
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GUY CHRISTOPHER MANNINO, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A. Whether the rule of completeness as codified in Rule 106 of the Federal Rules of Evidence, which provides that when a party introduces only a portion of a recorded or written statement, the opposing party may require the introduction "of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time," overrides, or "trumps," other evidentiary rules such as the hearsay rule that might make the evidence inadmissible.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Guy Christopher Mannino petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit is attached as Appendix 1. Oral rulings by the district court are attached as Appendix 2 and Appendix 3.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 12, 2017. App. A001-02. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISION INVOLVED

Rule 106 of the Federal Rules of Evidence provides:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

1. The Investigation.

In September, 2014, law enforcement officers were informed that an inmate at the same jail where Petitioner was housed had information about Petitioner. App. A052. Petitioner was awaiting sentencing in another case in which he had pled guilty to bankruptcy fraud and unlawful transfer of an

unregistered firearm. App. A052.

Officers met with the jail informant, and claimed Petitioner had asked him to kill several individuals. App. A052. They included a local Fairbanks attorney, an ATF agent, the bankruptcy trustee in Petitioner's bankruptcy case, a public defender who had previously represented Petitioner in his pending case, and a man named Greg Cox. App. A052. Cox had provided information to the government which, if believed,[1] would have dramatically enhanced the guideline range for the firearms offense in Petitioner's other case. App. A052. The informant provided a paper with diagrams Petitioner had drawn and information about Cox and others. App. A052.

At another meeting a week later, the informant provided the officers with a map drawn by Petitioner and notes the informant had written on the back. App. A052. The notes allegedly reflected what Petitioner had said about agents Petitioner wanted to kill, where the informant could get weapons and explosives, and how the informant might go about killing the agents. App. A052-53.

The officers subsequently arranged to have jail officials place a recording device in the jail law library, where Petitioner and the informant met. App. A053. This produced recordings of two meetings, and jail officials also provided recordings of two jail visits Petitioner had from friends. App. A053.

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[1] The court which sentenced Petitioner in the initial case ultimately found Cox not credible. App. A052.

2. The Charges.

Petitioner was initially charged with one count of soliciting the murder of multiple federal officers. App. A053. A subsequent superseding indictment broke that charge up into multiple counts and added a count for soliciting the murder of Greg Cox. App. A053. The charges ultimately tried were: (1) soliciting the murder of Cox; (2) soliciting the murder of Petitioner's former public defender; (3) soliciting the murder of an ATF agent; (4) soliciting the murder of another ATF agent; and (5) soliciting the murder of an FBI agent. App. A053. Each of the alleged targets had had negative interactions with Petitioner. *See* App. A054.

3. The Jail Informant's Testimony.

The government's main witness was the informant. He testified Petitioner approached him in the jail because he "had a lot of time in there," "knew the ins and outs," and "ha[d] a good head on his shoulders about jail house etiquette." App. A055. The informant talked about getting released to a treatment program and claimed Petitioner started talking to him about killing the alleged targets. *See* App. A055. The informant claimed he went to his lawyer when he concluded it was "pretty serious." App. A055. In return for his subsequent cooperation against Petitioner, he got "a pretty good deal" in a pending state case he had. App. A055.

The informant testified about four sets of handwritten notes from his meetings with Petitioner. App. A055. The notes had what the informant

claimed were diagrams of explosive charges he could use to kill various individuals, along with other suggestions about the killings, information about the individuals, maps, and information about people who could help the informant when he got out. App. A055. The informant admitted much of the handwriting in the notes was his, however, and the only explicit references to killing people were in the informant's handwriting. App. A055-56. While the informant claimed his notes were information Petitioner had provided, there was no corroboration of this. App. A056. The informant's notes also included a list, allegedly made at his lawyer's suggestion, of "possible things that I would want out of this case." App. A056.

