Evidence

by W. Randall Bassett*
Susan M. Clare**
and Simon A. Rodell***

I. INTRODUCTION

The 2012 term of the United States Court of Appeals for the Eleventh Circuit included precedential opinions providing helpful guidance on distinguishing the relevant from the irrelevant and on balancing the probative value of a criminal defendant’s prior convictions with the potential for unfair prejudice. The 2012 term also included several unpublished decisions analyzing the admissibility of expert testimony under Federal Rule of Evidence 702 and the United States Supreme Court’s opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc. Although these unpublished decisions are not binding precedent, they can provide guidance to the practitioner on the Eleventh Circuit’s view of recurring evidentiary issues. The court’s unpublished decisions may be of particular interest to practitioners who typically practice in Georgia.

* Partner in the firm of King & Spalding LLP, Atlanta, Georgia. The Citadel (B.S., 1989); University of Georgia School of Law (J.D., cum laude, 1992).
** Senior Associate in the firm of King & Spalding LLP, Atlanta, Georgia. The Georgia Institute of Technology (B.S., with highest honors, 2002); Emory University School of Law (J.D., with high honors, 2006).
*** Associate in the firm of King & Spalding LLP, Atlanta, Georgia. Occidental College (B.A., 2003); University of Florida, Hough Graduate School of Business (M.B.A., 2008); University of Florida, Levin College of Law (J.D., magna cum laude, 2008).

2. See Fidelity Interior Constr., Inc. v. Se. Carpenters Reg’l Council of the United Bhd. of Carpenters & Joiners of Am., 675 F.3d 1250, 1260 (11th Cir. 2012); United States v. Merrill, 685 F.3d 1002, 1012 (11th Cir. 2012).
state courts, which adopted a new Evidence Code—modeled after the Federal Rules—that became effective on January 1, 2013.6

The term’s two biggest evidence opinions involved constitutional limits on the use of evidence in criminal trials. In the first case, the court reversed a doctor’s convictions for distributing controlled substances because the doctor’s Confrontation Clause7 rights were violated when the district court allowed a government witness to testify about autopsy reports prepared by medical examiners whom the doctor did not have the opportunity to cross-examine.8 In the second case, the court reversed a civil contempt judgment against a person who invoked his Fifth Amendment9 privilege against self-incrimination and refused to decrypt hard drives sought in a grand-jury investigation into the dissemination of child pornography.10 This Survey describes all of these decisions to provide the practitioner with a brief overview of the evidentiary landscape in the Eleventh Circuit as it evolved in 2012.

II. RELEVANCE AND PREJUDICE

A. Relevance and Irrelevance

One of the district court's primary functions during a trial is to ensure that the jury considers only evidence that is relevant to the matter and not overly prejudicial. Under Federal Rule of Evidence 401, evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.”11 Under Rule 402, irrelevant evidence is inadmissible, but all relevant evidence is generally admissible unless excluded by the Constitution or by a federal statute or rule.12 Although distinguishing between relevant and irrelevant evidence is often routine,
each new factual situation provides an opportunity to further refine these principles. Two Eleventh Circuit cases from the past year illustrate the proper analysis of distinguishing the relevant from the irrelevant.

In *Fidelity Interior Construction, Inc. v. Southeastern Carpenters Regional Council of the United Brotherhood of Carpenters & Joiners*, a small contractor (Fidelity) alleged that the Southeastern Carpenters Regional Council (the Union) picketed and sent warning letters to various property owners and several general contractors to discourage them from hiring Fidelity. The Union's campaign proved successful—Fidelity was removed from three jobs in a single week, and several general contractors and property owners agreed never to use Fidelity again. Fidelity sued the Union for conducting an unlawful secondary boycott in violation of the National Labor Relations Act. At trial, the Union moved to exclude the jury from considering evidence of the Union's lawful conduct during its campaign against Fidelity. Refusing to exclude the evidence, the district court concluded that the jury could consider the Union's lawful conduct in determining the Union's objectives, although the jury could award damages only for losses proximately caused by the Union's unlawful conduct.

---

13. 675 F.3d 1250 (11th Cir. 2012).
14. *Id.* at 1255-57.
15. *Id.* at 1257.
16. Pursuant to the National Labor Relations Act, 29 U.S.C. §§ 151-169, it is an "unfair labor practice" for a union to conduct a secondary boycott, "which is conduct that `threaten[s], coerce[s], or restrain[s] any person engaged in commerce with the purpose to force[e] or require[e] any person to cease ... doing business with any other person.'" *Fidelity*, 675 F.3d at 1259; see also 29 U.S.C. § 158(b)(4)(ii)(B).
17. *Fidelity*, 675 F.3d at 1257.
18. *Id.* at 1257-58.
19. *Id.* at 1258. The district court instructed the jury that it could consider lawful conduct in determining the objectives of the Union, as follows:

The use of banners and peaceful distribution of handbills that do not involve patrolling or picketing are protected by the First Amendment and are not themselves unlawful. Likewise sending letters to third parties seeking their aid in a labor dispute, even if the letters warned that the union plans to engage in lawful protest, is also protected speech and not itself unlawful. However, while these activities are not themselves unlawful, they may be considered by you as a part of the totality of the circumstances that you review in your analysis of the objectives of the Council’s picketing.

*Id.* The district court further instructed the jury to award damages only for losses caused by the unlawful conduct of the Union: "You may only award damages to plaintiffs proximately caused by unlawful conduct of the Council. Plaintiffs are not entitled to compensation for losses which resulted from the Council's lawful conduct." *Id.*
for Fidelity and awarded $1.7 million in damages for the Union's unlawful secondary boycott.\textsuperscript{20}

On appeal, the Union iterated its argument that the district court erred in admitting evidence of the Union's lawful conduct.\textsuperscript{21} The Eleventh Circuit affirmed, noting that the determination of whether a union has engaged in an unlawful secondary boycott requires consideration of both the conduct and the intent of the union.\textsuperscript{22} In determining intent, "[f]act-finders may examine the entire course of conduct of a union to determine whether its actions were coercive."\textsuperscript{23} The court noted that the content of lawful handbills, banners, and warning letters will often offer "telling evidence of secondary intent" when evaluated "in light of the entire campaign strategy and conduct [of a union]."\textsuperscript{24} Because the evidence of the Union's lawful conduct was relevant to the Union's intent, the district court properly admitted the evidence.\textsuperscript{25}

