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Evidence

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In the 2019 term, the United States Court of Appeals for the Eleventh Circuit issued several opinions deciding evidentiary issues. Those opinions span a broad range of topics including constitutional limitations on admissible evidence, expert testimony, the scope of certain hearsay exceptions, and various other evidentiary rules. This article looks back at the Eleventh Circuit's 2019 term to highlight and analyze keynote decisions on those issues.

I. CONSTITUTIONAL LIMITATIONS ON THE ADMISSIBILITY OF EVIDENCE

A. Fifth Amendment—Miranda

The Fifth Amendment to the United States Constitution provides, "No person shall . . . be compelled in any criminal case to be a witness against himself[.]"[1] In *Miranda v. Arizona*,[2] the Supreme Court of the United States recognized this Amendment limits the admissibility of

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1. U.S. CONST. amend. V.
2. 384 U.S. 436 (1966).

evidence.[3] There, the Supreme Court held "the prosecution may not use statements[] . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination[]" as such action would violate the Fifth Amendment.[4] The Court reasoned that custodial interrogations require special safeguards to protect an individual's Fifth Amendment right against self-incrimination because the "inherently compelling pressures" of a custodial interrogation "undermine an individual's will to resist and to compel him to speak where he would otherwise not do so freely."[5]

The Supreme Court stated in *Miranda* that those "procedural safeguards" require the government to advise a defendant of the "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney."[6] Thus, *Miranda* requires the government to give a suspect those warnings if it seeks to use "statements" obtained during a "custodial interrogation" against a criminal defendant at trial. [7] But *Miranda* has its limits. The Supreme Court has articulated boundaries and exceptions to *Miranda* that lower courts apply to determine whether *Miranda* requires the exclusion of statements at trial.

In *United States v. Ochoa*,[8] the Eleventh Circuit considered the following questions: (1) whether a defendant's pre-*Miranda* statements made to an FBI agent before a SWAT team conducted a search of his home fell within the "public safety exception" to the *Miranda* rule; and (2) whether the defendant invoked *Miranda* rights during an interview at the police station, such that the statements were inadmissible at trial.[9] An FBI agent questioned Ochoa at his residence while executing an arrest warrant for Ochoa.[10] Upon arriving at the residence, the FBI agent ordered Ochoa and other suspects out of the home and asked them whether there were any "[b]ombs, booby traps, weapons," or other "harmful" objects that could harm SWAT team members who might enter the residence.[11] Ochoa responded that a handgun was inside the house. The police then took Ochoa into custody and mirandized him.

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3. *Id.* at 444–45.
4. *See id.* at 444.
5. *Id.* at 467.
6. *Id.* at 444.
7. *Id.*
8. 941 F.3d 1074 (11th Cir. 2019).
9. *Id.* at 1096.
10. *Id.* at 1081–82.
11. *Id.* at 1081.

The police interrogator asked Ochoa whether he wanted to waive his *Miranda* rights.[12] Ochoa first responded, "You're asking me at this time [if] I'm willing to answer questions without a lawyer. I don't agree with that."[13] But Ochoa continued speaking with the interrogating officer.[14] In response to a later question, "So, is that a yes, you'll speak without an attorney," Ochoa responded, "Yes."[15] The police used Ochoa's statements made later during that interview, namely that there was a gun in Ochoa's house, as a basis for obtaining a search warrant for the house where police found several guns and ammunition. The government charged Ochoa with knowingly possessing a firearm and ammunition while a convicted felon, among other crimes.[16]

At trial, Ochoa moved to suppress the introduction of the statements made outside the house and his statements made during the police interview, arguing that they violated his Fifth Amendment right against self-incrimination as protected by *Miranda*. The district court denied that motion for the following reasons: (1) Ochoa's statements outside his home fell within the public safety exception to *Miranda*; and (2) Ochoa did not unambiguously invoke his *Miranda* rights during the interview.[17] On appeal, the Eleventh Circuit affirmed—reviewing factual findings for clear error and reviewing *de novo* the application of law to facts.[18]

