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Out-of-Court Accusations Offered for “Background”: A Measured Response From the Federal Courts

PROFESSOR DANIEL J. CAPRA

The two most important exclusionary rules in the Federal Rules of Evidence are the hearsay rule (codified in Federal Rule of Evidence 801) and Federal Rule of Evidence 403. The hearsay rule excludes out-of-court statements when they are offered to prove that the information related in the statement is true. Rule 403 operates to exclude evidence when its probative value would be substantially outweighed by the prejudice, confusion or delay that would result were the evidence admitted.

As Ms. Hervic notes in her Comment, Rule 403 has an interesting and complex relationship with the hearsay rule. The hearsay rule is purpose-specific in its exclusion; it operates only where the statement is offered to prove that the information related in the statement is true. When an out-of-court statement is offered for something other than its truth—a so called “not-for-truth purpose”—the hearsay rule is inapplicable. Upon appropriate objection, however, the trial court must balance the probative value and the prejudicial effect of the statement under Rule 403; the evidence will have to be excluded where it is not very probative for any not-for-truth purpose, and where there is a significant risk that the jury will use the statement improperly for its truth. Such a use would prejudice the opponent under the terms of Rule 403.

The interrelationship between Rule 403 and the hearsay rule is brought into stark relief in a criminal case when the prosecution proffers out-of-court statements accusing the defendant of criminal activity. *United States v. Evans* is a recent example.¹ Thomas Rose was serving time and sought to cooperate with the authorities in order to get his sentence reduced. He told FBI agents that Evans was involved in drug trafficking. Thomas Rose then had his uncle, George, contact Evans, using Thomas’s name as a reference. Eventually, George asked Evans to find some drugs for him, and Evans did so. At trial, Evans claimed entrapment.

The government’s first witness at trial was FBI agent Darnell. Darnell testified about the origins of the undercover operation, including

1. 216 F.3d 80 (D.C. Cir. 2000).

the FBI's contacts with Thomas and George Rose. The agent was asked how he "came about knowing Mr. Evans."² Over defense objection, the agent testified that the FBI had "received information that Mr. Evans was involved in drug trafficking" and that George Rose "was in a position to directly go and approach Mr. Evans about narcotics."³ Evans claimed that admission of this testimony was error, because it referred to an out-of-court accusation and thus violated the hearsay rule and Rule 403.⁴

The government admitted that the FBI agent's testimony related an out-of-court statement, i.e., a statement from an unnamed person—in this case Thomas Rose—that Evans was involved in drug trafficking. The government, however, argued that this statement was not offered to prove that Evans was *in fact* involved in drug trafficking. Rather, it was offered to explain why the FBI suspected Evans and decided to target him for an undercover investigation.⁵

Why would it make a difference if the statement is not offered for its truth? Because the problem with hearsay is that it deprives the opponent of the opportunity to cross-examine the person who made the statement—there is no way to assess whether the hearsay declarant is credible. And the jury could treat the statement as true, even though there is no demonstrable way of assessing its truth. As the *Evans* court stated, cross-examination "is not of much use if there is no one to whom it can be applied."⁶ On the other hand, if the statement is really offered to prove something other than the truth of the information related, then we are not concerned about whether the hearsay declarant was telling the truth. If it's not offered for its truth, then it would not even matter if the declarant were lying. The hearsay declarant's credibility drops out of the case; there is no reason to cross-examine a witness if his statement is probative even if he is lying, because proving that he lied makes no difference.

Whether an out-of-court statement can be admissible for a purpose other than to prove the truth of its contents depends on whether it is relevant to some disputed issue without regard to its truth. Thus, for Thomas Rose's accusation about Evans to be admissible nonhearsay, it would have to prove some fact of consequence other than the fact that Evans was a drug dealer. The government in *Evans* proffered three

2. *Id.* at 84.

3. *Id.*

4. *Id.*

5. *Id.* at 84-85.

6. *Id.* at 85.

interconnected explanations for how the out-of-court statement could have been used other than for its truth.

First, the government argued that Thomas Rose's accusation was relevant to show that Evans had not been improperly targeted or selectively prosecuted. The contention was that even if the accusation were not in fact true, it could have provided a proper basis for the FBI agents to turn their suspicions and investigative resources toward Evans. The problem for the government, however, was that this not-for-truth purpose was not in dispute in the case. Thus, if the statement were in fact offered to rebut an inference of selective prosecution, it should have been excluded as insufficiently probative under Rule 403. As the court noted, "selective prosecution may qualify as an issue of consequence in some proceedings," but "it was not at issue in Evans trial."⁷ Evans never raised an inference of selective prosecution, and the court noted that Rose's accusation was elicited during the direct examination of the first government witness, before Evans had presented a defense or even begun to cross-examine.

