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REEXAMINING THE ADMISSIBILITY OF THE DEFENDANT'S NON-INCUPLATORY STATEMENTS AT TRIAL

Wes Reber Porter

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The powerful machine of our criminal justice system feeds off of the accused’s own incriminating statements. An overwhelming percentage of criminal cases are resolved by the defendant’s admission of guilt at a plea coloquy. In the rare criminal case that proceeds to trial, the government’s evidence regularly includes a presentation of the defendant’s pre-trial statement, his “confession.” By guilty plea or at trial, one way or another,

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2 Jed S. Rakoff, Why Innocent People Plead Guilty, N.Y. REV. BOOKS 16 (Nov. 20, 2014) https://www.nybooks.com/articles.2014/11/20/why-innocent-people-plead-guilty (explaining that over 90 percent of all criminal cases are resolved by guilty pleas and that the number is significantly higher in the federal system).

In 2013, while 8 percent of all federal criminal charges were dismissed (either because of a mistake in fact or law or because the defendant had decided to cooperate), more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial. The plea bargains largely determined the sentences imposed.

Id. “Over the last 50 years, defendants chose trial in less than three percent of state and federal criminal cases—compared to 30 years ago when 20 percent of those arrested chose trial. The remaining 97 percent of cases were resolved through plea deals.” INNOCENCE PROJECT, Report: Guilty Pleas on the Rise, Criminal Trials on the Decline, Innocence Staff Aug. 7, 2018, https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/.

3 See 18 U.S.C. § 3501(e) (2006) (effective Jan 3, 2012). Confession is defined as “any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.” Id.; United States v. Hoac, 990 F.2d 1099, 1107 (9th Cir. 1993); see also MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 4.1.
the government most certainly will use the accused's own words against him.\(^4\)

The accused, by contrast, may struggle to tell his\(^5\) side of the story at trial. Forgoing any meaningful constitutional analysis, trial courts rely instead on an inflexible application of the rules of evidence.\(^6\) The criminal defendants have lodged primarily evidentiary arguments to make use of the favorable, non-incriminating portions of their pre-trial statements.\(^7\) Trial courts categorically exclude the criminal defendant from independently admitting any part of his pretrial statement at trial.\(^8\) Most trial courts similarly prohibit the defendant from contemporaneously presenting the non-inculpatory portions of his pretrial statement that have been omitted from the government’s presentation.\(^9\) Lastly, trial courts will forbid the defendant from even referring to the non-inculpatory portions of his pretrial statement in questioning government witnesses during cross-examination.\(^10\)

\(^4\) You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it.” \textit{Id.} The commentary to § 4.1 of the Ninth Circuit’s criminal instructions states, “[t]his instruction uses the word ‘statement’ in preference to the more pejorative term, ‘confession’. . . [which] implies an ultimate conclusion about the significance of a defendant’s statement, which should be left for the jury to determine.” \textit{Id.} (citing \textit{Hoac}, 990 F.2d at 1108 n.4).

\(^5\) See \textit{FED. R. CRIM. P. 11(b)(1)} (“[T]he defendant may be placed under oath, and the court must address the defendant personally in open court.”); \textit{see also} \textit{FED. R. EVID. 801(d)(2)(A)} (defining “not hearsay” as a statement made by a party, like the criminal defendant, and offered by the party opponent).

\(^6\) Throughout this Article, male possessive pronouns (“his” and “him”) are used to reference the accused.

\(^7\) See \textit{Williamson v. United States}, 512 U.S. 594 (1994) (rejecting defendant’s argument that his pretrial statement was “statement against interest” and exception to inadmissible hearsay under Rule 804(b)(3)).

\(^8\) See \textit{infra} Section II (discussing how trial courts treat defendant’s pretrial statement under purely evidentiary considerations); \textit{see also} \textit{FED. R. EVID. 801(d)(2)(A)}. The “not hearsay” definition turns on who is offering the out-of-court statement. \textit{Id.} A party opponent may offer the other party’s statement as “not hearsay” but a party may not admit his own out-of-court statements as it is inadmissible hearsay. \textit{Id.}

\(^9\) See \textit{infra} Section V (arguing trial courts should allow accused to contemporaneously admit portions of defendant’s pretrial statement that the government omitted in its presentation); \textit{see also} \textit{FED. R. EVID. 106} (partially codifying common law “rule of completeness” as it relates to “writings and recordings”); \textit{FED. R. EVID. 611(a)} (controlling the manner of trial and providing similar fairness considerations for court as it relates to “oral statements”).

\(^10\) \textit{U.S. CONST. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be be confronted with the witnesses against him . . . .” Id; see also infra} Section VI (discussing defendant's Sixth Amendment right to
To make some use of the non-inculpatory portions of his pretrial statement, this Article argues that the criminal defendant deserves a more meaningful constitutional analysis from the lower court. The analysis draws upon the defendant's constitutional right to advance a "theory of the defense," the doctrine of fundamental fairness grounded in the Due Process Clause, and trial-related, constitutional protections enumerated in the Bill of Rights, particularly under the Sixth Amendment. Common law evidentiary doctrines and the codified rules of evidence that govern our adversarial trial system similarly support a criminal defendant's wider use of his own pretrial statements at trial. This Article urges trial courts to reexamine, through the lens of fairness to the criminally accused at trial, the constitutional protections and evidentiary rules that govern the accused's use of his own non-inculpatory, pretrial statements at trial.

"confront" the witnesses against him at trial, including his use of his non-inculpatory statements to formulate questioning of law enforcement witnesses).

11 Trial courts may refer to the defendant's privilege against incrimination under the Fifth Amendment or his right to confront witnesses under the Sixth Amendment. See supra Section II. This Article envisions a more robust constitutional analysis that incorporates: the right to present a theory of the defense; fundamental fairness under the Due Process Clause; the right to a trial before an impartial jury; and the defendant's right to confront the witnesses against him.

12 See infra Section II.a (reviewing the defendant's constitutional right to advance his theory of the defense to the jury in a criminal trial); see also United States v. Rutgerson, 822 F.3d 1223 (11th Cir. 2016); Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis, 82 COLUM. L. REV. 199, 203 (1982).


14 As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

Id. (emphasis added); see also Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968); Rochin v. California, 342 U.S. 165, 169 (1952) (describing whether it "offend[s] those canons of decency and fairness which express the notions of justice").

15 Courts consider the notion of fundamental fairness in criminal trials to be constitutional because of its connection to the Due Process Clause. See U.S. CONST. amend. V and XIV.

16 See U.S. CONST. amend. VI; see infra Sections III.b, III.c (discussing Supreme Court's renewed attention toward defendant's Sixth Amendment right to jury trial and to confront witnesses against him).

17 See FED. R. EVID. 106. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Id.; see also infra Section V (discussing common law, evidentiary doctrine of the "rule of completeness" as incorrectly applied by courts as to defendant's non-inculpatory statements); CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5072 (2d ed. 2005).

18 FED. R. EVID. 102, 106, 611(a), 403.
The introduction in Part I of this Article outlines how the trial courts currently treat the defendant’s use of his pretrial statements. When excluding the non-inculpatory portions of the defendant’s pretrial statement, lower courts fail to conduct any meaningful constitutional analysis and rely instead upon a strict application of the rules of evidence. Part II summarizes the defendant’s constitutional right to present his “theory of the defense” at trial. Lower courts readily agree that the defendant is entitled to present his theory of the defense, yet too often limit his ability to support his theory with evidence other than his own testimony under oath at trial.

Part III outlines the constitutional considerations relating to the accused’s ability to present his theory of the defense. This section first discusses the doctrine of fundamental fairness under the Due Process Clause and then discusses the Supreme Court’s renewed focus on two trial-related, constitutional protections under the Sixth Amendment: the defendant’s right to a trial before an impartial jury and his right to confront the witnesses against him. Last, this section explores the faulty judicial reasoning that continues to improperly compel the defendant to waive his privilege against self-incrimination to realize these other constitutional protections afforded to him at trial.

Part IV contends that the defendant has a constitutional right, consistent with his theory of the defense, to independently admit some of his non-inculpatory, pretrial statements at trial. Part V discusses how fundamental fairness and common-law evidentiary doctrine support the contemporaneous admission into evidence of the defendant’s non-inculpatory, pretrial statements when the government presents his confession at trial. Part VI argues that the defendant’s constitutional right to a meaningful cross-examination of government witnesses, particularly law enforcement witnesses, similarly embraces a permissible use for his pretrial statements. Trial courts must allow the accused, during cross-examination, to refer to portions of his pretrial statement that, consistent with his theory of the defense, challenge the nature and quality of the investigation.

Lastly, Part VII sets out proposed discrete limitations on the defendant’s use at trial of his non-inculpatory, pretrial statements and a proposed balancing test to apply in ruling on the admissibility of such statements so as not to subvert the fundamental underpinnings of the criminal justice system.

I. INTRODUCTION

The American criminal justice system requires a sea-change in criminal procedure and policy related to trial courts’ admissibility
determinations governing the criminal defendant’s pretrial statements. Trial
courts effectively gloss over any meaningful constitutional analysis and
proceed to a one-sided, government-oriented application of the rules of
evidence.\footnote{See FED. R. EVID. 801(d)(2), advisory committee notes to proposed rules. “Admissions by
a party-opponent are excluded from the category of hearsay on the theory that their admissibility
in evidence is the result of the adversary system rather than satisfaction of the conditions of the
hearsay rule.” Id. (citing John S. Strahorn, Jr., A Reconsideration of the Hearsay Rule and
Admissions, 85 U. PA. L. REV. 484, 564 (1937)); see also EDMUND MORRIS MORGAN, JOINT
COMM. ON CONTINUING LEGAL EDUC., BASIC PROBLEMS OF EVIDENCE 265 (1962); JOHN HENRY
WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON
LAW § 1048 (2d ed. 1925). “No guarantee of trustworthiness is required in the case of an admission.
The freedom which admissions have enjoyed from technical demands of searching for an assurance
of trustworthiness . . . and the rule requiring firsthand knowledge . . . calls for generous treatment
of this avenue to admissibility.” Id.}

More is required from a criminal justice system which is
designed to ensure constitutional protections for the accused at trial and
preserve an adversarial jury system that is premised on fairness to all
parties.\footnote{See Duncan v. Louisiana, 391 U.S. 145 (1968). A jury trial is central to the American
criminal trial system. Id.}

a. How it currently works?