As to Ochoa's statements made outside his home, the Eleventh Circuit held they were admissible because they fell within the well-established public safety exception to the *Miranda* rule.[19] The Supreme Court first recognized the public safety exception to *Miranda* in *New York v. Quarles*.[20] Under this exception, "a suspect's answers may be admitted into evidence" where a "police officer[] asks questions reasonably prompted by a concern for the public safety," even if the officer did not first read the suspect *Miranda* warnings.[21] The Eleventh Circuit reasoned that Ochoa's statements outside the house fell within the public safety exception, because the FBI officer asked questions he reasonably believed were necessary to secure the scene, and reasonably

12. *Id.*
13. *Id.* at 1082.
14. *Id.*
15. *Id.*
16. *Id.* at 1082–83.
17. *Id.* at 1083–1084.
18. *Id.* at 1096–1100.
19. *Id.* at 1098.
20. 467 U.S. 649, 655–56 (1984).
21. *Id.*

feared that he and his team members could be in danger when they entered the home.[22]

The Eleventh Circuit also held that Ochoa's statements during the interview were admissible, because Ochoa did not unambiguously invoke his *Miranda* right to remain silent or have an attorney present during the interview.[23] Citing *Davis v. United States*,[24] the Eleventh Circuit recognized the Supreme Court's rule that an invocation of *Miranda* must be "unambiguous" or "unequivocal."[25] If not, then the police "officers have no obligation to stop questioning him."[26] Ochoa's statement that he did not "'agree' with" the request to be questioned without a lawyer present was not an unambiguous invocation of *Miranda*, because it was not an express statement that Ochoa wished to have an attorney present.[27] Also, because the officer could have reasonably interpreted Ochoa's statements as indicating his confusion, it was appropriate for the officer to ask clarifying questions.[28]

B. Sixth Amendment–Confrontation Clause

The Sixth Amendment likewise establishes constitutional limits on the admissibility of evidence. The Confrontation Clause of the Sixth Amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."[29] The Confrontation Clause bars hearsay testimony of a declarant who is then unavailable at trial, or where in-court testimony is being offered and the defendant was unable to cross-examine the witness at that time.[30] The Supreme Court has outlined the type of testimony that the Confrontation Clause bars when a witness is unavailable. Until 2004, the Supreme Court followed the *Ohio v. Roberts*[31] framework which permitted statements of unavailable witnesses if they demonstrated an "adequate 'indicia of reliability'" by falling within a "firmly rooted hearsay exception" or showing "particularized guarantees of trustworthiness."[32] But, *Crawford v. Washington*[33] abrogated the old

22. *Ochoa*, 941 F.3d at 1098.
23. *Id.* at 1099.
24. 512 U.S. 452, 462 (1994).
25. *Ochoa*, 941 F.3d at 1098 (quoting *Davis*, 512 U.S. at 462).
26. *Id.*
27. *Id.* at 1099.
28. *Id.*
29. U.S. CONST. amend. VI.
30. Crawford v. Washington, 541 U.S. 36, 59 (2004).
31. 448 U.S. 56 (1980).
32. *Id.* at 66.

regime by holding that the Confrontation Clause barred "testimonial" hearsay.[34] The Supreme Court later clarified in *Davis v. Washington*,[35] that a statement is "testimonial" if it is offered to "prove past events potentially relevant to later criminal prosecution," whereas statements are "nontestimonial" if being "made in the course of police interrogation" where the "primary purpose of the interrogation is to . . . meet an ongoing emergency."[36] The court in *Davis* contemplated that it would be difficult to "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial."[37] Accordingly, lower courts have decided on a case-by-case basis whether statements are testimonial or nontestimonial.

This past term, in *United States v. Cooper*,[38] the Eleventh Circuit addressed the distinction between testimonial and nontestimonial statements. In that case, the defendant was charged with sex trafficking, among other federal crimes.[39] At trial, the district court allowed the prosecution to present the testimony of an officer who stated that unidentified men told him they came to the defendant's apartment "in response to the Backpage ad to receive [sexual] services."[40] On appeal, the Eleventh Circuit held that the court below abused its discretion because the statements were indeed testimonial.[41] After all, the agent "questioned the visitors during his investigation, to gain facts probative of [the defendant's] guilt."[42] But the court reasoned that the violation amounted to harmless error, because the testimony "did not contribute to the verdict obtained."[43] Aside from these statements, the government presented strong evidence at trial linking Cooper's illicit business to Backpage. Cooper made advertisement payments to Backpage; he posted to Backpage with his IP address; and undercover officers testified that they used Cooper's Backpage advertisement to contact women who offered sexual services.[44]

The Eleventh Circuit also addressed the standard for when a witness is considered "unavailable" for purposes of the Confrontation Clause. In

33. *Crawford*, 541 U.S. at 61.
34. *Id.*
35. 547 U.S. 813 (2006).
36. *Id.* at 822.
37. *Id.*
38. 926 F.3d 718 (11th Cir. 2019).
39. *Id.* at 728.
40. *Id.* at 731.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 734–36.

