Evidence

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I. INTRODUCTION

Although the 2010 term of the United States Court of Appeals for the Eleventh Circuit had its share of controversial cases,[1] the court's evidentiary rulings were few in number and moderate in scope. As it has in recent years, the court relied heavily on unpublished decisions to resolve cases without creating binding precedent; thus there were no major alterations to the law of evidence requiring practitioners to run to the nearest volume of the Federal Reporter. As explained in previous iterations of this Survey,[2] the court cautions that its "[u]npublished opinions are not considered binding precedent."[3] As a result,

> The court generally does not cite to its "unpublished" opinions . . . [although it] may cite to them where they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case.[4]

The court did, however, continue to refine its treatment of character evidence, the Confrontation Clause,[5] and the reliability prong of the

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1. *See*, *e.g.*, United States v. Irey, 612 F.3d 1160 (11th Cir. 2010) (en banc) (a child pornography case that produced two concurrences and three separate dissents).

2. For analysis of Eleventh Circuit evidence law during the prior survey period, see Marc T. Treadwell, *Evidence*, *2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1113 (2010).

3. 11TH CIR. R. 36-2.

4. FED. R. APP. P. 36, 11TH CIR. I.O.P. 7.

5. U.S. CONST. amend. VI.

Daubert v. Merrell Dow Pharmaceuticals, Inc.[6] three-part test for admitting expert testimony. This Survey will provide a brief précis on these cases and illustrate the major evidentiary trends in the Eleventh Circuit in 2010.

II. ARTICLE IV RELEVANCY

Federal Rule of Evidence 404[7] is the gatekeeping rule for character evidence and evidence of "crimes, wrongs, or acts" other than the conduct that gave rise to the instant litigation.[8] Rule 404 is designed to ensure that a jury's deliberations will be based only on the evidence presented to it and not skewed by the good or bad character or prior conduct of a party or a witness.[9] Thus, evidence of a person's character traits is inadmissible to show that the person acted according to those traits in the case at hand.[10] Similarly, "extrinsic act evidence"-evidence that a party or witness acted wrongly or rightly on a previous occasion-is not admissible to prove that the person acted the same way in a given situation.[11] Despite these limits, Rule 404 has such significant exceptions that much extrinsic evidence is admissible; for example, evidence showing knowledge or motive is admissible for those purposes, although not to show that a defendant acted in conformity with prior behavior.[12]

The court continued to rely heavily on Rule 404(b) in its decisions but frequently with only a brief recitation of the Rule's requirements. For the most part, the court's approach to extrinsic evidence is settled, and judges rarely take the time to explain the theoretical underpinnings of Rule 404(b) within their decisions.

One set of circumstances that recurred in a number of cases before the court in 2010 was the use of extrinsic evidence that is "inextricably

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6. 509 U.S. 579 (1993).
7. FED. R. EVID. 404.
8. *Id.* Rule 404(b) states the following:
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
9. *See* FED. R. EVID. 404 Advisory Committee's Note.
10. FED. R. EVID. 404(a).
11. FED. R. EVID. 404(b).
12. *Id.*

intertwined" with a charged offense. Although Rule 404(b) does not include an exception for outside evidence that is inextricably intertwined, this has long been an exception to the general rule of exclusion. For example, in *United States v. Ellisor,*[13] the court characterized "inextricably intertwined" evidence as something of an emanation from the listed exceptions in Rule 404(b), noting that such evidence "pertain[s] to the chain of events explaining the context, motive and set-up of the crime, . . . [if it] is necessary to complete the story of the crime for the jury."[14]

Intertwined evidence was the critical issue in *United States v. Lewis*.[15] The defendant, Lewis, was indicted for cocaine conspiracy and attempted possession arising out of an undercover drug bust operation in South Florida in 2007. A confidential informant contacted two of the codefendants about selling two expensive automobiles in exchange for drugs. One of the codefendants, Jeree Grey, testified about this sale and Lewis's role in starting a cocaine distribution organization in 2006 with Grey and another codefendant, Carlos Spratt. Grey testified that Lewis would transport cocaine from Atlanta, Georgia, to Birmingham, Alabama, where the cocaine would be divided between the three of them. Grey also testified that he received a call from Spratt in late 2007 regarding the transaction at issue, and that Lewis later convinced him to trade the vehicles.[16]

When Lewis argued that evidence of the cocaine conspiracy was prejudicial and irrelevant to the charged offense, the United States District Court for the Southern District of Florida disagreed, and the Eleventh Circuit held that there was no abuse of discretion in that choice.[17] The panel reitereated its prior holding that when a cooperating witness testifies about previous uncharged drug offenses that are inextricably intertwined with evidence of the charged offense, the testimony is admissible as intrinsic evidence.[18] In the present case, Grey's testimony concerning his prior narcotics dealings with Lewis provided context for the jury and explained why Lewis and Spratt attempted to involve Grey in the current drug deal.[19] Because the prior trafficking conduct was "linked closely in time as well as circumstance

13. 522 F.3d 1255 (11th Cir. 2008).

