EXCLUSION OF JUSTICE: THE NEED FOR A CONSISTENT APPLICATION OF WITNESS SEQUESTRATION UNDER FEDERAL RULE OF EVIDENCE 615

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I. INTRODUCTION

Separation of witnesses during a trial has been deemed "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[1] This device of witness sequestration has been codified as Federal Rule of Evidence 615.[2] The Rule currently embodies a practice that dates back to Biblical times.[3] Rule 615 allows parties to request that certain witnesses be sequestered, or excluded, from hearing the testimony of others.[4] The story of Susanna, as told in *The Apocrypha,*[5] demonstrates that sequestration has been used to seek the truth for thousands of years.[6] Susanna was a beautiful and pure woman, which is why two elders frequented her home and fantasized about being with her.[7] One day as Susanna walked in her

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[1] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol. 6, § 1838, 463 (Little Brown and Co. 1976).

[2]Fed. R. Evid. 615, Steven Goode & Olin Guy Wellborn III, *Courtroom Evidence Handbook,* 192 (5th ed., West 2002) [Hereinafter referred to as "the Rule"].

[3] *Govt. of the Virgin Islands v. Edinborough*, 625 F.2d 472, 473 (3d Cir. 1980) (stating that the practice of sequestration dates back to Biblical Times).

[4] Federal Rule of Evidence 615 ("The Rule") states:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person [a criminal defendant has a constitutional right to be in the courtroom], or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause [expert witness], or (4) a person authorized by statute to be present.

Goode & Wellborn III, *supra* n. 2*,* at 192.

[5] The term "apocrypha" was created by the 5th century Biblical scholar St. Jerome and refers to the Biblical books included as part of the Septuagint (Greek version of the Old Testament), but not included in the Hebrew Bible. These books have been variously included and omitted from Bibles over the course of the centuries, and include additions to famous books from the New Testament. One such example is the story of Susanna, which was added to the Book of Daniel. University of Virginia, *What is the Apocrypha?* http://etext.lib.virginia.edu/apocrypha_exp.html (accessed Mar. 23, 2004).

[6] Wigmore, *supra* n. 1, at § 1837, 455.

[7] The elders would watch Susanna, wife of Joacim of Babylon, walk in her garden everyday and lusted after her, but she was devoted to her husband and did not return their affection. John B. Hare,

garden, the elders could not control their lust for her any longer and told her that she must lie down (have intercourse) with them, or they would charge her with committing a sin.[8] Susanna replied she would rather die than go against the word of God, so they accused her of committing adultery.[9]

While most of the community believed the story of the well-respected elders, Daniel[10] supported Susanna and asked that one of the accusers be taken away while he questioned the other. The first witness claimed to have seen Susanna commit her sin under a mastic tree, while the second witness said it occurred under an evergreen oak. This inconsistency in the witnesses' testimony weighed heavily in the elders' decision to find Susanna not guilty of the crime.[11]

This Biblical example concisely demonstrates the policies supporting Rule 615. The exclusion of witnesses is designed to prevent a witness from *tailoring* his testimony based upon the testimony of another. Sequestration may reveal false testimony and other credibility issues by "removing [the] temptations or opportunities for witnesses to deliberately shape their testimony . . . ."[12] Currently, a judge must grant a Rule 615 request unless the request to exclude falls within one of the enumerated exceptions.[13] While the exclusion of certain witnesses from the courtroom is a matter of right for the requesting party, an order prohibiting communication between witnesses outside of the courtroom is not a right; a judge must grant the sequestration order upon request by either party, but if the party also asks the judge to expand the scope of sequestration to include communications outside of the courtroom, the

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Sacred Texts: Book of Susanna, http://www.sacred-texts.com/bib/apo/sus001.htm (accessed Mar. 23, 2004).

[8] *Id.*

[9] *Id.*

[10] Daniel is one of the four great prophets of the New Testament and was known for his amazing wisdom and ability to interpret dreams. He was first the governor of Babylon and then became the chief of governors and ruled over all of the wise men of Babylon. Wikipedia Encyclopedia, *Daniel*, http://en.wikipedia.org/wiki/Daniel (last updated Sept. 5, 2004).
Daniel is a book of the Old Testament, which is divided into two parts: history and prophecy. The Septuagint version contains additional parts, including the story of Susanna. Wikipedia Encyclopedia, *Book of Daniel*, http://en.wikipedia.org/wiki/Book_of_Daniel (last updated Sept. 1, 2004); *see supra* n. 5.

[11] *See generally* Gregory M. Taube, *The Rule of Sequestration in Alabama: A Proposal for Application Beyond the Courtroom*, 47 Ala. L. Rev. 177, 195 (1995).

[12] Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, ch. 6, § 339 (2d ed., West 2004); for a more complete discussion of the policies behind Rule 615 *see infra* pt. II (B).

[13] "The mandatory language of the rule shows that it was intended to change the prior practice under which the trial court had discretion to determine whether a witness should be excluded." *Govt. of the Virgin Islands*, 625 F.2d at 474; *see infra* n. 25 for a list of the enumerated exceptions to witness sequestration under Rule 615.

judge has discretion to deny the expansion of the order.[14]

The scope of how and when Rule 615 applies to conduct outside of the courtroom has been controversial and has resulted in a split among the Federal Circuits.[15] Some courts have applied Rule 615 narrowly, holding that witnesses are to be excluded from the courtroom, but may not be separated outside the courtroom.[16] Other courts have held that the purposes behind the Rule can only be fostered if applied more broadly to include the separation of witnesses outside the courtroom.[17]

This Comment argues that Rule 615 can only be fairly enforced when its scope is extended to all communications between witnesses, both inside and outside the courtroom. Section II discusses the background and history of Rule 615 and the two views splitting the Federal Circuits. Section III emphasizes the need for a consistent application of Rule 615, examines the problem of remedying violations of the Rule at trial, and offers the proper interpretation of the Rule, which is supported by Supreme Court dicta, evidentiary scholars, and state law. Finally, this Comment argues that the broad approach must be uniformly employed to offer protection against the conviction of defendants based on tainted and colluded testimony. This safeguard is necessary because once jurors are exposed to false testimony, it is impossible to expunge it from their minds, which could lead to a defendant being convicted on contaminated evidence.

II. BACKGROUND

A. *The History and Text of Rule 615*

The separation of witnesses in the courtroom has been part of English law since the recording of trials first began.[18] At common law, courts divided over whether a party must always be granted a sequestration order or whether the judge had the discretion to deny the order, but the majority of courts followed the discretionary approach.[19]

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[14] "In sum, the rule demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires. . . . And as we have indicated, if appellants desired a more vigorous sequestration regime, such as an edict that would have banned cohabitation or other contact amongst prisoner-witnesses, they had a duty to ask for it. They failed to do so." *U.S. v. Sepulveda*, 15 F.3d 1161, 1176-77 (1st Cir. 1993).

[15] *U.S. v. Solorio*, 337 F.3d 580, 592 (6th Cir. 2003).

[16] *See infra* n. 57 for a list of the courts that follow the narrow approach to Rule 615.

[17] *See infra* n. 76 for a list of the courts that follow the broad approach to Rule 615.

[18] Wigmore, *supra* n. 1, at § 1838, 461 (quoting Chief Justice Fortescue, De Laudibus Legum Angliae, circa 1460: "And if necessity requires, the witnesses may be separated, until they have testified to whatever they intended, so that what one says shall not instruct or warn another how to testify consistently").

[19] "A difference of judicial opinion exists as to whether sequestration is demandable as of right or is grantable only in the trial court's discretion. . . . A few Courts concede that sequestration is

Once the Rules of Evidence were codified in 1975, the right of a party to demand a separation order was no longer an issue because the order was now mandatory, rather than discretionary; but, the scope of the separation order caused another split among the judiciary.[20]

1. History and Common Law Behind Rule 615

At common law, most courts followed a discretionary[21] approach in the issuing of a sequestration order. However, the courts rarely denied an order to an accused in a criminal case.[22] The discretionary approach to witness separation comes from early English cases where the courts' grant of a sequestration request was viewed as a *mere favor* to the accused because a criminal defendant could not have his own witnesses sworn or called as a matter of right.[23] However, once a sequestration order was granted, common law tended to favor sequestration both inside and outside the courtroom:

> [At common law, the sequestration] process involves three parts: a) preventing prospective witnesses from consulting each other; b) preventing witnesses from hearing [another] testifying witness; and c) preventing [prospective witnesses] from consulting witnesses who have [already testified]. . . . But nothing should sanction any indirect method of conveying to prospective witnesses information of the testimony already given.[24]

2. Text and Scope of the Codified Rule

While the common law left a sequestration order to the judge's discretion, the codified rule states that a court *shall* grant the exclusion of a witness at a party's request, so long as the exclusion order does not violate one of the enumerated exceptions.[25] However, the court may also

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demandable as of right. But the remainder, following the early English doctrine, hold it grantable only in the trial Court's discretion." *Id*. at § 1839, 467-68.

[20] The Federal Rules of Evidence were codified effective July 1, 1975. Goode & Wellborn III, *supra* n. 2, at 1. The codification of Rule 615 made a sequestration order mandatory for a requesting party, so long as the witness to be excluded did not fall in one of the enumerated exceptions. *Id*. at 192; s*ee infra* pt. II(D) and accompanying text for a brief explanation of the current split in circuits.

[21] At common law, the decision of whether to grant a sequestration order was left to the judge's discretion. Wigmore, *supra* n. 1, at § 1839, 467. It was not a matter of right, as it is today under Rule 615. *Id*.

[22] *See State v. Sweet*, 168 P. 1112, 1115 (Kan. 1917) (stating "in a murder trial [the request] if timely made is seldom denied"); *Porter v. State*, 2 Ind. 435, 436 (Ind. 1850) (noting "a favor, it is true, rarely refused").

