

DISTORTING THE "RULE OF COMPLETENESS": THE MISAPPLICATION OF NEBRASKA REVISED STATUTES SECTION 27-106: STATE V. SCHREIN

INTRODUCTION

When a judge admits only a portion of evidence at trial, there exists a danger that the admission of the part may distort the whole.¹ A good example "would be accusing the Biblical David of blasphemy for saying, 'There is no God,' his full statement being, 'The fool hath said in his heart, there is no God.'"² The Nebraska Unicameral proposed Nebraska Revised Statutes section 27-106 ("section 27-106") to prevent such misunderstandings.³

In *State v. Schrein*,⁴ the Nebraska Supreme Court considered the correct application of section 27-106.⁵ In 1990, the State of Nebraska charged Dr. Daniel Schrein with five counts of sexual assault of a child.⁶ At his trial, the State moved to admit a *Redbook* magazine article on pedophiles in response to defense counsel's questioning of a police sergeant.⁷ The trial court admitted the *Redbook* article despite defense counsel's objections as to relevance.⁸ The Nebraska Supreme Court upheld the trial court's decision to admit the article under sec-

1. *State v. Schrein*, 244 Neb. 136, 145, 504 N.W.2d 827, 833 (1993).

2. *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986) (citing *Trial of Algernon Sidney*, 9 *Howell's State Trials* 818, 868-69 (K.B. 1683)).

3. NEB. REV. STAT. § 27-106 (Reissue 1989). Section 27-106 provides:

(1) When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing given into evidence, any other act, declaration or writing which is necessary to make it fully-understood, or to explain the same, may also be given in evidence.

(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at the same time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

Id. See *Chirside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 791, 401 N.W.2d 489, 494-95 (1987) (stating that the purpose of the rule of completeness is to prevent a document or writing from being taken out of context); *Spani v. Whitney*, 172 Neb. 550, 554, 110 N.W.2d 103, 106 (1961) (stating the purpose of the rule of completeness is to explain previous evidence or to make the evidence fully understood).

4. 244 Neb. 136, 504 N.W.2d 827 (1993).

5. See *State v. Schrein*, 244 Neb. 136, 143-47, 504 N.W.2d 827, 832-34 (discussing § 27-106 of the Nebraska Revised Statutes and how it applies to the *Redbook* article in question).

6. *State v. Schrein*, 1 Neb. Ct. App. 1581, 1583 (1992), *rev'd*, 244 Neb. 136, 504 N.W.2d 827 (1993).

7. *Id.* at 137-39, 504 N.W.2d at 829-30.

8. *Id.* at 138-39, 504 N.W.2d at 830.

tion 27-106.⁹ However, Judge Thomas Shanahan, dissenting from the supreme court's opinion, determined that the court misapplied section 27-106, and thereby violated Dr. Schrein's constitutional "rights to confront and cross-examine adverse witnesses."¹⁰

This Note will first discuss the court's decision in *Schrein*.¹¹ This Note will then examine the purposes behind "rule of completeness statutes," such as Rule 106 of the Federal Rules of Evidence and section 27-106 of the Nebraska Revised Statutes.¹² This Note will then survey the tests employed by other courts which have analyzed similar rule of completeness statutes.¹³ Next, this Note will analyze whether the trial court properly admitted the *Redbook* article into evidence.¹⁴ This Note concludes that the court misapplied the test for admitting evidence under section 27-106.¹⁵

FACTS AND HOLDING

Dr. Daniel Schrein practiced as a pediatrician in Omaha, Nebraska, for many years.¹⁶ Dr. Schrein was involved in coaching and organizing "The Gladiators," an Omaha youth sports organization.¹⁷ In August of 1990, in the midst of an investigation, he closed his Omaha practice intending to move to Hawaii in order to establish a new practice.¹⁸ In September of the same year, the Federal Bureau of Investigation ("FBI") arrested Dr. Schrein in California on suspicion of sexually assaulting a child.¹⁹ Subsequently, the State of Nebraska charged Dr. Schrein with five counts of sexual assault of a child.²⁰

Most of the State's charges against Dr. Schrein stemmed from his diagnosis of adolescent male patients as suffering from meatitis, an inflammation of the opening of the penis, or meatal stenosis, a narrowing of the opening of the penis.²¹ The State alleged that, after applying Neosporin to the minor patient's penis, Dr. Schrein manipulated the patient's penis for five to ten minutes or until ejaculation oc-

9. *Id.* at 146, 504 N.W.2d at 833-34.

10. *Id.* at 148-51, 504 N.W.2d at 835-37 (Shanahan, J., dissenting).

11. *See infra* notes 66-101 and accompanying text.

12. *See infra* notes 102-12 and accompanying text.

13. *See infra* notes 113-225 and accompanying text.

14. *See infra* notes 225-301 and accompanying text.

15. *See infra* notes 225-301 and accompanying text.

16. *State v. Schrein*, 244 Neb. 136, 137, 504 N.W.2d 827, 829 (1993).

17. *Id.*

18. *State v. Schrein*, 1 Neb. Ct. App. 1581, 1583 (1992), *rev'd*, 244 Neb. 136, 504 N.W.2d 827 (1993).

19. *Id.*

20. *Id.* at 1582. Additionally, the State had ten other witnesses willing to testify to similar misconduct. *Id.* at 1583.

21. *Schrein*, 1 Neb. Ct. App. at 1583-84.

curred.²² The State further alleged that Dr. Schrein stroked a patient's thigh and fondled a patient's penis, and touched a child's genitals through a pair of jeans during an out of state trip.²³

At Dr. Schrein's trial, fifteen young men testified on behalf of the State that Dr. Schrein had previously molested them.²⁴ Dr. Daniel Glow, an expert witness for the State, testified that during his years of practice, he had never observed any adolescent patients with meatitis.²⁵ In response, Dr. Schrein maintained that his contact with the patients was associated with normal treatment.²⁶ In support of Dr. Schrein, Dr. Philip Wayne Marsh testified that Neosporin was an appropriate treatment for adolescent meatitis.²⁷ Furthermore, Dr. Marsh testified that he had previously observed meatitis in adolescents.²⁸ Dr. Marsh testified that it was not unusual for a doctor in practice for twenty-six years to treat ten to fifteen adolescents for meatitis.²⁹

Omaha police Sergeant Kenneth Bovasso testified regarding his investigation of Dr. Schrein.³⁰ During cross-examination, defense counsel questioned Bovasso regarding his conversations with parents of Dr. Schrein's patients during the investigation.³¹ Bovasso stated that he had discussed pedophilia during his interviews with the parents.³² In response to defense counsel's questions, Bovasso testified that he had distributed literature to the parents containing information regarding pedophiles.³³ After defense counsel asked Bovasso why he had distributed the literature, he explained that the investigative unit viewed the case as possibly involving a pedophile.³⁴ Bovasso testified that when he had interviewed the parents he neither stated nor implied that Dr. Schrein was a pedophile.³⁵ Defense counsel did not ask any additional questions about the content or identity of the literature distributed.³⁶

22. *Id.* at 1583.

23. *Id.* at 1584.

24. *Schrein*, 244 Neb. at 137, 504 N.W.2d at 829.

25. *Schrein*, 1 Neb. Ct. App. at 1584. Dr. Schrein had treated many adolescent males for meatitis and meatal stenosis. *Id.* at 1583-84. Dr. Glow testified that meatitis is "commonly associated with infants because of the presence of urine in their diapers." *Id.*

26. *Schrein*, 1 Neb. Ct. App. at 1584.

27. *Id.* at 1584-85.

28. *Id.* at 1585.

29. *Id.* Dr. Schrein had been in practice for twenty-six years. *Id.*

30. *Schrein*, 244 Neb. at 137, 504 N.W.2d at 829.

31. *Schrein*, 1 Neb. Ct. App. at 1586-87.

32. *Id.* at 1587.

33. *Id.*

34. *Id.*

35. *Schrein*, 244 Neb. at 138, 504 N.W.2d at 829.

36. *Id.* at 149, 504 N.W.2d at 835 (Shanahan, J., dissenting).

On redirect, the prosecutor handed Bovasso a copy of a *Redbook* article and asked him whether that was the literature he had distributed.³⁷ Defense counsel objected on the grounds of relevance to the State's introduction of the *Redbook* article into evidence.³⁸ Defense counsel failed to object that the *Redbook* article was prejudicial.³⁹ The trial court admitted the *Redbook* article into evidence because defense counsel asked Bovasso which materials he had distributed during his investigation.⁴⁰ The trial court reasoned that the *Redbook* article helped explain Bovasso's actions during the investigation.⁴¹

The article admitted into evidence by the trial court was a *Redbook* article entitled "The Child Abuser: How Can You Spot Him?".⁴² The *Redbook* article states that:

He's a man you trust. He's a man your children trust. He's a teacher, a coach, a Cub Scout leader — someone your family knows well. And he's much more likely to sexually abuse little boys than little girls, according to a landmark study of 403 sex offenders. In this shocking report, the doctor who headed the research team offers a profile of the typical child abuser — and tells you how to protect your children. . . .

