Cross-Examining the Preliminary Question: Encouraging Defendant Participation under Federal Rule of Evidence 104(d)

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INTRODUCTION

The Federal Rules of Evidence (FRE) and the case law interpreting them attempt to strike a balance between truth seeking and procedural protections for criminal defendants. The interaction between Rules 611(b) and 104(d) embodies this tension. Rule 611(b) is the general rule on cross-examination. It provides that "[c]ross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility," but the rule also permits courts to "allow inquiry into additional matters as if on direct examination."[1] This reflects the Advisory Committee's preference for "wide-open" cross-examination unconstrained by procedural rules strictly limiting it to the scope of the direct.[2] Rule 104(d), however, is meant to counterbalance Rule 611(b)'s breadth in

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1 FRE 611(b).

2 See FRE 611, Advisory Committee Note to Subdivision (b). The Supreme Court has sanctioned the practice of relying on the Advisory Committee Notes as a "useful guide" in interpreting the FRE. In *Tome v United States*, 513 US 150 (1995), Justice Anthony Kennedy wrote for the majority that, "[w]here . . . 'Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.'" Id at 160, quoting *Beech Aircraft Corp v Rainey*, 488 US 153, 165 n 9 (1988). The Court's analysis in *Tome* relied heavily on the Notes to derive the "purpose" behind Rule 801(d)(1)(B), the rule at issue in that case. See *Tome*, 513 US at 160–61. It is true that the Court is not unanimous in its adherence to the Advisory Committee Notes—Justice Antonin Scalia believed that "they bear no special authoritativeness as the work of the draftsmen." Id at 167 (Scalia concurring). But even Scalia regarded them as persuasive authority—"ordinarily *the* most persuasive"—concerning the meaning of the Rules. Id (Scalia concurring). See also generally Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 Loyola LA L Rev 1283 (1995) (discussing the *Tome* opinions and concluding that the objections to the use of traditional types of legislative history in interpreting legal texts do not apply to the Advisory Committee Notes).

the context of criminal preliminary hearings.[3] Matters decided at such hearings include, but are not limited to, the admissibility of evidence,[4] the admissibility of a confession,[5] and bail.[6] Rule 104(d) provides that, by "testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case."[7] This additional procedural protection is meant to encourage defendants' participation in the determination of preliminary matters[8] and is especially important in light of the legal burdens that attach to and disincentivize defendant testimony.[9]

While Rule 104(d) is designed to limit cross-examination of criminal defendants at preliminary hearings and to provide them with procedural protection from overly broad exposure on cross, it has not always been interpreted and applied this way by courts. The language of the rule is vague—nowhere do the FRE define what is meant by "preliminary question"—and the four-sentence Advisory Committee Note does little to illuminate the rule's intended scope. Courts have ranged from narrow to broad interpretations of the rule's language. The broader a court's interpretation of "preliminary question," the less it protects defendants from questioning about "other issues" in the case on cross-examination and, consequently, the more likely it is to discourage a defendant from testifying.

As a general matter, courts treat a "preliminary question" either as coterminous with the scope of the preliminary hearing

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3 See FRE 104, Advisory Committee Note to Subdivision (d) ("The provision is necessary because of the breadth of cross-examination under Rule 611(b).").

4 See, for example, *Simmons v United States*, 390 US 377, 381 (1968); *United States v Gomez-Diaz*, 712 F2d 949, 950 (5th Cir 1983).

5 See, for example, *Wright v State*, 9 A2d 253, 255 (Md 1939); *United States v Roberts*, 14 F3d 502, 509 (10th Cir 1993).

6 See, for example, *Ex parte Homan*, 963 SW2d 543, 543 (Tex App 1996).

7 FRE 104(d).

8 FRE 104, Advisory Committee Note to Subdivision (d).

9 For a discussion of ways in which the criminal justice system discourages defendants from testifying, see Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 NYU L Rev 1449, 1457–62 (2005) (describing "the pervasive fact of silence in the criminal justice system and how the everyday procedures and practices of litigation consistently ensure that defendants say little or nothing"); Jeffrey Bellin, *Improving the Reliability of Criminal Trials through Legal Rules That Encourage Defendants to Testify*, 76 U Cin L Rev 851, 863 (2008) (noting that harsher burdens have been placed on the right to testify than on the right to remain silent); Ted Sampsell-Jones, *Making Defendants Speak*, 93 Minn L Rev 1327, 1328 (2009) (noting that "[t]he prosecutor's ability to cross-examine a defendant chills the latter's right to testify" and concluding that "[t]he legal system punishes defendants too much for taking the stand, and rewards defendants too much for remaining silent").

itself or as requiring some degree of parsing the hearing into constituent issues. The first approach protects defendants from cross-examination into "other issues in the case" as required under Rule 104(d) by importing the "scope-of-the-direct" limitation from Rule 611(b) but without its allowance for "inquiry into additional matters as if on direct." This in effect applies the first sentence of Rule 611(b) to the preliminary hearing context. The problem with this reading, however, is that its conflation of Rules 611(b) and 104(d) is contrary to the Advisory Committee's intention that cross-examination on preliminary questions be *narrower* than general cross-examination. As a result, it leaves Rule 104(d) with very little teeth in protecting criminal defendants.

The second approach breaks down the hearing issue into component parts. While courts have been reluctant to interpret "preliminary question" as the smallest constituent unit of the matter at issue,[10] they have generally defined it as narrower than the scope of the hearing.[11] For example, in the suppression context, instead of treating the admissibility of a particular piece of evidence as a single preliminary question, courts following this approach might treat each of the defendant's claims (for example, lack of a search warrant, lack of consent to a search, and lack of probable cause) or each individual legal question (for example, was there a warrant, or did a warrant exception apply?) as a separate preliminary question. This would allow the court to limit cross-examination to whether there was lack of consent, if that were the determinative question, and disallow cross on other issues implicated by the hearing. Such narrower interpretations of "preliminary question" thus provide criminal defendants with greater protection by decreasing the exposure they face in choosing to testify. Regardless of a court's interpretation of "preliminary question," however, defendants face another hurdle in the form of the Rule 104(d) impeachment exception, which allows cross-examination to attack credibility

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[10] See, for example, *Gomez-Diaz*, 712 F2d at 951–52 (refusing to define "preliminary question" as the single yes-or-no question whether the defendant signed an x-ray consent form, treating the defendant's consent more generally as the preliminary question at issue).

[11] See, for example, *Wright*, 9 A2d at 255 (defining voluntariness as a preliminary question in deciding the admissibility of a confession); *Homan*, 963 SW2d at 544 (treating the defendant's ability to make bail as a preliminary question and precluding cross-examination regarding other bail factors).

beyond what would otherwise be permissible under Rule 104(d).[12]

Given the importance of preliminary matters in the resolution of a defendant's case and the fact that the defendant himself is often the person who "above all others may be in a position to meet the prosecution's case,"[13] clarity on the protection Rule 104(d) actually provides is extremely important. This is especially true because the very uncertainty of the legal rule can discourage defendants from testifying,[14] contrary to the purpose of the rule. For this reason, this Comment provides a framework for guiding trial judges' discretion to preserve the integrity of the text and purpose of the rule.

This Comment, which proceeds in three parts, argues for a more protective reading of Rule 104(d). Part I introduces Rules 104(d) and 611(b) and discusses the seminal Supreme Court cases that inspired the rules in their present form.[15] Part II examines current differences among courts in interpreting the scope of preliminary-question cross-examination under Rule 104(d). Finally, Part III performs a close textual analysis of Rule 104(d) in the context of the FRE more generally and proposes three approaches for ensuring that the rule achieves its purpose. First, it suggests outer limits to Rule 104(d) cross-examination. Second, it suggests limiting the impeachment exception to attacks on credibility that are within the scope of the preliminary matter. Finally, it encourages judges to make preliminary rulings regarding the scope of cross-examination before a defendant decides whether to take the stand. Taken individually, these changes are modest, require no amendment to the FRE, and would not upset the current framework the Rules have established. Nonetheless, in combination, outer limits, limited impeachment, and preliminary rulings tackle the different factors that currently disincentivize defendant participation—overly broad interpretations of "preliminary question," an expansive impeachment exception, and uncertainty as to how a judge will rule—and provide greater predictability for criminal

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12 While an impeachment exception to Rule 104(d) is universally accepted, see Part I.B.2, the scope of the exception is not well defined.

13 Bellin, 76 U Cin L Rev at 854 (cited in note 9), quoting *Ferguson v Georgia*, 365 US 570, 582 (1961).

14 See *Simmons*, 390 US at 392 ("[A] defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof . . . necessary . . . .").

15 See generally *Johnson v United States*, 318 US 189 (1943); *Simmons*, 390 US 377.

defendants while safeguarding the truth-seeking function of the trial process.

I. BACKGROUND AND HISTORICAL FOUNDATIONS OF RULE 104(D)

Rules 104(d) and 611(b) together govern the scope of cross-examination in criminal cases—Rule 104(d) in the preliminary hearing context and Rule 611(b) at trial. Rule 104(d) states that "[b]y testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case."[16] The rule can be understood only in parallel to Rule 611(b), however, as the Advisory Committee explicitly defines the rules in relation to each other, describing Rule 104(d) as "necessary because of the breadth of cross-examination under Rule 611(b)."[17] Rule 611(b), in turn, provides that "[c]ross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility," but "[t]he court may allow inquiry into additional matters as if on direct examination."[18] The first sentence of Rule 611(b), also known as the "scope-of-the-direct" requirement, is its general governing provision. The Advisory Committee notes that "[t]he provision of the second sentence . . . is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case."[19] Thus, in light of the Advisory Committee's intent that Rule 104(d) act as a counterweight to the breadth of Rule 611(b) at preliminary hearings, Rule 104(d) cross-examination should not exceed that which would be permitted under the first sentence of Rule 611(b). Given the two rules' interdependent relationship, it is crucial to understand how both evolved and function in practice.

This Part proceeds by looking at the landmark cases that inspired the rules in their current form: the relevancy test of *Johnson v United States*,[20] which is the foundation of today's Rule 611(b), and the constitutional doctrine of *Simmons v United States*,[21] which inspired Rule 104(d). By looking at the historical roots of Rules 611(b) and 104(d), it is possible to flesh out the substance of the rules and their underlying policy goals,

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16 FRE 104(d).

17 FRE 104, Advisory Committee Note to Subdivision (d).

18 FRE 611(b).

19 FRE 611, Advisory Committee Note to Subdivision (b).

20 318 US 189 (1943).

21 390 US 377 (1968).

illuminating the Advisory Committee's intent upon codification of the common-law rules in 1975.