In contrast, in \textit{United States v. Merrill},\textsuperscript{26} the court considered the district court's exclusion of evidence as irrelevant under Rule 402.\textsuperscript{27} In Merrill, the criminal defendant's company secured a contract with the U.S. Army to provide the Afghanistan Security Forces with approximately 500 million rounds of AK-47 ammunition.\textsuperscript{28} The contract required the company to certify where the ammunition was manufactured to ensure compliance with a federal embargo on ammunition "acquired, directly or indirectly, from a Communist Chinese military company."\textsuperscript{29} The company used an Albanian munitions dealer to fulfill the contract.\textsuperscript{30} When a company representative arrived in Albania to oversee the shipping operation, he realized that the ammunition was in hermetically sealed tins with paper inside that bore Chinese characters, revealing that the ammunition might have been manufactured in China.\textsuperscript{31} Removing the papers would require destruction of the vacuum

\begin{footnotes}
\begin{itemize}
\item[20.] Id.
\item[21.] Id. at 1260.
\item[22.] Id. at 1259.
\item[23.] Id. at 1260.
\item[24.] Id. (quoting Serv. Emps. Int'l Union Local 525, 329 N.L.R.B. 638, 682 (1999) (alterations omitted)).
\item[25.] Id. at 1260-61.
\item[26.] 685 F.3d 1002 (11th Cir. 2012).
\item[27.] Id. at 1012.
\item[28.] Id. at 1005-06.
\item[29.] Id. at 1006.
\item[30.] Id.
\item[31.] Id. The ammunition was acquired by the Albanian munitions dealer in the 1960s and 1970s, before the United States enacted an arms embargo against China. Id. The defendant's company asked a State Department official in an e-mail whether "it was legal to broker Chinese Ammunition that has been sitting for about 20 years with a company in
\end{itemize}
\end{footnotes}
seal, which could render the ammunition unsafe for the battlefield. Nevertheless, the defendant decided to open the tins, remove the paper, and repackage the ammunition in cardboard boxes. The company then shipped the repackaged ammunition to Afghanistan and sent at least thirty certificates of conformance stating that the ammunition was manufactured by the supplier in Albania, rather than by a Communist Chinese military company.32

A federal grand jury indicted the defendant for conspiracy33 to commit false statements,34 major fraud,35 and wire fraud against the United States,36 and for numerous substantive offenses of major fraud and wire fraud.37 At trial, the defendant sought to introduce evidence that the government knew the ammunition was manufactured by a Communist Chinese military company to support defenses of public

Albania." Id. (internal quotation marks omitted). The State Department official responded that "US policy would not authorize the transaction. Exceptions to this policy require a presidential determination." Id. (internal alteration and quotation marks omitted).

32. Id. at 1007.

33. Federal law imposes criminal penalties for conspiring to commit a federal criminal offense or to defraud the United States. 18 U.S.C. § 371 (2006) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.").

34. 18 U.S.C. § 1001 (2006) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined [or imprisoned].").

35. 18 U.S.C. § 1031 (2006 & Supp. 2011) ("Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent— (1) to defraud the United States; or (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of such grant, contract, subcontract, . . . or any constituent part thereof, is $1,000,000 or more shall [be fined or imprisoned].").

36. 18 U.S.C. § 1343 (2006 & Supp. 2011) ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined [or imprisoned].").

37. Merrill, 685 F.3d at 1008.
authority, entrapment by estoppel, and innocent intent. The district court excluded the evidence as irrelevant.\textsuperscript{38}

Affirming this ruling, the Eleventh Circuit noted that each of these government-knowledge defenses required the defendant to "show that he relied on official government communications before acting in a manner proscribed by law."\textsuperscript{39} Yet, the defendant never claimed that he knew about or relied on any government communication at the time he repackaged the ammunition and falsely certified that it was manufactured outside China.\textsuperscript{40} Instead, he learned that the government knew the true origin of the ammunition after he had already lied to the Army and committed his crimes.\textsuperscript{41} Because the defendant did not know about the government's knowledge when he was committing his crimes, the evidence could not have helped show any innocent intent.\textsuperscript{42} In other words, the evidence could not have had "any tendency to make [the defendant's innocent intent] more or less probable than it would be without the evidence."\textsuperscript{43} The district court therefore properly excluded the irrelevant evidence of the government's knowledge of the origin of the ammunition.\textsuperscript{44}

B. Balancing Relevance and Prejudice Under Rule 403

Although the Rules permit admission of relevant evidence in most cases, Rule 403 allows a district court broad discretion to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ."\textsuperscript{45} The Rule calls for the district court to balance the probative value of evidence against any risk of

\textsuperscript{38} Id.
\textsuperscript{39} Id. at 1012 (quoting United States v. Johnson, 139 F.3d 1359, 1365 (11th Cir. 1998)).
\textsuperscript{40} Id.
\textsuperscript{41} Id. The defendant also argued that the evidence was still relevant "because he could not conceal from the government what it already knew . . . ." Id. As the court put it, the defendant's argument reduced to a contention that, "for the purposes of a fraud conviction, a lie is only a lie if it works. But 'a false statement can be material even if the decision maker actually knew or should have known that the statement was false.'" Id. (quoting United States v. Neder, 197 F.3d 1122, 1128 (11th Cir. 1999)).
\textsuperscript{42} Id.
\textsuperscript{43} See FED. R. EVID. 401.
\textsuperscript{44} Merrill, 685 F.3d at 1012.
\textsuperscript{45} FED. R. EVID. 403. The district court may also "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Id.
unfair prejudice.\textsuperscript{46} One of the most common sources of controversy in this balancing test is the district court's decision whether to allow the prosecution in a criminal case to present evidence of a defendant's prior criminal convictions.\textsuperscript{47} In general, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."\textsuperscript{48} However, such evidence is admissible under Rule 404(b) "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."\textsuperscript{49} Nevertheless, even if evidence would be admissible under Rule 404(b), the district court can still exclude the evidence as unfairly prejudicial under Rule 403.\textsuperscript{50} Thus, in criminal cases the prosecution will often offer a prior conviction to show the defendant's intent or absence of mistake, and the defendant will respond that admission of the prior conviction will unfairly prejudice his defense by provoking the jury to convict based on the defendant's past criminal behavior rather than

\textsuperscript{46} See 1 McCormick on Evidence § 185, at 1009-10 (7th ed. 2013) ("Analyzing and weighing the pertinent costs and benefits of evidence is no trivial task . . . . Accordingly, much leeway is given to trial judges who must fairly weigh probative value against probable dangers.").

