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## Evidence

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# Evidence

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## I. INTRODUCTION

In its 2021 term,<sup>1</sup> the United States Court of Appeals for the Eleventh Circuit issued several important and precedential opinions on a number of evidentiary topics. For example, in two opinions, the court considered the totality of the evidence to determine whether admission of testimonial hearsay implicated the Sixth Amendment's Confrontation Clause or was instead harmless error.<sup>2</sup> The court also twice addressed whether a suggestion to the jury that a defendant's silence was substantive evidence of his guilt violated the defendant's Fifth Amendment rights.<sup>3</sup>

Additionally, the Eleventh Circuit issued several opinions concerning lay witness and expert testimony. In two opinions this term, the court affirmed the district courts' categorization of testimony as lay witness testimony and therefore admissible under Federal Rule of Evidence

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1. For an analysis of evidentiary topics during the prior Survey period, see W. Randall Bassett et al., *Evidence, Eleventh Circuit Survey*, 72 MERCER L. REV. 1149 (2021).

2. *United States v. Powell*, No. 20-1041, 2021 U.S. App. LEXIS 26243 (11th Cir. Aug. 31, 2021); *United States v. Pendergrass*, 995 F.3d 858 (11th Cir. 2021).

3. *Raheem v. GDCP Warden*, 995 F.3d 895 (11th Cir. 2021); *United States v. Pate*, 853 F. App'x 430 (11th Cir. 2021).

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

Lastly, the court also issued several opinions balancing Rule 401's<sup>6</sup> relevancy requirement against Rule 403's<sup>7</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>8</sup> The court further addressed the prohibition against character evidence<sup>9</sup> and hearsay in several opinions.<sup>10</sup> This Survey summarizes all of these rulings and provides the practitioner with a concise overview of the most important developments in the law of evidence.

## II. CONSTITUTIONAL EVIDENTIARY PRINCIPALS

### 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>11</sup> In *Crawford v. Washington*,<sup>12</sup> the Supreme Court of the

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4. FED. R. EVID. 701. See *United States v. Wheeler*, 16 F.4th 805 (11th Cir. 2021); *Omni Health Sols., LLC v. Zurich Am. Ins. Co.*, 857 F. App'x 501 (11th Cir. 2021).

5. *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235 (11th Cir. 2021); *United States v. Castaneda*, 997 F.3d 1318 (11th Cir. 2021); *Buland v. NCL (Bah.) Ltd.*, 992 F.3d 1143 (11th Cir. 2021); *Prosper v. Martin*, 989 F.3d 1242 (11th Cir. 2021).

6. FED. R. EVID. 401.

7. FED. R. EVID. 403.

8. *Id.* See *United States v. Colston*, 4 F.4th 1179 (11th Cir. 2021); *United States v. Coleman*, 851 F. App'x 1016 (11th Cir. 2021); *United States v. Sunmonu*, 859 F. App'x 431 (11th Cir. 2021).

9. *United States v. Perry*, 14 F.4th 1253 (11th Cir. 2021); *United States v. Jeune*, No. 19-13018, 2021 U.S. App. LEXIS 25102 (11th Cir. Aug. 23, 2021); *Colston*, 4 F.4th at 1192; *United States v. Collins*, 861 F. App'x 362 (11th Cir. 2021); *United States v. Louis*, 860 F. App'x 625 (11th Cir. 2021); *United States v. Acevedo*, 860 F. App'x 604 (11th Cir. 2021); *United States v. Elysee*, 993 F.3d 1309 (11th Cir. 2021); *United States v. Diaz*, 846 F. App'x 846 (11th Cir. 2021); *United States v. Jones*, 847 F. App'x 830 (11th Cir. 2021); *United States v. Pineda*, 843 F. App'x 174 (11th Cir. 2021); *United States v. Chukwu*, 842 F. App'x 316 (11th Cir. 2021).

10. *United States v. Sims*, No. 19-13963, 2021 U.S. App. LEXIS 31734 (11th Cir. Oct. 21, 2021); *Okwan v. Emory Healthcare Inc.*, No. 20-11467, 2021 U.S. App. LEXIS 27092, at \*4 (11th Cir. Sept. 9, 2021); *Nix v. Advanced Urology Ins. of Ga.*, No. 21-10106, 2021 U.S. App. LEXIS 24467 (11th Cir. Aug. 17, 2021); *Pendergrass*, 995 F.3d at 878; *United States v. Hart*, 841 F. App'x 180 (11th Cir. 2021).

11. U.S. CONST. amend. VI.

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>13</sup> The 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>14</sup> Since *Crawford*, the 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>15</sup> Statements are testimonial “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>16</sup> Statements are nontestimonial, however, “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>17</sup> The Eleventh Circuit has also found that statements are “clearly nontestimonial” when made “unwittingly” to government informants because they are made “freely without a reasonable belief that [they] . . . would be available for use at a later trial.”<sup>18</sup>

In three opinions this term, the Eleventh Circuit looked at ancillary evidence to reject a Confrontation Clause challenge. In *United States v. Powell*,<sup>19</sup> a detective noticed an SUV speeding and weaving through traffic. After running the plates, the detective found inconsistencies between the registered description and the vehicle, thereby suggesting it was stolen, so he decided to perform a traffic stop. The driver and a passenger—the defendant—both fled, after which the detective spotted a firearm on the front of the SUV by the passenger side. A different detective interviewed the defendant and requested a search warrant for the contents of his phone, which revealed photos of the defendant

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12. 541 U.S. 36 (2004).

13. *Id.* at 59.

14. *Id.* at 51–52.

15. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

16. *Id.*

17. *Id.*

18. *Sims*, 2021 U.S. App. LEXIS 31734, at \*6.

19. No. 20-10941, 2021 U.S. App. LEXIS 26243 (11th Cir. Aug. 31, 2021).

brandishing two different firearms. The defendant was found guilty of possession of a firearm by a convicted felon.<sup>20</sup>

At trial, one of the detectives relayed statements made to her by two other women who were riding in the back of the SUV.<sup>21</sup> One of the women told the detective “that she didn’t know anything,” that “the gun wasn’t hers,” and that she was the defendant’s girlfriend.<sup>22</sup> The detective testified that the other woman told her “she didn’t know anything about that gun and it wasn’t hers.”<sup>23</sup>

On appeal, the defendant argued that this testimony was “testimonial hearsay” that violated the Confrontation Clause.<sup>24</sup> The Eleventh Circuit determined that even if the testimony violated the defendant’s Sixth Amendment rights, any error was harmless.<sup>25</sup> The “statements were ancillary at worst and cumulative at best to the government’s case.”<sup>26</sup> Moreover, even though the defendant could not cross-examine the hearsay declarants, “he was given ample opportunity to cross [the detective].”<sup>27</sup> The court went on to note that “the strength of the government’s case alone ma[de] th[e] error harmless.”<sup>28</sup> Because “[t]he government’s case would have been no less persuasive if the hearsay statements had been excluded,” the Eleventh Circuit found any Confrontation Clause violation was harmless error.<sup>29</sup>

In *United States v. Pendergrass*,<sup>30</sup> the defendant challenged the admission of four statements, including “the statements of [the defendant’s] girlfriend and her mother that [the defendant] lived in the basement of their home.”<sup>31</sup> Although the statements from the defendant’s girlfriend and her mother concerning the defendant’s residence were testimonial hearsay, the Eleventh Circuit determined that the defendant could not show that their admission violated his substantial rights because that information was established through other means.<sup>32</sup>

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20. *Id.* at \*2–4.

21. *Id.* at \*8.

22. *Id.* at \*8–9.

23. *Id.*

24. *Id.* at \*9.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at \*9–10.

30. 995 F.3d 858 (11th Cir. 2021).

31. *Id.* at 878.

32. *Id.* at 880.

The court further found that the remaining challenged statements were not hearsay because they were not offered for the truth of the matter asserted.<sup>33</sup> Accordingly, the court determined that the statements could not violate the Confrontation Clause.<sup>34</sup> Relying on its decision in *United States v. Jiminez*,<sup>35</sup> the court reiterated that the Confrontation Clause “prohibits *only* statements that constitute impermissible hearsay’ because ‘the Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’”<sup>36</sup> Because the first three categories of challenged testimony did not qualify as hearsay, the defendant’s Confrontation Clause challenge necessarily failed.<sup>37</sup>

The defendant in *Pendergrass* argued on appeal that the Eleventh Circuit’s decision in *United States v. Charles*<sup>38</sup> warranted a different result; however, the court disagreed.<sup>39</sup> In *Charles*, the Eleventh Circuit held that “a proper Confrontation Clause analysis does not begin or end with a determination of whether a statement constitutes ‘impermissible hearsay.’”<sup>40</sup> The court then explained that the Confrontation Clause analysis “first requires a determination of whether the declarant’s statement is ‘testimonial,’ i.e. a declaration offered for the purpose of proving some fact to be used at trial.”<sup>41</sup> Because the first three challenged statements were not offered for the truth of the matters asserted nor to prove guilt, they were not testimonial hearsay and therefore could not trigger the Confrontation Clause.

#### *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>42</sup> The Supreme Court has explained that “statements made during a custodial interrogation are not admissible at trial unless

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33. *Id.* For a discussion of the court’s hearsay analysis on these statements, see *infra* at Section IV.C.

34. *Id.*

35. 564 F.3d 1280 (11th Cir. 2009).

36. *Pendergrass*, 995 F.3d at 879 (quoting *Jiminez*, 564 F.3d at 1286–87) (alterations in original).

37. *Id.* at 879–80.

38. 722 F.3d 1319 (11th Cir. 2013).

39. *Pendergrass*, 995 F.3d at 880.

40. *Id.* at 1328 n.10.