The accused, prior to trial, may move to suppress his incriminating
pretrial statement on constitutional grounds under the voluntariness
standard\footnote{See Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming voluntariness as the Fifth
Amendment standard for the defendant to challenge a confession compelled by government
coercion); see also Miranda v. Arizona, 384 U.S. 436 (1966).} of the Fifth Amendment and the proscriptions of \textit{Miranda v. Arizona}.\footnote{384 U.S. 436 (1966). The \textit{Miranda} Court concluded that the coercion inherent in custodial
interrogation blurs the line between voluntary and involuntary statements, and thus heightens the
risk that an individual will not be “accorded his privilege under the Fifth Amendment . . . not to be
compelled to incriminate himself.” \textit{Id.} at 439. Accordingly, the Court laid down “concrete
constitutional guidelines for law enforcement agencies and courts to follow.” \textit{Id.} at 442. Those
guidelines established that the admissibility in evidence of any statement given during custodial
interrogation of a suspect would depend on whether the police provided the suspect with four
warnings. \textit{Id.} at 479 (requiring the following warnings prior to any questioning: (1) of his right to
remain silent; (2) that anything he says could be used against him in a court of law; (3) that he has
a right to the presence of an attorney; and (4) that if he cannot afford an attorney one will be
appointed to him before any questioning).} Once the defendant’s suppression motions are denied,\footnote{The defendant’s motions to suppress raise constitutional challenges to the government’s
class determination during the investigative stage of the case. These motions are distinguishable from the
constitutional challenges at issue in this Article. This Article argues that the notions of fundamental
fairness during the criminal trial and the accused’s trial-related constitutional rights present
alternative considerations for the trial court when making admissibility determinations about the
defendant’s pretrial statement. \textit{See infra} Sections IV, V and VI.} however, the trial court almost exclusively relies upon the rules of evidence to
determine admissibility of the defendant’s pretrial statements during the criminal trial.\textsuperscript{23} Trial courts, adhering to a strict construction of the rules of evidence, only allow the government to admit the defendant’s pretrial statement.\textsuperscript{24} The government, moreover, may redact the defendant’s statement so as to present a version of the accused’s confession to the jury that is most favorable to the government.\textsuperscript{25}

By contrast, under current judicial interpretation, the accused can make almost no use of his own pretrial statements during trial. The governing rules of evidence do not distinguish the criminal defendant from any other “party” on trial, including parties to a civil action.\textsuperscript{26} The portions of the defendant’s pretrial statement to law enforcement that do \textit{not} incriminate him, unless the government otherwise agrees,\textsuperscript{27} are categorically excluded at trial under the rules of evidence.\textsuperscript{28} Trial courts also preclude the jury from contemporaneously considering the non-inculpatory portions of the defendant’s pretrial statement when the government presents the

\begin{footnotes}
\footnotetext[23]{Generally, the admissibility of evidence at trial is governed by the applicable evidence code, the parties’ motions in limine and the trial court’s determinations under Rule 103(d).}
\footnotetext[24]{Compare \textit{Fed. R. Evid.} 801(c) (defining inadmissible hearsay as an out-of-court statement offered for the truth of the matter asserted), \textit{with} 801(d)(2)(A) (defining a statement made by a party and offered by a party-opponent as “not hearsay”), and \textit{Fed. R. Evid.} 801(d)(2) advisory committee’s notes to proposed rules (detailing how “admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule”). This one-sided construct of the evidence code did not turn out as scholars predicted in the early days of common law evidence jurisprudence. See John S. Strahorn, Jr., \textit{A Reconsideration of the Hearsay Rule and Admissions}, 85 U. Pa. L. Rev. 564, 568 (1937) (discussing the “circumstantial utterance theory of admissions [as] the simplest explanation of their relation to the hearsay rule”).}
\footnotetext[25]{See infra Section II.b (offering an illustrative example of the government redacting and culling of the defendant’s pretrial statement); see also infra Section V (arguing that the common law evidentiary doctrine of “the rule of completeness,” partially codified in Rule 106, should allow the defendant to contemporaneously admit the non-inculpatory portions of his statement with the government’s presentation).}
\footnotetext[26]{See \textit{Fed. R. Evid.} 102, 106, 611(a), 403 (governing the defendant’s use of the non-inculpatory portions of his pretrial statements). Rules 102, 106, 611(a), and 403 apply equally in criminal and civil trials. See id.; cf. \textit{Fed. R. Evid.} 609 (explicitly acknowledging and providing for the difference between impeachment by prior convictions when the criminal defendant is the witness at trial as compared to any other witness).}
\footnotetext[27]{The government can agree to contemporaneously admit the defendant’s non-inculpatory statements, as discussed in the second proposal outlined in this Article. See, e.g., \textit{Pattern Criminal Jury Instructions of the Seventh Circuit \S 1.02.}}
\end{footnotes}

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, and stipulations. A stipulation is an agreement between both sides that [certain facts are true] [that a person would have given certain testimony] \ldots. You may accept those facts as proved, but you are not required to do so.

\textit{Id.} (emphasis added).

\footnotetext[28]{See supra note 24; \textit{Fed. R. Evid.} 801(c), (d)(2)(A) (explaining the difference between hearsay and nonhearsay).}
incriminating portions in its case-in-chief.\textsuperscript{29} Lastly, lower courts even limit the defense’s viable avenues of cross-examination and questions that may be asked during cross-examination of government witnesses if the line of inquiry touches upon his non-inculpatory, pretrial statements.\textsuperscript{30}

The drafters of the rules of evidence intended this outcome for the criminally accused,\textsuperscript{31} but, as argued in this Article, the Framers of Constitution did not.\textsuperscript{32}

The criminal defendant deserves a more meaningful constitutional analysis regarding the admission of his non-inculpatory, pretrial statements so that he may properly support and argue his theory of the defense at trial.\textsuperscript{33} As it stands now, if his trial were a motion picture, the portions of the

\textsuperscript{29} See infra Section V (discussing how the accused’s constitutional rights and common law evidentiary doctrine should command a different admissibility outcome when the government presents select portions of the defendant’s pretrial statement as his confession at trial); see also infra note 148.

\textsuperscript{30} See U.S. CONST. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .” \textit{Id.} (emphasis added). See also United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000) (holding that defendant could not question a law enforcement witness on cross-examination using his own pretrial, exculpatory statements); United States v. Bensimon, 172 F.3d 1121, 1128 (9th Cir. 1999) (holding that whether limitations on cross-examination are so severe as to violate the Confrontation Clause is a question of law reviewed \textit{de novo}). In \textit{Ortega}, the accused actually raised the precise confrontation clause challenge that is argue for in the third proposal of this Article. 203 F.3d at 679-81. The trial court held that the defendant was not permitted to use his exculpatory statements \textit{because} he waived his privilege against self-incrimination by testifying at trial. \textit{Id.} at 682-83. Of course, procedurally, the defendant made his decision to testify \textit{after} the court foreclosed his cross-examination using his non-inculpatory statements during his case-in-chief. \textit{Id.}

\textsuperscript{31} The admission of statements by party opponents, under Federal Rule 801(d)(2)(A), operates less as an evidentiary rule and more like the doctrine of estoppel. See \textit{Fed. R. Evid. 801(d)(2)(A)}. The reception of admissions, therefore, need not be justified on grounds of trustworthiness; the significance of an admission is “inter partes, like estoppel or res judicata, which some-times make truth irrelevant.” Roger C. Park, The Rationale of Personal Admissions, 21 \textit{Ind. L. Rev.} 509, 510 (1988). “[A] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath.” \textit{Id.} (citing EDMUND MORRIS MORGAN, JOINT COMM. ON CONTINUING LEGAL EDUC., BASIC PROBLEMS OF EVIDENCE 266 (1962)). The doctrine of judicial estoppel, sometimes known as the doctrine of preclusion of inconsistent statements, prevents a party from asserting a position contrary to an earlier successful position in another proceeding. \textit{See} \textit{I} John Moore, \textit{MOORE’S FEDERAL PRACTICE} \textsection{8.39], at 106-07 (1994). In other words, under the doctrine of judicial estoppel, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not take a contrary position in a subsequent case simply because his interests have changed. \textit{Id.; see also} Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 211-15 (1st Cir. 1987).

\textsuperscript{32} See infra Sections IV, V (arguing that the accused should be able to admit or otherwise make use of his non-inculpatory, pretrial statements under the doctrine of fundamental fairness grounded in the Due Process Clause and the Supreme Court’s renewed focus on trial-related constitutional rights under the Sixth Amendment).

\textsuperscript{33} See infra Section II (outlining the criminal defendant’s constitutional right to advance a “theory of the defense” at trial, so long as supported by evidence).
accused’s pretrial statements potentially favorable to him which align with his theory of the defense end up on the cutting room floor. But why?

b. An illustrative example of the Ponzi schemer’s confession

For illustrative purposes, consider a fraud case involving a classic Ponzi scheme. The scheme to defraud involved multiple participants with varying levels of involvement and the requisite criminal intent. For purposes of demonstrating the constitutional violations and fundamental unfairness to the accused described in this Article, consider the following voluntary, pretrial statement made to law enforcement officials by a promoter of the fraud scheme:

1. I didn’t do this. These seminars were not my idea. I didn’t have anything to do with the seminars.
2. You should talk to [another suspect]. He was the mastermind.
3. [The other suspect] did this before with other communities. He did this in [other jurisdictions] with other people promoting his scheme.
4. I knew what I was doing was wrong.
5. I knew the [victims] likely didn’t understand what they were getting into.
6. But I never thought [the other suspect] was committing crimes.
7. I didn’t ever imagine that what Michael was asking me to do was illegal.

*(Law enforcement then informed the defendant about the extent of the fraud including the number of victims and dollar amount)*

8. I’m so sorry. I feel so sorry for those people.
9. I didn’t even know the extent of what happened after [victims] showed up to the seminars.

34 For example, a scheme to defraud, like a criminal conspiracy, may involve different participants and varying levels of involvement and culpability: (1) the mastermind; (2) the “pitch people” who made the false statements to the victims; (3) the “promoters” who recruited or promoted the scheme by attracting prospective victims; and (4) the “cover-up people” who papered over the scheme with doctored “account statements” and subsequent communications to the victims.
10. I should have known what was going on because [victims] were so happy, talking about getting rich and telling their friends.

In many ways, the above-described pretrial statement from the defendant represents a typical "confession" to law enforcement. Some parts of the statement are incriminating and thus helpful to the government. However, others are not self-inculpatory; other parts of a defendants' pretrial statement provide information, investigative leads, and additional suspects for law enforcement. Information and leads may not only offer law enforcement investigative steps to pursue during an ongoing investigation but even if not pursued, they should be admissible if relevant to the defendant's theory of the case at trial.

At the criminal trial of the promoter that follows, the government will introduce prosecution-favorable portions of the defendant's pretrial statement as a "confession." The confession will be presented to the jury as follows:

- I knew what I was doing was wrong.
- I knew the [victims] likely didn't understand what they were getting into.
- I'm so sorry.
- I feel so sorry for the [victims].
- I should have known what was going on because the [victims] were so happy, talking about getting rich and telling their friends.

- OR -

I didn't do this. These seminars were not my idea. I didn't have anything to do with the seminars. You should talk to [another suspect]. He was the mastermind. He did this before with other communities. He did this in [other jurisdictions] with other people promoting it, like [other suspects]. I knew what I was doing was wrong. I knew the [victims] likely didn't understand what they were getting into. But I never thought Michael was committing crimes. I didn't ever imagine that what Michael was asking me to do was illegal. I'm so sorry. I feel so sorry for the [victims]. I should have known what was going on because the [victims] were so happy, talking about getting rich and telling their friends.
At trial, the defense may object to the government’s presentation of his “confession” on evidentiary grounds, including that it is hearsay and unfairly prejudicial to the accused. Under current practices, the trial court will likely overrule these objections and allow the government’s presentation as offered above. Next, the court will not contemporaneously admit the redacted portions of the accused’s pretrial statement under the partially-codified “rule of completeness” in Rule 106. Lastly, the defendant may seek to make use of some of his non-inculpatory, pretrial statements (paragraphs #1, 2, 3 and 9 above) to formulate questions during cross-examination of law enforcement witnesses. But the trial court will likely rule that such use is impermissible as well.

c. Proposed trial uses of the accused’s pretrial statement

This Article argues that the defendant enjoys a constitutional right to advance his theory of the defense to the jury during the criminal trial. His theory of the defense can include his intention to sponsor a specific jury instruction, explore avenues of inquiry during cross-examination of government witnesses, or argue to the jury in summation. The trial court’s rulings affecting these strategies turn on the defendant’s articulation of some evidence in support of the defense theory. The trial court’s admissibility determinations to exclude the non-inculpatory portions of the defendant’s pretrial statements have constitutional implications under the doctrine of fundamental fairness and the accused’s enumerated constitutional rights under the Sixth Amendment.

This Article contends that, under some circumstances at trial, the lower courts must permit the jury to consider the favorable, non-inculpatory portions of the defendant’s pretrial statement that support his theory of the defense. The jury should be allowed to weigh a fuller and more complete version of his pretrial statement contemporaneously with the government’s

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35 This Article focuses on three possible uses for the accused’s non-inculpatory, pretrial statements:

i. independent admission in support of the defendants’ theory of the defense;

ii. contemporaneous admission with the government’s presentation of the accused’s inculpatory statements as his confession at trial; and

iii. use of the portions of the defendant’s non-inculpatory, pretrial statements which criticize the underlying investigation as a means of cross-examining the government’s witnesses.

36 See infra Section IV (describing the constitutional support for the defendant to independently admit the non-inculpatory portions of his pretrial statement during his defense case-in-chief).
presentation of his “confession” in its case-in-chief. Lastly, the defendant, in some instances, should be allowed to refer to the non-inculpatory portions of his pretrial statement during cross-examination of government witnesses to support his theory of the defense that is critical of the government’s investigation.