A. Cross-Examination before and after the Federal Rules

The Supreme Court has referred to cross-examination as the "greatest legal engine ever invented for the discovery of truth"[22] and stated that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of . . . cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[23] For this reason, cross-examination has been lauded and protected, especially in the context of the Sixth Amendment's Confrontation Clause, which protects a defendant's right to cross-examine adverse witnesses.[24] Thus, given cross-examination's status as an important truth-seeking tool, courts have historically imposed few limits on parties' ability to cross-examine witnesses, including criminal defendants.[25]

1. The traditional approach to cross-examination: the relevancy test.

The traditional view of cross-examination is illustrated in *Johnson*. The defendant in the case, Enoch L. "Nucky" Johnson (the inspiration for the character "Nucky Thompson" in the HBO TV series *Boardwalk Empire*[26]), was an Atlantic City politician from the 1910s until his conviction for tax evasion in 1941.[27] Serving as county treasurer, Johnson became the "political boss" of Prohibition-era Atlantic City, protecting those who engaged in

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22 *California v Green*, 399 US 149, 158 (1970).

23 *Pointer v Texas*, 380 US 400, 405 (1965).

24 US Const Amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

25 See *Portuondo v Agard*, 529 US 61, 69 (2000) ("[W]hen [a criminal defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well."), quoting *Perry v Leeke*, 488 US 272, 282 (1989).

26 See *Boardwalk Empire* (HBO 2010). See also Dustin Rowles, *How Similar Is Nucky Thompson from 'Boardwalk Empire' to the Real-Life Nucky Johnson?* (Uproxx, Sept 6, 2013), archived at http://perma.cc/LMD9-WR9G; *Boardwalk Empire* (IMDb), archived at http://perma.cc/GA52-ZRG6.

27 See *Enoch "Nucky" Johnson* (Mob Museum), archived at http://perma.cc/77P2-SG7U.

bootlegging, gambling, and prostitution.[28] He lived lavishly, his income coming from "the percentage he took on each gallon of illegal liquor and on the income of each gambling establishment and house of prostitution in Atlantic City."[29] Johnson famously did not apologize for delivering illegal products to paying customers,[30] and his public persona attracted federal attention. He was indicted in 1939 and tried on charges of evading taxes on $125,000 received from illegal lottery operators in 1935, 1936, and 1937.[31]

At his trial, Johnson took the stand and, on direct examination, admitted that he had received weekly payments from the lottery syndicate up to November 1937. On cross-examination, Johnson denied receiving any payments from the syndicate during November and December 1937.[32] The prosecution then asked Johnson whether he had received any money from the syndicate in 1938.[33] Defense counsel objected to the question on the ground that it was not relevant to Johnson's activity in the years in question and would tend to prove a different offense from the one charged in the indictment (namely that Johnson had also committed tax violations in 1938). Nevertheless, the district court overruled the objection, and Johnson answered that he had.[34] The prosecution then asked who had given him the money, and the defense objected again.[35]

In a sidebar discussion outside the hearing of the defendant and the jury, the prosecution and defense argued over the appropriate scope of cross-examination. The prosecutor maintained that the questions asked in cross-examination were proper to establish a continuous practice of receiving lottery income throughout 1937, while the defense insisted that cross-examination should be limited to the subjects opened up by the direct examination.[36] The trial judge ruled that the cross-examination was permissible because it bore directly on credibility.[37] When cross-examination resumed, Johnson asserted his

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28 See *Enoch L. Johnson, Ex-Boss in Jersey: Prohibition-Era Ruler of Atlantic City, 85, Dies* (NY Times, Dec 10, 1968), archived at http://perma.cc/BUB6-K4VQ.

29 Id.

30 Id.

31 Id.

32 *Johnson*, 318 US at 191.

33 Id.

34 Id.

35 Id.

36 *Johnson*, 318 US at 192.

37 Id.

Fifth Amendment right against self-incrimination.[38] In closing arguments, the prosecutor argued at length that Johnson's claim of privilege amounted to an admission of income tax violations in 1938, which in turn implied that Johnson had lied about not receiving money from the syndicate in the last two months of 1937.[39] Johnson was convicted of tax evasion for 1936 and 1937,[40] and the Third Circuit affirmed his convictions.[41]

The Supreme Court also affirmed Johnson's convictions, holding that the cross-examination was proper because Johnson's "voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all."[42] The Court's sole inquiry in determining the appropriateness of the cross-examination questions was whether they were relevant.[43] Because the amount and source of the 1938 income might support a finding that the payments were not interrupted during the last two months of 1937, they were relevant, and the Court concluded that the questioning was therefore proper.[44] While the Third Circuit had decided the matter on the theory that the testimony went to Johnson's credibility,[45] the Supreme Court rejected this reasoning in favor of the relevancy test.[46]

The Supreme Court's departure from the lower court's reasoning was significant. The relevancy test that the Court expounded reflects a much broader and more inclusive view of cross-examination than the impeachment rationale relied on by the Third Circuit. While impeachment remains a valid use of cross-examination under the FRE, even when it is beyond the

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38 Id at 192–93.

39 Id at 193–94.

40 *Johnson*, 318 US at 190. He was acquitted of the 1935 charge. Id.

41 Id at 195, citing *United States v Johnson*, 129 F2d 954 (3d Cir 1942).

42 *Johnson*, 318 US at 195 (emphasis omitted).

43 Id. Under the FRE, 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." FRE 401.

44 *Johnson*, 318 US at 195–96.

45 *Johnson*, 129 F2d at 960–61 ("These questions properly were designed to test the credibility of the defendant's original statement that he did not receive money from the numbers backers in the last two months of 1937.").

46 *Johnson*, 318 US at 196 ("That line of inquiry therefore satisfied the test of relevancy and was a proper part of cross-examination. Though the issue might have been more aptly phrased by the court in terms other than credibility, the meaning of the ruling in its context is plain.") (citations omitted).

scope of the direct[47] (and even under Rule 104(d)),[48] it is narrowly limited: impeachment cross-examination is permissible only when, and only to the extent that, it is used to undermine the defendant's credibility in a way consistent with the FRE.[49] The relevancy test, on the other hand, is the default rule and represents a vision of wide-open cross-examination unconstrained by procedural limitations—for which anything that has any tendency to make a material fact more or less likely is relevant and therefore a proper subject of cross. Because the *Johnson* decision reflects a view that virtually any line of inquiry meets this lenient standard, it limits criminal defendants' procedural protections on cross-examination to the rule against inquiry into collateral crimes unconnected with the charged offense.[50]

2. Cross-examination today: Rule 611(b) and its limits.

While cross-examination under today's Rule 611(b) is not quite as unconstrained as it was under *Johnson*,[51] 611(b) cross-examination remains extremely broad. The scope-of-the-direct requirement has generally replaced the wide-open rule, but between the second sentence of Rule 611(b) and courts' willingness to broadly interpret the scope of the direct, *Johnson*'s influence persists.

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47 FRE 611(b) ("Cross-examination should not go beyond the subject matter of the direct examination *and matters affecting the witness's credibility*.") (emphasis added).

48 For a discussion of how cases after *Simmons* read an impeachment exception into the doctrine, see Part I.B.2.

49 See FRE 404, 608, 609, 613, 801(d)(1) (governing the permissible use of impeachment in various circumstances). Several forms of impeachment are not codified in the FRE, however, such as impeachment by bias, incapacity, or specific contradiction. Impeachment in the context of Rule 104(d) will be discussed in considerably more detail in Parts I.B.2, II.C, and III.B.

50 *Johnson*, 318 US at 195. The Court also addressed the question whether the prosecutor's use of Johnson's claim of privilege against him in closing arguments was improper. Id at 196–200. The Court's reasoning on this issue and related notions of fairness are discussed in Part I.B.1 in the context of *Simmons* and its underlying policy rationales.

51 Some state rules of evidence, however, explicitly retain the *Johnson* relevancy test. See, for example, Md Rule Evid 5-611(b) (emphasis added):

> (1) Except as provided in subsection (b)(2), cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. . . .
>
> (2) An accused who testifies on a non-preliminary matter may be cross-examined on *any matter relevant to any issue in the action.*

United States v Bozovich[52] illustrates just how liberally courts are willing to interpret the extent of a defendant's direct examination for purposes of establishing the proper scope of cross-examination. Mark Bozovich was convicted of conspiracy to distribute heroin and appealed on the theory that the district court had erred by allowing the government to cross-examine him well beyond the scope of his direct testimony.[53] At trial, Bozovich had testified about his criminal record and heroin addiction.[54] The prosecution then cross-examined Bozovich about who had supplied him and his associates with heroin.[55] Holding that "[t]he standard under Rule 611(b) is whether the cross-examination was reasonably related to the subject matter of direct examination,"[56] the Seventh Circuit concluded that "[b]y testifying on direct about his heroin purchasing habits and the motives for his purchases, Bozovich opened himself up for cross-examination as to those topics."[57] The court noted that "both the United States Supreme Court and our court have liberally interpreted the extent of the defendant's direct examination for purposes of establishing the proper scope of the cross-examination."[58] Thus, in this case, the Seventh Circuit found that it was perfectly reasonable for the district judge to view the scope of Bozovich's direct examination not as "heroin addiction" but more broadly as "heroin use," which encompassed information about Bozovich's suppliers, purchase quantities, and ability to pay.[59]

The "management of cross examination is [thus] peculiarly committed to the district court's discretion."[60] Trial judges can "exercise reasonable control over the mode and order of examining witnesses and presenting evidence"[61] and can interpret direct examination broadly or narrowly for the purpose of establishing the scope of cross. Furthermore, a deferential abuse-of-discretion standard of review means trial judges' Rule 611(b) rulings are rarely reversed on appeal.[62] By

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52 782 F3d 814 (7th Cir 2015).
53 Id at 815.
54 Id.
55 Id at 816.
56 *Bozovich*, 782 F3d at 816 (quotation marks omitted).
57 Id at 817 (quotation marks omitted).
58 Id at 816, quoting *United States v Harbour*, 809 F2d 384, 388–89 (7th Cir 1985).
59 *Bozovich*, 782 F3d at 817.
60 Id at 816.
61 FRE 611(a).
62 See *Bozovich*, 782 F3d at 816.

delegating control over cross-examination to trial judges and giving them express license to push the bounds of the scope-of-the-direct requirement,[63] Rule 611(b) codifies the spirit behind the *Johnson* relevancy test.

