

# Mercer Law Review

---

Volume 72  
Number 4 *Eleventh Circuit Survey*

Article 10

---

7-2021

## Evidence

W. Randall Bassett

Val Leppert

Lauren Newman

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [Evidence Commons](#)

---

### Recommended Citation

Bassett, W. Randall; Leppert, Val; and Newman, Lauren (2021) "Evidence," *Mercer Law Review*. Vol. 72 : No. 4 , Article 10.

Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol72/iss4/10](https://digitalcommons.law.mercer.edu/jour_mlr/vol72/iss4/10)

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# Evidence

by W. Randall Bassett \*

Val Leppert \*\*

and Lauren Newman \*\*\*

## I. INTRODUCTION

In its 2020 term, the United States Court of Appeals for the Eleventh Circuit<sup>1</sup> issued several important and precedential opinions on a number of evidentiary topics. For example, in four published opinions, the court considered whether certain evidence was “testimonial” to determine whether its admission would implicate the Sixth Amendment’s Confrontation Clause.<sup>2</sup> The court also addressed whether a defendant on federal supervised release faces a “classic penalty situation,” thereby deeming any confession compelled in violation of the Fifth Amendment, when a probation officer asks him to answer questions that would reveal he had committed new crimes.<sup>3</sup>

The Eleventh Circuit additionally issued several opinions concerning lay witness and expert testimony. In five published opinions, the court affirmed the district courts’ categorization of testimony as admissible

---

\* Partner, King & Spalding LLP, Atlanta, Georgia. The Citadel (B.S., 1989); University of Georgia School of Law (J.D., cum laude, 1992). Member, State Bars of Georgia and Florida.

\*\* Partner, King & Spalding LLP, Atlanta, Georgia. Westminster College (B.A., 2004); Mercer University School of Law (J.D., magna cum laude, 2010). Member, State Bars of Georgia and Florida.

\*\*\* Associate, King & Spalding LLP, Atlanta, Georgia. Emory University (B.A., 2012); Georgia State University College of Law (J.D., summa cum laude, 2019). Member, State Bar of Georgia.

<sup>1</sup> For an analysis of evidentiary topics during the prior survey period, see W. Randall Bassett, Val Leppert & Elijah T. Staggars, *Evidence, Eleventh Circuit Survey*, 71 MERCER L. REV. 1021 (2020).

<sup>2</sup> *United States v. Melgen*, 967 F.3d 1250, 1261 (11th Cir. 2020); *United States v. Ruan*, 966 F.3d 1101, 1153 (11th Cir. 2020); *United States v. Clotaire*, 963 F.3d 1288, 1295 (11th Cir. 2020); *United States v. Santos*, 947 F.3d 711, 727–29 (11th Cir. 2020).

<sup>3</sup> *McKathan v. United States*, 969 F.3d 1213, 1224 (11th Cir. 2020).

under Rule 701<sup>4</sup> as lay witness testimony.<sup>5</sup> Regarding the admissibility of expert opinions, the court in three cases followed its trend of deferring to the district courts on the use or exclusion of expert testimony, affirming all three in published opinions.<sup>6</sup>

The court also issued several opinions balancing Rule 401's<sup>7</sup> relevancy requirement against Rule 403's<sup>8</sup> grant of discretion to exclude relevant evidence where "its probative value is substantially outweighed" by, among other things, unfair prejudice or a likelihood of confusion.<sup>9</sup> Although the court has long recognized that Rule 403 is "an extraordinary remedy that the court should invoke sparingly,"<sup>10</sup> it nonetheless excluded evidence under the rule in two published opinions this term.<sup>11</sup> The court also addressed the Rules' prohibition against character evidence<sup>12</sup> and hearsay in several published opinions.<sup>13</sup> This survey of the Eleventh Circuit's 2020 opinions on evidentiary issues summarizes all of these rulings and provides the practitioner with a concise overview of the most important developments to the law of evidence.

---

<sup>4</sup> FED. R. EVID. 701.

<sup>5</sup> *United States v. Estrada*, 969 F.3d 1245, 1270–71 (11th Cir. 2020); *United States v. Chalker*, 966 F.3d 1177, 1191–92 (11th Cir. 2020); *Clotaire*, 963 F.3d at 1298; *United States v. McLellan*, 958 F.3d 1110, 1114–15 (11th Cir. 2020); *Sabal Trail Transmission, LLC v. 3,921 Acres of Land in Lake Cty. Fla.*, 947 F.3d 1362, 1368–69 (11th Cir. 2020).

<sup>6</sup> *United States v. Gayden*, 977 F.3d 1146, 1153 (11th Cir. 2020); *Crawford v. ITW Food Equip. Grp., LLC*, 977 F.3d 1331, 1339 (11th Cir. 2020); *United States v. Pon*, 963 F.3d 1207, 1220 (11th Cir. 2020).

<sup>7</sup> FED. R. EVID. 401.

<sup>8</sup> FED. R. EVID. 403.

<sup>9</sup> *McLellan*, 958 F.3d at 1115; *Estrada*, 969 F.3d at 1273; *United States v. McGregor*, 960 F.3d 1319, 1324–25 (11th Cir. 2020); *Sowers v. R.J. Reynolds Tobacco Co.*, 975 F.3d 1112, 1121–22 (11th Cir. 2020).

<sup>10</sup> *United States v. Wilson*, 823 F. App'x 712, 717 (11th Cir. 2020).

<sup>11</sup> *See Sowers*, 975 F.3d at 1121–22 (excluding evidence of husband's adultery as unnecessarily prejudicial); *Estrada*, 969 F.3d at 1273 (excluding evidence of compliance with regulations on grounds that its potential for confusing the jury substantially outweighed any minimal relevance).

<sup>12</sup> *United States v. Graham*, 981 F.3d 1254, 1263–64 (11th Cir. 2020); *United States v. Joseph*, 978 F.3d 1251, 1263 (11th Cir. 2020); *Estrada*, 969 F.3d at 1274–75.

<sup>13</sup> *Joseph*, 978 F.3d at 1265; *United States v. Amede*, 977 F.3d 1086, 1097–98 (11th Cir. 2020); *Estrada*, 969 F.3d at 1275–76; *Mamani v. Sánchez Bustamanta*, 968 F.3d 1216, 1242–44 (11th Cir. 2020); *Ruan*, 966 F.3d at 1150–51; *Clotaire*, 963 F.3d at 1293; *United States v. Bates*, 960 F.3d 1278, 1291 (11th Cir. 2020); *Santos*, 947 F.3d at 724.

## II. CONSTITUTIONAL EVIDENTIARY PRINCIPLES

A. *The Confrontation Clause*

The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>14</sup> In *Crawford v. Washington*,<sup>15</sup> the Supreme Court of the United States interpreted the clause as barring the admission of “[t]estimonial statements of witnesses absent from trial,” unless, “the declarant is unavailable” and the defendant “had a prior opportunity to cross-examine” the declarant.<sup>16</sup> The Supreme Court declined to define with particularity what a “testimonial” statement is but identified a “core class” of testimonial materials including “affidavits, depositions, prior testimony, or confessions,” as well as “statements that 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.”<sup>17</sup> Since *Crawford*, the Supreme Court has clarified the difference between testimonial and nontestimonial statements by focusing on the “primary purpose” of the questioning that elicited the out-of-court statement.<sup>18</sup> 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.”<sup>19</sup> Statements are testimonial, however, “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.”<sup>20</sup>

In four published opinions this term,<sup>21</sup> the Eleventh Circuit considered whether certain public records, business records, and summaries of records, were testimonial and therefore subject to the Confrontation

---

<sup>14</sup> U.S. Const. amend. VI.

<sup>15</sup> 541 U.S. 36 (2004).

<sup>16</sup> *Id.* at 59; see also *Santos*, 947 F.3d at 727 (noting the Supreme Court in *Crawford* “held that the Sixth Amendment prohibits the introduction of out-of-court testimonial statements unless the declarant is unavailable to testify, and the defendant had a prior opportunity to cross-examine the declarant”).

<sup>17</sup> *Crawford*, 541 U.S. at 51–52; see also *Santos*, 947 F.3d at 727–28.

<sup>18</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Melgen*, 967 F.3d at 1261; *Ruan*, 966 F.3d 1101 at 1153; *Clotaire*, 963 F.3d at 1295–96; *Santos*, 947 F.3d at 729–30.

Clause. In *United States v. Santos*,<sup>22</sup> the defendant—a native of the Dominican Republic—applied for naturalization.<sup>23</sup> As part of this process, he completed an N-400 Application for Naturalization, “which is a standard form that all individuals must submit to the government to become a naturalized citizen.”<sup>24</sup> In a section titled “Good Moral Character,” the defendant certified under penalty of perjury that he had never been arrested, charged with a crime, convicted of a crime, or been in jail or prison.<sup>25</sup> Roughly a year-and-a-half later, a United States Citizen and Immigration Services (USCIS) officer interviewed the defendant.<sup>26</sup> During the interview, the officer annotated the N-400 form in red ink, writing comments such as “claims no arrest[,] no offense[,] no DUI” under the defendant’s answers, and then signed the Application.<sup>27</sup> At the end of the interview, the defendant swore under penalty of perjury that the contents of the Application, including the officer’s annotations, were true and correct.<sup>28</sup>

The question before the court in *Santos* was whether the district court’s introduction of the N-400 Application for Naturalization, including the USCIS officer’s annotations, violated the defendant’s Sixth Amendment rights under the Confrontation Clause. Relying on a case from the United States Court of Appeals for the First Circuit,<sup>29</sup> the court concluded that it did not.<sup>30</sup> The court reasoned that all naturalization applicants are required to complete a Form N-400 Application and that USCIS officers perform the same verification process in every naturalization interview.<sup>31</sup> Moreover, “USCIS officers are not conducting the interviews because they suspect the applicants of crimes and are not making the red marks on the Form N-400 for later criminal prosecution.”<sup>32</sup> The court therefore determined that the defendant’s annotated Form N-400 Application was a “nontestimonial public record produced as a matter of administrative routine” and “for the primary purpose of determining [the defendant’s] eligibility for naturalization.”<sup>33</sup> Because the red marks on the annotated Form N-400 Application were

---

<sup>22</sup> 947 F.3d 711 (11th Cir. 2020).