41. *Id.*

42. U.S. CONST. amend. V.

the defendant was first advised of his rights, including the right against self-incrimination.”<sup>43</sup> An individual is considered to be “in custody” for *Miranda* purposes when there is a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”<sup>44</sup> The inquiry focuses on the perspective of a reasonable innocent person, and “the actual, subjective beliefs of the defendant and the interviewing officer on whether the defendant was free to leave are irrelevant.”<sup>45</sup>

In *United States v. Vorasiangsuk*, the Eleventh Circuit affirmed the district court’s finding that the defendant was not in custody for *Miranda* purposes after the court considered the totality of the circumstances.<sup>46</sup> The interview in *Vorasiangsuk* was calm and cordial and the agents did not “physically touch, threaten, point their guns at, handcuff, or even raise their voices” to the defendant.<sup>47</sup> Although the court observed that “[t]he location of the interview is not necessarily dispositive, [ ] courts are much less likely to find a custodial encounter when the interrogation occurs ‘in familiar or at least neutral surroundings, such as the suspect’s home.’”<sup>48</sup> The fact that the conversation took place at the defendant’s residence bolstered the court’s conclusion that the defendant was not in custody.<sup>49</sup>

To protect an accused’s right to silence, the Fifth Amendment also forbids suggesting to the jury that a defendant’s silence is substantive evidence of his guilt.<sup>50</sup> To determine whether such a suggestion has been made, the Eleventh Circuit looks to whether either of the following is true: “(1) the comment was ‘manifestly intended’ to invite the impermissible inference of guilty; or (2) the nature of the comment was such that a jury would ‘naturally and necessarily’ construe it as an invitation to make an inference of guilt based on the defendant’s silence.”<sup>51</sup>

During its 2021 term, the Eleventh Circuit twice affirmed the lower court’s finding that certain suggestions to the jury did not violate a

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43. *United States v. Vorarut Vorasiangsuk*, No. 19-13647, 2021 U.S. App. LEXIS 23640, at \*2 (11th Cir. Aug. 10, 2021) (citing *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966)).

44. *United States v. Brown*, 441 F.3d 1330, 1347 (11th Cir. 2006).

45. *Id.*

46. *Id.* at \*3.

47. *Id.*

48. *Id.* (quoting *Brown*, 441 F.3d at 1348).

49. *Id.*

50. *Pate*, 853 F. App’x at 438.

51. *Id.* (quoting *United States v. Thompson*, 422 F.3d 1285, 1299 (11th Cir. 2005)).

defendant's Fifth Amendment rights. In *United States v. Pate*,<sup>52</sup> after the government rested its case, the district court instructed the jury:

Ladies and gentlemen of the jury, the Government has rested its case in chief. What remains now which we will take up in the morning, in every criminal case—remember I explained to you at the beginning of the trial that the Government has the burden of proof. The defendant does not have the burden of proof. So in every criminal trial it is the defendant's decision whether or not to put forth a defense, and so in the morning we will find out from the defense what witnesses or evidence they wish to put forth, if any. And they're not required to. Remember that. That is their choice since the Government has the burden of proof. Nevertheless, in the morning we will hear from the Defendant—from the defense, again, if they make the decision to put forth any evidence or any witnesses of any kind.<sup>53</sup>

The defendant did not object to the instruction, and ultimately declined to present any testimony, exercising her Fifth Amendment right to remain silent.<sup>54</sup>

On appeal, the defendant in *Pate* argued that the district court erred in making the following statement: “In the morning we will hear from the Defendant—from the defense, again, if they make the decision to put forth any evidence or any witnesses of any kind.”<sup>55</sup> The court reviewed for plain error given that the defendant challenged the jury instructions for the first time on appeal.<sup>56</sup> Looking to the test described above, the court found that the jury instructions bore neither offending hallmark.<sup>57</sup> First, the defendant herself believed, or at least presumed, that the court's statement about “hearing from the Defendant” was “a slip of the tongue.”<sup>58</sup> “The context and the words immediately following those show it was obviously unintended. And an unintentional slip up is the opposite of manifest intent.”<sup>59</sup> Nor was there any suggestion that the jury would have “naturally and necessarily” taken the court's statement as an invitation to infer guilt because the defendant failed to testify.<sup>60</sup> The statement did not instruct the jury to do that and “the four words (‘hear from the Defendant’) appear in the middle of one

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52. 853 F. App'x 430 (11th Cir. 2021).

53. *Id.* at 437–38.

54. *Id.* at 438.

55. *Id.*

56. *Id.* (citing *United States v. Felts*, 579 F.3d 1341, 1343 (11th Cir. 2009)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*



sentence of a 147-word paragraph in which the court reiterates on four occasions that [the defendant] d[id not] have to put forward a defense.”<sup>61</sup> To find a violation of the Fifth Amendment under these circumstances, the Eleventh Circuit would have to assume that the jury disregarded repeated instructions that the defendant was not required to defend herself.

The Eleventh Circuit again deferred to the lower court on a ruling addressing silence as substantive evidence of guilt in *Raheem v. GDCP Warden*.<sup>62</sup> In *Raheem*, the prosecutor said in closing argument: “Raheem didn’t take the stand but you heard his videotaped statement. And I submit to you that it ain’t true.”<sup>63</sup> The defendant moved for a mistrial, which the Henry County Superior Court denied, explaining:

I don’t know that it is a comment on his failure to take [the stand]. I took it as how that information was coming from him. I certainly think it would have been better left unsaid. But I don’t take it to be any argument, for instance, that they should hold that against him that he failed to take the stand. It was mainly pointing out to the jury the source of the evidence you were about to tell them about, it was a video tape.<sup>64</sup>

On appeal, the Georgia Supreme Court concluded that the constitutional rule that “a prosecutor may not make any comment upon a criminal defendant’s failure to testify at trial” was violated, but nevertheless found any violation harmless.<sup>65</sup>

The defendant then filed a section 2254<sup>66</sup> petition in the district court, raising many of the same claims.<sup>67</sup> The district court granted a certificate of appealability (COA) on the Fifth Amendment issue, among others. The district court determined that none of the state court’s findings were contrary to or an unreasonable application of clearly established law, nor were they unreasonable in light of the evidence presented.<sup>68</sup>

Before the Eleventh Circuit, the defendant relied on the Supreme Court of the United States’ ruling in *Griffin v. California*,<sup>69</sup> for his Fifth

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61. *Id.*

62. 995 F.3d 895 (11th Cir. 2021).

63. *Id.* at 936.

64. *Id.* (alteration in original).

65. *Id.*

66. 28 U.S.C. § 2254 (1994).

67. *Raheem*, 995 F.3d at 906.

68. *Id.*

69. 380 U.S. 609 (1965).

Amendment claim.<sup>70</sup> In *Griffin*, the Court held that the Fifth Amendment privilege against self-incrimination “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.”<sup>71</sup> However, in *Chapman v. California*,<sup>72</sup> the Supreme Court clarified that *Griffin* violations are subject to harmless error review, explaining that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”<sup>73</sup> According to the Eleventh Circuit, that was exactly what the Georgia Supreme Court did here: “it found a *Griffin* violation, but held, under *Chapman*, that the violation was harmless beyond a reasonable doubt.”<sup>74</sup> The decisions in *Pate* and *Raheem* therefore illustrate the difficulty a defendant faces in challenging on appeal suggestions of guilt based on silence.

### III. WITNESS OPINION TESTIMONY

#### A. Expert Testimony

Federal Rule of Evidence 702<sup>75</sup> controls the admissibility of expert testimony.<sup>76</sup> Pursuant to that rule, the proponent of the evidence bears the burden of showing that:

- (1) [T]he expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue;
- (2) the testimony is based on sufficient facts or data;
- (3) the testimony is the product of reliable principles and methods; and
- (4) the expert has reliably applied the principles and methods to the facts of the case.<sup>77</sup>

With respect to the first factor, the question “is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.”<sup>78</sup> The

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70. *Raheem*, 995 F.3d at 936.

71. *Griffin*, 380 U.S. at 615.

72. 386 U.S. 18 (1967).

73. *Id.* at 24.

74. *Raheem*, 995 F.3d at 937.

75. FED. R. EVID. 702.

76. *Perry*, 14 F.4th at 1262.

77. *St. Louis Condo. Ass’n*, 5 F.4th at 1244 n.7.

78. *Castaneda*, 997 F.3d at 1330 (internal quotation marks omitted); *see also* United States v. Litzky, 18 F.4th 1296, 1302–03 (11th Cir. 2021) (concluding expert’s testimony

requirement that the testimony be helpful also “requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”<sup>79</sup>

The Eleventh Circuit addressed the requirement that testimony be helpful twice in its 2021 term. In *United States v. Castaneda*,<sup>80</sup> the defendant was convicted of attempted enticement of a minor to engage in unlawful sexual activity and traveling across a state line with the intent to engage in sexual activity with a person under the age of twelve years.<sup>81</sup> At trial, the defendant attempted to put forward Dr. Herriot as an expert in “Computer Mediated Communication” (CMC) on sexual topics, to testify that statements made over the internet cannot be reliably taken at face value “because people sometimes create fictitious details on the internet.”<sup>82</sup> The United States District Court for the Northern District of Georgia excluded Dr. Herriot’s testimony because it had “not been shown to be relevant to this case.”<sup>83</sup> The district court explained that although Dr. Herriot’s report:

[I]ndicate[d] that he reviewed material “related” to this case, he [went] on to say that he ha[d] not made any findings or drawn any conclusions with respect to the particulars of *this* case, nor ha[d] he conducted any analysis or made any recommendations regarding the specifics of *this* case.<sup>84</sup>

The court concluded, at most:

Dr. Herriot would only be able to provide general background information on CMC, without any specific opinion as to whether the defendant in this case acted in accordance with CMC expectations, and if so, what that mean[t] within the context of the charges in the indictment, as well as any defenses thereto.<sup>85</sup>

On appeal, the Eleventh Circuit upheld the exclusion of Dr. Herriot’s testimony because “that testimony was not specifically pegged to [the defendant’s] communications but only contained generalized background information that some people sometimes mix fact with

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was inadmissible under Rule 702 because it was not “geared to any issue that the jury was tasked with deciding.”).