Despite the breadth of permissible cross-examination, the practice is not entirely without limits. The Supreme Court has held that "the right to . . . cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[64] Such constraints have been narrowly circumscribed, however, as the Court closely examines any competing interest invoked to limit cross-examination in order to protect the "integrity of the fact-finding process."[65] The Court recognized this potential limitation on the right to cross-examination in *Chambers v Mississippi*,[66] despite the fact that it did not find a sufficient countervailing interest on the facts before it. In *Chambers*, the defendant had been denied the opportunity to cross-examine a key witness on the basis of Mississippi's voucher rule, which stated that a party may not impeach his own witness.[67] The voucher rule rests on the presumption that a party who calls a witness "vouches for his credibility," without regard to the circumstances of the particular case.[68] Weighing the voucher rule against the defendant's Sixth Amendment right to confrontation, the Court concluded that the voucher rule is an outdated vestige of English trial practice that "bears little present relationship to the realities of the criminal process" and can be harmful to defendants' efforts to develop a defense.[69] Thus, in *Chambers*, the Court held that the defendant's right to cross-examination prevailed over competing interests.[70]

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63 See FRE 611, Advisory Committee Note to Subdivision (b) ("We recommend that the rule allowing questions upon any part of the issue known to the witness . . . be adopted.").

64 *Chambers v Mississippi*, 410 US 284, 295 (1973).

65 Id.

66 410 US 284 (1973).

67 Id at 295. Leon Chambers was convicted of murdering a police officer. At his trial, he attempted to show that another man, Gable McDonald, had repeatedly confessed to the crime, including once in a sworn statement to Chambers's attorney. Chambers called McDonald at trial but, due to the application of Mississippi's voucher rule, was not allowed to question McDonald as an adverse witness when McDonald repudiated his confession on the state's cross-examination. Id at 285–91.

68 Id at 295.

69 Id at 296. FRE 607 explicitly rejects the voucher rule. See FRE 607, Advisory Committee Note ("The traditional rule against impeaching one's own witness is abandoned as based on false premises.").

70 *Chambers*, 410 US at 295–98, 302.

While the *Chambers* Court concluded that the voucher rule did not provide a sufficient countervailing interest to limit cross-examination, the First Circuit relied on the Court's language to hold that the right to cross-examination must yield in light of a state procedural rule whose purpose "is central to the truth-seeking function of the trial."[71] In *Cheek v Bates*,[72] Dorothy Cheek was convicted of second-degree murder and argued on appeal that the trial judge's refusal to allow her lawyer to question one of the prosecution's chief witnesses to show bias violated her Sixth Amendment right to confrontation.[73] The trial judge's ruling was made pursuant to a Massachusetts rule that requires a cross-examining lawyer to make some explanation as to how he expects to show bias by means of the witness's answer when the judge is unable to see the relevance or purpose of a question.[74] In this case, Cheek's lawyer violated the rule by failing to explain the basis for his questions in order to obtain a more definitive ruling from the court.[75] Relying on *Chambers*, the First Circuit concluded that the trial judge's ruling denying cross-examination into the witness's bias was proper, considering that the "policy of requiring an explanation of an otherwise ambiguous question is central to the truth-seeking function of the trial."[76]

Chambers and *Cheek* thus suggest that a court may limit cross-examination when doing so would enhance rather than undermine the truth-seeking process. This view finds support in the Advisory Committee Note to Rule 611(b), which says that the "efforts, delays and misprisions" caused by restrictive rules of cross-examination are worth the cost when they do not merely govern the order of evidence but are "the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial."[77]

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71 *Cheek v Bates*, 615 F2d 559, 562–63 (1st Cir 1980).

72 615 F2d 559 (1st Cir 1980).

73 Id at 560.

74 Id at 561–62.

75 Id at 561.

76 *Cheek*, 615 F2d at 562–63.

77 FRE 611, Advisory Committee Note to Subdivision (b).

B. The *Simmons* Doctrine: 104(d)-like Protection for Constitutional Rights

Simmons was decided in 1968, only seven years before the FRE were enacted, and Rule 104(d) is sometimes said to embody the Supreme Court's holding in *Simmons*.[78] While the exact scope of the holding in *Simmons* is unclear, its reach is narrower than that of Rule 104(d). First, *Simmons* is most commonly interpreted as a special protection that applies only to Fourth Amendment suppression hearings or perhaps only to constitutional rights more generally.[79] Second, *Simmons* addresses the question of when a criminal defendant's testimony at a preliminary hearing can be admitted against him at trial, while Rule 104(d) governs the scope of cross-examination at the hearing itself.[80] Nonetheless, the *Simmons* doctrine runs parallel to Rule 104(d), and the two share the same motivating principles, making *Simmons* and its progeny highly relevant to interpreting the scope of Rule 104(d).

1. Limiting subsequent use of preliminary hearing testimony and mitigating the deterrent effect of uncertainty on defendants' decision to testify.

In *Simmons*, defendants Thomas Simmons, William Andrews, and Robert Garrett were convicted of armed bank robbery.[81] Before trial, Garrett moved to suppress a suitcase containing incriminating evidence seized by FBI agents during a search of Andrews's mother's house, alleging that the suitcase had been searched and seized in violation of the Fourth Amendment.[82] The agents had no warrant, and at trial, it was

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78 See, for example, *United States v Roberts*, 14 F3d 502, 517 (10th Cir 1993); *United States v Williams*, 754 F2d 672, 676 (6th Cir 1985) ("[*Simmons*] formed the basis for the subsequently enacted rule, Fed.R. of Evid. 104(d)."). See also FRE 104, Advisory Committee Note to Subdivision (d) (citing *Simmons* directly).

79 Compare *Ex parte Homan*, 963 SW2d 543, 544 (Tex App 1996) ("*Simmons* dealt with the Fourth Amendment protection from unreasonable searches and seizures."), with *Nelson v State*, 765 SW2d 401, 403 (Tex Crim App 1989) (characterizing *Simmons*'s "limited purpose" doctrine as providing that "an accused is not required to surrender one constitutional right in order to gain the benefit of another").

80 See FRE 104, Advisory Committee Note to Subdivision (d) ("The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter."), citing generally *Simmons*, 390 US 377.

81 *Simmons*, 390 US at 379–81. The Seventh Circuit affirmed as to Simmons and Garrett but reversed Andrews's conviction due to insufficient evidence linking him to the robbery. The Supreme Court granted certiorari as to Simmons and Garrett. Id at 381.

82 Id at 380–81.

disputed whether Andrews's mother had given them permission to search the house.[83] Because Garrett was not present at the time the suitcase was seized, in order to establish standing for his Fourth Amendment suppression motion, he had to testify that, although he could not identify the suitcase with certainty, it was similar to one he had owned and he was the owner of clothing found inside.[84] The district court denied Garrett's motion to suppress, and Garrett's testimony at the hearing that he was the owner of the suitcase was later admitted against him at trial.[85]

The Supreme Court held that Garrett's testimony at the suppression hearing should not have been admitted against him at trial on the issue of guilt.[86] Because Garrett was forced to choose between a potentially valid Fourth Amendment claim and his Fifth Amendment privilege against self-incrimination, the Court reasoned that while a defendant's testimony should not be considered "compelled" just because, in refraining from testifying, he forgoes a benefit, "an undeniable tension is created" when the benefit to be gained is that afforded by another provision of the Bill of Rights.[87] In such circumstances, the Court "[found] it intolerable that one constitutional right should have to be surrendered in order to assert another."[88] Thus, the *Simmons* doctrine protects defendants from having their preliminary hearing testimony used against them at trial whenever their testimony brings two constitutional rights into conflict.

A driving force behind the Court's holding in *Simmons* was the concern that "a defendant who knows that his testimony *may* be admissible against him at trial will sometimes be deterred from presenting the testimonial proof . . . necessary to assert a . . . claim."[89] The harmful effect of such uncertainty was illustrated in *Johnson*, when the prosecution used Johnson's claim of privilege under the Fifth Amendment against him in its

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83 Id at 380.

84 Id at 381, 389–91 ("The only, or at least the most natural, way in which [Garrett] could found standing to object to the admission of the suitcase was to testify that he was its owner. Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim.").

85 *Simmons*, 390 US at 381.

86 Id at 393–94.

87 Id.

88 Id at 394.

89 *Simmons*, 390 US at 392–93 (emphasis added).

closing argument.[90] The *Johnson* Court emphasized the importance of good-faith preliminary rulings, finding that "[a]n accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him."[91] A defendant, knowing that his claim of privilege, though granted, might be used against him, "well might never claim it."[92] By limiting later use of preliminary hearing testimony, the *Simmons* Court eliminated some of this uncertainty, thus encouraging defendant participation in preliminary hearings—which dovetails into a policy goal of Rule 104(d).[93]

2. *Simmons* and the Rule 104(d) impeachment exception.

Cases after *Simmons* read an impeachment exception into the doctrine, such that *Simmons* came to stand for the proposition that "[a] defendant at a suppression hearing may testify without fear that that testimony will be used against him at trial *except for impeachment*."[94] Even after *Simmons*, the prosecution would be able to introduce Garrett's hearing testimony regarding his ownership of the suitcase against him at trial if, for example, he took the stand and denied ever having seen it before. While an impeachment exception is in line both with the way impeachment is incorporated into the FRE and with the impeachment exception to the exclusionary rule,[95] it is worth noting that *Simmons* itself recognizes no such exception. In fact, *Simmons* does not mention the words "impeachment" or "credibility" anywhere in the opinion.[96] While some courts have recognized that "*Simmons* left open the question of whether the

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90 See text accompanying notes 38–41. While the Court discussed the issue at some length, the statements are dicta because the defendant waived any objection to the prosecutor's comment below. See *Johnson*, 318 US at 200.

91 *Johnson*, 318 US at 197.

92 Id.

93 See FRE 104, Advisory Committee Note to Subdivision (d).

94 *United States v Gomez-Diaz*, 712 F2d 949, 951 n 1 (5th Cir 1983) (emphasis added), citing generally *Simmons*, 390 US 377. See also *Roberts*, 14 F3d at 517 ("Rule 104(d) embodies the Supreme Court's holding in *Simmons v. United States* permitting a defendant to testify at a suppression hearing without fear his testimony will be used for *other than impeachment purposes* at trial.") (emphasis added and citation omitted).

95 See *Walder v United States*, 347 US 62, 65 (1954) (limiting the exclusionary rule in the Fourth Amendment context to the government's case in chief, thus allowing introduction of evidence and statements obtained in violation of the Fourth Amendment for impeachment purposes); *Harris v New York*, 401 US 222, 225–26 (1971) (limiting the exclusionary rule in the *Miranda* context to the same ends).