<sup>23</sup> *Id.* at 716.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 716–17.

<sup>28</sup> *Id.* at 717.

<sup>29</sup> See *United States v. Phoeun Lang*, 672 F.3d 17, 22–23 (1st Cir. 2012).

<sup>30</sup> *Santos*, 947 F.3d at 729.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citation omitted).

nontestimonial, the court concluded that their admission could not violate the Confrontation Clause.<sup>34</sup>

In *United States v. Ruan*,<sup>35</sup> the court addressed the question of whether the admission of data from Alabama's Prescription Database Monitoring Program (PDMP) violated the defendants' Sixth Amendment rights under the Confrontation Clause.<sup>36</sup> The court first observed that "certain statements by their nature are not testimonial—for example, business records or statements in furtherance of a conspiracy."<sup>37</sup> Because the court determined the PDMP reports were business records, it found that "they [we]re not testimonial and d[id] not violate the Confrontation Clause."<sup>38</sup> The court additionally noted, however, that even if the reports were not business records, they would nonetheless be nontestimonial. It reasoned that "[p]harmacists are required by law to enter the PDMP data for the primary purpose of aiding physicians in treating patients, such as combating addiction."<sup>39</sup> "[T]he fact that the pharmacists may be aware when they input the data that law enforcement also has access to the database if needed during an investigation does not transform the data entry into the type of formal statement required for testimonial evidence."<sup>40</sup> The court therefore affirmed the district court's admission of the PDMP data, concluding it was not implicated by the Confrontation Clause.

In *United States v. Clotaire*,<sup>41</sup> the court addressed the applicability of the Confrontation Clause to another business record.<sup>42</sup> In *Clotaire*, the district court admitted screenshots of ATM surveillance footage pursuant to Rules 803(6)<sup>43</sup> and 902(11)<sup>44</sup> under the records of regularly conducted business activity.<sup>45</sup> The defendant objected to this evidence, arguing "that the person who pulled still frames from the video surveillance [footage was] a witness against him and [] he therefore had the right to confront the methods used to produce the images and the opportunity to cross-examine someone with knowledge of how the exhibits were created."<sup>46</sup>

---

<sup>34</sup> *Id.*

<sup>35</sup> 966 F.3d 1101 (11th Cir. 2020).

<sup>36</sup> *Id.* at 1153.

<sup>37</sup> *Id.* (citation and internal marks omitted).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 963 F.3d 1288 (11th Cir. 2020).

<sup>42</sup> *Id.* at 1295–96.

<sup>43</sup> FED. R. EVID. 803(6).

<sup>44</sup> FED. R. EVID. 902(11).

<sup>45</sup> *Clotaire*, 963 F.3d at 1294.

<sup>46</sup> *Id.*

The Eleventh Circuit disagreed, finding that “[s]till frame pictures are not statements at all, let alone testimonial ones.”<sup>47</sup> It observed that “pictures are not witnesses[,]” “[s]urveillance cameras are not witnesses, and surveillance photos are not statements.”<sup>48</sup> The court additionally expressed skepticism at the defendant’s suggestion that the photos were somehow “enhanced.”<sup>49</sup> The court determined that even if they had undergone some “post-capture processing for clarity,” any such processing would not make them testimonial, because the photo processor did nothing more than get the clearest image.<sup>50</sup> “[S]he made no assertion about what the image showed or who it might be.”<sup>51</sup> Because the surveillance photos nor their purported enhancement constituted statements, much less testimonial ones, the court affirmed the district court’s admission of the ATM surveillance photos.<sup>52</sup>

Although the Eleventh Circuit ultimately found the business records in *Ruan* and *Clotaire* nontestimonial and therefore they did not implicate the Confrontation Clause, the court’s analysis varied slightly between the cases. In *Ruan*, the Eleventh Circuit found the PDMP data nontestimonial because it was a business record.<sup>53</sup> It cited *United States v. Wilson*<sup>54</sup> and *United States v. Naranjo*<sup>55</sup> for the proposition that business records are categorically nontestimonial and therefore not implicated by the Confrontation Clause.<sup>56</sup> Both *Wilson* and *Naranjo* cited *Crawford* for support.<sup>57</sup> However, the Eleventh Circuit in *Clotaire* expressly rejected any such categorical approach.<sup>58</sup> In a footnote at the end of the opinion, the court stressed that its conclusion that the ATM surveillance photos were nontestimonial “does not—and cannot—rest on

---

<sup>47</sup> *Id.* at 1295.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1296.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See *Ruan*, 966 F.3d at 1153 (“Because the PDMP reports are business records as explained above, they are not testimonial and do not violate the Confrontation Clause.”).

<sup>54</sup> 788 F.3d 1298, 1316 (11th Cir. 2015) (“Certain statements ‘by their nature [are] not testimonial—for example, business records or statements in furtherance of a conspiracy.’” (citing *Crawford*, 541 U.S. at 56)).

<sup>55</sup> 634 F.3d 1198, 1213–14 (11th Cir. 2011) (“Business records are not testimonial.” (citing *Crawford*, 541 U.S. at 56)).

<sup>56</sup> *Ruan*, 966 F.3d at 1153.

<sup>57</sup> See *Crawford*, 541 U.S. at 56 (“Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.”).

<sup>58</sup> *Clotaire*, 963 F.3d at 1295 n.4.

[its] determination that the ATM photographs [we]re business records.”<sup>59</sup> It reasoned that the Supreme Court held in *Melendez-Diaz v. Massachusetts*<sup>60</sup> that business records “are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.”<sup>61</sup> The court therefore observed that the proper inquiry is not whether evidence qualifies for admission under an exception to the hearsay rule, but whether the evidence is testimonial.<sup>62</sup> These cases combined suggest that although business records are generally nontestimonial under *Crawford*, certain business records may still run afoul of the Confrontation Clause if they are testimonial in nature.<sup>63</sup>

In *United States v. Melgen*,<sup>64</sup> the Eleventh Circuit considered the applicability of the Confrontation Clause to summaries of data.<sup>65</sup> There, the defendant was charged with operating a multi-year scheme to defraud Medicare.<sup>66</sup> At trial, the district court allowed the introduction of summary charts under Rule 1006<sup>67</sup> that compared the defendant-physician’s billing to the billing of peer physicians.<sup>68</sup> The defendant was ultimately found guilty. He appealed his conviction arguing, among other things, that the summary charts were testimonial hearsay in violation of the Confrontation Clause.<sup>69</sup> He specifically argued “that the mere act of choosing selection criteria to decide which doctors’ data to include in the

---

<sup>59</sup> *Id.*

<sup>60</sup> 557 U.S. 305 (2009).

<sup>61</sup> *Clotaire*, 963 F.3d at 1295 (citing *Melendez-Diaz*, 557 U.S. at 324).

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g.*, *United States v. Brooks*, 715 F.3d 1069, 1079 (8th Cir. 2013) (observing that “most business records under Rule 803(6) are non-testimonial statements to which the Confrontation Clause does not apply” but acknowledging that some may still violate the Confrontation Clause if they are testimonial in nature); *United States v. Pursley*, 577 F.3d 1204, 1223 (10th Cir. 2009) (citing *Crawford* and *Melendez-Diaz* for proposition that a statement’s admission may violate the Confrontation Clause, even if it qualifies for an exception to the hearsay doctrine, if it constitutes testimonial hearsay).

<sup>64</sup> 967 F.3d 1250 (11th Cir. 2020).

<sup>65</sup> *Id.* at 1260–61.

<sup>66</sup> *Id.* at 1255.

<sup>67</sup> Rule 1006 states: “The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.” FED. R. EVID. 1006.

<sup>68</sup> *Melgen*, F.3d at 1260.

<sup>69</sup> *Id.*



summary comparisons was a testimonial act” and therefore he had the right to cross-examine whoever selected the criteria.<sup>70</sup> The Eleventh Circuit affirmed the admission of the summary charts.<sup>71</sup> First, it observed that the summaries were compiled from nontestimonial Medicare records and thus did not implicate the Confrontation Clause.<sup>72</sup> The court also determined that the defendant’s argument “ha[d] no basis in our law.”<sup>73</sup> “Attorneys routinely make decisions about which evidence they believe is relevant to establishing a particular point,” such as “which witnesses to call, or as here, which summaries to enter into evidence.”<sup>74</sup> The court concluded that although the Confrontation Clause certainly guarantees a criminal defendant the right to be confronted with the witnesses against him, “[i]t does *not* reach back a step further to demand the opportunity to cross-examine an attorney over why they decided to call a particular witness—or, as in this case, about why they chose specific selection criteria in compiling the summary.”<sup>75</sup>

#### *B. The Privilege Against Self-Incrimination*

More commonly known as the right against self-incrimination, the Fifth Amendment of the Constitution of the United States provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>76</sup> The Supreme Court has explained that “[t]he essence of this basic constitutional principle is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.”<sup>77</sup> A violation of the Fifth Amendment occurs when “the accused is compelled to make a testimonial communication that is incriminating.”<sup>78</sup> If an individual is compelled to answer an incriminating question, “his answers are inadmissible against him in a later criminal prosecution.”<sup>79</sup>

To succeed under a Fifth Amendment challenge on a motion to suppress a confession, a movant must show three things: “(1) that the

---

<sup>70</sup> *Id.* at 1261.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> U.S. Const. amend. V.

<sup>77</sup> *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (citation, internal marks, and emphasis omitted).

<sup>78</sup> *Fisher v. United States*, 425 U.S. 391, 408 (1976).