II. DEFENDANT’S “THEORY OF THE DEFENSE” AT TRIAL

A defense is a “set of identifiable conditions or circumstances which may prevent a conviction for an offense.” The criminally accused is entitled to advance a “theory of the defense” during his criminal trial. The theory of the defense can materialize in the form of a specially-crafted, jury instruction presented at trial. Similarly, the defense theory can define the scope of permissible inquiry during cross-examination of government

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37 See infra Section V (recounting the constitutional and common law evidentiary arguments for the defendant to contemporaneously admit the non-inculpatory portions of his pretrial statement during his government’s case-in-chief).

38 See infra Section VI (arguing that the constitution protects the defendant’s right to confront the government’s evidence and witnesses, including to make some use of, and explicitly reference, the non-inculpatory portions of his pretrial statement during his cross-examination of law enforcement witnesses).

39 See Robinson, supra note 12 (discussing, inter alia, the “failure of proof” defenses available to the accused at trial).


The single most important thing to remember about [the O.J. Simpson] case is that it involved a trial that is so vastly different from what criminal justice is in the United States today . . . It reveals an immense disparity in our criminal system, based on how much wealth a defendant has. In reality, the only reason our system works and does not grind to a standstill, the only reason most defendants reach plea agreements and do not fully exploit the benefits of the system, is because they can’t afford it.

Id. “The public’s perception will be that if you have enough money and celebrity-hood and high-priced lawyers, then you can beat the rap . . . This is going to prompt all kinds of tinkering to give more power to prosecutors.” Id. (quoting Roy Black, Lawyer, Florida).

41 Model criminal jury instructions can include versions of the “theory of the defense” instruction. See, e.g., Kevin F. O’Malley, Jay E. Grenig, & Hon. William C. Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 19.01 (6th ed. 2006); PATTERN CRIMINAL JURY INSTRUCTIONS CH. 6.01 (SIXTH CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS); Eighth Circuit Criminal Jury Instruction § 8.05; Ninth Circuit Introductory Comments to Chapter 6 (Specific Defenses). While a general instruction is not required, it would read as follows:

(Name) has raised the defense of (state the defense). (State the defense) is a legally recognized defense to a federal criminal charge. I will instruct you on the law defining this defense (now) (shortly).

Id.
Defendant’s non-inculpatory statements

witnesses. Trial courts also grant the defense wide latitude when arguing its theory of the defense in closing. 42

a. Defendant’s theory of the defense is constitutional

The accused’s right to instruct the jury on his theory of the defense is constitutionally protected and inextricably tied to his fundamental right to a fair trial. 43 His right to present his theory of the defense at trial is grounded in the requirements of due process during the criminal trial. 44 The Supreme Court has relied on the defendant’s general “right to present a defense,” although a defendant’s right to present witnesses must “comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” 45 The Ninth Circuit described “[t]he right to have the jury instructed as to the defendant’s theory of the case is . . . ‘basic to a fair trial.’” 46 The Fourth Circuit has held

42 See FED. R. CRIM. P. 30. “At the close of evidence or such earlier time as the trial court reasonably directs, any party may file written requests that the court instruct the jury on the law set forth in the requests.” Id.; see also United States v. Rutgerson, 822 F.3d 1223 (11th Cir. 2016) (holding that the instruction given by court accurately conveyed the substantive law and the core of the defense theory, and defendant’s counsel was permitted to argue his theory of defense extensively in closing argument). Unfortunately, the Eleventh Circuit in Rutgerson relied upon the extensive defense argument in closing as a basis to not overturn his conviction for failure to give a “theory of the defense” instruction. See id.

43 The defendant has a constitutional right to raise a legally acceptable defense and to present evidence in support of that defense. See, e.g., Taylor v. Illinois, 484 U.S. 400, 408-09 (1988); Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973); cf. United States v. Barham, 595 F.2d 231, 244 (5th Cir. 1979) (holding that the defendant, however, is not “entitled to a judicial narrative of his version of the facts, even though such a narrative is, in one sense of the phrase, a ‘theory of the defense’”).

44 See California v. Trombetta, 467 U.S. 479, 485 (1984) (“Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.”). A right to a fair trial in a federal court is protected under the Due Process Clause of the Fifth Amendment. See United States v. Agurs, 427 U.S. 97, 107 (1976). A right to a fair trial in a state court is protected under the Due Process Clause of the Fourteenth Amendment. See Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting); Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring); Lisenba v. California, 314 U.S. 219, 236 (1941).


46 United States v. Escobar de Bright, 742 F.2d 1196, 1201 (9th Cir. 1984) (citing United States v. Sielaff, 615 F.2d 402, 403 (7th Cir. 1979)).

The general principle is well established that a criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him
that "a defendant . . . is constitutionally entitled to [a defense] instruction . . . if the evidence supports it." 47

Because the defendant’s right to present his theory of the defense to the jury is constitutionally protected as fundamental to a fair trial, the procedures and policies securing these constitutional guarantees in practice become vital to the analysis. 48 Trial courts instead turn the constitutional analysis on its head. Courts use trial-related constitutional rights more often as a basis to deny relief to the accused than to grant it. 49

Lower courts improperly refer to the defendant’s option to testify in his own defense at trial as the best method to advance his theory of the defense. 50 This is another layer of unfairness to the accused that also has constitutional implications. At trial, courts essentially pit one constitutionally guaranteed right against other constitutional protections at a time when the defendant needs those other protections the most. Courts readily steer the accused into a scenario where he must waive his Fifth Amendment privilege against self-incrimination in order to have an evidentiary basis for presenting his theory of the defense as is necessary to have a fair trial and effectively confront the government evidence including the witnesses testifying against him. The Framers of the Constitution intended for the accused’s different constitutional rights work in tandem for the accused during his criminal trial, not that the accused be required to sacrifice some of those rights to secure the others.

and which has some foundation in the evidence, “even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.”

Id. 47 Kornahrens v. Evatt, 66 F.3d 1350, 1354 (4th Cir. 1995) (requiring evidence to properly support a defense instruction is consistent with other jury instructions that could favor the defendant at trial such as a “lesser included offense” instruction); see also Hopper v. Evans, 456 U.S. 605, 611 (1982) (holding “due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction”).

48 “In plain terms[,] the right to present a defense” is among “the most basic ingredients” of due process of law.” Washington v. Texas, 388 U.S. 14, 19 (1967). The Supreme Court has consistently held that a criminal defendant has a constitutional right to “a meaningful opportunity to present a complete defense” including right to a trial that comports with “fundamental fairness” derived from the Fifth and Fourteenth Amendments’ Due Process Clauses. Trombetta, 467 U.S. at 485. See U.S. CONST. amends. V, XIV.

49 See infra Section III.c. (addressing the inherent conflict when trial courts refer to the defendant’s Fifth Amendment privilege against self-incrimination as a basis to deny other trial-related constitutional protections).

50 See Mark A. Summers, Taking Confrontation Seriously: Does Crawford Mean That Confessions Must Be Cross-Examined? 76 ALB. L. REV. 1805, 1815 (2013). “[A] criminal defendant is clearly not unavailable as a witness in any absolute sense. She has the right to testify on her own behalf.” Id. (citing Rock v. Arkansas, 483 U.S. 44, 51 (1987)).
b. Evidence in support of the defendant’s theory

Trial courts recognize that the defendant is entitled to advance his “theory of the defense” before the jury; yet, courts differ significantly on how the defendant can support that theory of the defense with evidence.51 A defendant is purportedly entitled to a jury instruction relating to a defense theory for which there is any foundation in the evidence, even though the evidence may be “weak, insufficient, inconsistent, or of doubtful credibility.”52 It follows that whether there is supporting evidence for an accused’s theory of the defense may turn on the court’s admissibility determinations and whether he is allowed to explore certain lines of inquiry with government witnesses during cross-examination.

Unfortunately, despite the accused’s request, the court does not always give his theory of the defense jury charge. Trial courts deny the defendant’s request for a theory of the defense instruction primarily on two grounds: first, that the instruction is inadequately supported by the evidence;53 and, second, that the theory is fairly represented in the applicable standard jury instructions in a criminal case.54 Of these two grounds to deny a defense instruction, the former highlights the importance of allowing the accused to admit or otherwise make use of his non-inculpatory statements in support of his theory of the defense.

51 See, e.g., United States v. Hoffecker, 530 F.3d 137, 176-77 (3d Cir. 2008) (upholding trial court’s refusal to give the requested “theory of defense” instructions as “merely statements of the defense’s factual arguments”); United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999) (“A court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant.”); United States v. Chowdhury, 169 F.3d 402, 407 (6th Cir. 1999) (quoting United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997)) (rejecting a “theory of the defense” instruction that merely represented the “defendant’s view of the facts of the case, rather than a distinct legal theory”).

52 Compare Escobar de Bright, 742 F.2d at 1198 (quoting United States v. Sielaff, 615 F.2d 402, 403 (7th Cir. 1979)) (holding that defendants are entitled to the theory of the defense instruction “even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility”), with United States v. Wofford, 122 F.3d 787, 788-89 (9th Cir.1997) (quoting United States v. Morton, 999 F.2d 435, 437 (9th Cir. 1995)) (“A ‘mere scintilla’ of evidence supporting a defendant’s theory, however, is not sufficient to warrant a defense instruction.”).

53 See Kornahrens, 66 F.3d at 1354.

54 See infra Section II.d. The second ground for denying a theory of defense instruction reflects those criminal trials wherein the defendant relies on the theory that the government did not meet its burden of proof at trial or an affirmative defense with its own standard instructions such as self-defense or establishing an alibi.
c. Sparse appellate relief on the defendant's theory instruction

The chances for relief for the criminal defendant are bleaker on appeal. A defendant may challenge the failure of the district court to provide a jury instruction sought on appeal.55 A trial court's decision not to include a requested jury instruction can be reversible error.56 A jury verdict against the accused may be overturned, however, "only if the instruction that was sought accurately represented the law in every respect and only if viewing as a whole the charge actually given, the defendant was prejudiced."57

The accused can be hard-pressed to demonstrate such prejudice on appeal once convicted at trial. Where a defendant claims that a trial court erred for failing to give his requested instruction, appellate courts overturn the conviction only if: (1) "that instruction is legally correct;" (2) it "represents a theory of defense with basis in the record that would lead to acquittal;" and (3) "the theory is not effectively presented elsewhere in the charge."58

The criminal defendant may rest his hopes upon the government's high burden of proof during the criminal trial. He has a constitutional right to remain silent at trial, present no witnesses and evidence in his case and hold the government to its burden. As is argued elsewhere in this Article, however, the accused should be allowed to rely upon the panoply of constitutional rights at trial, the government's high burden of proof, and his own viable theory of the defense. He should not be compelled to choose one constitutional protection over another.

55 See United States v. Montero-Camargo, 177 F.3d 1113, 1123 (9th Cir. 1999), amended by 183 F.3d 1172 (9th Cir. 1999). Federal appellate courts review de novo whether the district court correctly construed a hearsay rule. See id. Further, federal appellate courts review exclusion of evidence under a hearsay rule for abuse of discretion. See United States v. Matta-Ballesteros, 71 F.3d 754, 767 (9th Cir. 1995) (amended by 98 F.3d 1100 (9th Cir. 1999)).

56 See, e.g., United States v. Lyman, 592 F.2d 496, 504 (9th Cir. 1978) (holding that the failure to give a theory of the defense instruction upon request was a reversible error); United States v. Noah, 475 F.2d 688, 697 (9th Cir. 1973).