[M]ost of us think that a child molester is a rather slimy individual — a stranger in town, sitting in his car near a schoolyard, luring children with candy. Our findings reveal that, on the contrary, the child molester is not a stranger, but is someone we know well. He often is a man we trust, a man our children trust.

Many child molesters try to move themselves into positions or occupations within the community that will allow them to spend time alone with children without attracting much notice. Molesters often become youth ministers, day-care workers, Boy Scout leaders, teachers, Big Brothers, and pediatricians, . . . there are exceedingly few men who are child molesters. But there are a few. Of the several hundred molesters I've treated in the last two years, one was a school physician, two were child psychiatrists, another was a pediatrician.⁴³

M.M., one of the parents who received the *Redbook* article, testified for the defense.⁴⁴ M.M. did not recall whether Bovasso ever im-

37. *Schrein*, 244 Neb. at 138, 504 N.W.2d at 829.

38. *Id.* at 138, 504 N.W.2d at 830.

39. *Id.*

40. *Id.* at 138-39, 504 N.W.2d at 830.

41. *Id.* at 140, 504 N.W.2d at 830.

42. *Id.* at 139, 504 N.W.2d at 830.

43. Gene G. Able & Nora Harlow, *The Child Abuser: How Can You Spot Him?*, REDBOOK, Aug. 1987, at 98.

44. *Schrein*, 244 Neb. at 140, 504 N.W.2d at 830.

plied that Dr. Schrein was a pervert, nor did she mention the *Redbook* article in her testimony.⁴⁵ Admission of the *Redbook* article became one element of Dr. Schrein's appeal.⁴⁶

Myra Langenfeld, Dr. Schrein's nurse, testified against Dr. Schrein.⁴⁷ Langenfeld testified that on a couple of occasions, Dr. Schrein remained in examination rooms with adolescent male patients for "an inordinately long time."⁴⁸ Langenfeld stated that she once smelled the odor of semen on a tissue in one of Dr. Schrein's examination rooms after noticing that Dr. Schrein appeared flushed when he exited the room.⁴⁹ The trial court allowed this testimony over defense counsel's objection.⁵⁰ Langenfeld's testimony concerning the odor of semen created another basis of Dr. Schrein's appeal.⁵¹

Furthermore, Langenfeld testified that a picture hanging in Dr. Schrein's office portrayed a shirtless young boy wearing low-cut jeans, tilting his head back, and smiling.⁵² Langenfeld stated that she thought the picture was suggestive and was not appropriate because it looked sexy.⁵³ Over defense counsel's objection, the trial court allowed the testimony.⁵⁴ Langenfeld's testimony concerning the picture formed the final element of Dr. Schrein's appeal.⁵⁵

The jury found Dr. Schrein guilty of five counts of sexual assault of a child.⁵⁶ On appeal based on the three elements discussed above, the Nebraska Court of Appeals reversed Dr. Schrein's convictions and remanded the case for a new trial.⁵⁷ In regard to Dr. Schrein's first issue on appeal, the court of appeals held that the trial court had erroneously admitted the *Redbook* article into evidence.⁵⁸ The court found that the credibility of Bovasso was not a fact of consequence at trial.⁵⁹ Furthermore, the court found that the trial did not turn upon matters related to the *Redbook* article Bovasso had distributed.⁶⁰ The court stated that even if the *Redbook* article was relevant, the trial court

45. *Id.*

46. *Id.* at 137, 504 N.W.2d at 829.

47. *Schrein*, 1 Neb. Ct. App. at 1584.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1592.

52. *Schrein*, 244 Neb. at 141, 504 N.W.2d at 831.

53. *Id.*

54. *Schrein*, 1 Neb. Ct. App. at 1584.

55. *Id.* at 1592.

56. *Schrein*, 244 Neb. at 137, 504 N.W.2d at 830.

57. *Schrein*, 1 Neb. Ct. App. at 1594.

58. *Id.*

59. *Id.* at 1588-89. The State argued that it moved to admit the article in order to reestablish Bovasso's credibility. *Id.*

60. *Schrein*, 1 Neb. Ct. App. at 1588-89.

should not have admitted it because it created a danger of unfair prejudice under Nebraska Revised Statutes section 27-403.⁶¹

In regard to the second and third issues on appeal, the court ruled that the trial court properly admitted Langenfeld's testimony regarding the odor of semen as proper, non-expert opinion; however, the court held that the trial court should not have allowed Langenfeld to testify regarding the picture hanging in Dr. Schrein's office.⁶² The court determined that the prejudicial value of Langenfeld's testimony regarding the picture substantially outweighed the probative value of that testimony.⁶³ The State appealed the court of appeals decision regarding the admission of the *Redbook* article and the testimony about the picture.⁶⁴

In a *per curiam* opinion, the Nebraska Supreme Court reversed the court of appeals' decision and ordered the trial court to reinstate Dr. Schrein's five convictions.⁶⁵ The supreme court began by discussing under which circumstances Nebraska Revised Statute section 27-106 ("section 27-106") allows for the admission of evidence.⁶⁶ The court found that under section 27-106, a court may admit evidence only if it explains previously admitted evidence or is necessary to prevent evidence from being taken out of context.⁶⁷ Noting the similarities between section 27-106 and Rule 106 of the Federal Rules of Evidence ("Rule 106"), the court determined that prior decisions interpreting Rule 106 would aid in its interpretation of section 27-106.⁶⁸

61. *Id.* at 1589; NEB. REV. STAT. § 27-403 (Reissue 1989). Section 27-403 of the Nebraska Revised Statutes provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." NEB. REV. STAT. § 27-403 (Reissue 1989).

62. *Schrein*, 1 Neb. Ct. App. at 1593.

63. *Schrein*, 244 Neb. at 142, 504 N.W.2d at 331.

64. *Id.* at 143, 504 N.W.2d at 832.

65. *Id.* at 137-48, 504 N.W.2d at 829-35.

66. *Id.* at 143-45, 504 N.W.2d at 832-33.

67. *Id.* at 143, 504 N.W.2d at 832; *see* NEB. REV. STAT. § 27-106 (Reissue 1989) (allowing for the admission of completing evidence when it is necessary to explain or assist in a full understanding of the previous evidence); *see supra* note 3. After examining a previous case and the legislative history of section 27-106, the court determined that the predecessor to section 27-106 allowed for the admission of evidence which might otherwise be inadmissible. *Schrein*, 244 Neb. at 144, 504 N.W.2d at 832 (citing *Spani v. Whitney*, 172 Neb. 550, 110 N.W.2d 103 (1961)).

68. *Schrein*, 244 Neb. at 144, 504 N.W.2d at 832. Federal Rule of Evidence 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." FED. R. EVID. 106.

The Court first examined whether the defense had introduced the *Redbook* article into evidence.⁶⁹ The court utilized the United States Court of Appeals for the Eighth Circuit's decision in *United States v. Durham*⁷⁰ to answer this question.⁷¹ In *Durham*, the Eighth Circuit found that the trial court correctly allowed a prosecutor's questions regarding the identity of an unnamed man because defense counsel had previously elicited testimony that the unnamed man had inquired into the whereabouts of the murder victim.⁷² The Nebraska Supreme Court agreed with the State's contention that the mere mention of the *Redbook* article during cross-examination was analogous to testimony regarding the identity of the unnamed man in *Durham*.⁷³

Having concluded that the defense introduced the *Redbook* article, the supreme court articulated the test for determining whether the trial court had properly admitted the contents of the article.⁷⁴ The court outlined a two-part test employed by the United States Court of Appeals for the Seventh Circuit to determine whether a trial court should admit "completing" evidence under Rule 106.⁷⁵ Under that test, a court must first determine whether the completing evidence is relevant to the issues of the case.⁷⁶ The court must then determine whether the completing evidence qualifies or explains any part of the previously admitted evidence.⁷⁷ The court set forth four factors to use in determining whether the completing evidence explains or qualifies the previously admitted evidence: (1) whether the evidence explains the admitted evidence; (2) whether the evidence places the admitted evidence in context; (3) whether the evidence prevents the trier of fact from being misled by the admitted evidence; and (4) whether the evidence insures an impartial and fair understanding of the admitted evidence.⁷⁸

After discussing the test used by the Seventh Circuit, the court determined that the *Redbook* article was relevant to the content of

69. *Schrein*, 244 Neb. at 144, 504 N.W.2d at 832.

70. 868 F.2d 1010 (8th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989).

71. *United States v. Durham*, 868 F.2d 1010 (8th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989); *Schrein*, 244 Neb. at 144-45, 504 N.W.2d at 832-33.

72. *Durham*, 868 F.2d at 1012.

73. *Schrein*, 244 Neb. 136, 145, 504 N.W.2d 827, 833; *see Durham*, 868 F.2d at 1011 (allowing the completing evidence to prevent a misunderstanding concerning an unnamed man's relationship with the murder victim), *cert. denied*, 493 U.S. 954 (1989).

74. *Schrein*, 244 Neb. at 145, 504 N.W.2d at 833.

75. *Id.* at 145, 504 N.W.2d at 833; *see United States v. Velasco*, 953 F.2d 1467 (7th Cir. 1992) (describing a two-part test in which the evidence must be relevant and necessary to qualify or explain the previous evidence).