[23] *See* Wigmore, *supra* n. 1, at § 1839, 468 (quoting from *Vaughn's Trial*, 13 How. St. Tr. 485, 494 (1696): "You cannot insist upon it as your right, but only a favour [sic] that we may grant").

[24] *Id*. at § 1840 (4), 471.

[25] Michael H. Graham, *Handbook of Federal Evidence: Exclusion and Separation of Witnesses* § 615.1 (5th ed., West 2004). The enumerated exceptions to Rule 615 include the following: "(1) a party who is a natural person (a criminal defendant has a constitutional right to be in the courtroom), or (2) an officer or employee of a party which is not a natural person designated as its representative

order witness sequestration, even if a party has not requested it, to ensure that the policies behind the Rule are not frustrated.[26] Generally, a party should request the separation of witnesses before testimony begins.[27] Typically, no further instructions regarding outside communications with other witnesses will be given.[28]

The text of the codified rule indicates a narrow scope because the Rule defines the exclusion of witnesses as applying to the "testimony of other witnesses."[29] Because testimony only takes place in the courtroom, the Rule does not acknowledge communication among witnesses outside of the courtroom where witnesses are not hearing courtroom *testimony*.[30] Therefore, the majority of sequestration orders involve placing the witnesses in a room separate from the courtroom and under the supervision of an officer who controls their departure and their conversations.[31] Whether the separation can continue outside of the proceedings is within the trial court's discretion. Upon a party's request to extend the scope of the separation order, a judge may instruct the witnesses to remain separated and not discuss their testimony outside of the courtroom.[32]

The dilemma of whether the scope of the Rule should be broadened to extend to communications outside the courtroom proceedings is highly debated.[33] Some authorities have concluded that

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or attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case . . . [an expert witness], or (4) a person authorized by statute to be present (the victim of a crime has the right to be present at all court proceedings relating to the offense unless the court determines that the victim's testimony would be materially affected if the victim heard other testimony at trial)." Goode & Wellborn III, *supra* n. 2, at 192-93.

[26] Graham, *supra* n. 25, at § 615.1.

[27] Rule 615 does not specify a time period in which a party should make the request, but several courts have reached a consensus on this issue. Generally, the failure to request witness sequestration before trial testimony starts may cause the judge to deny the request. *See e.g. Blackmon v. Johnson*, 145 F.3d 205, 211 (5th Cir. 1998) (holding that the defendant could not demonstrate sufficient prejudice by the lower court's failure to invoke the Rule because the defendant did not attempt to invoke the Rule until the second day of testimony, after witnesses had already entered the courtroom).

[28] *See infra* nn. 31-32 and accompanying text for an explanation of how a sequestration order is typically carried out.

[29] Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure* Ch. 7, § 6243 (West 2004).

[30] *Id.* Although formal testimony is given at depositions, hearings, and trials, an amendment to Federal Rule of Civil Procedure 30(c) ended the dispute over applying the Rule in the deposition context, by expressly stating Rule 615 does not apply to depositions. When the Advisory Committee amended Rule 30(c) in 1993, it stated in its notes that "[e]xclusion, however, can be ordered under Rule 26(c)(5) when appropriate . . . ." *Advisory Committee's Notes*, 146 F.R.D. 401, 664 (1993).

[31] Wigmore, *supra* n. 1, at § 1840(4).

[32] *See U.S. v. Smith*, 578 F.2d 1227, 1235 (8th Cir. 1978) (holding that the sequestration order was limited to the exclusion of witnesses from the courtroom, but the question of whether or not to instruct segregated witnesses concerning communications with other witnesses after they have testified is within the court's discretion).

[33] *See generally* Wright, *supra* n. 29, at § 6243.

any communications outside of the courtroom proceedings must be prevented because the policies behind the Rule will be frustrated if witnesses can compare and prepare testimony outside of court.[34] On the other hand, some authorities have determined that Rule 615 does not apply to out of court communications between witnesses; these authorities have held, however, that Rule 615 is violated when a witness reads the trial testimony of another witness.[35] In that case, the Rule is violated because the reading of trial testimony of another witness is improper refreshing of the witness's recollection since a witness is not allowed to hear another witness's testimony, whether heard in the courtroom or read from a transcript.[36] Some courts hold that an instruction to prohibit out-of-court communications (or reading of transcripts) is not inherent in the Rule, but these courts will, at times, grant this form of instruction upon the specific request of the parties.[37]

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[34] *See United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978) (holding that "a circumvention of [Rule 615] does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify"); *see infra* pt. II (B) for a list and explanation of the policies behind Rule 615.

[35] *See United States. v. Womack*, 654 F.2d 1034, 1041 (5th Cir. 1981) (declining to hold that no violation of Rule 615 had occurred because "that rule does not require that witnesses be instructed not to discuss the case; rather, it merely requires that witnesses be excluded from the courtroom") (citing *Smith*, 578 F.2d at 1227); *but see Miller v. Universal City Studios*, 650 F.2d 1365, 1373 (5th Cir. 1981) (stating "[t]he opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony").

[36] Refreshing recollection refers to the process by which an attorney uses some item in an effort to trigger a witness's faulty memory. Under Federal Rule of Evidence 612, a party may attempt to refresh a witness's recollection through the use of a writing. The rule applies both prior to and during the testimony. If the effort to refresh is successful, then the witness may testify from his now-revived memory. The procedure for proper refreshing with a writing is as follows:

a) "Counsel should show the writing to the witness and allow him to read it silently. Counsel should not read the writing to the witness in the presence of the jury."

b) "If the witness testifies that he now recalls the matter independently of the writing, he may testify to that independent recollection. . . . If the court believes the witness's memory has not truly been refreshed, it may refuse to allow the witness to testify."

c) "If the witness cannot call the matter after having reviewed the writing, his testimony is forestalled unless counsel can lay the predicate for admitting the contents of the writing under the past recollection recorded exception to the hearsay rule, Rule 803(5), or some other hearsay exception." Goode & Wellborn III, *supra* n. 2, at 184-86.

Rule 612 provides procedural protections to an opponent of a party who attempts to refresh a witness's recollection because the adverse party has the right to inspect the writing, cross-examine the witness about it, and introduce into evidence any portions of the writing related to the witness's testimony. *Id*. If a witness reviews a writing before testifying, the court may order disclosure of the document if "it is necessary in the interests of justice." *Id*. If a witness reads trial transcripts before testifying and does not comply with Rule 612 (by not informing the court of the refreshing), the adverse party is not given a chance to cross-examine the witness about it, nor can the judge determine whether the witness has been able to recall the matter independently of the writing. *Id*.

[37] "While Rule 615 does not explicitly provide for the separation of witnesses [outside the courtroom], courts have inherent authority to take further measures . . . such as ordering them to remain physically apart, not to discuss the case with one another, and not to read a transcript of another witness's trial testimony." Kenneth S. Broun et al., *McCormick on Evidence* § 50 (John W.

In contrast, the courts holding that the instruction is inherent in the Rule reason that the policies behind the Rule will be violated if they follow the narrow approach.[38]

B. *Policies Supporting Rule 615*

The courts that apply the Rule broadly extend the scope of sequestration to further the policies of preventing the collusion of testimony and obtaining truthful testimony. First, witness sequestration prevents one witness from shaping his testimony in light of the testimony of other witnesses.[39] This shaping, or tailoring of testimony, may occur maliciously in that a witness may deliberately change his testimony based upon what another witness says, or it may even occur subconsciously without the witness realizing he has been influenced by another's testimony.[40] The subconscious influencing is common where one of two witnesses called by the same party may be sympathetic to the cause and may subconsciously *mold* his testimony into greater consistency with the other, or may unconsciously have his memory refreshed by what he has heard.[41] For example, two agents who work for the Government may briefly discuss the testimony of one, before the other is about to testify, to ensure they have key dates consistent because "the defense lawyers [may] try to trip [him] up on some dates."[42] Thus, the Government agents would be plotting their testimony to make sure

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Strong ed., 5th ed., West 1999); Wright, *supra* n. 29, at § 6243; s*ee Smith*, 578 F.2d at 1235 (holding that the sequestration order was limited to the exclusion of witnesses from the courtroom, but the question of whether or not to instruct segregated witnesses concerning communications with other witnesses after they have testified is within the court's discretion).

[38] *See Johnston*, 578 F.2d at1355 (holding that "a circumvention of the rule does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify"); s*ee Gregory v. United States*, 369 F.2d 185, 192 (D.D.C. 1966) (stating that "[o]ne of the purposes in segregating witnesses during a trial is to insure, as far as possible, that each gives his individual recollections of the events in the suit, unaffected by the testimony of other witnesses. It is for this reason, too, that witnesses, before being segregated, are advised not to discuss the case with anyone other than counsel from the other side").

[39] *See U.S. v. Rugiero*, 20 F.3d 1387, 1392 (6th Cir. 1994) (stating "[t]he statutory purpose of the rule requiring sequestration of witnesses is to preclude coaching or the influencing of a witness' testimony by another witness"); *Dunlap v. Reading Co.,* 30 F.R.D. 129, 131 (E.D. Pa. 1962) (stating "sequestration will deny to the dishonest witness the advantage of observing the experience of other witnesses as they give their testimony on direct examination and are confronted with contradictions or evasions under cross-examination. At the least, it will make available the raw reactions and the individual recollection of each witness unaided by the stimulation of the evidence of any other witness").

[40] *See Queen City Brewing Co. v. Duncan*, 42 F.R.D. 32, 33 (D. Md. 1966) (stating "[d]efendant's purpose in seeking the [sequestration] order is to secure the independent recollection . . . without that recollection having been influenced, properly or improperly . . . .").

[41] Mueller & Kirkpatrick, *supra* n. 12, at § 339.

