



2013

Supplementing the Record in the Federal Courts of Appeals: What If the Evidence You Need Is Not in the Record?

George C. Harris

Xiang Li

Follow this and additional works at: <http://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the [Evidence Commons](#), and the [Litigation Commons](#)

Recommended Citation

George C. Harris and Xiang Li, *Supplementing the Record in the Federal Courts of Appeals: What If the Evidence You Need Is Not in the Record?*, 14 J. APP. PRAC. & PROCESS 317 (2013).

Available at: <http://lawrepository.ualr.edu/appellatepracticeprocess/vol14/iss2/7>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

PRACTICE NOTE

SUPPLEMENTING THE RECORD IN THE FEDERAL COURTS OF APPEALS: WHAT IF THE EVIDENCE YOU NEED IS NOT IN THE RECORD?

George C. Harris* and Xiang Li**

I. INTRODUCTION

The federal courts of appeals review district court orders and judgments on the basis of a closed record, which is limited to materials in the record when the district court made the decision under review.¹ This limitation is “fundamental” because appellate courts “lack the means to authenticate

*Litigation Partner, Morrison & Foerster, San Francisco.

**Litigation Associate, Morrison & Foerster, San Francisco.

1. See e.g. *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1165 (3d Cir. 1986) (pointing out that “[t]he only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court”). A district court record includes “(1) the original papers and exhibits filed in the district court; (2) the transcripts of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.” Fed. R. App. P. 10(a). Consequently, “papers not filed with the district court or admitted into evidence by that court are not part of the record on appeal.” *Barcamerica Intl. USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 593–94 (9th Cir. 2002) (citation omitted); but see *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1004 (9th Cir. 2009) (holding that a pretrial order delivered into the possession of the clerk was part of the record when it had been submitted for review by the court and had been referenced in a motion, even though it was not officially filed).

documents” and must rely on the district court’s designation of submitted documents as part of the record.² “Litigants who disregard this process impair [the courts’] ability to perform [their] appellate function.”³

But what if highly relevant documents on the key issue of intent come to light after the district court has dismissed your client’s contract case on summary judgment? And what if the newly uncovered documents were responsive to discovery requests and within the possession of the opposing party? Are you simply out of luck? Or are there ways to supplement the record on appeal with those documents? What if a new witness comes forward with potential testimonial statements that strongly refute a key finding of fact made against your client in the district court? Is there anything you can do to get the court of appeals to consider a sworn statement by the witness?

Fortunately, the general rule of a closed appellate record is not absolute. Attorneys requesting that federal courts of appeals consider materials not in the district court record can rely on three possible avenues to supplement the record on appeal: (1) Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure, (2) Rule 201 of the Federal Rules of Evidence, and (3) the inherent equitable authority of the federal courts of appeals.⁴ This article uses hypothetical scenarios to examine the various contexts in which each of these avenues may present a means of supplementing the record on appeal.

2. See *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003).

3. *Id.*

4. See *id.* (citing Fed. R. App. P. 10(e)(2)(C) and Fed. R. Evid. 201, and listing the three exceptions to the general rule of reviewing a closed record). Rule 48 of the Federal Rules of Appellate Procedure also provides for appellate fact-finding in the form of appointing a “special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court.” Fed. R. App. P. 48. The Advisory Committee Note indicates, however, that the Rule is not intended to alter the practice of remanding unresolved factual issues to trial courts, but applies instead to ancillary matters such as the “application for fees or eligibility for Criminal Justice Act status on appeal.” Fed. R. App. P. 48, advisory comm. n. Thus, while Rule 48 allows for supplementation of the appellate record with evidence not in the district court record, its limited purpose greatly restricts the nature of the evidence permitted.

II. IS THERE ANY WAY TO SUPPLEMENT THE RECORD IF . . .

A. Scenario 1

In a breach of contract action over an asset-purchase agreement, there is a dispute about the parties' intent as to whether certain patent rights are included. Communications between the opposing party and third parties evidencing an intent to include the rights come to light only after the court has dismissed the case on summary judgment against your client. The communications were within the scope of discovery requests and in the opposing party's possession at the time of discovery. On appeal, is there anything you can do to introduce the newly discovered communications?

1. Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure and Rule 201 of the Federal Rules of Evidence

FRAP 10(e)(2)(C) and FRE 201 will not help you here. They apply only in very specific and narrow circumstances—correcting inadvertent omissions under FRAP 10(e)(2)(C) or taking judicial notice of highly indisputable facts or directly related court proceedings under FRE 201.

a. Rule 10(e)(2)(C)

Intended to permit correction of the appellate record to accurately reflect what happened in the district court,⁵ FRAP 10(e)(2) provides that

[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

- (A) on stipulation of the parties;
- (B) by the district court before or after the record has been forwarded; or
- (C) by the court of appeals.⁶

5. See *U.S. ex rel. Mulvaney v. Rush*, 487 F.2d 684, 687 n. 5 (3d Cir. 1973).

6. Fed. R. App. P. 10(e)(2).

Accordingly, most federal courts of appeals interpret FRAP 10(e)(2) to allow supplementing the appellate record “only to correct inadvertent omissions, not to introduce new evidence.”⁷ The courts of appeals are willing to supplement the record with materials not in the district record only if the materials were relied on in the district court proceedings and would have been introduced into the district court record but for inadvertent omission.⁸

For example, in *Ross v. Kemp*, the Eleventh Circuit permitted a deposition to supplement the record even though it had not been filed in accordance with the then-recently changed Federal Rules of Civil Procedure.⁹ The court found the omission inadvertent because (1) the party seeking to supplement the record had reasonably believed the deposition was filed in accordance with the Federal Rules of Civil Procedure in effect at the time of taking the deposition, and (2) both parties had relied on the deposition as part of the record in their pleadings.¹⁰ Similarly, in *Brown v. Home Insurance Company*, the Eighth Circuit permitted a deposition to supplement the record when the party seeking to supplement had referenced the deposition in

7. *In re Application of Adan*, 437 F.3d 381, 388 n. 3 (3d Cir. 2006); *accord George v. Smith*, 586 F.3d 479, 486 n. 1 (7th Cir. 2009) (denying supplementation when the evidence sought to be introduced was “essentially brand new” because it was never offered to the trial court until after the appeals process had begun); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003) (characterizing an attempt “to add new material that was never considered by the district court” as “not permitted under the rule”); *U.S. v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981) (explaining that “[w]hat in fact went on below may be settled and placed of record pursuant to Rule 10(e),” and noting that “whatever proceedings are necessary to that end are permissible,” but that “[n]ew proceedings of a substantive nature, designed to supply what might have been done but was not, are beyond the reach of the rule”).

8. *See Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003) (“Thus, the purpose of amendment under this rule is to ensure that the appellate record accurately reflects the record before the District Court, *not* to provide this Court with new evidence not before the District Court, even if the new evidence is substantial.”) (citation omitted; emphasis in original); *Thompson v. Bell*, 373 F.3d 688, 690 (6th Cir. 2004) (adhering to court’s “previous interpretation that Rule 10(e) does not allow inclusion in the appellate record of material that the district court did not consider”), *reversed on other grounds*, 545 U.S. 794 (2005). The Tenth Circuit has even refused supplementation under FRAP 10(e)(2) when the omission arose from logistical or technical difficulties encountered at the district court level by a pro se litigant. *Duvall v. Putnam City Sch. Dist.*, 530 Fed. Appx. 804, 806 n. 1 (10th Cir. 2013).

9. *See* 785 F.2d 1467, 1471–72 (11th Cir. 1986).

10. *Id.*

a motion for summary judgment but had failed to file the deposition with the district court.¹¹

Even if the omission from the district court record was not inadvertent, some federal courts of appeals allow supplementation under FRAP 10(e)(2) when (1) the proffered materials bear heavily on the merits of the issue before the court,¹² (2) a new issue arises on appeal,¹³ (3) the subject of appellate review is a habeas petition or an appeal from an administrative proceeding,¹⁴ or (4) the proffered materials have been stipulated to by both parties.¹⁵ But aside from those

11. 176 F.3d 1102, 1104 n. 2 (8th Cir. 1999).

12. In reviewing a criminal defendant's allegations of ineffective assistance, which were premised on trial counsel's failure to move for suppression of particular evidence, the Second Circuit permitted supplementation of the appellate record because the government had provided defendant's trial counsel with the materials but had never filed them with the district court. *See U.S. v. Aulet*, 618 F.2d 182, 185–87 (2d Cir. 1980). The Second Circuit reasoned that because the omitted materials may have been the very reason that prompted defendant's trial counsel to forgo the motion to suppress, the court could not justify "ignoring these materials which bear heavily on the merits of [defendant's] claim." *Id.* at 187. The reader should note that permitting supplementation with materials that "bear heavily on the merits" is likely limited to the context of habeas petitions. *See infra* Part II(d) (discussing the courts' demonstration of particular leniency in permitting requests by habeas petitioners to supplement the record). Otherwise, such a potentially broad exception risks undermining the general rule of a closed appellate record. A federal court of appeals may also permit supplementing the appellate record with materials that the district court excluded when that evidentiary ruling is itself on appeal. *See e.g. U.S. v. Stoltz*, 683 F.3d 934, 936 n. 3 (8th Cir. 2012).