79. *Id.* at 1330–31.

80. 997 F.3d 1318 (11th Cir. 2021).

81. *Id.* at 1322.

82. *Id.* at 1330.

83. *Id.*

84. *Id.* (first alteration in original).

85. *Id.*

fiction on the internet.”<sup>86</sup> Dr. Herriot’s primary conclusion—that not all communications on the internet are truthful—is “within the knowledge of laypersons.”<sup>87</sup> Put simply, “[n]o juror [would] need[] expert help understanding that concept.”<sup>88</sup> The Eleventh Circuit therefore held the district court did not abuse its discretion.<sup>89</sup>

The Eleventh Circuit again addressed the requirement that testimony be helpful in *Prosper v. Martin*,<sup>90</sup> involving an altercation between a taxicab driver and a police officer that resulted in the taxi driver’s death.<sup>91</sup> The taxi driver was driving in Miami when he apparently lost consciousness and collided with a pole. The police officer was called to the scene, where the taxi driver appeared to be “on something” and was “acting weird.”<sup>92</sup> Three facts were undisputed: that the police officer tased the driver, that the driver bit on the police officer’s finger, and that the police officer shot the driver three times in the chest. The taxi driver’s wife filed suit against the officer on his behalf.<sup>93</sup>

The police officer moved to exclude two of the plaintiff’s expert witnesses: Dr. Knox, an expert in “crime scene reconstruction” and Dr. Kohrman, a neurologist.<sup>94</sup> Dr. Knox offered opinions relating to the circumstances of the altercation, the location of a surveillance camera, and what the video showed. Dr. Kohrman offered an opinion relating to the cause of the taxi driver’s unusual behavior the night of his death, opining that he had likely suffered a stroke, seizure, or brain infection. The district court granted the motion to exclude in part. It agreed that Dr. Knox’s opinions interpreting the surveillance video would not be helpful to a jury because Dr. Knox admitted that he did not “purport to have some expertise to see anything in the video that somebody else can’t see.”<sup>95</sup> The court also found his testimony that the police officer “could have fired a minimum of three rounds from his service weapon and a maximum of four rounds” was unhelpful because it was

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86. *Id.* at 1331.

87. *Id.*

88. *Id.*

89. *Id.*

90. 989 F.3d 1242 (11th Cir. 2021).

91. *Id.* at 1245.

92. *Id.*

93. *Id.* at 1246.

94. *Id.* at 1247.

95. *Id.*

undisputed that the officer fired at least three shots, and whether he fired a fourth could be determined by a jury.<sup>96</sup>

As for Dr. Kohrman's opinion regarding the cause of the driver's behavior, the lower court found that it was both unreliable and unhelpful.<sup>97</sup> It was unreliable because Dr. Kohrman merely concluded that the driver may have suffered from one of three separate neurologic events. It was unhelpful because the cause of the driver's unusual behavior was irrelevant to whether the officer's use of force was objectively reasonable, since the cause was unknown to the officer at the time.<sup>98</sup>

On appeal, the plaintiff argued that the district court abused its discretion in excluding the opinions of Dr. Knox and Dr. Kohrman.<sup>99</sup> The Eleventh Circuit agreed with the district court's determination that the surveillance video was not helpful "because it did not offer anything the jury could not discern on its own."<sup>100</sup> Even Dr. Knox admitted that "[a]nyone . . . watching the video . . . is going to see the same thing."<sup>101</sup> The Eleventh Circuit also agreed with the district court that Dr. Kohrman's opinion regarding the cause of the driver's erratic behavior would not be helpful to a jury.<sup>102</sup> Because the qualified immunity analysis "is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question," whether the driver was "drugged, intoxicated, or had suffered a neurological episode was not relevant."<sup>103</sup>

With respect to the reliability requirement, the Supreme Court set forth the standard for analyzing whether an expert's methodology is reliable in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>104</sup> Under this standard, known as the *Daubert* standard, the court considers:

- (1) [W]hether the expert's methodology has been tested or is capable of being tested;
- (2) whether the theory or technique used by the expert has been subjected to peer review and publication;
- (3) whether there is a known or potential error rate of the methodology; and
- (4)

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96. *Id.*

97. *Id.*

98. *Id.* at 1247–48.

99. *Id.* at 1248.

100. *Id.* at 1249.

101. *Id.* at 1250.

102. *Id.*

103. *Id.*

104. 509 U.S. 579 (1993).

whether the technique has been generally accepted in the relevant scientific community.<sup>105</sup>

These factors are not a “definitive checklist or test,” and the district court has “considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”<sup>106</sup> The goal of this inquiry is “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>107</sup> The judge “must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.”<sup>108</sup> Importantly, the reliability inquiry scrutinizes the principles and methodologies, not the conclusions they generate.<sup>109</sup>

In the 2021 term, the Eleventh Circuit published two opinions addressing challenges under the *Daubert* standard.<sup>110</sup> In both cases, the court followed its trend of deferring to the district courts on the admission or exclusion of expert testimony.

In *Buland v. NCL (Bahamas) Ltd.*,<sup>111</sup> Andre Ow Buland and his wife boarded a cruise ship operated by Norwegian Cruise Lines (NCL).<sup>112</sup> While on the cruise, Mr. Buland woke up with stomach pain. After having acid reflux pain all day and ultimately vomiting, Mr. Buland went to the ship infirmary. The ship’s doctors administered a blood test, a chest x-ray, and an electrocardiogram. The tests showed that Mr. Buland was having a heart attack, so the doctors admitted him to the ship’s intensive care unit. The ship’s doctors consulted with the Cleveland Clinic and determined that it was safest for Mr. Buland to stay on the ship for treatment because they did not know whether there were facilities to treat an arterial blockage in the closest port city. Although the ship carried thrombolytic medications, which are “clot-busting medicines used to treat heart-attack patients,” the ship’s doctors determined it was too risky to treat Mr. Buland with a

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105. *Prosper*, 989 F.3d at 1249.

106. *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.* at 1248 (citing *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004)) (“[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard.”).

111. 992 F.3d 1143 (11th Cir. 2021).

112. *Id.* at 1147.

thrombolytic.<sup>113</sup> They reasoned he experienced symptoms for too long, and “had recently undergone medical procedures that created a risk thrombolytics could cause life-threatening internal bleeding.”<sup>114</sup> After the ship arrived in Miami, a day-and-a-half later, an ambulance waiting at the port took Mr. Buland to the hospital. He continues to suffer from medical problems caused by the damage to his heart.<sup>115</sup>

Mr. Buland sued NCL for negligence, alleging the ship’s medical staff failed to diagnose and properly manage his status and failed to evacuate him from the ship.<sup>116</sup> As part of his damages, he sought loss of the capacity to earn money. To support his damages valuation, Mr. Buland retained Dr. Gary A. Anderson, Ph.D. to testify about the value of Mr. Buland’s lost earning capacity. NCL moved *in limine* to exclude Dr. Anderson’s testimony on loss of earning capacity arguing that Mr. Buland had no evidence to establish the magnitude of any diminished capacity.<sup>117</sup> NCL argued Dr. Anderson “was not a vocational expert and his analysis was based only on [Mr. Buland’s] subjective opinions about the work he could perform after his heart attack, not his actual post-injury earning capacity.”<sup>118</sup> The district court granted the motion to exclude. At trial, NCL moved for a directed verdict on the issue of lost earning capacity. The district court granted the motion, agreeing that Mr. Buland failed to prove the extent of any impairment of his earning capacity with enough certainty for a jury to determine a reasonable award.<sup>119</sup>

On appeal, the Eleventh Circuit affirmed the district court’s exclusion of Dr. Anderson’s testimony on the value of Mr. Buland’s lost earning capacity.<sup>120</sup> Dr. Anderson used the following steps to evaluate the present value of Mr. Buland’s lost earning capacity: (1) he used Mr. Buland’s actual history of earnings as his pre-injury earning capacity; (2) he assumed modest yearly salary increases over the course of Mr. Buland’s working life; (3) he subtracted the amount Mr. Buland would be expected to earn in each of several post-injury careers; and (4) he discounted the difference to present value and reported the resulting number as Mr. Buland’s loss of earning capacity.<sup>121</sup>

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1148.

118. *Id.*

119. *Id.*

120. *Id.* at 1150.

121. *Id.* at 1151.

The Eleventh Circuit concluded that Dr. Anderson's testimony would only be reliable to the extent the hypothetical careers it was based on reliably approximated Mr. Buland's actual post-injury earning capacity.<sup>122</sup> But Dr. Anderson's assumption that Mr. Buland would not have career opportunities more lucrative than, for example, working as a part-time university teacher or member of a corporate board, was entirely speculative.<sup>123</sup> The court noted that "[t]o be admissible under *Daubert*, an expert's opinion must be 'supported by good grounds for each step in the analysis.'"<sup>124</sup> Because "Dr. Anderson did not have good grounds to support his assumption that there was no middle ground between [Mr.] Buland's suggestions about the kinds of part-time work he could perform and the work as a senior finance professional he could no longer perform," the court determined that his testimony was unreliable.<sup>125</sup>

The Eleventh Circuit again affirmed a lower court's *Daubert* ruling in *St. Louis Condominium Association, Inc. v. Rockhill Insurance Company*.<sup>126</sup> There, the St. Louis Condominium Association (Association) told defendant Rockhill Insurance Company (Rockhill) about property damage caused by Hurricane Irma. The Association submitted a proof of loss form pursuant to the Rockhill policy, claiming damages totaling \$16 million. Rockhill's inspectors, however, determined that the damage to the property was "well below" the Policy's hurricane deductible.<sup>127</sup> Rockhill therefore refused to pay for repairs, and the Association filed suit. Rockhill moved to exclude three of the Association's experts: Paul Beers, the Association's water leakage expert; William Pyznar, the Association's expert in building engineering; and Hector Torres, a general contractor with a specialty in high rise construction appraisals, who estimated the cost of repairing the property.<sup>128</sup>

Rockhill challenged Mr. Torres's methodology "because he spent only 5 hours at the Property, failed to conduct any testing, 'relied overwhelmingly on the reports of an undisclosed building engineer and unit owners' to conclude that repairing the Property would cost \$16 million."<sup>129</sup> Rockhill argued Mr. Pyznar's methodology was flawed

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. 5 F.4th 1235 (11th Cir. 2021).