<sup>79</sup> *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (citation omitted).

government compelled him to make a (2) testimonial communication or act and (3) that the testimonial communication or act incriminated him.”<sup>80</sup> During its 2020 term, the Eleventh Circuit addressed the first element and considered whether a defendant who was on federal supervised release was compelled to incriminate himself when his probation officer asked him to answer questions that would reveal he had committed new crimes.<sup>81</sup> In *McKathan v. United States*,<sup>82</sup> the defendant, McKathan, completed a prison term for possession of child pornography in 2007, after which “he began living under the terms of his supervised release.”<sup>83</sup> “One of those terms required McKathan to answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.”<sup>84</sup> In 2014, McKathan’s probation officer became concerned about him and conducted a surprise visit at his apartment to investigate. At the apartment, the probation officer reviewed McKathan’s phone’s internet browser history and asked if he had been viewing child pornography. McKathan answered that he had. Based on the probation officer’s testimony, the court revoked McKathan’s supervised release and sent him back to prison.<sup>85</sup>

Separate from his supervised release revocation, a federal grand jury also, under violation of 18 U.S.C. § 2252A(a)(4)(B),<sup>86</sup> charged McKathan with three counts of knowingly possessing material containing an image of child pornography. McKathan’s counsel filed a motion to suppress, arguing that the government had obtained McKathan’s statements and the fruits of the browser history through an illegal search in violation of the Fourth Amendment. The motion, however, was unsuccessful.<sup>87</sup> Having lost his suppression motion, McKathan pled guilty to one count of violating 18 U.S.C. § 2252A(a)(2)(A)<sup>88</sup> for knowingly receiving child pornography.<sup>89</sup>

In November 2015, McKathan filed a *pro se* habeas petition to vacate, set aside, or correct his conviction, arguing that his counsel had been constitutionally deficient because they did not assert a Fifth Amendment

---

<sup>80</sup> *McKathan v. United States*, 969 F.3d 1213, 1223–24 (11th Cir. 2020).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1213.

<sup>83</sup> *Id.* at 1218.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1218–19.

<sup>86</sup> 18 U.S.C. § 2252A(a)(4)(B) (2018).

<sup>87</sup> *McKathan*, 969 F.3d at 1219.

<sup>88</sup> 18 U.S.C. § 2252A(a)(2)(A) (2018).

<sup>89</sup> *McKathan*, 969 F.3d at 1220.

argument to suppress his statements to his probation officer.<sup>90</sup> To succeed on a claim of ineffective assistance of counsel, a defendant must establish that “(1) his counsel’s performance was deficient and (2) his counsel’s deficient performance prejudiced the defense.”<sup>91</sup> Under the prejudice prong, the court considers whether “a reasonable likelihood exists that the suppression issue the attorney did not advance would have affected the outcome of the case.”<sup>92</sup> The court therefore turned to the merits of the underlying Fifth Amendment issue.<sup>93</sup>

Ordinarily, to invoke the protections of the Fifth Amendment, “an individual must actually invoke the right not to make statements, or his answers will not qualify as ‘compelled’ within the meaning of the Amendment.”<sup>94</sup> But the Supreme Court has determined that “when the government denies an individual a ‘free choice’ to either speak or remain silent, the Fifth Amendment is considered ‘self-executing,’ and an individual need not expressly invoke the right for his statements to be suppressed in a later criminal proceeding.”<sup>95</sup> The court observed that the Supreme Court has identified only three “self-executing” circumstances: (1) custodial settings, unless the speaker has knowingly and intelligently waived the privilege;<sup>96</sup> (2) extremely limited tax-return-filing circumstances;<sup>97</sup> and (3) when the government creates a “classic penalty situation.”<sup>98</sup> The court found only the last exception relevant and therefore turned to the question of whether a federal probation officer’s questioning constitutes a “classic penalty situation.”<sup>99</sup>

The Eleventh Circuit answered in the affirmative, finding that a reasonable person in McKathan’s position would have believed that an invocation of the Fifth Amendment could result in revocation of his supervised release.<sup>100</sup> First, the court examined the precise terms of McKathan’s supervised-release conditions, finding they did not weigh in his favor.<sup>101</sup> Although the conditions required McKathan to answer his probation officer’s questions truthfully, they did not expressly condition

---

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1222 (citation and internal marks omitted).

<sup>92</sup> *Id.* at 1223.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1224 (citation and internal marks omitted).

<sup>95</sup> *Id.*

<sup>96</sup> See *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1966).

<sup>97</sup> See *Marchetti v. United States*, 390 U.S. 39, 48–49 (1968).

<sup>98</sup> See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

<sup>99</sup> *McKathan*, 969 F.3d at 1228.

<sup>100</sup> *Id.* at 1226–28.

<sup>101</sup> *Id.* at 1226.

supervised release on a waiver of Fifth Amendment privilege.<sup>102</sup> The court then considered whether there was any reasonable basis for McKathan to have thought that invoking his Fifth Amendment privilege would result in the revocation of his supervised release.<sup>103</sup> To do so, the court turned to precedent and looked at whether the government had successfully attempted to revoke supervised release in any case in the Eleventh Circuit, “merely because the supervised releasee invoked his Fifth Amendment privilege.”<sup>104</sup>

In *United States v. Robinson*,<sup>105</sup> the court found such precedent.<sup>106</sup> The court determined that “a reasonable person in McKathan’s position would understand *Robinson* to authorize punishment for a supervised releasee’s refusal to answer his probation officer’s questions.”<sup>107</sup> Because the court found that McKathan’s statements were made under a “classic penalty situation,” it concluded that the government would be well within its rights to use the statements to revoke McKathan’s supervised release, but it could not use them to prosecute him for a new crime.<sup>108</sup> For these reasons, the court concluded that there was a “reasonable likelihood that a Fifth Amendment suppression motion would have been successful.”<sup>109</sup>

---

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1226–27.

<sup>105</sup> 893 F.2d 1244 (11th Cir. 1990).

<sup>106</sup> *McKathan*, 969 F.3d at 1227. In *Robinson*, the Eleventh Circuit affirmed the district court’s revocation of a releasee’s probation when—in response to his probation officer asking about a source of income—the releasee invoked his Fifth Amendment right to remain silent. *Robinson*, 893 F.2d. at 1245.

<sup>107</sup> *McKathan*, 969 F.3d at 1228.

<sup>108</sup> *Id.* at 1229. The court presented two other bases for its holding. First, it cited an opinion from the United States Court of Appeals for the Ninth Circuit that had reached the same conclusion. See *United States v. Saechao*, 418 F.3d 1073, 1081 (9th Cir. 2005). The court also considered the fact that in the wake of opinions like *Robinson*, the U.S. Sentencing Commission felt the need “to clarify that defendants should not be punished for failing to truthfully answer their probation officer’s questions if the failure resulted from an invocation of the Fifth Amendment privilege.” *McKathan*, 969 F.3d at 1230. Because McKathan answered his probation officer’s questions before the Sentencing Commission promulgated this amendment, the court determined the amendment would not be controlling. *Id.*

<sup>109</sup> *McKathan*, 969 F.3d at 1231. The court vacated the district court’s denial of McKathan’s § 2255 motion and remanded for further proceedings. *Id.* at 1233.

## III. WITNESS OPINION TESTIMONY

A. *Expert Testimony*

Under the Federal Rules of Evidence, a witness's opinion testimony "is classified as either lay testimony or expert testimony."<sup>110</sup> Under Rule 702,<sup>111</sup> federal courts assess the admissibility of expert testimony.<sup>112</sup> Pursuant to that rule, the proponent of the evidence bears the burden of showing that "the expert is qualified regarding the matter at hand, employs a reliable methodology, and will provide testimony that assists the trier of fact to understand the issue."<sup>113</sup> The Supreme Court set forth the standard for analyzing whether an expert's methodology is reliable in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>114</sup> Under this standard, known as the *Daubert* standard,<sup>115</sup> the court considers: "(1) whether the expert's testimony can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community."<sup>116</sup>

In the 2020 term, the court published three opinions addressing challenges under the *Daubert* standard, deferring to the district court's decision in each one. In *United States v. Pon*,<sup>117</sup> the defendant, an ophthalmologist, was charged with health care fraud.<sup>118</sup> As a part of his scheme, he would diagnose patients with a debilitating and incurable eye disease known as wet age-related macular degeneration (WMD) and then move to the "treatment" phase, "which involved lasering one or both of the patient's eyes."<sup>119</sup> But other doctors who also treated the defendant's patients grew skeptical of this technique.<sup>120</sup> One doctor, who saw one of the defendant's patients after receiving this "treatment," did not see WMD in either of the patient's eyes.<sup>121</sup> After another doctor, Dr. Williams, referred some of his patients to the defendant, every patient went back to Dr. Williams with a WMD diagnosis and no sign that the

---

<sup>110</sup> *McLellan*, 958 F.3d at 1114.

<sup>111</sup> FED. R. EVID. 702.

<sup>112</sup> *Id.*

<sup>113</sup> *ITW Food*, 977 F.3d at 1338.

<sup>114</sup> 509 U.S. 579 (1993).

<sup>115</sup> *See Gayden*, 977 F.3d at 1153.

<sup>116</sup> *ITW Food*, 977 F.3d at 1338.

<sup>117</sup> 963 F.3d 1207 (11th Cir. 2020).

<sup>118</sup> *Id.* at 1212, 1215.

<sup>119</sup> *Id.* at 1212.

<sup>120</sup> *Id.* at 1213.

<sup>121</sup> *Id.*

defendant had lasered their eyes in a way that would actually treat WMD. After federal law enforcement officers executed a search warrant and seized the defendant's patient files, an expert determined that maybe five to ten of the 500 patients whom the defendant had diagnosed with WMD actually had any form of macular degeneration.<sup>122</sup>

The indictment alleged that the defendant committed fraud by falsely diagnosing patients and using those false diagnoses for a basis of submitting Medicare reimbursement claims. Before trial, the defendant "notified the government that he intended to offer the expert testimony of Giorgio Dorin, a former director of development at the company that manufactured the 'laser' used by the defendant."<sup>123</sup> Dorin's proposed testimony boiled down to two main points: (1) the general concepts of lasers and their application to eye disease; and (2) the "newer method" of treating WMD that the defendant claimed to have used on his patients known as "subthreshold micropulse laser photostimulation."<sup>124</sup> The government moved to exclude Dorin's proposed testimony under *Daubert*, arguing that subthreshold micropulse laser photostimulation is not a scientifically or medically valid treatment for WMD. At the end of a three-day *Daubert* hearing, the court ruled that Dorin could testify about the general concepts of lasers and their applications, but he could not offer his opinion that subthreshold micropulse laser photostimulation could treat WMD.<sup>125</sup>

At trial, the defendant was found guilty. He appealed his conviction arguing that the district court should have allowed his expert to testify about the use of subthreshold micropulse photostimulation as a treatment for WMD.<sup>126</sup> The Eleventh Circuit affirmed the district court's exclusion of the expert's testimony.<sup>127</sup> It began its discussion by underscoring the standard of review, stating "[i]t is not easy to persuade a court of appeals to reverse a district court's judgment on *Daubert* grounds."<sup>128</sup> In fact, the deference the appellate court shows "trial courts on evidentiary rulings is especially pronounced in the *Daubert* context, where the abuse of discretion standard places a 'heavy thumb'—'really a thumb and a finger or two'—on the district court's side of the scale."<sup>129</sup> The court then determined that three of the four *Daubert* factors weighed

---

<sup>122</sup> *Id.* at 1213–14.

