the defendant as the product of diligent and professional investigation and explaining how to evaluate the evidence from law enforcement's perspective adds substantial persuasive weight to the prosecution's case. Further compounding the problem, each of these priming approaches delivers the investigation narrative to the jury in the guise of evidence, generally endorsed by one or more law enforcement professionals. Instead of having to merely argue the inferences to the jury, the prosecution can point to evidence establishing pro-conviction inferences.

The force of the investigation narrative cannot be overstated. Jury experts advise lawyers that jurors arrive with expectations shaped by popular media.<sup>273</sup> Police procedure has become a staple media offering, steeping viewers in the process of investigating fictional crimes, and sometimes pairing the investigation with the prosecutor's subsequent quest for a conviction.<sup>274</sup> In court, the investigation narrative plays to the jurors' expectation that they will be privy to the investigation. The narrative invites them to focus on the motives and actions of law enforcement—the heroes of the police procedural<sup>275</sup>—rather than maintaining focus only on the alleged criminal

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273. See, e.g., Robert D. Duboff & Nancy L. Neuffer, *Scoping the Juror's Head: What's Going on in There?*, NAT'L L.J., Feb. 4, 2008, at S1.

274. This is the format of the popular *Law & Order* series.

275. Merriam Webster defines a police procedural as "a mystery story written from the point of view of the police investigating the crime." *Police Procedural*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/police%20procedural> (last visited Nov. 13, 2015). The police procedural has become a popular format for television shows such as *Law & Order* and *CSI*.

conduct of the defendant. It provides jurors with a comfortable emotional path to conviction, aligning them with the law enforcement team.<sup>276</sup>

Courts should also consider the ways in which the prosecution exploits this improperly admitted priming evidence. For example, in *United States v. Meises*, the court held that, considering the cumulative effect of all the errors in the trial, the overview testimony was not harmless.<sup>277</sup> In *Meises*, the prosecution relied heavily on the testimony of a paid informant<sup>278</sup> and also placed before the jury the statement of an alleged co-conspirator who had admitted guilt in the case.<sup>279</sup> The prosecution also presented an overview witness, an experienced drug investigator, who identified the defendants as participants in the conspiracy and effectively vouched for the credibility of the informant.<sup>280</sup> In *Meises*, the court recognized that the jury might not have credited the informant's testimony in the absence of the supporting overview testimony.<sup>281</sup>

Further, if the improper evidence was central to the prosecution theory of the case or featured in the prosecution's arguments to the jury, the court should reverse. Thus, in cases involving other significant errors that might be harmless if viewed in isolation, the court should reject the harmless error argument because of the effect of the priming evidence.

#### B. EDUCATE JUDGES, PROSECUTORS, AND DEFENSE COUNSEL

Educating all the actors in the criminal justice system is critical. All must receive the message that the investigation narrative is not an appropriate subject in a criminal trial unless the defense opens to door by challenging the investigation. There appears to have been a time when prosecutors did not expect—or were not permitted—to develop the investigation narrative or to use these types of priming evidence. However, once prosecutors are allowed to use this approach in some trials and the resulting convictions are not reversed, they are encouraged to follow the same approach in future trials. As the prosecution advances investigation-narrative arguments in more trials and is permitted to introduce otherwise inadmissible evidence, not only prosecutors, but also trial judges and defense counsel will begin to accept the

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276. See, e.g., Duboff & Neuffer, *supra* note 273 (suggesting that lawyers must address the jurors "emotional concerns" and help them "to understand the motives of the key players"); see also Neuffer et al., *supra* note 6 (arguing that "[i]t is critical . . . to deliver key information to the jury in a concise and simple story while taking into consideration jurors' predispositions").

277. *United States v. Meises*, 645 F.3d 5, 23–25 (1st Cir. 2011). The trial court had acknowledged the impropriety and the strong stance of the court against such evidence but nevertheless denied the defendants relief, perhaps because the defendants moved for an acquittal but not for a new trial. See *United States v. Reyes-Guerrero*, 638 F. Supp. 2d 177, 185–90 (D.P.R. 2009).

278. *Meises*, 645 F.3d at 24.

279. *Id.* at 18–19.

280. *Id.*

281. *Id.* at 23–24.

investigation narrative as legitimate and the use of evidence to serve that narrative as proper.

One factor in legitimizing the prosecution arguments may be the ascension of former prosecutors to the ranks of trial judges.<sup>282</sup> As those former prosecutors rule on admissibility of prosecution evidence, the arguments they made unsuccessfully when serving as prosecutors are likely to resonate with them, inclining them to endorse the investigation narrative and admit evidence that develops the narrative. Over time, everyone involved in the criminal justice system internalizes a sense that the priming evidence is appropriate and the investigation narrative has a proper role to play at trial. Without strong efforts to resist this evolution, the investigation narrative and the use of priming evidence is likely to become entrenched.