127. *Id.* at 1237–38.

128. *Id.* at 1238.

129. *Id.* at 1244.



because “he also relied on information from an undisclosed building engineer, as well as information ‘taken at face value’ from the Association’s property manager.”<sup>130</sup> Rockhill also challenged Mr. Pyznar’s testimony because he “inspected only nine units and cherry-picked high-speed wind strength data from other parts of Florida in order to reach his opinion that Hurricane Irma caused the damage to the Property.”<sup>131</sup> Lastly, Rockhill argued Mr. Beers’s opinion was unreliable for two reasons: “(1) Beers d[id] not have a college degree and therefore Rockhill believe[d] he [wa]s ‘incompetent,’ and (2) he ‘deliberately failed to consider pre-Hurricane Irma maintenance records.”<sup>132</sup>

The United States District Court for the Southern District of Florida found that Rockhill’s *Daubert* challenges “lacked merit.”<sup>133</sup> Mr. Torres “conducted a thorough review of the property by inspecting [two-thirds] of the Property’s 130 units and the building’s exterior and roofing. Mr. Torres also consulted the property manager and engineering staff to determine if there were water damage complaints from unit owners before the hurricane.”<sup>134</sup> The district court further found that Mr. Pyznar did not take the information he learned at face value; rather “he visually inspected the property as well.”<sup>135</sup> Finally, the judge found that Mr. Beers’s opinion was not unreliable, recognizing that Mr. Beers “had 40 years of experience and specialized in water leak repairs.”<sup>136</sup> The district court concluded that Rockhill’s challenges went to the weight, rather than the admissibility, of these experts’ opinions.<sup>137</sup> The Eleventh Circuit agreed, determining that the district court applied the proper legal standard and that its fact findings were not “manifestly erroneous.”<sup>138</sup> The appellate court therefore concluded it was not an abuse of discretion to deny Rockhill’s *Daubert* motion as to the three experts.<sup>139</sup>

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130. *Id.*

131. *Id.* at 1244–45.

132. *Id.* at 1245.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

*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>140</sup> Rule 701 requires that lay opinion testimony be "(a) 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>141</sup> Rule 701 was amended to "eliminate the risk that the reliability requirements set forth in Rule 702 would be evaded through the simple expedient of proffering an expert in lay witness clothing."<sup>142</sup>

The Eleventh Circuit confronted Rule 701 in *United States v. Wheeler*,<sup>143</sup> which involved five co-defendants charged with wire fraud, mail fraud, and conspiracy for alleged involvement in a telemarketing scheme to defraud stock investors.<sup>144</sup> The defendants operated from two phone rooms, one in Florida and the other in California.<sup>145</sup> Among the witnesses who testified for the government was Stuart Rubens, who took a job undercover in the Florida phone room.<sup>146</sup> The district court allowed Rubens to testify that the Florida phone room was a "boiler room," a term used to describe a salesroom that uses high-pressure selling tactics.<sup>147</sup> Rubens also identified and defined the roles that were commonly assigned to salespeople in "boiler-room operations."<sup>148</sup>

The defendants argued on appeal that the district court abused its discretion by allowing Rubens to offer improper lay opinions.<sup>149</sup> The Eleventh Circuit rejected this argument, finding Rubens' testimony satisfied the elements of Rule 701.<sup>150</sup> His testimony was able to help the jury by explaining some of the jargon used in the defendants' conversations.<sup>151</sup> Further, he was able to draw from his own experience in the field to explain how "boiler rooms" functioned and the various roles that salespeople generally played in such operations.<sup>152</sup> The

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140. FED. R. EVID. 701.

141. *Id.*

142. *Omni Health Sols.*, 857 F. App'x at 517.

143. 16 F.4th 805 (11th Cir. 2021).

144. *Id.* at 811.

145. *Id.* at 812.

146. *Id.* at 813.

147. *Id.* at 827.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 827–28.

152. *Id.* at 828.

Eleventh Circuit therefore determined that “[b]ecause Rubens’s testimony was based on his own perceptions, was helpful to the jury, and was not based on scientific or technical knowledge,” his lay opinion was proper.<sup>153</sup>

The Eleventh Circuit upheld the exclusion of improper lay opinion in *Omni Health Solutions, LLC v. Zurich American Insurance Company*.<sup>154</sup> In *Omni*, Plaintiff Omni Health Solutions, LLC (Omni) obtained an insurance policy from the defendant to cover its medical building in Macon, Georgia.<sup>155</sup> In 2011, Omni filed an insurance claim with the defendant seeking coverage for a damaged and leaky roof. Although the defendant agreed that covered damage existed, the parties were unable to agree on a loss amount. Omni sued, claiming the defendant “breached the Policy and acted in bad faith by failing to make a timely coverage decision, underpaying the amount awarded for structural damage, and refusing to compensate Plaintiff for the diminished value of the property.”<sup>156</sup>

Plaintiff argued that the post-repair value of its property was \$500,000 less than its pre-loss value.<sup>157</sup> To support that contention, plaintiff cited the testimony of Dr. Green, Omni’s managing member. At his deposition, Dr. Green opined that the property had lost an estimated \$500,000 in value as a result of the environmental conditions that affected the property. Fourteen months after his deposition, Dr. Green clarified the basis for his diminished value testimony in a declaration opposing summary judgment.<sup>158</sup> He stated that his opinion was based on his:

[K]nowledge of the building, the nature of the damage to the building, the resulting mold infestation in the building, the stigma likely to attach to buildings that have endured the extent and duration of damage that Omni’s building ha[d] endured, and the commercial real estate market in the Macon metropolitan area, including sales prices of comparable properties that have not suffered the damage that Omni’s building has suffered.<sup>159</sup>

The United States District Court for the Middle District of Georgia excluded Dr. Green’s testimony, finding him unqualified to proffer

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153. *Id.*

154. 857 F. App’x 501 (11th Cir. 2021).

155. *Id.* at 501.

156. *Id.*

157. *Id.* at 515.

158. *Id.* at 515–16.

159. *Id.* at 516.

testimony regarding diminution in value.<sup>160</sup> The court reasoned that Dr. Green sought to proffer expert testimony, as opposed to lay opinion testimony under Rule 701, because “diminution in value, by its very nature and as opposed to a stagnant, moment-in-time value of property, requires knowledge of the value of property but also some specialized knowledge of the effects certain kinds of damages and repairs have on the *change* in that value.”<sup>161</sup>

The Eleventh Circuit affirmed the district court excluding Dr. Green’s testimony because there was no abuse of discretion.<sup>162</sup> It observed that Rule 701 generally “does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences.”<sup>163</sup> Additionally, the court observed that a property owner is generally competent to testify regarding its value.<sup>164</sup> “However, when an ‘owner bases his estimation solely on speculative factors,’ courts may exclude the owner’s testimony.”<sup>165</sup> The Eleventh Circuit determined that the record lacked any evidence that Dr. Green had any such particularized knowledge or experience regarding the value of the repaired, mold-remediated properties.<sup>166</sup> Nor did the record reflect that “Dr. Green acquired any knowledge from outside sources, such as a realtor, that could inform an opinion regarding the current value of Plaintiff’s property.”<sup>167</sup> Omni maintained that Dr. Green acquired knowledge regarding the sales prices of medical buildings in the Macon area through his experience in the Macon commercial real estate market.<sup>168</sup> The Eleventh Circuit nevertheless determined that Omni failed to show that the sales on which Dr. Green based his opinion involved repaired buildings affected by mold.<sup>169</sup> “Without such information, Dr. Green’s testimony regarding loss in value associated with environmental factors [was] not ‘rationally based on his perception,’” and therefore was not helpful to determining a fact in issue.<sup>170</sup>

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160. *Id.*

161. *Id.* (alterations in original)

162. *Id.* at 517.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* (second alteration in original).

Additionally, the Eleventh Circuit agreed with the district court that Dr. Green's testimony was based on specialized knowledge within the scope of Rule 702 and therefore was improper lay opinion testimony.<sup>171</sup> The court concluded that:

Absent objective evidence of the current value of [Omni's] property (such as unsuccessful sales efforts, offers received, or estimates provided by trained professionals), which could inform a lay opinion regarding post-repair value, estimating the value of a repaired and mold remediated building requires specialized knowledge within the scope of Rule 702.<sup>172</sup>

Because it was undisputed that Dr. Green was not an expert in property valuation, the Eleventh Circuit upheld the district court's exclusion of Dr. Green's diminished value testimony.<sup>173</sup>

#### IV. OTHER RULES OF EVIDENCE

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

Generally, the Federal Rules of Evidence consider all relevant evidence admissible at trial.<sup>174</sup> The Rules define relevant evidence broadly as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence."<sup>175</sup> In its 2021 term, the Eleventh Circuit upheld the exclusion of irrelevant questioning in *United States v. Akwuba*.<sup>176</sup> There, the defendant was convicted of issuing and conspiring to issue prescriptions for controlled substances improperly; conspiring to commit health care fraud; and committing health care fraud through her practice as a nurse practitioner. The defendant sought to testify that a prescription pad belonging to one of her collaborative physicians had been stolen and used to issue false or fraudulent prescriptions. When asked to tell the jury about that and its significance to the case, the government objected and the court conducted a sidebar.<sup>177</sup>

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171. *Id.*

172. *Id.*

173. *Id.* at 518.

