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## Summarizing Prior Witness Testimony: Admissible Evidence, Pedagogical Device, or Violation of the Federal Rules of Evidence?

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# FLORIDA STATE UNIVERSITY LAW REVIEW



SUMMARIZING PRIOR WITNESS TESTIMONY:  
ADMISSIBLE EVIDENCE, PEDAGOGICAL DEVICE,  
OR VIOLATION OF THE FEDERAL RULES OF EVIDENCE?

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# SUMMARIZING PRIOR WITNESS TESTIMONY: ADMISSIBLE EVIDENCE, PEDAGOGICAL DEVICE, OR VIOLATION OF THE FEDERAL RULES OF EVIDENCE?

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## I. INTRODUCTION

According to Federal Rule of Evidence 1006, the only summaries of evidence that may be introduced at trial are those that recapitulate the contents of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.<sup>1</sup> Rule 1006, however, does not mention the admissibility of summaries of prior in-court testimony, nor does any other rule of evidence. Further, the notes of the Advisory Committee on the Federal Rules of Evidence do not address the admissibility of summary testimony.

Federal courts have nonetheless expanded Rule 611(a), which Congress drafted to restate the power and obligation of the common law judge, to include the admission of summary testimony. Court decisions have deemed summary testimony admissible during the prosecution’s case-in-chief, when a federal agent merely repeats the testimony of prior witnesses.<sup>2</sup> In effect, the courts have allowed the prosecution to put the credibility of prior witnesses at issue for a second time. This violates the Federal Rules of Evidence because of the extreme prejudice to the defendant. Although the U.S. Court of Appeals for the Sixth Circuit warned other federal courts in 1979 that such summary testi-

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1. FED. R. EVID. 1006.  
 2. United States v. Johnson, 54 F.3d 1150 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

mony was problematic,<sup>3</sup> the Fourth Circuit allowed this type of testimony in violation of the Rules as recently as 1995.<sup>4</sup>

This Comment examines the federal courts' recent expansion of the use of summaries at trial. Part II explores the background and purpose of Federal Rule of Evidence 1006 and examines how federal courts have limited the use of the Rule with respect to summaries of in-court testimony. Part III discusses how the courts have expanded Federal Rule of Evidence 611(a), beginning with the Sixth Circuit's decision in *United States v. Scales*.<sup>5</sup> *Scales* was the first decision to recognize Rule 611(a) as a basis for the use of summaries under the Rule's "mode and order" language.<sup>6</sup> Part IV analyzes how federal courts have since progressively expanded the use of Rule 611(a), a process that culminated in the Fourth Circuit's recent application of the Rule in *United States v. Johnson*.<sup>7</sup> Finally, this Comment concludes that federal courts have violated the purpose of the Federal Rules of Evidence by expanding Rule 611(a) and proposes that the Advisory Committee on the Federal Rules of Evidence address the issue to clarify the scope and purpose of the Rule.

## II. FEDERAL RULE OF EVIDENCE 1006 AND ITS JUDICIALLY INTERPRETED LIMITATIONS

Entitled "Summaries," Federal Rule of Evidence 1006 provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.<sup>8</sup>

Rule 1006 follows the common law tradition that recognized that parties could prove the contents of voluminous writings in the form of testimonial or written charts, summaries, or calculations when the writings, because of their voluminous contents, could not be examined in court without causing inconvenience or a waste of time.<sup>9</sup> The purpose of the Rule is simply "to allow the use

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3. *United States v. Scales*, 594 F.2d 558, 564 (6th Cir.), cert. denied, 441 U.S. 946 (1979).

4. *Johnson*, 54 F.3d at 1150.

5. *Scales*, 594 F.2d at 558.

6. *Id.* at 563.

7. 54 F.3d 1150 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

8. FED. R. EVID. 1006.

9. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, ¶ 1006[01] (1996).

of summaries when the volume of documents being summarized is so large as to make their use impractical or impossible; summaries may also prove more meaningful to the judge and jury.”<sup>10</sup>

A proper foundation must be laid before a summary of voluminous writings, recordings, or photographs will qualify as admissible under Rule 1006.<sup>11</sup> There are four requirements for such a foundation: (1) the writings to be summarized must be too voluminous for convenient in-court examination;<sup>12</sup> (2) the documents underlying the summary must be admissible,<sup>13</sup> unless they were reasonably relied upon by an expert and used in his or her testimony;<sup>14</sup> (3) the original materials or duplicates must be made available to the other parties for examination at a reasonable place and time in advance of trial;<sup>15</sup> and (4) the summaries must accurately reflect the content of the original materials.<sup>16</sup>

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10. *United States v. Johnson*, 594 F.2d 1253, 1255 (9th Cir.), cert. denied, 444 U.S. 964 (1979).

11. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[03].