Finally, the informant testified about selected clips from the recordings of his two meetings with Petitioner in the law library. App. A056. The recordings were in many instances difficult to hear, as evidenced by (1) the district judge's own acknowledgment; (2) defense counsel's complaints; (3) multiple descriptions of some speech as "indiscernible" on virtually every page of transcripts the government provided; (4) the official court reporter's inability to transcribe the greater part of the recordings, as indicated by repeated entries in the official trial transcripts that "no meaningful transcripts can be made of the recording"; and (5) the informant's multiple corrections of the transcripts the government provided. App. A056. Still, parts of the recordings were introduced and could be heard, and the informant testified about some of what could be heard. App. A056. He claimed Petitioner was giving instructions on where to go after he got out, where to get weapons, how to make explosive charges, and other things he would need to have and know. App. A056-57.

At no point in the recordings did Petitioner definitively say he wanted a murder committed. App. A057. Instead, Petitioner's words were explained by the informant. *See* App. A057. And other statements Petitioner made raised doubt. Those included statements such as the following:

> MANNINO: So why am I gonna fuck that up by me being stupid. You know what I'm saying? And I'll tell you again, you don't have to do a thing.
> CHS: Okay.
> MANNINO: Just get there. You know what I'm saying? Just get there.
> CHS: Yeah.
> MANNINO: And I'm good. Because even if I went to sentencing right now today and Uncle Rick showed up, just gonna throw up a bunch of stuff and say all sorts of nasty stuff and we're gonna say – we're gonna call it bull shit.
> And he's gonna say, "Well I heard it from him, and I heard it from Greg."
> And we're gonna say "Snitch," and then we're gonna say, "Snitch," and then we're gonna put our own people up to prove what they are. Right?

App. A060.

> Well, I am not asking you to do anything, and I think you should take care of your fuckin' shit and take care of you to get out'a here. By involving yourself in something you think that I want, you're just making a mistake.

App. A060.

> I don't want you to do that. I think you're causin' a shit storm. I am telling you straight up, to talk about it and all that stuff will kill ya', but you're not my missile.

App. A060.

There was also testimony from a jail official who testified about one of the jail visit recordings. App. A060. He testified Petitioner had given him a warning several days after the informant had been released. App. A060-61.

> [Petitioner] asked me if I knew where J.T. [the informant] was, and I said no, and he said, well, you know, we talked

about things that could probably get somebody hurt and, you know, there was nothing to it, you know. It was something that, you know, I was trying to work with some people about, but I need to find out where he is, because he could hurt somebody if we don't find out where he is right away.

App. A061. The jail official inferred from this that "if Petitioner did want someone hurt, . . . [h]e wanted that stopped." App. A061.

4. The Other Jail Recordings.

The government also introduced portions of the recordings of the two jail visits which had been recorded, *see supra* p. 3. App. A057. The portions the government highlighted from the first recording – a visit from one Preston Miller – were some brief exchanges which the government asserted showed Petitioner was trying to find Greg Cox. App. A058. But it was Miller who brought that up.

MANNINO: . . . Greg Cox got busted.
And while they were searchin' the house they fuckin' went, "Oh, what's this? This is a machine gun, and this is a hand grenade."
And, he goes, "Listen, uh, I know you want my buddy Chris, and, uh, I'll turn snitch for ya' if you just don't arrest me."
MILLER: Where's he at anyway?
MANNINO: I don't know, I'd love to know. So, um, he – then he went and got Grabber and Grabber's an idiot. And now he's out in Fotech (ph) trying fucking nail Fotech (ph). He did, uh . . .
MILLER: Really?
MANNINO: Yeah. He – ah, he took me – you know, the, uh, Tannerite mixture that you gave me.
MILLER: Uh-huh (affirmative).
MANNINO: I told 'em, well if you put silica sand in it – you know put 6 percent silica sand, you know, it will go off with the .22's. Right.
MILLER: Uh-huh (affirmative).

MANNINO: So, he's marketing it as – as "Arctic Thunder" binary explosives. He's out there doin' it right now.

MILLER: He is?

MANNINO: Yeah.

MILLER: Then where is he?

MANNINO: I don't know. I'd sure like to know. How long you here for?

MILLER: Uh, I'm here til Sunday.

MANNINO: It'd be great to get on the computer and find that shit out. I mean, I'd really like to know where he's at.

App. A058 (emphasis added).