174. FED. R. EVID. 402; *see also* *United States v. Akwuba*, 7 F.4th 1304, 1314 (11th Cir. 2021) ("Only relevant evidence is admissible at trial.").

175. FED. R. EVID. 401; *see also* *Akwuba*, 7 F.4th at 1314.

176. *Akwuba*, 7 F.4th at 1304.

177. *Id.* at 1313–14.

During the sidebar, defense counsel said he did not know where his own line of questioning was going or how it was relevant.<sup>178</sup> Defense counsel stated that his client gave him a list of questions she wanted him to ask her and that was one of those questions. The United States District Court for the Middle District of Alabama refused to allow the defendant to present the evidence unless she could show that some of the prescriptions the collaborative physician had described as forged were relevant to this incident. The court then gave the defendant and her counsel time to look through the prescription records, after which defense counsel withdrew the line of questioning.<sup>179</sup>

On appeal, the Eleventh Circuit upheld the exclusion of the line of questioning.<sup>180</sup> It observed that the district court gave the defendant an opportunity to review the records to “see if any prescriptions issued from the stolen prescription pad were attributed to her.”<sup>181</sup> Once defense counsel told the court there was no issue, the line of questioning about the stolen pad became irrelevant and inadmissible.<sup>182</sup>

Even if evidence is deemed relevant, Rule 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>183</sup> The Eleventh Circuit has long held that Rule 403 “is an extraordinary remedy which should be used sparingly.”<sup>184</sup> In a criminal trial, because relevant evidence is inherently prejudicial, “it is only when *unfair* prejudice *substantially* outweighs probative value that the rule permits exclusion.”<sup>185</sup> Unfair prejudice in a criminal case “means that the relevant evidence has the capacity to ‘lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.’”<sup>186</sup> In balancing the interests under Rule 403, the Eleventh Circuit instructs courts to “consider, among other things, the prosecutorial need for the evidence and the effectiveness of a limiting instruction.”<sup>187</sup> Further, the court “view[s] the evidence in the light

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178. *Id.* at 1314.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. FED. R. EVID. 403 ; *See also Sunmonu*, 859 F. App’x at 433.

184. *Coleman*, 851 F. App’x at 1022 (“We ask whether the evidence was dragged in by the heels solely for prejudicial impact.”).

185. *Sunmonu*, 859 F. App’x at 433 (citing *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983)) (alterations in original).

186. *Id.* at 433–34 (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

187. *Id.* at 434.

most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact.”<sup>188</sup>

Pursuant to the scrupulous legal standard, the Eleventh Circuit upheld the introduction of purportedly prejudicial evidence in four opinions in its 2021 term. In *United States v. Sunmonu*,<sup>189</sup> officers attempted to apprehend the defendant for driving a stolen vehicle, but he fled the scene back to his apartment.<sup>190</sup> When a detective arrived at the apartment complex, she saw the defendant “reaching into his right pocket.”<sup>191</sup> A federal grand jury later indicted the defendant for possession with intent to distribute a controlled substance, carrying a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a convicted felon. Before trial, the defendant moved *in limine* to limit the government’s introduction of the testimony that he reached for his front pocket during his arrest pursuant to Rule 403. The United States District Court for the Middle District of Florida denied the motion.<sup>192</sup> At trial, another detective testified about the events surrounding the defendant’s arrest, including the fact that the defendant reached for a handgun during the struggle. That detective also testified about his personal experience working drug cases.<sup>193</sup> Specifically, the detective testified that from his seven years of investigating drug cases, many of the cases “involved dealers who possess guns on or near them” when arrested.<sup>194</sup>

On appeal, the defendant argued that the district court misapplied Rule 403 and erred when it allowed the government to present evidence “(1) that he allegedly reached for a loaded firearm in his front pocket as he was being arrested and (2) that drug dealers occasionally use guns to collect debts and to intimidate others.”<sup>195</sup> He argued that the evidence should not have been admissible because it

had no probative value, was unnecessary, and was unfairly prejudicial because it allowed the government to “tacitly argue to the jury that [he] had intended to inflict serious harm upon, or murder,” the officers who arrested him, and that it “speculatively painted him

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188. *Id.* (citing *United States v. Bradberry*, 466 F.3d 1249, 1253 (11th Cir. 2006)).

189. 859 F. App’x 431 (11th Cir. 2021).

190. *Id.* at 431.

191. *Id.*

192. *Id.* at 432.

193. *Id.* at 432–33.

194. *Id.* at 433.

195. *Id.*

as a menace” who uses [gun violence] to “threaten hapless drug users with death.”<sup>196</sup>

The Eleventh Circuit disagreed with respect to the testimony about reaching for his pocket, the court determined that it was probative of the elements establishing violation of 18 U.S.C. § 924(c)(1).<sup>197</sup> The evidence was also probative to establish the knowledge requirement of 18 U.S.C. § 922(g),<sup>198</sup> another of the charges against the defendant.<sup>199</sup> With respect to the detective’s testimony that drug dealers often carry loaded firearms, the Eleventh Circuit reiterated that “there is a strong presumption that a defendant aware of a weapon’s presence will think of using it if his illegal activities are threatened”<sup>200</sup> and that guns are the “tools of the drug trade, as there is a frequent and overpowering connection between the use of firearms and narcotics traffic.”<sup>201</sup> The court therefore concluded the testimony probative because it provided contextual evidence as to why the defendant likely possessed the firearm, which in turn showed that the firearm was not there “by chance.”<sup>202</sup> Ultimately, the Eleventh Circuit held that the district court did not abuse its discretion in admitting the challenged evidence.<sup>203</sup>

In *United States v. Coleman*,<sup>204</sup> the defendant was convicted for bank robbery.<sup>205</sup> The defendant was not identified as the robber until eight months after the robbery when a friend of his girlfriend reported him to the police. The police followed this tip by speaking with the girlfriend, who informed the police of the defendant’s confession to her on the day of the robbery. Prior to trial, the defendant moved to prevent testimony concerning two instances of domestic violence, allegedly committed by the defendant. The United States District Court for the Middle District of Florida denied the motion to exclude the domestic violence testimony. It found that the testimony was essential to explain the girlfriend’s delayed report of the robbery to police, and it was likely that the defense would use the delay to undermine her credibility at trial.<sup>206</sup>

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196. *Id.*

197. *Id.* at 434; *see also* 18 U.S.C. § 924(c)(1) (2018).

198. 18 U.S.C. § 922(g) (2015).

199. *Sunmonu*, 859 F. App’x at 434.

200. *Id.* at 435 (quoting *United States v. Carillo-Ayala*, 713 F.3d 82, 92 (11th Cir. 2013)).

201. *Id.* (quoting *United States v. Pham*, 463 F.3d 1239, 1246 (11th Cir. 2006)).

202. *Id.*

203. *Id.*

204. 851 F. App’x 1016 (11th Cir. 2021).

205. *Id.* at 1017.

206. *Id.*



On appeal, the Eleventh Circuit affirmed the district court's ruling on the domestic violence evidence.<sup>207</sup> Although the testimony "could provoke antipathy from the jury[,] . . . the government did not bring in evidence of domestic abuse simply to paint [the defendant] in an unfavorable light."<sup>208</sup> Rather, the testimony was admitted to establish the credibility of an important witness.<sup>209</sup> The domestic-violence testimony "was critical to explaining why [the girlfriend] had fears about reporting [the defendant's] confession sooner."<sup>210</sup>

In *United States v. Williams*,<sup>211</sup> the defendant was charged and convicted of sex trafficking three women—two of whom were minors when he recruited them.<sup>212</sup> Predictably, much of the evidence presented at the defendant's trial was graphic.<sup>213</sup> The women described their work as prostitutes and detailed the defendant's violent punishments. During their testimony, images of the women—sometimes nude, and sometimes in lingerie—which were posted as online ads, were also introduced as evidence. There were additional images and videos that the defendant kept, including nude pictures of the girls in provocative poses and videos of the girls engaged in sexual conduct. The defense argued at trial that the admission of these files "went too far" under Rule 403.<sup>214</sup>

Because the defendant conceded the relevancy of the evidence, "the only question on appeal [wa]s whether its probative value was substantially outweighed by the danger of unfair prejudice."<sup>215</sup> The Eleventh Circuit agreed with the United States District Court for the Southern District of Florida that the images and videos were probative.<sup>216</sup> To prove the defendant's charges, the government needed to show that the defendant knew force, threats of force, fraud, or coercion would be used to cause his victims to engage in commercial sex.<sup>217</sup> The images and videos helped show how the defendant "exerted complete dominance over his victims."<sup>218</sup> The images and videos also

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207. *Id.* at 1022.

208. *Id.*

209. *Id.*

210. *Id.*

211. 5 F.4th 1295 (11th Cir. 2021).

212. *Id.* at 1298.

213. *Id.* at 1301.

214. *Id.*

215. *Id.*

216. *Id.* at 1302.