13. If a new issue arises on appeal, the Third Circuit has permitted supplementation under FRAP 10(e) when both parties agreed to stipulate to a fact relating to a potential mootness barrier. *Brody v. Spang*, 957 F.2d 1108, 1114 n. 4 (3d Cir. 1992).

14. In cases of judicial review of administrative proceedings or habeas petitions, the federal courts of appeals have also demonstrated willingness to supplement the record with materials from state courts or agency proceedings, even if they were omitted from the district court record. *See M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 641 n. 8 (9th Cir. 2005) (granting supplementation of the appellate record with testimony from the administrative proceeding because a reviewing court must examine the administrative record as a whole, even if the district court record did not include the testimony in question); *Crockett v. Hulick*, 542 F.3d 1183, 1188 n. 3 (7th Cir. 2008) (granting supplementation of the record with jurors' affidavits and accountability instruction from a habeas petition).

15. *See Williams v. Drake*, 146 F.3d 44, 50 n. 6 (1st Cir. 1998) (noting that "[a]lthough the trial transcript is silent on the magistrate's response to the removal request, the parties have filled the gap by stipulating to the substance of the magistrate's reply," and accepting that stipulation); Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 Minn. L. Rev. 2016, 2034 (2012) ("Courts and commentators will occasionally suggest that stipulation by the parties can permit a court to consider evidence that was not before the trial court."); *but see also id.* ("On the other hand, there is plenty of case law supporting the traditional rule, under which appellate courts will refuse to consider supplemental evidence on appeal even

specific exceptions, federal courts of appeals generally interpret FRAP 10(e) to permit supplementation only to correct inadvertent omission and not to add to the appellate record matters not considered by the district court.¹⁶

b. Rule 201

Under FRE 201, federal courts of appeals can take judicial notice of highly indisputable facts or other court proceedings that directly relate to the issues on appeal. The general rule of appellate review based on a closed record “is subject to the right of an appellate court in a proper case to take judicial notice of new developments not considered by the lower court.”¹⁷ Parties may in consequence seek to supplement the appellate record with new materials that meet the FRE 201 requirements.

The Rule provides that, at any stage of the proceedings, a federal court of appeals may take judicial notice of “adjudicative facts” that are not subject to reasonable dispute because they are “generally known within the territorial jurisdiction of the trial court” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”¹⁸ Thus, a “high degree of indisputability is the essential prerequisite” to courts’ taking judicial notice.¹⁹

In addition to highly indisputable facts relating to a pending case, the federal courts of appeals may take judicial notice of a proceeding in another court if the proceeding has a direct

when the parties are willing to stipulate to its accuracy and to its inclusion in the appellate record.”); *cf. Jones v. Jackson Natl. Life Ins. Co.*, 819 F. Supp. 1385, 1387 (W.D. Mich. 1993) (refusing to augment district court record on the basis of parties’ stipulation, and pointing out that “[t]o the extent there may be an ‘inherent equitable power’ to supplement the record exceeding the power provided in Rule 10(e), such power is to be exercised not by this Court, but by the Court of Appeals”) (citations omitted). See *infra* Part II(a)(2) for a discussion of courts’ inherent equitable power. Individual courts may also have local rules that permit supplementation of the appellate record with unopposed materials. See *e.g. Duvall*, 530 Fed. Appx. at 806 n. 1 (noting that “[u]nder its authority pursuant to Tenth Circuit Rule 27.3(A)(3), the clerk granted the unopposed portion of Ms. Duvall’s motion [to supplement]”).

16. See Brock A. Swartzle, *Using “Inherent Equitable Authority” to Expand the Record on Appeal*, App. Prac. J. 1, 3 (Fall 2010).

17. See *e.g. Landy v. FDIC*, 486 F.2d 139, 151 (3d Cir. 1973).

18. Fed. R. Evid. 201(a), (b), (d).

19. Fed. R. Evid. 201, advisory comm. n.

connection to the issues on appeal.²⁰ For example, in review of habeas petitions, a federal court of appeals may take judicial notice of the relevant state court documents even if they were not a part of the district court record.²¹

Here in Scenario 1, the documents you want to bring to the attention of the court of appeals were not inadvertently omitted from the record by the party seeking their introduction, and are not highly indisputable facts in your case or a directly related court proceeding. Thus, neither FRAP 10(e)(2)(C) nor FRE 201 will be a basis to supplement the record with those documents.

2. *Inherent Equitable Authority*

What about the court's inherent equitable authority? Parties may request that the court exercise its inherent equitable authority to supplement the appellate record when changes in the law affect the outcome or when changes in the facts affect the suitability of injunctive relief or the court's subject-matter jurisdiction. And, even in the absence of such changed circumstances, courts are inclined to exercise inherent equitable authority if supplementing the record will advance the principles of fairness, truth, or judicial efficiency.