14. *Id.* at 1269 (quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).

15. 373 F. App'x 930 (11th Cir. 2010) (per curiam).

16. *Id.* at 932.

17. *Id.* at 931-32.

18. *Id.* at 932.

19. *Id.*

to the instant offenses," there was no abuse of discretion in admitting the conduct to provide the jury a full understanding of the charged crime.[20] Thus, Rule 404 is not applicable because intertwined evidence is intrinsic and goes to the actual charged offense.[21]

In *United States v. McNair*,[22] the court swiftly disposed of the defendant's arguments that extrinsic evidence was improperly admitted, offering a litany of Rule 404(b) exceptions.[23] The defendant, McNair, was one of several Jefferson County, Alabama, commissioners who took bribes from contractors in exchange for securing highly lucrative sewage-repair contracts.[24] During the trials of the various commissioners, the United States District Court for the Northern District of Alabama admitted evidence of the bribes taken by the other commissioners.[25] On appeal the Eleventh Circuit concluded that this evidence was admissible under any one of the Rule 404(b) exceptions.[26] First, the court explained that evidence of the other bribes was inextricably intertwined with the bribes taken in each individual case.[27] Second, even if the evidence was not intertwined, the evidence would be admissible to show the intent of the conspirators because the contractors' arguments that they gave money out of friendship or goodwill could be rebutted by showing that they gave money to other commissioners as well.[28] Finally, the evidence of other bribes could show a common plan or motive, yet another Rule 404(b) exception.[29] With a brief statement that there was no merit to the defendants' argument that the prejudice of this extrinsic evidence outweighed its probative value, the court noted that the district court had properly given limiting instructions for the Rule 404(b) evidence, refuted each of defendants' contentions, and concluded that there had been no abuse of discretion.[30]

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20. *Id.*
21. *See id.*; *see also* United States v. Valere, 388 F. App'x 922, 927-28 (11th Cir. 2010) (discussing inextricably intertwined evidence and Rule 404(b)); United States v. Garcia-Barzaga, 361 F. App'x 109, 114 (11th Cir. 2010) (discussing inextricably intertwined evidence and Rule 404(b)).
22. 605 F.3d 1152 (11th Cir. 2010).
23. *Id.* at 1203-06.
24. *Id.* at 1164-65.
25. *Id.* at 1203.
26. *Id.*
27. *Id.* at 1203-04.
28. *Id.* at 1204.
29. *Id.*
30. *Id.* at 1204-06 & n.72.

In *United States v. Park*,[31] a confidential informant testified about his prior drug dealings with the defendant and his coconspirators.[32] The court recognized that evidence of crimes other than those charged is generally not admissible under Rule 404(b).[33] Such evidence is admissible, however, "if (1) [it] is relevant to an issue other than the defendant's character, (2) the act is established by sufficient proof to permit a jury to find the defendant committed the extrinsic act, and (3) the probative value of the evidence is not substantially outweighed by its undue prejudice."[34]

The court observed that "Rule 404(b) does not apply where the evidence concerns the context, motive, and set-up of the crime, or forms an integral and natural account of the crime, or is necessary to complete the story of the crime for the jury."[35] The court stated, however, that under Rule 403[36] "[s]uch 'inextricably intertwined' evidence may be excluded . . . if its probative value is substantially outweighed by the danger of unfair prejudice."[37] Furthermore, "[t]he balance under Rule 403 should be struck in favor of admissibility."[38]

Next, the court determined that the Southern District of Florida did not abuse its discretion by admitting the confidential informant's testimony regarding their prior drug dealing because it gave context to the crime and "was inextricably intertwined with the evidence of the conspiracy."[39] The district court properly admitted evidence of the defendant's subsequent cocaine possession because, by maintaining that he had not conspired to possess cocaine with an intent to distribute, the defendant placed his intent at issue.[40] The fact that he later possessed cocaine was relevant to his motive and intent in his interactions with his coconspirators.[41]

The probative value versus prejudicial effect balancing test is critical but not always dispositive of whether the district court abused its discretion. Despite the potential for prejudice, the admission of extrinsic evidence will not defeat a conviction when the evidence of guilt is

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31. 386 F. App'x 965 (11th Cir. 2010).
32. *Id.* at 968.
33. *Id.*
34. *Id*.
35. *Id*.
36. FED. R. EVID. 403.
37. *Park*, 386 F. App'x at 968.
38. *Id.*
39. *Id.*
40. *Id.* at 968-69.
41. *Id.* at 969.