United States v. Smith,[45] the court stated that unavailability "does not require the government to make every conceivable effort to locate a witness; it requires only a good faith effort that is reasonable under all of the circumstances of the case."[46] The witness in *Smith* had no phone or address, had absconded outside of Florida, and was in hiding.[47] Although the government successfully served a subpoena on the witness, the Court deemed the witness unavailable because the government's unsuccessful efforts to locate witness were in good faith and reasonable under the circumstances.[48] Specifically, the government tried to locate the witness at her uncle's house, through her former attorney, and finally through her boyfriend.[49]

II. EXPERT WITNESSES

A. Federal Rule of Evidence 702—Testimony of Expert Witnesses

Federal Rule of Evidence 702[50] governs the admissibility of expert testimony. Under Rule 702, an expert qualified by "knowledge, skill, experience, training, or education" may provide an opinion if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[51]

The Supreme Court instructed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[52] that courts must perform a "gatekeeping role" to ensure an expert's testimony is based "on a reliable foundation," and "relevant to the task at hand."[53]

Applying *Daubert*, the Eleventh Circuit has adopted a three-part inquiry to evaluate the admissibility of expert testimony under Rule 702.[54] Expert testimony may be admitted into evidence if:

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45. 928 F.3d 1215 (11th Cir. 2019).
46. *Id.* at 1230.
47. *Id.*
48. *Id.* at 1231.
49. *Id.*
50. FED. R. EVID. 702.
51. *Id.*
52. 509 U.S. 579 (1993).
53. *Id.* at 597.
54. *See* United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004).

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusion is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or determine a fact in issue.[55]

Consistent with the Supreme Court's directive in *Daubert*, the Eleventh Circuit has generally afforded significant deference to district court rulings on *Daubert* motions. At the conclusion of the 2018 term, the Eleventh Circuit had affirmed over seventy percent of all *Daubert* rulings since 2010.[56] In that eight-year span, the appellate court affirmed every ruling where the trial court admitted evidence over a *Daubert* objection.[57] All six cases reversing a *Daubert* ruling between 2010 and 2018 involved the lower court's exclusion of expert evidence.[58] And all of those six cases involved the same posture—exclusion of a plaintiff's expert testimony resulting in summary judgment or jury verdict in favor of the defendant.[59]

This past term, the Eleventh Circuit finally broke the trend. In *United States v. Hawkins*,[60] it reversed a district court decision to admit the government's expert testimony.[61] There, the government indicted Hawkins and his co-defendant on charges of possession with intent to distribute cocaine and use of a communication facility in furtherance of a conspiracy.[62] The government's case-in-chief relied on intercepted telephone calls and text messages between the two co-defendants where they allegedly used code words common to the drug business which the

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55. *Id.* (quoting City of Tuscaloosa v. Harcros Chem., 158 F.3d 548 (11th Cir. 1998)).

56. *See* W. Randall Bassett et. al., *Evidence, Eleventh Circuit Survey*, 68 MERCER L. REV. 1019, 1029–30 (2017).

57. *Id.*

58. *Id.* Two possible exceptions to this pattern are *United States v. Harrell*, 751 F.3d 1235, 1243–1244 (11th Cir. 2014), where the Eleventh Circuit found the district court abused its discretion in allowing a detective to testify as an expert, but that the error was harmless, and *United States v. Watkins*, 880 F.3d 1221, 1227 (11th Cir. 2018), where the Eleventh Circuit found that the district court likely erred in admitting expert testimony concerning the use of a fingerprint to identify an individual who was previously deported, but again affirmed based on the harmless error doctrine.