96 See generally *Simmons*, 390 US 377.

government may . . . use a defendant's suppression hearing testimony to impeach him at trial,"[97] many courts have proceeded on the assumption that *Simmons* provides an impeachment exception.[98] Regardless of whether courts have realized that *Simmons* does not provide the concrete support they have ascribed to it, this gap in the law has effectively been filled, as "every Circuit to [address the issue] has allowed impeachment use of a defendant's suppression hearing testimony."[99]

The impeachment exception to the *Simmons* privilege has thus become part of post-*Simmons* jurisprudence, and an impeachment exception has also been imported into Rule 104(d). The Senate Judiciary Committee was careful to clarify that Rule 104(d) "is not [ ] intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing."[100] This language, combined with the Advisory Committee's citation[101] to *Walder v United States*,[102] which held that a defendant cannot use the government's inability to cross-examine him as "a shield against contradiction of his untruths,"[103] suggests that the Committee intended to incorporate an impeachment exception into the rule.[104]

Thus, even when Rule 104(d) applies, the prosecution sometimes may cross-examine a defendant beyond the scope of the preliminary question at issue for the purpose of impeaching his credibility. This limitation, while sensible in terms of preventing a defendant from lying on the stand, is also problematic. A defendant's credibility will almost always be at issue in a

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97 *United States v Mitchell*, 2015 WL 5886198, *2 (ED Pa) ("This Court has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial."), citing *United States v Salvucci*, 448 US 83, 93–94 (1980). See also generally Morgan G. Graham, Note, *The Use of Suppression Hearing Testimony to Impeach*, 59 Ind L J 295 (1984) (discussing the post-*Salvucci* uncertainty about whether *Simmons* protection extends to impeachment).

98 See, for example, *Gomez-Diaz*, 712 F2d at 951 n 1; *Roberts*, 14 F3d at 517.

99 *Mitchell*, 2015 WL 5886198 at *2 (collecting cases).

100 S Rep No 93-1277, 93d Cong, 2d Sess 24 (1974), reprinted in 1974 USCCAN 7051, 7070–71.

101 See FRE 104, Advisory Committee Note to Subdivision (d).

102 347 US 62 (1954).

103 Id at 65.

104 The Maryland Rules of Evidence support this conclusion: "An accused who testifies only on a preliminary matter of admissibility can be cross-examined only on that matter *and as to credibility*." Md Rule Evid 5-104, Advisory Committee Note to Subdivision (d) (emphasis added). See also text accompanying note 114 (discussing why the Maryland Rules can shed light on the FRE).

preliminary hearing,[105] and the purpose of the prosecutor's cross-examination questions may not always be clear.[106] Further, while in the *Simmons* context the Court has been explicit that there is no difference between whether the defendant is impeached as to collateral matters or as to matters bearing directly on the crimes charged,[107] the scope of the Rule 104(d) impeachment exception is less clear.[108]

II. CONFUSION REGARDING THE SCOPE OF RULE 104(D)

No unified body of case law dealing with Rule 104(d) has developed. Courts differ in their treatment of the issue, but they do not fall into any well-defined circuit split. Despite the lack of uniformity, there are roughly three approaches courts take in determining the scope of preliminary-hearing cross-examination.

The most protective, pro-defendant reading gives "preliminary question" its narrowest possible meaning in order to constrain the matters on which the defendant is subject to questioning on cross. For example, in the context of a Fourth Amendment suppression hearing, a "preliminary question" would be each individual legal question that a court must answer in order to determine whether a piece of evidence is admissible—for example, was there a search, was there a warrant, or did a warrant exception apply? To the extent that the defendant's testimony were cabined to only some of these questions, cross-examination would also be so limited.

An intermediate approach might define "preliminary question" as any claim that on its own is sufficient to affect the admissibility of a particular piece of evidence. Thus, if the defendant were to make three Fourth Amendment claims relating to the same piece of evidence, each would represent a separate "preliminary question." If the defendant's testimony were limited to only one of them, cross-examination would also be so limited. What these two approaches have in common is that they both involve intrahearing parsing of the issues. While courts

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[105] See *Roberts*, 14 F3d at 517 ("Although Rule 104(d) circumscribes the government's cross-examination to the issue of voluntariness, defendant's credibility is inextricably tied to that resolution.").

[106] See, for example, *United States v Grady*, 2005 WL 2739031, *2 (MD NC) (illustrating how parties can disagree about whether particular cross-examination questions are being used substantively or only for impeachment purposes).

[107] See *Harris*, 401 US at 225.

[108] The Rule 104(d) impeachment exception will be discussed in more detail in Part II.C.

rarely define issues as narrowly as defendants might wish, most do define preliminary questions more narrowly than the subject of the entire motion and thus engage in at least some degree of intrahearing parsing.

Under the least protective approach, the admissibility of a particular piece of evidence, or even an entire motion to suppress, counts as a single "preliminary question." If the defendant were to testify about any facts relating to the admissibility question, he would open the door to cross-examination on any fact relevant to the admissibility of that piece of evidence. This application of Rule 104(d) most closely resembles the traditional *Johnson* approach and essentially imports the first sentence of Rule 611(b) into the preliminary-hearing context such that the preliminary question and the hearing issue are one and the same.

This Part discusses a number of federal and state cases that interpret the scope of "preliminary question." This provides a framework for drawing the outer limits of Rule 104(d) cross-examination in light of its stated goals and relationship to Rule 611(b).

A. Intrahearing Parsing of Preliminary Questions—a Protective (Defendant-Friendly) Approach

One set of cases illustrates the most protective approach to Rule 104(d) cross-examination, reading "preliminary question" as the smallest constituent unit of the hearing issue. For example, in *Wright v State*,[109] the Maryland Court of Appeals defined the scope of the hearing as the admissibility of the defendant's confession and limited cross-examination to the narrower issue of voluntariness. Although *Wright* was decided before the enactment of the FRE, its protective interpretation of "preliminary matter" was later incorporated into Maryland Rule of Evidence 5-104(d).[110] While the Maryland Rules, adopted in 1993, were modeled on the FRE, the language of Maryland Rules 5-104(d) and 5-611(b) clarifies the relationship between the two rules in a way that can shed light on their federal counterparts. Most notably, the Maryland Rules explicitly exclude preliminary-question cross-examination from the

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[109] 9 A2d 253 (Md 1939).

[110] The Maryland Rule is nearly identical to FRE 104(d): "The accused does not, by testifying upon a preliminary matter of admissibility, become subject to cross-examination as to other issues in the case." Md Rule Evid 5-104(d).

Johnson relevancy test,[111] specify that the second provision of Rule 611(b) does not apply to the preliminary-hearing context,[112] and directly incorporate an impeachment exception into Rule 5-104(d).[113]

Overall, the Maryland Rules of Evidence reflect a much greater effort to clearly define the scope of cross-examination, both generally and in the preliminary-hearing context. Because the Maryland Rules were adopted in 1993, these changes may have been made in response to confusion resulting from the FRE's formulations, which is especially likely considering that the Maryland Court of Appeals "did not wish the [Evidence Rules] Subcommittee simply to propose an uncritical adoption of the Federal Rules."[114] On the one hand, the Maryland Rules thus can help interpret the FRE, as they reflect how the FRE were interpreted and their wording ameliorated by a state court. On the other hand, the FRE have been amended multiple times since 1994, and Rules 104(d) and 611(b) have remained unchanged, suggesting that reading the FRE in light of Maryland's and other states' revisions should be done with considerable caution.

The Maryland Court of Appeals wrestled with these same issues in *Wright* more than fifty years prior to the adoption of the Maryland Rules. In *Wright*, defendants Howard Wright and James Watkins were convicted of selling and possessing lottery tickets in violation of state law.[115] After his arrest, Watkins was locked in a jail cell for twenty hours, denied the privilege of seeing his attorney or obtaining bail, and grilled by police until he

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111 The Committee note to Rule 5-104(d) directly indicates that it should be read in conjunction with 5-611(b)(2), which states that "[a]n accused who testifies on a *non-preliminary* matter may be cross-examined on any matter relevant to any issue in the action." Md Rule Evid 5-611(b) (emphasis added).

112 Md Rule Evid 5-611(b)(1) ("*Except for the cross-examination of an accused who testifies on a preliminary matter*, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.") (emphasis added). The emphasized language is missing from FRE 611(b), leaving it ambiguous whether it is within the court's discretion to allow cross-examination as if on direct in the FRE 104(d) context, as well. Thus, the Federal Rule is silent on whether the second sentence of Rule 611(b) can be imported into the preliminary-hearing context, whereas the Maryland Rule clearly prohibits it.

113 Md Rule Evid 5-104, Advisory Committee Note to Subdivision (d) ("An accused who testifies only on a preliminary matter of admissibility can be cross-examined only on that matter *and as to credibility*.") (emphasis added).

114 Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 Md L Rev 1032, 1033 (1995).

115 *Wright*, 9 A2d at 254.

confessed to selling slips for a man whose name he did not know.[116] The defense asked the trial court to allow Watkins to testify for the sole purpose of explaining the circumstances under which his confession was made, but the court ruled that if Watkins took the stand, even if only for this narrow purpose, he would nevertheless be subject to cross-examination "as to any facts pertaining to the charge in the indictment that may be brought out by his counsel on direct examination."[117] The trial court thus applied the scope-of-the-direct rule in the context of deciding the preliminary question of the admissibility of Watkins's confession.

The Maryland Court of Appeals found the trial court's ruling improper, holding that cross-examination beyond the preliminary issue of the voluntariness of Watkins's confession should not have been permitted:

> Inasmuch as the admissibility of a confession is dependent upon its voluntary character, the question of whether or not it is voluntary must be decided in the first instance, when the offer to introduce the testimony is made. The sole question to be determined by the trial judge at that time is whether the confession is admissible because voluntary, or inadmissible because involuntary.[118]

The Court of Appeals thus broke down the issue into its component parts and—instead of allowing general cross-examination into any relevant facts or into all factors pertaining to the admissibility of Watkins's confession—limited cross-examination solely to the issue of voluntariness. It is noteworthy that the trial court had merely said that it would allow cross-examination relating to other matters brought out on direct, which is normally permissible under the general cross-examination provision in the first sentence of Rule 611(b). Yet, in this case, in the context of a preliminary hearing on the admissibility of a confession, the Court of Appeals circumscribed the scope of cross-examination within much narrower limits. *Wright* thus illustrates a protective approach to preliminary-hearing cross-examination by rejecting the lower court's coterminous interpretation and opting instead for intrahearing parsing. Although the FRE came later, considering the Advisory Committee's intention that Rule 104(d)

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116 Id at 255–56.

117 Id at 255.

118 Id.

act as a counterweight to the broad cross-examination allowed under Rule 611(b),[119] the court's treatment of preliminary-hearing cross-examination in *Wright* not only provides criminal defendants with the greatest degree of protection,[120] but is also faithful to the spirit of the Rule.

Like Maryland, Texas has also interpreted "preliminary question" narrowly. *Ex parte Homan*[121] provides an even stronger example of the defendant-friendly approach to Rule 104(d). The case concerned defendant Elbert Homan's appeal of an order denying an application for a writ of habeas corpus. Homan sought a reduction in bail, claiming that the trial court had erred in overruling his request to testify concerning his ability to make bail without subjecting himself to cross-examination as to other issues.[122] The Texas Court of Appeals, interpreting Texas Rule of Criminal Evidence 104(d),[123] held that "a defendant may testify in a bail hearing regarding his ability to make bail without subjecting himself to cross-examination on the nature and circumstances of the offense with which he is charged."[124] The court thus treated Homan's ability to make bail as a "preliminary matter" under Rule 104(d). This constitutes a narrow reading, given that under Texas law, the ability to make bail is but one factor out of five (another of which is the nature and circumstances of the offense) to be considered in fixing the amount of bail.[125] Thus, like the court in *Wright*, the court here broke down the issue (appropriate amount of bail) into its component parts, treating each factor as its own preliminary question.