<sup>123</sup> *Id.* at 1215.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1215–16.

<sup>126</sup> *Id.* at 1219.

<sup>127</sup> *Id.* at 1221.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (citation omitted).

against the reliability, and therefore the admissibility, of Dorin's theory that subthreshold micropulse laser photostimulation can be used to treat WMD.<sup>130</sup> First, the court determined that although Dorin testified his theory *could* be tested, it had not been.<sup>131</sup> Defense counsel conceded that "Dorin [was] drawing conclusions that ha[d] not . . . been scientifically tested."<sup>132</sup> Second, the defendant "failed to provide evidence about the theory's known or potential rate of error and whether any standards exist[ed] to control for error."<sup>133</sup> Third, the court determined that Dorin's theory was "not generally accepted in the ophthalmology field."<sup>134</sup> That left only one factor in favor of reliability: Dorin's peer-reviewed paper mentioning this theory.<sup>135</sup> But the court concluded that "publication alone is not enough to conclude that a district court abused its discretion in not admitting expert testimony."<sup>136</sup>

The court additionally considered a fifth factor articulated by the Supreme Court in *General Electric Co. v. Joiner*:<sup>137</sup> whether there is an "analytical gap between the data and the opinion proffered."<sup>138</sup> At the *Daubert* hearing, "Dorin suggested that because a study showed subthreshold micropulse laser treatment [could] treat diabetic macular edema, his theory that it could treat WMD [was] sound."<sup>139</sup> But the court stated that was a "leap from an accepted scientific premise to an unsupported one."<sup>140</sup> Instead of "bridging that gap, Dorin tried to *ipse dixit* over it; but a bald assertion cannot carry the *Daubert* burden."<sup>141</sup> The court therefore concluded that the district court's exclusion of Dorin's testimony regarding subthreshold micropulse photostimulation "was not an abuse of discretion but a proper exercise of the 'considerable leeway' the court had."<sup>142</sup>

In *Crawford v. ITW Food Equipment Group, LLC*,<sup>143</sup> the Eleventh Circuit again affirmed a district court's *Daubert* decision.<sup>144</sup> There, the

---

<sup>130</sup> *Id.* at 1220.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 522 U.S. 136 (1997).

<sup>138</sup> *Pon*, 963 F.3d at 1220.

<sup>139</sup> *Id.* at 1221.

<sup>140</sup> *Id.* (citation and internal marks omitted).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (citation omitted).

<sup>143</sup> 977 F.3d 1331 (11th Cir. 2020).

<sup>144</sup> *Id.* at 1340.

plaintiff sued ITW Food Equipment Group LLC, (FEG) for negligent product design after his arm was amputated when it came into contact with an unguarded blade of one of FEG's commercial meat saws. To support his case, the plaintiff introduced the expert testimony of a professor of mechanical and aerospace engineering who was an expert in saw and guard design. The professor designed and built an alternative meat saw that employed a self-deploying blade guard. At the close of trial, FEG moved for judgment as a matter of law, arguing—among other things—that the professor's expert testimony was inadmissible. The district court disagreed, finding the expert's testimony regarding the alternative design satisfied the *Daubert* standard.<sup>145</sup>

On appeal, the Eleventh Circuit affirmed the lower court's decision.<sup>146</sup> FEG argued that the professor did not sufficiently test whether his design would function similarly to FEG's meat saw or whether his design would be purchased by users.<sup>147</sup> The court determined that these issues were objections going to the weight of the testimony, not objections to its admissibility.<sup>148</sup> Of the four *Daubert* factors, FEG's main objection was a failure to test.<sup>149</sup> But FEG was silent as to what the professor should have done differently.<sup>150</sup> Despite FEG's arguments to the contrary, the court found that the professor had adequately tested his design.<sup>151</sup> He applied for a patent, submitted the model for peer review in the *American Journal of Mechanical Engineering*, and demonstrated the operation of the model in a video before the jury.<sup>152</sup> FEG also failed to cite any case law suggesting that consumer surveys or commercial analyses of an alternative product design were required before evidence of that design could be admitted.<sup>153</sup> For these reasons, the court concluded that the district court did not abuse its discretion in rejecting FEG's challenge to the plaintiff's expert testimony.<sup>154</sup>

In *United States v. Gayden*,<sup>155</sup> the Eleventh Circuit faced the issue of whether expert testimony that is subject to confirmation bias should be excluded under *Daubert*.<sup>156</sup> In *Gayden*, the government sought to

---

<sup>145</sup> *Id.* at 1336–38.

<sup>146</sup> *Id.* at 1340.

<sup>147</sup> *Id.* at 1339.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1340.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1341.

<sup>155</sup> 977 F.3d 1146 (11th Cir. 2020).

<sup>156</sup> *Id.* at 1153.



introduce an expert witness to testify that Gayden had overprescribed controlled substances.<sup>157</sup> Gayden argued, however, that the expert had reviewed “irrelevant inflammatory information about Gayden before forming his opinion,” rendering it unreliable.<sup>158</sup> The court disagreed, observing that all persons are subject to the potential for confirmation bias.<sup>159</sup> The court also found that the district court properly determined that any such bias “was appropriate fodder for cross-examination.”<sup>160</sup> Although the court recognized that defense counsel would face a difficult tactical decision at trial because asking the expert about any bias in formulating his opinion would necessarily elicit information that could harm Gayden, it determined this was “not the kind of Hobson’s choice that [would] mandate[] striking the expert from testifying.”<sup>161</sup> Accordingly, the court concluded that the district court did not abuse its discretion in allowing the expert to testify.<sup>162</sup>

In addition to determining whether an expert’s methodology is reliable under *Daubert*, district courts must also determine whether the expert is qualified to testify.<sup>163</sup> The proponent of expert testimony “must show that the expert is qualified based on her ‘knowledge, skill, experience, training, or education.’”<sup>164</sup> The defendants in *Ruan*, discussed *supra* at Section II.A, were board-certified doctors specializing in pain management.<sup>165</sup> The indictment against them alleged that their medical clinic was essentially a “pill mill” that prescribed controlled substances for no legitimate medical purpose.<sup>166</sup> The defendants were charged with a slew of crimes including conspiracy to distribute controlled substances, conspiracy to violate the Controlled Substances Act, conspiracy to commit health care fraud, and illegal drug distribution.<sup>167</sup> At trial, one of the government’s medical experts, Dr. Aultman, “testified that prescribing drugs based on one’s own financial interest is outside the usual course of professional practice.”<sup>168</sup> Dr. Aultman also reviewed several patients’

---

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Ruan*, 966 F.3d at 1161.

<sup>165</sup> *Id.* at 1121.

<sup>166</sup> *Id.* at 1120.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1123.

files and opined that the defendants' treatment of those individuals did not meet the usual course of professional practice standard.<sup>169</sup>

The defendants argued on appeal that Dr. Aultman was not qualified to give her expert opinion because she was not a board-certified pain management physician and did not have her own specialty clinic like defendants'.<sup>170</sup> The Eleventh Circuit disagreed.<sup>171</sup> Citing a number of opinions from the Eleventh and other circuits,<sup>172</sup> the court observed that a "proffered physician need not be a specialist in the particular medical discipline to render expert testimony relating to that discipline."<sup>173</sup> In this case, Dr. Aultman had a medical degree, completed a residency in internal medicine, had practiced medicine for over twenty years, and regularly prescribed pain medicine.<sup>174</sup> At the time of the trial she was practicing as a hospitalist, but she had also practiced general medicine in a private clinic and palliative care in a hospice setting.<sup>175</sup> Dr. Aultman's familiarity with prescribing opioids and treating chronic pain therefore qualified her to opine on the defendants' conduct, even though she was not a pain management specialist.<sup>176</sup>

The court also gave weight to the defendants' ability to question Dr. Aultman in front of the jury.<sup>177</sup> On cross-examination, the defendants established that as a hospitalist, Dr. Aultman did not have her own clinical practice and that when a patient "presented with a significant amount of pain that was beyond [her] specialization, [she] referred that patient to someone else."<sup>178</sup> The court therefore found no abuse of discretion in the admission of Dr. Aultman as an expert, as "the weight of her testimony was for the jury to evaluate."<sup>179</sup>

---

<sup>169</sup> *Id.* at 1130.

<sup>170</sup> *Id.* at 1161–62.

<sup>171</sup> *Id.* at 1161. Like a district court's *Daubert* determination, "[a] district court's decisions regarding the admissibility of expert testimony will not be set aside" absent abuse of discretion. *Id.*

<sup>172</sup> See *McDowell v. Brown*, 392 F.3d 1283, 1297 (11th Cir. 2004); see also *Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010); *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn.*, 388 F.3d 976, 979–80, 982 (6th Cir. 2004); *Doe v. Biological, Inc.*, 971 F.2d 375, 385 (9th Cir. 1992); *United States v. Viglia*, 549 F.2d 335, 336–37 (5th Cir. 1977).

<sup>173</sup> *Ruan*, 966 F.3d at 1162.

<sup>174</sup> *Id.* at 1161–62.

<sup>175</sup> *Id.* at 1162.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1163.