76. *Schrein*, 244 Neb. at 145, 504 N.W.2d at 833.

77. *Id.*

78. *Id.* at 145, 504 N.W.2d at 833 (citing *Velasco*, 953 F.2d at 1475; *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986)).

Bovasso's testimony, although it was irrelevant to Dr. Schrein's guilt or innocence.⁷⁹ Thus, the court found that the defense counsel's "cross-examination of . . . Bovasso opened the door for the . . . [Redbook] article."⁸⁰

The court then addressed the issue of whether the *Redbook* article was unfairly prejudicial to Dr. Schrein under Nebraska Revised Statutes section 27-403.⁸¹ The court declined to address the issue of unfair prejudice because defense counsel failed to raise that objection at trial.⁸²

The court then examined Langenfeld's testimony regarding the picture hanging in one of Dr. Schrein's examination rooms.⁸³ The court noted that lay opinion testimony is allowable if it is: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [the witness'] testimony or the determination of a fact in issue."⁸⁴ However, the court did not apply the test because defense counsel failed to object to Langenfeld's description of the picture at trial and questioned Langenfeld at trial as to her opinion of the picture.⁸⁵ The court determined that even if Langenfeld's testimony was inadmissible, its admission was harmless error.⁸⁶ As a result, the court reversed the judgment of the court of appeals and remanded the case with directions to the trial court to reinstate the five convictions of Dr. Schrein.⁸⁷

Judge Thomas Shanahan, joined by Judges C. Thomas White and D. Nick Caporale, dissented.⁸⁸ Judge Shanahan argued that the court misapplied section 27-106.⁸⁹ Judge Shanahan determined that the

79. *Id.* at 145-46, 504 N.W.2d at 833-34.

80. *Id.* at 146, 504 N.W.2d at 833-34.

81. *Id.* at 145, 504 N.W.2d 834.

82. *Id.* at 147, 504 N.W.2d at 834.

83. *Id.* at 147-48, 504 N.W.2d at 834-35.

84. *Id.* at 148, 504 N.W.2d at 834. Section 27-701 of the Nebraska Revised Statutes (Reissue 1989) provides:

If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

NEB. REV. STAT. § 27-701 (Reissue 1989).

85. *Schrein*, 244 Neb. at 148, 504 N.W.2d at 835.

86. *Id.* After Ms. Langenfeld described the picture, the prosecutor asked what she did not like about the picture. *Id.* at 141, 504 N.W.2d at 831. Schrein's counsel objected to the relevance of only this question. *Id.* The court overruling the objection, allowed Schrein's counsel to ask several foundational questions. *Id.* Schrein's counsel asked Ms. Langenfeld if there was anything obscene about the picture. *Id.* Ms. Langenfeld stated that she thought "[i]t looked sexy. . . . It looked suggestive to [her] . . . [and she did not] think it was appropriate." *Id.*

87. *Schrein*, 244 Neb. at 141, 504 N.W.2d at 831.

88. *Id.* at 148-51, 504 N.W.2d at 835-37 (Shanahan, J., dissenting).

89. *Id.* (Shanahan, J., dissenting).

purpose of section 27-106 is to prevent the trier of fact from being misled by incomplete evidence.⁹⁰ Judge Shanahan stated that a trial court may admit a whole document if the completing evidence is relevant, and if it explains, modifies, or qualifies the previously admitted evidence.⁹¹ However, Judge Shanahan cautioned that the range of evidence admitted under section 27-106 should be limited.⁹²

Judge Shanahan articulated a number of reasons why the trial court should not have admitted the *Redbook* article under section 27-106.⁹³ First, in analyzing Bovasso's testimony, Judge Shanahan noted that defense counsel never asked Bovasso to identify the literature he distributed.⁹⁴ Judge Shanahan found that it was the remainder of the conversation between Bovasso and the parent that may have been admissible under section 27-106.⁹⁵ Second, Judge Shanahan considered whether the *Redbook* article qualified or explained Bovasso's previously admitted testimony.⁹⁶ Judge Shanahan reasoned that because Bovasso's credibility was never an issue, the *Redbook* article was not needed to repair his credibility as a witness.⁹⁷ Judge Shanahan determined that the *Redbook* article did not bear on Dr. Schrein's guilt or innocence.⁹⁸ Judge Shanahan concluded that the trial court's admission of the *Redbook* article violated Dr. Schrein's constitutional "right to confront and cross-examine adverse witnesses."⁹⁹ Judge Shanahan characterized the *Redbook* article as a "witness" which defense counsel was unable to cross-examine.¹⁰⁰ Based on his analysis, Judge Shanahan determined that the decision of the court of appeals should have been affirmed and the trial court reversed.¹⁰¹

90. *Id.* at 149, 504 N.W.2d at 835 (Shanahan, J., dissenting).

91. *Id.* (Shanahan, J., dissenting).

92. *Id.* at 150, 504 N.W.2d at 836 (Shanahan, J., dissenting) (quoting *United States v. Brown*, 921 F.2d 1304, 1307-08 (D.C. Cir. 1990)).

93. *Id.* at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting).

94. *Id.* at 149, 504 N.W.2d at 835 (Shanahan, J., dissenting).

95. *Id.* at 150, 504 N.W.2d at 836 (Shanahan, J., dissenting).

96. *Id.* (Shanahan, J., dissenting).

97. *Id.* at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting). The State argued that defense counsel left the impression that Bovasso passed out "sinister" literature to the parents and therefore admission of the magazine article was necessary to restore his credibility. *Id.* at 145, 504 N.W.2d at 833. Judge Shanahan stated that Bovasso neither contradicted himself nor damaged his credibility. *Id.* at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting).

98. *Schrein*, 244 Neb. at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting).

99. *Id.*

100. *Id.* at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting).

101. *Id.* at 151, 504 N.W.2d at 837 (Shanahan, J., dissenting).

BACKGROUND

"RULE OF COMPLETENESS" STATUTES

When a trial court admits only a portion of the evidence rather than the complete evidence at trial it risks taking the evidence out of context.¹⁰² At common law, the "rule of completeness" allowed counsel to enter into evidence the remainder of any conversation or writing to "secure for the tribunal a complete understanding of the total tenor and effect of the utterance."¹⁰³

The federal government codified the "rule of completeness" in Rule 106 of the Federal Rules of Evidence ("Rule 106").¹⁰⁴ Rule 106 attempts to prevent a trial court from taking matters out of context.¹⁰⁵ Rule 106 states that "[w]henever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it."¹⁰⁶

Some states, including Nebraska, have adopted a modified version of Rule 106.¹⁰⁷ Nebraska Revised Statutes section 27-106 ("section 27-106") provides:

(1) When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at the same time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.¹⁰⁸

Section 27-106 states that the evidence that one seeks to admit must be on the "same subject" as the previously admitted evidence.¹⁰⁹ The

102. KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 56 (Edward V. Cleary ed., 3d ed. 1984).

103. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988) (citing 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2113 (J. Chadbourn Rev. 1978)).

104. FED. R. EVID. 106 advisory committee's note.

105. *Id.*

106. FED. R. EVID. 106.

107. DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 49 (Supp. 1993) (noting that some of those states include Iowa, Ohio, and Nevada).

108. NEB. REV. STAT. § 27-106 (Reissue 1989).

109. *Id.*

Nebraska Supreme Court has determined that the purpose of the codified "rule of completeness" is to prevent conversations or documents from being taken out of context.¹¹⁰ The supreme court has also held that the purpose of the "rule of completeness" is to explain or make previous evidence fully understood.¹¹¹ Section 27-106 allows for the remaining evidence to be admitted but does not require it.¹¹²

WHEN DOES A PARTY INTRODUCE EVIDENCE UNDER THE RULES OF COMPLETENESS?

Many federal courts have applied similar criteria to determine when evidence should be admitted under Rule 106.¹¹³ Rule 106 applies when a court deems a party to have partially introduced evidence.¹¹⁴ Although section 27-106 applies to oral statements, Rule 106 does not.¹¹⁵ On its face, "Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence."¹¹⁶

However, the United States Court of Appeals for the Eleventh Circuit has held that Rule 106 applies when one party extensively questions a witness about a written statement without introducing that statement into evidence.¹¹⁷ In *Beech Aircraft Corp. v. Rainey*,¹¹⁸

110. *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 791, 401 N.W.2d 489, 494-95 (1987).

111. *Spani v. Whitney*, 172 Neb. 550, 554, 110 N.W.2d 103, 106 (1961).

112. NEB. REV. STAT. § 27-106 (Reissue 1989); *State v. Manchester*, 213 Neb. 670, 679, 331 N.W.2d 776, 782 (1983).

113. *See, e.g., United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984) (holding that "[t]he Rule does not require introduction of portions of a statement that are neither explanatory of nor relevant to the passages that have been admitted"), *cert. denied*, 469 U.S. 1161 (1985); *United States v. Crosby*, 713 F.2d 1066, 1074 (5th Cir. 1983) (holding that "the portion sought to be admitted must be relevant to the issues, and only the parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted"), *cert. denied*, 464 U.S. 1001 (1983); *United States v. Brown*, 720 F.2d 1059, 1071 (9th Cir. 1983) (holding that "a statement may be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact"); *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982) (holding that Rule 106 requires "that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact"); *United States v. Jamar*, 561 F.2d 1103, 1108 (4th Cir. 1977) (holding that the rule permits introduction of evidence that "place in context other writings admitted into evidence which, viewed alone, may be misleading").