"overwhelming" or even merely "substantial."[42] This principle appears with clarity in *United States v. Darling*.[43] Brenda Darling was convicted of fraudulently endorsing and passing U.S. Treasury checks. At trial, a number of Darling's former coworkers testified about her questionable dealings, including passing checks to unauthorized people, forced endorsements, and hurried, whispered conversations among the coconspirators. Those very coconspirators testified against Darling, corroborating much of the other evidence and explaining the nature of their conspiracy.[44]

On appeal, Darling argued that the Southern District of Florida had erroneously admitted evidence showing that the bank had investigated her and found irregularities in records of bank accounts belonging to her family members.[45] Although the Eleventh Circuit noted that it was not certain whether this evidence was inextricably intertwined with the evidence of fraud, the court relied on the oft-used "harmless error" doctrine and concluded that the rest of the evidence amassed at trial was more than enough to justify Darling's conviction.[46] Given the substantial evidence of guilt presented at trial, the admission of extrinsic evidence that was not inextricably intertwined or subject to another 404(b) exception was insufficient grounds for reversal.[47]

III. HEARSAY AND THE CONFRONTATION CLAUSE

The hearsay rule,[48] its exceptions,[49] and its interplay with the Confrontation Clause of the Sixth Amendment[50] are some of the most convoluted elements of evidence law. Though the rule is simple-out of court statements are inadmissible to prove the truth of the matter asserted[51]-there are seemingly endless permutations as to when and how the rule applies. Given the relative brevity of the Federal Rules of Evidence, the twenty-three separate hearsay exceptions listed in Federal

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42. *See* United States v. Hersh, 297 F.3d 1233, 1254 n.31 (11th Cir. 2002) (holding that any error was harmless considering overwhelming evidence of guilt); United States v. Hubert, 138 F.3d 912, 914 (11th Cir. 1998) (holding that when evidence of guilt is substantial, error is harmless).

43. 396 F. App'x 607 (11th Cir. 2010).

44. *Id.* at 608-10.

45. *Id.* at 614.

46. *Id.* at 615.

47. *See id.*; *see also Hubert*, 138 F.3d at 914.

48. FED. R. EVID. 802.

49. FED. R. EVID. 803, 804.

50. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id*.

51. *See* FED. R. EVID. 801-802.

Rule of Evidence 803 are testament themselves to the importance of controlling hearsay in federal courts. Furthermore, the scholarship on the contentious debates surrounding the scope of the Confrontation Clause are some indication of the stakes involved in admitting statements from any person who is not testifying live in the courtroom.[52]

Put briefly, the Confrontation Clause guarantees criminal defendants the opportunity to "confront" and question the witnesses brought forth by the government.[53] "Testimonial" hearsay evidence is barred unless the declarant is unavailable, and the defendant had a prior opportunity to cross-examine the declarant.[54] "Testimonial" statements are usually "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact."[55] These statements can include "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[56]

Since the Supreme Court of the United States' decision in *Crawford v. Washington*[57] seven years ago, the Eleventh Circuit, understandably, has had to grapple with a number of hearsay and Confrontation Clause cases.[58] Somewhat more surprisingly, the court has had to explain the hearsay rule and its exceptions and exclusions. The year 2010 was no exception-both the Confrontation Clause and the hearsay rules received substantial attention from the court. In fact, these cases were among the most significant evidence rulings of the year.

In *United States v. Green*,[59] Messiah Green contested his twenty-year sentence for armed robbery and possession of a firearm during a crime of violence. One critical part of the case against Green was the cell phone tower location information derived from his phone and his cell phone records on the day the robbery was committed. The Government

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52. *See, e.g.*, Todd E. Pettys, *Counsel and Confrontation*, 94 MINN. L. REV. 201 (2009) (outlining the Supreme Court's fractious and changing approach to the Confrontation Clause).