*B. Lay Witness Testimony*

While Rule 702 is used to challenge an expert's testimony, Rule 701 may be used to challenge the testimony of lay witnesses.<sup>180</sup> Rule 701 requires that lay opinion testimony be "(1) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."<sup>181</sup> In addition, the lay witness's opinion must be derived from her personal knowledge or experience.<sup>182</sup>

There are generally two types of Rule 701 challenges: (1) a speculation challenge, arguing that a witness lacks personal knowledge or experience;<sup>183</sup> or (2) an improper expert opinion challenge, arguing that what is presented as "lay witness" testimony is actually a guise for expert testimony.<sup>184</sup> The first type of challenge is fairly straight forward as it only requires determining whether the testimony was derived from personal knowledge or speculation. For example, in *Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County Florida*,<sup>185</sup> the court allowed a property owner to testify about the impact that an underground pipeline and permanent easement would have on the value of the property, finding her testimony was based on her personal knowledge, not speculation.<sup>186</sup> Even though she had no prior experience selling property encumbered by a pipeline, she had sold twenty-five similar lots for rural residential development.<sup>187</sup> Based on her interactions with prospective purchasers, she believed "that a purchaser who was buying a rural residential lot wanted to enjoy nature, have privacy, and be free from restrictions governing what she could do with her land."<sup>188</sup> Because the owner's opinion was based on her personal experience and knowledge, the court concluded that allowing her to testify was not an abuse of discretion.<sup>189</sup>

---

<sup>180</sup> See FED. R. EVID. 701.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (see advisory committee's note to 2000 amendment).

<sup>183</sup> See, e.g., *Sabal Trail*, 947 F.3d at 1368–69.

<sup>184</sup> See *Chalker*, 966 F.3d at 1191–92; *Clotaire*, 963 F.3d at 1298; *McLellan*, 958 F.3d at 1115; *Estrada*, 969 F.3d at 1270.

<sup>185</sup> 947 F.3d 1362 (11th Cir. 2020).

<sup>186</sup> *Id.* at 1369–70.

<sup>187</sup> *Id.* at 1369.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1369–70.

The second type of challenge is rooted in Rule 701(c),<sup>190</sup> which states that lay witness testimony must not be “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”<sup>191</sup> When faced with such a challenge, the court must determine whether the testimony sought to be admitted is based on personal experience or some form of scientific, technical, or specialized knowledge.<sup>192</sup> The distinction is important because expert testimony, unlike lay witness testimony, has disclosure and reporting requirements.<sup>193</sup>

The court confronted a Rule 701 improper expert opinion challenge in four published opinions this term. In *United States v. Estrada*,<sup>194</sup> the court affirmed the lower court’s admission of testimony of an Office of Foreign Assets Control (OFAC) agent and a State Department agent about government policy relating to visa applications.<sup>195</sup> Although these specific agents had not personally handled the visa applications in dispute, the court observed that “Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences.”<sup>196</sup> The court then determined that their testimony was not based on technical or specialized knowledge within the scope or Rule 702 because the court limited the agents to testifying about “the policies and practices of their employers.”<sup>197</sup> The Advisory Committee notes for Rule 701 explain that such testimony is admissible as lay opinion testimony because it is “admitted not because of experience, training[,] or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.”<sup>198</sup>

In *United States v. Chalker*,<sup>199</sup> the court allowed an FBI forensic accountant to testify about the defendant’s bank and wage records as a lay witness.<sup>200</sup> The witness testified on direct examination that she had “two bachelor’s degrees, one in business management” and “one in accounting,” as well as a “master’s degree in forensic accounting.”<sup>201</sup> She also told the jury that she was a “certified public accountant, [a] certified

---

<sup>190</sup> FED. R. EVID. 701(c).

<sup>191</sup> *Id.*

<sup>192</sup> *Sabal Trial*, 947 F.3d at 1368–69.

<sup>193</sup> *See McLellan*, 958 F.3d at 1114.

<sup>194</sup> 969 F.3d 1245 (11th Cir. 2020).

<sup>195</sup> *Id.* at 1270–71.

<sup>196</sup> *Id.* at 1271.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (citing FED. R. EVID. 701, advisory committee’s note to 2000 amendment).

<sup>199</sup> 966 F.3d 1177 (11th Cir. 2020).

<sup>200</sup> *Id.* at 1191.

<sup>201</sup> *Id.*

fraud examiner and certified in financial forensics.”<sup>202</sup> The defendant objected to the testimony as “undisclosed expert testimony.”<sup>203</sup> The Eleventh Circuit disagreed.<sup>204</sup> Although the witness listed her credentials, she never opined as an expert.<sup>205</sup> She limited her testimony to a summary of the defendant’s bank and wage records and at no point opined about these records, much less about the defendant’s conduct in the case.<sup>206</sup>

In *United States v. McLellan*,<sup>207</sup> the defendant argued that the district court improperly permitted an arresting officer to “testify as an expert on the relationship between guns and drug activity.”<sup>208</sup> At trial, the officer was asked whether there is “a correlation between weapons and drugs,” to which he responded “[y]es there is.”<sup>209</sup> The officer then testified that it was “‘very common’ for individuals involved in narcotic[s] . . . ‘to possess handguns, a lot of times for protection’ because of the threat of ‘robbery of their narcotics’ and the ‘sometimes large amounts of money they possess as well.’”<sup>210</sup> The defendant argued that this was improper expert opinion, but the Eleventh Circuit disagreed.<sup>211</sup> The court found that this testimony “did not require any scientific, technical, or specialized knowledge, but was rationally based on his perception of the relationship between guns and drug activity that he acquired during his time as a police officer in the narcotics division.”<sup>212</sup> The officer “merely offered his view of the relationship between guns and drug activity; a view he acquired from observations he made as a police officer, and one that did not require any additional specialized skills or training to obtain.”<sup>213</sup>

Lastly, in *Clotaire*, discussed *supra* at Section II.A, the defendant took issue with the testimony of an investigator with the Labor Department.<sup>214</sup> At trial, the investigator made statements “about the difference between what one sees with the naked eye and what one sees in a two-dimensional photograph.”<sup>215</sup> The Eleventh Circuit determined

---

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1192.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> 958 F.3d 1110 (11th Cir. 2020).

<sup>208</sup> *Id.* at 1113.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1113–14.

<sup>211</sup> *Id.* at 1114.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1115.

<sup>214</sup> *Clotaire*, 963 F.3d at 1298.

<sup>215</sup> *Id.*

that “[i]t does not take specialized expertise to understand that three-dimensional objects may look different in person than in a two-dimensional photograph.”<sup>216</sup> Accordingly, the appellate court affirmed, finding the district court did not err in allowing the investigator to testify “to this basic point.”<sup>217</sup>

#### IV. OTHER RULES OF EVIDENCE

##### A. *Balancing Relevance and Unfair Prejudice*

In general, the Federal Rules of Evidence consider all relevant evidence admissible at trial.<sup>218</sup> The Rules define relevant evidence broadly as any evidence that “has any tendency to make a fact more or less probable than it would be without the evidence.”<sup>219</sup> In its 2020 term, the Eleventh Circuit addressed the extent to which a non-defendant’s belief is relevant to the defendant’s. In *United States v. Graham*,<sup>220</sup> the IRS spent years trying to collect overdue taxes from the defendant, Richard Graham.<sup>221</sup> Graham eventually met a man named “Thomas Walker, who claimed to specialize in ‘credit repair.’”<sup>222</sup> “Walker told Graham that he knew ‘some people’ who could ‘help use a bill of exchange’ to pay off his taxes . . . for the low price of \$10,000.”<sup>223</sup> After Graham paid the fee, Walker connected him to two men who sent Graham a packet of documents, one of which was a \$3.6 million check titled “international bill of exchange.”<sup>224</sup> Walker and Graham delivered the documents to an IRS building, after which an IRS employee grew skeptical of the bill of exchange’s validity. Graham repeated this ruse three more times. The international bills of exchange, however, were soon found to be fraudulent.<sup>225</sup>

Graham was charged with one count of passing a fictitious financial instrument and one count of corruptly endeavoring to obstruct the administration of the internal revenue laws.<sup>226</sup> “At trial, Graham’s counsel tried to ask Walker whether he believed that the international

---

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> FED. R. EVID. 402.

<sup>219</sup> FED. R. EVID. 401.

<sup>220</sup> 981 F.3d 1254 (11th Cir. 2020).

<sup>221</sup> *Id.* at 1257.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1257–58.

<sup>224</sup> *Id.* at 1258.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

bills of exchange 'were valid forms of payment for Mr. Graham's taxes.'"<sup>227</sup> The district court sustained the government's objection that such testimony was irrelevant. On appeal, Graham argued that the court's exclusion of this testimony was clearly erroneous because "if 'Walker believed the documents were valid,' it would be 'more likely that Graham, too, believed the documents to be valid.'"<sup>228</sup> The Eleventh Circuit disagreed, noting Graham presented no evidence that Walker assured him of the instruments' authenticity.<sup>229</sup> Moreover, the court observed that "[w]hat mattered at trial was what *Graham* knew and thought"; "[w]hat Walker knew and thought had no bearing on Graham's own intent."<sup>230</sup> The court therefore found the testimony to be irrelevant.<sup>231</sup>

Even if evidence is deemed relevant, Federal Rule of Evidence 403 allows courts to exclude relevant evidence where "its probative value is substantially outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."<sup>232</sup> The Eleventh Circuit has "long" said that Rule 403 "is an extraordinary remedy which should be used sparingly" and "the trial court's discretion to exclude evidence as unduly prejudicial is narrowly circumscribed."<sup>233</sup> "Moreover, [i]n applying Rule 403, courts must look at the evidence in a light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact."<sup>234</sup>

Despite such a scrutinous legal standard, the Eleventh Circuit affirmed the exclusion of evidence under Rule 403 twice during this term.<sup>235</sup> In *Estrada*, discussed *supra* at Section III.B, the defendants—a baseball trainer and a baseball manager—"partnered with business professionals, human traffickers, and members of a Mexican criminal organization to smuggle baseball players out of Cuba and into the United States so that the players could enter into . . . 'free agent' contracts with Major League Baseball teams."<sup>236</sup> At trial, the defendants attempted, unsuccessfully, to introduce evidence "about baseball players who waited

---

<sup>227</sup> *Id.* at 1261.

<sup>228</sup> *Id.* at 1262.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> FED. R. EVID. 403; *see also McLellan*, 958 F.3d at 1115.

<sup>233</sup> *McGregor*, 960 F.3d at 1324.

<sup>234</sup> *Id.* (internal marks omitted).

<sup>235</sup> *See Estrada*, 969 F.3d at 1273; *Sowers v. R.J. Reynolds Tobacco Co.* at 1121–22.