The sense that the investigation narrative is relevant may flow at least in part from that fact that, outside the context of the trial on guilt or innocence, judges, prosecutors, and defense counsel must regularly consider and base arguments on that narrative. In determining whether to bring charges and in presenting its case to the grand jury, prosecutors assess the investigation narrative, considering whether, for example, the investigation was proper and the right defendants are being charged.<sup>283</sup> In addition, when a defendant files a motion to suppress, the investigation narrative is central to the hearing on the motion:<sup>284</sup> at the hearing on the suppression motion, the court must resolve questions such as whether law enforcement had reasonable suspicion or probable cause and whether each step in the government's investigative actions was justified under the Constitution.<sup>285</sup> The ruling may turn on what

282. A significant percentage of judges were prosecutors before taking the bench. See Richard A. Wise & Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427, 429–30 (2004) (reporting that of their sample of 146 state and federal judges, 14% had served as prosecutors, and an additional 36% had served both a prosecutor and criminal defense counsel); Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CALIF. L. REV. 1029, 1044 tbl.2 (2003) (reporting that over 10% of federal judges' job immediately prior to becoming a judge was as a prosecutor). A report by the Alliance for Justice surveyed President Obama's judicial nominees, based on the data from the Senate Judiciary questionnaires, and determined that prosecutors outnumbered defenders by almost three to one. See ALL. FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 6 & n.6 (2015), <http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf>.

283. See *United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (commenting that overview testimony is admissible in the grand jury but not at trial); *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003) (noting that the use of summary testimony by a witness without personal knowledge and not based on evidence in the record is permitted before the grand jury but not at trial).

284. See *Garcia*, 413 F.3d at 213 (distinguishing between information that can contribute to probable cause and that which is admissible at trial). Some of the background information would be relevant to a motion to suppress the evidence, but suppression questions are not within the province of the jury. See generally 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 3.1–3.10, Westlaw (database updated Dec. 2014).

285. See generally 2 LAFAVE ET AL., *supra* note 284, §§ 3.1–3.10.

the law enforcement officers knew and when they knew it, and the judge may also consider the officers' experience, opinions, and collective wisdom in determining the constitutionality of their actions. Accustomed to arguments and presentations that revolve around the investigation narrative, prosecutors and judges may fail to differentiate between the contexts where that narrative is appropriately part of the discussion and the trial, where it is not. Proper education will encourage judges and prosecutors to maintain that distinction. One can hope that courts will then better police this evidence and prosecutors will adopt a more cautious stance.<sup>286</sup>

Defense counsel likewise need to be educated to understand that the investigation narrative is generally off limits at trial and to make the appropriate objections. Too often, the defense does not object to the priming evidence or development of the investigation narrative.<sup>287</sup> As a consequence, neither the trial judge nor the trial prosecutor is alerted to the impropriety of the evidence. The arguments against the evidence are not articulated at trial, and the question for the court on appeal is whether the use of the evidence was plain error, a difficult hurdle for the defense.<sup>288</sup> Better educated defense

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286. See *United States v. Reyes*, 18 F.3d 65, 72 (2d Cir. 1994). In *Reyes*, the Second Circuit suggested a protective procedure:

We add a note of caution to criminal prosecutors. Because in criminal cases there has been little prior discovery, and the defense lawyers often do not know in advance what will be the testimony of prosecution witnesses, trial judges have little ability to prevent error if prosecutors act without due caution. The need for retrial of this case could easily have been avoided if the Assistant U.S. Attorney, recognizing that he was about to elicit potentially incendiary evidence as to which there are arguable grounds for exclusion, had begun by a proffer, preferably in writing, explaining the issues in full, so that the defendant had the chance to object and the judge to rule before the harm was done.

*Id.*

287. See, e.g., *United States v. Montes-Salas*, 669 F.3d 240, 248–50 (5th Cir. 2012) (reviewing for plain error because the defendant did not object to profile evidence at trial); *United States v. Morin*, 627 F.3d 985, 995–98 (5th Cir. 2010) (noting that the defendant did not object on the ground that testimony constituted profile evidence, so the claim was reviewed for plain error only); *United States v. Warman*, 578 F.3d 320, 348 (6th Cir. 2009) (noting that the defendant forfeited a prejudice argument under Rule 403 by objecting only on grounds of relevance); *United States v. Vazquez*, 555 F.3d 923, 930–31 (10th Cir. 2009) (holding admission of profile evidence was not plain error); *United States v. Johnson*, 529 F.3d 493, 501–02 (2d Cir. 2008) (reviewing for plain error because defense had failed to object); *Garcia*, 413 F.3d at 209–10 (reporting that the defense objected to very few of the overview witness's conclusions regarding the role of various actors in the conspiracy); *United States v. Ayala-Pizarro*, 407 F.3d 25, 27–29 (1st Cir. 2005) (noting that the defendant objected only as to classification of opinion testimony and did not move to strike); *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000) (reviewing for plain error because defense did not object to profile evidence at trial); *United States v. Reyes-Guerrero*, 638 F. Supp. 2d 177, 185–90 (D.P.R. 2009) (noting the defense sought acquittal rather than new trial).