53. U.S. CONST. amend. VI.

54. Crawford v. Washington, 541 U.S. 36, 68 (2004).

55. *Id.* at 51.

56. *Id.*

57. 541 U.S. 36 (2004).

58. *See, e.g.*, United States v. Williams, 526 F.3d 1312, 1319 (11th Cir. 2008) (discussing the Confrontation Clause and the right to cross-examination, particularly of the government's "star" witness); United States v. Brown, 441 F.3d 1330, 1358-61, 1362 n.12 (11th Cir. 2006) (discussing the interplay between the hearsay rule and the Confrontation Clause, as well as the Supreme Court's ruling in *Crawford*).

59. No. 10-10300, 2010 WL 3401485 (11th Cir. Aug. 31, 2010).

presented the data supplied by Metro PCS, Green's cell phone carrier, and the United States District Court for the Northern District of Georgia denied Green's objection.[60]

On appeal, Green argued that the tower locations and the cell records used against him violated his Sixth Amendment Confrontation Clause rights, asserting he had a right to cross-examine an employee of Metro PCS at his trial.[61] The Eleventh Circuit explained the testimonial-evidence rule stated in *Crawford* and noted that the Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*[62] expanded the testimonial statement definition to include affidavits containing forensic analysis results of seized substances.[63] The Supreme Court had reasoned that the sole purpose of these affidavits "was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance," and the circumstances under which the statements were made would lead a reasonable witness to understand that the statements may be used at a trial.[64]

When the Supreme Court dismissed the claim that such affidavits were admissible as business records, the Court explained that because business records are created by an entity for the administration of its affairs rather than for proving or establishing facts at trial, the records are typically not testimonial.[65] Accordingly, the Eleventh Circuit noted it had previously held that for purposes of the Sixth Amendment, non-testimonial documents include those that are routinely prepared for purposes other than a criminal trial.[66]

Applying this interpretation of *Crawford*, there was only one possible outcome. The Eleventh Circuit concluded that Green's phone records and tower location information were non-testimonial and, therefore, admissible under Rule 803(6)[67] as business records.[68] In addition, Metro PCS created the records for business administration purposes rather than for proving a fact at trial; therefore, they were non-testimonal and Green's constitutional right was not violated when the district court admitted the records into evidence.[69] The decision in

60. *Id.* at *1.
61. *Id.*
62. 129 S. Ct. 2527 (2009).
63. *Green*, 2010 WL 3401485, at *1 (citing *Melendez-Diaz*, 129 S. Ct. at 2532).
64. *Id.* (quoting *Melendez-Diaz*, 129 S. Ct. at 2532) (internal quotation marks omitted).
65. *Id.* at *1-2 (quoting *Melendez-Diaz*, 129 S. Ct. at 2539-40).
66. *Id.* at *2 (citing United States v. Caraballo, 595 F.3d 1214, 1226-29 (11th Cir. 2010)).
67. FED. R. EVID. 803(6).
68. *Green*, 2010 WL 3401485, at *2.
69. *Id.*

Green demonstrates that, in light of *Melendez-Diaz*, criminal defendants will face a higher burden of showing that many regularly prepared documents are inadmissible or violative of the Confrontation Clause.[70]

The Eleventh Circuit also considered the Confrontation Clause and its interplay with Rule 403 in *Childers v. Floyd*.[71] In *Childers*, the State argued that the defendant, a county commissioner, paid Willie Junior, also a county commissioner, for the purpose of securing Junior's vote in favor of Escambia County's (County) purchasing a local soccer complex from Joe Elliott. In return, Elliott allegedly gave monetary kickbacks to Childers and Junior after the County bought the property.[72]

After striking a plea bargain with the State, Junior provided evidence about Childers's and Elliott's participation in the bribes and related kickbacks. After Elliott was acquitted, Junior provided additional details to his story. Among other things, Junior changed his initial statement that there had only been an implicit understanding that he and Childers would receive $100,000 in kickbacks; the new testimony was that Childers had explicitly said there would be payments. The State then moved to revoke Junior's plea agreement, arguing that the new details showed that Junior had not testified truthfully in the Elliot trial, but the trial court refused to grant the motion.[73]

At Childers's trial, the court refused to allow Childers's counsel to cross-examine Junior about the State's attempt to revoke the plea agreement for the purpose of probing Junior's bias or motive to embellish his story "because, among other reasons, under [Florida's version of Rule 403], 'the prejudice would outweigh any probative value.'"[74] Instead, the cross-examination covered the multiple, changing iterations of Junior's testimony, leaving out the fact that the State believed its star witness had been untruthful in his prior testimony.[75] The jury convicted Childers of bribery and unlawful compensation.[76]

Childers sought habeas relief, contending that the trial court violated his right to confront Junior by limiting "his cross-examination of Junior solely to avoid 'unfair prejudice' to the State."[77] The magistrate judge, and later the district judge for the United States District Court for the

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70. *See generally* United States v. Fernandez, 392 F. App'x 743, 745-47 (11th Cir. 2010) (describing the business records rule and the requirement that a custodian authenticate the record).