A majority of circuits recognize the existence of the courts' equitable authority to supplement the appellate record as justice requires regardless of inadvertent omission, though the courts rarely exercise that power absent extraordinary circumstances.²²

20. See *Philips Med. Sys. Intl., B.V. v. Bruetman*, 982 F.2d 211, 215 (7th Cir. 1992).

21. See *White v. Gaetz*, 588 F.3d 1135, 1137 n. 2 (7th Cir. 2009) (taking judicial notice of state court transcript); *Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (taking judicial notice of the tolling period based on documents in state case that had a direct relationship to federal habeas appeal); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (taking judicial notice of appellees' guilty pleas because they "are most relevant and critical," involving "the very property and issues involved in this proceeding").

22. See *Ross*, 785 F.2d at 1474–75; see also *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 227 (3d Cir. 2009); *Adan*, 437 F.3d at 388 n. 3; *Gibson v. Blackburn*, 744 F.2d 403, 405 n. 3 (5th Cir. 1984); *Turk v. U.S.*, 429 F.2d 1327, 1329 (8th Cir. 1970); *Lowry*, 329 F.3d at 1024 (referring to "unusual circumstances"); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 n. 11 (10th Cir. 2010) (recognizing power but declining to exercise it); *U.S. v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000); *Dickerson v. Ala.*, 667 F.2d 1364, 1367 n. 5 (11th Cir. 1982); *Colbert v. Potter*, 471 F.3d 158, 165–66 (D.C. Cir. 2006); *Goland v. CIA*, 607 F.2d 339, 371 (D.C. Cir. 1978).

Some courts have held that this authority is implicit in FRAP 10(e)²³ while others treat it as a part of the courts' inherent equitable powers.²⁴ Because FRAP 10(e) in its terms provides for supplementation only to correct inadvertent omission, this article categorizes such equitable authority as an exercise of inherent power.

The Sixth Circuit has slowly trended towards embracing the concept of inherent equitable authority to supplement the appellate record, and, in particular, has recently exercised the power in reviewing habeas petitions.²⁵ While willing to allow supplementation based on inherent equitable authority in some circumstances, the Eleventh Circuit has made it clear that exercise of this inherent power is "entirely inappropriate" when a federal court of appeals reviews a case for plain error and examines the record before the district court for error that is "clear or obvious."²⁶

A federal court of appeals exercises its inherent equitable authority to supplement the record when (1) changes in the pertinent law affect the outcome,²⁷ or (2) changes in the facts

23. See e.g. *Aulet*, 618 F.2d at 187; *Mill Bridge V, Inc. v. Benton*, 496 Fed. Appx. 170, 174 n. 5 (3d Cir. 2012) ("We have recognized that in limited circumstances, we may have the equitable power under Federal Rule of Appellate Procedure 10(e) to allow a party to supplement the record with documents that were not presented to the District Court.").

24. See e.g. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 n. 4 (11th Cir. 2003); *Lowry*, 329 F.3d at 1024; see also *Dobbins*, *supra* n. 15, at 2035.

25. Compare *In re Fisher*, 296 Fed. Appx. 494, 503 (6th Cir. 2008) ("[W]e need not decide whether to recognize an inherent authority to supplement the record."), with *U.S. v. Murdock*, 398 F.3d 491, 500–01 (6th Cir. 2005) (rejecting the defendant's request to supplement the record after concluding that the equities did not demand the proffered materials be added to the record), and *Thompson*, 373 F.3d 688 (exercising the court's inherent equitable power to supplement the record in the case of a habeas petitioner facing capital punishment).

26. See *U.S. v. Brown*, 526 F.3d 691, 707 (11th Cir. 2008) (describing the court of appeals as "looking over the trial judge's shoulder, examining what was before the judge," noting that the affidavit in question "was not before the district court," and declining in consequence "to supplement the record and consider it"), *vacated and remanded*, 556 U.S. 1150 (2009).