288. See *United States v. Olano*, 507 U.S. 725, 734 (1993) (discussing the plain-error test); see also 3B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 856, Westlaw (database updated Apr. 2015) (discussing plain error); Harry T. Edwards, *To Err Is Human, but*

counsel will not only object at trial, but also present more cogent arguments against the evidence, increasing the likelihood that the trial court will bar the evidence as well as increasing the chance of success on appeal if the court admits the evidence over objection.

### C. STRENGTHEN APPELLATE CONDEMNATION

Recognizing the illegitimacy and force of the investigation narrative should lead courts more often to view these errors as harmful and, therefore, reverse the resulting convictions. In addition, appellate courts should strengthen their language disapproving the use of priming evidence in cases where they do not reverse the conviction. The courts should state in no uncertain terms that the investigation narrative is not an appropriate topic for proof at trial. They should ensure that trial courts assiduously enforce the rules of evidence restricting the admissibility of out-of-court statements, overview witnesses, opinion testimony, and profile testimony. Further, they should condemn the use of evidence that serves only to advance the investigation narrative.

Stronger condemnation alone may not be successful.<sup>289</sup> If prosecutors continue to offer the improper evidence and the trial courts continue to admit it, appellate courts can add emphasis to their holdings by naming the prosecutor who offered the evidence or even sanctioning prosecutors who disregard rulings restricting use of the evidence.<sup>290</sup> Such action would send a strong message. Combined with a greater willingness to reverse and better education of lawyers and judges, strong condemnation may stop the use of this improper evidence.

## VIII. CONCLUSION

Courts capitulate too readily to prosecution arguments that otherwise inadmissible evidence should be admitted to help the jury understand the course of the investigation or the motives or perspective of the law enforcement agents. To permit the prosecution to achieve these goals, courts improperly admit several categories of evidence. Courts admit out-of-court statements to law enforcement that inculcate the defendant on the grounds that they serve as non-hearsay background, explaining the course of the investigation and the reason for focusing on the investigation on the defendant. They permit prosecution overview witnesses to introduce and

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*Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U.L. REV. 1167, 1183–85 (1995) (discussing the development of plain-error test).

289. See *United States v. Meises*, 645 F.3d 5, 13–14 (1st Cir. 2011) (expressing frustration that strong condemnation had not stopped the use of overview testimony).

290. See *United States v. Flores-de-Jesús*, 569 F.3d 8, 27 (1st Cir. 2009); see also *United States v. Rodríguez-Adorno*, 695 F.3d 32, 37–38 (1st Cir. 2012) (remarking that the court had stated many times that overview testimony was improper although not reporting the imposition of any sanctions).



summarize the course of the investigation that led to the trial of the defendant. They allow law enforcement witnesses to provide unqualified lay and expert opinion testimony, instructing the jurors on how to view the evidence. Finally, courts permit the prosecution to introduce evidence of criminal profiles, inviting the jurors to view the defendant through the lens of law enforcement and compare the defendant's actions or characteristics to those of defendants in other criminal cases. None of this evidence would be permitted if the courts did not buy into the notion of the investigation narrative, viewing as legitimate the prosecution's efforts to present the case against the defendant in the context of the work of law enforcement and to filter the evidence through the eyes of law enforcement agents. The evidence improperly strengthens the case against the defendant, priming the jury to convict.

Steps should be taken to stop courts from accepting arguments based on the investigation narrative and to exclude evidence that plays no legitimate purpose in the trial. First, the courts should engage with this issue, recognizing both the illegitimacy and the force of the investigation narrative and the inadmissibility of evidence offer to advance that narrative. They should return to basics, applying the rules of evidence carefully and holding that these categories of evidence are not admissible. Second, the judiciary should ensure that judges, prosecutors, and defense counsel are better educated on these issues. Education is necessary to counteract the growing perception that the investigation narrative plays a legitimate role in the criminal trial. Finally, the appellate courts should find ways to strengthen their condemnation of the practice of admitting evidence that is not properly admissible for the purpose of advancing the investigation narrative. Only an aggressive campaign to expose and condemn the investigation narrative as an illegitimate focus in a criminal trial will curtail these unfair evidentiary practices.