71. 608 F.3d 776 (11th Cir. 2010), *reversed en banc* 625 F.3d 1319 (11th Cir. 2010).

72. *Id.* at 780.

73. *Id.* at 780-81.

74. *Id.* at 781-82.

75. *Id.* at 783, 793.

76. *Id.* at 787.

77. *Id.* at 788.

Northern District of Florida, disagreed.[78] After conducting a de novo review of Childers's Confrontation Clause arguments (which had not been raised in state court), the magistrate judge explained that the testimony excluded at trial would not have affected the jury's impression of Junior's credibility and therefore did not constitute a violation of the Confrontation Clause.[79]

On appeal Judge Barzilay, visiting from the United States Court of International Trade, concluded that Childers was entitled to a writ of habeas corpus.[80] Judge Barkett concurred.[81] The Court reasoned that the trial court impermissibly limited Childers's right to cross-examine the State's star witness regarding Junior's perceptions as to how Elliott's acquittal affected his plea bargain and how the notice to revoke his plea agreement affected Junior's state of mind.[82] The court noted that, contrary to the assertions made by the dissent, the Confrontation Clause violation was not coextensive with Florida Rule of Evidence 403.[83] Instead, the court concluded that the limited nature of Childers's cross-examination of Junior stripped the questioning of context and prevented the jury from hearing crucial information about why Junior changed his testimony.[84] This limitation severely impaired Childers's efforts to expose Junior's possible motivations for changing his previous testimony to implicate Childers and violated Childers's constitutional rights.[85]

Judge Tjoflat, in his dissent, argued that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[86] insulated the trial court's Rule 403 decisions to limit the cross-examination from federal review.[87] Because the ruling was, in Judge Tjoflat's opinion, a straightforward evidentiary decision by a trial court, there was no appropriate federal claim for the court of appeals to consider.[88] Judge Tjoflat maintained that there could be no violation of the Confrontation Clause if the trial court had not abused its discretion in excluding the evidence under Florida Rule of Evidence 403: "it is clear that the Confrontation Clause in the cross-examination context does not preclude the operation

78. *Id.*
79. *Id.*
80. *Id.* at 779-80 & n.*.
81. *Id.* at 794 (Barkett, J., concurring).
82. *Id.* at 791-92 (majority opinion).
83. *Id.* at 789 n.6; *see also* FLA. STAT. § 90.403 (2010).
84. *Id.* at 792.
85. *Id.* at 793.
86. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered section of 8, 18, 22, 28, & 42 U.S.C.).
87. *Childers*, 608 F.3d at 795 (Tjoflat, J., dissenting).
88. *Id.* at 808.

of Florida 403 as written or the Florida practice of committing Florida 403 rulings to the trial judge's discretion."[89] Accordingly, in the exercise of discretion by a trial court, nothing about Rule 403 violates the right of confrontation.[90] Other members of the Eleventh Circuit apparently agreed with Judge Tjoflat: after a poll, the court voted to rehear the case en banc.[91] The en banc court concluded that there had been no violation of the Sixth Amendment.[92] "[C]learly established law says only that trial courts cannot bar *all* cross-examination into a witness's possible biases."[93] Judge Tjoflat, writing for the court and echoing his dissent, explained that "Childers's attorneys were clearly able to probe Junior's biases regarding the plea agreement . . . [and] Childers's jury learned about Junior's motive to lie."[94] As such, the court concluded that the state court's decision was not an unreasonable application federal law. And, because the court did not confront "facts that are materially indistinguishable from" Supreme Court precedents, its decision was not contrary to clearly established federal caselaw.[95] Accordingly, the court of appeals changed course, and concluded that Floyd was not entitled to habeas relief.[96]