\textsuperscript{47} For a broader review of the Eleventh Circuit's recent decisions applying Rule 404(b), see the 2010 version of this Survey. W. Randall Bassett & Susan M. Clare, Evidence, Eleventh Circuit Survey, 62 Mercer L. Rev. 1163, 1164-68 (2011). For an application of Rule 403's balancing test outside the prior-conviction context, see United States v. Mazard, 486 F. App'x 812, 814-15 (11th Cir. 2012) (holding that the district court did not abuse its discretion by admitting two photographs—one of the defendant making a hand gesture that implied he was a gang member, and one showing that a strip club was next door to the store front from which the defendant allegedly sold drugs).

\textsuperscript{48} Fed. R. Evd. 404(b)(1).

\textsuperscript{49} Fed. R. Evd. 404(b)(2).

\textsuperscript{50} See United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992) (en banc) (noting that evidence admitted under Rule 404(b) "must possess probative value that is not substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403").
the conduct for which he is on trial.\textsuperscript{51} Such was the case in \textit{United States v. Sanders}.\textsuperscript{52}

The defendant in \textit{Sanders} was a commercial truck driver caught hauling 153 kilograms of cocaine hidden in a load of rotting cabbages.\textsuperscript{53} At the defendant's trial on drug-trafficking and conspiracy charges, the district court admitted into evidence the defendant's 22-year-old conviction for selling 1.4 grams of marijuana. The government argued that the prior marijuana conviction was probative of the defendant's intent to enter into a conspiracy to haul the cocaine.\textsuperscript{54} In his closing, the defendant argued to the jury that he was "just a truck driver" and that, although he may have had "a thing for marijuana," "[t]hat doesn't mean he has a thing for cocaine."\textsuperscript{55} Appealing his convictions, the defendant argued that the district court abused its discretion by admitting his 22-year-old conviction for selling a small amount of marijuana.\textsuperscript{56}

On appeal, the Eleventh Circuit concluded that the district court abused its discretion by admitting the 22-year-old conviction.\textsuperscript{57} Although acknowledging Circuit precedent holding that "[e]vidence of prior drug dealings is highly probative of intent to distribute a controlled substance," the court held that the 22-year-old conviction was so remote

\textsuperscript{51} Rule 404(b) also does not preclude evidence that meets one of the following descriptions: "(1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." United States v. Edouard, 485 F.3d 1324, 1344 (11th Cir. 2007) (quoting United States v. Baker, 432 F.3d 1189, 1205 n.9 (11th Cir. 2005)). For recent cases applying this exception to Rule 404(b), see United States v. Stapleton, 455 F. App'x 896, 897 (11th Cir. 2012) (evidence relating to defendant's prior bankruptcy proceeding was admissible because the conduct was intrinsic to the charged offenses of wire fraud and making false statements); United States v. Carpenter, 457 F. App'x 889, 894 (11th Cir. 2012) (district court properly admitted confidential informant's testimony that he began buying drugs from the defendant in 1995 because the testimony was necessary to complete the story of the crime and was inextricably intertwined with the charged conspiracy); United States v. Woodley, 484 F. App'x 310, 320 (11th Cir. 2012) (testimony that defendant robbed a cooperating witness's cousin as the reason why the witness stopped dealing drugs to the defendant was arguably extrinsic, but the error, if any, was harmless in light of overwhelming evidence of guilt); United States v. Benavides, 470 F. App'x 782, 787 (11th Cir. 2012) (evidence of defendant's uncharged participation in prior similar healthcare fraud scheme was admissible as evidence inextricably intertwined with the charged healthcare fraud offense).

\textsuperscript{52} 668 F.3d 1298 (11th Cir. 2012).

\textsuperscript{53} \textit{Id.} at 1301.

\textsuperscript{54} \textit{Id.} at 1307.

\textsuperscript{55} \textit{Id.} (internal quotation marks omitted).

\textsuperscript{56} \textit{Id.} at 1308.

\textsuperscript{57} \textit{Id.} at 1315.
The court also emphasized that the prior conviction was "for a street-level sale of 1.4 grams of marijuana, and the current charges involved an international conspiracy to traffic 153 kilograms of cocaine." The defendant's victory proved Pyrrhic, however. According to the Court, the "paucity of probative value create[d] an additional problem for [the defendant]—the remoteness and dissimilarity of the prior conviction not only decrease[d] the probative value to show intent but also diminishe[d] the potential for unfair prejudice." After reviewing the abundant evidence of the defendant's guilt, the court ultimately concluded that any error in admitting the prior conviction was harmless. The opinion remains important, however, because it establishes an outer temporal boundary for the admissibility of a defendant's prior convictions, even in drug cases where such convictions can be "highly probative" of the defendant's intent to enter into a drug conspiracy.

III. EXPERT TESTIMONY

The use of expert testimony has become increasingly more commonplace today, and most practitioners in federal courts (and many state courts) have dealt with Federal Rule of Evidence 702. This rule allows a party to present expert testimony, in the form of an opinion, to assist in the jury's determination of the pertinent issues in the case. To