27. The Supreme Court has held that courts of appeal are required to "consider any change, either in fact or in law, which has supervened" since the disputed decision was issued. *Patterson v. Ala.*, 294 U.S. 600, 607 (1935); *Watts, Watts & Co. v. Unione Austriaca Di Navigazione*, 248 U.S. 9, 21 (1918). In a case in which these changes alter the suitability of the outcome or of any injunctive relief, the court of appeals may remand the case to the district court to supplement the record. See *Adan*, 437 F.3d at 389 n. 3; *Gomez v. Wilson*, 477 F.2d 411, 416–17 (D.C. Cir. 1973) (denying request for supplementation on appeal but remanding for supplementation of the pleadings below in light of changes in the

alter either the suitability of injunctive relief²⁸ or the court's subject-matter jurisdiction.²⁹ In the absence of these specific circumstances, the court evaluates every request for supplementation on a case-by-case basis and considers whether supplementation advances the principles of fairness, truth, or judicial efficiency.³⁰ A stronger showing for one factor may offset a weaker showing for another factor.³¹

law). Alternatively, in a case in which the “new situation demands one result only, and discretion could not be exercised either way,” the court of appeals may choose to supplement the record with information about the new facts rather than to remand the case to the district court. *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972) (taking into consideration a recent substitution of attorneys, which “drastically alter[ed] the nature of the case”); *but see Natl. Wildlife Fedn. v. Natl. Marine Fisheries Serv.*, 422 F.3d 782, 799–800 (9th Cir. 2005) (“[W]e conclude that there are issues that have arisen after the issuance of the preliminary injunction that may require modification of the district court order. It is inappropriate for us to decide those questions for the first time on appeal, and we therefore deny the parties’ motions to supplement the record.”).

28. *See supra* n. 27 (collecting cases) and accompanying text.

29. A federal court of appeals may also exercise its inherent equitable authority to supplement the record with facts that divest it of subject-matter jurisdiction. *See Lowry*, 329 F.3d at 1024 (pointing out that “[c]onsideration of new facts may even be mandatory, for example, when developments render a controversy moot and thus divest us of jurisdiction”); *Acumed*, 561 F.3d at 226 n. 25 (recognizing that “sometimes a case becomes moot on appeal by reason of circumstances arising after the completion of a case in a district court,” and noting that “[s]uch circumstances can and should be brought to the attention of the court of appeals”). Only post-judgment changes in the facts, however, can be supplemented and considered if the question of subject-matter jurisdiction was already before the district court. *Compare Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir. 1989) (describing the consideration of “the existence of subject matter jurisdiction” as requiring “a consideration of all relevant information . . . necessary to make an informed and final decision,” and concluding that “[i]n the interest [of] judicial economy, supplementation is necessary for a final disposition of this issue and to avoid remand on all issues”), *with Rio Grande Silvery Minnow*, 601 F.3d at 1110 n. 11 (denying motion to supplement the record with facts that show the case was moot before the trial court’s judgment). If the question of subject-matter jurisdiction was not before the district court at the time of the disputed decision, the court of appeals may consider the facts—even though they were not a part of the district court record—because it is deciding whether the case before it is moot, rather than reviewing the district court’s decision. *See Cedar Coal Co. v. UMW*, 560 F.2d 1153, 1166 (4th Cir. 1977) (“We think [the evidence] may be considered in ascertaining whether the cases are moot . . . because there was no mootness question before the district court, so we are not reviewing that. Rather, we are deciding whether the cases are now moot.”); *but see KNC Investments, LLC v. Lane’s End Stallions, Inc.*, 504 Fed. Appx. 467, 468 (6th Cir. 2012) (remanding to the district court for a determination of whether “factual events” that occurred after the district court’s decision rendered the controversy moot because the “district court is best suited to find any relevant facts and to determine in the first instance whether a live controversy remains”).

30. In *Ross*, the Eleventh Circuit articulated three factors that courts should consider in determining whether to exercise their inherent equitable authority to supplement the record: (1) whether “acceptance of the proffered material into the record would establish beyond

In Scenario 1, a strong case can be made for supplementing the record because including the materials bears heavily on the fairness of the adjudication. At least two federal courts of appeals have permitted supplementation when misconduct by the non-proffering party directly caused the proffered materials to be absent from the district court record. In *Ross*, a habeas case, the Eleventh Circuit remanded for supplementation when state officials misrepresented their custody of the evidence in question, thereby preventing its earlier discovery and introduction into the state trial court and federal district court records.³² In *Mangini v. United States*, the Ninth Circuit permitted supplementation because the non-proffering party's failure to provide all the relevant facts when a district court judge's impartiality was called into question deprived the district court judge "of the opportunity to exercise informed discretion" in determining whether he should have disqualified himself from adjudicating the case.³³ In both *Ross* and *Mangini*, however, the

any doubt the proper resolution of the pending issue," (2) whether remand of the case would be "contrary to both the interests of justice and the efficient use of judicial resources," and (3) whether the inherent judicial powers of the court in habeas petitions dictate supplementation. *Ross*, 785 F.2d at 1475 (quoting *Dickerson v. Ala.*, 667 F.2d 1364, 1367, 1368 (11th Cir. 1982)). These *Ross* factors, coupled with factors considered by other federal courts of appeals when exercising their inherent equitable authority to supplement the record, relate conceptually to the advancement of principles fundamental to the function of the judiciary: fairness, truth, and judicial efficiency. See *Warren v. Pollard*, 2012 WL 3234999, at *2 (E.D. Wis. Aug. 6, 2012) (referring to inherent equitable power and concluding that a court "may enlarge the record in unique cases when it believes the interests of justice are at stake").