The court reached a less controversial conclusion on the Confrontation Clause in *United States v. Jones*[97] (or at least a decision not requiring full review by the Court sitting en banc). Deon Jones was indicted on four counts of possessing a firearm and ammunition.[98] The United States District Court for the Southern District of Georgia allowed the prosecution to show the jury a video of an interrogation of Kelly Bigham during her testimony at trial.[99] The video depicted Bigham "inform[ing] the detective that she had sold a .38 revolver to Mr. Jones. . . . [and] describ[ing] how she and Mr. Jones drove to a nice area of town, where Mr. Jones shot a white man."[100]

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89. *Id.* at 804.
90. *Id.*
91. *See Childers*, 625 F.3d at 1319-20 (ordering rehearing en banc).
92. Childers v. Floyd, No. 08-15590, slip op. at 48 (11th Cir. June 4, 2011).
93. *See id.* at 35-43 (outlining federal caselaw demonstrating that limitations on cross-examination are routinely upheld).
94. *Id.*
95. *Id.*
96. *Id.* at 55.
97. 601 F.3d 1247 (11th Cir. 2010).
98. *Id.* at 1253.
99. *Id.* at 1261.
100. *Id.* at 1253.

Jones objected to the showing of the videotape, contending that it was hearsay and that it violated the Confrontation Clause.[101] The district court disagreed, deciding that the video was a past recollection recorded and admissible under Rule 803(5),[102] and there was no Sixth Amendment violation. During its deliberations, the jury requested a second viewing of the video, which was granted, again over the defendant's objection.[103] The jury convicted Jones and he appealed.[104] The Eleventh Circuit divided its review of Jones's claims in two parts, addressing first the Rule 803(5) argument and then the Confrontation Clause argument.[105]

Rule 803(5) requires that the witness once had knowledge of a matter but presently has insufficient memory "to testify fully and accurately."[106] When Bigham testified, she made several statements suggesting that "she lacked [a] 'clear and distinct recollection in [her] response to the question[s]' regarding the subject matter of her interview with [the d]etective."[107] Bigham explained that she could not remember crucial details, such as selling the defendant a firearm or the defendant making any remarks about the gun.[108] After showing her the video, the prosecutor asked if she recalled anything more, to which Bigham replied, "I remember what was just said;" Bigham further "responded that she could recall 'some' of the relevant events."[109] The Eleventh Circuit concluded that the district court had not abused its discretion in permitting the use of the video.[110]

The Eleventh Circuit went on to detail the manner in which a witness authenticates past recollection.[111] The court explained that in addition to a proper refreshing of memory, Rule 803(5) requires that "[t]he witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase

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101. *Id.* at 1261.
102. FED. R. EVID. 803(5).
103. *Jones*, 601 F.3d at 1261.
104. *Id.* at 1254.
105. *Id.* at 1262-63.
106. FED. R. EVID. 803(5).
107. *Jones*, 601 F.3d at 1262 (second and third alterations in original) (quoting NLRB v. Hudson Pulp & Paper Corp., 273 F.2d 660, 665 (5th Cir. 1960)). All decisions handed down by the former Fifth Circuit before October 1, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).
108. *Jones*, 601 F.3d at 1262.
109. *Id.*
110. *Id.* at 1263.
111. *Id.* at 1262.

requires the witness to affirm that he knew it to be true at the time."[112] Although the prosecution's efforts to secure such a statement from Bigham were "lackluster," they were enough to meet the standards of Rule 803(5).[113] Bigham testified that it was easier for her to remember her interaction with Jones when the video was made than during the trial and that her statements in the video were true.[114] At the very least, Bigham indicated that the video was an accurate record of her statements by saying "that's me talking [i]n the video."[115]

The court then turned to the defendant's claim that admission of Bigham's videotaped statement violated his rights under the Confrontation Clause.[116] The court quickly dispatched his argument, "emphasiz-[ing] that 'a primary interest secured by [the Confrontation Clause] is the right of cross-examination.'"[117] The Sixth Amendment's protection, however, is only for "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[118] Cross-examination typically consists of placing a witness "on the stand, under oath, and [having the witness] respond[] willingly to questions."[119]

The court explained that Jones's Sixth Amendment right to confront witnesses was not violated because Bigham was subject to unrestrained cross-examination while present at trial.[120] Additionally, Bigham

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112. *Id.* (quoting Lopez v. United States, 373 U.S. 427, 448 n.1 (1963)).

113. *Id.* at 1263.

114. *Id.* at 1262. In her own words, "If that was what was said then, that's what I remember then, what was just in the video." *Id.* (internal quotation marks omitted).