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119 See FRE 104, Advisory Committee Note to Subdivision (d).

120 In *Wright*, the Court of Appeals found Watkins's confession involuntary and reversed his conviction. 9 A2d at 256–57.

121 963 SW2d 543 (Tex App 1996).

122 Id at 543.

123 The Texas Rules of Criminal Evidence were the predecessor to the Texas Rules of Evidence, which were enacted in 1998 and amended in 2015. The version of Texas Rule 104(d) at issue in *Homan* stated: "The accused does not, by testifying upon a preliminary matter out of the hearing of the jury, subject himself to cross-examination as to other issues in the case." *Homan*, 963 SW2d at 543–44. Today's Tex Rule Evid 104(d) uses practically the same language: "By testifying outside the jury's hearing on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case." Both formulations are nearly identical to FRE 104(d). It is also useful to be aware of Tex Rule Evid 611(b), whose scope is even broader than its federal counterpart: "A witness may be cross-examined on any relevant matter, including credibility."

124 *Homan*, 963 SW2d at 544.

125 See Tex Crim Code 17.15.

Opting for an intermediate interpretation, the Fifth Circuit in *United States v Gomez-Diaz*[126] limited *Homan*'s deconstructive approach, holding that "[t]here is no federal right to limit the testimony of a witness on a preliminary matter to one single phase of an issue."[127] *Gomez-Diaz* thus rejects the narrowest possible interpretation of Rule 104(d), but it does not clearly delineate the outer limit of permissible cross-examination. While the quoted language could provide textual support for much broader interpretations of "preliminary question," the case itself straddles a middle ground in its application of Rule 104(d) and, like *Wright* and *Homan*, recognizes that a court may define constituent preliminary questions within the larger question at issue at a preliminary hearing.

In *Gomez-Diaz*, Jamie Alberto Gomez-Diaz was convicted of importing cocaine and possessing cocaine with intent to distribute.[128] When asked to take an x-ray after being apprehended at an airport for acting suspiciously, Gomez-Diaz "verbally agreed to the x-ray procedures, but refused to sign a written consent form, explaining that he wanted to reserve his right to sue the government in case he became ill from the examination."[129] When Gomez-Diaz was taken to the hospital, he did not resist and physically cooperated with all procedures, but again refused to sign a consent form offered by hospital personnel, reiterating his wish to retain his right to sue the government in case of injury.[130] Based on the x-ray results, Gomez-Diaz was arrested for transporting cocaine.[131]

Before trial, Gomez-Diaz moved to suppress the cocaine, alleging that the government had lacked sufficient cause to conduct the x-ray.[132] During the hearing on the motion, a customs inspector testified that Gomez-Diaz verbally consented to the x-ray. The defense asked the court to allow Gomez-Diaz to testify on the limited yes-or-no question whether Gomez-Diaz gave his consent. However, the court denied the request and explained that, if Gomez-Diaz took the stand, "the government would be allowed to cross-examine him about any matters relating to his alleged consent that occurred during the time he was detained

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126 712 F2d 949 (5th Cir 1983).
127 Id at 951.
128 Id at 950.
129 Id.
130 *Gomez-Diaz*, 712 F2d at 950.
131 Id.
132 Id.

for examination."[133] As a result, Gomez-Diaz decided not to testify; the motion to suppress was denied, and Gomez-Diaz was convicted and sentenced to nine years in prison.[134]

On appeal, the Fifth Circuit addressed the proper scope of cross-examination at Gomez-Diaz's suppression hearing. Holding that "[t]here is no federal right to limit the testimony of a witness on a preliminary matter to one single phase of an issue," the court found that the preliminary question at issue was "whether Gomez-Diaz consented to the x-ray," that "the issue of consent goes beyond a single yes or no answer to the question of whether he verbally agreed to the x-ray," and that therefore "[t]he magistrate correctly interpreted Rule 104(d) to permit full cross-examination on the 'preliminary matter' of consent if Gomez-Diaz chose to take the stand."[135] Based on the evidence of his oral consent and general cooperation, presented through the inspector's testimony, the Fifth Circuit concluded that Gomez-Diaz had consented to the x-ray and affirmed his conviction.[136]

Gomez-Diaz raises several important points in interpreting Rule 104(d). First, the case puts forth the idea that "preliminary question" does not have to be interpreted as the smallest constituent unit of the matter at issue, especially when this would require the court to break down a seemingly self-contained issue into smaller parts. There is an appealing logic to this reasoning. For example, in this case, it makes sense to view the issue of "consent" to encompass not only whether Gomez-Diaz signed a waiver but also his oral statements and behavior. Further, consent was already a narrow issue at the hearing, considering that the overall question of the suppression hearing was whether the x-ray was proper, which included whether the government needed a warrant, whether the government had reasonable suspicion that Gomez-Diaz had drugs in his body, and whether something more than reasonable suspicion should have been required.[137]

Nonetheless (and second), *Gomez-Diaz* demonstrates that, while Rule 104(d) runs counter to the intuition that limiting cross-examination undermines truth-seeking,[138] in reality narrowing the scope of preliminary-hearing cross-examination of

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133 Id at 950–51.

134 *Gomez-Diaz*, 712 F2d at 951.

135 Id at 951–52.

136 Id.

137 See id at 951.

138 See text accompanying notes 64–77.

the defendant frequently will not materially hinder the prosecution. In *Gomez-Diaz*, the prosecution had already presented all its desired evidence through the inspector's testimony. The court in *Homan* similarly rejected such a claim of unfair disadvantage, finding that "[t]he State has ample means with which to present evidence of the nature of the offense and the circumstances under which it was committed through the testimony of other witnesses and reports."[139] This may often be true in the Rule 104(d) context—that is, even assuming a narrow interpretation of "preliminary question," the prosecution can achieve similar results through a combination of limited cross-examination of the defendant, impeachment, and extrinsic evidence as it would have through broader cross-examination of the defendant. Such circumstances should be weighed in the defendant's favor under *Chambers* and *Cheek*: Rule 104(d)'s protection represents a legitimate countervailing interest that outweighs the impact on the integrity of the fact-finding process from limiting cross when the evidence can be introduced through other means.[140] After all, Rule 104(d) aims to provide procedural protection for defendants' substantive rights, and there is even less reason for minimizing the scope of that protection if it does not unfairly disadvantage the prosecution or compromise truth seeking. This is especially true because broad cross-examination tends to deter defendants from testifying in the first place, which itself undercuts the truth-seeking process.[141]

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While *Wright*, *Homan*, and *Gomez-Diaz* present different approaches to delineating Rule 104(d) cross-examination, they all recognize that a "preliminary question" is often a constituent issue within the larger question of the pretrial hearing. As such, *Wright* limited cross-examination to the issue of the voluntariness of the defendant's confession, *Homan* to one of five bail factors, and *Gomez-Diaz* to the issue of the defendant's consent to an x-ray. Thus defining "preliminary question" narrowly limits the defendant's exposure on cross-examination, decreases the disincentive for defendants to testify, and rarely puts the

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139 *Homan*, 963 SW2d at 545 (quotation marks omitted).

140 See text accompanying notes 64–77.

141 See text accompanying notes 192–94.

prosecution at an unfair disadvantage, preserving the truth-seeking function of the trial process.

B. Importing Rule 611(b) into the Preliminary-Hearing Context—a Less Protective (Prosecution-Friendly) Approach

The broadest interpretation of "preliminary question" that Rule 104(d) can reasonably bear is that of the trial court in *Wright*[142]—that is, importing Rule 611(b)'s scope-of-the-direct requirement into the preliminary-hearing context.[143] This reading of Rule 104(d) is coterminous with the first sentence of Rule 611(b), allowing cross-examination within the scope of the direct examination at preliminary hearings as well as at trial.

Allen v United States,[144] on the other hand, illustrates a formulation of Rule 104(d) that goes too far. The *Allen* court read "preliminary question" as an entire motion to suppress,[145] in effect importing *all* of Rule 611(b), including its second sentence allowing inquiry into additional matters, into the preliminary-hearing context. Defendant Billie Allen was convicted of murder in the course of an armed bank robbery and sentenced to death.[146] Allen filed a motion under 28 USC § 2255,[147] asking the court to set aside his death sentence on the grounds of numerous alleged constitutional violations. Allen

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[142] See text accompanying notes 117–20.

[143] This outer limit is in line with the Maryland Rules of Evidence, which state that, "*[e]xcept for the cross-examination of an accused who testifies on a preliminary matter*, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Md Rule Evid 5-611(b)(1) (emphasis added). This implies that, in the case of preliminary-question cross-examination, the court may *not* permit inquiry into additional matters as if on direct.

[144] 2011 WL 1770929 (ED Mo).

[145] Id at *6.

[146] Id at *1.

[147] The motion to vacate, set aside, or correct a sentence—provided by 28 USC § 2255—is a modern descendant of the petition for a writ of habeas corpus and is available to defendants convicted in the federal courts who are "in custody." Section 2255 is the primary avenue to postconviction relief for federal prisoners. See Brandon L. Garrett and Lee Kovarsky, *Federal Habeas Corpus: Executive Detention and Post-conviction Litigation* 417 (Foundation 2013) ("Virtually all of the post-conviction practice for federal prisoners involves § 2255 motions, and not habeas corpus motions under § 2241."). See also Emily Tancer Broach, Comment, *Post-conviction Proceedings, Supervised Release, and a Prudential Approach to the Mootness Doctrine*, 2010 U Chi Legal F 493, 494 n 3, 497–98 (2010); Terrell J. Iandiorio, Comment, *Federal Postconviction Relief and 28 USC § 2255(4): Are State Court Decisions "Facts"?*, 71 U Chi L Rev 1141, 1141–42 (2004). A broader range of claims—such as sentencing challenges—are cognizable under § 2255, as compared to the analog for those in state detention (§ 2254). See Garrett and Kovarsky, *Federal Habeas Corpus* at 418–20 (cited in note 147).

included a claim for ineffective assistance of counsel due to his trial lawyer's failure to effectively argue for suppression of his post-arrest statements to law enforcement in which he acknowledged having participated in the robbery and murder.[148] At the suppression hearing, the magistrate judge had said that, if Allen took the witness stand, "he's there for whatever cross examination that may pop up."[149] The judge had then asked Allen's lawyer whether there was any law that suggested otherwise, and Allen's lawyer failed to present arguments under Rule 104(d) and *Simmons*.[150] Based on this exchange with the judge, Allen decided not to testify at the hearing.[151]

The court concluded that Allen's trial counsel did not provide ineffective assistance in failing to offer Rule 104(d) and *Simmons* arguments in connection with Allen's motion to suppress,[152] finding no Rule 104(d) violation because "[t]he magistrate judge did not suggest that Allen would be subject to cross-examination on anything other than the 'preliminary matter' of issues relevant to his motion to suppress."[153] What is key here is that the court held that cross-examination on the "'preliminary matter' of issues relevant to [Allen's] motion to suppress" "might necessarily go beyond only those matters raised by counsel on direct examination."[154] Thus, without any mention of impeachment, the court endorsed the idea that cross-examination under Rule 104(d) can actually *exceed* the scope of cross-examination permitted under the first sentence of Rule 611(b). Given that Rule 104(d) cross-examination is meant to be narrower than that under Rule 611(b)[155] and that Rule 611(b) cross-examination is governed by the scope-of-the-direct requirement in the first sentence of that Rule,[156] that *Allen* allows Rule 104(d) cross to exceed the scope of the direct examination turns

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148 *Allen*, 2011 WL 1770929 at *3–4.