[42] *Solorio*, 337 F.3d at 591. This example is similar to what occurred in *Solorio*, where two Government agents admitted to a brief conversation about how the first agent's testimony *was going*, but the circuit court held that the district court had properly remedied the violation, the prosecution did not even know about the violation, and the second agent claimed his testimony was not affected by the conversation. *Id.*

their answers match.

This example of two Government agents discussing testimony also demonstrates the second policy behind Rule 615: sequestration of witnesses aids in detecting credibility problems and fosters the discovery of false testimony.[43] If a witness is permitted to hear the testimony of another witness, he may try to adapt his statements to avoid inconsistencies, avoid the impact of cross-examination, or undercut the testimony of the other witness.[44] If any of this tailoring were to occur, the trier of fact could be prevented from "receiving the unvarnished truth."[45] But, if the witnesses are separated and unable to plan their testimony in light of the other's testimony, it is easier for the cross-examining attorney to reveal inconsistencies in statements and potentially impeach the credibility of a witness.[46] The classic example used to illustrate this policy is the Biblical story of Susanna, whose accusers falsely claimed she committed adultery to get revenge on her because she failed to return their affections. Susanna was found not guilty of adultery after Daniel separated her accusers and exposed inconsistencies in their statements.[47] Thus, due to witness sequestration, Daniel was able to expose the false charges, which prevented Susanna from being convicted of a crime she did not commit.

C. *Remedying Violations of a Sequestration Order at Trial*

When witnesses violate[48] a sequestration order, a trial judge has numerous options at his disposal. These include refusing to allow a witness to testify, declaring a mistrial, allowing the witness to be cross-examined about the violation, and providing the jury with a cautionary instruction to "weigh the witness's credibility in light of the witness's presence in court or [in light of the witness's] discussions with another

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[43] Wright, *supra* n. 29, at § 6242.
[44] *Id.*
[45] *Id.*
[46] *Geders v. U.S.*, 425 U.S. 80, 87 (1976). "The aim of imposing 'the rule on witnesses,' as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid." *Id.*
[47] *See supra* nn. 5-11 and accompanying text for a further discussion of the story of Susanna and Daniel.
[48] Violations can include: a witness remaining in the courtroom despite the issuing of an exclusion order, *U.S. v. Ell*, 718 F.2d 291, 293 (9th Cir. 1983); excluded witnesses disobeying an instruction not to talk to each other, *U.S. v. Eyster*, 948 F.2d 1196, 1210-11 (11th Cir. 1991); a sequestered witness reading the trial transcripts daily, *Miller*, 650 F.2d at 1373. Some courts have held, however, that witnesses who are in contact with one another do not violate the order "unless the aggrieved party makes a showing that the witnesses actually spoke about the case to each other after having been instructed not to." Weinstein, *Weinstein's Federal Evidence*, § 615.07 (1987); s*ee e.g. Sepulveda*, 15 F.3d at 1176 (1st Cir. 1993) (holding that the Government did not violate its sequestration order by housing its witnesses in the same prison cell because there was no evidence that they actually spoke about the case to each other).

witness."[49] The judge may also declare the witness in contempt of court, and the witness may be charged with criminal contempt for willfully violating the separation order.[50]

The majority of judicial opinions decline to use these more drastic remedies of a mistrial or not permitting the witness to testify.[51] Typically, the judge will instruct the jurors to weigh the witness's testimony in light of the violation of the sequestration order, allow counsel to *comment* on the witness's violation as a means of impeaching his credibility, or permit counsel to cross-examine the witness on his violation.[52] The cross-examination approach "simultaneously explores the effect of the violation and reveals its occurrence to the finder of fact."[53] Furthermore, if the witness has already testified before the violation is discovered, the judge may strike the testimony.[54]

If a party raises the violation of a trial court's sequestration order on appeal, the reviewing court will reverse only if the aggrieved party can prove that the lower court abused its discretion by its failure to remedy the violation properly during trial and by showing sufficient prejudice occurred as a result.[55] Mistrials, however, are rarely granted even when the trial court did err because appellate courts deem a mistrial

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[49] Broun et al., *supra* n. 37, at § 50.

[50] *See U.S. v. McMahon*, 104 F.3d 638, 644-45 (4th Cir. 1997) (finding the defendant, who violated a sequestration order during his son's criminal trial, guilty of criminal contempt because "[t]he [d]efendant knew about the sequestration order and understood its scope").

[51] The Supreme Court in *Holder v. United States*, 150 U.S. 91, 92 (1893) stated "[i]f a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." This view is still the prevailing view today. *See U.S. v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (stating "[t]he remedy of exclusion is so severe that it is generally employed only when there has been a showing that a party or a party's counsel caused the violation. . . . Because exclusion of a defense witness impinges upon the right to present a defense, we are quite hesitant to endorse the use of such an extreme remedy") (citations omitted).

[52] "Less draconian sanctions available include allowing opposing counsel to interrogate the witness about the nature and scope of the violation, instructing the jury to consider the nature of the violation in assessing the witness's credibility, and holding the witness in contempt." Goode & Wellborn III, *supra* n. 2, at 194.

[53] Weinstein, *supra* n. 48, at § 615.07.

[54] *U.S. v. Pavon*, 561 F.2d 799, 802 (9th Cir. 1977). If a judge grants a motion to strike, this will involve the removal of the testimony from the record and an instruction to the jurors to disregard the testimony they have heard. *See id.* (instructing the jury "[t]he last witness to testify was Mr. Eugene Tucker, and he stated certain things. I am not going to repeat them. . . . I am advising you now . . . forget that he testified, who he is or what he said, just as though he never appeared in court").

[55] *Rugiero*, 20 F.3d at 1394 (stating "[i]n order to grant a new trial, we must find that the district court not only abused its discretion, but also that the court's error was prejudicial to the defendant's receiving a fair trial"); *see infra* n. 124 and accompanying text for an explanation of error that is prejudicial to the defendant.

a drastic remedy unless the *most egregious* of circumstances has occurred.[56]

D. *Modern Law Divide*

While most courts agree that a judge may consider issuing a sequestration order that applies both inside and outside the courtroom after a party so requests, the courts are split on whether the Rule itself calls for both applications in the absence of a request. For example, some courts hold to the literal text of the Rule, which calls for the exclusion of witnesses "so that they cannot hear the testimony of other witnesses."[57] The word "testimony" indicates the context of a formal legal situation, such as a hearing or trial; thus, many courts reason that communication between witnesses outside of that formal context does not enable them to "hear the testimony" of others.[58] Other courts reason that the policies behind the Rule will be frustrated if a sequestration order does not automatically include an instruction that the witnesses are not to discuss the case outside of the trial.[59] The Supreme Court has not decided the issue,[60] leaving the circuit courts divided:

> A more difficult question is whether the scope of Rule 615 extends beyond the courtroom to permit the court to preclude out-of-court communication between witnesses about the case during trial. The cases are in conflict. Some courts conclude that such out-of-court witness communication must be precluded in order to promote the purposes of Rule 615 . . . other courts conclude that Rule 615 on its face is inapplicable in this context, reasoning that out-of-court communication between witnesses does not permit one witness to "hear the testimony" of another witness.[61]

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[56] *See infra* pt. III (B) for a further discussion of the difficulty in obtaining a reversal ruling.

[57] Fed. R. Evid. 615; *see e.g. U.S. v. Arrunda*, 715 F.2d 671, 684 (1st Cir. 1983); *U.S. v. Arias-Santana*, 964 F.2d 1262, 1266 (1st Cir. 1992); *Sepulveda*, 15 F.3d at 1176; *U.S. v.* , 578 F.2d 1227 (8th Cir. 1978); *U.S. v. Collins*, 340 F.3d 672 (8th Cir. 2003).

[58] Wright, *supra* n. 29, at § 6243.

[59] *Johnston*, 578 F.2d. at 1355. "Moreover a circumvention of the rule does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify." *Id*.

[60] *Solorio*, 337 F.3d at 592 (cert. denied Dec. 1, 2003). In this case, the Sixth Circuit acknowledged the split in Federal Circuits regarding the scope of the application of Rule 615, but declined to issue a holding: "Circuits have split on the question of whether 'the scope of Rule 615 extends beyond the courtroom to permit the court to preclude out-of-court communication between witnesses about the case during trial' . . . we feel no need to decide the delicate issue of whether Rule 615 extends beyond the courtroom." *Id*. at 592-93.

[61] Wright, *supra* n. 29, at § 6243.

1. The Narrow View: The Literal Text Approach

Federal Rule of Evidence 1101[62] defines the courts, proceedings, and issues governed by the Rules of Evidence. The Rules apply in most federal court proceedings, including proceedings before bankruptcy judges and magistrates.[63] Taken literally, Rule 1101 indicates the Federal Rules of Evidence only apply in the courtroom and they do not extend beyond the formal, listed court proceedings.[64] This definition of the scope of Rule 1101 has led some courts to limit Rule 615's application to the sequestration of witnesses to the list supplied in Rule 1101.[65]

For example, in *U.S. v. Sepulveda*,[66] the First Circuit held that the placing of two inmate witnesses in the same jail cell did not violate a sequestration order because Rule 615 only applied to conduct inside the

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[62] Fed. R. Evid. 1101 states:

a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.
(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

> (1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
> (2) Grand jury. Proceedings before grand juries.
> (3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules Applicable in Part (This section was not included in this footnote due to length).