59. Bassett, *supra* note 56, at 1028.

60. 934 F.3d 1251 (11th Cir. 2019)

61. *Id.*

62. *Id.* at 1257.

government offered to show proof of the conspiracy and intent to distribute cocaine.[63]

To prove its case, the government offered the lead agent investigating the two co-defendants as an "expert in cocaine and base trafficking."[64] The trial court admitted testimony from the agent to offer an "expert opinion on cocaine dealing and drug jargon based on his training and experience."[65] But the agent strayed from his permitted scope and began speculating as to the intent of the co-defendants.[66] For example, the agent testified that "when Hawkins told Ware, 'Don't let this get away, man,' this meant: 'Evidently, Mr. Hawkins thought this was a good deal.'"[67] Moreover, the agent interpreted non-technical, plain language.[68] The agent testified that "'he can get as many as he wants' means that '[he] has a lot of cocaine.'"[69] The defendant made only "tepid" objections to the evidence during trial, but later appealed his conviction.[70] Concluding that defense counsel's "tepid" objections were not sufficient to preserve the issue for the typical "abuse-of-discretion review," the appellate court reviewed the lower court's ruling only under a plain error standard.[71]

But even under this very deferential standard of review, the Eleventh Circuit reversed for a new trial.[72] That is because the agent "went far beyond permissible testimony" when he provided "speculative interpretive commentary" about the defendants' actions and state of mind, and his testimony did not assist the trier of fact to understand any issue, as Rule 702 requires.[73] It merely "summarized" the evidence and "effectively spoon-fed his harsh interpretations of the phone calls . . . to the jury."[74]

In contrast to *Hawkins*, in *United States v. Delva*,[75] the Eleventh Circuit upheld the admission of expert testimony on technical language used by criminals.[76] In *Delva*, the government charged defendants

63. *Id.* at 1260–64.
64. *Id.* at 1261.
65. *Id.* at 1262.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1264.
71. *Id.*
72. *Id.*
73. *Id.* at 1261.
74. *Id.* at 1265 (quoting United States v. Freeman, 730 F.3d 590, 597 (6th Cir. 2013)).
75. 922 F.3d 1228 (11th Cir. 2019).
76. *Id.*

Bechir Delva and Kenny Delva with identify theft and conspiracy to possess fifteen or more unauthorized access devices, such as social security numbers and debit cards issued to other people, among other charges. At the defendants' joint trial, the prosecution offered testimony of a detective who sought to testify about code words that the defendants used in an undercover video.[77]

On appeal, the Eleventh Circuit began its analysis by recognizing the "well-settled" rule "that experienced and qualified law enforcement agents can testify as experts to decode criminal conversations and operations that jurors might not otherwise understand."[78] The Eleventh Circuit Court found the detective was "qualified to testify competently regarding the terminology used in this type of fraud based on his training and experience," which included more than seventy-five fraud investigations listening in on over thirty jail calls placed by identity refund fraud defendants, and teaching classes on the subject.[79] The expert's "methodology was reliable because his opinions were based on his extensive experience working on stolen identity refund fraud cases."[80] Finally, the detective's testimony would "assist[] the jury in understanding how the slang terms used by [the defendants] related to the terminology used in stolen identity refund fraud."[81]

Both *Delva* and *Hawkins* recognize the general rule that law enforcement agents may render expert testimony about code words or technical language under Rule 702—but only if the expert is not speculating and the testimony would assist the jury to determine a fact.[82] An expert merely putting his own spin on lay language is not helpful to the jury and therefore inadmissible.[83]

B. Federal Rule of Evidence 704—Opinion on an Ultimate Issue

Under Federal Rule of Evidence 704(a),[84] "[a]n opinion is not objectionable just because it embraces an ultimate issue."[85] Also,

77. *Id.* at 1238, 1240–41.

78. *Id.* at 1251 (citing United States v. Holt, 777 F.3d 1234, 1265 (11th Cir. 2015); United States v. Emmanuel, 565 F.3d 1324, 1335 (11th Cir. 2009); United States v. Garcia, 447 F.3d 1327, 1335 (11th Cir. 2009); United States v. Cross, 928 F.2d 1030, 1051, n.65 (11th Cir. 1991); United States v. Brown, 872 F.2d 385, 392 (11th Cir. 1989)).

79. *Id.* at 1252.

80. *Id.*

81. *Id.*

82. *See Hawkins*, 934 F.3d at 1265; *Delva*, 922 F.3d 1251 ("it is well-settled that experienced law enforcement agents can testify as experts to decode criminal conversations and operations that jurors might not otherwise understand").

83. *Hawkins*, 934 F.3d at 1265.