58.  Id. at 1314-15. The court noted that the defendant's prior conviction was nearly fifty percent older than the oldest conviction that the court had previously allowed. Id. (citing United States v. Lampley, 68 F.3d 1296, 1300 (11th Cir. 1995) (holding that a 15-year-old conviction was not so remote that it lacked any probative value to show intent to distribute narcotics)). For other recent cases assessing the prejudicial impact of a prior criminal conviction, see United States v. Cochran, 683 F.3d 1314, 1321 (11th Cir. 2012) (holding that the district court did not abuse its discretion by admitting eight-year-old conviction); United States v. Barry, 479 F. App'x 297, 301 (11th Cir. 2012) (holding that the district court did not plainly err by admitting, under Rule 404(b), five-year-old conduct that was similar to the charged conduct).
59.  Sanders, 668 F.3d at 1315.
60.  Id.
61.  Id.
62.  Id. at 1314. Indeed, one of the court's judges has expressly critiqued the Eleventh Circuit's precedent in this area. Judge Tjoflat has stated that the court's "doctrine has turned Rule 404(b) on its head, in so far as conspiracy cases are concerned," by "presumptively assuming that intent is always an issue in conspiracy cases and that all prior substantively-related acts are relevant to that intent. This is nothing more than propensity by any other name." United States v. Matthews, 431 F.3d 1296, 1319 (11th Cir. 2005) (Tjoflat, J., specially concurring).
63.  Rule 702 provides the following:
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if: (a) the
minimize the risk of misleading the jury through the use of opinions, which courts have recognized can be difficult for juries to evaluate.\textsuperscript{64} The Supreme Court has insisted that the district courts act as gatekeepers to prevent juries from considering and basing their verdicts on unreliable junk science.\textsuperscript{65} In doing so, the Court has given district courts broad discretion and will reverse only upon a showing of abuse of discretion.\textsuperscript{66}

In \textit{Daubert}, the Supreme Court identified a non-exhaustive list of factors for determining the admissibility of expert testimony.\textsuperscript{67} These factors include the following: (1) whether the expert's theory can be scientifically tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential error rate of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community.\textsuperscript{68} Since \textit{Daubert}, the Eleventh Circuit has applied a "rigorous three-part inquiry" to determine the admissibility of expert testimony under Rule 702:

\begin{quote}
Trial courts must consider whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in \textit{Daubert}; and (3) the testimony assists the trier of fact, through the application of
\end{quote}

expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon 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.

\textsuperscript{64} Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993). One especially thorny situation arises when the government offers a case agent who testifies as both a fact witness and a code-interpreting expert. \textit{See} United States v. Mallety, 496 F. App'x 984 (11th Cir. 2012). In \textit{Mallety}, Judge Jordan filed a special concurrence to emphasize the dangers of such dual-purpose testimony. \textit{Id.} at 991-92 (condemning the "troubling.. tactic" of using a "government overview witness[]" that "more closely resemble[s] the grand jury practice, improper at trial, of a single agent simply summarizing an investigation by others that is not part of the record") (quoting United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003))).

\textsuperscript{65} Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999). "In \textit{Daubert}, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony ... is not only relevant, but reliable.'" \textit{Id.} (quoting \textit{Daubert}, 509 U.S. at 589).

\textsuperscript{66} United States v. Frazier, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc).

\textsuperscript{67} \textit{Daubert}, 509 U.S. at 593-94.

\textsuperscript{68} \textit{Id.}; \textit{see also} Frazier, 387 F.3d at 1262 (listing the \textit{Daubert} factors).
scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. 69

A. Reliability Under Daubert

As has been typical in recent years, the Eleventh Circuit's 2012 term included frequent forays into the second prong of this inquiry—determining the reliability of proposed expert testimony. 70 This prong is the most susceptible to repeated analysis because judging reliability often depends on the nature of the opinion and the discipline in which the opinion is formed and being offered. In United States v. Barnes, 71 for example, the court addressed the defendant's challenge to the reliability of the opinions of three expert witnesses who testified on behalf of the government. 72 The defendant in Barnes was charged with armed bank robbery, and he defended on the grounds that the police had arrested the wrong man. 73 The robbery began when the robber entered the bank wearing a "thick, strange-looking beard," wielded a gun, jumped over the counter top, and took money from the teller stations. 74 The robber and an accomplice then drove away in a silver vehicle. 75 During the ensuing car chase, a police officer noticed the suspects "throw two black, fluffy objects from the windows." 76 After crashing the silver vehicle, the suspects ran away on foot. 77 Although the police officer briefly lost sight of the suspects, he tracked down the defendant, who appeared winded, had a flaky, sticky substance on both sides of his face, and wore clothing similar to one of the suspects. 78 The police officer arrested the defendant and identified him at trial as one of the suspects he had chased. 79

At trial, the government also presented, over the defendant's objection, three expert witnesses: a boot-print expert, a hair-and-fiber expert, and an adhesives expert. 80 Based on a comparison of "tape-lift" impressions

70. Last year's edition of this Survey addressed two 2011 cases discussing the reliability of expert testimony. See supra note 1, at 1252-55.
71. 481 F. App'x 505 (11th Cir. 2012).
72. Id. at 508-11.
73. Id. at 511.
74. Id. at 506.
75. Id.
76. Id. at 507.
77. Id. The car chase ended when the silver vehicle ran a stop sign, "collided with another vehicle, ran through a chain link fence and hit a house." Id.
78. Id.
79. Id. at 507, 511.
80. Id. at 508-11.
of a boot print left on the bank counter with the print of the boots the defendant was wearing when he was arrested, the boot-print expert testified that the defendant's boots "could have made" the impressions from the crime scene. However, the expert acknowledged that the quality of the tape-lift impressions from the crime scene was insufficient to make a more conclusive opinion. The hair-and-fiber expert compared hairs found in the patrol car that transported the defendant with hairs from a fake beard found by the side of the road where the police officer had seen the "black, fluffy objects" thrown out the window. The hair-and-fiber expert testified that the "two samples were consistent with having come from the same person or that the person whose head hair made up that fake beard could have been the source of the hairs found . . . from the patrol car." Finally, the adhesives expert compared a black, latex-like substance found in the silver vehicle with a similar substance found in the patrol car that transported the defendant and testified that the two substances were "physically consistent." Appealing his convictions, the defendant argued that all three experts' testimony should have been excluded as unreliable because they "r[an] afoul of the scientific requirement of at least some degree of quantification." Rejecting this argument, the Eleventh Circuit concluded that

---

81. Id. at 508-09. The boot-print expert found that the crime scene impressions had the following characteristics consistent with the defendant's boots:
   (1) angular elements around the perimeter and circular elements in the center that corresponded to the bottom of [the defendant's] left boot; (2) a pattern of circular elements in the center and chevron elements around the perimeter and a V-shaped element at the top that was similar to the toe of [the defendant's] boots; (3) a distinctive crescent-shaped wear characteristic that corresponded in size, design and orientation to the upper left portion of [the defendant's] left boot.
   [The boot-print expert] also found that the physical size characteristics of one crime scene impression corresponded to [the defendant's] boot, from the heel to the toe, including the spatial arrangement of the pattern on the sole.