149 Id at *4.

150 Id at *4–6.

151 Id at *5.

152 *Allen*, 2011 WL 1770929 at *7.

153 Id at *6. The court also found *Simmons* inapplicable because Allen's motion did not concern the admissibility of his hearing testimony later at trial, but only the proper scope of cross-examination at the hearing itself, which is governed by Rule 104(d), not *Simmons*. See id.

154 Id.

155 See FRE 104, Advisory Committee Note to Subdivision (d) ("[Rule 104(d)] is necessary because of the breadth of cross-examination under Rule 611(b).").

156 See FRE 611, Advisory Committee Note to Subdivision (b). See also text accompanying note 19.

Rules 104(d) and 611(b) on their heads. It is so broad as to undermine Rule 104(d)'s intended application as described by the Advisory Committee.

Allen thus helps draw the line past which a broad interpretation of Rule 104(d) goes too far: cross-examination under Rule 104(d) should not exceed the scope of what would be permitted under the first sentence of Rule 611(b). In other words, cross-examination of a criminal defendant at a preliminary hearing cannot exceed the scope of the direct (as liberally construed under *Bozovich*),[157] other than perhaps for the limited purpose of impeaching the defendant's credibility.

C. Uncertainty regarding the Scope of the Rule 104(d) Impeachment Exception

The impeachment exception to Rule 104(d), while universally accepted, has never been properly defined. The scope of this exception is extremely important, however, as an overbroad exception can undermine even a narrow interpretation of Rule 104(d) cross-examination by permitting questioning far beyond the scope of the preliminary matter on credibility grounds. The Senate report accompanying the FRE's enactment provides some guidance:

> [Rule 104(d)] is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice might result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.[158]

While the Senate report reaffirms the existence of an impeachment exception to Rule 104(d) and lays out the reasons for its importance, it leaves several questions unanswered. First, does the exception apply only to defendant testimony on a preliminary matter *before a jury* or to testimony on a preliminary matter more generally? While the quoted language clearly suggests

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[157] See text accompanying notes 51–63.

[158] S Rep No 93-1277 at 24 (cited in note 100).

the former, this would seem to be an unduly narrow reading, given that Rule 104(d) usually applies at pretrial hearings outside the presence of a jury. Second, while the Senate report permits extrahearing cross-examination when the defendant himself raises issues outside the scope of the preliminary question on direct, it is silent on whether the prosecution may engage in such cross-examination to impeach the defendant's credibility when the defendant has *not* injected extraneous issues into the hearing. This was the situation in *United States v Roberts*.[159]

Roberts illustrates one approach to the Rule 104(d) impeachment exception in cases in which the defendant is not responsible for introducing new issues into the hearing. Under this approach, the impeachment goes not only to the defendant's credibility, but is also constrained within the underlying substantive scope of the preliminary question at issue. In *Roberts*, the Tenth Circuit held that cross-examination regarding the defendant's mental capacity to run a business while under the influence of methamphetamine was proper on the issue of the voluntariness of his confession.[160] Defendant Lee Roberts was convicted of conspiracy to possess with intent to distribute methamphetamine.[161] Roberts filed a pretrial motion to suppress a confession he had given to a law enforcement agent while he was incarcerated.[162] At the suppression hearing, Roberts testified that, when the agent took his statement, he was under the influence of methamphetamine, which he asserted "gives the user a false sense of security."[163] He further testified that "he was not read his *Miranda* rights; he was handcuffed; and officers held a gun to his head."[164] On cross-examination, the prosecution challenged each of these statements and attempted to impeach Roberts's credibility by demonstrating that he was, in fact, "rational and functioning properly" at the time.[165] To make this showing, the prosecution questioned Roberts about his ability to run a business, direct sales, and collect money while high on methamphetamine.[166] The lower court allowed the questioning, reasoning that "because the hearing measured

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159 14 F3d 502 (10th Cir 1993).
160 Id at 517.
161 Id at 509.
162 Id at 508, 516.
163 *Roberts*, 14 F3d at 516–17.
164 Id at 517.
165 Id.
166 Id.

the sole issue of voluntariness, defendant could not pick and choose what evidence manifested his mental state at the time of his confession."[167]

While the Tenth Circuit acknowledged the protective rules of *Simmons* and 104(d), it emphasized that these protections give way to the ultimate goal of promoting the defendant's obligation to testify truthfully.[168] The court further held that, while the "preliminary question" at the suppression hearing was the voluntariness of Roberts's confession, "defendant's credibility is inextricably tied to that resolution."[169] In support of this point, the court approvingly cited[170] *United States v Williams*,[171] in which the Sixth Circuit held that the prosecution's questioning regarding whether Gregory Williams knew he was carrying drugs was proper given that Williams had previously placed his credibility in issue by denying he had been nervous at the time of his apprehension.[172] Finally, citing *Gomez-Diaz*, the court concluded that, "once [the] defendant takes the stand on this preliminary matter, Rule 104(d) does not permit him to define the question of voluntariness."[173] Thus, the court held that the trial court had not erred in permitting the prosecutor to question Roberts about his awareness and mental capacity to run a business during the time he had maintained he was substantially under the influence of drugs.[174]

In this case, Roberts's direct testimony was within the scope of the preliminary question of voluntariness, thus not triggering the full extrahearing cross-examination that the Senate report reserved for circumstances in which the defendant injects extraneous issues into the hearing on direct. And while the prosecution's cross-examination about Roberts's business might appear to be beyond the scope of the preliminary question or even the scope of the direct, the questioning actually goes directly to the

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167 *Roberts*, 14 F3d at 517.

168 Id ("[T]he Court has persisted in reading the [*Simmons*] rule to promote the defendant's obligation to testify truthfully, at the expense of policies designed to inhibit the violation of constitutional rights.") (quotation marks omitted). This view is in line with *Chambers*, which holds that cross-examination can give way only to legitimate competing interests when the truth-seeking process is not thereby undermined. *Chambers*, 410 US at 295. See also text accompanying notes 64–65.

169 *Roberts*, 14 F3d at 517.

170 See id.

171 754 F2d 672 (6th Cir 1985).

172 Id at 676.

173 *Roberts*, 14 F3d at 517, citing *Gomez-Diaz*, 712 F2d at 951.

174 *Roberts*, 14 F3d at 517.

issue of the voluntariness of his confession. Because Roberts argued that his confession was partially involuntary due to the fact that he was in an impaired state, it was highly relevant that Roberts was able to run a business and make rational business decisions while under the influence of meth, suggesting that he was also capable of giving a voluntary confession under the same conditions. Thus, the prosecution's impeachment of Roberts's credibility did not go beyond the preliminary question of voluntariness.

Whereas in *Roberts* the prosecution's impeachment was relevant both to credibility and to the underlying preliminary question, in other cases impeachment cross-examination may exceed the scope of the preliminary hearing. For example, if on direct Roberts had claimed that he had never owned a motorcycle—even though two of the times he was caught with meth he was riding a motorcycle[175]—the prosecution may have tried to impeach him with extrinsic evidence of his motorcycle use. However, this kind of cross-examination would have been beyond the scope of the preliminary question of the voluntariness of Roberts's confession, and its permissibility under Rule 104(d) is therefore uncertain. While in the *Simmons* context the Court has explicitly said that there is no difference between whether a defendant is impeached as to collateral matters or matters bearing directly on the crimes charged,[176] in the Rule 104(d) context, neither the FRE nor the Court has delimited the scope of the impeachment exception beyond the narrow circumstance addressed in the Senate report. Part III.B argues that Rule 104(d) impeachment cross-examination should be bifurcated: when the defendant injects "other issues" beyond the scope of the preliminary question on direct, he exposes himself to impeachment questioning beyond the scope of the preliminary question on cross; on the other hand, when the defendant does not raise extraneous issues, the prosecution must limit itself to impeachment cross-examination that does not exceed the bounds of the preliminary question. Thus, in the motorcycle example given above, the critical question for defining the scope of permissible impeachment cross-examination would be whether Roberts's statement that he had never owned a motorcycle counted as an extraneous issue. This approach balances Rule 104(d) protection

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175 Id at 508.

176 See *Harris v New York*, 401 US 222, 225 (1971).

for defendants, which can be undermined by broad impeachment, against truth seeking and the need to deter misleading and perjurious testimony.

III. PROPOSED SOLUTIONS TO A PROBLEM OF DISCRETION

This Comment proposes a solution to tackle the three primary factors responsible for disincentivizing criminal defendants from testifying at pretrial hearings: (1) the problem of overly broad cross-examination due to broad interpretations of "preliminary question," (2) the problem of using impeachment to justify cross-examination beyond the scope of the preliminary issue, and (3) the problem of uncertainty. To respond to these concerns, this Comment first argues for drawing a strict outer limit to the scope of cross-examination under Rule 104(d): cross-examination under Rule 104(d) must not exceed what would be permissible under the general provision of Rule 611(b). Second, the impeachment exception to Rule 104(d) should be limited to attacks on the defendant's credibility that are also relevant to the preliminary question at issue in the hearing. And third, this Comment encourages trial judges to make preliminary rulings on the scope of permissible cross-examination before the defendant decides whether or not to testify.

A. Defining the Bounds of Permissible Cross-Examination under Rule 104(d)

As discussed in the preceding sections, the extent of Rule 104(d)'s protection is not at all clear, and courts have diverged in their treatment of preliminary-hearing cross-examination. The Advisory Committee Notes help in linking Rule 104(d) to Rule 611(b), but the nature of this relationship is also ambiguous. For example, does Rule 104(d) merely override the second sentence of Rule 611(b)? Or does it provide a narrower scope than even Rule 611(b)'s general provision? The rule must be read in light of the overarching guiding principle provided by the Advisory Committee Notes: "to encourage participation by the accused in the determination of preliminary matters."[177]

[177] FRE 104, Advisory Committee Note to Subdivision (d).