84. FED. R. EVID. 704(a).

Federal Rule of Evidence 704(b)[86] states that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."[87] In other words, experts "may not testify to the legal implications of conduct"[88] because "questions of the law are not subject to expert testimony."[89]

Applying these concepts in *United States v. Stahlman*,[90] the Eleventh Circuit held that the district court would have violated Rule 704(b) if it had admitted the defendant expert psychologist's opinion that the defendant lacked the requisite mental state for the crime.[91] In *Stahlman*, the defendant was charged with using online communications to induce a minor to engage in sexual activity under 18 U.S.C. § 2422(b).[92] That statute criminalizes anyone who "knowingly" persuades a minor to engage in sexual activity.[93] The defense argued that the defendant lacked the *mens rea* necessary for the crime, because he was engaging in fantasy role-playing with a person whom he thought was an adult, and he intended to have sex with an adult.[94] To support this, the defense offered the testimony of its expert psychologist who sought to opine that "[t]here [was] insufficient behavioral evidence to conclude that Mr. Stahlman intended to have real sex with a minor, rather than act out a fantasy involving adults."[95] Interestingly, the expert did not opine on whether the defendant possessed the "knowingly" *mens rea* necessary for criminal liability under the statute. Nevertheless, the district court excluded the expert's testimony under Rule 704(b).[96]

On appeal, the Eleventh Circuit affirmed the trial court's exclusion of the defendant's expert evidence.[97] First, the Court distinguished this case from *United States v. Hite*,[98] where the United States Court of

85. *Id.*

86. FED. R. EVID. 704(b).

87. *Id.*

88. Commodores Entm't Corp. v. McClary, 879 F.3d 1114, 1128 (11th Cir. 2018) (quoting Montgomery v Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990)).

89. *Id.* at 1128–29.

90. 934 F.3d 1199 (11th Cir. 2019).

91. *Id.* at 1220.

92. *Id.* at 1208; 18 U.S.C. § 2422(b) (2020).

93. *Id.* at 1225 (quoting 18 U.S.C. § 2422(b)).

94. *Id.* at 1213.

95. *Id.* at 1220.

96. *Id.* at 1210.

97. *Id.* at 1220.

98. 769 F.3d 1154 (D.C. Cir. 2014).

Appeals for the District of Columbia Circuit concluded the defendant's expert psychologist could testify in a Section 2242 prosecution about the general difference between real-life attraction to children and online fantasy role-playing, and state that the defendant did not suffer from a condition that would predispose him to be attracted to children.[99] Unlike in *Hite*, the expert testimony in *Stahlman* "plainly r[an] afoul of Rule 704(b)'s directive."[100] If an expert could testify that "clinical and behavior evidence showed Stahlman intended to act out a fantasy with adults" the expert would "in effect, be telling the jury Stahlman did not intend to induce a minor to engage in sexual activity."[101] In other words, the expert would essentially tell the jury that Stahlman did not have the requisite *mens rea* for the crime.

III. MORE PREJUDICIAL THAN PROBATIVE AND LAY WITNESSES.

A. Federal Rule of Evidence 403—Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, and Other Reasons.

Federal Rule of Evidence 403[102] states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[103] Indeed, the Eleventh Circuit has recognized that the word "may" gives the court "discretion" to exclude evidence that meets the criteria of Rule 403.[104]

In *United States v. Hano*,[105] the Eleventh Circuit affirmed the lower court's refusal to exclude certain evidence that the defendant claimed would appeal to "class prejudice."[106] The defendant in *Hano* was charged with Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. At trial, the government presented the testimony of a witness to whom the defendant admitted his crimes. The witness testified about the defendant's lavish spending spree in Cuba after the robbery.[107] The

99. *Id.* at 1170.

100. *Stahlman*, 934 F.3d at 1220.

101. *Id.* at 1220–21.

102. FED. R. EVID. 403.

103. *Id.*

104. United States v. Hano, 922 F.3d 1272, 1289 (11th Cir. 2019); *see generally* Showan v. Presdee, 922 F.3d 1211, 1218 (11th Cir. 2019).

105. 922 F.3d 1272.

106. *Id.* at 1289.