217. *Id.*

218. *Id.*

“corroborated the victims’ testimony that [the defendant] forced them to engage in sexual acts.”<sup>219</sup>

The Eleventh Circuit also determined that the challenged evidence was not unduly prejudicial.<sup>220</sup> “To be sure, these images and videos [were] graphic. But it is unsurprising, given the nature of the crime itself, that explicit evidence would need to be introduced.”<sup>221</sup> The court also noted that to minimize the prejudicial impact of the graphic evidence, the district court cautioned potential jurors that they would hear testimony and view evidence of a “sexually explicit nature.”<sup>222</sup> The Eleventh Circuit held that because the district court “mitigated the prejudicial effects of the evidence” by screening potential jurors, there was no abuse in discretion in admitting these materials.<sup>223</sup>

In *United States v. Colston*,<sup>224</sup> the defendant walked into a post office, showed a tracking receipt on her phone, and walked out with a package containing approximately \$200,000 worth of cocaine.<sup>225</sup> The defendant was arrested and convicted of two different drug trafficking crimes. On appeal, the defendant argued that the United States District Court for the Southern District of Alabama erred by admitting text messages that she illegally sold prescription pills.<sup>226</sup> The Eleventh Circuit concluded that “the text messages rebutted the suggestion that she was not familiar with drug trafficking and allowed the jury to infer that her involvement in the charged crimes was no mere accident or mistake.”<sup>227</sup> The district court gave a limiting instruction three times to lessen any prejudicial impact of the messages, “cautioning the jury not to consider the messages as evidence that [the defendant] had a propensity to commit the charged crimes.”<sup>228</sup> Accordingly, the Eleventh Circuit held that the probative value of the text messages was not substantially outweighed by undue prejudice, and the defendant failed to meet “the heavy burden of demonstrating an abuse of discretion.”<sup>229</sup>

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219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. 4 F.4th 1179 (11th Cir. 2021).

225. *Id.* at 1183.

226. *Id.* at 1192.

227. *Id.*

228. *Id.* at 1193.

229. *Id.*

### B. Character Evidence

While Federal Rule of Evidence 403 gives district courts the discretionary power to exclude prejudicial evidence, Rule 404<sup>230</sup> addresses a specific type of potentially prejudicial evidence: character evidence. Rule 404(a) prohibits 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>231</sup> The admissibility of evidence under Rule 404(b) is governed by a three-prong test:

First, the evidence must be relevant to an issue other than the defendant's character; second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; third, the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of rule 403.<sup>232</sup>

The Rule is one of inclusion and favors admission "unless the evidence 'tends to prove *only* criminal propensity."<sup>233</sup>

With respect to the first prong, 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>234</sup> For example, in *United States v. Acevedo*,<sup>235</sup> the Eleventh Circuit upheld the admission of evidence of uncharged prior incidents when offered to prove identity and *modus operandi*.<sup>236</sup>

The Eleventh Circuit additionally upheld the admission of evidence when offered to prove knowledge twice in its 2021 term. First, in *United States v. Pierre-Louis*,<sup>237</sup> the defendant appealed a felon-in-possession conviction, arguing that the district court abused its discretion by admitting evidence of a prior felon-in-possession conviction under Rule 404(b).<sup>238</sup> The Eleventh Circuit disagreed, concluding that the previous

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230. FED. R. EVID. 404.

231. *Id.* See also *Chukwu*, 842 F. App'x at 319.

232. *United States v. Pineda*, 843 F. App'x 174, 181 (11th Cir. 2021) (quoting *United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir. 1995)); see also *Elysee*, 993 F.3d at 1347 (citing *United States v. Sterling*, 738 F.3d 228, 238 (11th Cir. 2013)).

233. *United States v. White*, 848 F. App'x 830, 840 (11th Cir. 2021) (emphasis added); see also *Perry*, 14 F.4th at 1274–75.

234. FED. R. EVID. 404(b)(2); See, e.g., *United States v. Maradiaga*, 860 F. App'x 650, 653 (11th Cir. 2021) (affirming admission of prior wrong to rebut allegation of entrapment).

235. 860 F. App'x 604 (11th Cir. 2021).

236. *Id.* at 610.

237. 860 F. App'x 625 (11th Cir. 2021).

238. *Id.* at 628.

conviction was “relevant to an issue other than the defendant’s character” such as “knowledge, intent, or absence of mistake.”<sup>239</sup> To convict the defendant of his felon-in-possession charge, the government needed to prove that he knew he possessed a firearm.<sup>240</sup> The court reasoned that evidence showing that the defendant had knowingly possessed a firearm in the past was probative of his knowledge to possess a firearm in the present.<sup>241</sup>

Second, the Eleventh Circuit reached a similar conclusion in *United States v. Colston*.<sup>242</sup> There, the court found evidence of prior drug dealings admissible because it showed that the defendant had knowledge that the package contained a controlled substance.<sup>243</sup>

With respect to intent, the Eleventh Circuit has previously explained that “a not guilty plea in a drug conspiracy case makes intent a material issue and opens the door to admission of prior drug-related offenses as highly probative, and not overly prejudicial, evidence of a defendant’s intent.”<sup>244</sup> For example, in *United States v. Perry*,<sup>245</sup> the Eleventh Circuit affirmed the admission of a prior drug-related offense as evidence of the defendant’s intent where the defendant pleaded not guilty.<sup>246</sup>

Similarly, in *United States v. Jeune*,<sup>247</sup> a jury convicted the defendant of conspiracy to defraud the government, filing false tax returns, and assisting and advising in the preparation of false tax returns.<sup>248</sup> Prior to trial, the government filed a motion *in limine* to allow the introduction of the defendant’s 2009 tax fraud conviction and the facts underlying that conviction under Rule 404(b).<sup>249</sup> The United States District Court for the Southern District of Florida ruled that the evidence was admissible to prove intent and motive.<sup>250</sup> On appeal, the defendant argued that the government introduced the evidence of her prior conviction “solely to demonstrate [her] alleged criminal propensity to

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239. *Id.* at 634.

240. *Id.*

241. *Id.*

242. *supra* Section IV.A.

243. *Colston*, 4 F.4th at 1192.

244. *Perry*, 14 F.4th at 1275 (quoting *United States v. Holt*, 777 F.3d 1234, 1266 (11th Cir. 2015)).

245. 14 F.4th 1253 (11th Cir. 2021).

246. *Id.* at 1274–75.

247. No. 19-13018, 2021 U.S. App. LEXIS 25102 (11th Cir. Aug. 23, 2021).

248. *Id.* at \*2.

249. *Id.* at \*17.

250. *Id.* at \*18.

commit tax fraud.”<sup>251</sup> The Eleventh Circuit affirmed, reasoning that because she entered a “not guilty plea,” intent was a material issue.<sup>252</sup> Therefore, to satisfy its burden of proving intent, the government could rely on qualifying 404(b) evidence.<sup>253</sup>

The Eleventh Circuit addressed the impact of strong evidence against the defendant on the first prong—relevance to an issue other than the defendant’s character—in *United States v. Jones*<sup>254</sup> and *United States v. Collins*.<sup>255</sup> In *Jones*, a federal grand jury indicted the defendant on multiple counts of distribution of cocaine.<sup>256</sup> Before trial, the government gave notice that it intended to introduce evidence of a 2006 guilty plea for a controlled substances violation. The defendant objected to the evidence, arguing it was highly prejudicial, but the United States District Court for the Middle District of Georgia overruled the objection without further argument and gave the jury a Rule 404(b) limiting instruction.<sup>257</sup>

On appeal, the Eleventh Circuit conceded that whether the Rule 404(b) evidence in this case met the three-pronged test was a “close question.”<sup>258</sup> With respect to the first prong, “the government had little incremental need for the evidence.”<sup>259</sup> In fact, the government had a plethora of other strong evidence, obviating the need for the previous drug plea.<sup>260</sup> “When the government has a strong case without the extrinsic evidence, fairness dictates that the extrinsic evidence should be excluded.”<sup>261</sup> But the Eleventh Circuit concluded that the strong evidence that led it to question the necessity of admitting the plea agreement also led it “to conclude that any error was harmless.”<sup>262</sup>

In *Collins*, the defendant appealed her conviction for conspiracy to import cocaine arguing the United States District Court for the Middle District of Florida abused its discretion by admitting a 2001 conviction

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251. *Id.* at \*20.

252. *Id.*

253. *Id.*

254. 847 F. App’x 830 (11th Cir. 2021).

255. 861 F. App’x 362 (11th Cir. 2021).

256. *Jones*, 847 F. App’x at 832.

257. *Id.* at 833.

258. *Id.* at 835.

259. *Id.*

260. *Id.*

261. *Id.*; see also *United States v. Hernandez*, 896 F.2d 513, 521 (11th Cir. 1990) (“[I]f the government has a strong case on intent without the extrinsic [evidence] . . . then the prejudice to the defendant will outweigh the marginal value of the extrinsic offense evidence and it will be excluded.”).

262. *Jones*, 847 F. App’x at 835.

for the sale or delivery of cannabis.<sup>263</sup> She argued that the probative value of the prior conviction was substantially outweighed by undue prejudice “because the prior offense [wa]s substantially different from and remote in time to the charged offense and because the government had other evidence of her intent and knowledge.”<sup>264</sup> Like *Jones*, the Eleventh Circuit determined that it “need not decide whether the district court abused its discretion in admitting [the] prior conviction,” because any error was harmless.<sup>265</sup> Again, the court relied on the significant strength of the government’s other evidence.<sup>266</sup>

An otherwise strong case would suggest that certain character evidence is likely being introduced solely as character evidence—relevant only to the defendant’s character, which is prohibited. However, the decisions in *Jones* and *Collins* suggest that a strong case likewise makes it very challenging to find reversible error based on the first prong.

With respect to the third prong, district courts should consider, among other things, “prosecutorial need, overall similarity between the extrinsic act and the charged offense, and temporal remoteness.”<sup>267</sup> Although similarities between the other act and charged offense will make the other offense highly probative with regard to intent, the “more closely the extrinsic offense resembles the charged offense, the greater the prejudice to the defendant since it increases the likelihood that the jury will convict [him] because he is the kind of person who commits this particular type of crime or because he was not punished for the extrinsic offense.”<sup>268</sup>

The Eleventh Circuit confronted the third prong twice in its 2021 term. First, in *United States v. Elysee*,<sup>269</sup> the defendant argued on appeal that the United States District Court for the Southern District of Florida abused its discretion by admitting into evidence one of his prior armed robbery convictions.<sup>270</sup> He specifically argued that the lower court should have redacted all references to “armed robbery” or “deadly weapon” in his conviction, leaving only the information that it was a

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263. *Collins*, 861 F. App’x at 363.