Later conversation during this visit suggested Petitioner's interest was investigating Greg Cox. App. A059. At one point where Petitioner returned to the idea of locating Cox and repeated he'd "really like to know" where he lived, App. A059, Petitioner went on to explain his legal team was conducting an investigation:

MANNINO: . . .

So, ah – and we're gonna fucking talk to people like Scott Paden (ph). Right? He's been his friend for 20 years, and he's gonna tell 'em, "That for 20 years he's been telling me he's a Navy SEAL."

And he told – he went on Michael Duke's radio show and said he was a Navy SEAL.

MILLER: Uh-huh (affirmative).

MANNINO: And they'll make a liar of him.

* * *

MANNINO: Yeah. Well, we got – I guess Mike's picked out a whole bunch of fucking radio shows where he's introduced, "I'm Greg Cox, I'm an ex-Navy SEAL.

MILLER: Uh-huh (affirmative).

MANNINO: So . . .

MILLER: Oh my God. Put that in front of a jury. He's lyin' about that.

MANNINO: Oh, yeah, so . . .

MILLER: And he's gonna fuck anything else he . . .

MANNINO: Well, it's his word against mine. Whether that STEN gun is – a) is a STEN gun; and, b) is a machine gun; and, c) was mine?

Number two, it's his word against my word that whether or not I hired him to kill somebody. They do have

a tape where I denied everything.

App. A059.

The second jail visit recording the government introduced – with one Dan Schoonover – began with Schoonover telling Petitioner he had seen the informant being released. App. A059. The jail official who produced the recording testified he heard references to a possible "wire" on this recording, though he heard them only the second time he listened to it. App. A059. Petitioner agreed he "ma[d]e a comment about being warned about a wire," but also said he "had no idea" the meetings were being recorded. App. A059-60. The government argued these comments about a "wire" showed Petitioner suspected he was being recorded, in an effort to explain the statements described *supra* pp. 6-7 that raised doubt about Petitioner's intent. App. A060.

5. The Defense Case.

The defense presented testimony from Petitioner and two other witnesses. The first witness was another jail inmate. This inmate described the informant as "a self-appointed shot-caller" who was "always riding [Petitioner's] bumper." App. A061. He also opined the informant was not truthful, noting he had "been burned by that kid so many times, it's not even funny." App. A061. He described Petitioner as a "good guy," non-violent, and someone he had never known to lie. App. A061.

The second witness called by the defense was the case agent. He had gone to a location on a map Petitioner drew where there was supposed to be a

conex containing guns, body armor, and "all the stuff [the informant] needed," and found there was no conex there, though he claimed "[y]ou could see where it had been." App. A061.

Finally, Petitioner testified. App. A061. He denied soliciting any murders. App. A061. He had met the informant in jail, thought he seemed "like he was in charge," and concluded "it would be best to be on his good side." App. A062. Petitioner had caught the informant on two occasions going through his discovery, which had some of the agents' names in it. App. A062. Petitioner admitted he had written and drawn in the notes the informant produced, but testified he did this in response to questions and requests by the informant. App. A062. Petitioner played along with the informant when the informant talked about getting released and then absconding and killing people, including an officer who had arrested the informant. App. A062. Petitioner provided the informant with false information and directed him to people who could keep track of him in case he really did try to do the things he was talking about. App. A062. Petitioner also told the informant multiple times he did not need to do anything for Petitioner. App. A062. When the informant was released, Petitioner tried to warn jail officials the informant might be dangerous. App. A062.

6. <u>The Limits on the Defense Case.</u>

Prior to trial, the government made a motion to preclude the defense from introducing other portions of the jail recordings. *See* App. A014-21. It argued the statements made in the recordings would be hearsay if offered by

the defense and were not admissible even if they were made contemporaneously with the portions offered by the government. *See* App. A016. Among the supporting cases the government cited was *United States v. Ortega*, 203 F.3d 675 (9th Cir. 2000), *see* App. A016, in which a Ninth Circuit panel reaffirmed prior Ninth Circuit case law holding the "rule of completeness" in Rule 106 of the Federal Rules of Evidence cannot be used to make otherwise inadmissible evidence admissible, *see Ortega*, 203 F.3d at 682 (citing *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996)).