107. *Id.* at 1282.

defendant argued that the evidence should be excluded under Rule 403 because it "appealed to class prejudice."[108] The Eleventh Circuit quickly dismissed this argument, reasoning that the evidence of the defendant's expenditures was indeed probative because it "buttressed the inference that Hano had recently come into a large sum of money when he set sail for Cuba," and it was not admitted to suggest any prejudicial effect to "entic[e] the jury to convict Hano based on his wealth or socioeconomic status."[109]

B. Federal Rule of Evidence 606—No Impeachment Rule

Federal Rule of Evidence 606(b)[110] codifies the well-established "no-impeachment" rule as to jury decisions to protect the solemnity and finality of jury deliberations.[111] That rule states:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.[112]

Rule 606(b) does, however, enumerate three exceptions: (1) "extraneous prejudicial information was improperly brought to the jury's attention;" (2) "an outside influence was improperly brought to bear on any juror; or" (3) "a mistake was made in entering the verdict form."[113]

In *United States v. Brown*,[114] the Eleventh Circuit held that allegations of juror-on-juror gender-bias was not an exception to allow juror testimony to impeach a verdict under Rule 606(b).[115] Following a high-speed car chase, several police officers from Boynton Beach, Florida assaulted the driver and passengers of the vehicle and attempted to cover up the assault by omitting information from their reports. The federal government subsequently brought claims against two officers: Officer Brown under 18 U.S.C. § 242, alleging that he deprived the victims of their civil rights under color of the law; and

108. *Id.* at 1289.
109. *Id.* at 1290.
110. FED. R. EVID. 606(b).
111. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).
112. *Id.* at 864–65 (quoting FED. R. EVID. 606(b)).
113. *Id.*
114. 934 F.3d 1278 (11th Cir. 2019).
115. *Id.* at 1303–04.

Officer Antico, alleging that he obstructed justice. Brown and Antico were convicted at trial.[116] After trial, a female juror sent Antico an email notifying him that other jurors engaged in "a variety of misconduct," namely that they "made fun of her and discounted her opinion because she allegedly had a 'crush' on Antico."[117] Antico moved the district court to interview the juror in chambers and conduct an investigation. The district court denied this motion, citing Rule 606(b) and Eleventh Circuit precedent against using juror testimony to impeach a verdict.[118] Antico appealed the district court's denial of the motion.[119]

On appeal, the Eleventh Circuit affirmed, holding that the district court did not abuse its discretion in deciding not to hold an evidentiary hearing to investigate alleged juror misconduct at the end of trial.[120] The Eleventh Circuit acknowledged that the juror's purported comments suggested a "gender bias by one juror against the first juror"[121] and that the Supreme Court has established a racial-bias exception to Rule 606(b).[122] But, the Eleventh Circuit declined to recognize an additional exception for gender bias, reasoning that it did not fit within any enumerated exception.[123] The Eleventh Circuit also noted that neither it nor the Supreme Court has recognized an exception on the basis of gender or even an exception for the bias of "one juror *against another juror*."[124]

IV. HEARSAY AND EVIDENCE AUTHENTICATION

A. Federal Rule of Evidence 804(b)(3)—Statement Against Interest

Federal Rules of Evidence 801–807[125] govern the admissibility of hearsay. Rule 801[126] defines hearsay as an out of court statement made for "the truth of the matter asserted."[127] While there are a number of exceptions to the hearsay rule, one oft-cited exception is for statements

116. *Id.* at 1285–88.
117. *Id.* at 1303.
118. *Id.* at 1293.
119. *Id.* at 1299.
120. *Id.* at 1304.
121. *Id.* at 1303.
122. *Id.* at 1302 (citing *Pena-Rodriguez*, 137 S. Ct. at 869).
123. *Id.* at 1303–04.
124. *Id.* at 1303 (emphasis in original).
125. *See* FED. R. EVID. 801–807.
126. FED. R. EVID. 801.
127. *Id.*

against interest under Federal Rule of Evidence 804(b)(3),[128] which has three elements: (1) the declarant must be unavailable to testify; (2) the statement must be "so contrary to the declarant's proprietary or pecuniary interest" that a reasonable person would have made the statement only if he believed it was true; and (3) the statement must be supported by corroborating circumstances to clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.[129] In the 2019 term, the Eleventh Circuit issued a pair of published opinions determining whether statements fall under that exception and may be admitted into evidence.