<sup>236</sup> *Estrada*, 969 F.3d at 1253.

to cross into the United States until they obtained their licenses and visas,” thereby complying with the OFAC regulations.<sup>237</sup> On appeal, the Eleventh Circuit determined that even if evidence that the defendants’ immigration attorney attempted to comply with OFAC regulations was minimally relevant to the defendants’ willfulness to violate the law, “the [district] court was permitted to exclude the evidence on the ground that its potential for confusing the jury substantially outweighed any probative value.”<sup>238</sup> The appellate court reasoned that the lawyer’s testimony would have been “particularly confusing” given that at no point during the trial did the defendants pursue the theory that they acted on the lawyer’s advice “in submitting documents with false information to OFAC and the State Department.”<sup>239</sup>

In *Sowers v. R.J. Reynolds Tobacco Co.*,<sup>240</sup> the Eleventh Circuit again affirmed the exclusion of evidence under Rule 403.<sup>241</sup> In that case, the plaintiff lost her husband to lung cancer and then sued the cigarette manufacturing company under Florida’s wrongful death statute.<sup>242</sup> Before trial, the plaintiff moved to exclude testimony about her husband’s infidelity and the couple’s divorce and subsequent remarriage.<sup>243</sup> The defendant opposed the motion, arguing the evidence was relevant to damages, addiction, and causation, and was necessary to rebut the plaintiff’s testimony about the length of the marriage and how long the decedent had smoked. The district court granted the widow’s motion to exclude, finding: (1) the marital-discord evidence was irrelevant having occurred so long ago; and (2) the evidence would be unfairly prejudicial under Rule 403 because it would cast the decedent in a bad light.<sup>244</sup>

The Eleventh Circuit affirmed, finding that even if the evidence was relevant, it would be unduly prejudicial.<sup>245</sup> “[W]hat counts as the Rule 403 ‘probative value’ of an item of evidence . . . may be calculated by comparing evidentiary alternatives.”<sup>246</sup> In this case, the jury heard evidence about the extent of the decedent’s alcohol abuse and the negative impact the abuse had on his marriage. It heard he was a heavy

---

<sup>237</sup> *Id.* at 1272–73.

<sup>238</sup> *Id.* at 1273.

<sup>239</sup> *Id.*

<sup>240</sup> 975 F.3d 1112 (11th Cir. 2020).

<sup>241</sup> *Id.* at 1123–24.

<sup>242</sup> *Id.* at 1117.

<sup>243</sup> *Id.* at 1121.

<sup>244</sup> *Id.* at 1121–22.

<sup>245</sup> *Id.* at 1123–1124.

<sup>246</sup> *Id.* at 1124.



drinker for four decades. It heard that he drank in the morning, throughout the day, and sometimes all night.<sup>247</sup> It heard that his drinking caused “significant friction in his marriage,” and was a “clinically significant disruption” in their relationship.<sup>248</sup> The court found that although the evidence “might have given the jury a fuller understanding of the couple’s many years of life together . . . that does not mean that the probative value . . . outweighed [the] prejudicial impact.”<sup>249</sup> The evidence the jury already heard about the decedent’s long history of alcohol abuse and the negative impacts the abuse had on his marriage diminished any probative value that the evidence of the couple’s marital problems may have otherwise had.<sup>250</sup>

The Eleventh Circuit continued its trend of deferring to the district court on Rule 403 rulings in three other published opinions this term.<sup>251</sup> In *Clotaire*, discussed *supra* at Section II.A, the defendants attempted to use intercepted preloaded debit cards at various banks. Thanks to surveillance footage from these banks, the defendants were eventually caught and charged with access device fraud, conspiracy to commit access device fraud, and aggravated identity theft. Because one of the defendants presented a defense at trial based on a theory of mistaken identity,<sup>252</sup> the district court allowed the government to introduce the defendant’s mug shot into evidence so the jury could compare the ATM surveillance photos with a more contemporaneous photo of him.<sup>253</sup>

On appeal, the defendant argued that the introduction of the mug shot evidence was an abuse of discretion under Rule 403.<sup>254</sup> The Eleventh Circuit began its discussion by “paus[ing] to appreciate the longstanding judicial skepticism about the use of mug shots in criminal trials.”<sup>255</sup> The court further stated its belief that any such “skepticism is appropriate.”<sup>256</sup> But the Eleventh Circuit also observed that “mug shots are not categorically barred” under its precedent.<sup>257</sup> Rather, in *United*

---

<sup>247</sup> *Id.* at 1123.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1123–24.

<sup>250</sup> *Id.* at 1124.

<sup>251</sup> See *Clotaire*, 963 F.3d 1288; *United States v. Hines*, 955 F.2d 1449 (11th Cir. 1992); *McLellan*, 958 F.3d 1110.

<sup>252</sup> *Clotaire*, 963 F.3d at 1291–92.

<sup>253</sup> *Id.* at 1299.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

*States v. Hines*,<sup>258</sup> the appellate court adopted a three-step inquiry.<sup>259</sup> Under the *Hines* test, “introducing a defendant’s mug shot would be error unless the government satisfied three prerequisites[.]”<sup>260</sup> (1) “The Government must have a demonstrable need to introduce the photographs;” (2) “The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record;” and (3) “The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.”<sup>261</sup>

Turning to the first *Hines* requirement, the Eleventh Circuit observed in *Clotaire* that “demonstrable need” had not been defined with sufficient precision.<sup>262</sup> If “need” is shown by the importance of the defendant’s identity, then the standard would be met.<sup>263</sup> If, however, “need” implies a lack of alternatives, then the standard would not be met.<sup>264</sup> Looking to its sister circuits for guidance,<sup>265</sup> the Eleventh Circuit determined that “the government meets its burden under the first requirement when identification of the defendant is central to the government’s case.”<sup>266</sup> Because the government’s case hinged on whether the defendant was the man pictured in the ATM surveillance images, the court determined that the first requirement was “easily met.”<sup>267</sup>

The Eleventh Circuit then turned to *Hines*’s second requirement: that the photos cannot imply that the defendant has a prior criminal record.<sup>268</sup> First, the court noted that the government and judge had informed the jury that the photograph was taken on October 11, 2016—the day of the defendant’s arrest.<sup>269</sup> The court determined that this effectively removed any implication of a prior arrest.<sup>270</sup> The court then considered what steps the government took to remove stigma. If, for example, the government introduced “the characteristic ‘double-shot’ display—adjacent front and profile photographs[.]” then “the inference of criminality [would be]

---

<sup>258</sup> 955 F.2d 1449 (11th Cir. 1992).

<sup>259</sup> *Id.* at 1456.

<sup>260</sup> *Clotaire*, 963 F.3d at 1299.

<sup>261</sup> *Hines*, 955 F.2d at 1455–56.

<sup>262</sup> *Clotaire*, 963 F.3d at 1299–1300.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> See *United States v. Torres-Flores*, 827 F.2d 1031, 1039 (5th Cir. 1987); *United States v. Fosher*, 568 F.2d 207, 215 (1st Cir. 1978); *United States v. Harrington*, 490 F.2d 487, 495 (2d Cir. 1973).

<sup>266</sup> *Clotaire*, 963 F.3d at 1300.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1300–01.

<sup>270</sup> *Id.* at 1301.

‘natural, perhaps automatic’ given this display “is so familiar, from ‘wanted’ posters in the post office, motion pictures and television[.]”<sup>271</sup> Here, however, the government introduced only the direct shot, not the profile picture “so emblematic of a mug shot.”<sup>272</sup> The government additionally removed jailhouse administrative markings.<sup>273</sup> Although the photo showed the defendant in jailhouse clothes and its background showed the height gauges,<sup>274</sup> the court concluded that the mug shot still satisfied *Hines*’s second requirement “because the jury had no reason to suspect that the photo was taken from an earlier brush with the law.”<sup>275</sup>

The Eleventh Circuit found that the third *Hines* requirement was likewise satisfied.<sup>276</sup> It determined that the third requirement is “[e]ssentially” that “counsel should not put on a show about the fact that they are introducing a mug shot, or even have a dialogue with the court about it in front of the jury.”<sup>277</sup> The court observed that in this case, the debate over the propriety of the mug shot took place away from the jury.<sup>278</sup> “Because of the care taken by the district court,” the court found that the photo’s introduction satisfied the third prong.<sup>279</sup> Taking all three requirements into account, the court found that it was not error to admit the defendant’s booking photo.<sup>280</sup>

In *McLellan*, discussed *supra* at Section III.B, the defendant was found in his car in an area that was frequently used for illegal narcotics transactions and dumping.<sup>281</sup> As police officers approached the defendant’s car, one officer noticed drug paraphernalia in plain view as well as a “crystalline-type substance” on the defendant’s lap.<sup>282</sup> The other officer saw a firearm located on the center console of the car. The defendant was charged with three counts of being a felon in possession of a firearm.<sup>283</sup> At trial, the district court allowed one of the arresting officers to testify that he believed the defendant possessed a “sellable”

---

<sup>271</sup> *Id.* (citation omitted).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *See, e.g., Torres-Flores*, 827 F.2d at 1039 (criticizing visible measuring tape in mug shot).

<sup>275</sup> *Clotaire*, 963 F.3d at 1301.

<sup>276</sup> *Id.* at 1301–02.

<sup>277</sup> *Id.* at 1301.

<sup>278</sup> *Id.* at 1302.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *McLellan*, 958 F.3d at 1112.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 1112–13.

amount of methamphetamines when he was arrested.<sup>284</sup> On appeal, the defendant argued that this testimony was unfairly prejudicial and therefore should have been excluded under Rule 403.<sup>285</sup> The Eleventh Circuit disagreed.<sup>286</sup> First, the court observed that where a defendant contests at trial whether he knowingly possessed a gun, “evidence of possession of illegal drugs is relevant to determining whether a defendant knowingly possessed a weapon found in close proximity to drugs.”<sup>287</sup> Moreover, because the defendant “contested the issue of whether the amount of meth he possessed was sellable or solely for personal use, the government was entitled to rebut [the defendant’s] characterization.”<sup>288</sup> Lastly, the court reasoned that there was other evidence to support the inference that the amount was in fact “sellable,” and therefore the arresting officer’s testimony was not unfairly prejudicial. The court thus concluded that the district court did not abuse its discretion in permitting the arresting officer’s testimony.<sup>289</sup>

In *United States v. McGregor*,<sup>290</sup> the Eleventh Circuit again admitted evidence of contraband found at the site of an arrest.<sup>291</sup> Police discovered a gun and evidence of identity theft—personal identifying information (PII)—while on a routine probation check of the defendant’s home. The defendant pled guilty to possession as a convicted felon but proceeded to trial on his other counts: possession of fifteen or more unauthorized access devices and aggravated identity theft. The defendant objected to the introduction of the firearm and several photographs of him holding the firearm. He claimed they were unduly prejudicial in light of his guilty plea for the firearm charge.<sup>292</sup> The Eleventh Circuit disagreed, finding that the firearm “had substantial probative force” because the defendant’s defense to the fraud charges was that he was in the wrong place at the wrong time.<sup>293</sup> “[T]hat his firearm was recovered from a small closet with a sheet of PII—a sheet that also contained [the defendant’s] fingerprints—was highly probative that the PII also belonged to [the defendant].”<sup>294</sup>

---

<sup>284</sup> *Id.* at 1115.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* (citation omitted).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> 960 F.3d 1319 (11th Cir. 2020).