The defense objected in a trial brief that "in a fair trial, the jury would listen to all of the recordings and decide for themselves whether [Petitioner] actually solicited [the informant]." App. A026 (emphasis in original). The defense also argued in a separate motion that only the recordings, and not government transcripts of the recordings, should be provided to the jury because of the poor quality of the recordings. *See* App. A031-32. The government opposed this motion, first, because the recordings "are not totally inaudible as the defense suggests," and, second, the court would be instructing the jury that the actual evidence was the recordings rather than the transcripts. App. A035.

The district court agreed with the government. On the government's motion to preclude the defense from introducing other portions of the recordings, the court noted that it "[l]ooks like the law is pretty clear" and granted the motion at a pretrial conference. App. A005-06. Several days later, it ruled the transcripts could be used, after reviewing both the transcripts and the portions of the recordings they transcribed. *See* App. A013.

The government then used the recordings and transcripts as described

above. It was not satisfied with just that, however. In response to Petitioner's testimony he had said things that were not reflected in the recordings the government had played, the prosecutor suggested Petitioner could have offered other portions of the recordings, despite the government's successful pretrial motion precluding this. The prosecutor asserted in a leading question that "if there was something that you thought we didn't play, you could have played it for us; right?" App. A039. Petitioner, not being a lawyer educated in Ninth Circuit case law about the rules of evidence, responded: "That's probably true. I – I didn't – that's really the PI's job." App. A039.

7. The Verdict and Appeal.

Petitioner was convicted of three of the five counts charged and sentenced to 17 years in prison. App. A051, A063. He filed an appeal in which he argued (1) there was insufficient evidence to support the convictions in light of the high standard for a solicitation conviction; (2) the district court had committed plain error by failing to instruct on the renunciation defense provided for in the solicitation statute; and (3) the prosecutor had engaged in various forms of misconduct, including the false assertion that Petitioner could have introduced other portions of the recordings after having successfully precluded Petitioner from doing that. *See* App. A040-106. The court of appeals rejected these claims in an unpublished opinion, holding (1) there was sufficient evidence to support the convictions; (2) there was no error in failing to instruct on the renunciation defense; and (3) any prosecutorial misconduct was harmless given what the court saw as "overwhelming evidence of

[Petitioner's] guilt." App. A002.

V.

REASONS FOR GRANTING THE WRIT

Rule 106 of the Federal Rules of Evidence codifies, at least in part, the common-law "rule of completeness." Fed. R. Evid. 106 advisory committee's note. The rule provides that when a party introduces only a portion of a recorded or written statement, the opposing party may require the introduction "of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." Fed. R. Evid. 106.

This petition presents a question about Rule 106 on which the circuit courts are badly divided, namely, whether the rule incorporates what commentators have labeled the "trumping" function of the common-law rule, *see, e.g.*, 21A Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* 387 (2d ed. 2005); Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 Tex. L. Rev. 51, 55 (1996) – that the rule overrides other evidentiary rules, such as the hearsay rule, which might otherwise make the evidence inadmissible. Some circuits – including the Ninth Circuit, in which Petitioner's case was prosecuted – hold that Rule 106 does not incorporate this aspect of the common-law rule. Other circuits hold that Rule 106 does incorporate this aspect of the rule.

This petition gives the Court an opportunity to resolve the disagreement in the circuits. It also presents the issue in one of its most common and

important forms – namely, the selective introduction by the government of statements made by a criminal defendant. In addition, it illustrates a particularly egregious abuse of the advantage given the government – in the form of the prosecutor's affirmative, and false, suggestion that Petitioner could have introduced helpful statements if they existed.

A. THE COURT SHOULD GRANT THE PETITION BECAUSE OF THE CONFLICT IN THE CIRCUITS OVER WHETHER RULE 106 INCORPORATES THE TRUMPING FUNCTION OF THE COMMON-LAW RULE OF COMPLETENESS.

The first reason to grant the petition is that there is a long-standing conflict in the circuit courts that needs to be resolved. As Professor Graham has observed, "the issue still has not been put to rest and requires further elucidation." 21A Wright and Graham, *supra* p. 13, at 519.