57 United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005).

58 See United States v. Sheehan, 838 F.3d 109, 124-25 (2d Cir. 2016) (citing United States v. Quattrone, 441 F.3d 153, 177 (2d Cir. 2006)); see also United States v. Doyle, 130 F.3d 523, 540 (2d Cir. 1997); United States v. Garcia-Cruz, 978 F.2d 537, 540 (9th Cir. 1992). If, however, the proposed instruction is not supported by the law, or if the instructions actually given "fairly and adequately cover . . . the issues presented," a theory of the defense instruction need not be given. See Garcia-Cruz, 978 F.2d at 540. The court need not instruct the jury using the defendant's precise words, as "[a] defendant is not entitled to any particular form of instruction." United States v. Lopez-Alvarez, 970 F.2d 583, 597 (9th Cir. 1992).
d. Viable theories of the defense

The accused enjoys a constitutional right to advance several viable theories of the defense before the jury at trial. The nature of the defense theory dictates whether a specially-crafted jury charge is appropriate and, as argued here, whether the court's admissibility determinations as to defendant's pretrial statements have constitutional implications.

i. Defense theories based upon elements, defenses and the burden of proof

Viable defense theories include claims that (i) the government failed to prove an element of the offense, (ii) the defendant lacked the requisite criminal intent of the offense charged, or (iii) a recognized legal or affirmative defense applies at trial. These theories do not, however, encompass the constitutional considerations and the prospective relief discussed in this Article. With these defense theories, the court's standard jury instructions most likely would adequately cover the defense theory, and therefore the accused's ability to argue his theory would not be unfairly restricted nor would admission of his non-inculpatory pretrial statements be flatly denied as unhelpful to the jury.

ii. Defense theories related to the government's investigation

A criminal trial flows directly from, and is the product of, a government investigation. Criminal investigations involve gathering evidence against the accused and securing statements from percipient witnesses including the accused. Some of these investigatory steps have constitutional implications. Other investigatory decisions represent subjective judgements that our society, through the criminal justice system,
has entrusted to law enforcement.\textsuperscript{63} Law enforcement officers must make subjective, investigatory decisions about the list of suspects, which leads to pursue, and the scope of the investigation.\textsuperscript{64} Stated differently, law enforcement controls the "what" and the "who" of the investigation.

With the world watching, the criminally accused has, at times, succeeded at trial when attacking the government's investigation as a defense.\textsuperscript{65} As with the defendant's pretrial statements, the government seeks to control what the jury learns about the underlying investigation. It follows that the defense's presentation of certain aspects of the investigation do not assist the jury in its adjudicative duties.\textsuperscript{66} Similarly, modern trial courts have constrained the criminal defendant's ability to present another perspective on the investigation consistent with his theory of the defense. Trial courts, in so doing, have subscribed unwittingly to an axiom: the defendant is on trial, not the investigation.\textsuperscript{67}

However, when the accused's theory of defense challenges the government's underlying investigation, it carries potential constitutional implications and, as argued in this Article, affects the trial court's


Contrary to fictional portrayals, detectives do not work from facts to identification of suspects; they work from identification of suspects back to facts that are necessary to prosecute and convict them. The primary job of detectives is not to find unknown suspects, but to collect evidence required for a successful prosecution of known suspects. Although fictional detectives are constantly warning against the danger of forming a hypothesis too early, that is precisely what real detectives do most of the time.

\textit{Id.} at 5.

\textsuperscript{64} The criminal defendant only knows the duality of the criminal trial. As reflected in the caption of a criminal case, it is the government versus the accused. To the defendant, law enforcement functions as his accuser and, therefore, acts with some degree of bias and subjectivity against him.

\textsuperscript{65} See Labaton, supr\textsuperscript{a} note 40 (discussing the O.J. Simpson case). The ability to openly critique the investigation during the criminal trial, however, may be a luxury reserved for only the most notable defendants. The government aims to exclude evidence critical of its underlying investigation. See United States v. Ortega, 203 F.3d 675, 679-81 (9th Cir. 2000). Trial courts have accommodated the government, excluding evidence bearing on the investigation and foreclosing avenues of defense questioning of law enforcement witnesses. See \textit{id}.

\textsuperscript{66} See FED. R. EVID. 403. The court cannot allow the defense to employ graymail tactics by presenting a recitation of the process by which one enters the system as the criminally accused. See \textit{id}. The rules of evidence further protect against the "waste of time" and the "needless presentation of cumulative evidence." \textit{Id}. However, the jury's time may not be wasted when it learns about subjective, investigatory choices made in the case and why law enforcement made those choices.

\textsuperscript{67} See Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (holding that the defendant is not entitled to conduct a wholesale review of the government's investigation).
admissibility determinations of the non-inculpatory portions of defendant’s pretrial statement that support his theory. These defense theories do not relate to negating an element or a recognized legal defense. Yet, the subjective, strategic decisions by law enforcement during the investigation are relevant in the criminal trial. For example, evidence of the strategic decisions within a developing investigation may be relevant because they impact the credibility of the government’s witnesses and the reliability of the government’s other evidence.

For instance, the defendant may request that the court specially craft a jury instruction based upon his theory that (i) another person committed the offense (an identity defense), (ii) government investigators failed to follow up on reasonable, investigative leads that would have led to the identification of other suspects, or (iii) investigators selectively gathered only information and evidence consistent with their “tunnel vision” which prevents them from seeing the suspect as anything other than a defendant. Evidence supporting these defense theories is relevant and can support the exercise of the defendant’s right to cross-examine the government witnesses who shaped and carried out the investigation.

When foreclosing or limiting defense theories that challenges the government’s investigation at trial, lower courts risk constitutional error by committing due process violations. Trial courts must carefully weigh constitutional considerations before denying evidence, or barring questioning and arguments related to these defense theories about the government investigation. Similarly, trial courts must consider the constitutionality of restricting the defendant’s ability to support his variety

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68 For example, the defense may believe that the investigation was underdeveloped, sloppy, or incomplete. The defense may wish to demonstrate in front of the jury that law enforcement narrowed down to one suspect, the defendant now at trial, too quickly when other investigatory steps and suspects should have been explored. When the theory of the defense relates to the quality, integrity and results of the government investigation, then the defendant’s constitutional right to confront those witnesses against him should include the government law enforcement witnesses who conceived and conducted the investigation.

69 In contrast, many other aspects of the underlying, criminal investigation are wholly irrelevant during the criminal case. For example, the ministerial, tactical chronology of events that immediately precede and follow the defendant’s arrest do not make any “fact of consequence” more or less likely than without that evidence. See FED. R. EVID. 401. Execution of searches and pretrial detainment similarly are irrelevant at the criminal trial under most circumstances. See id. The criminal trial is not the proper forum to air grievances about accepted aspects of the criminal justice system and treatment of criminal defendants.

70 See FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”). Decisions that narrow the investigation to a specific suspect do have “some tendency” to make a “fact of consequence,” such as the government’s required proof on the issue of identity, “less likely than without the evidence.” Id.

71 See cases cited supra notes 43-47 and accompanying text.
of defense theories with evidence including the non-inculpatory portions of
the defendant’s pretrial statement. The doctrine of fundamental fairness and
certain trial rights under the Sixth Amendment, as discussed below, support
this analysis.

III. FUNDAMENTAL FAIRNESS AND TRIAL-RELATED
CONSTITUTIONAL RIGHTS

Since the turn of the twentieth century, the Supreme Court has
reviewed the constitutionality of various aspects the criminal justice system
based upon either an inherent notion of fundamental fairness during the
criminal trial, or upon application of specific, trial-related protections
enumerated in the Bill of Rights.\(^ \text{72} \) The accused’s theory of defense,
particularly a theory critical of the government’s investigation, relates
directly to both applications. Determinations regarding evidence offered by
the accused related to the government’s investigation could entail oft-
overlooked constitutional considerations for the trial court. Such
constitutional considerations include the accused’s right to present his theory
of the defense, fundamental fairness grounded in the Due Process Clause,
and enumerated constitutional protections afforded to the accused during the
criminal trial under the Sixth Amendment to the Constitution.

a. Fundamental fairness and violations of due process

The Constitution requires the government to conduct a fair trial of
the criminal defendant. The Due Process Clause requires that notions of
fundamental fairness govern all phases of the criminal trial.\(^ \text{73} \) The Supreme
Court has held that the Due Process Clause protects against practices and
policies that violate notions of fundamental fairness.\(^ \text{74} \) The criminal
defendant may challenge any trial-related practice or policy as violating
fundamental fairness under the Due Process Clause. A practice or policy
offends the notions of fundamental fairness when “a fundamental principle

\(^{72}\) See generally Tracey L. Meares, Everything Old is New Again: Fundamental Fairness and
the Legitimacy of Criminal Justice, 3 OHIO ST. J. CRIM. L. 105, 107 (2005); Craig M. Bradley &
Joseph L. Hoffman, People v. Simpson: Perspectives on the Implications for the Criminal Justice
System: Public Perception, Justice and the “Search for Truth” in Criminal Cases, 69 S. CAL. L.

\(^{73}\) See Meares, supra note 72 at 121.

\(^{74}\) See id. at 123 (“[T]he Court, in relying on fundamental fairness recognized that the Due
Process Clause is a constitutional guarantee that includes the interests of all of us, not just
defendants.”).
of liberty and justice which inheres in the very idea of a free government and is the unalienable right of a citizen of such government."

Criminal defendants have relied upon the doctrine of fundamental fairness to challenge government practices and policies at trial. The defense may challenge the fairness of practices and policies designed to streamline criminal justice and ease the government’s path toward conviction by jury verdict. As the number of criminal trials decline, however, fundamental fairness due to the accused during his criminal trial should increasingly outweigh the interests of government efficiency and the ease of trial convictions.

Even before the steep decline in the number of criminal trials, the Supreme Court has relied upon considerations of fundamental fairness in several instances to ensure the accused’s constitutional rights are afforded to him at trial. For instance, relying on fundamental fairness during the criminal trial, the Court ensures that the government must prove its case by meeting the highest burden of proof: beyond a reasonable doubt; the burden of proof should not be shifted to the criminal defendant on any element of the crime; the government is required to produce reciprocal discovery to


76 See Ian Langford, Fair Trial: The History of an Idea, 8 J. OF HUMAN RIGHTS 37, 48 (2009) (quoting JOHN FREDERICK ARCHIBOLD; ARCHIBOLD: CRIMINAL PLEADING, EVIDENCE, AND PRACTICE (2006) (defining a “fair trial” as when the accused is allowed “a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis a vis his opponent”).

77 See Rakoff supra note 2, at 16; INNOCENCE PROJECT, Report: Guilty Pleas on the Rise, Criminal Trials on the Decline, Aug. 7, 2018, https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/ (“Over the last 50 years, defendants chose trial in less than three percent of state and federal criminal cases—compared to 30 years ago when 20 percent of those arrested chose trial.”).

78 See, e.g., In re Winship, 397 U.S. 358, 364 (1970) (holding that the highest standard of proof, beyond a reasonable doubt, was required in criminal cases by due process and fundamental fairness); Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (holding that the trial court’s failure to give jury instruction on presumption of innocence violated fundamental fairness); Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (requiring, upon defense request, jury instruction on presumption of innocence).

79 See Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); see also Mullaney v. Wilbur, 421 U.S. 684, 702 (1975) (holding that the defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); cf. Patterson v. New York, 432 U.S. 197, 211 (1977) (holding that defendant, however, may be required to bear burden of affirmative defense).
the defendant related to his affirmative defense of alibi\textsuperscript{80} and the defendant is permitted to wear something other than his "prison clothes" at trial.\textsuperscript{81}

Based on this line of cases, if a practice or procedure in a criminal case appears inherently unfair to the accused and is designed only to improve for government efficiency at trial, then the accused may raise a constitutional challenge under the doctrine of fundamental fairness and due process.\textsuperscript{82} In addition to its attention to fundamental fairness, the Supreme Court has demonstrated renewed attention to certain trial-related, constitutional protections afforded to the accused under the Sixth Amendment, such as his right to a jury trial before an impartial jury and his right to confront the witnesses against him.\textsuperscript{83}

\begin{quote}
\textit{b. Enumerated constitutional rights at the criminal trial}
\end{quote}

For the last century, the Court has reinforced the defendant's constitutional rights as they relate to the government's conduct during the investigative stage of the case. Specifically, the Court has held that the defendant has a right to be free from unreasonable searches and seizures,\textsuperscript{84} and free from the compulsion of involuntary, coerced confessions.\textsuperscript{85} Most of the constitutional jurisprudence in criminal procedure cases have focused on the relationship between government overreach and coercion during the investigative stages of cases and the accused's rights to be free from such intrusions. Yet, the Supreme Court remained relatively dormant as to the constitutional protections to be afforded to the accused \textit{during the criminal trial}.\textsuperscript{86}

\textsuperscript{80} See Wardius v. Oregon, 412 U.S. 470, 475-76 (1973) (holding that the defendant may not be required to provide disclosure to the prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state).