Goode & Wellborn III, *supra* n. 2, at 290.
[63] *Id*. at 291.
[64] "Rule 615 contemplates a smaller reserve; by its terms, courts must 'order witnesses excluded' only from the courtroom proper." *Sepulveda*, 15 F.3d at 1176.
[65] Wright, *supra* n. 29 at, § 6243; the First and Eighth Circuits have construed Rule 615 narrowly, refusing to extend the scope of sequestration beyond the courtroom. *See supra* n. 57 for a list of the cases issuing this holding.
[66] 15 F.3d 1161. The evidence showed that defendant Sepulveda ran a sophisticated cocaine business for almost six years in and around Manchester, New Hampshire. Over time, as his operation became more complex, he employed numerous assistants, buyers, and sellers, many of whom are defendants in this case. Among other issues on appeal, the defendants challenged the Government's housing of three key witnesses (inmates) in the same cell as a violation of the sequestration order under Rule 615. Their conviction was affirmed. *Id*. at 1176, 1202.

courtroom, and there was no evidence that the witnesses had, in fact, discussed the case.[67] The court reasoned that counsel could have asked the trial judge to exercise his discretion and increase the scope of the sequestration order, but since he failed to ask, there was no error.[68] This narrow application of the Rule is consistent with other First Circuit decisions holding that witness sequestration does not automatically extend to conduct outside the courtroom.[69]

Similar to the First Circuit's conclusion, the Eighth Circuit has followed the literal text approach in holding that a sequestration order does not extend outside the courtroom.[70] For example, in *U.S. v. Smith*,[71] the court held that the trial court correctly determined that Rule 615 was not violated when a police officer took notes during the trial and relayed them to witnesses waiting to testify. The appellate court determined that because the Rule does not automatically include an instruction that witnesses refrain from discussing the case, the issuing of such an instruction was "within the sound discretion of the trial court."[72]

More recently, in *U.S. v. Collins*,[73] the Eighth Circuit followed the First Circuit by holding that where inmate witnesses were housed in the

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[67] *Id.* at 1176-77 (holding "[t]he court's basic sequestration order, which ploughed a straight furrow in line with Rule 615 itself, did not extend beyond the courtroom").
[68] *Id.* "In sum, the rule demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires. . . . And as we have indicated, if appellants desired a more vigorous sequestration regime, such as an edict that would have banned cohabitation or other contact amongst prisoner-witnesses, they had a duty to ask for it. They failed to do so." *Id.*
[69] *See e.g. Arrunda*, 715 F.2d at 684 (holding that there was *technically* no violation of sequestration where witnesses conversed outside of the courtroom); *Arias-Santana*, 964 F.2d at 1266 (stating "[i]n addition to ordering their exclusion from the courtroom, the trial court has broad discretion to direct witnesses not to discuss their testimony outside the courtroom").
[70] *See e.g. Smith*, 578 F.2d 1227; *Collins*, 340 F.3d 672.
[71] 578 F.2d 1227 (8th Cir. 1978). The defendants were convicted on one count of conspiracy to distribute heroin. In addition to challenging the trial judge's overruling of their motion to suppress, the defendants argued that certain police officers should not have been permitted to testify due to a violation of Rule 615. Early in the trial, defendants requested a sequestration order and witnesses were excluded from the courtroom. The order did not include a request or provision that the witnesses refrain from watching publicized news on the trial or having discussions with one another about testifying. It was determined at an evidentiary hearing (requested by the defendants away from the jury) that a police officer had taken notes at the trial for an excluded police deputy who was to testify. The court held the officer's actions did not violate the order because the request and order did not include a restriction upon communications between witness, and the deputy could have learned the same information by watching the news. *Id.* at 1228, 1235.
[72] *Id.* at 1235.
[73] 340 F.3d 672. The defendant was convicted of conspiring to distribute and possession with intent to distribute more than 500 grams of methamphetamine, and subsequently challenged the sufficiency of the evidence used to convict him. He also argued that the Government violated the sequestration order when two witnesses were placed in the same holding cell and when one prosecution witness entered the courtroom during the testimony of another sequestered Government witness. The court held that the order was not violated since the inmates had not yet testified and could discuss what their testimony had been. In addition, the court held that the second instance was a violation of Rule 615, but there was no prejudice to the defendant. *Id.* at 676, 680-81.

same cell, Rule 615 did not automatically require the inmates to refrain from discussing their testimony before testifying.[74] The court determined that the inmates could not possibly be discussing their *testimony*, since they had not yet testified in the courtroom.[75]

2. The Broad View: Expanding the Scope of the Rule to Avoid Circumvention of Policy

Many courts have expanded the Rule's scope to automatically prohibit communications between witnesses outside the courtroom, because they have determined that the application of witness sequestration solely to courtroom or formal testimony circumvents the policies underlying the Rule.[76] Under this approach, once a sequestration order is requested and granted, the judge should give clear instructions to the attorneys and witnesses that "[the witnesses] are not allowed to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side."[77]

For example, the Tenth Circuit has repeatedly held that prohibiting communication among excluded witnesses outside the courtroom is inherent within the Rule.[78] In *U.S. v. Johnston*,[79] the court stated that the Rule must be interpreted to extend to communications outside the courtroom because failing to apply the Rule this way allows witnesses to

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[74] *Id.* at 681 (stating that the policies behind the Rule were not frustrated because the two witnesses had not testified, and thus could tailor their testimony to that of prior witnesses).
[75] *Id.*
[76] "While these purposes suggest sequestration under Rule 615 may advance accurate factfinding [sic], the efficacy of the provision should not be overstated. In many cases, witnesses have ample opportunity to compare their stories outside a proceeding in which testimony is given. Rule 615 by its terms only applies in such proceedings. . . . In short, a sequestration order under Rule 615 cannot prevent all witness collusion." Wright, *supra* n. 29, at § 6242; *see e.g. Johnston*, 578 F.2d. 1352; *U.S. v. Prichard*, 781 F.2d 179 (10th Cir. 1986); *U.S. v. Greschner*, 802 F.2d 373 (10th Cir. 1986); *U.S. v Buchanan*, 787 F.2d 477 (10th Cir. 1986); *Gregory*, 369 F.2d 185.
[77] *Buchanan*, 787 F.2d 477, 485. Although there are no other precautions than the instructions by the judge telling the witnesses to refrain from communicating outside of the courtroom, such as a warden of the court making sure the witnesses stay separated outside of the trial at all times, it is assumed that "witnesses, like all other persons subject to court orders, will follow the instructions they receive." *Sepulveda*, 15 F.3d at 1177.
[78] *See e.g. Johnston*, 578 F.2d. 1352; *Prichard*, 781 F.2d 179; *Greschner*, 802 F.2d 373; *Buchanan*, 787 F.2d 477.
[79] 578 F.2d 1352. The defendant was convicted of bank robbery and putting the lives of two bank employees in jeopardy. At trial, the defendant requested witness sequestration, and the judge failed to give an instruction to the witnesses telling them to refrain from communicating outside of the courtroom. Subsequently, two Government witnesses discussed one's testimony immediately before the other was to testify. The defendant moved to have the second witness's testimony excluded and the jury be instructed that they disregard his testimony. The court denied the defendant's motion since the witnesses had not been instructed to refrain from communicating about their testimony. On appeal, Johnston argued that he was prejudiced by the colluded testimony. Although the court held that the trial court erred in failing to instruct the witnesses to refrain from communicating, it held that the defendant was not prejudiced by the error. Thus, the defendant's conviction was affirmed. *Id.* at 1353-56.

"indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify."[80] Furthermore, the broad view ensures that witnesses are unable to mold their testimony to each other's and uses a sequestration order to require a judge to instruct the witnesses not only to be excluded from the courtroom, but also to refrain from discussing their testimony with other witnesses.[81]

Just like the Tenth Circuit, the D.C. Circuit has held Rule 615 to apply to a broad scope.[82] For example, in *Gregory v. United States*,[83] witnesses were separated during the trial, but were not instructed to refrain from discussing the case with each other.[84] As a result of a conversation with another witness outside of the courtroom, a key witness at the end of the trial changed his testimony, which implicated the defendant in the murder he was charged with committing.[85] The court reversed the case both on prejudicial grounds[86] and because the trial judge failed to advise the witnesses not to discuss the case with anyone other than counsel for either side.[87]

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[80] *Id*. at 1355.
[81] *Prichard*, 781 F.2d at 183. "The witnesses should be clearly directed, when the Rule is invoked, that they must all leave the courtroom (with the exceptions the Rule permits), and that they are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side." *Buchanan*, 787 F.2d at 485.
[82] *Gregory*, 369 F.2d 185, *rev'd on other grounds* 410 F.2d 1016 (D.C. Cir. 1969). The defendant was convicted of first degree murder, second
degree murder, two robberies, and one assault with a dangerous weapon. Defendant appealed on several accounts and received a new trial. However, his conviction was affirmed. *Id*.; *see infra* n. 86 for a further explanation of the defendant's arguments on appeal.
[83] 369 F.2d 185, *rev'd on other grounds* 410 F.2d 1016 (D.C. Cir. 1969).
[84] *Id*.
[85] *Id*. at 191-92.
[86] The judge reversed the case because several events occurred during trial that could lead the jury to be prejudice in making its decision of whether to convict the defendant. First, the prosecutor obstructed the defense counsel's right to interview certain witnesses by telling the witnesses not to speak to the attorney unless he, the prosecutor, was present. *Id*. at 188. Second, the defendant's motion for severance should have been granted because the court has joined separate offenses in a capital case, which could lead to prejudice: "The danger arising from the cumulative effect of evidence of other offenses on the minds of the jurors is too great to tolerate in such [capital] cases." *Id*. at 189. Third, a police officer twice gave testimony regarding an offense that was totally unrelated to the crimes for which the defendant was on trial, and the court just ordered the jurors to disregard the testimony. *Id*. Fourth, the judge erred by failing to give an identification instruction to the jurors that "beyond a reasonable doubt it was the defendant on trial who had committed [the crimes]" because there was a division among the eye witnesses as to whether or not the defendant was who they saw commit the crimes. *Id*. at 190. Fifth, it was improper for the court to require the defendant in exercising his Jencks Act rights to follow a procedure that may produce the inference that the prior statements received are consistent with the witness' testimony on trial since prior consistent statements are not admissible in evidence. *Id*. at 191. Finally, the judge erred in failing to instruct the witnesses not to discuss the case with anyone except counsel for either side after they left the courtroom. *Id*. at 192.
[87] *Id*.