On one side of the split are the Ninth Circuit and several other circuits. Those courts take the position that "Rule 106 'does not compel admission of otherwise inadmissible hearsay evidence.'" *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (quoting *Phoenix Associates III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995), and *United States Football League v. National Football League*, 842 F.2d 1335, 1375-76 (2d Cir. 1988)). As this position was justified early on by the Sixth Circuit in *United States v. Costner*, 684 F.2d 370 (6th Cir. 1982):

> Rule 106 is intended to eliminate the misleading impression created by taking a statement out of context. The rule covers an order of proof problem; it is not designed to make

something admissible that should be excluded.

Id. at 373. *Accord United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("Moreover, even if, as [the defendant] claims, Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible under the hearsay rules."); *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible.").

Other circuits disagree with these circuits, however, in some instances expressly. *See United States v. Lopez-Medina*, 596 F.3d 716, 735-36 (10th Cir. 2010) (stating that "[e]ven if the [statement] would be subject to a hearsay objection, that does not block its use when it is needed to provide context for a statement already admitted," while acknowledging contrary Second Circuit authority); *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) (acknowledging contrary Ninth Circuit view, but "adher[ing] to our own precedent" which "unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence"); *United States v. Range*, 94 F.3d 614, 621 (11th Cir. 1996) ("Under the Rule 106 fairness standard, the exculpatory portion of the defendant's statement should have been admitted if it was relevant to an issue in the case and necessary to clarify or explain the portion received."); *United States v. Sutton*, 801 F.2d 1346, 1368-69 (D.C. Cir. 1986). The view of these circuits, as expressed by then Judge, now Justice, Breyer in the early First Circuit case of *Irons v. Federal Bureau of Investigation*, 880 F.2d 1446 (1st Cir. 1989) (en banc), is that:

[T]he "rule of completeness" provides for "the right of the

> opponent, against whom the utterance is offered, to put the remainder in evidence on cross-examination or as part of his case . . . subject to the general principles of relevancy, 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 106[2] at 106-17 (1988), even though the remainder would not by itself have been admissible. *See* 7 J. Wigmore, Evidence §§ 2094-125 (Chadbourn rev. 1978) (formulating rule of completeness); (additional citations omitted).

Irons, 880 F.2d at 1453. As recognized in *Sutton*:

> Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.

Id., 801 F.2d at 1368.

Still other circuits have taken a middle ground or have left the question open. The Fifth Circuit has stated simply that "it remains unsettled whether Rule 106 trumps other evidentiary rules and makes the inadmissible admissible." *United States v. Garcia*, 530 F.3d 348, 354 (5th Cir. 2008). The Seventh Circuit has taken a middle ground; its position, at least in one of its opinions, is that admitting otherwise inadmissible portions of the statement is one of two alternatives.

> If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106, the view taken in 21 Wright & Graham, Federal Practice and Procedure § 5072, at p. 344 (1977), or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too. The party against whom that evidence is offered can hardly care which route is taken, provided he honestly wanted the otherwise inadmissible evidence admitted only for the purpose of pulling the sting from evidence his opponent wanted to use against him. Rule 106 was not intended to override every privilege and other exclusionary rule of evidence in the legal armamentarium, so there must be cases where if an excerpt is misleading the only cure is to

> exclude it rather than to put in other excerpts.

United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986). *But see United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) (stating that "a party cannot use the doctrine of completeness to circumvent Rule 803's exclusion of hearsay testimony").

It is time for this Court to settle the long-standing disagreement, and this case will allow the Court to do that.

B. THE COURT SHOULD GRANT THE PETITION BECAUSE THE ISSUE IS AN IMPORTANT ONE THAT ARISES FREQUENTLY AND CAN SIGNIFICANTLY AFFECT A DEFENDANT'S ABILITY TO ASSERT HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

As noted by Professor Saltzburg, the question of whether to admit otherwise inadmissible hearsay under Rule 106 arises most often when the prosecution in a criminal case introduces a portion of a defendant's statement. 1 Steven A. Saltzburg et al., *Federal Rules of Evidence Manual* 106-5 (11th ed. 2015). As Professor Saltzburg goes on to explain:

> That portion is admissible in the government's favor as a statement of a party-opponent. Often, however, the defendant's confession is not self-inculpatory in all respects. Defendants when confessing routinely attempt to exculpate or explain their conduct in whole or in part, while admitting to taking some part in a crime.