The *Evans* court declared that if Rule 403 could not operate to exclude out-of-court statements when offered to "explain" the uncontested conduct of government agents, it would "open a large loophole in the hearsay rule."⁸ As the court observed: "If we were to accept the government's rationale here, then explaining why the government agents did what they did through reference to statements of absent informants would be acceptable in almost any case involving an undercover operation, and in many others as well."⁹

The government's second explanation in *Evans*, for why the out-of-court statement was probative of something other than the truth of its contents, fared no better. The government argued that the accusation against Evans was necessary to combat "the threat of jury nullification."¹⁰ The government expressed concern that without the accusation, the jury might miss "the moral significance of the allegations, and thus render an unjustified acquittal."¹¹ The problem with this argument, is that it depended specifically on the *truth* of the accusation that Evans was a drug dealer. If Thomas Rose's allegation were false, then the allegation would have no "moral significance" and acquittal would not be "unjustified."¹² Thus, the government's nullification argument failed to articulate a not-for-truth purpose for the evidence.

7. *Id.*

8. *Id.* at 86.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

The government's final articulation of a not-for-truth purpose for the accusation in *Evans* was that the statement was relevant as background.¹³ This explanation was found infirm as well. It was simply another way of saying "we want to provide an explanation for the actions of the police leading up to the arrest of Evans." The court found that the probative value of the accusation for "background" was minimal.¹⁴ It was not very important to the case to show why the officers focused on Evans. Of course, background of the investigation was not completely irrelevant, for surely the jury would be curious as to how the government set its sights on Evans. But the court found that the probative value was substantially outweighed by the risk of prejudice, given the relative lack of importance of the police investigation to the contested issues of guilt.¹⁵ Therefore, the accusation should have been excluded under Rule 403.

But in what regard was the accusation of drug activity "prejudicial," if ostensibly offered only for the purpose of explaining the officer's conduct? It could not be prejudicial simply because it strengthened the government's case; if "prejudice" meant "harm," then *all* of the prosecution's evidence (including eyewitness and fingerprint testimony) would be subject to exclusion as "prejudicial."¹⁶

The *Evans* court found the admission of Thomas Rose's accusation to be prejudicial under Rule 403 in a different, more limited sense. It noted that the prejudice inquiry "asks whether the jury was likely to consider the statement for the truth of what was stated with significant resultant prejudice."¹⁷ Thus, prejudice would result from the *misuse* of the statement by the jury. For example, the jury might use the statement as proof that Evans really was a drug dealer, even though to do so would violate the hearsay rule and would be contrary to the government's stated purpose for admitting the evidence. The *Evans* court concluded its Rule 403 analysis as follows:

There was considerable danger that the jury would consider the information about Evans' prior drug crimes for its truth, and hence as evidence of his propensity to commit the crimes with which he was charged. When that danger is weighed against the insignificant probative value of the testimony as background, the Rule 403 balance comes out clearly against admission.¹⁸

13. *Id.* at 87.

14. *Id.*

15. *Id.* at 89.

16. See *Dollar v. Long Mfg.*, 561 F.2d 613, 618 (5th Cir. 1977) ("unfair prejudice within the meaning of Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it is not material. The prejudice must be unfair").

17. *Evans*, 216 F.3d at 87.

18. *Id.*

Evans illustrates that Rule 403 provides an important protection when an out-of-court accusation is offered as nonhearsay for its effect on the person who heard the statement, in this case the FBI agent. In order to be admissible nonhearsay, the conduct of the listener in response to the statement must be of some importance in the case, and the statement must be probative to explain the listener's response or state of mind, regardless of its truth. In many cases, statements accusing defendants of crime are subject to exclusion under Rule 403 when offered for "background" or "to explain the officer's conduct." Where the question is whether the defendant is guilty, there is often only minimal probative value in explaining why an officer acted in a certain way; in contrast, there is a substantial risk of prejudice because the jury could impermissibly use the statement for its truth.¹⁹