114. FED. R. EVID. 106; *see supra* note 68; *United States v. Pendas-Martinez*, 845 F.2d 938, 943 (11th Cir. 1988) (citations omitted).

115. FED. R. EVID. 106; NEB REV. STAT. § 27-106 (Reissue 1989); James Gillespie, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*, 62 NOTRE DAME L. REV. 382, 393 n.98 (1986).

116. *Pendas-Martinez*, 845 F.2d at 943 (citations omitted).

117. *Id.*

118. 784 F.2d 1523 (11th Cir. 1986), *vacated, reh'g granted*, 791 F.2d 833 (11th Cir. 1986) (en banc), *reinstated, on recons.*, 827 F.2d 1498 (11th Cir. 1987) (en banc), *cert. granted*, 485 U.S. 903, (1988), *aff'd in part, rev'd in part*, 488 U.S. 153 (1988).

a student and a Navy flight instructor were killed in an airplane crash.¹¹⁹ The spouses of the two decedents filed suit against the manufacturers of the airplane and the company that serviced the airplane.¹²⁰ The defendants claimed that pilot error caused the accident.¹²¹ The flight instructor's husband wrote a letter to the accident investigator detailing the husband's theory of the cause of the crash.¹²² During trial, defense counsel questioned the husband about the portions of the letter which suggested that pilot error caused the crash.¹²³ On cross-examination, plaintiff's counsel sought to question the husband regarding the remainder of the letter which suggested that equipment malfunction caused the crash.¹²⁴ The trial court sustained the defense counsel's objection to these questions.¹²⁵

On appeal, the Eleventh Circuit held that the trial court erred in prohibiting the cross-examination.¹²⁶ The court found that even though the letter itself was not introduced into evidence, the defense counsel's questions regarding the letter were "tantamount to introduction of evidence" and therefore Rule 106 applied.¹²⁷ The court reasoned that the testimony should have been allowed because it "would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone."¹²⁸

In *United States v. Pendas-Martinez*,¹²⁹ the Eleventh Circuit considered whether a few inadvertent questions regarding a report were enough to be "tantamount to the introduction of the report into evidence."¹³⁰ In *Pendas-Martinez*, on June 19, 1986, at 3:20 a.m., a United States Coast Guard patrol approached two boats floating to-

119. 784 F.2d 1523 (11th Cir. 1986), *vacated, reh'g granted*, 791 F.2d 833 (11th Cir. 1986) (en banc), *reinstated, on recons.*, 827 F.2d 1498 (11th Cir. 1987) (en banc), *cert. granted*, 485 U.S. 903, (1988), *aff'd in part, rev'd in part*, 488 U.S. 153, 156 (1988).

120. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 156 (1988).

121. *Id.* at 157.

122. *Id.* at 157-59. The husband was also a Navy flight instructor. *Id.* at 157.

123. *Beech Aircraft Corp.*, 488 U.S. at 159-60.

124. *Id.* at 160.

125. *Id.*

126. *Beech Aircraft Corp.*, 784 F.2d at 1529.

127. *Id.* at 1529 n.11.

128. *Id.* at 1529. On reconsideration, en banc, the United States Court of Appeals for the Eleventh Circuit agreed that the court should have allowed the testimony. See *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498, 1500 (11th Cir. 1987) (en banc) (affirming the initial appellate ruling on the application of Rule 106), *cert. granted*, 485 U.S. 903 (1988), *aff'd in part, rev'd in part*, 488 U.S. 153 (1988). The United States Supreme Court affirmed, holding that it was an abuse of discretion for the trial court not to allow the additional testimony. *Beech Aircraft Corp.*, 488 U.S. at 172 (1988). However, the Court stated that it did not need to explore the meaning and scope of Federal Rule 106. *Id.*

129. 845 F.2d 938 (11th Cir. 1988).

130. *United States v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988).

gether off the coast of Bimini.¹³¹ Members of the Coast Guard observed a man aboard one of the boats throw three white packages overboard.¹³² Some members of the patrol went aboard the boat, found several marijuana seeds, and took the men into custody.¹³³ The subsequent search discovered fifteen bales of marijuana drifting in the water near where the two boats had been floating.¹³⁴ A Coast Guard officer made a written report of what occurred during the seizure.¹³⁵ At trial, defense counsel questioned the officer about testing of the marijuana seeds.¹³⁶ During questioning, defense counsel inadvertently read portions of the officer's written report.¹³⁷ The trial court then allowed the prosecution to introduce the report into evidence.¹³⁸

The Eleventh Circuit held that the trial court improperly admitted the written report into evidence.¹³⁹ The court examined the admissibility of the report under Rule 106.¹⁴⁰ The court reasoned that the slight mention of the report was not "so extensive as to be tantamount to introduction of the report into evidence."¹⁴¹ In addition, the court found that a majority of the report was irrelevant to defense counsel's questions regarding the testing of the marijuana seeds.¹⁴²

131. *Id.* at 940.

132. *Id.*

133. *Id.* Field-testing of the seeds revealed that they were marijuana seeds. *Id.*

134. *Pendas-Martinez*, 845 F.2d at 940.

135. *Id.*

136. *Id.* at 944.

137. *Id.*

138. *Id.* at 940.

139. *Id.* at 945.

140. *Id.* at 943-45.

141. *Id.* at 944. The defendants were appealing the admission of a report handwritten by an officer who had arrested them. *Id.* The report detailed the events occurring at the time of the arrests. *Id.* Defense counsel inadvertently began questioning the police officer about his report:

Q. And there is no record of the test?

A. I believe there is a record of it in my statement, isn't there?

Q. You referred to several seeds in the vicinity of the starboard — strike that. What I am referring to is any record of what precise test was conducted.

A. Oh, no, sir. You mean the type of test?

Q. Right. In other words, somebody put in a report somewhere a field-test was conducted?

A. Yes.

Id. at 940-44.

142. *Pendas-Martinez*, 845 F.2d at 944-45.

THE TWO-PART TEST FOR ADMITTING EVIDENCE

The Threshold Test Requiring the Completing Evidence to be Relevant to an Issue Raised by the Previously Admitted Evidence

In *United States v. Velasco*,¹⁴³ the United States Court of Appeals for the Seventh Circuit considered whether relevance was a predicate to introducing evidence under Rule 106.¹⁴⁴ In *Velasco*, law enforcement officials observed the defendants and others participating in a complicated series of events culminating in an illegal drug sale.¹⁴⁵ After the arrests, one defendant made a police statement describing the events of the drug sale.¹⁴⁶ Several months later, that defendant recanted portions of his post arrest statement.¹⁴⁷ The prosecution introduced a portion of the defendant's statement concerning his knowledge of the presence of the drugs.¹⁴⁸ Defense counsel argued that the trial court should admit the entire statement.¹⁴⁹ The trial court ruled that Rule 106 did not require the introduction of the complete statement.¹⁵⁰

On appeal, the Seventh Circuit affirmed the trial court's decision to not admit the entire statement.¹⁵¹ In analyzing the trial court's application of Rule 106, the court noted that the remaining portion of evidence needed to be relevant "to the issues in the case."¹⁵² In addition, the court stated that a trial court could only have admitted the remaining portion of evidence if it qualified or explained the previously admitted evidence.¹⁵³ The court found that the unadmitted testimonial evidence was inadmissible because it involved accusations against three men who were not defendants in this case.¹⁵⁴ As a result, the evidence was irrelevant because it did not affect the case against the defendant.¹⁵⁵ When applying Rule 106, the court stated that a trial court must make a determination whether the remaining evidence is "relevant to the issues in the case."¹⁵⁶

143. 953 F.2d 1467 (7th Cir. 1992).

144. *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992).

145. *Id.* at 1469.

146. *Id.*

147. *Id.* at 1470.

148. *Id.* at 1472-73.

149. *Id.*

150. *Id.* at 1474.

151. *Id.* at 1476.

152. *Id.* at 1474-75.

153. *Id.* at 1475.

154. *Id.* at 1473.

155. *Id.*

156. *Id.* at 1475.