\textsuperscript{81} See Estelle v. Williams, 425 U.S. 501, 512-13 (1976) (holding that, while convenient and efficient, the government cannot compel an accused to stand trial before a jury while dressed in "identifiable prison clothes").

\textsuperscript{82} See cases cited supra notes 75, 78 and accompanying text; see also Langford, supra note 76, at 448.

\textsuperscript{83} See Meares, supra note 71, at 123 ("[T]he Bill of Rights has become the central mechanism for the articulation of constitutional criminal procedure."); see also In re Winship, 397 U.S. at 377 (Black, J., dissenting) (arguing that the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights).

\textsuperscript{84} See U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.").

\textsuperscript{85} See U.S. CONST. amend V. ("No person shall be . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.").

\textsuperscript{86} See FED. R. CRIM. P. 11(b)(1) (describing constitutional rights that must be knowingly and voluntarily waived in open court with the judge during a guilty plea).
Beginning in the early 2000s, the Supreme Court expanded its constitutional review in criminal procedure cases to include two trial-related protections enumerated in the Bill of Rights. First, the Court crafted a modern application of the accused’s Sixth Amendment “right to a trial before an impartial jury” to address the lower court’s treatment of evidence supporting sentencing enhancements within mandatory sentencing schemes in the federal and state justice systems. The Court next developed a new constitutional test and markedly changed the application of the confrontation clause to criminal cases.

Trial courts now decide the admissibility of certain evidence including out-of-court statements, taking into account constitutional grounds, as opposed to relying exclusively on evidentiary grounds. Importantly, the court’s constitutional analysis has caused dramatic changes in the government’s presentation during the modern criminal trial. The prosecution has had to alter its approach to trial presentation as these

[T]he defendant may be placed under oath, and the court must address the defendant personally in open court [and] . . . the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government’s right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
(B) the right to plead not guilty . . . to persist in that plea;
(C) the right to a jury trial;
(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
(F) the defendant’s waiver of these trial rights if the court accepts a plea of guilty. . .

Id. 87 See supra Section III (discussing Supreme Court’s rejuvenation of enumerated rights under the Sixth Amendment including defendant’s right to a fair trial, jury trial and to confront the witnesses against him); see also U.S. CONST. amends. V, XIV, § 1; United States v. Booker, 543 U.S. 220, 232-33 (2005); Crawford v. Washington, 541 U.S. 36, 61-62 (2004).
88 See infra notes 92-106.
89 See infra Section III.b (discussing the ripple affect caused by Crawford and its progeny); see generally Crawford, 541 U.S. at 61-62.
90 See infra note 109 (describing Crawford’s quickly evolving list refining the new confrontation clause test and “testimonial” evidence requiring a live witness or past cross-examination).
decisions fundamentally interfered with the "business as usual" approach to criminal justice.\footnote{See cases cited infra note 118 and accompanying text (discussing the Court's decisions which caused significant changes to the government's trial presentation of government expert testimony and reports); infra note 111.}

i. Right to a jury trial before an impartial jury

Our adversarial system of criminal justice ensures that the defendant "enjoy[s] the right to a . . . trial before impartial jury" under the Sixth Amendment.\footnote{U.S. CONST. amend. VI.} The Supreme Court, beginning in 2004, relied upon the enumerated, constitutional right to a jury trial to dramatically alter the landscape of criminal sentencing across the country in federal and state cases.\footnote{See generally Blakley v. Washington, 542 U.S. 296, 301-02 (2004); United States v. Booker, 543 U.S. 220, 236-37 (2005).} From approximately 1988 through 2004,\footnote{See U.S. SENTENCING COMM'N, GUIDELINES MANUAL (1987) (amended 1989). This is known as the "mandatory guidelines era" because the United States Sentencing Guidelines ("Guidelines") were binding in federal courts. See id. The "era" of the mandatory Guidelines is defined as November 1, 1987, the date the Guidelines became "effective," to January 12, 2005, the date of the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 227 (2005).} the government narrowly presented its trial evidence to prove only the elements of the charged conduct to the jury beyond a reasonable doubt.\footnote{See id., e.g., Booker, 543 U.S. at 227.} Prosecutors strategically omitted any trial presentation of other "considerations" that they reserved instead for determination by the judge alone at sentencing under a lesser burden of proof.\footnote{See id. "Based upon Booker's criminal history and the quantity of drugs found by the jury, the . . . Guidelines required . . . [between 210 and 262 months in prison]. The judge, however, held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and . . . obstruct[ed] justice . . . [Mandating a] sentence between 360 months and life imprisonment." Id. (emphasis added) (citation omitted).} That is, the government would present only the evidence necessary to prove the offense elements to the jury during the criminal trial by the higher burden of proof: beyond a reasonable doubt.

The prosecution affirmatively deprived the jury of any trial presentation to prove these other "sentencing considerations"\footnote{See id. (describing the additional weight of drugs and obstruction as "sentencing considerations" merely found by the trial court by preponderance of the evidence).} that, at a later hearing outside the presence of the jury, would serve to increase the accused ultimate sentence.\footnote{See id.} Following the jury verdict and prior to sentencing, the government merely furnished the trial judge with information, typically documentary evidence, supporting these sentencing considerations. The trial
court, at a judge-only sentencing hearing, made findings on applicable sentencing enhancements using a far lesser burden of proof, preponderance of the evidence.99

In its 2004 decision in Blakely v. Washington,100 the Supreme Court rejected Washington state’s streamlined, “business as usual” procedure that allowed prosecutors to segregate from the jury certain factual determinations that later served to enhance the accused’s sentence imposed by the court.101 Congress invested heavily, with time and money, in its own mandatory sentencing scheme to promote uniformity and consistency through the nation’s federal courts.102 In the 1980s, Congress authorized the United States Sentencing Commission and its standardization of federal sentencing though the United States Sentencing Guidelines.103

One year after Blakely, in two companion cases - United States v. Booker104 and United States v. Fanfan,105 the Court handed down a qualified rejection of a practice orchestrated by federal prosecutors within the federal system that was similar to the Washington state procedure in Blakely. The Booker Court torpedoed Congress, the Sentencing Commission, and their mandatory sentencing scheme as set forth in the Guidelines. Decades of sentencing jurisprudence also was impacted to guarantee that the defendant’s constitutional right to a jury trial applied to even the slightest factual consideration not properly presented to the jury during the criminal trial.

Prosecutors had uniformly chosen their strategy of presenting matters related to sentencing for determination by judges rather than juries as a matter of efficiency, to streamline the path to conviction by jury verdict

99 See id.
101 See id. at 312-14.
102 See Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (2018); see also Mistretta v. United States, 488 U.S. 361, 364 (1989) (“Congress delegated almost unfettered discretion to the sentencing judge to determine” a convicted defendant’s sentence, but a review of the legislative history strongly suggests that the sentencing disparity that Congress hoped to eliminate did not stem from prosecutorial discretion, but instead from unchecked judicial discretion in formulating sentences); United States v. LaBonte, 70 F.3d 1396, 1400 (1st Cir. 1995) (“Three principal forces propelled the legislation: Congress sought to establish truth in sentencing by eliminating parole, to guarantee uniformity in sentencing for similarly situated defendants, and to ensure that the punishment fit the crime.”).
105 542 U.S. 956 (2004). The jury findings in Fanfan, regarding the conspiracy and the 500 grams of powder, translated to an applicable sentencing guideline range of 63 to 78 months, whereas the judge at sentencing found additional drug weight, that equated to 188 to 235 months. Booker, 543 U.S. at 228.
(as well as the ultimate sentence sought). It is significant that, in these cases, the government did provide the accused with a “jury trial before an impartial jury” under the Sixth Amendment as a matter of guilt to the crime charged. But the defense eventually challenged this practice as depriving the accused of a “jury trial” on other aspects of the government’s presentation. The Court relied upon the accused’s constitutional right to a jury trial to end a widespread “business as usual” practice and policy by prosecutors in the state and federal systems.

ii. Right to confront witnesses against the accused

At about the same time, in 2004, the Supreme Court again relied on an enumerated right under the Sixth Amendment to establish an entirely new test for the defendant’s right to confront witnesses against him during the criminal trial. The Court, beginning with its 2004 decision in Crawford v. Washington and its progeny, revived the once dormant Confrontation Clause. The Crawford Court created a new test for Confrontation Clause cases and rejected a series of “business as usual” government practices and

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106 See Booker, 543 U.S. at 244 (citing Blakely, 542 U.S. at 313) (“[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.”).

107 See id. at 227 (recounting that the jury found Booker guilty at trial of possession with intent to distribute controlled substances).

108 See id. at 244-45 (rejecting the government practice of segregating matters related to the elements for the jury ad matter for the judge at sentencing).

109 See United States v. Crawford, 541 U.S. 36, 62 (rejecting the “I know it when I see it” test for confrontation clause violations under the Sixth Amendment); see also Ohio v. Roberts, 448 U.S. 56, 66 (1980) (overruled by Crawford, 541 U.S. 36) (holding that an out-of-court statement was admissible if it falls within a “firmly rooted hearsay exception” or otherwise demonstrated an “indicia of reliability.”).

110 See Crawford, 541 U.S. 36 at 66-67 (holding that Confrontation Clause violations are subject to harmless error analysis); see also United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999).


112 See generally Melendez Diaz v. Massachusetts, 557 U.S. 305 (2009) (rejecting the government’s use of laboratory reports in lieu of government expert witness from the laboratory); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (rejecting the government’s theory that government expert witnesses from the laboratory were fungible); Williams v. Illinois, 567 U.S. 50 (2012) (allowing the government’s expert witness to read from the laboratory reports created by other government experts). Following Crawford, the Court has had to revisit the rule for “testimonial evidence” and interpret variations of out-of-court statements introduced in a criminal case and against the accused, both statements made to the government and statements made by the government.
policies. The Court focused on a defendant’s right to meaningfully cross examine government witnesses who bear testimony against him.

The court’s new test under Crawford centered on the term “testimonial” and broadened the concept of “witnesses against the accused” to include anyone who bears testimony against the defendant. The new test in Crawford constitutionally excluded at trial any pretrial statements made to the government that the declarant “would reasonably expect to be used prosecutorially.” Further, the Court’s guidance did not exempt those statements made by the government that it would also expect to be part of its case presentation during the criminal trial. Many of the out-of-court statements that the government planned to be part of its case presentation because the statements were previously deemed admissible under the rules of evidence, were instead found to constitutionally require to be subjected to some form of cross-examination during the criminal trial or when the statement was made prior to trial. Statements by the government, for these purposes, included statements by government experts, the use of their reports, and their prospective testimony in criminal cases.

Before Crawford, prosecutors relied almost exclusively on the rules of evidence to elicit convenient testimony from government experts at trial and admit certified laboratory reports. In some jurisdictions, the government established practices and policies that allowed for the fungibility of its government laboratory experts, those professionals who tested controlled substances or conducted scientific or technical testing. Trial courts in Massachusetts even allowed prosecutors to present scientific, laboratory evidence through a certified document only and thus without a sponsoring witness.

See Crawford, 541 U.S. at 68-69 (rejecting Ohio v. Roberts, 448 U.S. 56 (1980) and creating a new test for whether an out-of-court statement offered by the government and against the accused violated the accused’s Sixth Amendment right to confront the witnesses against him). Justice Roberts’ failings were on full display in the proceedings below. See id. at 65. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Id. at 50-51. See id. at 51-52, 67-69. The Court described that evidence was “testimonial” when the declarant could reasonably expect that it “would be used prosecutorially.” Id. at 51.

See generally cases cited supra note 112.

See Crawford, 541 U.S. at 40 (finding that the statement at issue from the defendant’s wife was admissible via the “statement against penal interest” hearsay exception under Washington Rule of Evidence 804(b)(3)); see also Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321-24 (finding that the government’s laboratory report was admissible as a business record of the laboratory under Federal Rule of Evidence 803(6)).