82. Id. at 509. "[d]ue to the movement when the impressions were made, portions of the outsole did not impress[,] and [the boot-print expert] 'couldn't see the characteristics that [he] needed to make an identification.'" Id.

83. Id. at 509-10.
84. Id. at 510.
85. Id. at 511.
86. Id. at 513 (alteration in original) (internal quotation marks omitted). The defendant also challenged the reliability of the principles and methods employed by the boot-print expert. Id. Specifically, the defendant argued that a "test print created by a person of 'unknown height, weight, and gait' cannot be reliably compared to an impression made by another person with a different height, weight, and gait." Id. Rejecting this argument, the court noted that the defendant offered no authority or evidence showing that
experts are not necessarily required to provide a quantitative basis for their opinions. The rule is that experts who provide “probabilistic opinions” must “also provide quantitative bases for them, such as scientific studies or quantified personal experiences.” In the defendant’s case, however, none of the three experts provided probabilistic or quantitative opinions. “That is, none of the experts expressed a degree of likelihood or probability; rather, they said that something was a possibility and explicitly declined to opine as to probability.” Because each expert used generally accepted “methodologies that did not allow for quantification” (and because each expert declined to express a quantitative opinion), the district court did not abuse its discretion by allowing the experts to testify.

In fulfilling their role as gatekeepers, the district courts retain broad discretion to balance Daubert’s reliability factors and to “avoid unnecessary ‘reliability' proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted. . . .” In Rutledge v. NCL (Bahamas), Ltd., the district court did just that. In Rutledge, the plaintiff sued a cruise line for negligence after she was injured in a fall as she attempted to enter an elevator on the cruise ship. A security officer for the cruise line responded to the incident and accompanied the plaintiff to the infirmary. The security officer testified that the plaintiff smelled of alcohol, so he requested that she take an alcohol breath test. The plaintiff consented, and the security officer gave the plaintiff the test, which was a “disposable screening device for one-time use.” The security officer testified that the test showed that the plaintiff’s blood-alcohol content exceeded 0.08%. The plaintiff moved

“footwear impression analysis is reliable only if a person of the same height, weight and gait is used to make the comparison print.” Id. Moreover, the boot-print expert testified that his methods for footprint analysis were the standard procedures that were generally accepted throughout the world. Id.

87. Id. at 513.
88. Id. at 513-14.
89. Id. at 514.
90. Id.
91. Id.
93. 464 F. App’x 825 (11th Cir. 2012).
94. Id. at 826.
95. Id.
96. Id. In all fifty states, a blood-alcohol content of 0.08% is the legal limit to operate a vehicle. See State v. Mechler, 153 S.W.3d 435, 445 n.14 (Tex. Ct. Crim. App. 2005) (citing MARGARET C. JASPER, DWI, DUI AND THE LAW 115-16 & App. 18 (2004), which notes that all 50 states have enacted laws stating that a blood-alcohol content of 0.08% means that a driver is per se intoxicated).
before trial to exclude the results of the breath test as unreliable, but
the district court denied the motion. A jury returned a verdict for the
defendant.97

On appeal, the plaintiff argued that the district court abused its
discretion by allowing the security officer to testify to the results of the
alcohol breath test.98 The Eleventh Circuit was not persuaded. Noting
that the reliability of alcohol breath tests had been generally accepted
since at least 1973, the court concluded that the district court's
admission of the breath test in the case was not an abuse of discre-
tion.99 Furthermore, the breath test used in the case would pass even
the most rigorous Daubert analysis, because the defendant had
presented evidence that the device had been subjected to laboratory tests
showing that the device was highly reliable, and the device had been
approved by the National Highway Traffic Safety Administration as
conforming to the Model Specifications for Screening Devices to Measure
Alcohol in Bodily Fluids.100 And even though the manufacturer had
stated that the device "is not intended to legally determine blood alcohol
presence, level, or inference of intoxication[,]" this language did not
render the test unreliable.101 Rather, the manufacturer's statement
went to the weight the jurors might assign to the result of the test, not
to reliability.102

In contrast to the generally accepted alcohol-breath test, one type of
testimony that the court continues to reject is expert testimony on the
reliability of eyewitness identification. In United States v. Vega,103
the defendant appealed his convictions for carjacking and using a firearm
during a crime of violence.104 The defendant argued that the district
court abused its discretion by excluding the defendant's proffered expert
witness from testifying about certain factors that would diminish the

97. Rutledge, 464 F. App'x at 827.
98. Id. "Scientific tests results are subject to the same reliability and relevancy
   standards as scientific testimony itself." Id. (citing United States v. Lee, 25 F.3d 997, 998-
   99 (11th Cir. 1994)). Although scientific evidence is usually presented by an expert, the
   security officer was allowed to testify to the results of the scientific test without being
   qualified as an expert. Id. at 827 n.1; see also Lee, 25 F.3d at 998-99. The court noted this
   anomaly in a footnote, but did not address the issue because the plaintiff failed to raise it
   in her initial brief on appeal. Rutledge, 464 F. App'x at 827 n.1.
100. Id.
101. Id.
102. Id. at 828.
103. 450 F. App'x 844 (11th Cir. 2012), cert. denied, 133 S. Ct. 106 (2012).
104. Id. at 846.
reliability of eyewitness identification. The court summarily affirmed on this point, noting that the court has "consistently looked unfavorably" upon such testimony and, in fact, has explicitly held that "a district court does not abuse its discretion when it excludes expert testimony on eyewitness identification." And, despite continued controversy concerning the lack of reliability of eyewitness testimony, the Eleventh Circuit seems unlikely to overrule this precedent any time soon.

B. Helpfulness to the Trier of Fact

In addition to these cases addressing the reliability of expert testimony, the Eleventh Circuit also addressed the third prong of the inquiry for the admissibility of expert testimony—whether the testimony would be helpful to the jury. In Tardiff v. Geico Indemnity Co., several people who were injured in a car accident sued the car owner's insurer for insurance bad faith. At the ensuing jury trial, the plaintiffs proposed to have an expert witness testify about "industry standards for handling insurance claims." The district court excluded the expert's testimony on the ground that "any normal person could figure out if [the insurer was] reasonable or unreasonable." The jury found for the defendant insurer, and the plaintiff appealed.