While the Fourth, Fifth, and Sixth Circuits have not decided this issue, they have issued several opinions indicating that they prefer the broad approach.[88] For example, in *U.S. v. Milanovich*,[89] the defendants claimed it was error for the trial judge to refuse to further instruct the excluded witnesses to refrain from discussing their testimony, but the Fourth Circuit held it was not error because there was no proof that the defendants had been prejudiced. Nevertheless, the court took the time to "indicate their view" that when a sequestration order is granted, the judge should "take the further step" of instructing the witnesses not to discuss their testimony with each other outside of the courtroom.[90]

Recently, in *U.S. v. McMahon*,[91] the Fourth Circuit reaffirmed its view on Rule 615 where a defendant was charged with criminal contempt for violating a sequestration order.[92] The defendant claimed that because he was only instructed to stay out of the courtroom during his son's trial, he did not realize he would violate the order if he read notes taken by his secretary at the trial.[93] The court rejected his argument and stated that "an instruction that he could not circumvent the sequestration order by reviewing trial transcripts . . . would simply have stated the obvious . . . [t]he Defendant knew about the sequestration order and understood its scope."[94] Thus, the Fourth Circuit held that a witness willfully violated a sequestration order by obtaining communications about the trial, even though the judge failed to instruct him on this issue.

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[88] *See e.g. U.S. v. Milanovich*, 275 F.2d 716 (4th Cir. 1960), *rev'd in part on other grounds* 365 U.S 551 (1961); *McMahon*, 104 F.3d 638; *Womack*, 654 F.2d 1034; *U.S. v. Green*, 293 F.3d 886 (5th Cir. 2002); *Rugiero*, 20 F.3d 1387; *Solorio*, 337 F.3d 580.

[89] 275 F.2d 716 (4th Cir. 1960). Milanovich was convicted of larceny, while his wife was convicted of larceny and receiving stolen property for robbing a store on a naval base. The testimony of their three accomplices was the primary evidence used to convict them. The defendants claimed the court erred in granting a sequestration order without further instructing the witnesses to refrain from communicating with each other outside of the courtroom. The court did acknowledge that the instruction would have been *proper*, but since there was no indication that the witnesses had actually communicated about their testimony, the defendants were not prejudiced. Therefore, their convictions were affirmed. *Id*. at 717-18, 720.

[90] "We wish to indicate our view, however, that ordinarily, when a judge exercises his discretion to exclude witnesses from the courtroom, it would seem proper for him to take the further step of making the exclusion effective to accomplish the desired result of preventing the witnesses from comparing the testimony they are about to give. If witnesses are excluded but not cautioned against communicating during the trial, the benefit of the exclusion may be largely destroyed." *Milanovich*, 275 F.2d at 720.

[91] 104 F.3d 638, 639, 644 (4th Cir. 1997). The defendant was charged with criminal contempt for violating a sequestration order during his son's criminal trial. McMahon was excluded from the courtroom, but sent his secretary to take notes for him of what went on during the trial. McMahon claimed he did not realize this was a violation of the order since he was only instructed to stay out of the courtroom, but the court did not believe him and convicted him of criminal contempt. *Id*. at 639, 644.

[92] *Id*. at 644.

[93] *Id*.

[94] *Id*.

Just like the Fourth Circuit, the Fifth Circuit has not ruled directly on this issue, but has indicated that it favors the broad view. For example, in *U.S. v. Womack*,[95] the Fifth Circuit declined to hold that a violation of Rule 615 occurred where witnesses were not instructed to refrain from discussing the case and did so before testifying. For purposes of the opinion, however, the court *assumed* that the witness violated the Rule.[96] Furthermore, the court stated in a recent decision, *U.S. v. Green*,[97] that the trial court had violated Rule 615 by failing to instruct inmate witnesses not to discuss the case, but found the error did not prejudice the defendant.[98] Thus, although the Fifth Circuit has yet to rule directly on the scope of Rule 615, it has shown support for the broad view.

In addition, the Sixth Circuit has indicated in dicta that it prefers the broad application of Rule 615. For example, in *U.S. v. Solorio*,[99] the court stated that Rule 615 is the codification "of the sequestration powers of judges at common law"[100] and cited precedent where it had favored the broad application of the Rule.[101] In the earlier decision, *U.S. v.*

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[95] 654 F.2d 1034 (5th Cir. 1981). The defendant was convicted of manufacturing explosive materials without a license. On appeal, he argued that the court erred in refusing to grant him a new trial due to an alleged violation of a sequestration order. The court issued a separation order, but did not instruct the witnesses to refrain from communicating with each other. After the trial, two Government witnesses admitted in affidavits that they had discussed the testimony of prior witnesses, possible answers to anticipated questions, their association with the defendant, and the case in general. Although the court assumed the order was violated, it declined to hold that Rule 615 requires a further instruction regarding communications outside the courtroom. Furthermore, the defendant did not prove sufficient prejudice so his conviction was affirmed. *Id*. at 1037, 1040.

[96] *Id.* "We do not decide the issue whether the trial court's failure to instruct the sequestered witnesses not to discuss the case, where the parties did not request that such restrictive conditions be placed on the sequestration order, is a violation of Rule 615. For the purposes of this opinion, we have assumed that the Rule was violated." *Id.* at 1041.

[97] 293 F.3d 886 (5th Cir. 2002). Several defendants were convicted of operating a continuing criminal enterprise (drug trafficking ring). The defendants alleged a violation of Rule 615 and moved for a mistrial because thirty-seven Government witnesses were incarcerated together, but not instructed to refrain from discussing the case and their testimony. The court held that the trial court did not err in refusing to grant a mistrial because the defendants did not show that any prejudice occurred, and it was not even certain that the inmates had discussed the case. *Id*. at 889, 892.

[98] "The court failed to instruct them not to discuss the case, a violation of Federal Rule of Evidence 615." *Id*. at 892.

[99] 337 F.3d 580, 592 (6th Cir. 2003). The defendants were convicted of conspiring to possess cocaine with intent to distribute and raised nine issues of error on appeal, including the court's failure to strike two witnesses' testimony. The defendants wanted the testimony excluded because the court discovered the two witnesses had conversed during a trial recess. Rather than strike the testimony, the court allowed counsel to bring out the violation on cross-examination and instructed the jury to consider the violation in weighing the credibility of the witnesses. The court held that since the trial court had issued a remedy, the defendants were not prejudiced and upheld their convictions. The court did, however, decline to issue a holding on the scope of Rule 615. *Id*. at 584, 592-93.

[100] *Id.* at 592; s*ee supra* n. 23 and accompanying text. "[T]he common law supported sequestration beyond the courtroom." *Sepulveda*, 15 F.3d at 1175-76.

[101] *Solorio,* 337 F.3d at 592. "This court once suggested in dicta that the rule's ambit extends beyond the courtroom." *Id*. (referring to *Rugerio*, 20 F.3d at 1394).

Rugerio,[102] the court stated that once a sequestration order is issued, neither party needs to request that the court instruct the witnesses not to discuss their testimony with each other because "[a]ttorneys know, without such construction, that witnesses who have testified when the sequestration rule is in effect should not discuss the substance of their testimony with a witness who has not yet given testimony."[103] However, the court ultimately held that the defendant was not prejudiced by the pre-testimony discussions between the witnesses.[104] Thus, while the Sixth Circuit declined to issue a holding regarding the scope of Rule 615, it did indicate that the issuing of a sequestration order automatically applies to communications both inside and outside of the courtroom.

III. ANALYSIS

A uniform application of the broad approach to witness sequestration is needed to ensure that parties are provided with the protections of Rule 615 to the fullest extent.[105] Furthermore, the protections offered by the broad approach to witness separation could help avoid the problems associated with remedying a sequestration order violation at trial.[106] In addition, the Supreme Court, evidentiary scholars, and state courts and legislatures have adopted or shown support for the broad application of the Rule.[107] Therefore, the proper solution to the split in authority is a uniform application of the broad reading of Rule 615, which extends witness sequestration to prohibit communications among witnesses outside of the courtroom.

A. *Uniform Application of the Broad Approach Will Provide Parties with the Protections of Rule 615 to the Fullest Extent*

Courts need to adopt a consistent approach for excluding witnesses under Rule 615 because the Rule has left "some apparent gaps in coverage" by failing to address the exclusion of witnesses in contexts

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[102] 20 F.3d at 1389. The defendants were convicted of conspiring to possess cocaine with intent to distribute. Among other issues, the defendant raised an argument that a Government witness violated the sequestration order because he sat in the courtroom for forty-five minutes during a key witness's testimony, and the Government had arranged a meeting among some of the witnesses. Although the court determined that "[t]he government's arranging of a meeting between a prospective witness and a witness who was in the process of cross-examination risked a violation of the spirit, if not the letter, of the exclusion of the witness rule," it affirmed the defendants' convictions. The court reasoned that there was no evidence that one witness had relayed what his testimony had been to the prospective witness, so the defendant was not prejudiced. *Id*. at 1389, 1394.

[103] *Id.* at 1394.

[104] *Id*.

[105] *See infra* pt. III (A) for a discussion of the policies underlying Rule 615.