See id. at 328-29. After Crawford, the court had the opportunity to look at Massachusetts practice with respect to lab testing and lab reports during the criminal trial. See id. Under the
The Crawford Court caused lower courts to re-examine the admissibility of broad categories of out-of-court statements previously admitted against the accused in criminal cases under the rules of evidence. The Court's renewed focus on the defendant's constitutional right to confront witnesses against him thereafter included his right to cross examine out-of-court declarants who the government did not intend to be witnesses at trial. The implications of the new test under the Confrontation Clause fundamentally changed the way that the prosecution presented its case at trial and caused trial courts to weigh constitutional considerations with the rules of evidence to determine admissibility.

Prior to 2004, trial courts simply glossed over any meaningful constitutional analysis and routinely admitted the testimony and reports from government laboratory witnesses. The government's presentation of these expert witnesses and their reports was certainly efficient and streamlined the path to conviction by jury verdict. The Court's analysis, however, gave weight to separate considerations under the Confrontation Clause and led to different admissibility outcomes than did applying only the rules of evidence. Reinvigorating Confrontation Clause analysis over the next fifteen years, the Court held that the defendant's constitutional right during his criminal trial trumped the government's interest in efficiency and convenience.

iii. Fifth Amendment privilege against self-incrimination

The American criminal justice system favors one method over all others for the accused to advance his theory of the defense before the jury: trial courts prefer that he testify under oath. Trial courts regularly reference the accused's ability and option to testify in his own defense when excluding other evidence potentially favorable to him at trial, including portions of his own pretrial statements. Trial courts also rely upon the accused’s option to testify in his own defense when he specifically raises constitutional challenges.

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Crawford test, the lab report was certainly testimonial and one that the government expected to use prosecutorially. See id. The court rejected Massachusetts' long time, efficient trial practices and required that a live witness be produced to give meaning to the criminal defendants Sixth Amendment right to confront witnesses against him at trial. Id. The government in many jurisdictions had processes and evidentiary pathways to admitting out-of-court statements without regard for the defendant's constitutional rights before Crawford. For example, over the course of decades, in Massachusetts state court the government routinely presented the lab reports in narcotics cases without a witness from the lab.

121 See Booker, 543 U.S. at 244-45.
There is little to no legal support for the proposition that the accused must forgo his privilege against self-incrimination during the criminal trial to preserve his other, trial related constitutional protections. However, trial courts tend to pit the defendant's privilege against self-incrimination against the other protections discussed in this Article, such as his constitutional right to present a theory of defense, his right to a fair trial, his right to a jury trial, and his right to confront the witnesses against him. The accused, of course, should not have to waive his privilege against self-incrimination and subject himself to cross-examination in order to present at trial his side of the story and to offer the jury a theory of the defense. Nevertheless, trial courts essentially compel the criminal defendant to waive his privilege against self-incrimination, so that he may meaningfully exercise other constitutional rights afforded to him, when he needs those protections the most—at trial.

The Framers of the Constitution did not intend for its protections afforded to the accused at trial to work like a game show. Instead the Framers would have wanted the accused, whose liberty is at risk, to enjoy all of the constitutional protections afforded to him during his criminal trial. The constitutional safeguards underlying the defendant's right to present his "theory of the defense" and the notions of fundamental fairness work together to benefit the accused during his criminal trial. The trial-related protections enumerated in the Bill of Rights similarly were intended to work in concert to protect all citizens when they may need those protections most, during a criminal jury trial in which they are accused of a serious crime.

The Founding Fathers intended the accused's constitutional privilege against self-incrimination to act as a shield for the accused to raise both before and during trial. Under current judicial treatment the defendant may have no choice but to forgo that privilege against self-incrimination, testify under oath at trial, and "subject himself to cross-examination by the government." The constitutional analysis of the

122 See supra Section II.c. With proper judicial treatment of his pretrial statements, the defendant would be better informed in making this decision as to whether to testify in his own defense.

123 U.S. CONST. amend. V. (enumerating how defendant can invoke his privilege against self-incrimination before or during trial). The defendant maintains his privilege even if he waived it pretrial and provided statements to law enforcement.

124 See, e.g., United States v. Willis, 759 F.2d 1486, 1501 (11th Cir. 1985) (holding that a defendant cannot attempt to introduce an exculpatory statement made at the time of his arrest without "subjecting [himself] to cross-examination"); United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988) (holding that the district court did not abuse its discretion when it limited the accused's ability to elicit his exculpatory hearsay statements on cross-examination); See Ortega, 203 F.3d at 683 (citing Fernandez, 839 F.2d at 640) (analyzing admissibility of hearsay offered by the defense). The Ninth Circuit in Ortega went so far as to hold that the accused should not be
consequences of excluding the non-inculpatory portions of the defendant's pretrial statement called for in this Article should compel different results.

ARGUMENT

The criminally accused have long argued that the non-inculpatory portions of their pretrial statements should be independently admissible at trial. However, most defense arguments have been reduced to evidentiary arguments that the applicable evidence code expressly intended to preclude defendants' desired uses. The absence of decisions undertaking a constitutional analysis of this issue provides a glimmer of hope for criminal defendants. And the timing is right for constitutional consideration of this issue.

The criminal justice system is characterized by a diminishing number of criminal trials. We have learned more about the relative reliability of confessions and the growing body of research on false confessions. The Supreme Court, as discussed in Sections II and III of this Article, has resuscitated trial-related, constitutional protections and (hopefully) the umbrella doctrine of "fundamental fairness" during the criminal trial. These constitutional considerations should be a basis for challenging admissibility determinations that lead to unjust policies and practices—and results—at trial. This appears to be true in part because the perceived risks of allowing the defendant to make use of his non-inculpatory, pretrial statements can be regulated with limitations and a balancing test for determining admissibility.

In the argument sections that follow, this Article will discuss three options for the defendant to make use of the non-inculpatory portions of his pretrial statement during his criminal trial.

(1) The defendant could independently offer into evidence the non-inculpatory portions of his pretrial statement (Section IV).

(2) When the government admits only portions of the defendant's pretrial statement as his confession at trial, the defendant could ask the court to admit the other portions of his pretrial statement contemporaneously in the government's case-in-chief (Section V).

(3) The defendant could frame cross-examination questions of government witnesses that reflect those same portions of his pretrial statements. (Section VI).

allowed to use the Confrontation Clause as a means of admitting hearsay testimony through the "back door" without subjecting himself to cross-examination. See Ortega, 203 F.3d at 683 (citing Fernandez, 839 F.2d at 640).
IV. DEFENDANT'S CONSTITUTIONAL RIGHT TO INDEPENDENT ADMISSION OF HIS NON-INCULPATORY STATEMENTS AT TRIAL

The first of the proposed options would require that trial courts allow a defendant to independently admit portions of his pretrial statement during the defense case-in-chief consistent with his theory of the defense. This is the least probable of the three proposed options, but, because of the order of proof in a criminal trial, it is the fairest of the three. The defendant currently has no ability to have the non-inculpatory portions of his pretrial statement independently admitted; instead, those portions would be categorically excluded under the rules of evidence.

Under the first proposed approach, the lower court's admissibility determination would account for constitutional considerations as well as evidentiary doctrines. This process must be analyzed with a constitutional lens that includes the theory of the defense, the umbrella doctrine of fundamental fairness, and other trial-related constitutional rights. Subject to the limitations and a balancing test set out in Section VII below, trial courts would allow both sides to present the relevant portions of the accused's pretrial statement that advance their respective theories of the case.

a. Constitutional right to advance a "theory of the defense"

The accused enjoys a constitutional right to advance his theory of the defense before the jury, so long as it is properly supported by evidence. His ability to independently admit portions of his pretrial statement turns on how the favorable parts of his pretrial statement relate to, and align with, his theory of the defense. An accused's theory of the defense that is based upon a critique of the government's investigation lends itself to such a connection.

The accused's theory of the defense could converge on a combination of theories such as mistaken identity, failure of proof, or the quality of the investigation. For example, if the defendant offered additional investigative leads and suspects in his pretrial statements to law enforcement that were not pursued by law enforcement, then those portions of his statement may support his theory of the defense. The trial court's denial of this evidence supporting his theory of the defense connects directly to the due process right of fundamental fairness during the criminal trial and his Sixth Amendment right to a jury trial on all material issues at trial.
b. Fundamental fairness during the criminal trial

The inherent connection between a defendant’s right to present his theory of the defense at trial, and the notions of fundamental fairness in the criminal trial is instructive here. The interplay between an accused’s theory of the defense and fundamental fairness comes to bear with the defendant’s right to independently admit the non-inculpatory portions of his pretrial statement. The accused must be able to support his theory of the defense, particularly if his theory represents a critique of the government’s investigation, with portions of his own pretrial statement.

There is not an issue with a defense theory critical of the government investigation. Because, once the defendant testifies in his own defense under oath, then our criminal justice system readily allows those theories of the defense based on critique of the government’s investigation. Our criminal justice system should go further, however, to conclude that it offends the notions of fundamental fairness to not permit the criminal defendant to advance his defense theory in other ways, including a way that permits the defendant to preserve his privilege against self-incrimination. Notions of fundamental fairness must compel lower courts to allow the accused to preserve all his constitutional rights during the criminal trial, as opposed to requiring the accused to waive one constitutional protection to advance another.

The defendant’s inability to make any use of his non-inculpatory pretrial statements under the rules of evidence rises to the level of a “procedure or policy” that offends the notions of fundamental fairness during the criminal trial. The process due to the accused during his criminal trial requires that the notions of fundamental fairness be met during all phases of that trial.

For decades, the government’s presentation of the defendant’s “confession” has been exclusively governed by the rules of evidence and in favor of an efficient and streamlined government presentation during the criminal trial. Drafters of evidence codes, federal and state, certainly

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125 See supra notes 72-78.
126 See supra note 78; cf. Gary Goodpaster, On the Theory of American Adversary Criminal Trial, 78 J. CRIM. L. & CRIMINOLOGY 118, 126 (1987-88) (discussing how the defendant’s constitutional rights at trial can actually hinder effective truth-finding). Plainly, the criminal defendant has a set of rights which may interfere with truth-finding and which go beyond immediate fairness considerations. A defendant’s right against self-incrimination, the right to unilateral discovery from the prosecution, the right to a jury trial, and the burden of proof beyond a reasonable doubt, for example, are potentially significant barriers to truth-finding. Id.
127 The Federal Rules of Evidence were adopted by order of the Supreme Court on Nov. 20, 1972, transmitted to Congress by the Chief Justice on February 5, 1973, and became effective on
constructed the rules of evidence to disfavor the accused’s use of his pretrial statements. Yet, constitutional, as well as evidentiary considerations, should factor into the trial court’s admissibility determinations in the criminal case.

As it happened with the Court’s holdings as to trial-related, constitutional rights in the early 2000’s,\textsuperscript{128} trial courts should revisit this procedure and policy that unfairly dices the defendant’s pretrial statement. To exclude this information under only the rules of evidence, predominantly rules relating to hearsay, trial courts play a role in orchestrating an unfair proceeding. The prospect of a recurring constitutional violation that offends fundamental fairness during the criminal trial should outweigh considerations of efficiency.

c. Sixth Amendment right to trial before an unbiased jury

In addition to the notions of fundamental fairness grounded in due process, the accused is entitled to his Sixth Amendment right to a “trial before an unbiased jury.”\textsuperscript{129} The Supreme Court instructed that, even if a case is presented to a jury, that case can still suffer from a Sixth Amendment, jury trial violation. If an issue is material to the outcome of the jury’s determination of guilt (or at sentencing),\textsuperscript{130} then the defendant is also constitutionally afforded a jury trial on that narrow issue. Under the same argument, the accused is entitled to a jury trial on the narrow issue discussed in this Article, the government’s unfair apportioning of his pretrial statement.

The accused’s pretrial statements to law enforcement are not always the neat and clean confessions that prosecutors are permitted to present at trial.\textsuperscript{131} Instead, a defendant’s pre-trial statement may equivocate, minimize his culpability, and raise questions about the government’s investigation. Yet, the government’s redacted confession presentation can be deceptively clean, streamlined and favorable to the state.