12. “Contents of charts or summaries admitted as evidence under Rule 1006 must fairly represent and be taken from underlying documentary proof which is too voluminous for convenient in-court examination, and they must be accurate and nonprejudicial.” MICHAEL H. GRAHAM, *EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 332 (2nd ed. 1989) (citing *United States v. Scales*, 594 F.2d 558, 561-63 (6th Cir.), cert. denied, 441 U.S. 946 (1979)).

13. *Johnson*, 594 F.2d at 1256 (“[C]ommentators and other courts have agreed that Rule 1006 requires that the proponent of a summary establish that the underlying documents are admissible in evidence.”).

14. FED. R. EVID. 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

15. *United States v. Kim*, 595 F.2d 755, 764 (D.C. Cir. 1979) (“When the underlying documents are not subject to examination by the opposing parties, the summary should not be admitted into evidence.”); *Wright v. Southwest Bank*, 554 F.2d 661, 663 (5th Cir. 1977) (holding that summary is improper when opposing party is not provided with opportunity to examine original records).

Even though the original records need not be introduced into evidence, it is within the court’s discretion whether to require production of the documents in court. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 300-01 (3d Cir. 1961) (“[I]t must be shown that the summation accurately summarizes the materials involved by not referring to information not contained in the original. . . . Usually the records or materials summarized must first be made accessible to the opposing party for inspection and for use in cross-examination.”); see also *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 289 (S.D.N.Y. 1971) (explaining that because many important management decisions in the business world are made through intelligent application of statistical and computer techniques, defendants should be able to rely on the same techniques, including computer printouts, in litigation).

16. *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1070-71 (W.D. Mo. 1985) (excluding file summary where testimony showed that information in summary was not contained in files “summarized” or elsewhere in record, nor within witness’s personal knowledge).

Once a party has established a proper foundation, it may offer the summaries in written or oral form.<sup>17</sup> The person responsible for preparing the charts, summaries, or calculations is not specifically required to authenticate them on the witness stand.<sup>18</sup> This practice departs from the custom that enabled the opposing party to challenge the evidence by cross-examining the person who put the evidence together.<sup>19</sup> Instead, courts have allowed supervisory personnel to attest to the accuracy and authenticity of charts, summaries, and calculations, thus facilitating authentication of the evidence.<sup>20</sup>

Courts have interpreted Rule 1006 as applying only to summaries of voluminous writings deemed to be admissible evidence.<sup>21</sup> Courts have also held, however, that Rule 611(a) properly governs the use of summary charts and verbal summaries of prior in-court witness testimony.<sup>22</sup>

### III. JUDICIAL EXPANSION OF FEDERAL RULE OF EVIDENCE 611(A): SUMMARIES AS PEDAGOGICAL DEVICES

Federal Rule of Evidence 611(a) states that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”<sup>23</sup>

According to the Advisory Committee’s note, item (1) of the Rule restates the power and obligation of the judge under common law principles.<sup>24</sup> In addition to addressing whether testimony should be in the form of free narrative responses to specific questions, item (1) covers such concerns as the order in which witnesses are called, the presentation of evidence, the use of demonstrative evidence, and many other questions that only a judge’s common sense and fairness can resolve.<sup>25</sup> Item (2) ad-

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17. See *Nichols v. Upjohn Co.*, 610 F.2d 293, 294 (5th Cir. 1980).

18. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[06].

19. *United States v. Nivica*, 887 F.2d 1110 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990) (summary compiled from business records was properly admitted where FBI agent testified concerning summary’s source).

20. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[06].

21. PAUL R. RICE, *EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE* 856 (1987).

22. E.g., *United States v. Johnson*, 54 F.3d 1150, 1158 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

23. FED. R. EVID. 611(a).

24. FED. R. EVID. 611 advisory committee’s note.

25. *Id.* (citations omitted).

dresses the needless consumption of time that is a trial court's daily concern.<sup>26</sup> Item (3) calls on judges, under certain circumstances, to use their discretion to avoid harassment and undue embarrassment during testimony.<sup>27</sup> Such circumstances include "the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion."<sup>28</sup>

Neither the text of Rule 611(a) nor the Advisory Committee's note address the admissibility of charts and statements summarizing prior in-court witness testimony. In fact, authority for allowing such summaries does not exist in the Federal Rules of Evidence at all; rather, it stems from the Sixth Circuit's decision in *United States v. Scales*.<sup>29</sup>

Appealing from a conviction of conspiracy and nine counts of unlawfully converting union assets to his personal use, the defendant in *Scales* claimed in part that the trial judge had committed reversible error by allowing Government Exhibit 145 into evidence under Federal Rule of Evidence 1006 and by allowing an FBI agent to testify concerning the exhibit.<sup>30</sup> The exhibit consisted of a series of charts, the first of which summarized all of the charges the indictment listed.<sup>31</sup> The court held that admission of the first chart was not prejudicial because it was clear that "the trial judge ha[d] discretion to submit the indictment to the jury . . . as long as limiting instructions [were] given to the effect that the indictment [was] not to be considered as evidence of the guilt of the accused."<sup>32</sup>