264. *Id.*

265. *Id.* at 364.

266. *Id.*

267. *United States v. Tercero*, 859 F. App’x 506, 508 (11th Cir. 2021) (quoting *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997)).

268. *Id.* (internal quotation marks omitted).

269. 993 F.3d 1309 (11th Cir. 2021).

270. *Id.* at 1347.

“firearm conviction.”<sup>271</sup> The Eleventh Circuit disagreed for two reasons.<sup>272</sup>

First, the redacted version of the defendant’s conviction “was not equally as probative for its relevant purpose as the unredacted version of the conviction.”<sup>273</sup> Admitting that the defendant had a previous “firearm conviction” would not have provided as much information “about his familiarity with firearms as admitting his conviction for carrying a firearm in an armed robbery.”<sup>274</sup> For example, it would not have “demonstrated his familiarity with how a firearm feels when it is held and carried.”<sup>275</sup> It would also not address the defendant’s knowledge of how to obtain a firearm illegally.<sup>276</sup>

Second, “even assuming the two versions were equally probative, [the defendant] ha[d] not shown that the District Court clearly abused its discretion by admitting the unredacted conviction.”<sup>277</sup> The Eleventh Circuit observed that the defendant’s argument—that the court “should compare the redacted and unredacted versions and decide whether it was an abuse of discretion not to redact the conviction”—is not how it reviews Rule 404(b) rulings.<sup>278</sup> Rather, the court’s “only concern [wa]s whether the prejudicial effect of the Rule 404(b) conviction, as it was allowed by the District Court (*i.e.*, unredacted), substantially outweighed the conviction’s probative value.”<sup>279</sup> Here, the Eleventh Circuit concluded the answer was no. Although the defendant’s prior conviction for armed robbery “carried some danger of prejudicing the jury against him,” the court observed that it is a tough standard to show that the prejudicial effect of the evidence “*substantially outweighed*” its probative value.<sup>280</sup>

The Eleventh Circuit again confronted the third prong in *United States v. Pineda*.<sup>281</sup> There, the defendant was indicted for health care fraud and conspiracy to commit healthcare and wire fraud.<sup>282</sup> At trial, a special agent testified that two of the checks the defendant cashed were

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271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 1347–48.

277. *Id.* at 1347.

278. *Id.* at 1348.

279. *Id.*

280. *Id.*

281. 843 F. App’x 174 (11th Cir. 2021).

282. *Id.* at 176.

from a specific pharmacy and signed by the pharmacy's owner. The agent further testified that the pharmacy owner had been previously convicted of healthcare fraud and had introduced the defendant to his coconspirators.<sup>283</sup> The defendant objected to this testimony, arguing it had no probative value, was "gratuitous," and unfairly prejudicial; the United States District Court for the Southern District of Florida overruled the objection.<sup>284</sup>

On appeal, the defendant argued that the district court erred by allowing the government to elicit testimony that the pharmacy owner had been convicted of healthcare fraud and that he was associated with him.<sup>285</sup> In addressing the third prong—whether the probative value of the evidence was substantially outweighed by its prejudice—the court concluded that the evidence of the relationship was significant and therefore probative to the government's case.<sup>286</sup> The testimony explained how the defendant met his coconspirators and was therefore relevant to show the origins of the fraud at issue.

The Eleventh Circuit also determined that the probative value was not substantially outweighed by undue prejudice because the jury already knew that the defendant worked for another individual, Pablo Garcia Menendez, who was an experienced fraudster.<sup>287</sup> "[A] passing reference to another fraudster didn't tip the prejudice scale substantially."<sup>288</sup> The court also observed that the evidence was "not a major feature of the trial."<sup>289</sup> Finally, the Eleventh Circuit noted that "the district court took affirmative steps to mitigate any unfair prejudice caused by the rule 404(b) evidence."<sup>290</sup> Specifically, the district court gave the jury a limiting instruction about the evidence and told the jury "to be very mindful to not consider this evidence to decide if [the defendant] engaged in the activity alleged in the indictment."<sup>291</sup> According to the Eleventh Circuit, these instructions reduced the risk of any unfair prejudice to the defendant.<sup>292</sup> The Eleventh Circuit therefore held the district court did not abuse its discretion based on the importance of the Rule 404(b) evidence to the government's case, the

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283. *Id.* at 178.

284. *Id.*

285. *Id.* at 181.

286. *Id.* at 181–82.

287. *Id.* at 182.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 182–83.

292. *Id.* at 183.



fact that the jury knew the defendant was associated with other healthcare fraudsters, and the limiting instruction given by the district court.<sup>293</sup>

Evidence of other wrongs also falls outside the scope of Rule 404(b), making it independently admissible, if it is intrinsic evidence.<sup>294</sup> Evidence is intrinsic if it is “linked in time and circumstances with the charged crime and concerns the context, motive or setup of the crime; or forms an integral part of the crime; or is necessary to complete the story of the crime.”<sup>295</sup> Where evidence is inextricably intertwined with the crimes charged, the Eleventh Circuit “has refused to find that the evidence should nonetheless be excluded as unduly prejudicial under Rule 403.”<sup>296</sup>

In *United States v. Chukwu*,<sup>297</sup> the defendant sought to exclude bank records and related screenshots and photographs from outside of the time period of the alleged offense conduct.<sup>298</sup> The Eleventh Circuit ultimately concluded that the evidence was inextricably intertwined with evidence of the charged offense and was therefore admissible under Rule 404(b).<sup>299</sup> The screenshots showed financial transactions that occurred within a year of the conduct charged in this case. They also demonstrated conduct similar to the charged offense—money deposited into Chukwu’s accounts and then transferred in large batches to foreign bank accounts. Because the screenshots were “linked in time and circumstances with the charged crime and concern[ed] the context, motive or setup of the crime” and “necessary to complete the story of the crime,” the Eleventh Circuit upheld the lower court’s admission of evidence.<sup>300</sup>

In *United States v. Diaz*,<sup>301</sup> the defendant appealed her convictions for conspiring to defraud the United States and receiving illegal health care kickbacks for referring individuals to Medicare.<sup>302</sup> The defendant argued that the United States District Court for the Southern District of Florida erred when it denied her motion to exclude evidence of her prior involvement with other home health care agencies in patient-

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293. *Id.*

294. *Chukwu*, 842 F. App’x at 320.

295. *Id.*

296. *Id.* (internal quotation marks omitted).

297. 842 F. App’x 314 (11th Cir. 2021).

298. *Id.* at 315.

299. *Id.* at 320.

300. *Id.*

301. 846 F. App’x 846 (11th Cir. 2021).

302. *Id.* at 848.

referral schemes.<sup>303</sup> The Eleventh Circuit upheld the admission of the defendant's prior involvement, reasoning that it was inextricably intertwined with and probative of how the defendant became involved with the health care agencies at issue.<sup>304</sup> Specifically, the evidence of her involvement explained how she came to know certain individuals and joined the conspiracy of which she was found guilty.<sup>305</sup>

### *C. Rule Against Hearsay*

The Federal Rules of Evidence generally prohibit the admission of hearsay statements at trial. Rule 801<sup>306</sup> defines hearsay as an out-of-court statement offered for “the truth of the matter asserted.”<sup>307</sup> Therefore, a statement is not hearsay if it is not offered for the truth of the matter asserted.<sup>308</sup> During its 2021 term, the Eleventh Circuit issued three opinions addressing statements that were purportedly not offered for the truth of the matter asserted.

In *Pendergrass*, a special agent testified that his investigation into the defendant's armed robberies began in 2017 when he obtained cell phone “tower dumps.”<sup>309</sup> The tower dumps provided the agent with the phone numbers that had accessed the cell towers closest to the robbery locations around the time of the robberies. From these results, the agent identified two phone numbers that were near three of the robbery locations. The agent also testified about another potential suspect that law enforcement had eliminated from consideration—Quintarious Luke.<sup>310</sup>

The defendant argued that certain statements were inadmissible hearsay. Specifically, the defendant contested the agent's testimony concerning “(1) the contents of the tower-dump records, (2) others' statements about potential suspect Quintarious Luke, [and] (3) the statements of [people] who said surveillance video was not available[.]”<sup>311</sup> The Eleventh Circuit held that none of the challenged statements were hearsay because they were not offered for the truth of

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303. *Id.* at 849.

304. *Id.* at 850.

305. *Id.*

306. FED. R. EVID. 801.

307. *Id.* See also *Hart*, 841 F. App'x at 182.

308. *United States v. Hawkins*, 905 F.2d 1489, 1494 (11th Cir. 1990) (“A statement is not subject to the hearsay rule . . . unless it is offered ‘to prove the truth of the matter asserted.’”).

309. *Pendergrass*, 995 F.3d at 869; *supra* Section II.A.