115. *Id.* (internal quotation marks omitted). Jones also asserted that the district court erred by allowing the jury to view the video of Ms. Bigham a second time during their deliberations. *Id.* at 1263-64. Jones argued that the second viewing was, in effect, an admission of the video into evidence as an exhibit, and that Rule 803(5) forbids such admissions. *Id.* at 1264; *see also* FED. R. EVID. 803(5) ("If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."). The court assumed that the viewing was error, but "this non-constitutional error was . . . harmless." *Jones*, 601 F.3d at 1264. As with so many of its evidentiary decisions, the Court determined that, "[i]n light of all the evidence available to the jury, we can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed" nor were Jones's substantial rights affected. *Id.* (internal quotation marks omitted).

116. *Jones*, 601 F.3d at 1263.

117. *Id.* (alteration in original) (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

118. *Id.* (emphasis omitted) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)) (internal quotation marks omitted).

119. *Id.* (quoting United States v. Owens, 484 U.S. 554, 555 (1988)) (internal quotation marks omitted).

120. *Id.*

answered Jones's questions while under oath and before a jury that was able to analyze Bigham's credibility as to the statements on the video and her testimony.[121] The court explained that neither confirmation nor specific guarantees of trustworthiness are required when a hearsay declarant is exposed to unobstructed cross-examination and is present at trial.[122] Furthermore, the constitutional requirements are met by the jury's evaluation of the witness's behavior, the protections of cross-examination, and the oath.[123]

Although the Confrontation Clause was not addressed, the Eleventh Circuit dealt with hearsay in *United States v. Belfast*.[124] At first glance, *Belfast* seems more like a law school final exam than an actual case given the complicated legal questions it presents. The numerous hearsay issues in *Belfast*, however, were more than an academic exercise; the court affirmed a ninety-seven-year prison term for Roy Belfast, the son of deposed Liberian autocrat Charles Taylor.[125] In Judge Marcus's words, "[t]he facts of this case are riddled with extraordinary cruelty and evil."[126]

The defendant alleged that the Southern District of Florida abused its discretion by admitting, pursuant to Rule 801(d)(1),[127] several out-of-court hearsay statements by Kpadeh and Dulleh, two of his torture victims, which explained Belfast's commission of the alleged acts.[128] Rule 801(d)(1) provides that "[a] statement is not hearsay if . . . [t]he declarant testifies at . . . trial . . . and is subject to cross-examination concerning the statement, . . . the statement is consistent with the declarant's testimony," and the statement "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."[129]

The court determined that under both Rules 801(d)(1)(B) and 803(2)[130] Dulleh's prior consistent statements were admissible.[131] The court noted that Dulleh's prior consistent statements had been used to rebut Belfast's implication that Dulleh had the motive to fabri-

121. *Id.*
122. *Id.*
123. *Id.* (quoting United States v. Owens, 484 U.S. 554, 560 (1988)).
124. 611 F.3d 783 (11th Cir. 2010).
125. *Id.* at 793.
126. *Id.*
127. FED. R. EVID. 801(d)(1).
128. *Belfast*, 611 F.3d at 816.
129. FED. R. EVID. 801(d)(1).
130. FED. R. EVID. 803(2).
131. *Belfast*, 611 F.3d at 817.

cate.[132] Dulleh's statements were thus admissible under Rule 801(d)(1)(B) because the statements were made before the alleged motive arose.[133] The court also established that Dulleh's prior consistent statements, made four to five hours after he was assaulted, were admissible as excited utterances under Rule 803(2),[134] which permits the admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[135] Belfast argued that the time lapse was too long, but the court held that the district court had not abused its discretion in deciding that when Dulleh told other prisoners about the torture he endured, the stress of excitement was still on him.[136]

Belfast further alleged that it was an abuse of discretion for the district court to admit, under Rule 803(4),[137] parts of the victims' medical records.[138] Belfast first objected to Kpadeh's recorded statement that he was tortured and imprisoned for two months, which was given to a medical professional.[139] The court determined that this statement was admissible under Rule 801(d)(1)(B) as a prior consistent statement.[140] Belfast next argued that it was an abuse of discretion for the district court to refuse to redact terms such as "abuse" and "torture" in the victims' medical records.[141] The court observed, however, that Rule 803(4) allows statements regarding medical treatment and diagnosis to be admissible hearsay.[142]