The remainder of Exhibit 145 consisted of a summary of objective proof that related to a number of the counts and overt acts with which the defendant had been charged, as well as written statements that union records did not contain certain information, primarily authorization for travel.<sup>33</sup> The FBI agent's testimony summarized and helped the jury organize the over 150 exhibits that had already been admitted.<sup>34</sup> The defendant claimed that the agent's testimony had prejudiced him because the agent was not an expert and had therefore not authenticated the charts.<sup>35</sup> The Sixth Circuit concluded that because the charts contained no

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26. *Id.*

27. *Id.*

28. *Id.*

29. 594 F.2d 558 (6th Cir.), cert. denied, 441 U.S. 946 (1979).

30. *Id.* at 559, 561.

31. *Id.*

32. *Id.* at 561-62.

33. *Id.* at 562.

34. *Id.* at 561-62.

35. *Id.* at 563.

misleading or conclusory references and appeared to present merely an organization of some of the undisputed objective evidence, the exhibit was admissible under Rule 1006.<sup>36</sup>

Although the court admitted Exhibit 145 as evidence under the guise of Rule 1006, it stated in dictum that, aside from Rule 1006, ample authority existed to support the admission of the exhibit under Rule 611(a) because of the “established tradition, both within this circuit and in other circuits, that permits a summary of evidence to be put before the jury with proper limiting instructions.”<sup>37</sup> The court cited several income tax cases that had allowed agents to testify to summary charts detailing clearly objective evidence compiled from voluminous documents and calculations.<sup>38</sup> None of the summary charts used in the income tax cases summarized prior in-court witness testimony. Finding that there had never been any formal distinction between the use of summaries in income tax cases and criminal cases, the Scales court concluded that such summaries did not come under the purview of Rule 1006, but rather were more properly admitted under Rule 611(a) to aid the jury in its examination of the evidence already before it.<sup>39</sup>

The court then went on, however, to state the dangers of permitting such summary presentations in criminal cases, including the possibility that a jury might either rely upon the alleged facts in the summary as if they had already been proven or use the summary as a substitute for assessing witness credibility.<sup>40</sup> The court resolved these dangers by requiring “guarding instructions” to explain that the chart itself is not evidence but, instead, is simply an aid in evaluating the evidence.<sup>41</sup> The Scales court concluded that because the facts summarized in the case were entirely objective—meaning that no issue of witness credibility was presented—the summaries did not undermine the defendant’s theory of the case and therefore were admissible.<sup>42</sup>

The Scales court admitted the chart summary because it reflected objective evidence already before the jury that did not include

36. *Id.* at 564.

37. *Id.* at 563.

38. *Id.* at 564 (citing *United States v. Conlin*, 551 F.2d 534 (2d Cir.), cert. denied, 434 U.S. 831 (1977); *United States v. Jalbert*, 504 F.2d 892 (1st Cir. 1974)). Both *Conlin* and *Jalbert* in turn cite *Gordon v. United States*, 438 F.2d 858 (5th Cir.), cert. denied, 404 U.S. 828 (1971), which involved misapplication of bank funds. See *Conlin*, 551 F.2d at 538; *Jalbert*, 504 F.2d at 894.

39. *Scales*, 594 F.2d at 563.

40. *Id.* at 564.

41. *Id.*

42. *Id.*



summaries of witness testimony.<sup>43</sup> The chart summary helped the jury organize the government's case, which had over 150 exhibits, and, most importantly, did not put the credibility of any prior witness at issue. The Scales standard has since been eroded by the federal courts, however. This erosion has continued to the point where summaries are being admitted that violate the purpose and scope of the Federal Rules of Evidence.<sup>44</sup> The Scales decision, which interpreted Rule 611(a) as permitting the admission of summaries under the Rule's "mode and order" language,<sup>45</sup> has been cited during the past seventeen years as the leading authority throughout the U.S. Courts of Appeals on the admission of summaries under Rule 611(a).<sup>46</sup>

The type of summary evidence at issue in *Scales* is known as a "pedagogical device," which is a method used to summarize testimony and emphasize certain points.<sup>47</sup> Judge Jack B. Weinstein's *Evidence*<sup>48</sup> is the leading authority cited by judges and by evidence authorities throughout the nation as the source of explanation for the use of summaries as pedagogical devices.<sup>49</sup> According to Judge Weinstein, these summaries should not be allowed into the jury room during deliberations without the consent of all parties because they are more akin to argument than evidence.<sup>50</sup>

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43. *Id.*

44. See, e.g., FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .").

45. *Scales*, 594 F.2d at 563.