Id.

There is much more than a mere evidentiary rule at stake in this circumstance. As Judge Fisher explained in dissent in a recent Ninth Circuit

case:

> The trumping function served by the rule of completeness is all the more important where, as here, a criminal defendant's constitutional right against self-incrimination is involved. As numerous courts have recognized, a criminal defendant should not be forced to choose between leaving the government's distorted presentation unanswered and surrendering the Fifth Amendment right not to testify. *See Sutton*, 801 F.2d at 1370 ("Since this was a criminal case [the defendant] had a constitutional right not to testify, and it was thus necessary for [the defendant] to rebut the government's inference with the excluded portions of these recordings."); *United States v. Marin*, 669 F.2d 73, 85 n.6 (2d Cir. 1982) ("[W]hen the government offers in evidence a defendant's confession and in confessing the defendant has also made exculpatory statements that the government seeks to omit, the defendant's Fifth Amendment rights may be implicated."); *United States v. Walker*, 652 F.2d 708, 713-14 (7th Cir. 1981) (observing "the Government's incomplete presentation may have painted a distorted picture of [the criminal defendant's] prior testimony which he was powerless to remedy without taking the stand" and acknowledging that "[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession . . . is a denial of his right against self-incrimination" (alterations in original) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 106[01] (1979)) (internal quotation marks omitted)); *cf. Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) ("[O]ne constitutional right should [not] have to be surrendered in order to assert another."). (Footnote omitted.)

United States v. Quinones-Chavez, 641 Fed. Appx. 722, 731 (9th Cir. 2016) (unpublished) (Fisher, J., concurring in part and dissenting in part and concurring in the judgment).

Professor Saltzburg has expressed similar concerns:

> It is critical that defendants be allowed some leeway to place these confessions in context, and Rules 106 and 611(a), when properly read, provide the necessary flexibility. It should also be noted that the more expansive . . . view of Rule 106 helps to prevent the prosecution from admitting portions of a confession as a way to put pressure

> on the defendant to take the stand. If the completing portions of the statement are not admitted, defendants may have no choice but to take the stand and explain that the prosecution took their prior statements out of context.

1 Saltzburg et al., *supra* p. 17, at 106-9.

It is true there is a competing concern, expressed in other opinions, that a defendant will be "able to place his exculpatory statements 'before the jury without subjecting [himself] to cross-examination, precisely what the hearsay rule forbids.'" *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000) (quoting *United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988)). But this is not a reason to deny review. Rather, it is another divergence of views which this Court should resolve.

C. THE COURT SHOULD GRANT THE PETITION BECAUSE THIS CASE IS A GOOD VEHICLE FOR DECIDING THE QUESTION.

A third reason to grant the petition is that the present case is a good vehicle for deciding the question. To begin, it presents the issue in what is probably the most common situation in which it arises. That is statements made by a criminal defendant which the prosecutor introduces in a selective way that the defense claims is misleading. *See* 1 Saltzburg et al., *supra* p. 17, at 106-5. As expressed in the defense trial brief in the present case:

> Of course the Government seeks suppression of these recordings, but in a fair trial, the jury would listen to <u>all</u> of the recordings and decide for themselves whether [Petitioner] actually solicited [the informant].

App. A026 (emphasis in original).

The present case also has an additional circumstance, namely, a

prosecutor aggravating the misleading selectivity. The prosecutor in the present case did not just leave the jury to *assume* there was nothing exculpatory the defense could have introduced. He affirmatively suggested this in his cross-examination, by asserting in a leading question, "If there was something that you thought we did not play, you could have played it for us; right?" App. A039. And Petitioner, not being a lawyer trained in the rules of evidence as interpreted by the Ninth Circuit, responded: "That's probably true. I – I did not – that is really the PI's job." App. A039.