[106] *See Id.*

[107] *See infra* pt. III (C) for a discussion of the Supreme Court dicta, evidentiary scholars, and states that have shown support for the broad application of the Rule.

other than the taking of testimony: "While FRE 615 does not mention instructions to the witness being excluded, an order removing him from court during testimony by others is largely ineffective unless he is also somehow sequestered (separated from other witnesses outside the courtroom)."[108] The broad approach, as employed by the Tenth Circuit and D.C. Circuit, should be uniformly adopted because if witnesses are not consistently instructed to separate themselves from one another both inside and outside the courtroom, then the purpose of the Rule will be indirectly defeated.[109]

First, witnesses are sequestered to prevent one witness from shaping his testimony in light of the testimony of other witnesses.[110] Further instruction that warns witnesses not to discuss their testimony with each other should uniformly be given to support the need for independent testimony.[111] As a result of the circumventions that occur under the narrow approach (without the further instruction), most circuit courts have indicated that judges "should direct the witnesses not to discuss the case with each other."[112] Moreover, some of the courts that have not yet directly addressed the scope of Rule 615 have recognized the common sense demonstrated by extending instructions to prohibiting communications outside the courtroom so that the policy behind the sequestration rule is not thwarted.[113]

Second, sequestration of witnesses aids in detecting credibility problems and fosters the discovery of false testimony.[114] The broad application of the Rule ensures that courts are extending this policy to its

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[108] Mueller & Kirkpatrick, *supra* n. 12, at § 339. Besides the scope of the rule, the gaps that Mueller and Kirkpatrick are referring to include the fact that the Rule does not apply to pre-trial suppression hearings, nor is there a provision about opening and closing remarks. *Id.*

[109] *See Johnston*, 578 F.2d. at 1355 (stating that "a circumvention of the rule does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify"). *Id.*

[110] *See supra* pt. II (B) for a discussion of this policy behind Rule 615.

[111] *Buchanan,* 787 F.2d at 485. "The witnesses should be clearly directed, when the Rule is invoked, that they must all leave the courtroom (with the exceptions the Rule permits), and that they are not to discuss the case, or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side." *Id.*

[112] *See* Weinstein, *supra* n. 48, at § 615.06, which is titled: "Courts Should Instruct Excluded Witnesses Not to Discuss Case with Each Other"; *see supra* n. 76 for a list of these cases.

[113] *Milanovich*, 275 F.2d at 720. "We wish to indicate our view, however, that ordinarily, when a judge exercises his discretion to exclude witnesses from the courtroom, it would seem proper for him to take the further step of making the exclusion effective to accomplish the desired result of preventing the witnesses from comparing the testimony they are about to give. If witnesses are excluded but not cautioned against communicating during the trial, the benefit of the exclusion may be largely destroyed." *Id.* "Attorneys know, without such construction, that witnesses who have testified when the sequestration rule is in effect should not discuss the substance of their testimony with a witness who has not yet given testimony." *Rugiero,* 20 F.3d at 1394.

[114] *See supra* nn. 43-47 and accompanying text for a discussion of this policy behind Rule 615.

fullest capacity.[115] If sequestered witnesses are not instructed to abstain from discussing their testimony, the court could be fostering collusion among witnesses who choose to plan and shape their testimony ahead of time.[116] In addition, the courts that employ the narrow approach fail to employ a safeguard that could provide greater justice to a party by "smoking out lying witnesses."[117]

The inequitable results of inconsistent applications of the Rule are apparent by a case comparison. First, in *Gregory v. United States*,[118] a defendant challenged the lower court's failure to instruct the witnesses to refrain from discussing the case with each other.[119] As a result, a key witness for the Government discussed the case with another witness, the murder victim's son, and changed his testimony to implicate the defendant in the murder.[120] The court applied the broad approach in holding that the trial court had erred in failing to instruct the witnesses not to communicate with one another because:

> One of the purposes in segregating witnesses during a trial is to insure, as far as possible, that each gives his individual recollections of the events in suit, unaffected by the testimony of other witnesses. It is for this reason, too, that witnesses, before being segregated, are advised not to discuss the case with anyone other than counsel for either side.[121]

Furthermore, the jurors were able to hear the officer testify, but then were instructed to disregard the improper testimony, which is a nearly

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[115] "A rule which explicitly provides only for the physical exclusion of witnesses from the courtroom . . . severely limits the rule's capabilities. . . . This valuable means of preventing falsified testimony should be used to its full capacity." Taube, *supra* n. 11, at 195.

[116] "While physical exclusion of witnesses from the courtroom furthers these purposes, the circumvention of the rule through out-of-court communication limits the effectiveness of physical exclusion. To remove a witness from the courtroom but allow him to learn from another witness, or by some other means, what occurred in the courtroom in his absence accomplishes nothing." *Id*. at 196.

[117] "Sequestration helps to smoke out lying witnesses." *U.S. v. Rhynes*, 218 F.3d 310, 317 (4th Cir. 2000). "The witness who has . . . learned the substance of the actual trial testimony of previously testifying witnesses has the best chance to circumvent attempts to reach the truth. A broad application of the rule eliminates at least some of the perjurer's weapons." Taube, *supra* n. 11 at 197.

[118] 369 F.2d 185 (D.D.C. 1966), *rev'd on other grounds* 410 F.2d 1016 (D.C. Cir. 1969).

[119] *Id*.

[120] *Id*.

[121] *Id*. at 192. This was not the only issue in the case that caused the court to reverse. The court also reversed because the prosecution had not
provided the defense attorney with the contact information so that interviews with the eye witnesses could be conducted; the defendant's motion for severance (to try separate the trying of alleged offenses committed at different times) was denied; and, a witness for the Government gave testimony concerning an offense for which the defendant was under indictment for in another totally unrelated case. *Id*. at 188-89; *see supra* n. 86 for further information on these issues.

impossible feat.[122] Because the lower court had erred, the circuit court remanded the defendant's case for a new trial, rather than affirming his conviction for capital murder.[123]

In contrast, the convictions of three defendants in *U.S. v. Smith*[124] were affirmed because the court applied the narrow approach to Rule 615 in holding that the trial court did not err in admitting rebuttal testimony by police officers who, while under a sequestration order, received notes taken throughout the trial from another police officer.[125] The court determined that the officers did not violate the sequestration order because the court followed the literal text approach and held that Rule 615 does not prohibit communications outside of the courtroom.[126] Thus, the jurors were permitted to hear the testimony of a police officer who not only had the opportunity to read notes from the trial that he was excluded from attending, but also had the potential to shape his testimony to that of the other Government witnesses.[127]

These two cases had dramatically different results for the defendants. In both cases, witnesses placed under a sequestration order obtained information about other witnesses' testimony throughout the trial. But, where the broad approach was applied, the defendant had the chance to present his case in front of a new set of jurors, rather than having possibly fabricated testimony admitted against him. The importance of receiving the fullest protection of the Rule is critical in criminal cases: "Without doubt, conviction of the wrong man is the greatest single injustice that can arise out of our system of criminal law."[128] When the court applies the broad approach, it offers as much

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[122] *Id*. at 190; *see infra* nn. 136-39 and accompanying text for an explanation of the problems with jurors receiving instructions to disregard testimony.

[123] *Id*. at 193. On appeal, the trial court's conviction of the defendant was affirmed based upon the other issues on appeal; the court thus did not reverse its prior holding that prohibited circumventions of the sequestration rule. *Id*. At least, however, this defendant was given a chance at a new trial, with a fresh pool of jurors to fairly try his case. *Gregory*, 410 F.2d 1016.

[124] 578 F.2d at 1227. Early in the trial, defendants requested a sequestration order and witnesses were excluded from the courtroom. The order did not include a request or provision that the witnesses refrain from watching publicized news on the trial or having discussions with one another about testifying. It was determined at an evidentiary hearing (requested by the defendants away from the jury) that a police officer had taken notes at the trial for an excluded police deputy who was to testify. The court held the officer's actions did not violate the order because the request and order did not include a restriction upon communications between witness, and the deputy could have learned the same information by watching the news. *Id*. at 1228, 1235.

[125] *Id*. at 1235.

[126] "It is clear from the record that the trial court viewed the sequestration order to be limited to the exclusion of witnesses from the courtroom. We note that in requesting the order, the appellants' counsel did not request that any additional conditions be placed on the order." *Id*. at 1235.

[127] *Id*.

[128] *Gregory*, 369 F.2d at 190.

protection as it can against the collusion of witnesses and helps ensure that the wrong person is not convicted.[129]

B. *The Problem with Remedying Violations at Trial*

Even when violations of the Rule do occur, "it is well established" that the witness violating the order is not necessarily banned from testifying.[130] If a witness violates an exclusion order, the remedy lies within the judge's discretion and includes: 1) prohibiting the witness from testifying, 2) declaring a mistrial, 3) allowing the witness to be cross-examined about the violation and providing the jury an instruction on being cautious in weighing the credibility of the witness's testimony, 4) instructing the jury to disregard the testimony, or 5) holding the witness in contempt of court.[131] The courts are reluctant to issue the more harsh remedies of prohibiting testimony or declaring a mistrial.[132] The exclusion of testimony may hinder a party from presenting his case.[133] A mistrial is a "last resort" since "courts have long recognized that, within wide margins, the potential for prejudice stemming from improper testimony or comments can be satisfactorily dispelled by appropriate curative instructions."[134] The instruction(s) that courts typically utilize are to order the jurors to consider the credibility of the witness when weighing the testimony, allow counsel to *comment* on the witness's violation as a means of impeaching his credibility, or permit counsel to cross-examine the witness on his violation.[135]

However, these instructions, as well as ordering the jurors to strike or ignore the testimony, are "not without drawbacks" because in many cases the witness has already testified before the violation has been discovered.[136] The drawback to instructions is simple human nature:

> If testimony about the communication is presented to the jury, the jurors will have difficulty expunging the testimony from their minds. Although the testimony is technically inadmissible, the jurors have heard the testimony**,** and may be subconsciously affected. The

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[129] *See supra* n. 115 and accompanying text.
[130] *Smith*, 578 F.2d at 1235.
[131] *See supra* pt. II (C) and accompanying text for an explanation of remedying violations of Rule 615 during trial.
[132] Weinstein, *supra* n. 48, at § 615.07; *Sepulveda*, 15 F.3d at 1184.
[133] *Id*.
[134] *Id*.
[135] Goode & Wellborn III, *supra* n. 2, at 194. "Less draconian sanctions available include allowing opposing counsel to interrogate the witness about the nature and scope of the violation, instructing the jury to consider the nature of the violation in assessing the witness's credibility, and holding the witness in contempt." *Id*.
[136] Broun et al., *supra* n. 37, at § 50; *see e.g. Sepulveda*, 15 F.3d 1161; *Gregory*, 369 F.2d 185; *Rugiero*, 20 F.3d 1387.