46. See, e.g., *United States v. Johnson*, 54 F.3d 1150, 1159 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995); *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867 (1988); *United States v. Campbell*, 845 F.2d 1374, 1381 (6th Cir.), cert. denied, 488 U.S. 908 (1988); *United States v. Lemire*, 720 F.2d 1327, 1347-48 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States v. Apodaca*, 666 F.2d 89, 95 (5th Cir.), cert. denied, 459 U.S. 823 (1982).

47. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[07]; RICE, *supra* note 21, at 860; 2 GREGORY P. JOSEPH AND STEPHEN A. SALTZBURG, *EVIDENCE IN AMERICA*, § 5 (1994); see also *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985) ("Exhibit 30 is clearly a pedagogical device which merely summarizes and organizes data already in evidence."); *United States v. Gardner*, 611 F.2d 770, 776 (9th Cir. 1980) ("The [government's] use of the chart . . . contributed to the clarity of the presentation to the jury, avoided needless consumption of time and was a reasonable method of presenting the evidence.")

48. WEINSTEIN & BERGER, *supra* note 9.

49. See *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir. 1993), cert. denied, 115 S. Ct. 330 (1994); *United States v. Paulino*, 935 F.2d 739, 753 (6th Cir.), cert. denied, 502 U.S. 914 (1991); *United States v. Winn*, 948 F.2d 145, 158 (5th Cir. 1991), cert. denied, 503 U.S. 976 (1992).

50. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[07]; see also *Gardner*, 611 F.2d at 776 n.3 (holding that while it is better practice not to submit to jury charts that summarize admitted evidence, no reversible error was committed). The circuits are split, however, as to whether summaries are pedagogical devices under Rule 611(a) or evidence under Rule 1006, and whether the summary charts can go into the jury room for deliberations. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[07]; see also *United States v. Paulino*, 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991) (summary witness testimony explaining

In addition, it is within the sound discretion of the trial court to admit the summaries.<sup>51</sup>

The problem, however, is not the Scales court's interpretation of summaries, which simply recognized objective evidence as admissible when guarding instructions are given, but rather the recent decisions that have expanded the language of Scales. As discussed in the following section, federal courts have overstepped their bounds by admitting summaries that violate the scope and purpose of the Federal Rules of Evidence and erode the protections that the Rules provide to each party at trial.

#### IV. FROM A PEDAGOGICAL DEVICE TO A VIOLATION OF THE FEDERAL RULES OF EVIDENCE: THE EFFECT OF UNITED STATES V. JOHNSON

The erosion of the Scales standard culminated in the Fourth Circuit's recent decision in *United States v. Johnson*.<sup>52</sup> This section will analyze the cases cited by Johnson as support for its reasoning, thus revealing the Johnson court's erroneous interpretation and application of Rule 611(a) case law.

The confusion in the U.S. Courts of Appeals as to the appropriate role that summaries play and how they should be admitted at trial began with the Second Circuit's decision in *United States v. Baccollo*.<sup>53</sup> The Baccollo court upheld the trial judge's decision to permit "the prosecution to introduce as evidence charts on which there was represented primary evidence."<sup>54</sup> The court reasoned

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organizational chart fell under Rule 611(a), not Rule 1006); *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986) (concluding that summary charts, although used as a pedagogical device, were improperly admitted because court failed to give limiting instruction explaining exhibit's nature and purpose); *Gardner*, 611 F.2d at 776 (court had discretion under Rule 611(a) to admit chart that avoided needless consumption of time, contributed to the clarity of the presentation to the jury, and was reasonable method of presenting evidence); *United States v. Scales*, 594 F.2d 558, 563-64 (6th Cir.), cert. denied, 441 U.S. 946 (1979) (summaries are admissible pursuant to Rule 1006 and Rule 611(a)).

51. Winn, 948 F.2d at 159:

[S]ummary charts are, in the trial court's discretion, ordinarily admissible when: (1) the charts are based on competent evidence before the jury; (2) the primary evidence used to construct the charts is available to the other side for comparison in order that the correctness of the summary may be tested; (3) the person who prepared the charts is available for cross-examination; and (4) the jury is properly instructed concerning their consideration of the charts.

See also *United States v. Campbell*, 845 F.2d 1374, 1381 (6th Cir.), cert. denied, 488 U.S. 908 (1988); *Gomez*, 803 F.2d at 257; *United States v. Collins*, 596 F.2d 166, 169 (6th Cir. 1979).

52. 54 F.3d 1150 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

53. 725 F.2d 170 (2d Cir. 1983).