Unfortunately, there have been a number of instances in which the courts have ignored the Rule 403 questions inherent in background evidence, and in which hearsay statements have been offered to "explain" events that are of minimal or no relevance. One example is *United States v. Norquay*.²⁰ Norquay was charged with rape, and witnesses testified that the victim told them that she had been raped. The court held that the statements were properly admitted as nonhearsay because they were offered not for the truth of their content, but rather "to explain why the witnesses stopped for the woman on the highway late at night, took her to the police station, and sent her to be interviewed by an investigator."²¹ This analysis is misguided. The probative value of the statements for the articulated purpose was minimal because the conduct of the witnesses at the time was only marginally relevant to the case. The prosecution had little need to explain why the witnesses acted as they did, when there was no dispute as to their actions. In contrast, the prejudicial effect of the statements was obvious because there was a strong

19. For another case illustrating this point, see *United States v. Reyes*, 18 F.3d 65 (2d Cir. 1994) (reversing a conviction due to error in admitting statements made to a Customs agent which implicated the defendant in a conspiracy. Even though the jury in *Reyes* was instructed that the accusations were admitted only as "background," and the statements were somewhat relevant to explain the background of the investigation, the court found a substantial danger that the jury would have considered the statements for their truth anyway.) As the *Reyes* court stated, "the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice." *Id.* at 70; see also *United States v. Dean*, 980 F.2d 1286, 1288 (9th Cir. 1992) (finding that statements accusing the defendant of criminal activity, made to a police officer, were improperly admitted for the non-hearsay purpose of explaining why the officer went to the defendant's home to arrest him. The officer's reasons for going to the defendant's home "are not of consequence to the determination of the action, i.e., they do not bear on any issue involving the elements of the charged offense").

20. 987 F.2d 475 (8th Cir. 1993).

21. *Norquay*, 987 F.2d. at 479.

likelihood that the jury would impermissibly use the statements for the truth of their content: that the victim was actually raped.

Perhaps the *Norquay* Court would have ruled differently had defense counsel specifically objected to the statements under Rule 403. It appears that defense counsel in *Norquay* only made a hearsay objection. Once the prosecution articulated a legitimate not-for-truth purpose, the hearsay objection was properly overruled, and it was incumbent on defense counsel to argue specifically that the risk of the jury's misuse of the statement would substantially outweigh the minimal probative value of the statement for the purpose stated by the prosecution. If a Rule 403 objection is not specifically made at trial, it ordinarily will not be entertained on appeal.²² In contrast, defense counsel in *Evans* specifically objected on both hearsay and Rule 403 grounds to admission of Rose's accusation of drug activity.²³

Finally, it should be remembered that it will be proper, in certain cases, to admit statements implicating defendants in criminal wrongdoing in order to explain police activity or for "background." For example, if the defendant does interpose a defense of selective prosecution, accusations against him will be properly admitted to explain the officers' motivation, as the court implied in *Evans*. Similarly, if a person brings a claim for false arrest or excessive force, then accusations against him, of which the arresting officer is aware, will be admissible not for their truth but to prove the reasonableness of the officer's conduct.

Many of the above points are forcefully made by Ms. Hervic in her Comment. Ms. Hervic, however, sometimes overstates her points, rendering her Comment an exaggerated attack on courts in general and federal courts in particular. Ms. Hervic uses a good deal of firepower on the United States Supreme Court, most notably its decision in *Old Chief v. United States*.²⁴ She asserts that the Court in *Old Chief* gave the government carte blanche to admit out-of-court accusations of the defendant's criminal activity as evidence of background to the police investigation.²⁵ This is a most extravagant reading of *Old Chief*. First of all, *Old Chief* is not a case dealing with hearsay at all. There is no reference in the entire opinion to hearsay or to out-of-court statements.

22. See, e.g., *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991) (holding that hearsay objection at trial did not specifically request the trial court to weigh the prejudicial nature of the evidence against its probative value; therefore the objection to the prejudicial nature of the evidence was not properly preserved for appeal).

23. *Evans*, 216 F.3d at 84.

24. 519 U.S. 172 (1997).

25. Joelle Hervic, Comment, *Statements of Bystanders to Police Officers Containing an Accusation of Criminal Conduct Offered to Explain Subsequent Police Conduct*, 55 U. MIAMI L. REV. 771, 781 (2001).