31. See *Gibson*, 744 F.2d at 405 n. 3 (quoting *Dickerson* and exercising inherent equitable authority to supplement the record because the "proper resolution of [the] issue is not in doubt, and remanding to the district court 'would be contrary to both the interests of justice and the efficient use of judicial resources'"); *Cabalmeta*, 883 F.2d at 1555 (recognizing that an application of the *Ross* factors "militates toward a denial" of the request to supplement, but deciding that "the overall circumstances compel the court to allow supplementation"); *Ross*, 785 F.2d at 1475-77 (exercising inherent authority to supplement the record because the "interests of justice will best be served" due to the misrepresentation by state officials, even though there was no showing of the first *Ross* factor).

32. 785 F.2d at 1474-78.

33. 314 F.3d 1158, 1160-61 (9th Cir. 2003) (permitting supplementation of the record with documents establishing that the district judge's brother-in-law had acted as a lawyer for one of the parties below, although he had apparently not appeared before the judge, who was unaware of his relative's participation in the case). The *Mangini* court did not discuss under what authority the court permitted the supplementation, but it is likely that the record was supplemented under the court's inherent equitable authority because the

court seemed to infer bad faith on the part of the party that had withheld the proffered materials. It is unclear whether an honest mistake (e.g., oversight) by opposing counsel in Scenario 1 will be enough to invoke the court's inherent equitable authority.

B. Scenario 2

In dismissing on summary judgment a wrongful death action brought by your client, the court held that a reasonable trier of fact could not find that the defendant caused your client's spouse's death. A witness comes forward willing to testify that the defendant has confessed to intentionally killing the spouse. On appeal, is there anything you can do to introduce the new witness's affidavit?

1. Inherent Equitable Authority

FRAP 10(e)(2)(C) and FRE 201 are unlikely to apply in this case, as the omission was not inadvertent and you are not seeking to introduce highly indisputable facts. Under their inherent equitable authority, however, at least two federal courts of appeals have relied on the truth-seeking function of the judiciary to permit supplementation of evidence disputed by both parties. In *Colbert*, the D.C. Circuit permitted supplementation because the proffered front side of a receipt, not entered into the district court record with its reverse side, went "to the heart of the contested issue" and pretending that it did not exist would have been "inconsistent with [the] court's own equitable obligations."³⁴ And, in *Schwartz*, the Eleventh Circuit permitted supplementation because the proffered photographs were clearer copies of the proffering party's medical records, and allowing their supplementation would aid the court in "making an informed decision."³⁵

You can argue that, in Scenario 2, the new-witness affidavit certainly goes to the court's truth-seeking function. But in this

proffered materials would have been unlikely to qualify as having been inadvertently omitted under FRAP 10(e)(2) or as relevant to a highly indisputable fact under FRE 201.

34. 471 F.3d at 166 (citation omitted).

35. 341 F.3d at 1225 n. 4.

scenario, unlike in *Schwartz* and *Colbert*, there is no direct link between the evidence in the record and the evidence you seek to supplement on appeal. While the court in *Colbert* emphasized that it would be nonsensical to overlook the existence of materials that bear heavily on the contested issue,³⁶ accepting the same reasoning in this scenario would create an exception that swallows the rule: An affidavit containing the testimony of the newly discovered Scenario 2 witness would not be connected to documents already in the record in the same way as were the reverse side of the receipt in *Colbert* or the second set of photocopies in *Schwartz*.

C. Scenario 3

In a medical-malpractice action, you want to supplement the appellate record with your client's x-rays, which were directly referred to and discussed in other medical records admitted onto the district court record. On appeal, is there anything you can do to introduce the x-ray records?

1. Rule 10(e)(2)(C) of the Federal Rules of Appellate Procedure

This is a scenario in which FRAP 10(e)(2)(C) may apply. To a certain extent, the district court proceedings relied upon the x-ray records since they were discussed in the medical records admitted onto the district court record. A federal court of appeals is likely to permit supplementation under FRAP 10(e)(2)(C) if the proffering party can convince the court that the x-ray records were inadvertently omitted from the district court record. If counsel below referenced the materials in a brief or pleading filed in the district court or during a hearing, the court of appeals may be more inclined to infer an earlier intent to include the materials.³⁷

Alternatively, *Colbert* and *Schwartz* (discussed above in connection with Scenario 2) suggest that federal courts of

36. *Colbert*, 471 F.3d at 166.