54. *Id.* at 173 (emphasis added).

that the charts were properly admitted because the trial judge had explained to the jury how it should consider the charts.<sup>55</sup>

Although *Baccollo* held that the charts were admissible evidence, in contrast to the general consensus that a summary chart is not evidence but a pedagogical device, careful examination of the decision shows that the court did not mention whether the charts summarized testimony. Instead, the court's entire discussion of the issue only indicated that the charts reflected primary evidence offered by the prosecution.<sup>56</sup> The opinion discussed neither the type of evidence the chart reflected nor at which stage of the trial the chart was admitted into evidence, nor did it discuss the defendant's argument against the chart's admission.<sup>57</sup>

*Baccollo* should thus be given little or no weight by courts addressing the admission of summary testimony because of the *Baccollo* court's lack of discussion of the issue. Nevertheless, the *Johnson* court cited *Baccollo* and other cases<sup>58</sup> in support of its decision to allow the use of summary charts and summary testimony.<sup>59</sup>

The circuits are split as to whether a summary chart should be admitted and allowed into the jury room or whether it is just a pedagogical device that should be admitted to aid the jury in weighing the evidence that has already been presented.<sup>60</sup> The

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55. *Id.*

56. The court devoted two sentences to discussing the admission of summary testimony: Defendant's third point with respect to the substantive counts is that the district judge permitted the prosecution to introduce as evidence charts on which there was represented primary evidence which was offered by the prosecution and admitted by the court. The admissibility of such charts, provided their function is explained to the jury, as it was in this case by Judge Mishler, has long been recognized.

*Id.*

57. The only discussion concerning the defendant's arguments came at the very end of the opinion, where the court reasoned that the evidence before the jury was adequate to permit the jury to infer that there was only one conspiracy. *Id.* at 174.

58. *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990) (jury is allowed to have charts in jury room during deliberations as long as judge properly instructs jury that it is not to consider charts as evidence); *United States v. Goldberg*, 401 F.2d 644, 647-48 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969) (jury instructions not abuse of discretion where trial judge explained that charts were not independent evidence but rather only representations of other admitted evidence).

59. *United States v. Johnson*, 54 F.3d 1150, 1159 n.10, 1159-60 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

60. Compare *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991) (pedagogical devices summarizing previously admitted testimony or documents "should not be admitted into evidence or otherwise be used by the jury during deliberations") and *United States v. Seelig*, 622 F.2d 207, 214 (6th Cir.), cert. denied, 449 U.S. 869 (1980) (holding that such summaries should be accompanied by limiting instruction that summary does not itself constitute evidence) with *United States v. Poschwatta*, 829 F.2d 1477, 1481 (9th Cir. 1987) (court did not abuse its discretion by admitting charts into evidence, although better practice is to admit

jury hears the testimony in both instances, with the difference being whether the document is admitted into the jury room as evidence in the case. Johnson reconciled this difference by holding that “the concern should not be so much with the formal admission of the summaries as it is with the manner in which the district court instructs the jury to consider the chart.”<sup>61</sup> The court reasoned that whether the chart was technically admitted into evidence was not as important as whether the jury “is taking a close look at the evidence upon which that chart is based” and not relying upon the chart as independent evidence.<sup>62</sup>

The Johnson court held that the trial judge’s instructions focusing the jury on the evidence rather than on the summary testimony were sufficient,<sup>63</sup> thereby allowing testimony that simply summarized that of prior witnesses and put the credibility of those witnesses at issue for a second time. The Scales court warned of this problem when it recognized that Rule 611(a) could be used instead of Rule 1006 to admit testimony summarizing objective evidence.<sup>64</sup>

One of main issues the Johnson defendant argued on appeal was that the district court had abused its discretion and committed reversible error when it admitted part of FBI Agent Richard Hudson’s summary testimony.<sup>65</sup> Agent Hudson testified about an organizational chart that reflected his compilation of the prior in-court testimony of thirty co-conspirators, and presented foundational testimony in support of the chart.<sup>66</sup> In addition, Agent Hudson verbally summarized the prior in-court testimony of the thirty co-conspirators in the light most favorable to the prosecution.<sup>67</sup> The Fourth Circuit held that under Rule 611(a), the district

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charts only as testimonial aid for jury). See also RICE, *supra* note 21, at 856. Rice states that courts disagree over the evidentiary status of summaries, with some courts improperly holding that summaries are not evidence and restricting their use to assisting the jury in understanding and using the underlying facts and data already in the record. *Id.* (citing *United States v. Atchley*, 699 F.2d 1055 (11th Cir. 1983); *United States v. Nathan*, 536 F.2d 988 (2d Cir. 1976)). Rice goes on to say that the correctly interpreted evidentiary status of summaries was spelled out in *United States v. Smyth*, 556 F.2d 1179 (5th Cir. 1977), which held that the lower court properly admitted certain FBI computer printouts into evidence. RICE, *supra* note 21, at 857 (citing *Smyth*, 556 F.2d at 1184). Rice reconciles these differences by claiming that the courts have erroneously interpreted summary evidence by failing to distinguish between its use as a substitute for primary evidence under Rule 1006 and its use as pedagogical device to aid the jury in evidence organization. *Id.* at 858.

61. *Johnson*, 54 F.3d at 1159.

62. *Id.*

63. *Id.* at 1160.