The Test Requiring the Completing Evidence to Qualify and Explain an Issue Raised by the Previously Admitted Evidence

In *Chirnside v. Lincoln Telephone & Telegraph Co.*,¹⁵⁷ the Nebraska Supreme Court considered the admission of testimony under section 27-106.¹⁵⁸ The plaintiff, an eight-year-old boy, was hit by the defendant's truck while crossing the street.¹⁵⁹ The defendant was unable to stop his truck before striking the boy.¹⁶⁰ During the trial, the prosecutor questioned the police officer who took the defendant's statement at the accident.¹⁶¹ The prosecutor's questioning encompassed statements that the defendant made regarding the failure of his brakes.¹⁶² On cross-examination by defense counsel, and over the state's objections, the defense counsel questioned the defendant about statements he had made to the officer that the plaintiff had ran into the street.¹⁶³ The jury found for the plaintiff; nonetheless, the plaintiff appealed the trial court's admission of the defendant's statements.¹⁶⁴

Under section 27-106, the supreme court held that trial courts can only make evidence complete when the completing evidence relates to the "same subject" as the previously admitted evidence and explains or qualifies the previously admitted evidence.¹⁶⁵ The court stated that the defendant's statements about the plaintiff running into the street did not qualify or explain the testimony regarding the defendant's faulty brakes.¹⁶⁶ In addition, the court found that the testimony regarding the child running into the street did not address the same subject as testimony about the faulty brakes.¹⁶⁷ Therefore, the court held that the trial court erroneously admitted the testimony even though the testimony contained parts of the same conversation.¹⁶⁸

The United States Court of Appeals for the Seventh Circuit, in *United States v. Sweiss*,¹⁶⁹ undertook a similar analysis as did the

157. 224 Neb. 784, 401 N.W.2d 489 (1987).

158. *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 790-91, 401 N.W.2d 489, 494-95 (1987).

159. *Id.* at 785-86, 401 N.W.2d at 491-92.

160. *Id.* at 786, 401 N.W.2d at 492.

161. *Id.* at 789, 401 N.W.2d at 493.

162. *Id.* at 789, 401 N.W.2d at 494.

163. *Id.* at 789-90, 401 N.W.2d at 494.

164. *Id.* at 784-90, 401 N.W.2d at 491-94.

165. *Id.* at 791, 401 N.W.2d at 495.

166. *Id.*

167. *Id.* The Nebraska statute requires that the completing evidence be on the same subject as the previously admitted portions. NEB. REV. STAT. § 27-106 (Reissue 1989).

168. *Chirnside*, 224 Neb. at 789-91, 401 N.W.2d at 494-95.

169. 814 F.2d 1208 (7th Cir. 1987).

court in *Chirnside*.¹⁷⁰ The United States charged the defendant, Musa "Moses" Sweiss, with conspiring to set fire to a rival grocery store.¹⁷¹ William Franklin, one man involved in the plot, wore a recording device supplied by the United States Department of Alcohol, Tobacco and Firearms ("ATF").¹⁷² Franklin recorded conversations in which Sweiss' conspirator, Bassam Faraj discussed with him the plans to burn down the store.¹⁷³ Faraj was arrested and agreed to wear a recording device when he met with Sweiss.¹⁷⁴ Faraj wore the device on two occasions, once in August of 1984 and again in September of the same year.¹⁷⁵ The tape from the September conversation included Sweiss discussing how Faraj was hired to participate in the plot and how Faraj could flee the country.¹⁷⁶ The prosecution introduced only the September tape recording into evidence to show that Sweiss participated in the crimes.¹⁷⁷ Sweiss argued that the trial court should also admit the August tape recording because it was necessary to show that the government's accusations against Sweiss were untrue.¹⁷⁸ The trial court refused to admit the August tape recording.¹⁷⁹

On appeal, the Seventh Circuit held that the trial court correctly denied admission of the August tape recording.¹⁸⁰ The court stated that trial courts may only admit completing evidence when the evidence qualifies or explains the previously admitted evidence.¹⁸¹ The court noted that it would admit completing evidence as qualifying or explaining previously admitted evidence if the evidence: "(1) explain[s] the admitted portion[;] (2) place[s] the admitted portion in context[;] (3) avoid[s] misleading the trier of fact[;] or (4) insures a fair and impartial understanding [of the evidence]." ¹⁸² The court determined that hearing the August tape was not necessary to explain or qualify the September tape, even though hearing the tape may have

170. *United States v. Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987). See *Chirnside*, 224 Neb. at 791, 401 N.W.2d at 495 (finding that the completing evidence must explain and qualify the previously admitted evidence).

171. *Sweiss*, 814 F.2d at 1209.

172. *Id.* at 1209.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1209-10.

177. *Id.*

178. *Id.* at 1210. Defendant's version of the facts was that he first learned about the bombing and Mr. Faraj's plans to flee the country from Mr. Faraj during the August conversations. *Id.*

179. *Sweiss*, 814 F.2d at 1209.

180. *Id.* at 1211.

181. *Id.* at 1211 (citations omitted). The court also recognized that the remaining portion must also be relevant to the issues of the case. *Id.*

182. *Sweiss*, 814 F.2d at 1211-12 (quoting *United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984), cert. denied, 469 U.S. 1101 (1985)).

been helpful to the jury.¹⁸³ The court also found that hearing the August tape may have confused the jury because the conversations were "vague and rambling."¹⁸⁴

In *United States v. Haddad*,¹⁸⁵ the Seventh Circuit addressed the factors announced in *Sweiss* in determining whether completing evidence explains or qualifies previously admitted evidence.¹⁸⁶ Several ATF agents and local police officers attempted to serve a search warrant on the defendant at his residence.¹⁸⁷ During the search, law enforcement officials found a pistol and marijuana under the defendant's bed.¹⁸⁸ The defendant did not have a valid "Illinois Firearm Owner's Identification Document."¹⁸⁹ The United States charged the defendant with "knowingly possessing [a] . . . semi-automatic pistol, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year."¹⁹⁰

At the defendant's trial, when questioned by the prosecution, a police officer testified that the defendant acknowledged the fact that he was aware of the presence of the marijuana.¹⁹¹ On cross-examination, the defense counsel attempted to elicit testimony from the officer that the defendant had denied knowing the gun was under the bed next to the marijuana.¹⁹² The trial court did not allow the defense counsel to cross-examine the police officer on this point, and the defendant appealed the ruling.¹⁹³

On appeal, the Seventh Circuit held that the trial court should have permitted the defense counsel to question the police officer regarding the defendant's statements made to the officer regarding the gun.¹⁹⁴ The court applied the four factor test articulated in *Sweiss* to determine that the questions regarding the gun met each part of the test.¹⁹⁵ Noting that the gun was only six inches away from the marijuana, the court deemed it necessary to allow the questions about the gun in order to place the statement about the marijuana in context.¹⁹⁶

183. *Id.* at 1212.

184. *Id.*

185. 10 F.3d 1252 (7th Cir. 1993).

186. *United States v. Haddad*, 10 F.3d 1252, 1259 (7th Cir. 1993).

187. *Id.* at 1255.

188. *Id.* The pistol was just six inches away from the marijuana. *Id.*

189. *Haddad*, 10 F.3d at 1255.

190. *Id.* at 1254.

191. *Id.* at 1258.

192. *Id.* Mr. Haddad's girlfriend testified that she had bought the gun without telling the defendant. *Id.* at 1255-56.

193. *Id.*

194. *Id.* at 1258-59.

195. *Id.* at 1259 (citing *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992)). *Velasco* adopts the four-part test adopted in *Sweiss*. *Velasco*, 953 F.2d at 1475 (citing *Sweiss*, 814 F.2d at 1211-12).

196. *Haddad*, 10 F.3d at 1259.

The court found it necessary to allow in the defendant's entire statement in order to "present a fair and impartial understanding of the evidence."¹⁹⁷

On two previous instances, the United States Court of Appeals for the Eight Circuit allowed in otherwise inadmissible completing evidence without relying on Rule 106 as did the Seventh and Eleventh Circuits.¹⁹⁸ In *United States v. Womochil*,¹⁹⁹ the Eighth Circuit considered whether completing evidence should be admitted to clear up false impressions created by opposing counsel.²⁰⁰ The defendant, Wayne Womochil, was convicted of "conspiring to distribute cocaine" and of "possessing cocaine with the intent to distribute."²⁰¹ Through the use of telephone wire taps, the police learned that Womochil distributed cocaine to Harry Gilbert who then distributed it to others, including Ronald Bartrem.²⁰² Later, Womochil distributed the cocaine directly to Bartrem.²⁰³

At trial, witnesses testified regarding Bartrem's cocaine source.²⁰⁴ Defense counsel questioned Gilbert Lascala regarding statements he made to the FBI including whether he had told the Federal Bureau of Investigations ("FBI") that Bartrem had stated he received his cocaine from Gilbert.²⁰⁵ Defense counsel's questioning created the impression that Bartrem had only received cocaine from Gilbert.²⁰⁶ On redirect, the prosecutor inquired into a conversation between Lascala and Bartrem because Bartrem had told Lascala that he had received cocaine first from Womochil, then from Gilbert.²⁰⁷ The defense objected to the prosecutor's questioning because defense counsel had only questioned Lascala about his statement to the FBI, not about Bartrem's conversation with Lascala.²⁰⁸ The trial court allowed the prosecutor's redirect to continue because the court deemed

197. *Id.*

198. See *United States v. Durham*, 868 F.2d 1010, 1012 (8th Cir. 1989) (admitting the completing evidence to clear up a false impression created by the previously admitted evidence, but not discussing Rule 106), *cert. denied*, 493 U.S. 954 (1989); *United States v. Womochil*, 778 F.2d 1311, 1314-17 (8th Cir. 1985) (admitting completing evidence to explain the previously admitted evidence but not discussing Rule 106); see *supra* notes 118-56 and accompanying text; see *supra* notes 169-97 and accompanying text.

199. 778 F.2d 1311 (8th Cir. 1985).