1. Rule 611(b) as the outer limit to Rule 104(d) cross-examination.

Reading Rule 104(d) in the context of Rule 104 as a whole supports the parsing approach of *Wright*, *Homan*, and *Gomez-Diaz*. Rule 104(a) states that "[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."[178] Using the admissibility of evidence as an example, the language of Rule 104(a) can be interpreted in one of two ways: (1) it could mean that "whether . . . evidence is admissible" is a preliminary question or (2) it could mean that "*any* preliminary question *about whether* . . . evidence is admissible" is a preliminary question, implying that there can be multiple preliminary questions involved in deciding the admissibility of a particular piece of evidence. The latter view finds support in the Advisory Committee Note to Rule 104(a). The note states that the admissibility of evidence will often turn on the existence of a particular factual condition, such as whether an expert is a qualified physician or whether a witness whose former testimony is being offered is unavailable.[179] The existence of the condition is thus a constituent preliminary question within the broader preliminary question of the admissibility of the evidence. For example, if a hearsay statement is offered as a declaration against interest, the judge must first decide whether the statement meets the requirements for such statements under Rule 804(b)(3). In this case, each requirement would be a separate preliminary question—was the witness unavailable as required by Rule 804(a), was the statement against interest, and so on. Thus, the Advisory Committee Note to Rule 104(a) suggests that "preliminary question" should be interpreted more narrowly than simply whether evidence is admissible. This entails intrahearing parsing as discussed in Part II.A.

Rule 104(b) supports this narrow interpretation. The rule states that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."[180] The Advisory Committee Note to Rule 104(b) illustrates how this works and emphasizes the different levels of generality encompassed within the meaning of

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178 FRE 104(a).

179 FRE 104, Advisory Committee Note to Subdivision (a).

180 FRE 104(b).

"preliminary question": "In some situations, the relevancy of an item of evidence, *in the large sense*, depends upon the existence of a *particular* preliminary fact."[181] Whether the fact exists is thus a constituent preliminary question in deciding the broader preliminary question whether the evidence is relevant. For example, "when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it."[182] In this scenario, the fact (whether X heard the statement) is a constituent preliminary question that must be proven before the larger preliminary question (whether X had notice) can be decided. Because Rules 104(a) and 104(b) contemplate multiple levels of generality in which constituent preliminary questions have to be decided before larger ones, they support the deconstructive reading of Rule 104(d) adopted by *Wright*, *Homan*, and *Gomez-Diaz*. Rule 104 is inconsistent, however, with the broad interpretation of the court in *Allen*.

A potential problem with trying to define "preliminary question" more clearly, however, is the fact that the drafters of the FRE may have intentionally left Rule 104(d) open ended.[183] This is reflected in the Advisory Committee Note to Rule 611(b), which lays out the policy reasons for the Committee's preference for "wide-open" cross-examination limited only by trial-judge discretion:

> [T]he wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many court rooms, of continual bickering over the choice of the numerous variations of the "scope of the direct" criterion, and of their application to particular cross-questions. . . . If these efforts, delays and misprisions were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided.[184]

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[181] FRE 104, Advisory Committee Note to Subdivision (b) (emphasis added).

[182] FRE 104, Advisory Committee Note to Subdivision (b).

[183] See FRE 104, Advisory Committee Note to Subdivision (a) ("[T]his subdivision refers to preliminary requirements generally by the broad term 'questions,' without attempt at specification.").

[184] FRE 611, Advisory Committee Note to Subdivision (b).

This efficiency argument for a *Johnson*-like relevancy test,[185] combined with the fact that management of cross-examination is meant to be left to trial judges' discretion,[186] raises the concern that implementing a narrower approach to defining cross-examination might be contrary to the Rules' approach of leaving such matters to the discretion of the trial court.

This argument in favor of "wide-open" cross-examination does not apply to the Rule 104(d) context, however. Critically, the above-quoted language is found in support of Rule 611(b) rather than Rule 104(d). The Advisory Committee acknowledges this important difference when it says that the costs of restrictive cross-examination rules are too steep a price to pay simply for the regulation of the order of evidence. On the other hand, the Committee says the costs might be worth it if substantive rights were at stake. Given that Rule 104(d) aims to protect the substantive rights of criminal defendants at preliminary hearings, which often concern constitutional rights, the efficiency argument advanced in favor of wide-open cross-examination under Rule 611(b) cannot be imported into the Rule 104(d) context.[187] This is particularly true given the undeniable tension between broad trial-court discretion and the purpose of Rule 104(d) to "encourage participation by the accused in the determination of preliminary matters,"[188] which is hindered by uncertainty.[189]

The relationship between Rules 104(d) and 611(b) and the Senate Judiciary Committee's impeachment exception suggests limits for 104(d) cross-examination. First, Rule 104(d) is meant to counterbalance the breadth of Rule 611(b). Further, cross-examination under Rule 611(b) is generally governed by the scope-of-the-direct requirement in the first sentence of that rule.[190] Thus, Rule 104(d) cross-examination must not exceed the scope of the direct—unless, that is, cross-examination falls within the narrow impeachment exception described by the Senate Judiciary Committee in its report accompanying the enactment

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185 See notes 42–50 and accompanying text.

186 See FRE 104(a), 611(a); *Bozovich*, 782 F3d at 816. See also text accompanying notes 60–63.

187 This conclusion comports with Maryland Rule of Evidence 5-611(b)(2), which states that "[a]n accused who testifies on a *non-preliminary* matter may be cross-examined on any matter relevant to any issue in the action" (emphasis added), implying that the relevancy test does not apply to testimony on preliminary matters.

188 FRE 104, Advisory Committee Note to Subdivision (d).

189 See text accompanying notes 89–92.

190 See text accompanying note 19.

of the FRE.[191] This outer limit to Rule 104(d) cross-examination recognizes that any interpretation of "preliminary question" as broad as that in *Allen* is contrary to the text and spirit of Rule 104(d).

2. The *Chambers* floor to Rule 104(d) cross-examination—preserving the "integrity of the fact-finding process."

Chambers and *Cheek* recognize that the right to cross-examination must yield to other legitimate interests in the criminal trial process when limiting cross-examination will preserve the "integrity of the fact-finding process."[192] In light of the important substantive rights at stake during preliminary hearings and the overarching policy interest in encouraging defendant participation, Rule 104(d) will often provide a countervailing interest that is sufficient to justify limiting the scope of cross-examination. This is especially true given that defendant participation enhances the truth-seeking process, as the defendant himself is often the person who "above all others may be in a position to meet the prosecution's case."[193] This is because "[c]riminal defendants themselves are often a critical source of information about what happened," and, in cases with no witnesses, "the defendant is often one of the only good sources of information."[194] Thus, defendant testimony "help[s] to reduce both false negatives and false positives."[195]

Nonetheless, the *Chambers* floor remains a meaningful restraint on narrowing preliminary-hearing cross-examination. If carried to its logical extreme, Rule 104(d) could be used to eliminate preliminary-hearing cross-examination altogether.[196] Requiring that the integrity of the fact-finding process be

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191 See S Rep No 93-1277 at 24 (cited in note 100).

192 *Chambers*, 410 US at 295; *Cheek*, 615 F2d at 562–63.

193 *Ferguson v Georgia*, 365 US 570, 582 (1961).

194 Sampsell-Jones, 93 Minn L Rev at 1332 (cited in note 9).

195 Id. False positives occur when an innocent person is found guilty and false negatives when a guilty person is set free. Id at 1330.

196 See Sampsell-Jones, 93 Minn L Rev at 1328 (cited in note 9):

> In the interest of eliminating the cost [to defendant testimony], we could reform evidence law to prohibit prosecutorial cross-examination of criminal defendants. But such a reform would be senseless. Even if it would promote "neutrality" by unburdening the right to testify, it would be anomalous in evidence law, and it would impede the truth-seeking function of trial.

See also text accompanying notes 22–25, 64–77 (discussing the value of cross-examination as a truth-seeking tool).

preserved keeps the final judgment call in the hands of the trial judge. For example, in *Gomez-Diaz*, the court found that cross-examination must be broad enough to cover the entire issue of consent to the x-ray, not merely the yes-or-no question whether the defendant signed a waiver.[197] By trying to limit the scope of cross merely to whether he had signed a waiver when the rest of his behavior clearly indicated consent, Gomez-Diaz was attempting to skew his testimony in a manner not conducive to the truth-seeking process. Even though the prosecution was able to introduce the evidence by other means and so was not unduly disadvantaged in this case, the trial judge—and the Fifth Circuit when affirming—held that Rule 104(d) should not permit this kind of strategic manipulation. Thus, the court retained some flexibility for trial judges in defining the scope of cross by refusing to require that a defendant's testimony on a preliminary matter be limited to "one single phase of an issue."[198] This view is supported by the Advisory Committee's citation of *Walder*,[199] which held that a defendant cannot use the government's inability to cross-examine him as "a shield against contradiction of his untruths,"[200] and is the same concern that motivates the impeachment exception to Rule 104(d). *Chambers* and *Cheek* thus set an inner limit to Rule 104(d): cross-examination may be limited when important substantive rights are at stake as long as the truth-seeking function of the trial process is not thereby undermined. This permits trial judges to engage in intrahearing parsing while also preserving the flexibility to safeguard against attempts that so narrowly define the preliminary question as to make cross-examination meaningless.

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Constrained within the limits represented by *Chambers* and *Allen*, trial judges would retain significant discretion in deciding the scope of cross-examination, allowing anything as narrow as

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197 *Gomez-Diaz*, 712 F2d at 951–52. See also text accompanying notes 132–36.

198 *Gomez-Diaz*, 712 F2d at 951. The Second Circuit similarly allowed broader cross-examination in *United States v Jaswal*, 47 F3d 539 (2d Cir 1995) (per curiam), in which a defendant's direct examination went far beyond his original claim that he had not been properly advised of his *Miranda* rights and essentially accused the agents of fabricating his confession and procuring his signature by false promises. Id at 543. In this context, the court concluded that it was proper for the government to cross-examine the defendant to rebut his contentions. Id at 543.

199 See FRE 104, Advisory Committee Note to Subdivision (d).

200 *Walder*, 347 US at 65.

treating each individual legal issue as a preliminary question (for example, whether a witness is unavailable for the purpose of a Rule 804 hearsay exception) and anything as broad as a particular claim (for example, whether a hearsay statement is admissible under an exception). Judges would also play a key role in accounting for other factors, such as whether broader cross-examination should be allowed for purposes of impeachment, whether a defendant seems to be trying to artificially define "preliminary question" so narrowly as to manipulate the evidence and undermine the truth-seeking process, and the extent to which the prosecution will be harmed by limited cross-examination. The range provided by *Chambers* and *Allen* thus simply acts to guide trial-court discretion, harmonize Rule 104(d) interpretation with the text and purpose of the rule, and eliminate some disincentive for defendants to testify.