First, in *Hano*, the Eleventh Circuit held that one co-defendant's statement against his interest could be admitted into evidence and used against his co-defendant in a joint trial.[130] The government charged defendants Hano and Arrastia-Cardoso with Hobbs Act robbery and conspiracy to commit the same for robbing an armored Brink's truck.[131] At trial, the government sought to introduce Hano's statement to a witness that Hano had once "robbed an armored truck with a man named 'Reinaldo Arrastia.'"[132] Based on Rule 804(b)(3), the trial court overruled Arrastia-Cardoso's hearsay objection, ruling it was a statement against interest. Arrastia-Cardoso appealed, arguing that on balance it was a non-self-inculpatory statement made within a broader narrative that is generally self-inculpatory.[133] The Eleventh Circuit reviewed for abuse of discretion.[134]

The Eleventh Circuit acknowledged that Rule 804(b)(3) indeed "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."[135] But, the Eleventh Circuit nonetheless affirmed because Arrastia-Cardoso did not identify which portion of the statement was non-inculpatory and the pertinent statements did not substantially influence the outcome of the case in any event.[136]

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128. FED. R. EVID. 804(b)(3).
129. *Id.*
130. 922 F.3d at 1289.
131. *Id.* at 1280, 1282.
132. *Id.* at 1282.
133. *Id.* at 1289.
134. *Id.* at 1283.
135. *Id.* at 1289 (quoting Williamson v. United States, 512 U.S. 594, 600–01 (1994)).
136. *Id.* at 1289.

Next, in *Finnegan v. Commissioner of Internal Revenue*,[137] the Eleventh Circuit held that a tax court did not abuse its discretion by admitting Finnegan's tax preparer's testimony as a statement against interest.[138] The IRS sought to admit the affidavit testimony of Finnegan's tax preparer, who was unavailable.[139] The testimony stated that "every tax return he prepared during the relevant time period included some fraudulent entries."[140] The tax court admitted the evidence under Rule 804(b)(3) as a statement against interest, and ultimately found for the IRS. The taxpayer appealed to the Eleventh Circuit, arguing that the tax court abused its discretion by admitting the tax preparer's statements into evidence.[141]

The Eleventh Circuit held that the tax preparer's statements were admissible as statements against interest because they exposed the tax preparer to criminal and civil liability from his former clients.[142] The statement was also supported by corroborating circumstances because the preparer made these statements in a guilty plea where he was not given immunity, and so he had an incentive to be truthful or else, get a harsher sentence.[143]

B. Federal Rule of Evidence 901—Authenticating or Identifying Evidence

Federal Rule of Evidence 901[144] states that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[145] The Eleventh Circuit has established a "two-step process" that "governs the determination of whether a document is authentic" under Rule 901.[146] The two-step inquiry under 901 requires the following: (1) the "proponent to present 'sufficient evidence' to make out a prima facie showing that the

137. 926 F.3d 1261 (11th Cir. 2019).
138. *Id.* at 1273–74.
139. *Id.* at 1273.
140. *Id.*
141. *Id.* at 1273–1274.
142. *Id.* at 1274.
143. *Id.*
144. FED. R. EVID. 901.
145. FED. R. EVID. 901(a).
146. United States v. Mar. Life Caribbean Ltd., 913 F.3d 1027, 1032 (11th Cir. 2019).

evidence is what it purports to be"[147]; and (2) if the evidence is admitted, the jury decides the ultimate question of authenticity.[148]

In *United States v. Maritime Life Caribbean Limited*,[149] the Eleventh Circuit held that the district court erred when it applied a higher standard to authenticate evidence than what is required under Rule 901.[150] The proponent of evidence, Maritime Life, sought to prove the authenticity of a collateral assignment that allegedly granted it a security interest.[151] The district court adopted a bifurcated trial to address only the preliminary question of authenticity and erroneously required Maritime Life to prove the authenticity of the evidence by a "greater weight of the evidence" standard rather than the "sufficient evidence standard" mandated by Rule 901.[152] Nevertheless, the Eleventh Circuit concluded this amounted to harmless error, and affirmed the district court's decision, because Maritime Life suffered no prejudice from the exclusion of the evidence.[153]

147. *Id.* at 1033 (quoting United States v. Lebowitz, 676 F.3d 1000, 1009 (11th Cir. 2012).

148. *Id.*

149. 913 F.3d 1027.

150. *Id.* at 1032.

151. *Id.* at 1030.

152. *Id.* at 1032–33.

153. *Id.* at 1033.