Rather, *Old Chief* addresses whether a defendant has the right to have probative-but-prejudicial evidence excluded by stipulating to the facts on which the evidence is probative. Second, it should at least be noted that the Court reversed *Old Chief*'s conviction on the ground that the trial court abused its discretion under Rule 403 by admitting evidence of a prior conviction, even though the defendant had offered to stipulate to the fact that he had been convicted. Thus, the result in *Old Chief* is defendant-friendly. Third, much of the discussion in *Old Chief* concerning Rule 403 is quite helpful to defendants faced with prejudicial evidence. The Court specifically states that prosecutors do not have the right to use probative-but-prejudicial evidence if there is equally probative but less prejudicial evidence available.²⁶ The Court states that if alternative evidence has "substantially the same or greater probative value but a lower danger of unfair prejudice," the court under Rule 403 must "discount the value of the item first offered and exclude it if its discounted probative value [is] substantially outweighed by unfairly prejudicial risk."²⁷ This mandated consideration of evidentiary alternatives could assist defendants in their arguments to exclude out-of-court accusations when offered as background. Often, there is a good deal of nonhearsay evidence available concerning the background of the police investigation (e.g., checks of records, surveillance, etc.), and this evidence does not present the same risk of misuse as does an out-of-court accusation. Under the *Old Chief* analysis, the out-of-court accusation would have to be excluded under Rule 403 where equally probative and less risky background evidence is available.

The specific section of the *Old Chief* opinion that Ms. Hervic seems to find so objectionable is the portion of the opinion that addresses the government's argument that it should never have to accept a defendant's stipulation.²⁸ The government in *Old Chief* argued that it had free rein to prove its case by evidence of its own choice, and therefore that a defendant never has the power to "stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."²⁹ The Court agreed with this as a general proposition. Justice Souter noted, correctly in my view, that in reality stipulations are rarely as effective as actual evidence.³⁰ Juries want to hear a story, not an instruction. If jurors hear a stipulation rather than a story, they may draw a negative inference against the party with the burden of proof, i.e., they may conclude that the party is hiding some weakness by accepting a

26. See *Old Chief*, 519 U.S. at 192.

27. *Id.* at 183.

28. *Id.* at 177.

29. *Id.* at 186-87.

30. *Id.* at 188-89.

stipulation. Any practicing lawyer would agree with the *Old Chief* Court that the “persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them” and that “a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.”³¹

Ms. Hervic states that Justice Souter, in this section of the majority opinion in *Old Chief*, expresses the view (in her words) “that in a criminal case, the jury is entitled to know the whole story behind the arrest of the defendant, and thus by implication [Justice Souter] sanctioned the introduction of out-of-court statements in recounting the story leading to an arrest.”³² But Justice Souter expressed nothing of the kind. The opinion does not even refer to proof about a defendant’s arrest. The word “arrest” appears only one time in the opinion, as a reference to the historical background fact that *Old Chief* had been arrested for his crime.³³ There is simply nothing in *Old Chief* to support the premise that the government now has carte blanche to admit out-of-court accusations as “background” evidence.

Far from being rabidly pro-prosecution, the *Old Chief* Court was rightfully wary about an opponent’s attempts to stipulate away relevant evidence. There is a real danger that the proponent of relevant evidence can be “sandbagged” by an opponent who proffers a stipulation. The proffered stipulation may well be crafted in such a way as to deny the proponent the fair effect of the evidence. Forced stipulations are problematic because it is rare for relevant evidence to be offered to prove only a single point in dispute in a trial.³⁴ A single piece of evidence often proves more than one disputed point. A common risk of stipulations is that the opponent will offer to stipulate to the fact in such a way that the stipulation is probative on only one of the multiple points on which the evidence is actually relevant. If the proponent is forced to accept that stipulation, then the stipulation will deprive the proponent of the rightful weight of the evidence. To take an easy example: eyewitness testimony that the defendant shot the victim will usually prove a number of points in issue. The bare fact of shooting proves the act of shooting, but the circumstances seen by the eyewitness will usually be evocative of the defendant’s intent or absence of mistake. Assume that the defendant offers to stipulate that he shot the victim. The Court in

31. *Id.* at 187.

32. Hervic, *supra* note 25, at 779.

33. *Old Chief*, 519 U.S. at 174.

34. *Old Chief* was such a rare case; proof of a prior conviction was offered on a single point—the defendant’s status as a felon for purposes of a felon-firearm-possession charge. But as the Court in *Old Chief* noted, most relevant evidence cannot be so easily confined to a single issue. *Old Chief*, 519 U.S. at 179.

Old Chief is right to declare that the government should not be forced to accept that stipulation because to do so would rob the evidence of its fair weight in proving intent. This is not to speak of all the other deleterious consequences of forced stipulations, e.g., depriving the jury of traditional means of proof and a full narrative.