105. Id. at 847. The district court characterized the proposed testimony as a "generalized critique on eyewitness credibility" and concluded that the testimony had little probative value and would not assist the jury in determining the credibility of each eyewitness. Id. at 846. The district court noted that the defendant "could question the eyewitnesses and raise doubt about their testimony through cross-examination, jury instructions, and closing arguments." Id.

106. Id. at 847 (quoting United States v. Smith, 122 F.3d 1355, 1357, 1359 (11th Cir. 1997)).

107. See Lauren Tallent, Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts, 68 WASH. & LEE L. REV. 765, 787 (2011) (stating that, although many circuits "have recently begun to accept the scientific validity of eyewitness identification experts," the "Eleventh Circuit is the last remaining circuit to mandate a per se rule of exclusion for eyewitness identification expert testimony"). For a recent Supreme Court case analyzing the reliability of eyewitness identifications, see Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012) (holding that the Fourteenth Amendment's Due Process Clause does not require the trial judge to pre-assess the reliability of an eyewitness identification if the identification was not procured under unnecessarily suggestive circumstances by law enforcement).

108. 481 F. App'x 584 (11th Cir. 2012).
109. Id. at 585.
110. Id. at 586.
111. Id. (internal quotation marks omitted).
112. Id.
The Eleventh Circuit affirmed, agreeing with the district court's conclusion that the testimony would not have been helpful to the jury. The court noted that, to prove that an insurer acted in bad faith under Florida law, the plaintiffs had to "prove that the insurer did not 'use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business.'" The plaintiffs conceded that no Florida court had required a plaintiff to present expert testimony to establish an insurance bad faith claim, and the plaintiffs failed to show that "'any normal person' would be unable to decide whether [the insurer] acted in bad faith without the assistance of expert testimony." Because the plaintiffs failed to establish that their expert's testimony would be helpful to the jury's assessment of the insurer's good or bad faith, the district court did not abuse its discretion.

IV. CONSTITUTIONAL LIMITS ON THE USE OF EVIDENCE IN CRIMINAL CASES

A. The Confrontation Clause

The Sixth Amendment to the U.S. Constitution provides a "bedrock procedural guarantee" to a criminal defendant by ensuring the right to confront the witnesses against him. As interpreted by the Supreme Court, the Confrontation Clause prohibits the prosecution from offering into evidence a "testimonial" out-of-court statement unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. Thus, the Supreme

113. Id. at 587.
114. Id. (quoting Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980)).
115. Id. (citing Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932, 939 (10th Cir. 1994) ("[J]urors may properly be viewed as capable of evaluating good and bad faith (just as they regularly determine what constitutes the conduct of a 'reasonable' person) by bringing their own common sense and life experience to bear.").
116. Id.
117. U.S. CONST. amend. VI.
118. Crawford v. Washington, 541 U.S. 36, 42 (2004). The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.
119. Crawford, 541 U.S. at 59. The Supreme Court in Crawford expressly declined to offer a comprehensive definition of "testimonial." Id. at 68. In Davis v. Washington, the Court noted that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." 547 U.S. 813, 821 (2006). Endeavoring to define "testimonial" in the context of a police interrogation, the Court stated:
Court has held, for example, that the prosecution may not introduce a testimonial report asserting that the defendant’s blood-alcohol content was three times the legal limit unless the prosecution presents testimony by a scientist who was actually involved in preparing the lab report.\(^\text{129}\)

In *United States v. Ignasiak*,\(^\text{121}\) the Eleventh Circuit examined the application of the Confrontation Clause to autopsy reports prepared by non-testifying medical examiners.\(^\text{122}\) The defendant in *Ignasiak* was a medical doctor charged with healthcare fraud and illegal drug distribution for operating an alleged “pill-mill” for prescription pain medications.\(^\text{123}\) At trial, the government presented the testimony of a medical examiner who conducted an autopsy of one of the defendant’s patients and determined that the patient died of “multiple drug intoxication.”\(^\text{124}\) The district court admitted into evidence the medical examiner’s autopsy report for that patient. But during the medical examiner’s testimony, the district court also admitted, over the defendant’s objection, five autopsy reports of other patients who were not referenced in the indictment. These reports were prepared by two other medical examiners who did not testify at the trial. Each of the five autopsy reports concluded that the cause of death was pharmaceutical drug overdose. The medical examiner who did testify confirmed the conclusions of the five other autopsy reports and stated her agreement with the cause of death for each patient.\(^\text{125}\)

On appeal, the Eleventh Circuit reversed the defendant’s convictions.\(^\text{126}\) The court first concluded that the autopsy reports were “testimonial” evidence subject to the Confrontation Clause.\(^\text{127}\) Citing

---

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822.

120. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) (holding that the Confrontation Clause precludes the prosecution from introducing a forensic report containing a testimonial certification through the in-court testimony of an analyst who did not sign the document or personally observe the test).

121. 667 F.3d 1217 (11th Cir. 2012).

122. *Id.* at 1220.

123. *Id.* at 1219-26.

124. *Id.* at 1224.

125. *Id.* at 1224-25.

126. *Id.* at 1239.

127. *Id.* at 1229-33.
the Supreme Court's decision in Melendez-Diaz v. Massachusetts,"128 which held that a forensic laboratory report identifying a substance as cocaine was testimonial, the Eleventh Circuit noted that the autopsy reports were prepared by medical examiners who, under Florida law, operated under the auspices of the Department of Law Enforcement.129 The court further noted that the medical examiners were "not mere scriveners reporting machine generated raw-data"—the testifying medical examiner confirmed that the "observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy."130 Given the statutory framework and the skill required in preparing the reports, the Eleventh Circuit concluded that the autopsy reports were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."1131

Moreover, because the testifying medical examiner was not present during the five autopsies she did not perform, "she was not in a position to testify on cross-examination as to the facts surrounding how the autopsies were actually conducted or whether any errors, omissions, or mistakes were made."132 Thus, her live, in-court testimony was not a "constitutionally adequate surrogate for the actual medical examiner who performed the autopsy."133 Because the defendant had not had an opportunity to cross-examine the medical examiners who prepared the testimonial autopsy reports, the admission of those reports into evidence violated the defendant's rights under the Confrontation Clause.134