<sup>291</sup> *Id.* at 1324.

<sup>292</sup> *Id.* at 1321–1322.

<sup>293</sup> *Id.* at 1325.

<sup>294</sup> *Id.*

*B. Character Evidence*

While Rule 403 gives district courts the discretionary power to exclude prejudicial evidence, Rule 404(a)<sup>295</sup> addresses a specific type of potentially prejudicial evidence—character evidence—by *prohibiting* evidence of a person’s character or character trait to “prove that on a particular occasion the person acted in accordance with the character or trait.”<sup>296</sup> In criminal cases, the prohibition of character evidence cuts both ways: the government is generally prohibited from introducing character evidence to show that the defendant had the propensity to commit the crime, and the defendant is barred from presenting evidence of good conduct to negate the criminal intent.<sup>297</sup> Rule 404(b)<sup>298</sup> also prohibits evidence of prior bad acts by prohibiting the admission of evidence of a “crime, wrong, or other act . . . to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”<sup>299</sup>

But, of course, there are exceptions to Rule 404(b)’s prohibition of evidence of other wrongs. First, evidence of other wrongs is admissible for other purposes, such as “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>300</sup> The Eleventh Circuit found such an exception in *Graham*, discussed *supra* at Section IV.A.<sup>301</sup> There, the court allowed the government to introduce a twelve-year-old misdemeanor conviction and plea agreement for failing to file a tax return.<sup>302</sup> The court found that this misdemeanor went to show that the defendant had knowledge that the documents he provided to the IRS were false, suggesting either “‘absence of mistake’ or ‘lack of accident.’”<sup>303</sup> The prior conviction was therefore properly offered as Rule 404(b) evidence.<sup>304</sup>

Evidence of other wrongs also falls outside the scope of Rule 404(b), making it independently admissible, if it is intrinsic evidence.<sup>305</sup>

---

<sup>295</sup> FED. R. EVID. 404(a)(1).

<sup>296</sup> *Id.*

<sup>297</sup> *See, e.g. Graham*, 981 F.3d at 1264 (finding district court acted properly in excluding evidence of a good-faith attempt to cooperate with the IRS because “[e]vidence of good conduct is not admissible to negate criminal intent”).

<sup>298</sup> FED. R. EVID. 404(b)(1).

<sup>299</sup> *Id.*

<sup>300</sup> FED. R. EVID. 404(b)(2).

<sup>301</sup> *Graham*, 981 F.3d at 1264.

<sup>302</sup> *Id.* at 1263–64.

<sup>303</sup> *Id.* at 1264.

<sup>304</sup> *Id.*

<sup>305</sup> *Joseph*, 978 F.3d at 1263.

“Evidence is intrinsic if it is: (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the store of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense.”<sup>306</sup> Evidence is “inextricably intertwined” with “evidence of the charged offense if it forms an ‘integral and natural part of the witness’s accounts of the circumstances surrounding the offenses for which the defendant was indicted.’”<sup>307</sup>

The Eleventh Circuit confronted intrinsic evidence twice in published opinions this term.<sup>308</sup> First, in *Estrada*, discussed *supra* at Sections III.B and IV.A, the defendants filed two motions in limine before trial to exclude evidence of violence, threats of violence, and smuggling. The district court denied the motions, thereby allowing the government to highlight numerous instances of violence and extortion at trial.<sup>309</sup> The Eleventh Circuit affirmed the district court’s decision, finding it was “intrinsic evidence necessary to complete the story of the crimes and integral to the charged conspiracy.”<sup>310</sup> The evidence was related to a criminal organization that the defendants relied on to smuggle Cuban players and their families into the United States through third countries.<sup>311</sup> Although the appellate court recognized that “some of the evidence—such as testimony by a player’s wife that a handler threatened to chop her husband into pieces—had the potential to elicit an emotional response from the jury,” the court determined that the probative value outweighed any prejudicial effect.<sup>312</sup>

In *United States v. Joseph*,<sup>313</sup> the defendant was charged with four counts of possessing and conspiring to possess heroin and fentanyl.<sup>314</sup> During opening statements, the prosecutor mentioned that the defendant rented his apartment using a stolen identity.<sup>315</sup> On appeal, the defendant argued that these statements warranted a mistrial because he was not charged with an identity-theft crime, and therefore the evidence was inadmissible under Rule 404(b).<sup>316</sup> The Eleventh Circuit found that the

---

<sup>306</sup> *Id.*; see also *United States v. Ford*, 784 F.3d 1386, 1393 (11th Cir. 2015).

<sup>307</sup> *Joseph*, 978 F.3d at 1263 (citation omitted).

<sup>308</sup> *Id.*; *Estrada*, 969 F.3d at 1275.

<sup>309</sup> *Estrada*, 969 F.3d at 1274–75.

<sup>310</sup> *Id.* at 1275.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> 978 F.3d 1251 (2020).

<sup>314</sup> *Id.* at 1256.

<sup>315</sup> *Id.* at 1259.

<sup>316</sup> *Id.* at 1263.

defendant's use of the false identity was inextricably intertwined with the narcotic offenses because he had used the false identity to rent the property in which he stored the narcotics.<sup>317</sup> The evidence established that the defendant "leased the property and exercised dominion and control over the drugs."<sup>318</sup> The evidence of identity theft was also: "(1) relevant as a step [the defendant] took to conceal the criminal activity, and (2) necessary to complete the story of how officers discovered [the defendant] was renting the apartment and garage."<sup>319</sup> It is important to note that in each of these cases addressing exceptions to Rule 404(b), the court took notice of the curative effects of a jury instruction.<sup>320</sup>

### C. Rule Against Hearsay

"The Federal Rules of Evidence generally prohibit the admission of hearsay statements at trial."<sup>321</sup> Rule 801<sup>322</sup> defines hearsay as an out-of-court statement made for "the truth of the matter asserted."<sup>323</sup> But Rule 801(d)<sup>324</sup> identifies certain types of statements "that are 'not hearsay' and thus not prohibited by the hearsay rule[s]."<sup>325</sup> Under Rule 801(d)(2)(B),<sup>326</sup> a statement is not hearsay if it is offered against an opposing party and:

- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while

---

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *See, e.g., Graham*, 981 F.3d at 1264 ("The district court provided the jury with a limiting instruction—both when the evidence was introduced and in its final jury instructions—clarifying that the evidence was admitted only to show intent, knowledge, and absence of mistake, not 'as any type of character evidence to show that he did something before and he might do it again."); *Joseph*, 981 F.3d at 1264 ("Further, the district court gave a limiting instruction about the identity-theft evidence: that [the defendant] [was] on trial only for the specific narcotics crimes charged in the indictment."); *Estrada*, 969 F.3d at 1275 ("In any event, any prejudicial effect was addressed by the curative instruction to the jury, which explained that the defendants' association with unsavory characters was not enough to prove their guilt.").

<sup>321</sup> *Santos*, 947 F.3d at 723.

<sup>322</sup> FED. R. EVID. 801.

<sup>323</sup> *Id.*; *see also Santos*, 947 F.3d at 723.

<sup>324</sup> FED. R. EVID. 801(d).

<sup>325</sup> *Santos*, F.3d at 723.

<sup>326</sup> FED. R. EVID. 801(d)(2)(B).

it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy.<sup>327</sup>

When the statement is made directly by a defendant, Rule 801(d)(2)'s<sup>328</sup> application is fairly straight forward.<sup>329</sup> The analysis is more complex, however, when the statement was made by a co-conspirator. For a statement to qualify under the co-conspirator exemption, "the government must prove by a preponderance of the evidence that: a conspiracy existed, the conspiracy included the declarant and the defendant against whom the statement is offered, and the declarant made the statement during the course of and in furtherance of the conspiracy."<sup>330</sup> The Eleventh Circuit applies a "liberal standard in determining whether a statement is made in furtherance of a conspiracy."<sup>331</sup>

During the 2020 term, the Eleventh Circuit addressed the co-conspirator exemption in three published opinions this term, each time reiterating the above-cited law [and affirming the admission of out-of-court statements under this exemption?].<sup>332</sup> The court also considered the issue of whether a co-conspirator's declaration is admissible under Rule 801(d)(2) if he joins the conspiracy after the statement was made.<sup>333</sup> In *United States v. Amede*,<sup>334</sup> the defendant argued that the district court abused its discretion in admitting three recorded phone calls between his unindicted co-conspirator and an undercover officer arranging a drug transaction.<sup>335</sup> The defendant argued "there was no evidence that he was a member of the conspiracy at the time of the three recorded phone calls because he was never named during those calls and was not yet known to law enforcement."<sup>336</sup> The court rejected this argument, noting that "a co-conspirator's declaration made in the course and in furtherance of a

---

<sup>327</sup> *Id.*

<sup>328</sup> FED. R. EVID. 801(d)(2).

<sup>329</sup> *See, e.g., Ruan*, 966 F.3d at 1150–52 (admitting prescriptions written by doctor-defendants for controlled substances where they were written by defendants themselves).

<sup>330</sup> *Estrada*, 969 F.3d at 1275–76.

<sup>331</sup> *Id.* at 1276.

<sup>332</sup> *Amede*, 977 F.3d at 1097–98; *Estrada*, 969 F.3d at 1275–76 (finding district court did not abuse its discretion by admitting testimony about phone conversation between several men where declarant was a member of the conspiracy and his statements were made in furtherance of the conspiracy); *Ruan*, 966 F.3d at 1150–51 (admitting prescriptions written by defendants for controlled substances where they were written by defendants or a co-conspirator).