Additionally, stipulations are problematic because the opponent has an incentive to frame the stipulation in such a way as to give away as little ground as possible. Lawyers being as they are, there is a possibility that a stipulation does not even concede a single point on which the evidence is offered. For example, in *United States v. Colon*,³⁵ the defendant was charged with intent to distribute narcotics, specifically that he was operating as a “steerer” in a drug transaction (i.e., as a conspirator who “steered” prospective buyers to the conspirator holding the drugs). The government planned to offer the defendant’s prior steering convictions to prove intent. Defense counsel sought to head this off by proffering a stipulation. He offered to stipulate that if the government proved that Colon knew the drug seller and was in fact directing the undercover buyer specifically to that drug seller, “then I will acknowledge that he intended to violate the federal narcotics law and intended to aid in the sale of drugs.”³⁶ But this stipulation was rightly rejected, because in effect, the stipulation said, “if you can prove intent, then I admit intent.” The court concluded that defense counsel’s offer “stipulated nothing.”³⁷ Tactics like these indicate that the *Old Chief* Court was rightfully wary of holding that a defendant can control the government’s choice of proof by way of stipulation.

All this appropriate caution about forced stipulations in *Old Chief* does not translate into a receptiveness to admitting out-of-court accusations as background evidence. A court that is suspicious about stipulations is not thereby accepting of hearsay. A defendant who moves to exclude evidence on grounds of hearsay and prejudice is in no sense as problematic as a defendant who tries to control the government’s proof by forcing it to accept a stipulation.

Perhaps Ms. Hervic is concerned that the prosecution can use the premise of *Old Chief*—that the prosecution generally has the right to tell the story of the crime through evidence rather than stipulation—as the springboard to a more dramatic argument that the prosecution has the right to tell the story of the crime *with whatever evidence it chooses to present*. But this would be a preposterous extension of *Old Chief*. The Court in *Old Chief* provided a careful analysis of how the defendant

35. 880 F.2d 650 (2nd Cir. 1989).

36. *Id.* at 654.

37. *Id.*

could use Rule 403 to exclude unduly prejudicial evidence; it did not in any way imply that the government can now tell its story free from the strictures of all exclusionary rules of evidence.

The argument for such a dramatic extension of *Old Chief* was forcefully rebuffed by the District of Columbia Circuit in *Evans*, as discussed above. In *Evans*, the Court found error when an out-of-court accusation was proffered and admitted as background evidence.³⁸ It was not enough that the prosecution wanted to tell its story in its own way. The Court explained:

It is true, of course, that as a general matter the prosecution is entitled to present the "whole story" of criminal misconduct in order to guard against just such an eventuality. See *Old Chief v. United States*, 519 U.S. 172 (1997); *United States v. Crowder*, 141 F.3d 1202, 1207 (D.C.Cir.1998) (en banc).³⁹ But in presenting that story, the government is as much bound by the rules of evidence as it is on any other issue. No matter how important it is for the government to present a complete, morally compelling narrative, it must present that narrative through admissible evidence, not through hearsay.⁴⁰

In sum, Ms. Hervic misreads the import and intent of *Old Chief*. There is still plenty of room in the federal courts to exclude an out-of-court accusation offered as background when its probative value for this nonhearsay purpose is substantially outweighed by the risk that the jury will misuse the accusation as proof of the defendant's guilt.

It is especially unsettling for Ms. Hervic to complain that the federal courts have used *Old Chief* as a "launching pad" for the wholesale use of hearsay when offered for background.⁴¹ The proffered evidence that *Old Chief* is being exploited in this manner is notably unconvincing. The three cases supporting the point, cited by Ms. Hervic in her footnote forty-eight, preceded *Old Chief*. The most recent of the cited cases was decided ten years before *Old Chief*.

What's more, none of the cited cases support the proposition that federal courts routinely fail to scrutinize out-of-court accusations when

38. *United States v. Evans*, 216 F.3d 80, 86-87 (D.C. Cir. 2000).

39. In *Crowder*, the Court held that the government was not required to accept the defendant's stipulation that he intended to commit the narcotics crime with which he was charged. The proffered stipulation was an attempt to prevent the government from introducing evidence of Crowder's prior drug crimes to prove intent to commit the charged crime. The *Crowder* Court cited *Old Chief*, as well as this author, for the proposition that the government is permitted to prove intent through admissible proof, and is not forced to accept a stipulation on the intent element of a crime. *Crowder*, 141 F.3d at 1208-09. Neither *Crowder* nor *Old Chief*, however, stand for the proposition that the prosecution can tell the story its own way, unconstrained by rules of admissibility. Instead, both cases stand for the proposition that the prosecution generally can tell the story its own way, unconstrained by a defendant's proffered stipulation.