37. See *Ross*, 785 F.2d at 1471–72 (indicating that proffering party had relied on supplemental materials in its pleadings); *Brown*, 176 F.3d at 1105 n. 2 (indicating that proffering party had referenced the materials in a motion for summary judgment).

appeals will be more inclined to exercise their inherent equitable authority based on a truth-seeking rationale when some form of the proffered materials was already in the district court record.³⁸ In Scenario 3, whether the court will choose to exercise its inherent equitable authority to supplement the record with the x-rays will likely turn on how closely related the proffered materials are to the medical records already in the record.

D. Scenario 4

Your client has been sentenced to capital punishment for murder, and you represent him in his habeas petition before a federal court of appeals. His post-arrest breathalyzer test results are not a part of the state court record or the district court habeas record, but you seek their introduction in support of his assertion of mitigating circumstances (severe intoxication at the time of committing murder) for reduced sentencing. Can you introduce the breathalyzer test on appeal?

1. Inherent Equitable Authority in Habeas Actions

If supplementation is not already permitted under FRAP 10(e)(2) or FRE 201,³⁹ federal courts of appeals demonstrate particular leniency with supplementing the record under their inherent equitable authority in habeas cases. In *Brown v. Watters*, the Seventh Circuit used its inherent equitable authority to permit supplementation of the record with the defendant's commitment proceedings.⁴⁰ And in *Thompson*, the Sixth Circuit used its inherent equitable authority to permit supplementation of the record when a proffered deposition was negligently omitted from the earlier record.⁴¹

38. See *Colbert*, 471 F.3d at 166 (noting that the back side of the proffered receipt had already been introduced into the record); *Schwartz*, 341 F.3d at 1225 n. 4 (pointing out that photocopies of the medical records had already been introduced into the record).

39. See *supra* nn. 14 and 21 and accompanying text (discussing supplementation of the record in habeas petitions under FRAP 10(e)(2)(C) and FRE 201).

40. 599 F.3d 602, 604 n. 1 (7th Cir. 2010).

41. 373 F.3d at 691. *Thompson* suggests that federal courts of appeals may be particularly generous in granting requests to supplement submitted by petitioners who face capital punishment. See *id.* ("Because the evidence here was apparently negligently omitted

Because *Thompson* and *Brown* both involved evidence that was in the state court record but absent from the district court record, it is unclear whether a federal court of appeals would permit supplementing the record in Scenario 4, in which the breathalyzer test was absent from both the district court and state court records.

On the one hand, you could invoke the general principle established by the Supreme Court:

For the writ of habeas corpus . . . to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have . . . the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. *Federal habeas petitioners long have had the means to supplement the record on review.*⁴²

On the other hand, the Seventh Circuit has denied supplementation in a habeas case where the evidence sought to be introduced was “essentially brand new” and had never been offered to the state court until after the federal habeas process had begun.⁴³

E. Scenario 5

In a declaratory judgment action seeking recognition of your client’s adverse possession of a particular plot of farm land, the complaint is dismissed without leave to amend for failure to state a claim under FRCP 12(b)(6) because the complaint alleged insufficient facts to show hostility. Your

. . . and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record.”).

42. *Boumediene v. Bush*, 553 U.S. 723, 786 (2008) (holding that Military Commission Act’s elimination of federal courts’ jurisdiction over habeas cases pending at time of enactment was an unconstitutional suspension of the writ) (emphasis added; citation omitted). It bears noting, however, that when a state habeas petition preceded the habeas claim before a federal court of appeals, the Supreme Court has ruled that a petitioner seeking relief under § 2254(d)(1) is restricted to the record before the state court that adjudicated the same claim. *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S. Ct. 1388, 1399 (2011) (limiting § 2254(d)(1) review to the record in the state court because “[i]t would be contrary to [the statutory] purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*”) (emphasis in original).

43. *George*, 586 F.3d at 486 n. 1.

client now has uncovered communications showing that the defendant knew about and prohibited your client's use of the land in dispute. Can you introduce the new materials on appeal?

1. Inherent Equitable Authority

In Scenario 5, the lower court has dismissed your client's complaint on the face of the pleadings without leave to amend. Federal courts of appeals have held that a plaintiff appealing an FRCP 12(b)(6) dismissal may request that the court consider extra-record materials, without assigning them evidentiary weight, in determining whether the complaint should have been dismissed without leave to amend. In *Orthmann v. Apple River Campground, Inc.*,⁴⁴ for example, the Seventh Circuit considered evidence produced during discovery in a parallel case but never introduced at trial in the case on appeal.