200. *Womochil*, 778 F.2d at 1315.

201. *Id.* at 1312.

202. *Id.*

203. *Id.*

204. *Id.* at 1313-15.

205. *Id.* at 1315.

206. *Id.* Police wire taps showed that Mr. Womochil and Mr. Gilbert had supplied cocaine to Mr. Bartrem. *Id.* at 1312.

207. *Womochil*, 778 F.2d at 1314-15.

208. *Id.* at 1315.

the questioning necessary to clear up a false impression as to the source of the cocaine.²⁰⁹

On appeal, the Eighth Circuit affirmed the trial court's ruling.²¹⁰ The court agreed with the trial court's findings that the defense counsel's line of questioning had created a false impression that Womochil was not involved in distributing cocaine.²¹¹ Accordingly, the court held that the trial court's admission of the testimony was not an abuse of discretion because it was necessary to clear up the false impression.²¹²

In *United States v. Durham*,²¹³ the Eighth Circuit cited *Womochil* to support its conclusion that otherwise inadmissible completing evidence was allowable to clear up a false impression.²¹⁴ In *Durham*, Kenneth Clark owed the defendant, Ricky Durham, approximately fifteen hundred dollars for drugs Clark had previously purchased.²¹⁵ Clark, a postal employee, was murdered while delivering mail.²¹⁶ Prior to his murder, Durham sent Clark a letter containing a death threat.²¹⁷ Furthermore, a witness saw Durham, enter an alleyway and drive away in a green car after shots were fired.²¹⁸ Another witness testified that earlier that day, Durham left home with a gun in a green car.²¹⁹ To rebut the inference that Durham killed Clark, defense counsel elicited information from one of Clark's co-workers that an unnamed man had been looking for Clark on many occasions, in-

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 1315-17. In another instance, defense counsel had asked an FBI agent whether the defendant had been officially accused of any crimes involving narcotics. *Id.* at 1316. The agent responded that he was not aware of any. *Id.* During redirect, the prosecution asked the agent if he had received any information about the defendant and narcotics. *Id.* The agent responded that he had received such information many times in the past. *Id.* Over the defendant's objections, the trial court allowed this questioning. *Id.*

On appeal, the Eighth Circuit held that "defense counsel opened the door to questions about whether the agent had ever received information as to Womochil's involvement with narcotics by creating the false impression on cross-examination that Womochil had never come under suspicion with respect to drugs." *Id.* at 1317. The court found that it was necessary to admit the testimony in order to clear up the false impressions created by defense counsel. *Id.* The court held that when a false impression is created the court may "allow the use of otherwise inadmissible evidence on redirect to clarify the issue." *Id.*

213. 868 F.2d 1010 (8th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989).

214. *United States v. Durham*, 868 F.2d 1010, 1012 (8th Cir. 1989) (citing *Womochil*, 778 F.2d at 1315), *cert. denied*, 493 U.S. 954 (1989).

215. *Id.* at 1011.

216. *Id.*

217. *Id.* The letter referred to Mr. Clark's debt and stated that there was a warrant out for Mr. Clark's head. *Id.*

218. *Durham*, 868 F.2d at 1011.

219. *Id.*

cluding the day of his murder.²²⁰ During cross-examination, and over defense counsel's objections, the prosecutor inquired into the identity of the unnamed man and discovered that he was a landlord or realtor.²²¹ Based on these objections, Durham appealed his conviction.²²²

On appeal, the Eighth Circuit held that the testimony elicited by the prosecution was admissible.²²³ Without the completing testimony, the court noted that the jury may have been misled to believe the unnamed man had committed the murder.²²⁴ Thus, the court held that the testimony was necessary to clear up the false impression created by the defense counsel's questions.²²⁵

ANALYSIS

In *State v. Schrein*,²²⁶ the Nebraska Supreme Court upheld the admission of a *Redbook* article on pedophiles under Nebraska Revised Statutes section 27-106 ("section 27-106").²²⁷ In its analysis of section 27-106, the supreme court outlined the test employed by the United States Courts of Appeals when applying Rule 106 of the Federal Rules of Evidence ("Rule 106").²²⁸ The court found that in order for a federal court to admit evidence under Rule 106, the completing evidence must be relevant to the issues in the case and must explain or qualify the

220. *Id.* at 1012.

221. *Id.*

222. *Id.* at 1011.

223. *Id.*

224. *Id.* This misidentification could occur because that man had been looking for Mr. Clark on a number of occasions and, on the day of the murder, wanted to know where he was. *Id.*

225. *Durham*, 868 F.2d at 1011.

226. 244 Neb. 136, 504 N.W.2d 827 (1993).

227. *State v. Schrein*, 244 Neb. 136, 146-48, 504 N.W.2d 827, 834-35 (1993); see NEB. REV. STAT. § 27-106 (Reissue 1989) (regulating when completing evidence may be allowed).

228. *Compare Schrein*, 244 Neb. at 145, 504 N.W.2d at 853 (outlining a test that states the additional evidence must be relevant and must qualify or explain the previous evidence) with *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992) (holding that the completing evidence must be relevant, and necessary to qualify and explain the previously admitted evidence) and *United States v. Sweiss*, 814 F.2d 1208, 1211-12 (7th Cir. 1987) (holding that the completing evidence must be relevant, and necessary to explain or qualify the previously admitted evidence), and *United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984) (holding that "the rule does not require introduction of portions of a statement that are neither explanatory of nor relevant to the passages that have been admitted"), *cert. denied*, 469 U.S. 1161 (1985) and *United States v. Crosby*, 713 F.2d 1066, 1074 (5th Cir. 1983) (holding that the "portion sought to be admitted must be relevant to the issues, and only the parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted"), *cert. denied*, 464 U.S. 1001 (1983) and *United States v. Brown*, 720 F.2d 1059, 1071 (9th Cir. 1983) (holding that the completing evidence may be admitted if it is relevant and qualifies or explains the previous evidence) and *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982) (holding that Rule 106 requires that the completing evidence be relevant and explain or qualify the admitted evidence).

previously admitted evidence.²²⁹ The test outlined by the court is in accord with the test used by the United States Court of Appeals for the Seventh Circuit and similar to the test it applied in *Chirnside v. Lincoln Telephone & Telegraph Co.*²³⁰ After discussing this test, the court found that the trial court did not err in admitting the *Redbook* article.²³¹

Judge Thomas Shanahan, joined by two other judges, dissented.²³² Judge Shanahan adopted the same test that the court outlined for analyzing section 27-106.²³³ Although Judge Shanahan outlined the same test as the court, he would have held that the trial court erred in admitting the *Redbook* article.²³⁴ When the court's analysis is compared to the decisions of other courts who have applied the same test, Judge Shanahan's application of the test for section 27-106 is more compelling than the court's application.²³⁵ The court's result was inaccurate for three reasons: (1) defense counsel's questions of Sergeant Kenneth Bovasso did not introduce the *Redbook* article into evidence; (2) the *Redbook* article did not cover the same subject matter as Bovasso's testimony; and (3) the *Redbook* article did not explain or qualify Bovasso's testimony.²³⁶

WHETHER THE *REDBOOK* ARTICLE WAS INTRODUCED INTO EVIDENCE

In order for section 27-106 to apply, a party must introduce part of a complete declaration, act, conversation or writing.²³⁷ In both

229. *Schrein*, 244 Neb. at 145, 504 N.W.2d at 833.

230. 224 Neb. 784, 401 N.W.2d 489 (1987). Compare *Schrein*, 244 Neb. at 145, 504 N.W.2d at 853 (outlining a test that states the additional evidence must be relevant and must qualify or explain the previous evidence) with *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 791, 401 N.W.2d 489, 495 (1987) (holding that the remainder of evidence may be admitted if "it tends to qualify or explain part disclosed") (citations omitted) and *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992) (holding that the completing evidence must be relevant, and necessary to qualify and explain the previously admitted evidence) and *United States v. Sweiss*, 814 F.2d 1208, 1211-12 (7th Cir. 1987) (holding that the completing evidence must be relevant, and necessary to explain or qualify the previously admitted evidence).

231. *Schrein*, 244 Neb. at 145-48, 504 N.W.2d at 833-35.

232. *Id.* at 147-51, 504 N.W.2d at 835-37 (Shanahan, J., dissenting).

233. Compare *id.* at 145-48, 504 N.W.2d at 833-35 (outlining a test which looked to whether the evidence was relevant and whether it explained or qualified the admitted portion) with *id.* at 149-51, 504 N.W.2d at 835-37 (Shanahan, J., dissenting) (adopting a test which looked to whether the evidence was relevant and whether it explained or qualified the admitted portion inadmissible).

234. See *supra* note 233 and accompanying text. See *Schrein*, 244 Neb. at 151, 504 N.W.2d at 837 (Shanahan, J., dissenting) (outlining a test wherein the completing evidence must be relevant and must qualify or explain the previously admitted evidence and finding that the trial court should not have admitted the article).

235. See *infra* notes 237-301 and accompanying text.

236. See *infra* notes 237-301 and accompanying text.

237. *Schrein*, 244 Neb. at 144, 504 N.W.2d at 832.