\textsuperscript{128} See infra Section III.b. (describing the Supreme Court’s renewed focus on the defendant’s Sixth Amendment rights to a jury trial and to confront witnesses against him).

\textsuperscript{129} See U.S. CONST. amend. VI; see supra Section III.a (describing the purpose of the Due Process Clause as promoting fundamental fairness).

\textsuperscript{130} See Brady v. Maryland, 373 U.S. 83, 87-89 (1963) (setting forth “materiality” as the standard for the government’s constitutional discovery obligations); see also United States v. Agurs, 427 U.S. 97, 108-10 (1976). The theory underlying the government’s constitutional discovery requirement is, the guilty are convicted and the innocent are acquitted. The government must ensure that trials are fair so that the innocent will not be convicted.

\textsuperscript{131} See supra Section I.b (outlining an illustrative example of the Ponzi scheming promoter as the criminal defendant).
The Supreme Court, in *Booker* and its progeny, provides guidance that there is constitutional infirmity when the prosecutor picks and chooses potentially outcome-determinative information that will not be before the jury and therefore will not be proved beyond reasonable doubt at trial. The *Booker* Court held that the government violated the accused's Sixth Amendment right to a jury trial when it omitted from trial information not needed to prove the elements of the offense. The Court held that the defendant's constitutional right to a jury trial outweighed the government's interest in an efficient and streamlined presentation at trial. Similar compelling interests are at stake here. The jury deserves to hear and pass on the omitted information here: the defendant's non-inculpatory, pretrial statements.

The defendant is entitled to more than a simplified and streamlined jury trial. He is constitutionally entitled to more than a mere day in court. It's not just about the accused having his day in court. Trial courts must ensure the quality of all aspects of his day in court. We must review the matters that the government presented to the jury and, more critically, the matters that the prosecution strategically left out.\(^\text{132}\)

When part of the evidence that the jury will use to judge guilt at trial includes the accused's confession, then, as a constitutional matter, the defendant is entitled to a jury trial on that narrow, yet material, issue. The jury should hear all relevant portions\(^\text{133}\) of the defendant's statement and decide the case understanding the full context in which the incriminating portions of the statement were made. Current judicial treatment permits the government to have a jury trial only on those portions that reinforce the government's theory of guilt. The defendant maintains a constitutional right to a jury trial on all aspects of a single piece of evidence, a confession, wherein even the slightest omissions could lead to a verdict that deprives him of his liberty.

\textit{d. Better timing in the defense case-in-chief}

Independently admitting portions of the accused's pretrial statement is the most difficult outcome for a trial court to accept, but that outcome is fairest. That is, it is preferable that the defendant first fully appreciates the

\(^{132}\) *See supra* notes 95-96. The prosecution in *Booker* strategized to present the bare minimum before the jury at trial to save other matters for later judge-alone determinations under a lesser burden of proof. *See Booker*, 543 U.S. at 227. This is not unlike when the government strategically presents the accused's confession at trial without the context of the surrounding statements that do not incriminate him, and may even exculpate him. *See id.*

\(^{133}\) *See FED. R. EVID.* 401. Under the proposal, relevance is still an important, threshold limitation on the admissibility of evidence.
government’s case-in-chief against him and, armed with that information, then decides whether to present witnesses and evidence, testify in his own defense or present independently admissible portions of his pretrial statement.

e. The reliability of the defendant’s statement

The Innocence Project and other organizations have unveiled some of the root causes that led to wrongful convictions. Many cases where convicted defendants were later exonerated involved “confession” evidence presented by the government turned out to be false. This has happened frequently enough that the field of false confessions is ripe for expert testimony in criminal trials.

Trial courts, knowing this, readily admit the inculpatory portions of the defendant statements to law enforcement pretrial. The reliability and validity of the defendant’s incriminating statements appears to present less of an issue in our criminal justice system. Reliability and whether the statement is “self-serving” becomes a concern when the defendant seeks to admit or make use of his non-inculpatory, pretrial statements at trial.

f. The Ponzi scheme promoter example

Drawing upon the Ponzi scheme example above, if the Ponzi promoter’s theory of the defense related to investigatory leads not taken, suspects not pursued and the government’s “tunnel vision” in narrowing its focus prematurely to him as the bad actor, then he has an argument to independently admit the non-inculpatory portions of his pretrial statement, in paragraphs 1, 2, 3 and 9. Following the close of the government’s case and during his case-in chief, the accused could independently admit these parts of his pretrial statement as evidence in support of his stated theory of the defense. The defendant could then request a specially-crafted jury instruction and better argue his theory of the defense to the jury in summation. Perhaps most importantly, the accused could do so while maintaining his privilege against self-incrimination.

V. DEFENDANT’S NON-INCULPATORY STATEMENTS CONTEMPORANEOUSLY ADMITTED DURING THE GOVERNMENT’S PRESENTATION

This Article’s second proposal is, when the government presents the defendant’s confession during its case-in chief, the defendant is
constitutively entitled to contemporaneously admit all or some of the other portions of his statement. When the government offers something less than the entirety of the defendant’s pretrial statement during its presentation, this Article argues that the defendant enjoys a constitutional right, or a common-law, evidentiary option, to present the other relevant portions of his own pretrial statement at the same time. At the very least, in fairness, the jury should consider the redacted portions of the defendant’s confession to complete the context of the defendant’s statement.

a. Fundamental fairness

The fundamental fairness argument in the first proposal above applies equally here. When the government presents only incriminating portions of the defendant’s pretrial statement during its trial presentation, the defendant can point to a phase of his criminal trial that is patently unfair. The current treatment of his pretrial statement, and how the government can parse out a confession, offends notions of fundamental fairness and due process for the accused.

Examples of procedures and policies that the Court found violated fundamental fairness are similarly instructive here. By precluding the accused from using the non-inculpatory portions of his pretrial statement at trial to put into proper context the portions of his pretrial statement that were admitted into evidence by the government, the criminal defendant is forced either to accept that misleading presentation by the prosecution or to waive his Fifth Amendment privilege against self-incrimination to support his own theory of the defense of trial. This current treatment of the defendant’s pretrial statement is as offensive and damning to notions of fundamental fairness as forcing him to wear his prison clothes at trial or to carry the burden to proof on one of the government’s elements of trial.

The doctrine of fundamental fairness further should be triggered when the parties to a civil trial are treated more fairly than the criminal defendant within the adversarial jury trial system. How can lower courts decide that the defendant receives a fair trial, receives the process that is due to him, when the court permits the government to pick and choose the defendant’s words that will incriminate him during the trial? It is time to re-examine this practice with a meaningful, constitutional analysis.
b. Common law evidentiary doctrine

When the trial court allows the government to present his confession at trial, the criminal defendant has until now relied on a collection of evidentiary rules to request that the court contemporaneously admit omitted, non-inculpatory portions of his statement. The defendant specifically relies upon rules of evidence based on fairness within the adversarial trial system such as Federal Rules of Evidence 102, 106, 611(a) and 403. The drafters of evidence codes, however, sought to exclude potentially self-serving, pretrial statements made by the defendant and this concern typically trumps the application of these other rules.

Tantamount to a categorical exclusion, courts remain extremely hesitant to recognize any bone fide use of a defendant’s pretrial statement other than by the prosecution as a confession. The trial court also has failed to exercise its discretion to admit evidence because otherwise it would unfairly prejudice the accused or potentially mislead to the jury. The trial courts simply do not favor the accused’s admission or use of his pretrial statements. Trial courts typically reject these purely evidentiary arguments because, in part, the rules have strayed from the common law doctrine and lost the connection to the underlying premise of “fairness” and “ascertaining the truth” for the parties at trial.

i. The common law “rule of completeness”

The common law, evidentiary doctrine of the “rule of completeness” furnishes an excellent argument for the defendant in addressing the admissibility of clarifying or qualifying portions of his non-inculpatory,
The rule permits a party to contemporaneously admit the other portions of a recording, writing or oral statement that were left out of the opponent’s trial presentation. The rule of completeness, partially-codified under Rule 106, sets out a clear method for the criminal defendant to contemporaneously admit the omitted, non-inculpatory portions of his pretrial statement. The rule operates less as an evidentiary principal and more as a fairness and timing mechanism. While application of Rule 106 should itself provide the relief sought in the second proposal, unfortunately, the trial courts seldom agree.

Courts rely upon one of three explanations in rejecting the application of Rule 106 to support denying the defendant’s request to admit the favorable portions of his pretrial statement. First, courts hold that Rule 106 only applies to writings and recordings and, therefore, doesn’t apply to oral pretrial statements by the accused. Second, courts hold that the rule does not render inadmissible information admissible because it is coupled in the same writing or recording as the information offered by the proponent. Lastly, as discussed above, the defendant can waive his privilege against self-incrimination and testify under oath to offer the non-inculpatory portions of his pretrial statement.

Such judicial reasoning can be countered as follows. First, the “rule of completeness” applies equally under Rule 611(a) for oral statements, as Rule 106 applies to “writings and recordings.” Also, many pretrial statements. The rule of completeness, partially-codified under Rule 106, sets out a clear method for the criminal defendant to contemporaneously admit the omitted, non-inculpatory portions of his pretrial statement. The rule operates less as an evidentiary principal and more as a fairness and timing mechanism. While application of Rule 106 should itself provide the relief sought in the second proposal, unfortunately, the trial courts seldom agree.

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140 See Fed. R. Evid. 106; see also Ortega, 203 F.3d at 682 (holding that Rule 106 “does not compel admission of otherwise inadmissible hearsay evidence”). Rule 106 applies only to written and recorded statements. Fed. R. Evid. 106; see also Phoenix Associates III v. Stone, 60 F.3d 95, 103 (2d Cir. 1995). If the government witness’ testimony concerned an unrecorded oral confession, the rule of completeness does not apply. Even if the rule of completeness did apply, exclusion of the defendant’s exculpatory statements was proper because these statements would still have constituted inadmissible hearsay. See Ortega, 203 F.3d at 682; see also Collicott, 92 F.3d at 983.

141 See Wright & Graham supra note 16.


143 See United States v. Velasco, 953 F.2d 1467, 1474–75 (7th Cir. 1992) (citations omitted). Rule 106 requires that the evidence the proponent seeks to admit must be relevant to the issues in the case. Even then, a trial judge need admit only that evidence which qualifies or explains the evidence offered by the opponent. In addition to relevancy, the trial court should ask (1) does it explain the admitted evidence, (2) does it place the admitted evidence in context, (3) will admitting it avoid misleading the trier of fact, and (4) will admitting it insure a fair and impartial understanding of all the evidence. Id.; see also 21A Wright & Graham, Jr., § 5072.

144 See Fed. R. Evid. 106 (expressly incorporating “writings and recordings” and omitting oral conversations).

145 See supra Section II.C.

146 See Fed. R. Evid. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.”); see also United States v. Pacquette, 557 Fed. Appx. 933, 936 (11th Cir. 936).
statements are, in fact, written or recorded, including oral statements recounted in an investigatory report or other writing.

Second, the common-law rule of completeness allows the opponent to admit otherwise inadmissible evidence to give proper context to the incomplete writing, recording or statement offered by the proponent.\textsuperscript{147} In a circuit split,\textsuperscript{148} the majority of the trial courts hold that, although the defendant’s pretrial statement is inadmissible hearsay when offered by him,\textsuperscript{149} it should be contemporaneously admitted at the accused’s request under Rule 106 when the government offers only the incriminating parts of his pretrial statement at trial. It is more logical, for a rule based on fairness and timing, that a party should be able to consider inadmissible evidence at the same time as the admissible evidence for context and to avoid “misleading the jury.”\textsuperscript{150}

Courts must revisit the evidentiary dead ends for the accused on this issue as well. Wholly distinct from the constitutional arguments in this Article, the rules of evidence are purportedly premised on fairness to the parties in our adversarial system of jury trial. But, as it relates to the defendant’s pretrial statements, the drafters of the rules and the trial courts have favored government advantage at every turn.