64. 594 F.2d at 564.

65. *Johnson*, 54 F.3d at 1156.

66. *Id.*

67. *Id.* at 1157.

court had not erred in admitting the summary chart, the foundational testimony for the chart, or the testimony summarizing that of the prior in-court witnesses.<sup>68</sup> The court based its conclusion upon the large number of witnesses and extensive evidence that the government had presented, as well as the district court's curative instructions to the jury.<sup>69</sup>

The court split its discussion of summary evidence, addressing first the admissibility of the summary chart and then discussing the admissibility of the summary testimony.<sup>70</sup> The court looked to the Second Circuit's decision in *United States v. Pinto*<sup>71</sup> as a good example of how a court should apply Rule 611(a) in admitting summary charts.<sup>72</sup>

#### A. Summary Charts as Admissible Evidence

*Pinto* involved the prosecution of several defendants for conspiracy to import cocaine.<sup>73</sup> The government introduced into evidence summary charts that reflected wiretaps, telephone calls, the names of individuals that participated in the telephone conversations, the telephone numbers used, and the addresses where the telephone calls were placed or received.<sup>74</sup> The *Pinto* court held that because the trial judge had determined that the charts would be helpful to the jury and were not cumulative, it had not committed reversible error by admitting the charts into evidence or allowing them into the jury room during deliberations.<sup>75</sup>

The *Johnson* court set forth two guiding principles that courts should use when reviewing a district court's admission of a summary chart into evidence under Rule 611(a). First, the court should determine whether the summary chart aids the jury in ascertaining the truth.<sup>76</sup> Second, the court should consider the possible

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68. *Id.*

69. *Id.* at 1162.

70. *Id.* at 1157, 1161.

71. 850 F.2d 927 (2d Cir.), cert. denied, 488 U.S. 867 (1988).

72. *Johnson*, 54 F.3d at 1158.

73. *Pinto*, 850 F.2d at 929.

74. *Id.* at 935. The opinion does not make clear whether all of the information summarized on the charts was already in evidence. The opinion does state, however, that during the ten-week trial, numerous witnesses and voluminous evidence were presented by the government, including references to 66 wiretaps of telephone calls placed to some 35 telephone numbers. *Id.*

75. *Id.*

76. The court cited *Pinto* and *Scales* in support of this prong of the two-part test. *Id.* at 1159 (citing *Pinto*, 850 F.2d at 935; *United States v. Scales*, 594 F.2d 558, 563 (6th Cir.), cert. denied, 441 U.S. 946 (1979)). The court listed several factors that a trial judge should employ when making this determination, such as the complexity of the case, the length of the trial, and any confusion that a large number of witnesses and exhibits may cause. *Id.*

prejudice to the defendant that would result if the summary chart were allowed into evidence.<sup>77</sup> The Johnson court described this second prong as “essentially an analysis under Rule 403 of the Federal Rules of Evidence.”<sup>78</sup>

The summary chart admitted into evidence in Johnson reflected the testimony of thirty prior witnesses called by the government during its case-in-chief, twenty-eight of whom were co-conspirators or had direct dealings with the drug conspiracy.<sup>79</sup> The government called Agent Hudson, who had prepared the chart after the witnesses had testified, to testify as to the organization and creation of the chart.<sup>80</sup> Agent Hudson also summarized the prior in-court testimony reflected in the chart while he discussed the chart’s organization.<sup>81</sup>

The admission of the summary violated the standard that the Scales court adopted when it recognized that Rule 611(a) could be used as authority to admit summaries as long as the summaries contained only objective evidence and not evidence that put witness credibility at issue.<sup>82</sup> The summary chart presented by Agent Hudson was not comprised of objective evidence because it reflected prior in-court witness testimony.<sup>83</sup> The Johnson court cited Pinto and Scales as leading cases that supported the admission of the summary chart into evidence.<sup>84</sup> Nevertheless, the court violated the Pinto and Scales standard that allows only summary charts reflecting objective evidence.<sup>85</sup>

Overlooking the prejudice to the defendant that resulted from the admission of the summary chart, the Johnson court found that the district court had taken all of the appropriate measures required under the second prong of Pinto to ensure that the jury was properly instructed as to the weight it was to give the chart.<sup>86</sup>

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77. *Id.*

78. *Id.* Rule 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

79. *Johnson*, 54 F.3d at 1160.

80. *Id.* at 1156-58.

81. *Id.* at 1157.

82. See 594 F.2d at 564.

83. Note that the summary chart did not reflect objective evidence such as the certain number of wiretaps, addresses, or telephone numbers that the Pinto court admitted into evidence under Rule 611(a). See *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867 (1988).

84. *Id.* at 1158-59.

85. *Scales*, 594 F.2d at 564; *Pinto*, 850 F.2d at 935.