---

129. Ignasiak, 667 F.3d at 1230-31.
130. Id. at 1232.
131. Id. at 1232-33 (quoting Baker, 432 F.3d at 1203).
132. Id. at 1234.
133. Id. at 1233. As the Eleventh Circuit noted, the Supreme Court has rejected as constitutionally inadequate this type of "surrogate" testimony. See Bullcoming, 131 S. Ct. at 2713-15 (2011). In Bullcoming, the Court rejected "surrogate" testimony by an analyst who did not sign the testimonial certification or observe the performance of the test reported in the certification, stating that "the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" Id. (quoting Melendez-Diaz, 557 U.S. at 319 n.6).
134. Ignasiak, 667 F.3d at 1233. The court rejected the government's argument that the Confrontation Clause error was harmless, concluding that the evidence of guilt was not overwhelming. Id. at 1235-37. After the Eleventh Circuit issued its opinion in Ignasiak, the Supreme Court issued a divided decision on a related issue in Williams v. Illinois. 132 S. Ct. 2221 (2012). In Williams, the Supreme Court considered whether the admission of
Thus, in the Eleventh Circuit, the government cannot admit an autopsy report prepared for trial unless the medical examiner who prepared the report is unavailable and the defendant had a prior opportunity to cross-examine.135

B. The Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment to the U.S. Constitution establishes an additional check on the admissibility of evidence. The Fifth Amendment provides that "[n]o person shall... be compelled in any criminal case to be a witness against himself..."136 This privilege "not only extends to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant."137 In one of the Eleventh Circuit's most important constitutional cases of the year, the court brought the Fifth Amendment's privilege against self-incrimination into the digital age.

In In re Grand Jury Subpoena Duces Tecum,138 the court held that a district court violated the Fifth Amendment by holding John Doe, the target of a grand-jury subpoena, in contempt for refusing to decrypt hard drives sought as part of a grand jury's child pornography investiga-
In 2011, Doe was served with a subpoena duces tecum requiring him to appear before a grand jury and produce the unencrypted contents of five external hard drives and the hard drives from two laptop computers. Doe informed the U.S. Attorney that he would appear before the grand jury but that he would invoke his Fifth Amendment privilege against self-incrimination and refuse to testify. The U.S. Attorney applied to the district court for an order granting Doe limited immunity and requiring him to respond to the subpoena.

Doe and the U.S. Attorney then appeared before the district court, and the U.S. Attorney requested that the court grant Doe immunity "limited to the use [of Doe's] act of production of the unencrypted contents of the hard drives." This "act-of-production" immunity would not extend to the government's derivative use of the contents of the hard drives in a future criminal prosecution (assuming, of course, that the government found incriminating information on the drives). In accord with the U.S. Attorney's request, the district court granted Doe the limited "act-of-production" immunity and declined to grant immunity for any derivative use of the contents of the hard drives. After the hearing, Doe again appeared before the grand jury and again refused to decrypt the hard drives. The district court then ordered Doe to show cause why he should not be held in contempt.

At the show-cause hearing, Doe explained that he invoked his Fifth Amendment privilege because the court's immunity order permitted the government to use the decrypted contents of the hard drives obtained as a result of his immunized testimony. Doe also argued that he should not be held in contempt because he was unable to decrypt the

139. Id. at 1352-53.
140. Id. at 1337.
141. Id. at 1338. Pursuant to 18 U.S.C. § 6003, a U.S. Attorney may obtain an order from the district court requiring an individual to give testimony or provide other information that he refuses to give or provide on the basis of his privilege against self-incrimination. If the district court issues an order requiring the witness to testify, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.
142. In re Grand Jury Subpoena, 670 F.3d at 1338 (alteration in original) (internal quotation marks omitted).
143. Id.
144. Id. Doe appeared without counsel at both the first hearing and the show-cause hearing. Id. at 1338 n.5 & n.6.
hard drives.\textsuperscript{145} In response, the government offered the testimony of a forensic examiner, who testified that the hard drives were encrypted with a software program called “TrueCrypt.”\textsuperscript{146} The software program creates partitions within a hard drive so that other parts of the hard drive remain secured even if one part of the hard drive is accessed. The forensic examiner acknowledged that, because the hard drives were encrypted, the government was unable to recover any data at all from the hard drives. Although he believed that there was data on the hard drives, the forensic examiner conceded on cross-examination that it was possible that the hard drives contained nothing.\textsuperscript{147} This possibility existed because the TrueCrypt software fills free space on the encrypted drive with random data, and no part of encrypted data can be distinguished from the random data generated by the software to fill the free space.\textsuperscript{148} At the end of the hearing, the district court found Doe in contempt and remanded him to the custody of the U.S. Marshal.\textsuperscript{149}

On appeal, the Eleventh Circuit noted Doe had to prove three things to show that the Fifth Amendment applied: “(1) compulsion, (2) a testimonial communication or act, and (3) incrimination.”\textsuperscript{150} The government conceded elements one and three—that Doe’s decryption and production of the decrypted hard drives would be compelled and incriminatory.\textsuperscript{151} Thus, the only issue was whether decryption of the hard drives—and the act of producing the contents of those hard drives—would constitute a testimonial act under the Fifth Amendment.\textsuperscript{152}

The Eleventh Circuit concluded that “an act of production can be testimonial when that act conveys some explicit or implicit statement of fact that certain materials exist, are in the subpoenaed individual’s possession or control, or are authentic.”\textsuperscript{153} However, the Fifth Amend-

\textsuperscript{145} Id. at 1338.
\textsuperscript{146} Id. at 1340.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 1340 n.11.
\textsuperscript{149} Id. at 1340.
\textsuperscript{150} Id. at 1341.
\textsuperscript{151} For a recent analysis of compulsion for purposes of the Fifth Amendment, see United States v. Gannaway, 477 F. App’x 618, 621 (11th Cir. 2012) “[B]ecause the ‘touchstone of the Fifth Amendment is compulsion,’ the use of both direct and indirect economic sanctions used to compel testimony are violative of the Fifth Amendment.” Id. (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977)).
\textsuperscript{152} In re Grand Jury Subpoena, 670 F.3d at 1341.
\textsuperscript{153} Id. at 1342.
\textsuperscript{154} Id. at 1345. The court derived this rule by reconciling two Supreme Court cases, Fisher v. United States, 425 U.S. 391 (1976), and United States v. Hubbell, 530 U.S. 27 (2000). In Fisher, the Internal Revenue Service sought to obtain documents prepared by
ment privilege is not triggered if the government "merely compels some physical act," such as the production of a key to the lock of a strongbox, or if the act of production will reveal only information about which the government already knows, "thereby making any testimonial aspect a 'foregone conclusion.'"5