The present case thus presents both the most common circumstance, and a particularly aggravated abuse by the prosecutor.[2]

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[2] In its unpublished opinion, the court of appeals opined, as noted *supra* pp. 12-13, that various instances of prosecutorial misconduct to which Petitioner pointed, of which this was one, were rendered harmless by "overwhelming evidence." App. A002. The evidence was not overwhelming, however. The only evidence the government had was (1) an unsavory informant who had reason to give the government something it wanted and (2) transcripts, notes, and diagrams that depended to a large extent on the unsavory informant's explanation. While there were recordings of some conversations, the recordings were incomplete, selectively used by the government under the Ninth Circuit's interpretation of Rule 106, and difficult to hear.

Further, there was both evidence and a legal standard which raised doubt. The evidence which raised doubt included (1) the warning Petitioner gave to the jail sergeant after the informant was released, *see supra* pp. 6-7; (2) the government's inability to corroborate the one thing it did try to corroborate, when an agent followed Petitioner's map and did not find the conex that was supposed to be there, *see supra* pp. 9-10; and (3) Petitioner's statements on the recordings that "you don't have to do a thing," "I am not asking you to do anything," and "you're not my missile," *supra* p. 6. *See also* App. A095-99 (opening brief discussion of closeness of case). On top of this, the government had an unusually high legal standard to meet, for the solicitation statute under which Petitioner was prosecuted requires proof of not

D. THE COURT SHOULD GRANT THE PETITION BECAUSE THE VIEW TAKEN BY THE LOWER COURT HERE THAT RULE 106 DOES NOT INCORPORATE THE COMMON-LAW'S TRUMPING FUNCTION IS THE UNSOUND VIEW.

The final reason to grant the petition is that the view that Rule 106 does not incorporate the common-law rule's trumping function is the unsound view. Initially, the commentators have become nearly unanimous on this point. While Judge Weinstein's respected treatise initially supported the view that Rule 106 did not incorporate the trumping function, it has since become neutral. 21A Wright and Graham, *supra* p. 13, at 525 & n.38. *See* 1 *Weinstein's Federal Evidence* § 106.03[1] (2d ed. 2017 update) (present edition simply noting split in circuits). *See also* Nance, *supra* p. 13, at 64-65 n.48 (quoting 1996 edition of *Weinstein's Evidence* asserting that Rule 106 merely "regulates a detail of the order of proof"). And virtually every other commentator of note strongly criticizes the opinions holding Rule 106 does not incorporate the trumping function. Professor Nance, who has written multiple law review articles on the rule, opines that "the better interpretation, the one favored by the most explicit and well-considered judicial opinions, is that the completing portion is admissible contemporaneously if it satisfies the 'fairness' standard stated in the rule, notwithstanding at least some otherwise applicable exclusionary rules." Nance, *supra* p. 13, at 74. Professors Mueller and Kirkpatrick describe the opinions holding the common-law rule's

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just intent that another person commit the solicited crime, but also "circumstances strongly corroborative of that intent." 18 U.S.C. § 373(a).

trumping function is not incorporated as "unsound decisions." 1 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* 291 (4th ed. 2013). Professor Saltzburg opines similarly, stating that "[w]e believe that these rulings are misguided and contrary to the completeness principle embodied in Rule 106." 1 Saltzburg et al., *supra* p. 17, at 106-6. Finally, Professor Graham has expressed concern that courts recognizing the unfairness simply resort to "questionable doctrines such as the metaphor of 'opening the door' to escape the worst consequences of the view." 21A Wright and Graham, *supra* p. 13, at 531.

One of the earliest cases taking the view that Rule 106 does incorporate the trumping function of the common-law rule – *United States v. Sutton*, 801 F.2d 1346, 1368-69 (D.C. Cir. 1986) – provides a multitude of reasons why that is the better view, as succinctly summarized by Professor Nance. First, Rule 106 appears in Article I of the Rules, which addresses the methods of applying the usual admissibility rules, rather than in connection with Rule 611, which provides for judicial control of the sequence of evidence presentation, and this goes against the idea that Rule 106 is concerned only with the order of proof. Nance, *supra* p. 13, at 69. *See also Sutton*, 801 F.2d at 1368. Second, Rule 106, unlike the rules of exclusion, is not qualified by "except as otherwise provided by these rules" language. Nance, *supra* p. 13, at 69. *See also Sutton*, 801 F.2d at 1368 (citing Fed. R. Evid. 402; Fed. R. Evid. 501; Fed. R. Evid. 602; Fed. R. Evid. 613(b); Fed. R. Evid. 704; Fed. R. Evid. 802; Fed. R. Evid. 806; Fed. R. Evid. 901(b)(10); and Fed. R. Evid. 1002); 21A Wright and Graham, *supra* p. 13, at 520. Third and fourth, legislative intent to vary from a well-established common-law principle generally must be clearly