40. *Evans*, 216 F.3d at 86-87.

41. Hervic, *supra* note 25, at 779.

offered as background. In *United States v. Freeman*,⁴² evidence of an accusation by a confidential informant was offered to explain why officers had the defendant under surveillance on a day when he received counterfeit money. The officers had received a report from an informant that two people, Martin and Grady, were passing counterfeit money. The informant also stated that Martin and Grady planned to meet with an unidentified white male on a particular weekend for the purpose of passing counterfeit money. The officer then undertook surveillance of Martin and Grady, and in following them he witnessed their meeting with Freeman on the identified weekend.⁴³ The court held that it was within the trial court's discretion to find that the probative value of the informant's tip as background was not substantially outweighed by the risk that the jury would consider the accusation for its truth.⁴⁴ Thus, both trial and appellate court in *Freeman* conducted a Rule 403 analysis—neither court found the evidence automatically admissible as soon as the prosecution said the word “background.”

More importantly, the *Freeman* Court's Rule 403 analysis was surely correct. The jury was bound to wonder how the police could be in the position to testify that they saw a counterfeit money transaction take place. Were they just on patrol and happened to spot suspicious counterfeiters? If that was the purported scenario, the testimony of the officer would be implausible and suspect. The prosecution clearly had a legitimate interest in preventing jury speculation on how the officers came to know what they knew. Of course, there was a risk of prejudice, i.e., that the jury could use the informant's accusation for its truth. But, under Rule 403 the risk of prejudice must *substantially* outweigh probative value for the accusation to be excluded. A judge could reasonably conclude that there was no such substantial outweighing under the facts of *Freeman*. This is especially so because the confidential informant did not even identify Freeman by name—this is hardly a fatal accusation that would surely be misused for its truth. Far from a wholesale admission of out-of-court accusations as “background,” the *Freeman* decision represents a good understanding of the relationship between hearsay and Rule 403. The *Freeman* court takes a measured approach to the important problem addressed by Ms. Hervic.

The second case cited by Ms. Hervic, *United States v. Scott*,⁴⁵ contains no discussion at all about the hearsay point, and merely states that if hearsay was wrongly admitted, it was harmless error.⁴⁶ And the third

42. 816 F.2d 558 (10th Cir. 1987).

43. *Id.* at 560.

44. *Id.* at 563-64.

45. 678 F.2d 606 (5th Cir. 1982).

46. *Id.* at 612.

case, *United States v. Pedroza*,⁴⁷ was one in which the defendant's conviction was reversed, in part because hearsay accusations were improperly admitted as "background"—the court declaring that there is no such thing as a "background" exception to the hearsay rule and that the accusations should have been excluded because they were only probative for their truth.⁴⁸ All this is slim evidence indeed on which to base a conclusion that federal courts "regularly" admit out-of-court accusations as nonhearsay, "even where clearly irrelevant to the matters in issue and/or unfairly prejudicial and clearly including hearsay."⁴⁹ It is no evidence at all that the *Old Chief* opinion could be responsible for such a phenomenon.

The powerful points made by Ms. Hervic are further muted by overbroad assertions concerning harmless error and curative and limiting instructions. At one point in the Comment, Ms. Hervic asserts that admission of an out-of-court accusation as background is *always* harmful error whenever Rule 403 would have mandated its exclusion. This assertion is patently overbroad. Clearly such an error can be harmless under many circumstances. Take a murder case in which the government produces four eyewitnesses, reliable DNA evidence, and the defendant's confession. Besides all this evidence, a police officer testifies that he was told by a confidential informant that the defendant committed the murder. This testimony should probably have been excluded under Rule 403, but the error is clearly harmless because the admission of the evidence had no effect on the verdict.⁵⁰

A *per se* rule of harmful error would be extremely costly. It would result in retrials that usually would end with the same result as the previous trial. Do we really want to impose such costs on the system, in the name of process for its own sake? Do we really want to delay justice for those who have not been tried once by allocating resources to those who

47. 750 F.2d 187 (2nd Cir. 1984).

48. *Id.* at 200.

49. Hervic, *supra* note 25, at 786.

50. The standard of harmfulness for such a non constitutional error is whether it had "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Lane*, 474 U.S. 438, 449 (1986). In the hypothetical case discussed in text, the error would clearly not rise to this level given the large amount of properly admitted evidence of guilt. If the defendant makes a confrontation clause objection, an error in admitting hearsay as background might be one of constitutional dimension. But even if that is so, many errors in admitting hearsay will still be harmless. The standard of review for a constitutional error is whether it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). If the admissible evidence of guilt is overwhelming, a court will justifiably hold that erroneously admitted hearsay was harmless beyond a reasonable doubt. See generally *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (finding evidence admitted in violation of the Confrontation Clause to be harmless beyond a reasonable doubt).

have already been tried (albeit in a trial that was not perfect) and will be convicted again?