*Beech Aircraft Corp. v. Rainey*²³⁸ and in *United States v. Pendas-Martinez*,²³⁹ the United States Court of Appeals for the Eleventh Circuit held that Rule 106 may apply when one side questions a witness about a writing without introducing part of the writing into evidence.²⁴⁰ The questions must be "tantamount to introduction of the evidence" in order to open up the possibility for the adverse party to introduce the remainder of the writing into evidence.²⁴¹ As a result, section 27-106 may have permitted the trial court to admit the *Redbook* article because the article was initially introduced when defense counsel questioned Bovasso.²⁴² However, when comparing the facts in *Schrein* to *Beech Aircraft Corp.* and *Pendas-Martinez*, it does not appear that the questions asked by defense counsel of Bovasso were "tantamount to the introduction of evidence."²⁴³

In *Beech Aircraft Corp.*, a witness was questioned about a letter he had written concerning the true cause of an airplane crash.²⁴⁴ The testimony of the witness specifically centered on the exact contents of the letter.²⁴⁵ Moreover, the content of the letter was an important issue in the case and was the subject matter of several questions.²⁴⁶ In *Pendas-Martinez*, defense counsel questioned a Coast Guard officer about statements he had made in a report.²⁴⁷ Defense counsel asked one question and then struck the question from the record.²⁴⁸ The question about the report was one in a set of questions concerning the conduct of the officer at the time of the investigation.²⁴⁹ The court in *Beech Aircraft Corp.* held that the writing should have been admitted

238. 784 F.2d 1523 (11th Cir. 1986), *vacated, reh'g granted*, 791 F.2d 833 (11th Cir. 1986) (en banc), *reinstated, on recons.*, 827 F.2d 1498 (11th Cir. 1987) (en banc), *cert. granted*, 485 U.S. 903 (1988), *aff'd in part and rev'd in part*, 488 U.S. 153 (1988).

239. 845 F.2d 938 (11th Cir. 1988).

240. *Beech Aircraft Corp. v. Rainey*, 784 F.2d 1523, 1529 n.11 (11th Cir. 1986), *vacated, reh'g granted*, 791 F.2d 833 (11th Cir. 1986) (en banc), *reinstated, on recons.*, 827 F.2d 1498 (11th Cir. 1987) (en banc), *cert. granted*, 485 U.S. 903 (1988), *aff'd in part and rev'd in part*, 488 U.S. 153 (1988); *United States v. Pendas-Martinez*, 845 F.2d 938, 943-44 (11th Cir. 1988).

241. *Pendas-Martinez*, 845 F.2d at 943-44.

242. *Schrein*, 244 Neb. at 144-45, 504 N.W.2d at 832-33.

243. See *infra* notes 244-54 and accompanying text.

244. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 159-60 (1988).

245. *Id.* at 159.

246. *Beech Aircraft Corp.*, 784 F.2d at 1529. See *Beech Aircraft Corp.*, 488 U.S. at 171 (stating that questioning about the content of the letter was necessary to support his theory of the airplane crash).

247. *Pendas-Martinez*, 845 F.2d at 944.

248. *Id.*

249. *Id.* at 940-44. The officer was being questioned about what testing was done on what was thought to be marijuana seeds, at the time of the arrest of the defendant on drug charges. *Id.* at 944.

and the court in *Pendas-Martinez* held that the report should not have been admitted.²⁵⁰

In *Schrein*, defense counsel did not question Bovasso regarding the content of the *Redbook* article.²⁵¹ Instead Bovasso's testimony focused on how he acted during his interviews with the parents.²⁵² The defense counsel only asked questions of Bovasso regarding whether he passed out any literature and if so, why.²⁵³ The questioning in *Schrein* resembled that seen in *Pendas-Martinez* as opposed to *Beech Aircraft Corp.*²⁵⁴ Therefore, because the defense counsel did not explore the contents of the *Redbook* article, the *Redbook* article was not introduced into evidence.²⁵⁵

WHETHER THE *REDBOOK* ARTICLE WAS THE SAME SUBJECT AS BOVASSO'S TESTIMONY

Section 27-106 requires that the completing evidence concern the same subject as the previously admitted evidence.²⁵⁶ In *Chirnside*, after one party introduced testimony regarding faulty brakes, the trial court did not permit the opposing party to introduce evidence that the plaintiff ran into the street.²⁵⁷ In upholding the trial court, the Nebraska Supreme Court held that the testimony regarding the plaintiff running into the street could not "conceivably be said to embrace the subject of faulty brakes."²⁵⁸

Similarly, in *Schrein*, defense counsel questioned Bovasso about how he conducted his investigation not about the contents of the *Redbook* article.²⁵⁹ The *Redbook* article presented general information about child molesters, not specific information about Dr. Schrein.²⁶⁰ Just as the testimony about the boy running into the street was not deemed to be on the same subject matter as faulty brakes in *Chirnside*, the content of the *Redbook* article was not on the same subject as the defense counsel's questions regarding how

250. *Beech Aircraft Corp.*, 784 F.2d at 1529; *Pendas-Martinez*, 845 F.2d at 945.

251. *Schrein*, 244 Neb. at 144, 504 N.W.2d at 833.

252. *Id.* at 146, 504 N.W.2d at 833.

253. *Id.* at 144-45, 504 N.W.2d at 833.

254. See *supra* notes 244-53 and accompanying text.

255. See *supra* note 237-54 and accompanying text.

256. NEB. REV. STAT. § 27-106 (Reissue 1989).

257. *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 791, 401 N.W.2d 489, 495 (1987).

258. *Chirnside*, 224 Neb. at 791, 401 N.W.2d at 495.

259. *Schrein*, 244 Neb. at 144-45, 504 N.W.2d at 833.

260. *Id.* at 151, 504 N.W.2d at 833 (Shanahan, J., dissenting).

Bovasso conducted his investigation.²⁶¹ Therefore, the trial court should not have admitted the *Redbook* article into evidence.²⁶²

WHETHER THE *REDBOOK* ARTICLE EXPLAINED AND QUALIFIED THE PREVIOUSLY ADMITTED TESTIMONY

The trial court's admission of the *Redbook* article also failed to satisfy the final part of the test of completeness outlined by the Nebraska Supreme Court, requiring the completing evidence to explain or qualify the previously admitted evidence.²⁶³ The Nebraska Supreme Court discussed four factors in determining whether admission of completing evidence was necessary to qualify and explain the previously admitted evidence — whether the completing evidence: (1) explained the previously admitted evidence; (2) placed the previously admitted evidence in context; (3) prevented the trier of fact from being misled; and (4) insured a fair and impartial understanding of the previously admitted evidence.²⁶⁴

With regard to the first factor, the *Redbook* article must explain a portion of Bovasso's testimony elicited by defense counsel.²⁶⁵ The State argued and the court agreed that the introduction of the *Redbook* article was necessary to reestablish Bovasso's credibility.²⁶⁶ However, Bovasso's credibility was not an issue.²⁶⁷ Judge Shanahan commented that "Bovasso did not mention or imply that [Dr.] Schrein was a pedophile."²⁶⁸ Furthermore, a parent to whom the *Redbook* article was given testified that Bovasso did not imply anything derogatory about Dr. Schrein.²⁶⁹ In addition, the parent did not mention the *Redbook* article in her testimony.²⁷⁰

With regard to the second factor, the *Redbook* article must place the previously admitted evidence in context.²⁷¹ The State argued that

261. Compare *Chirnside*, 224 Neb. at 784, 401 N.W.2d at 495 (stating that the testimony was not on the same subject as the previous testimony) with *Schrein*, 244 Neb. at 150, 504 N.W.2d at 836 (Shanahan, J., dissenting) (stating that how the *Redbook* article became the balance of the same subject as the cross-examination was puzzling).

262. See *supra* notes 256-61 and accompanying text.

263. See *infra* notes 265-301 and accompanying text.

264. *Schrein*, 244 Neb. at 145, 504 N.W.2d at 833.

265. See *id.* at 143-47, 504 N.W.2d at 832-34 (discussing the trial courts admission of the *Redbook* article and discussing that completing evidence may explain and qualify the previously admitted evidence if it explains the previously admitted evidence).

266. *Id.* at 145, 504 N.W.2d at 833.

267. *State v. Schrein*, 1 Neb. Ct. App. 1581, 1588-89 (1992), *rev'd.*, 244 Neb. 136, 504 N.W.2d 827 (1993).

268. *Schrein*, 244 Neb. at 150, 504 N.W.2d at 836 (Shanahan, J., dissenting).

269. *Id.* at 140, 504 N.W.2d at 830.