Applying these principles to the government's demand that Doe decrypt the hard drives, the Eleventh Circuit first concluded that the decryption was not a mere physical act—the act of decrypting the hard drives "would be tantamount to testimony by Doe of his knowledge of the existence and location of potentially incriminating files; of his possession, control, and access to the encrypted portions of the drives; and of his capability to decrypt the files."155 Furthermore, the government had not shown that it already knew about the existence or the whereabouts of any files that were on the encrypted drives.157 In fact, the government's forensic examiner conceded that the encryption software precluded him from determining whether there were any files at all on the hard drives.158 Under these circumstances, the court concluded that the Fifth Amendment protected Doe's refusal to decrypt the hard drives.159 Accordingly, the court reversed the civil contempt judgment

accountants that the taxpayers had given to their attorneys, and the district court ordered production of the documents over the taxpayers' assertion of the Fifth Amendment privilege. 425 U.S. at 393-95. The Supreme Court noted that the taxpayers' act of production itself might qualify as testimonial: "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." Id. at 410. But in the cases before it, the Court concluded that production of the subpoenaed documents would not be testimonial because "the existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." Id. at 411. In Hubbell, a grand jury investigating the Whitewater Development Corporation issued a subpoena duces tecum requiring Hubbell to produce certain categories of documents. Hubbell invoked the Fifth Amendment privilege, and the district court granted Hubbell immunity. After Hubbell turned over more than 13,000 pages of documents in response to the subpoena, the grand jury indicted him on federal charges. The district court dismissed the indictment, finding that the government could not show that it knew the contents of the documents from a source independent of the documents themselves. 530 U.S. at 30-32. The Supreme Court affirmed the dismissal, concluding that Hubbell's "act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena." Id. at 45.

156. Id. at 1346.
157. Id. at 1346-47.
158. Id. at 1347.
159. Id. at 1349. Although the Fifth Amendment protected Doe, the district court still could have compelled him to turn over the encrypted contents—and held him in contempt if he failed to do so—if the district court had granted Doe "constitutionally sufficient
entered against Doe, and he was released from the custody of the U.S. Marshal.160

Another recurring Fifth Amendment issue arises in the context of trial. Specifically, a prosecutor may not comment on a criminal defendant's failure to testify in his own defense because to do so would impose a penalty for exercising the Fifth Amendment privilege against self-incrimination.161 In United States v. Wilmoth,162 the court found the prosecutor's comment on the defendant's silence so improper that the court rebuked the prosecutor by name in its opinion.163 The defendant in Wilmoth was charged with conspiracy to violate the Clean Water Act164 by dumping grease from local restaurants into the public sewer system.165 During his opening statement, the defendant's counsel stated, "[Witness] Clark wanted to take off and do things on his private time. He said I'm on commission and I can do what I want to. One day the evidence will show . . . ."166 The prosecutor interrupted and said, "I object. If [the defendant] wants to testify to this, that's fine."167 The district court promptly overruled the objection.168 The defendant later moved for a mistrial on the ground that the prosecutor had improperly commented on the defendant's silence, but the district court denied the motion and issued a curative instruction to which the defendant did not

---

160. Id. at 1349-50. But in Kastigar v. United States, the Supreme Court held that the Fifth Amendment privilege requires immunity from use and derivative use. 406 U.S. 441, 448-49 (1972). Because the district court granted only "act-of-production" immunity, which would have allowed the government to use the contents of the hard drives obtained as a result of Doe's act of production, the district court's immunity was constitutionally insufficient. In re Grand Jury Subpoena, 670 F.3d at 1351-52.

161. In re Grand Jury Subpoena, 670 F.3d at 1353.


163. 476 F. App'x 448 (11th Cir. 2012).

164. Id. at 452.

165. Wilmoth, 476 F. App'x at 449. The defendant was the president and manager of a company that the restaurants hired to transport and dispose of their grease in accord with state and federal regulations. Id.

166. Id. at 452.

167. Id.

168. Id.
The jury convicted the defendant of conspiracy and of several violations of the Clean Water Act. The defendant argued on appeal that the district court erred in denying a mistrial based on the prosecutor's improper comment. The Eleventh Circuit noted that the prosecutor's comment was "inexcusable" and "could have had no purpose other than to suggest to the jury that [the defendant] could testify to whether Clark could take time off if he wanted to." The court appeared to have been particularly irritated because the prosecutor had served as co-counsel in a previous prosecution "involving an almost identical violation." But despite the prosecutor's "want of professionalism," the court concluded that the prosecutor's remarks were harmless beyond a reasonable doubt in light of the district court's curative instruction to the jury and the substantial evidence of the defendant's guilt. Accordingly, the defendant's convictions were affirmed.

169. Id. The defendant initially declined to move for a mistrial but later changed his mind. Id.

170. Id. at 449. Although the government charged the defendant with intentionally violating the Clean Water Act, the jury convicted the defendant of lesser-included offenses of negligently violating the Act. Id.

171. Id. at 452.

172. Id. at 452-53. A prosecutor's comments violate the Fifth Amendment if they "were manifestly intended to urge the jury to draw an inference from the defendant's silence that he or she is guilty, or whether a jury would naturally and necessarily construe the prosecutor's remarks as inviting such an impermissible inference." United States v. Thompson, 422 F.3d 1285, 1299 (11th Cir. 2005).

173. Wilmoth, 476 F. App'x at 453. The previous prosecution earned a reprimand from the Fifth Circuit. See United States v. Lucas, 516 F.3d 316, 349 (5th Cir. 2008). In the previous prosecution, the prosecutor objected, during defense counsel's cross-examination of a government witness, as follows: "Your honor, he's just simply testifying. If they want to put [the defendant] on to say what happened. But he's testifying. I object to it." Id. at 349 n.131.

174. Wilmoth, 476 F. App'x at 453.

175. Id.