It is true that some grave constitutional errors can never be harmless because they affect the entire structure of the trial. Denial of counsel and denial of jury trial are examples of such grave errors.⁵¹ A discrete error in admitting prejudicial hearsay, however, does not rise to that level.⁵² Indeed, Ms. Hervic's position would lead to the conclusion that every erroneous admission of hearsay, and indeed every erroneous admission of prejudicial evidence under Rule 403, would result in an automatic retrial. Our system simply could not bear the weight of such perfection.⁵³

Ms. Hervic's attack on jury instructions has merit, but it is also somewhat overstated. She takes aim at both curative and limiting instructions, without delineating between them.⁵⁴ Technically speaking, a curative instruction is designed to cure error that has occurred at trial, while a limiting instruction is designed to limit the jury's use of evidence to the purpose for which it was properly admitted. A limiting instruction is not correcting an error because the evidence was properly admitted for a certain purpose.

Ms. Hervic is certainly correct that one should not place too much confidence in the curative powers of a curative instruction. Yet, it is too much to say that such an instruction will *never* be effective or that reversal should *always* be required. Practicing lawyers and judges often remark on the ability of jurors to follow most instructions. Jurors who have been interviewed have generally stated that they followed the judge's instructions and excluded certain evidence from consideration. As Professor Damaska has pointed out, instructions will usually have a subtle yet positive effect—they will prevent jurors from making arguments during deliberations that are directly contrary to the instructions.⁵⁵ The juror in her own mind may disregard an instruction, but she would not indicate such a blatant disregard in discussions with other jurors, and

51. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 1501-06 (6th ed. 2000).

52. See *Arizona v. Fulminante*, 499 U.S. 279 (1991) (holding that error in admitting an involuntary confession is a discrete evidentiary error, not a structural error affecting the entirety of the trial; therefore it is subject to harmless error review).

53. I don't mean to say that the harmless error doctrine is never abused. Indeed, cases can be found in which an appellate court will dodge a trial court error by making a questionable finding of harmlessness. I only mean to say that a rule of automatic reversal for virtually every evidentiary error is simply unworkable.

54. Ms. Hervic is not alone in grouping curative and limiting instructions. See, e.g., *United States v. Universal Rehabilitation Services*, 205 F.3d 657 (3rd Cir. 2000) (en banc) (both majority and dissenting judges speak of a "curative" and a "limiting" instructions without distinguishing between them).

55. See MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* (1997).

so her arguments would be limited by the appropriately admitted evidence. For example, if an accusation is improperly admitted and the judge tells the jury to disregard it, it is unlikely that a juror will bring up that accusation in the course of deliberations to try to persuade other jurors to vote guilty. Thus, to that extent, the deliberations will not be tainted by the error.

Limiting instructions are more complicated. It is certainly possible for a limiting instruction to be so confusing as to be impossible for a lay juror to follow. This was certainly one of the problems with the instruction in the case relied on by Ms. Hervic, *Bruton v. United States*.⁵⁶ Bruton's codefendant Evans had confessed to the crime, implicating both himself and Bruton. The jury was instructed that it *had* to consider the statement as proof of Evans's guilt, but that it *could not* consider the statement as proof of Bruton's guilt.⁵⁷ The Court found the instruction insufficient to protect Bruton's right to confrontation. It reasoned that it was impossible for lay jurors to follow such an instruction given the fact that the accusation was "powerfully incriminating" and the jury was instructed to use it for its truth against Evans but not at all against Bruton.⁵⁸ Such a differential use instruction might well be more difficult to follow than a curative instruction, which simply tells a juror not to consider the evidence for any purpose, to strike it from your mind.

If a trial judge admits an out-of-court accusation as background, then upon request the trial judge will give a limiting instruction. Specifically, the jury will be instructed that the accusation is to be used only as proof of the background police investigation, and not as proof that the defendant committed the crime. This kind of instruction is undeniably similar to the instruction that the Court found insufficient to protect the defendant's confrontation rights in *Bruton*. By way of distinction, an argument could be made that it is easier to understand an instruction to use evidence for one *purpose* and not another, than it is to understand an instruction to use evidence against one *person* and not another. The more fundamental point is that where a court instructs the jury that it should consider an accusation only to explain the police investigation and not as evidence of guilt, that court has already made the determination that the evidence is admissible under Rule 403. In other words, the probative value of the accusation as background is not substantially outweighed by the risk of misuse of the accusation for its truth.⁵⁹ Thus, the

56. 391 U.S. 123 (1968).