86. For example, one limiting instruction that the district court offered during Agent Hudson’s cross-examination was as follows:

Such limiting instructions, however, are clearly insufficient. The court should not have admitted the summary chart as evidence. In addition, the court should not have allowed the government to use such a summary chart because its use defeats the purpose of Federal Rule of Evidence 403.<sup>87</sup> The Rules were drafted to protect the integrity of the trial process by ensuring fairness to both sides by avoiding prejudice and ensuring judicial economy.<sup>88</sup>

What is even more surprising is the fact that the Johnson court used Rule 611(a) to admit the summary chart.<sup>89</sup> Because the chart was merely a repetition of prior in-court testimony, its admission violated one of the tenets that Rule 611(a) itself established—the avoidance of needless consumption of time.<sup>90</sup> Having Agent Hudson visually and verbally summarize the testimony of thirty witnesses through the use of an organizational chart was unquestionably a needless consumption of time.

In addition, the district court, using the same reasoning it had applied to admit the chart, allowed Agent Hudson to orally summarize the prior testimony of government witnesses as to particular events and persons.<sup>91</sup> The court found that Hudson's summary testimony likely aided the jury in ascertaining the truth, and held that the testimony was admissible because the defendant was allowed extensive cross-examination concerning the validity of Hudson's testimony.<sup>92</sup> The court cited two cases in support of its decision to admit the summary testimony, *United States v. Baker*<sup>93</sup> and *United States v. Paulino*.<sup>94</sup>

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The chart . . . is the Government's analysis of the evidence. It is the case as the Government sees it from the evidence which has been adduced here in the courtroom, and, of course, it is subject to such interpretation as you as a jury feel is appropriate to be given to it. In other words, it is presented to show what the Government contends has been proven in the case. That is the contention. It's up to you then as a jury to resolve any issues that may be in your mind concerning [the chart].

*Johnson*, 54 F.3d at 1160. The district court also charged the jury that "[g]overnment's Exhibit Number 19, that's the chart that was put up, that is simply a summary of what the Government contends that the evidence shows. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case." *Id.* at 1160-61.

87. The purpose of Federal Rule of Evidence 403 is to balance the admissibility of otherwise admissible evidence in regards to its probative value versus the danger of unfair prejudice to the defendant. FED. R. EVID. 403 advisory committee's note. If the court finds the danger of unfair prejudice outweighs the probative value, the judge may give a limiting instruction to the jury regarding the evidence, or the court may exclude the evidence in its entirety. *Id.*

88. See FED. R. EVID. 403, 611(a).

89. *Johnson*, 54 F.3d at 1157.

90. FED. R. EVID. 611(a).

91. *Johnson*, 54 F.3d at 1161.

92. *Id.* at 1162.

93. 10 F.3d 1374 (9th Cir. 1993), cert. denied, 115 S. Ct. 330 (1994).

94. 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991).

### B. Summary Testimony as Admissible Evidence

In *Baker*, twenty-four defendants were charged with conspiracy to manufacture, distribute, and possess with intent to distribute methamphetamines.<sup>95</sup> Four of the defendants were charged with conducting a continuing criminal enterprise.<sup>96</sup> The district court allowed the prosecution's final witness, FBI Special Agent Lee Besse, to attempt to establish the "substantial proceeds" element of the continuing criminal enterprise crime.<sup>97</sup> Though no witness testified as to the value of any particular transaction, Agent Besse projected values onto the transactions and events and totaled known expenditures based upon the price lists she had prepared from the testimony of prior witnesses.<sup>98</sup>

The trial judge instructed the jury that the summary testimony was not evidence, did not represent the prosecution's opinion as to the credibility of the witnesses, and should be disregarded where the jury found that it conflicted with previously admitted testimony and evidence.<sup>99</sup> On appeal, the Ninth Circuit held that the admission of the summary evidence was a "valid exercise of the district court's discretion under Rule 611(a)" and that the summary testimony was not unduly prejudicial under Rule 403.<sup>100</sup>

The *Johnson* court misconstrued *Baker* and incorrectly applied it as support for the prejudicial decision to admit Agent Hudson's summary testimony. Agent Besse's testimony in *Baker* did not rehash word-for-word the prior in-court testimony of witnesses, as Agent Hudson's summary testimony did in *Johnson*.<sup>101</sup> Rather, the prosecution introduced Agent Besse's testimony to tie its evidence together through the agent's calculations of what the prior witnesses did not say.<sup>102</sup> The testimony allowed the prosecution to present its case-in-chief in accordance with the "theme" of its case. Agent Besse's testimony was simply another piece in the puzzle the prosecutor put together before the jury. Her testimony did not present prior witness testimony to the jury for a second time, thus allowing a figure as authoritative as an F.B.I. agent to reiterate the testimony for the jury in the event it did not "get it"

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95. *Baker*, 10 F.3d at 1386.

96. *Id.*

97. *Id.* at 1411.

98. *Id.*

99. *Id.*

100. *Id.* at 1412.