<sup>333</sup> *Amede*, 977 F.3d at 1097–98.

<sup>334</sup> 977 F.3d 1086 (11th Cir. 2020).

<sup>335</sup> *Id.* at 1097.

<sup>336</sup> *Id.*



conspiracy is admissible against a co-conspirator, even one who may have joined the conspiracy after the statement was made.”<sup>337</sup> The defendant did not deny that the statements were made during the course and in furtherance of the conspiracy.<sup>338</sup> Therefore, even if the defendant did not join the conspiracy until after the three phone calls were made, the court concluded that the co-conspirator’s statements to the undercover cop were still admissible against the defendant.<sup>339</sup>

Another exemption to the general prohibition against hearsay is an adoptive admission under Rule 801(d)(2)(B).<sup>340</sup> To qualify as an adoptive admission, the statement: “(1) must be such that an innocent defendant would normally be induced to respond, and (2) there must be sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.”<sup>341</sup> The Eleventh Circuit considered a statement’s admissibility under this exemption in *Santos*, discussed *supra* at Section II.A.<sup>342</sup> The issue before the court was whether the officer’s red marks on the defendant’s Form N-400 Application constituted non-hearsay as an adopted statement by an opposing party.<sup>343</sup> As previously described, the defendant in *Santos* swore under penalty of perjury that the contents of the Application, including the officer’s annotations in red ink, were true and correct.<sup>344</sup> Because the defendant never disputed that his signature appeared on the annotated form and did not raise any objection as to the authenticity of that document, the court found that the defendant expressly adopted the officer’s corrections by signing it and swearing under penalty of perjury that the corrections were “true and correct to the best of [his] knowledge and belief.”<sup>345</sup> The court thus affirmed the district court’s decision to admit the annotated Form N-400 Application a non-hearsay under Rule 801(d)(2)(B).<sup>346</sup>

Separate and distinct from Rule 801(d)’s exemptions to the prohibition against hearsay are Rule 803’s<sup>347</sup> exceptions to the rule against

---

<sup>337</sup> *Id.* at 1097–98 (citing *United States v. Reeves*, 742 F.3d 487, 503 (11th Cir. 2014)).

<sup>338</sup> *Id.* at 1098.

<sup>339</sup> *Id.*

<sup>340</sup> See FED. R. EVID. 801(d)(2)(B).

<sup>341</sup> *Santos*, 947 F.3d at 724 (citation omitted).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 723.

<sup>344</sup> *Id.* at 717.

<sup>345</sup> *Id.* at 724.

<sup>346</sup> *Id.* at 725.

<sup>347</sup> FED. R. EVID. 803.

hearsay.<sup>348</sup> For instance, Rule 803(6)<sup>349</sup>—otherwise known as the business records exception—“provides an exception to the rule against hearsay for a record made at or near the time of an act by a person with knowledge if the record ‘was kept in the course of regularly conducted activity of a business’ and ‘making the record was a regular practice of the activity.’”<sup>350</sup> In its 2020 term, the Eleventh Circuit determined that a rental application and lease,<sup>351</sup> still photos of ATM surveillance videos,<sup>352</sup> and PDMP data and reports<sup>353</sup> all qualified as business records under Rule 803(6).

In *United States v. Bates*,<sup>354</sup> the Eleventh Circuit also addressed the “present sense impression” exception under Rule 803(1)<sup>355</sup> and, under Rule 803(2),<sup>356</sup> the “excited utterance.”<sup>357</sup> In *Bates*, a task force of federal and state officers executed a warrant for the defendant’s arrest and a search of his residence for drug-related offenses. When the police arrived and commanded that he open the door, no one answered. The officers began to ram the door, after which the defendant fired two gunshots through the door, hitting one officer in the leg. The defendant then called 9-1-1 and told the operator that the police were at his door and to please tell them not to shoot him. He also said he thought somebody was trying to come in and that he hoped he didn’t shoot someone. The defendant eventually opened the front door and was taken into custody.<sup>358</sup> When the officers took the defendant to a patrol car, he told a federal agent “that he did not know the police were at his door and that he thought he was being robbed.”<sup>359</sup> The defendant was ultimately indicted on five counts: assaulting a federal officer, discharging a firearm in relation to a crime, possessing marijuana with intent to distribute, discharging a firearm in relation to a drug trafficking crime, and knowingly possessing a firearm as a convicted felon.<sup>360</sup>

The defendant argued before the Eleventh Circuit that the district court abused its discretion by excluding his testimony regarding the

---

<sup>348</sup> *Id.*

<sup>349</sup> FED. R. EVID. 803(6).

<sup>350</sup> *Joseph*, 978 F.3d at 1265 (citing FED. R. EVID. 803(6)).

<sup>351</sup> *Id.*

<sup>352</sup> *Clotaire*, 963 F.3d at 1294.

<sup>353</sup> *Ruan*, 966 F.3d at 1151.

<sup>354</sup> 960 F.3d 1278 (11th Cir. 2020).

<sup>355</sup> FED. R. EVID. 803(1).

<sup>356</sup> FED. R. EVID. 803(2).

<sup>357</sup> *Bates*, 960 F.3d at 1291.

<sup>358</sup> *Id.* at 1284.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

statement he made to the federal agent.<sup>361</sup> The defendant contended the statement was admissible under two exceptions to the rule against hearsay: excited utterance and present sense impression.<sup>362</sup> The Eleventh Circuit affirmed the district court's exclusion.<sup>363</sup> First, it determined that there was too large of a gap in time for the statement to constitute an excited utterance.<sup>364</sup> Under Rule 803(2), an excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."<sup>365</sup> The court found that while the defendant was clearly in an excited state during the 9-1-1 call, he made no similar statement while speaking with the 9-1-1 operator, while being arrested, while being calmed down after his arrest, or while being escorted to the patrol car.<sup>366</sup> "By the time [the defendant] reached the patrol car and made this statement, it is improbable that, as [the defendant] argued at trial, the 'physical altercation as he [was] being arrested is what led to this statement[.]'"<sup>367</sup>

The defendant also argued that his statement to the federal agent qualified as a present sense impression.<sup>368</sup> Under Rule 803(1), a present sense impression is "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."<sup>369</sup> Again, the Eleventh Circuit found the defendant's arguments unavailing.<sup>370</sup> The court determined that the defendant's "statement was not a present sense impression because it was not 'made while or immediately after [he] perceived' the event."<sup>371</sup> Put simply, the defendant's statement to the agent was just "too far removed to be a present sense impression."<sup>372</sup>

Lastly, in *Mamani v. Sánchez Bustamante*,<sup>373</sup> the court, under Rule 803(8),<sup>374</sup> addressed the public records exception.<sup>375</sup> At dispute in this

---

<sup>361</sup> *Id.* at 1287–88.

<sup>362</sup> *Id.* at 1291.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> FED. R. EVID. 803(2).

<sup>366</sup> *Bates*, 960 F.3d at 1291.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> FED. R. EVID. 801(1).

<sup>370</sup> *Bates*, 960 F.3d at 1291.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> 968 F.3d 1216 (11th Cir. 2020).

<sup>374</sup> FED. R. EVID. 803(8).

<sup>375</sup> *Mamani*, 968 F.3d at 1242–43.

case were seven State Department cables that discussed the status of Bolivian social unrest in October 2003.<sup>376</sup> At trial, the plaintiffs argued that the cables should have been excluded because they contained “highly prejudicial second-level hearsay.”<sup>377</sup> The defendants argued in response that the cables were admissible under the public-records exception to the rule against hearsay. The district court admitted the cables into evidence at trial.<sup>378</sup>

On appeal, the Eleventh Circuit determined that the district court committed reversible error by admitting the State Department cables.<sup>379</sup> Under Federal Rule of Evidence 803(8), “[a] record or statement of a public office” is excepted from the rule against hearsay if the evidence sets out “a matter observed while under a legal duty to report” or if it contains “factual findings from a legally authorized investigation.”<sup>380</sup> Under either exception, “the evidence is only admissible if the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.”<sup>381</sup> The court reasoned that “[m]ost of the information that buttresse[d] the State Department’s findings about the events in Bolivia lack[ed] source attribution.”<sup>382</sup> “The cables repeatedly base[d] their findings on unidentified ‘reports’ or ‘sources.’”<sup>383</sup>

The defendants in *Mamani* cited two out-of-circuit opinions to argue that the cables were admissible under Rule 803(8).<sup>384</sup> But the Eleventh Circuit court found neither persuasive, distinguishing them on their facts.<sup>385</sup> While recognizing that “[o]ther circuits ha[d] found State Department reports about the conditions in other countries admissible under the public-records exception[,]”<sup>386</sup> the Eleventh Circuit concluded that “considering the cables ‘even though they are hearsay’ is not the

---

<sup>376</sup> *Id.* at 1240–41.

<sup>377</sup> *Id.* at 1241. Under Rule 805, “[h]earsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.” FED. R. EVID. 805. Put another way, “[i]f a statement contains multiple levels of hearsay, each level must satisfy an exception to the hearsay rule.” *ITW Food*, 977 F.3d at 1348.

<sup>378</sup> *Id.* at 1240–41.

<sup>379</sup> *Id.* at 1241–42.

<sup>380</sup> FED. R. EVID. 803(8).

<sup>381</sup> *Id.*; see also *Mamani*, 968 F.3d at 1241.

<sup>382</sup> *Mamani*, 968 F.3d at 1242.

<sup>383</sup> *Id.* at 1243.

<sup>384</sup> See *United States v. Gluk*, 831 F.3d 608, 614 (5th Cir. 2016); *Union Pac. R.R. Co. v. Kirby Inland Marine, Inc. of Miss.*, 296 F.3d 671, 679 (8th Cir. 2002).

<sup>385</sup> *Mamani*, 968 F.3d at 1243–44.

<sup>386</sup> *Id.* at 1240 (citing *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143–44 (2d Cir. 2000)).

standard in this Circuit<sup>387</sup> and therefore vacated the lower court's judgment and remanded the case for further proceedings.<sup>388</sup>

---

<sup>387</sup> *Mamani*, 968 F.3d at 1244.

<sup>388</sup> *Id.* at 1246.