57. *Id.* at 125.

58. *Id.*

59. This is unlike *Bruton*, where the accusation was not admissible against Bruton for any purpose—so the solution for protecting Bruton's rights was not a limiting instruction but rather severance of the defendants or redaction of the confession.

limiting instruction is not used as an excuse for admitting otherwise inadmissible evidence. Rather, it is used as a protective measure for limiting the negative impact of evidence already found to be admissible under the Federal Rules of Evidence. The trial court does not say, "I am not balancing probative value and prejudicial effect, I'll just admit the hearsay and give a limiting instruction." Instead, the trial court says, "after balancing probative value and prejudicial effect, I find the accusation to be admissible as background; I will give a limiting instruction to protect the defendant against the prejudice which I have found does not substantially outweigh the probative value of the accusation as background."

It is true that in conducting the balance under Rule 403, the court will consider the likely effect of the limiting instruction in controlling prejudice.⁶⁰ It is possible that the trial court may overestimate the impact that the instruction will have. If so, the court will improperly minimize the weight of the prejudice that will be balanced against the probative value. Such an overestimation of the effect of a limiting instruction is certainly cause for concern and leaves room for abuse. It does not follow that a limiting instruction is simply an excuse used by trial courts to paper over its errors. Rather, the limiting instruction formalizes the Rule 403 balance already struck by the trial court—if that balance is incorrect, it does not get sanctified by a limiting instruction.

CONCLUSION

Ms. Hervic has highlighted an important evidentiary problem that is of legitimate concern to criminal defendants. Certainly, it is inappropriate to admit out-of-court accusations automatically whenever the prosecution says it's offered for "background." We don't want a broad "background" exception to the hearsay rule. Certainly, there are cases in which hearsay accusations have been improperly admitted as "background." I don't believe, however, that the federal courts are completely inattentive to the risks involved in admitting out-of-court accusations under the guise of "background." Indeed, the *Evans* case, with which this essay began, shows an appropriate consideration of the matter under Rule 403. Moreover, I am not at all persuaded that the United States

60. See STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* 260-61 (7th ed. 1998). See also *United States v. Figueroa*, 618 F.2d 934, 943 (2nd Cir. 1980) (stating that when balancing probative value and prejudicial effect under Rule 403, the trial judge "should carefully consider the likely effectiveness of a cautionary instruction that tries to limit the jury's consideration of the evidence to the purpose for which it is admissible"; the trial judge, "sensitive to the realities of the courtroom context as in all other trial rulings, must simply include a sound estimate of the likely force of limiting instructions in the overall Rule 403 determination").

Supreme Court's decision in *Old Chief* can be used to establish anything like a "background" exception to the hearsay rule. That certainly has not been the case so far.

In my role as reporter to the Judicial Conference Advisory Committee on Evidence Rules, I am essentially an employee of the federal courts. So one might say that I am biased when I defend those courts against a charge that they are engaged in a wholesale abrogation of the hearsay rule specifically and a wholesale trampling on the rights of criminal defendants generally. Perhaps I am biased, and I know there are cases in which evidence is admitted against criminal defendants that should in fairness have been excluded. I must say, however, that I see little support for broad assertions of gloom and doom. Instead, I see written opinions that exclude accusations offered for background when the evidence is not very probative and the risk of misuse is high. More fundamentally, I see trial judges excluding government-proffered evidence, even though there is a good argument for its admissibility under the Federal Rules of Evidence. Quite often, trial judges exclude what appears to be admissible evidence on the ground that it would simply be unfair to admit it against the defendant.⁶¹ These trial court decisions are not reported, and are not generally subject to appeal. But, those exclusions at ground level are an important, and hopefully continuing, source of protection for criminal defendants.

61. Prior crimes are a good example. I have had discussions with a number of federal district judges who say that they often exclude evidence of a defendant's prior narcotics convictions when the government offers them to prove intent to commit the drug crime charged. When I point out that the Supreme Court in *Old Chief*, and indeed their own circuits, have permitted such proof, the response has been that to admit such crimes is simply unfair and they often exercise their discretion under Rule 403 to exclude them—unless the defendant takes the stand and testifies that he is anti-drug and would never be involved with drugs.