As Judge Posner explained in *Orthmann*, although the materials presented for the first time on appeal were "no part of the official record," the appellant, hoping "to show that the complaint should not have been dismissed on its face" could present "an unsubstantiated version of the events," so long as that story "was not inconsistent with the allegations of the complaint."⁴⁵ The supplemental materials had, he noted, "no standing as evidence but [were] usable to show how the accident might have happened."⁴⁶ Thus, here in Scenario 5, you should be able to rely on the recently discovered communications, not as record evidence, but to show how hostility might have been established and, accordingly, why the district court should not have dismissed your client's complaint on its face without leave to amend.

44. 757 F.2d 909 (7th Cir. 1985); see also *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 177 n. 2 (3d Cir. 2000) (noting that "as the complaint references and relies on the content of certain documents," the court would "consider them" on appeal); *Hightsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439 (7th Cir. 1994) ("This court has held that when reviewing 12(b)(6) motions, we will consider new factual allegations raised for the first time on appeal provided they are consistent with the complaint.").

45. *Orthmann*, *supra* n. 46, at 914–15.

46. *Id.* at 915.

III. PROCEDURE FOR REQUESTING SUPPLEMENTATION

A party seeking to supplement the appellate record should proceed by motion or formal request so that the court and opposing counsel are properly apprised of the status and contents of the evidence in question.⁴⁷ Improper procedures in seeking supplementation may invite sanctions.⁴⁸ When a federal court of appeals permits supplementation under FRAP 10(e)(2) or FRE 201, it directly supplements the record with or takes judicial notice of the new materials.⁴⁹ Upon a request to supplement the record under the court's inherent equitable authority, however, a federal court of appeals may remand the case to the district court to supplement the record; or, if the issue can be readily decided without remand, the court of appeals may supplement the record directly to conserve judicial resources.⁵⁰

IV. CONCLUSION

A party seeking to supplement the appellate record with materials not introduced in the district court record may move or formally request that a federal court of appeals correct an inadvertent omission under FRAP 10(e)(2), take judicial notice of a highly indisputable fact under FRE 201, or expand the

47. See *Lowry*, 329 F.3d at 1025; *Jones v. White*, 992 F.2d 1548, 1567 (11th Cir. 1993) (noting, in a case in which supplementation was allowed, that it had previously been denied "when a party ha[d] failed to request leave of this court to supplement a record on appeal or ha[d] appended material to an appellate brief without filing a motion requesting supplementation").

48. See e.g. *Lowry*, 329 F.3d at 1025–26 (imposing monetary sanctions for unilaterally supplementing the record).

49. See e.g. *Brody*, 957 F.2d at 1114 n. 4; *Crockett*, 542 F.3d at 1188 n. 3; *White*, 588 F.3d at 1137 n. 2; *Smith*, 297 F.3d at 815.

50. See *Colbert*, 471 F.3d at 166 ("Normally, supplementation of the record is effected by remanding the case to the District Court to allow that court to order the introduction of new evidence. Certainly, we could have remanded this case to the District Court with instructions to obtain and review [the newly supplemented evidence]. However, remand for such a ministerial task, which this court easily can perform itself, would serve no good purpose and would ultimately amount to a waste of judicial resources.") (internal citations omitted); *Gibson*, 744 F.2d at 405 n. 3 (quoting *Dickerson v. Ala.*, 667 F.2d 1364, 1367 (11th Cir. 1982), and exercising inherent equitable authority to supplement the record when the "proper resolution of [the] issue is not in doubt, and remanding to the district court 'would be contrary to both the interests of justice and the efficient use of judicial resources'").

appellate record under its inherent equitable authority. Supplementation under FRAP 10(e)(2) is generally limited to materials relied upon in the district court that would have been in the district court record but for inadvertent omission. Judicial notice under FRE 201 is generally limited to highly indisputable facts or judicial proceedings that bear a direct connection to the issues on appeal.

A party seeking supplementation with materials that do not fall within the scope of FRAP 10(e)(2) or FRE 201 can seek to invoke the courts' inherent equitable authority to supplement the record. The federal courts of appeals generally exercise their inherent equitable authority to permit supplementation if (1) post-judgment changes in the law affect the suitability of the outcome, (2) post-judgment changes in the facts alter the suitability of injunctive relief, (3) post-judgment changes in the facts divest the court of its subject-matter jurisdiction, or (4) the court is convinced, after factoring in the principles of fairness, truth, and judicial efficiency, that the balance of equities tips in favor of supplementation.

So, if the evidence you need to make your case in a federal court of appeals is not in the district court record, don't despair without considering these alternatives. Even if you do not meet the requirements of FRAP 10(e)(2) or FRE 201, you may be able to persuade the appellate court that fairness, truth, or judicial efficiency will be served by considering the missing evidence.