B. Constraining the Scope of the Impeachment Exception

Given the sometimes-conflicting interests of protecting defendants and safeguarding the truth-seeking function of cross-examination, an interpretation of Rule 104(d) would be incomplete without considering the scope of its impeachment exception. Failing to recognize an impeachment exception would underdeter defendants from lying on the stand, whereas overly broad impeachment would undermine a narrow reading of "preliminary question," making the outer limits described in Part III.A ineffectual. This Comment thus proposes a middle-ground approach to the Rule 104(d) impeachment exception: when the prosecution seeks to impeach a defendant's credibility and the defendant has not injected issues beyond the scope of the preliminary question on direct, impeachment cross-examination also must not exceed the scope of the preliminary question. It is important to recall that the text of Rule 104(d) itself says nothing about impeachment; rather, the exception has been read in over time due to the background principle that a defendant should not be shielded against contradiction of his untruths.[201] Despite the innate notion that impeachment preserves an element of fairness in criminal trials, there is a competing background principle that dictates that impeachment be limited when it conflicts with countervailing policy interests. In the context of a preliminary hearing, encouraging defendant

[201] See id.

participation in the determination of preliminary matters is the policy goal that animates Rule 104(d). It is therefore necessary to read in both background principles to prevent the impeachment exception from swallowing the rule.

Other rules limit impeachment in certain circumstances. For example, Rule 408 prohibits introducing evidence of compromise offers to prove or disprove the validity or amount of a disputed claim. Such evidence may not be offered to impeach a witness by prior inconsistent statement or contradiction.[202] Similarly, Rule 411, which prohibits evidence of liability insurance to prove wrongdoing, also allows only impeachment for bias.[203] In both cases, the FRE limit impeachment in order to promote countervailing policy interests—"the public policy favoring the compromise and settlement of disputes"[204] in the case of Rule 408 and the desire to prevent juries from deciding cases on improper grounds in Rule 411.[205] In such cases, "the trial court must balance the policy . . . with the need for evaluating the credibility of the witnesses."[206]

Sometimes, a court may judge the policy interest so strong as to be reluctant to allow any impeachment at all. For example, in the context of settlement negotiations, the Tenth Circuit has found that "[t]he risks of prejudice and confusion entailed in receiving settlement evidence are such that often . . . the underlying policy of Rule 408 require[s] exclusion even when a permissible purpose can be discerned."[207] This view is reflected in Rule 410, which excludes *all* evidence of criminal plea negotiations, including for impeachment purposes, in order to encourage plea bargaining.[208] Rules 408, 410, and 411 thus reflect the view that, while some impeachment may be necessary to preserve the integrity of the truth-seeking process,[209] impeachment

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202 FRE 408.

203 FRE 411.

204 FRE 408, Advisory Committee Note. See also *Ramada Development Co v Rauch*, 644 F2d 1097, 1106 (5th Cir 1981) ("This rule is designed to encourage settlements by fostering free and full discussion of the issues.").

205 FRE 411, Advisory Committee Note.

206 *Reichenbach v Smith*, 528 F2d 1072, 1075 (5th Cir 1976) (applying Rule 408 to prohibit impeachment cross-examination of the plaintiff about a settlement agreement).

207 *Equal Employment Opportunity Commission v Gear Petroleum, Inc*, 948 F2d 1542, 1545–46 (10th Cir 1991).

208 See FRE 410, Advisory Committee Note. See also *United States v Lawson*, 683 F2d 688, 692–93 (2d Cir 1982) (describing how the legislative history of Rule 410 explicitly precluded use of statements made in plea negotiations for impeachment purposes).

209 See Part III.A.2 (discussing *Chambers*).

can and should be limited when it would otherwise undermine the policy interests that motivate the rule.[210]

Thus, the fact that Rule 104(d) contains an impeachment exception says little about its intended scope. The Senate report accompanying the rule's enactment[211] provides some guidance, but as discussed in Part II.C, the report addresses only the narrow situation in which a defendant injects extraneous issues into the hearing on direct. The report is silent on the scope of permissible cross-examination to impeach a defendant's credibility when the defendant is not responsible for introducing new issues into the hearing.[212] Thus, in the latter context, there is room for a more limited impeachment exception, and an impeachment exception that is restricted to the scope of the preliminary question at issue—that is, when the questioning is relevant both to credibility and the underlying substantive question, as was the case in *Roberts*—is the most faithful to the text and purpose of Rule 104(d). After all, the language of the rule explicitly states that a testifying defendant must "not become subject to cross-examination on other issues in the case." Given the rule's purpose to protect defendants and encourage their full participation at preliminary hearings, a limited impeachment exception is both consistent with case law and faithful to the text and purpose of Rule 104(d). Further, because this limited exception does not disturb the broader exception reserved for cases in which a defendant "gratuitously" raises "other issues . . . beyond the scope of the preliminary matters," the injustice the Senate Judiciary Committee feared is not implicated.[213]

C. Preliminary Rulings as an Extra Procedural Protection

Even after constraining preliminary-hearing cross-examination within the bounds established by *Allen* and *Chambers* and limiting impeachment to the scope of the preliminary question, trial judges will retain significant discretion. Thus,

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[210] Impeachment use of substantively inadmissible evidence can also be completely forbidden. For example, while the exclusionary rule permits impeachment use of evidence and statements obtained in violation of the Fourth Amendment or *Miranda*, use of confessions excluded as involuntary is never allowed. See *Walder*, 347 US at 65; *Harris v New York*, 401 US 222, 225–26 (1971); *Jackson v Denno*, 378 US 368, 385–86 (1964).

[211] S Rep No 93-1277 at 24 (cited in note 100). See also text accompanying note 159.

[212] See text accompanying notes 158–59. For an example of a situation in which the defendant injects extraneous issues into the hearing on direct, see text accompanying notes 175–76.

[213] S Rep No 93-1277 at 24 (cited in note 100). See also text accompanying note 159.

some uncertainty will continue to deter defendant participation. Preliminary rulings could be one response to this lingering uncertainty. Encouraging defendants to request and judges to make good-faith preliminary rulings can mitigate the concern raised in *Simmons* that a defendant who knows his testimony *may* be used against him will sometimes be deterred from testifying at all.

The necessary framework for Rule 104(d) preliminary rulings is already in place. Rule 104(a) requires judges to make preliminary rulings as to preliminary questions like privilege and admissibility, and Rule 104(c) requires judges to conduct a separate hearing if a criminal defendant will testify as a witness and so requests. Further, motions in limine and preliminary rulings are common practice in modern litigation.[214] For example, a Florida district court has said that it "welcomes requests for preliminary rulings," finding that they "help clarify the issues for trial," "allow the parties to prepare knowing what evidence will be presented," and "avoid[ ] resolving disputes later on the jury's time."[215] The Supreme Court itself has sanctioned the practice, noting that, "[a]lthough the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials."[216] The Advisory Committee Notes accompanying the 2000 amendment to Rule 103, which the Court cites directly in support of its proposition, clearly acknowledge the prevalence of such in limine rulings.[217]

Not only are motions in limine common practice, but several courts have already successfully employed them in the Rule 104(d) context. For example, in *Gomez-Diaz* and *Allen*, the judges told the parties before the defendants' testimony that they would allow broad cross-examination. The defendants were then able to make informed decisions about whether to testify—

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214 See generally Randy Wilson, *From My Side of the Bench: Motions in Limine*, 59 Advocate 74 (Summer 2012) (describing young lawyers' kitchen-sink approach to motions in limine). See also generally David Paul Horowitz, *In the Beginning . . . Motions* in Limine, 77 NY St Bar J 16 (May 2005) (discussing the strategic advantages of motions in limine over traditional objections).

215 *Petty v Black*, 2014 WL 11511673, *1 (ND Fla), citing FRE 104(a) and *Luce v United States*, 469 US 38, 41 n 4 (1984).

216 *Luce*, 469 US at 41 n 4, citing FRE 103(c).

217 See FRE 103, Advisory Committee Note to 2000 Amendment ("The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called '*in limine*' rulings.").

in both cases, they decided not to.[218] As these cases demonstrate, preliminary rulings do not resolve the *Allen* problem or the disincentive effect of an unfavorable ruling. Further, in limine rulings are merely "preliminary" and "advisory in nature"[219] and as such are not binding on the trial judge. Nonetheless, as long as preliminary rulings are made in good faith and observed to the extent possible, as required by the Court in *Johnson*, they can mitigate the effect of uncertainty and reduce the likelihood of the unfair outcome of a defendant being surprised after he has already testified.

CONCLUSION

Rule 104(d) has the potential to provide a valuable procedural protection for defendants seeking to assert important substantive, and often constitutional, rights. However, the FRE do not define the scope of the rule, and some courts have interpreted it in such a way as to minimize its protective force and thus discourage defendants from testifying. This is a result contrary to the stated purpose of the rule and its historical development. By examining Rule 104(d) in the context of Rules 104(a), 104(b), and 611(b), and the accompanying Advisory Committee Notes, it is possible to discern a view of "preliminary question" that encompasses different levels of generality, in which constituent preliminary questions must be decided before broader ones. The Rules are therefore consistent with a narrow, intrahearing reading of "preliminary question," as illustrated by the approaches of *Wright*, *Homan*, and *Gomez-Diaz*. On the other hand, the Rules do not support a reading as broad as that in *Allen*, in which "preliminary question" was interpreted so as to allow cross-examination even broader than that permitted under the first sentence of Rule 611(b).

To promote the purpose of the rule to encourage defendants to testify at pretrial hearings, this Comment has proposed that cross-examination at such hearings must never be broader than the scope of the direct. Further, to counteract the possibility of using impeachment as a back door for impermissibly broadening the scope of Rule 104(d) cross-examination, this Comment has suggested that the impeachment exception be limited to credibility impeachment that is substantively relevant to the

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[218] See *Gomez-Diaz*, 712 F2d at 950–51; *Allen*, 2011 WL 1770929 at *4–6.

[219] Horowitz, 77 NY St Bar J at 16 (cited in note 214).

preliminary question at issue. Finally, due to the deterrent effect of uncertainty, the Comment has also argued in favor of increased use of preliminary rulings in order to protect defendants from the disincentivizing—and arguably unfair—effects of uncertainty and surprise. These changes would increase protection for defendants, encourage defendant participation in preliminary hearings, and preserve the structure of the current system of evidence and the role of trial court discretion, while striving to interpret the scope of preliminary-question cross-examination in a way that is faithful to the text and spirit of Rule 104(d) and to the truth-seeking function of the trial process more generally.