270. *Id.*

271. See *id.* at 143-47, 504 N.W.2d at 832-34 (discussing the trial courts admission of the *Redbook* article and discussing that completing evidence may explain and qualify

the *Redbook* article placed Bovasso's testimony in context.²⁷² According to the State, defense counsel's questions created an impression in the jury members' minds that the *Redbook* article contained something sinister about pediatricians and thus improperly influenced witnesses because Bovasso was showing the *Redbook* article to parents during his investigation.²⁷³ Although the court did not specifically address the State's argument, Judge Shanahan noted that the State's argument of undue influence of witnesses was "premised on absolute speculation."²⁷⁴ In support of Judge Shanahan's argument, defense counsel did not discuss the content of the *Redbook* article, except for the fact that it contained information on pedophiles.²⁷⁵ Defense counsel never mentioned that the *Redbook* article suggested that pediatricians sometimes suffer from pedophilia.²⁷⁶ Because Bovasso did not discuss the contents of the *Redbook* article, the trier of fact could not have taken his testimony out of context.²⁷⁷

With regard to the third factor, Bovasso's testimony must have created the potential of misleading the trier of fact which the admission of the *Redbook* article would have prevented.²⁷⁸ The State argued that introduction of the *Redbook* article was consistent with the standards articulated in *United States v. Haddad*,²⁷⁹ *United States v. Durham*,²⁸⁰ and *United States v. Womochil*.²⁸¹

the previously admitted evidence if it places the previously admitted evidence in context).

272. See Brief for Appellee at 39, *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993) (No. 91-0518) (arguing that admission of the *Redbook* article was necessary to counter defense counsel's suggestion that Bovasso improperly influenced witnesses during his investigation).

273. See *id.* (arguing that admission of the article was necessary to counter defense counsel's suggestion that Bovasso improperly influenced witnesses during his investigation); *Schrein*, 244 Neb. at 145, 504 N.W.2d at 833.

274. See *id.* at 145-46, 504 N.W.2d at 833 (describing the State's argument but not addressing it). *Id.* at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting).

275. *Schrein*, 244 Neb. at 144-45, 504 N.W.2d at 833.

276. *Id.*

277. Appellant's Memorandum Brief in Support of Motion for Reh'g at 5, *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993) (No. 91-0518).

278. See *Schrein*, 244 Neb. at 143-47, 504 N.W.2d at 832-34 (discussing the trial court's admission of the *Redbook* article and discussing that completing evidence may explain and qualify the previously admitted evidence if admitting the completing evidence will avoid misleading the fact finder).

279. 10 F.3d 1252 (7th Cir. 1993).

280. 868 F.2d 1010 (8th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989).

281. 778 F.2d 1311 (8th Cir. 1985); see Brief of Appellee at 38, *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993) (No. 91-0518) (comparing *Schrein* to *Womochil* and arguing that it was necessary under the rule articulated in *Womochil* to allow the article in to clarify the false impression given to the jury); *Haddad*, 10 F.3d at 1258 (allowing completing evidence to allow the jury to have a fair understanding of the evidence); *Durham*, 868 F.2d at 1011 (allowing the completing evidence to clear up a false impression given to the jury); *Womochil*, 778 F.2d at 1315-17 (allowing completing evidence to prevent the creation of a false impression).

In *Haddad*, the United States Court of Appeals for the Seventh Circuit ruled that it was necessary to allow the introduction of the completing evidence that the defendant had not known of the presence of a gun when he had previously admitted knowing of the presence of marijuana.²⁸² The key fact was that the gun was only six inches away from the marijuana.²⁸³ As a result, because the defendant had previously admitted having knowledge of the marijuana, the court allowed the testimony about the gun in order to prevent the jury from being misled.²⁸⁴

In *Durham*, a defense witness testified that an unnamed man was looking for the murder victim on the day of the murder.²⁸⁵ The court allowed testimony about the real identity of the man in order to prevent the jury from being misled through an impression that it was the unnamed man who murdered the victim.²⁸⁶ The identity of the murderer was a central issue in the case.²⁸⁷

In *Womochil*, the trial court allowed a witness to further testify that he received cocaine from the defendant in order to dispel a false impression.²⁸⁸ Without the additional testimony, the jury may have been misled into thinking the witness never received any drugs from the defendant.²⁸⁹ Whether the defendant supplied the witness with cocaine was a central issue in the case.²⁹⁰

In *Haddad*, *Durham*, and *Womochil*, the court reached the same conclusion because there was a danger that the jury would be misled by partial evidence regarding key issues.²⁹¹ In *Schrein*, there was no threat that the fact finder would be misled because the contents of the article did not pertain to any of the central issues in the case.²⁹² The *Redbook* article was only introduced in conjunction with a minor issue in the case.²⁹³ It was brought up in connection with a "tangential witness of a tangential factual question."²⁹⁴

282. *Haddad*, 10 F.3d at 1259.

283. *Id.*

284. *Id.*

285. *Durham*, 868 F.2d at 1012.

286. *Id.* at 1012.

287. *Id.*

288. *Womochil*, 778 F.2d at 1315.

289. *Id.* at 1315.

290. *See id.* at 1315 (stating that the additional testimony was necessary to prevent the false impression that Mr. Gilbert alone had been Mr. Bartrem's cocaine source).

291. *See supra* notes 282-90 and accompanying text.

292. *Schrein*, 244 Neb. at 150, 504 N.W.2d at 836 (Shanahan, J., dissenting).

293. *Schrein*, 1 Neb. Ct. App. at 1588.

294. *Id.* at 1589. In *Schrein*, the fact finder was informed about the nature of Bovasso's investigation by both Bovasso's testimony and the testimony of another witness. *See Schrein*, 244 Neb. at 138, 504 N.W.2d at 829, 830 (outlining the testimony as to Bovasso's investigation). The dissent could not determine what confusion or misrepresentation existed as to what Bovasso had done during his investigation which would

With regards to the fourth factor, the *Redbook* article must have been necessary to present a fair and impartial understanding of the evidence.²⁹⁵ The State argued that the admission of the *Redbook* article was necessary to repair Bovasso's credibility and rebut the impression that he improperly influenced witnesses.²⁹⁶ However, the Nebraska Court of Appeals found that any probative value that the *Redbook* article had in regards to Bovasso's credibility was outweighed by the *Redbook* article's "tendency to create unfair prejudice."²⁹⁷ The article singled out a pediatrician as an example of a classic child molester.²⁹⁸ In addition, neither side introduced evidence regarding the author's qualifications or expertise.²⁹⁹ In all respects, the trial court's admission of the *Redbook* article could not present a fair and impartial understanding of Bovasso's testimony because the *Redbook* article itself was misleading and prejudicial.³⁰⁰

CONCLUSION

"Rule of completeness" statutes, such as Nebraska Revised Statute section 27-106 ("section 27-106"), were enacted to ensure that the fact finder receives a complete understanding of all the evidence when only a portion of it was previously introduced. The question of when section 27-106 allows for the admission of evidence arose in *State v. Schrein*³⁰¹ when a trial court admitted into evidence a *Redbook* article about pedophilia.³⁰² The Nebraska Supreme Court outlined a two-part test in determining whether the trial court correctly admitted the *Redbook* article into evidence.³⁰³ First, the supreme court asked whether the *Redbook* article was relevant to the issues in the case.³⁰⁴ Second, the court asked whether the *Redbook* article explained or qualified the previous testimony.³⁰⁵ The court held that the *Redbook* article was both relevant and necessary to explain or qualify the previ-

require admission of the magazine article. *Id.* at 150, 504 N.W.2d at 836 (Shanahan, J., dissenting). Therefore, the dissent determined that the court had misapplied section 27-106 by admitting the additional evidence. *Id.* at 148, 504 N.W.2d at 835 (Shanahan, J., dissenting).

295. *See Schrein*, 244 Neb. at 143-47, 504 N.W.2d at 832-34 (discussing the trial court's admission of the *Redbook* article and discussing that completing evidence may explain and qualify the previously admitted evidence if admitting the completing evidence will insure an impartial and fair understanding of the evidence).

296. *Id.* at 145, 504 N.W.2d at 833.

297. *Schrein*, 1 Neb. Ct. App. at 1589.

298. *Id.*

299. *Schrein*, 244 Neb. at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting).

300. *See supra* notes 295-99 and accompanying text.

301. 244 Neb. 136, 504 N.W.2d 827 (1993).

302. *See State v. Schrein*, 244 Neb. 136, 137-52, 504 N.W.2d 827, 829-37 (1993).

303. *Id.* at 145, 504 N.W.2d at 833.

304. *Id.*

305. *Id.*

ously admitted testimony.³⁰⁶ Judge Thomas Shanahan dissented from the court's opinion, arguing that the *Redbook* article was not relevant and therefore failed the first part of the test.³⁰⁷

Although the court and the dissent reached different conclusions on whether the *Redbook* article was relevant, neither fully examined the second part of the test and the four factors used in analyzing the second part. The application of the four factors as analyzed by other courts to the facts in *Schrein* demonstrates that the *Redbook* article neither explained nor qualified Sergeant Kenneth Bovasso's previous testimony. By admitting the *Redbook* article, the trial court did not place Bovasso's testimony in context, and did not help clarify a misleading impression left over from defense counsel's questioning of Bovasso. Furthermore, defense counsel's questions of Bovasso regarding how he distributed the literature raised an insignificant issue that did not open the door to the State's introduction of the *Redbook* article describing the habits and hidden identities of child molesters. Examination of the court's two-part test and the decisions of other courts interpreting that test clearly show that the trial court erred in admitting the *Redbook* article.

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306. *Id.* at 145-46, 504 N.W.2d at 833-34.

307. *Id.* at 151, 504 N.W.2d at 836 (Shanahan, J., dissenting).