manifested, Nance, *supra* p. 13, at 69; *cf. Neder v. United States*, 527 U.S. 1, 21 (1999) ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (Quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992), and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).), and prior statutes upon which Rule 106 was modeled have been interpreted as consistent with the common law, Nance, *supra* p. 13, at 69; *see also Sutton*, 801 F.2d at 1368 n.17. Fifth, the Department of Justice made an attempt to amend the rule to include language requiring the remainder to be otherwise admissible but that language was not added. Nance, *supra* p. 13, at 69. *See also Sutton*, 801 F.2d at 1368 n.17; 21A Wright and Graham, *supra* p. 13, at 523. Sixth, limiting the rule to otherwise admissible evidence would be inconsistent with the general mandate that the rules of evidence should be interpreted so as to "secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102, *quoted in* Nance, *supra* p. 13, at 69-70. *See also Sutton*, 801 F.2d at 1368 ("A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court."); 21A Wright and Graham, *supra* p. 13, at 524. Seventh, and finally, good trial judges will find other ways to avoid injustices resulting from the restrictive interpretation of Rule 106 in any event, and "it would be more honest and direct to use Rule 106." Nance, *supra* p. 13, at 70. *See also Sutton*, 801 F.2d at 1369 n.18 (noting concern expressed by Professors Wright and Graham that "[n]o self-respecting judge would permit a party to manipulate the rules of evidence to

put on a case that looked like an advertisement for a bad movie" and "[i]f this cannot be done in a forthright manner under Rule 106, the judge must find some other way to say that justice is done" (quoting 21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5078, at 377 (1st ed. 1977 and 1986 Supp.)).

It also bears noting there is coming to be doubt even in the circuits which have adopted the more restrictive view. One Sixth Circuit panel spoke of following a prior Sixth Circuit opinion that had already adopted the restrictive view with the caveat, "Right or wrong." *United States v. Adams*, 722 F.3d 788, 826 (6th Cir. 2013). The panel added that "should this Court sitting en banc address whether Rule 106 requires that the other evidence be otherwise admissible, it may consider . . . ," and then provided a list that included the same multiple commentators and *Sutton* opinion discussed above in this petition. *Id.* at 826 n.31. And Judge Fisher of the Ninth Circuit, in the lengthy and scholarly dissent quoted in part *supra* p. 18, has criticized his circuit's rejection of the trumping function.

> Wise courts and commentators, however, have concluded the rule of completeness should override, or "trump," the hearsay rule in the specific context. [Citing Wright and Graham, *supra* p. 13; Saltzburg et al., *supra* p. 17; Nance, *supra* p. 13; *Sutton*, 801 F.2d at 1368; *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008); and *United States v. Castro-Cabrera*, 534 F. Supp. 2d 1156, 1160-61 & n.6 (C.D. Cal. 2008).] Indeed, when courts have refused to recognize the common-law rule's trumping function, some judges have come to regret that decision. [Citing *Adams*.]

United States v. Quinones-Chavez, 641 Fed. Appx. at 729-30 (Fisher, J., concurring in part and dissenting in part and concurring in the judgment).

In sum, the circuits which have adopted the view that Rule 106 does not

incorporate the common-law's trumping function are beginning to question themselves, the vast majority of the commentators reject that view, and there is a persuasive and in-depth discussion of the issue in the D.C. Circuit's *Sutton* opinion which reaches the contrary conclusion. This is one more reason to grant the petition in this case.

VI.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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s/ Carlton F. Gunn
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