101. *Johnson*, 54 F.3d at 1161.

102. *Baker*, 10 F.3d at 1411.



the first time. Rather than merely putting the prior witnesses' credibility at issue, Agent Besse's testimony instead presented another piece of the prosecution's puzzle before the jury to aid it in determining the credibility of Agent Besse's testimony itself.

The second case the Johnson court cited in support of the admitted summary testimony was *United States v. Paulino*.<sup>103</sup> The Paulino defendants appealed convictions for conspiring to possess and distribute cocaine and possessing cocaine with intent to distribute.<sup>104</sup> The defendants contended that the district court had committed reversible error when it allowed the prosecution to have a witness explain, through the use of summary charts, the various players and their roles in the conspiracy, as well as the cash generated from cocaine sales during a certain period of time.<sup>105</sup> The defendants claimed that the summary testimony was "prejudicial, inflammatory, and constituted impermissible argument."<sup>106</sup>

On appeal, the Sixth Circuit found that the summaries were admissible as pedagogical devices because they aided the jury in its examination of testimony and documents already admitted into evidence.<sup>107</sup> The court cited Rule 611(a) as authority for allowing such summaries, provided that a limiting instruction were given.<sup>108</sup> The court held that the district court properly allowed the summary testimony because the charts were not substantially inconsistent with the evidence.<sup>109</sup> Moreover, the court found that the trial judge had properly instructed the jury that the charts and summaries were not evidence.<sup>110</sup>

The Johnson court erred in citing *Paulino* as support for its holding that oral summaries of prior in-court witness testimony

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103. 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991).

102. *Id.* at 743.

105. *Id.* at 752.

106. *Id.* at 752-53.

107. *Id.* at 753.

108. *Id.*

109. *Id.* at 754.

110. *Id.* Although the trial judge failed to give a cautionary instruction prior to the summary witness' testimony, the court did give the following jury instruction concerning the nature of the summaries at the close of proofs:

The charts or summaries prepared by the United States and admitted in evidence received for the purposes of explaining facts disclosed by books, records and other documents which are in evidence in the case. Such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them. In other words, such facts or summaries are used only as a matter of convenience. So, if and to the extent that you find they are not, in truth, summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

*Id.*

are admissible.<sup>111</sup> The summary testimony the Paulino court approved summarized objective evidence, not evidence that put the credibility of prior witnesses at issue. The summary witness in Paulino testified about charts that summarized the amount of cash generated from cocaine sales and reflected the roles that various defendants played in the conspiracy.<sup>112</sup> Not once did the summary witness restate what prior witnesses had said in the courtroom.<sup>113</sup> As in Baker, the summary witness in Paulino simply put another piece of the prosecution's puzzle before the jury to allow it to determine whether the charts accurately depicted evidence already admitted.

The summary testimony that the Johnson court approved, however, gave the prosecution another chance to prove its case-in-chief. The prosecution was allowed to present the same piece of the puzzle a second time through the testimony of Agent Hudson.<sup>114</sup> Neither the Baker nor Paulino courts put the credibility of prior witnesses at stake a second time when they allowed summary testimony of objective evidence.

## V. CONCLUSION

By allowing Agent Hudson to testify about the summary charts and prior testimony, the Johnson court violated Federal Rule of Evidence 403 because the testimony unfairly prejudiced the defendant, misled the jury, and was a needless presentation of cumulative evidence that confused the jury. Further, the Johnson court exceeded its authority by expanding Rule 611(a). Earlier decisions have held that to be admitted under Rule 611(a), a summary must reflect objective evidence that does not put the credibility of witnesses at issue.<sup>115</sup> Moreover, the Johnson court disregarded the Advisory Committee's intent in drafting Federal Rule of Evidence 611(a).<sup>116</sup>

Federal courts should not adopt Johnson as authority for admitting summaries. In addition, the Advisory Committee on the Federal Rules of Evidence should address the conflict that exists among the circuits regarding Rule 611(a), clarify the scope and

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111. Johnson, 54 F.3d at 1162.

112. Paulino, 935 F.2d at 752-53.

113. Id.

114. Johnson, 54 F.3d at 1161.

115. See, e.g., *United States v. Baker*, 10 F.3d 1374 (9th Cir.), cert. denied, 115 S. Ct. 330 (1993); *United States v. Paulino*, 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991); *United States v. Pinto*, 850 F.2d 927 (2nd Cir.), cert. denied, 488 U.S. 867 and 488 U.S. 932 (1988); *United States v. Scales*, 594 F.2d 558 (6th Cir.), cert. denied, 441 U.S. 946 (1979).

116. See discussion *supra* part III.

purpose of Rule 611(a), and state once and for all whether summary evidence is admissible under Rule 611(a). Finally, if the Committee finds that summary evidence is admissible under Rule 611(a), it should address under what circumstances such evidence is to be admitted.