> judge's instruction to disregard the evidence will be ineffective; even a rational juror acting in good faith may not be able to honor the instruction. The impact of the testimony probably will color the jury's deliberations.[137]

When the judge instructs the jurors to disregard what they have just heard, it is "presumed" that they will put it out of their minds, but this is a "naïve" assumption that the damaging effects of the testimony can be overcome merely by ordering them to disregard it.[138] A trial judge giving these instructions anticipated the difficulty of expunging damaging testimony from a juror's mind:

> Sometimes it is said that it is difficult for jurors to unring a bell, so to speak, but in our system of justice it really becomes necessary that you do just exactly that if you are so advised by the court. . . . The last witness to testify was Mr. Eugene Tucker, and he stated certain things. I am not going to repeat them because that puts one more cling in that bell. I am advising you now . . . forget that he testified, who he is or what he said, just as though he never appeared in court.[139]

Yet, jurors are not likely to receive this ineffective instruction from the judge because courts disfavor excluding or striking a witness's testimony.[140] Courts tend to avoid the remedies of excluding or striking a witness's testimony because it may deny the party offering the witness the chance to present relevant testimony and "[l]ess draconian sanctions" are available, including an instruction to jurors to weigh the nature of the violation in assessing the witness's credibility.[141] Thus, jurors may have heard potentially damaging testimony and not even been instructed to disregard it.[142] The violating witness may have succeeded in getting shaped and colluded testimony heard by the trier of fact.[143]

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[137] Edward J. Imwinklried, *Judge Versus Jury: Who Should Decide Questions Of Preliminary Facts Conditioning The Admissibility Of Scientific Evidence?* 25 Wm and Mary L. Rev. 577, 597 (1984).

[138] "[T]he court should strike the offending evidence and promptly instruct the jury to disregard it. . . . Jurors are presumed to follow such instructions, except in extreme cases." *United States v. Magana*, 127 F.3d 1, 6 (1st Cir. 1997). "The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Gregory*, 369 F.2d at 190 (quoting Jackson, J., concurring, *Krulewitch v. United States*, 336 U.S. 440, 453 (1949)).

[139] *Pavon*, 561 F.2d at 802 (citing McGovern, C.J., W.D. Wa.).

[140] *See supra* nn. 51-52 and accompanying text.

[141] Weinstein, *supra* n. 48, at § 615.07; Goode & Wellborn III, *supra* n. 2, at 194.

[142] *See e.g. U.S. v. Bobo*, 586 F.2d 355, 366 (5th Cir. 1978) (holding that the failure of a witness to comply with a sequestration order would not render his or her testimony inadmissible absent a showing of prejudice).

[143] *See supra* pt. II (B) for an explanation of the policies behind the Rule.

Furthermore, it is highly unlikely that a defendant will appeal successfully because mistrials are rarely granted.[144] The defendant can prevail only if it is determined that the lower court, by allowing the witness to testify despite his violation of the Rule, abused its discretion and caused prejudice to the defendant.[145] The prejudice the court is concerned with involves the jurors hearing testimony that may have been modified as a result of hearing another witness's testimony. This could expose the jury to colluded evidence: "The witness who . . . has learned the substance of the actual trial testimony of previously testifying witnesses has the best chance to circumvent attempts to reach the truth."[146] Thus, if a witness is able to hear another witness's testimony prior to giving his own, he may be able to fashion his statements to match that witness's testimony.

Even though sequestration orders are often violated, rarely is a defendant's conviction reversed and, unfortunately, reversal is also rare where the trial court uses the broad approach.[147] Absent a willful violation of the Rule, the appellate court is unlikely to find there was collusion or any kind of prejudice to the defendant.[148] In order to prove a violation of the Rule was willful, the complainant must demonstrate that the violating witness remained in the courtroom "with the 'consent, connivance, procurement, or knowledge' of the party seeking [the violating witness's] testimony."[149] Thus, when violations of the Rule are inadvertent, the court is less likely to employ the drastic measures of mistrial, excluding or striking testimony, or charging the witness with criminal contempt.[150] This distinction between willful and inadvertent

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[144] *Sepulveda*, 15 F.3d at 1184 ("Declaring a mistrial is a last resort, only to be implemented if the taint is ineradicable, that is, only if the trial judge believes that the jury's exposure to the evidence is likely to prove beyond realistic hope of repair.").

[145] *See e.g. Rugiero*, 20 F.3d at 1394 (stating "[i]n order to grant a new trial, we must find that the district court not only abused its discretion, but also that the court's error was prejudicial to the defendant's receiving a fair trial"); *U.S. v. Pickel*, 746 F.2d 176, 182 (3d Cir. 1984) (noting that a violation of a sequestration order might support dismissal in a most egregious situation); *U.S. v. Jones*, 2002 U.S. App. Lexis 21357 at **3-4 (3d Cir.) (stating "in order for the court to invoke the extreme remedy of declaring a mistrial, the violation must have prejudiced the defendant . . . the District Court . . . determined that the Appellant had not suffered prejudice as a result of the violation of the sequestration order, and properly exercised its discretion to craft appropriate remedies").

[146] Taube, *supra* n. 11, at 197.

[147] *See e.g. Womack*, 654 F.2d 1034; *Green*, 293 F.3d 886; *U.S. v. Smith*, 578 F.2d 1227 (8th Cir. 1978); *Collins*, 340 F.3d 672; *Johnston*, 578 F.2d. 1352; *Prichard*, 781 F.2d 179; *Greschner*, 802 F.2d 373; *Buchanan*, 787 F.2d 477.

[148] *U.S. v. Gammon*, 961 F.2d 103, 105 (7th Cir. 1992). "Absent evidence of prejudice, collusion, or willful violation, it was within the district court's sound discretion to allow Neal to testify. . . . [T]he court found Neal had inadvertently [violated the order]." *Id.*

[149] *U.S. v. Gibson*, 675 F.2d 825, 836 (6th Cir. 1982).

[150] *See id.* "There is no indication at all in the record that Government counsel intentionally permitted disregard of the rule." *Johnston*, 578 F.2d at 1355 (holding that "there was no abuse of discretion in refusing to exclude Jacobs's testimony"). "To support a conviction for criminal

violations is critical because it is more difficult to obtain a sanction against the testimony of an inadvertent violator, than against a willful one.[151]

Because of the difficulty in remedying a violation once it has occurred, the best solution is prevention "by the court impressing upon both the witnesses and counsel the importance of obeying the court's ruling excluding and separating witnesses."[152] By employing the broad approach, a court will be taking the extra step to invoke the Rule to its full capacity and to ensure that the purpose behind the Rule is fulfilled.[153] Furthermore, the witnesses will be given full instructions on what conduct violates the Rule and will lose the excuse that their conduct was inadvertent, which could allow a court to classify their violation as willful, resulting in the use of a harsher remedy.[154]

C. *The Broad Application of the Rule is Supported by the Supreme Court, Scholars of Evidentiary Law, and State Law.*

Although Rule 615 does not expressly provide instructions for witness sequestration outside of the courtroom, the Tenth Circuit has adopted the correct approach by expanding the scope of the Rule. The approach necessarily broadens the scope because a sequestration order removing one witness from the courtroom is pointless unless that witness is also separated from other witnesses outside the courtroom.[155] Even a court that has failed to adopt the broad application of the Rule has acknowledged that "[i]ndeed, such non-discussion orders are generally thought to be a standard concomitant of basic sequestration fare, serving

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contempt for violation of a court order, it must be proved beyond a reasonable doubt, that a person willfully, contumaciously, intentionally, with a wrongful state of mind, violated a decree which was definite, clear, specific, and left no doubt or uncertainty in the minds of those to whom it was addressed." *McMahon*, 104 F.3d at 642.

[151] "It is important that a party not be deprived of valuable testimony for reasons over which he has no control, yet it is equally important that the opposing party not be subjected to testimony concocted due to a violation of a court order." Robert L. Luce, *Witnesses-Enforcing a Sequestration Order to Exclude Witnesses-Barring the Witness from Testifying*, 11 U. Kan. L. Rev. 410, 412 (1963); *see McMahon*, 104 F.3d at 644, where the defendant was not even provided with a circumvention instruction, yet convicted for criminal contempt. The court deemed the instruction was not necessary because the Rule inherently required him to refrain from any activities that would circumvent the Rule: "McMahon testified and continues to maintain on appeal that he never . . . understood . . . that his activity, including talking with his secretary about the trial she attended and took notes of, would violate the court's written and oral sequestration orders. . . . The sequestration order is a product of common sense, and its purpose is obvious. . . . In this court's view, an instruction that he could not circumvent the sequestration order . . . would . . . have [just] stated the obvious." *McMahan*, 104 F.3d at 644.

[152] Broun et al., *supra* n. 37, at § 50.

[153] *See supra* n. 115 and accompanying text.

[154] "[T]he most appropriate and only effective means of enforcing an order of court and of securing the right of sequestration is to have it clearly understood that *disqualification as a witness may follow disobedience*." Wigmore, *supra* n. 1, at § 1842; *see supra* n. 151.

[155] *See supra* n. 116 and accompanying text.

to fortify the protections offered by Rule 615."[156] The Supreme Court has indicated support for the broad approach, as have several evidentiary scholars.[157] Furthermore, several state courts and legislatures have adopted the broad approach to Rule 615.[158] Therefore, the proper solution to the split in circuits is a uniform application of the broad approach to Rule 615.