\textsuperscript{147} See 2 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 106:2 (7th ed. 2012). To the extent however that such evidence, otherwise inadmissible, tends to deny, explain, modify, qualify, counteract, repel, disprove or shed light on the evidence offered by the opponent, the evidence may be admitted provided its explanatory value is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, or waste of time, Rule 403. See id.

\textsuperscript{148} See id.

\textsuperscript{149} See FED. R. EVID. 801(d)(2)(A) (defining “not hearsay” as a statement by a party offered by the party opponent).

\textsuperscript{150} See 1 Stephen A. Saltzburg et al., FEDERAL RULES OF EVIDENCE MANUAL § 106.02[3] (11th ed. 2015). “It seems that hearsay objections should not block use of a related statement [under Rule 106] . . . when it is needed to provide context for statements already admitted. Thus a statement should be admissible if it is needed to provide context under Rule 106 and to prevent misleading use of related statements even if the statement would otherwise be excludable hearsay.” Id.
VI. USING PORTIONS OF THE DEFENDANT'S NON INCULPATORY STATEMENTS ON CROSS-EXAMINATION OF GOVERNMENT WITNESSES

The third and final proposal would allow the criminal defendant to advance his theory of the defense by conducting a meaningful cross-examination of government witnesses at trial may require that he be able to use his non-inculpatory statements in formulating questions. The best vehicle for the defendant to advance his theory of the defense, in many criminal cases, rests with cross-examination of government witnesses. Again, when the defendant's theory relates to deficiencies in the government's investigation, then the non-inculpatory portions of pretrial statement can align directly with a proper and effective line of questioning during cross-examination.

Even though the defendant enjoys the constitutional right to argue as his sole defense that the prosecution has not met its burden of proof—and thus not present any evidence nor testify in his own defense—unfortunately, trial courts foreclose viable avenues of the defendant's cross-examination of government witnesses that would support the defendant's burden-of-proof defense. Similar to those decisions denying the other uses for the defendant's pretrial statements discussed above, trial courts rule against the defendant's use of his non-inculpatory, pretrial statements for cross-examination purposes. This too offends notions of fundamental fairness and due process in the criminal trial.

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151 The standard for an acceptable question on cross-examination is whether the questioner has a "good faith basis" to ask the question. Here, the accused relies upon his pretrial statement as the "good faith basis" to question government witnesses in accordance with his theory of the defense.

152 Cf. Mark A. Summers, Taking Confrontation Seriously: Does Crawford Mean That Confessions Must Be Cross-Examined? 76 ALBANY L. REV. 1805, 1810 (2013). "Yet, reading a defendant's confession to the police out of Crawford's definition of 'testimonial' statements is problematic for several reasons. First, as the analysis above suggests, such an interpretation is contrary to the plain language of Crawford. Second, on its face, it leads to an unavoidable contradiction—an accusatory statement made by a third party to the police is 'testimonial,' while a self-accusatory statement made by a defendant under exactly the same circumstances is not. And, finally, it would put Crawford's understanding of the word 'witness' as used in the Confrontation Clause at odds with the Court's interpretation of the same word in the Fifth Amendment." Id.

153 These admissibility determinations during the criminal trial offend notions of fundamental fairness under the Due Process Clause and deprive the accused of his right to a trial before an impartial jury under the Sixth Amendment. See supra Section III.a. Unlike the due process umbrella protection of fundamental fairness and the defendant's right to a trial before an impartial jury, discussed above, his Sixth Amendment right to confront the witnesses against him provides only the narrowest relief. The Supreme Court's renewed interest in the Confrontation Clause with a new test under Crawford focuses on the out-of-court declarant and the defendant's right to meaningfully confront that person at trial. Like the examples that followed the Crawford decision, set out above, with respect to lab reports government expert witnesses who work in laboratories,
Anytime the trial court limits the scope of cross-examination in a criminal case, the accused has a viable Confrontation Clause argument under the Sixth Amendment. It is more egregious here, as trial courts effectively have barred viable defense cross-examination because the basis of the questioning touched upon the accused’s non-inculpatory, pretrial statements. Merely because a line of cross-examination questioning referred to the defendant’s pretrial statement, lower courts have shut down the examination and specifically excluded any reference by the accused to his own pretrial statements.154

a. No constitutional right to confront yourself

A few trial courts have considered a defendant’s Confrontation Clause challenge to excluding his use of his pretrial statement during cross-examination. They quickly dispose of the issue without significant constitutional analysis because they focus on the fact that the defendant is the out-of-court declarant and conclude that the defendant has no constitutional right to confront himself. Accordingly, this thin analysis under the Confrontation Clause reveals the same result as the rules of evidence.

The Confrontation Clause argument in this Article emphasizes a slightly different constitutional right: the defendant’s right to confront law enforcement witnesses, not himself. Law enforcement witnesses aggregate the tapestry of the government’s case that involves other witnesses and evidence against the accused. For the criminal defendant, no classification of witnesses is more at odds with his theory of the defense and his hope for a not guilty verdict at trial then law enforcement. The Confrontation Clause should provide a meaningful opportunity for the accused to confront the law enforcement witnesses.

the court ultimately held that the defendant had the constitutional right to conduct a specific type of cross-examination with a specific witness compelled to attend trial.

154 See Fernandez, 839 F.2d at 640 (foreclosing cross-examination that referenced the defendant’s pretrial statement); Willis, 759 F.2d at 1501. Some scholars believe that the accused has more than enough of an advantage when it comes to confronting the witnesses against him. Summers, Taking Confrontation Seriously, at 1815.

He [the in-court witness] is confronting the very person whose statements he is reporting, he is subject to cross-examination by counsel who has at his elbow the person who knows all the facts and circumstances of the alleged statements and who is therefore in the best possible position to conduct a searching inquiry, and, finally, the declarant may himself go upon the stand and deny, qualify or explain the alleged admissions.

Id. (citing Edmund M. Morgan, Admissions as an Exception to the Hearsay Rule, 30 YALE L.J. 355, 355–59 (1921)) (noting Morgan’s argument that extra-judicial party admissions were not admitted for their truth).
enforcement witness and, in so doing, the government’s evidence lodged against him at trial.\footnote{155}

\textit{b. Oddly honoring the rules of evidence}

Trial courts do not generally limit the defendant’s cross-examination of government witnesses for historically-accepted, trial presentation reasons. However, lower courts do oddly honor the rules of evidence as they relate to precluding any use by defendant of his pretrial statements. The constitutional violation of denying the accused’s use of certain non-inculpatory statements during the cross-examination of law enforcement witnesses is exacerbated when the government is committed to introduce inculpatory statements from the defendant at trial.

\textit{c. Defendant’s attempt to “subvert the rules” with “self-serving” statements}

Some courts reveal a perverse sense that somehow the defendant would gain an unfair advantage during the criminal trial if he could use the non-inculpatory portions of his pretrial statements at trial. Courts actually refer to the defendant’s attempts to subvert the rules of evidence by trying to use his pretrial statements to formulate questions on cross-examination. Non-inculpatory, pretrial statements by the accused are seen as only being self-serving but statements that are potentially misleading to the jury.

Courts have held that to allow the defendant to independently present his own pretrial statements would be “self-serving.” However, anytime one party to a litigation admits evidence or elicits testimony, that party does so because that evidence is self-serving, because it favors their side. In contrast, if the defendant’s first words during the investigatory stage of his own criminal conduct can support his theory of the defense at trial, then it may be that those early statements may be more persuasive and probative.

\footnote{155 It stands to reason that many iterations of the defendants “theory of the defense” run in direct contradiction to the government’s presentation in its case in chief. The height of that contradiction and necessary adversarial opposition during the criminal trial is the defense cross-examination of enforcement witnesses. While the court always can control the manner and mode and duration of cross-examination, few of those determinations have actual constitutional implications. Limiting and shutting down information for use when the defendant cross-examines law enforcement may be one of those instances.}
d. Preserving the privilege against self-incrimination

Trial courts decide whether the defendant's ability, or in this case inability, to cross-examine government witnesses particularly law enforcement witnesses well before any criminal defendant should have to make the determination to waive or preserve his right not to testify at trial. A criminal defendant when considering whether or not he may take the stand in his own defense should do so in light of all the evidence that was presented to the jury at the time when the government closes its case. The sequence and timing of the criminal trial again supports not pitting the defendant's Confrontation Clause rights against his Fifth Amendment privilege against self-incrimination.

If the defendant is allowed to conduct a meaningful cross-examination of law enforcement witnesses using some portions of his pretrial statements consistent with his theory of the case, then he may not need to testify in his own defense at trial and he can instead rest on a defense that the prosecution has failed to meet its burden of proof. If the defendant is allowed to point out some of the deficiencies in the investigation and investigatory steps not taken and suspects not pursued, then the defendant may make a more informed decision about whether he needs to testify in his own defense once the case proceeds to the defense case in chief.

VII. LIMITATIONS AND A PROPOSED BALANCING TEST

The proposals in this Article come with some distinct limitations and a proposed balancing to guard against the defendant's improper uses of his pretrial statements and any gamesmanship by the defense.

a. Limitations to the proposals

The limitations on the criminal defendant's ability to use the non-inculpatory portions of his pretrial statements should be as follows.

First, to borrow a legal term of art from advocacy, the defendant must have a "good faith basis" for taking advantage of the proposals set forth in this Article. Specifically applicable here, the defense must have a "good faith basis" to pose a question to a government witness on cross-examination. The relief sought here is distinct from hypothetical questions.

Second, this Article does not change the current law as to the "exculpatory no" doctrine and it should not be included as part of the relief sought here. That is, the criminal defendant is entitled to deny the allegations against him upon his first interaction with government investigators without
repercussions. The jury in a criminal case is instructed that the defendant has plead not guilty and maintains his innocence at trial; thus, the accused’s “exculpatory no” need not be included in the proposed uses of his non-inculpatory statements argued herein.

Third, if portions of the defendant’s pretrial statement lack reliability, then the trial court should not admit those portions and allow them to infect the criminal trial. The government could refute the defendant’s theory of the defense that flows naturally from his non-inculpatory pretrial statements. The government could investigate leads and other suspects and, if necessary, request an evidentiary hearing prior to trial.

Lastly, the proposals apply only to pretrial statements provided before the defendant meets with an attorney or without the benefit advice of counsel. The proposals urge a new wave of trial court admissibility determinations, not a criminal litigation strategy for defense attorneys and savvy defendants in future criminal cases.

b. A proposed balancing test

This Article urges trial courts to consider the defendant’s constitutional protections, as well as evidentiary doctrine, in determining the admissibility and other uses for the defendant’s non-inculpatory, pretrial statements. In so doing, the lower court should weigh the competing considerations for the government and the criminal defendant. The government, as discussed above, has an interest in efficiency and a streamlined trial presentation, but this interest must be weighed against preserving the defendant’s constitutional protections.

The government should be compelled to file a motion in limine to exclude any portion of the defendant’s pretrial statement. There is now a presumption of inadmissibility, for the reasons discussed in this Article, for any portion of the defendant’s pretrial statement not presented by the government as the accused’s confession. The court would more readily engage in the balancing test proposed in this section if the government were required to affirmatively exclude the accused’s non-inculpatory pretrial, statements.

Assuming that the trial court conducts a balancing test, some factors will favor admissibility and other factors will favor exclusion. The limitations outlined above certainly will favor exclusion, as well as other indicia of gamesmanship, unreliability and misleading or confusing the jury. That is, the dangers set out in Rule 403 will continue to factor into any
admissibility balancing test. This Article offers three proposals designed to activate the defendant’s constitutional rights at trial, not open the door to graymail tactics and gamesmanship.

In addition to the constitutional and evidentiary arguments above, there are also some factual consideration that should be considered in determining admissibility, such as whether: law enforcement officers failed to pursue the investigatory leads or other suspects referred to in the defendant’s pretrial statement; the defendant was in a custody during the interrogation and waived his *Miranda* rights including his privilege against self-incrimination; the information within the non-inculpatory portions of the defendant’s pretrial statement is corroborated by other witnesses or evidence; the government introduces defendant’s confession at trial, consistent with the second proposal to contemporaneously admit the defendant’s non-inculpatory, pretrial statements.

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156 See Fed. R. Evid. 403.