310. *Id.*

311. *Id.* at 878.

the matter asserted.<sup>312</sup> Under Eleventh Circuit precedent, “statements by out-of-court witnesses to law enforcement may be admitted as non-hearsay if they help explain the course of a complex investigation, and the danger of unfair prejudice caused by the used of the statements does not substantially outweigh the probative value of the evidence.”<sup>313</sup> The court reasoned that these statements were admissible under this rule “because that evidence showed why [the agent] focused his investigation on [the defendant] and excluded other potential suspects during his investigation.”<sup>314</sup>

For example, the government did not offer the testimony about the unavailability of other surveillance videos to prove the accuracy of that statement.<sup>315</sup> Similarly, the testimony about Quintarious Luke—such as his physical description—was not offered for its truth. Rather, the government was attempting to show the steps the agent took during his investigation. With respect to the cell-site data, an FBI special agent testified as to how the data was collected, read, and reported. Records reflecting the substance of the data were also admitted into evidence, so when the agent discussed the records, they were already in evidence. Because the statements were either not introduced for the truth of the matter asserted, or were otherwise corroborated, the Eleventh Circuit therefore affirmed their admission.<sup>316</sup>

In *United States v. Sims*,<sup>317</sup> agents of the Alabama Law Enforcement Agency employed a confidential source to make three controlled drug purchases from the defendant. The agents initiated the telephone calls, which were recorded. During the first call, the defendant responded “yes” when asked if he could sell the confidential source an “onion ring or something.”<sup>318</sup> During the second call, the source said he would get some money and “come that way tomorrow,” to which the defendant replied, “Alright.” On the third call, the source stated he was driving to a Home Depot store to meet the defendant, and the defendant responded “Alright,” again. The source passed away at a later date.<sup>319</sup>

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312. *Id.*

313. *Id.* (citing *Jiminez*, 564 F.3d at 1288); see also *Elysee*, 993 F.3d at 1339 (“[T]he government in a criminal case may in some circumstances introduce out-of-court statements through investigative officers either (1) to explain the course of a complex investigation or (2) to rehabilitate officers after the defense has impugned their motives or behavior in the investigation.”).

314. *Pendergrass*, 995 F.3d at 878.

315. *Id.*

316. *Id.*

317. No. 19-13963, 2021 U.S. App. LEXIS 31734 (11th Cir. Oct. 21, 2021).

318. *Id.* at \*2.

319. *Id.* at \*3.

After his indictment, the defendant moved to suppress the audio recordings on the grounds they contained hearsay.<sup>320</sup> The United States District Court for the Northern District of Alabama denied the motion, but gave the defendant leave to make specific evidentiary objections at trial. The recordings were eventually admitted at trial. On appeal, the Eleventh Circuit held that the district court did not abuse its discretion in categorizing the statements as non-hearsay, because they were offered not for their truth, “but to give context to [the defendant’s] one-word responses.”<sup>321</sup> As the district court observed, the statements provided “the question . . . to understand the answer,” and therefore, the statements were not inadmissible hearsay.<sup>322</sup>

Under Rule 801(d)(2),<sup>323</sup> a statement is also 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 it existed; or (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.<sup>324</sup>

When the statement is made directly by a defendant, Rule 801(d)(2)’s application is fairly straightforward.<sup>325</sup> The analysis is more complex, however, when the statement was made by a coconspirator.

For a statement to qualify under the coconspirator exemption, the government must prove by a preponderance of the evidence that: “(1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the declarant made the statement during and in furtherance of the conspiracy.”<sup>326</sup> The Eleventh Circuit applies “a liberal standard in determining whether a statement was made in furtherance of a conspiracy.”<sup>327</sup> Therefore, a lower court’s determination that a statement was made in

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320. *Id.* at \*3–\*4.

321. *Id.* at \*5.

322. *Id.* (alteration in the original).

323. FED. R. EVID. 801(d)(2).

324. *Id.*

325. *See, e.g.*, *United States v. Perez*, 844 F. App’x 113, 117 (11th Cir. 2021) (affirming district court’s admission of body-camera footage because statements made in the footage “were made by [the defendant] and were therefore admissible under the party-opponent hearsay exception.”).

326. *Hart*, 841 F. App’x at 182.

327. *Id.*

furtherance of a conspiracy “will not be reversed on appeal unless clearly erroneous.”<sup>328</sup>

During the 2021 term, the Eleventh Circuit addressed the coconspirator exemption in one opinion, reiterating the above-cited law and continuing its trend of affirming the admission of out-of-court statements under this exemption. In *United States v. Hart*,<sup>329</sup> the government presented testimony from five of the defendant’s coconspirators about selling drugs to the defendant or purchasing drugs from the defendant. Another witness testified that he sold heroin for an individual and that the defendant was that individual’s supplier.<sup>330</sup> During his testimony, this witness testified that the individual told him to stay away from the defendant because the defendant had “beat [his] uncle out of \$40,000.”<sup>331</sup> After the United States District Court for the Middle District of Florida overruled a hearsay objection, the witness further elaborated that after what the individual told him, he sent someone else to purchase drugs from the defendant. After the witness finished testifying, the district court explained its ruling stating that the evidence established that there was a drug conspiracy involving the defendant, the witness, and the individual. Therefore, the court explained the individual’s statement was made during the course of and in furtherance of the conspiracy and was admissible as an exemption to the hearsay rule. The district court also expressed its skepticism whether the statement was even offered for the truth of the matter asserted.<sup>332</sup>

On appeal, the Eleventh Circuit began its discussion by observing the standard of review: “the improper admission of a co-conspirator’s hearsay statement is subject to the harmless error rule” and “[i]mproper admission of a co-conspirator’s hearsay statement is harmless when it had no substantial influence on the outcome and sufficient evidence supports the jury’s verdict.”<sup>333</sup> After reviewing the record, there was no error.<sup>334</sup> First, the individual’s statement that the defendant “beat his uncle out of \$40,000” was not offered for the truth of the matter asserted, “but, rather, was offered to explain why [the witness] never dealt with [the defendant] directly.”<sup>335</sup> But even

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328. *Id.* (quoting *United States v. Garcia*, 13 F.3d 1464, 1473 (11th Cir. 1994)).

329. 841 F. App’x 180 (11th Cir. 2021).

330. *Id.* at 181.

331. *Id.*

332. *Id.*

333. *Id.* at 182.

334. *Id.*

335. *Id.*

assuming that the statement was hearsay, any error was harmless because there was more than sufficient evidence to independently prove the defendant's guilt.<sup>336</sup>

Separate and distinct from Rule 801(d)'s exemptions to the prohibition against hearsay are Rule 803's<sup>337</sup> exceptions to the rule against hearsay. For instance, Rule 803(3) provides that statements "of the declarant's then-existing state of mind" are not excluded by the rule against hearsay.<sup>338</sup> In its 2021 term, the Eleventh Circuit twice affirmed the admission of testimony as a then-existing state of mind.

First, in *Nix v. Advanced Urology Institute of Georgia, PC*,<sup>339</sup> the plaintiff filed a discrimination claim based on disability against Advanced Urology Institute of Georgia (AUI).<sup>340</sup> The plaintiff had been deaf since birth and communicated primarily through American Sign Language (ASL). When securing a urology appointment at AUI, the plaintiff requested an interpreter at her appointment. Missy Sherling, the Vice President of Clinical Strategy, called the plaintiff back and assured her that AUI found a "certified" interpreter. AUI hired this interpreter after a call center employee named Samantha Fazzolare mentioned she had a friend who knew ASL. The interpreter, however, was not certified, only had three years of high school classes, and described his skills as "intermediate."<sup>341</sup> The plaintiff later sued AUI, arguing it intentionally discriminated against her in violation of the Rehabilitation Act and the Patient Protection and Affordable Care Act.<sup>342</sup> Sherling testified that Fazzolare, the call center employee, had informed her that the interpreter was qualified. The United States District Court for the Northern District of Georgia granted summary judgment for AUI, finding that the plaintiff failed to show deliberate indifference, and the plaintiff appealed.<sup>343</sup>

On appeal, the plaintiff argued that Fazzolare's statement to Sherling was inadmissible hearsay.<sup>344</sup> The Eleventh Circuit disagreed, reasoning that the relevance of Sherling's testimony was "in her state of mind regarding [the interpreter's] qualification, not in the substance of

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336. *Id.*

337. FED. R. EVID. 803.

338. FED. R. EVID. 803(3).

339. No. 21-10106, 2021 U.S. App. LEXIS 24467 (11th Cir. Aug. 17, 2021).

340. *Id.* at \*1.

341. *Id.* at \*2–3.

342. *Id.* at \*3.

343. *Id.* at \*6.

344. *Id.* at \*4.

her conversation with Fazzolare.”<sup>345</sup> The court therefore affirmed the district court’s grant of summary judgment.<sup>346</sup>

Second, in *Okwan v. Emory Healthcare*,<sup>347</sup> Dr. Derick Okwan, a black male born in Ghana, was a resident in the oncology residency program at Emory University’s School of Medicine. Due to poor performance, Dr. Okwan was dismissed from the program. Dr. Okwan later sued Emory, asserting claims of race and national-origin discrimination under Title VII and claims of race discrimination under section 1981.<sup>348</sup> Following discovery, Emory moved for summary judgment, which the United States District Court for the Northern District of Georgia granted.<sup>349</sup>

On appeal, Dr. Okwan argued that the district court erred in considering declarations by various Emory faculty members for purposes of summary judgment.<sup>350</sup> He argued that the declarations were out-of-court statements and therefore inadmissible hearsay.<sup>351</sup> The Eleventh Circuit affirmed the district court’s grant of summary judgment, reasoning that the alleged hearsay statements were not offered for the truth of the matter asserted, but instead were offered to demonstrate the declarants’ state of mind.<sup>352</sup>

The Emory faculty members who provided declarations did so to explain why the members of the [Clinical Compensation Committee] concluded that Dr. Okwan’s residency contract should not be renewed. That is, the declarations were offered to show that the [Clinical Compensation Committee’s] decision was motivated by Dr. Okwan’s consistently poor performance in his residency program, *not* racial or national origin bias.<sup>353</sup>

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345. *Id.* at \*7 n.2.

346. *Id.* at \*7.

347. No. 20-11467, 2021 U.S. App. LEXIS 27092 (11th Cir. Sept. 9, 2021).

348. *Id.* at \*1.

349. *Id.*

350. *Id.* at \*2.

351. *Id.*

352. *Id.* at \*9 n.9.

353. *Id.* (alteration in original).