1. Supreme Court Dicta Supports the Broad Application of the Rule

While the Supreme Court has not ruled on this issue, it has ruled on similar problems with Rule 615 and has shown support for the broad view. For example, in *Perry v. Leeke*,[159] the court stated that it is common for a witness to be told to refrain from discussing his testimony with anyone until after the end of trial. Such orders are viewed as:

> [A] corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections.[160]

In support of its dicta, the Supreme Court cited the Tenth Circuit opinions of *Johnston* and *Greschner* noting that these opinions held that Rule 615 extends beyond the courtroom.[161] In addition, the Supreme Court also quoted the *Milanovich* opinion from the Fourth Circuit:

> We wish to indicate our view, however, that ordinarily, when a judge exercises his discretion to exclude witnesses from the courtroom, it would seem proper for him to take the further step of making the exclusion effective to accomplish the desired result of preventing the witnesses from comparing the testimony they are about to give. If witnesses are excluded but not

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[156] *Sepulveda*, 15 F.3d at 1176.
[157] *See infra* pt. III (C) (1) for discussion of the Supreme Court's support for the broad approach.
[158] *See infra* pt. III (C) (2) for discussion of state courts and legislatures adopting the broad approach.
[159] 488 U.S. 272, 281 (1989) (holding that where the appellant-defendant took the stand to testify, he was no longer permitted to consult with counsel, and although long recesses may require that the defendant have access to counsel, the federal constitution does not mandate that every trial judge permit a defendant to consult his attorney while his testimony is in progress if the judge has decided there was a good reason to interrupt the trial for a few minutes only).
[160] *Id*. at 281-82.
[161] *Id*. (citing *U.S. v. Johnston*, 578 F.2d. 1352, 1355 (10th Cir. 1978) (holding "a circumvention of [Rule 615] does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify"); *Greschner*, 802 F.2d at 376 (holding that "[t]he trial judge was in error in his view that the Rule does not include this protection," and the protection is that the Rule extends to communication beyond the courtroom).

> cautioned against communicating during the trial, the benefit of the exclusion may be largely destroyed.[162]

Therefore, while the Supreme Court has not issued a holding on the scope of Rule 615, it has indicated support for the broad application of the Rule by citing to the Fourth Circuit and Tenth Circuit.

2. Common Law and Evidentiary Scholars Demonstrate Support for the Broad Approach

Common law and 20th century evidence scholars support the extension of Rule 615 beyond the courtroom.[163] Although Wigmore's[164] Evidence Treatise referred to the common law view without explicitly advocating for a broad application of the Rule, "his other writings indicate that he believed the [R]ule applied inherently to any attempt to circumvent its purpose."[165] For example, Wigmore created a witness sequestration rule referring to both direct and indirect circumvention of the Rule, and in his 1942 evidence code suggested a rule explicitly limiting communication among witnesses with one another.[166] Furthermore, Wigmore has noted that exclusion "is simple and feasible" and "so powerful and practical . . . that no contingency [justifies] its denial."[167] Moreover, another preeminent evidence scholar, Burr W. Jones, commented that a court may order the separation of witnesses so that they do not communicate when it will foster the policies supporting the Rule.[168]

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[162] *Id*. (quoting *Milanovich*, 275 F.2d at 720).

[163] "[T]he common law supported sequestration beyond the courtroom." *Sepulveda*, 15 F.3d at 1175-76; "The *process* itself involves three parts: (a) preventing the prospective witnesses from consulting each other; (b) preventing them from hearing a testifying witness; (c) preventing them from consulting a witness who has left the stand; the last including consultation between witnesses who have left the stand, since they may be still prospective witnesses." Wigmore, *supra* n. 1, at § 1840. "In judicial decisions these elements of the process are rarely stated in detail, but there can be no doubt that the common law rule implies all three." Wigmore, *supra* n. 1, at § 1840.

[164] Wigmore has been called one of the "[p]reeminent evidence scholars of the early twentieth century," and is frequently cited in evidentiary treatises and judicial opinions. Taube, *supra* n. 11, at 199, 200; *see* Mueller & Kirkpatrick, *supra* n. 12, at § 339; Wright, *supra* n. 29, at § 6242; *Sepulveda*, 578 F.2d at 1175, 1176; *Govt. of the Virgin Islands*, 625 F.2d at 473; *U.S. v. Snow*, 517 F.2d 441, 443 (9th Cir. 1975) (mentioning and citing Wigmore).

[165] Taube, *supra* n. 11, at 199, 200.

[166] *See id*. at 200, n. 186. "Rule 176 of Wigmore's Code vested in the judge the discretion to order that witnesses 'be so separated from each other as not to be able to communicate, while waiting, on the subject of the testimony' and in addition, that they 'be forbidden to communicate, with or without such separation.'" *Id.*

[167] Wigmore, *supra* n. 1, at § 1839.

[168] Taube, *supra* n. 11, at 199 (citing to Burr W. Jones, *Jones on Evidence* § 889 (Spencer A. Garded

In addition, several modern evidence scholars have supported a uniform adoption of the broad application of the Rule. First, Jack B. Weinstein, author of *Weinstein's Federal Evidence* treatise, has included a section under Rule 615 titled "Courts Should Instruct Excluded Witnesses Not to Discuss the Case With Each Other" because if sequestered witnesses are free to discuss their testimony with each other, it would cause their exclusion from the courtroom to be pointless.[169] Furthermore, in their recent treatise, Mueller and Kirkpatrick stated that a witness sequestration order is "largely ineffective" unless the witnesses are "also somehow sequestered (separated from other witnesses outside the courtroom)."[170] Therefore, like their twentieth century counterparts, modern evidentiary scholars have also shown support for the broad application of Rule 615.

3. Several States Have Adopted the Broad Approach

Several states have adopted this approach by enacting laws that specifically call for the sequestration of witnesses not only from the courtroom, but also from communications outside the courtroom. For example, the Supreme Court of Appeals of West Virginia has specifically addressed this issue and has adopted the broad approach.[171] In addition, Louisiana's legislature has enacted a law that extends the scope of sequestration to communications between witnesses outside the courtroom.[172] Furthermore, the Supreme Court of Connecticut has held that "in the absence of a contrary indication from the trial court," a sequestration order "prohibits counsel from discussing, outside of the courtroom, the testimony of a prior witness in the presence of a prospective witness."[173] Thus, the Supreme Court and evidentiary scholars have indicated support for the broad approach, and several states have expanded their version of Rule 615 to apply to communications among witnesses both inside and outside of the courtroom.

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ed., (rev. 5th ed., 1958)).

[169] *See* Weinstein, *supra* n. 48, at § 615.06. "Rule 615 gives no guidance on what instructions, if any, the court should give the witnesses when they are excluded from the courtroom. However, if the witnesses were free to discuss their testimony with each other, it would defeat the purpose of excluding them from the courtroom." *Id.*

[170] Mueller & Kirkpatrick, *supra* n. 12, at § 339.

[171] *State v. Omechinski*, 468 S.E.2d 173, 178 (W.Va. 1996) ("We specifically hold that a circumvention of Rule 615 occurs where witnesses indirectly defeat its purpose by discussing with other witnesses who are subject to recall testimony they have given and events occurring in the courtroom.").

[172] La. Code Evid. Art. 615 (LEXIS 2004). Upon request by the state or the defendant, "the court shall order that the witnesses be excluded from the courtroom or from where they can see or hear the proceedings and refrain from discussing the facts of the case" or the testimony of any witness with anyone other than the district attorney or defense counsel. *Id.*

[173] *State v. Nguyen*, 756 A.2d 833, 835 (Conn. 2000).

Courts should apply a uniform approach to the witness sequestration rule by applying it broadly, which automatically extends the scope of the Rule to include communications between witnesses both inside and outside of the courtroom. First, the broad application of the Rule fosters the policies behind witness sequestration to the fullest extent by offering protection against tailored and false testimony.[174] This is demonstrated by comparing two cases where defendants were convicted, yet where the broad approach was applied, the defendant got a new trial.[175] Second, remedying a violation of the Rule at trial only furthers the potential for collusion since a judge typically instructs jurors to weigh the credibility of the violating witness, rather than preventing the witness from testifying or ordering a new trial.[176] Finally, the Supreme Court, numerous evidentiary scholars, and states have demonstrated support for the broad view.[177]

IV. CONCLUSION

Courts should apply a uniform approach to the witness sequestration rule by adopting the broad application of the Rule, which automatically extends the scope of a separation order to include a prohibition on any communication among witnesses about what their testimony was or will be.[178] Most circuit courts, numerous scholars, and several states have supported an augmentation of the Rule so that the policies supporting it are extended to the fullest capacity and the trial is as fair as possible.[179] By extending the scope of the Rule to communications outside of the courtroom, courts offer further protection against colluded and false testimony being used to convict a defendant. The failure to limit communication among witnesses under a sequestration order is at best a futile attempt at justice[180] and at worst, a complete exclusion of it.

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[174] *See supra* pt. III(A).
[175] *See id.*
[176] *See supra* pt. III(B).
[177] *See supra* pt. III(C).
[178] *Buchanan*, 787 F.2d at 485. "The witnesses should be clearly directed, when the Rule is invoked, that they must all leave the courtroom (with the exceptions the Rule permits), and that they are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side." *Id.*
[179] Taube, *supra* n. 11, at 195. "A rule which explicitly provides only for the physical exclusion of witnesses from the courtroom . . . severely limits the rule's capabilities. . . . This valuable means of preventing falsified testimony should be used to its full capacity." *Id.*
[180] Mueller & Kirkpatrick, *supra* n. 12, at § 339. "While FRE 615 does not mention instructions to the witness being excluded, an order removing him from court during testimony by others is largely ineffective unless he is also somehow sequestered (separated from other witnesses outside the courtroom)." *Id.*