Belfast also argued that the district court abused its discretion by admitting the testimony of one of his former soldiers.[143] The Eleventh Circuit determined that the testimony was admissible under Rule 801(d)(2)(C)[144] as an admission by a party-opponent.[145] In particular, the statements at issue concerned the same matter for which Belfast had employed the soldier.[146] The testimony was therefore "a statement by

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132. *Id.*
133. *Id.*
134. *Id.* at 817-18.
135. FED. R. EVID. 803(2); *see also Belfast*, 611 F.3d at 817.
136. *Belfast*, 611 F.3d at 818.
137. FED. R. EVID. 803(4).
138. *Belfast*, 611 F.3d at 818.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 818-19; *see also* FED. R. EVID. 803(4).
143. *Belfast*, 611 F.3d at 820.
144. FED. R. EVID. 801(d)(2)(C).
145. *Belfast*, 611 F.3d at 820.
146. *Id.*

a person authorized by the party to make a statement concerning the subject" and admissible hearsay.[147]

Finally, Belfast posited that the admission of the testimony of a United States Department of State official regarding the general political environment of Liberia was an abuse of discretion by the district court.[148] The Eleventh Circuit determined that under Rule 803(20),[149] this testimony was admissible as hearsay regarding "the [r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located."[150] The court further reasoned that this testimony was necessary to educate the jury.[151] Thus, despite an incredibly convoluted record, the Eleventh Circuit concluded that the district court had not abused its discretion in admitting the various out of court statements used against Belfast and affirmed the conviction.[152]

IV. DAUBERT RELIABILITY

As was the case in previous versions of this Survey, the role of federal courts as gatekeepers for expert testimony received significant attention from the Eleventh Circuit in 2010. A brief review of the applicable standard, as explained in Federal Rule of Evidence 702[153] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[154] provides some context. *Daubert* makes district judges "gatekeepers," charged with ensuring that speculative, unreliable expert testimony does not reach the jury.[155] District courts must ensure that, whether based on professional studies or personal experience, an expert's testimony utilizes the same level of "intellectual rigor" used by experts in the field.[156]

Rule 702 governs the admission of expert testimony in federal court and provides that expert testimony is admissible "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of

147. *Id.* (internal quotation marks omitted); *see also* FED. R. EVID. 801(d)(2)(C).
148. *Belfast*, 611 F.3d at 821.
149. FED. R. EVID. 803(20).
150. *Belfast*, 611 F.3d at 821 (alteration in original) (internal quotation marks omitted); *see also* FED. R. EVID. 803(20).
151. *Belfast*, 611 F.3d at 821.
152. *Id.* at 820-21, 828.
153. FED. R. EVID. 702.
154. 509 U.S. 579 (1993).
155. *Id.* at 597.
156. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[157]

The Eleventh Circuit has interpreted Rule 702 and *Daubert* as permitting expert testimony that meets three requirements.[158] First, the expert must be qualified to competently testify concerning the matter the expert plans to address.[159] Second, the methodology used by the expert must be reliable as determined by a *Daubert* inquiry.[160] Third, the expert's testimony must assist the trier of fact in understanding the evidence or determining issues of fact.[161]

The decision in *Hendrix v. Evenflo Co.*[162] lays out the court's approach to *Daubert* reliability. Hendrix, the plaintiff, sued Evenflo Co., the defendant manufacturer of a child's car seat, after the device allegedly malfunctioned during a car accident. The car seat became dislodged when Hendrix's SUV was struck by another vehicle; her fifteen-day-old son was injured in the crash. Although both parties agreed that the child suffered a closed-head injury, they disputed its severity. By the time the child was eighteen months old, he began to exhibit signs of developmental disorders and was eventually diagnosed with autism-spectrum disorder (ASD). His physician, Dr. Suhrbier, also discovered a cyst-called a syringomyelia-on the child's spinal cord.[163]

Hendrix's experts, Dr. Suhrbier and Dr. Hoffman, concluded that the child's ASD and the syringomyelia were caused by injuries he sustained in the accident. Evenflo moved to exclude any testimony from Dr. Suhrbier or Dr. Hoffman, asserting that there was no reliable scientific basis for the experts' opinions.[164] The Northern District of Florida agreed that Hendrix's experts could not demonstrate a reliable basis for their conclusion that the accident had caused the child's ASD and granted partial summary judgment to Evenflo on that issue.[165] The district court, however, ruled that it would permit the experts' testimony with respect to the cause of the syringomyelia. Instead of proceeding to litigate liability with regard to the cause of the syringomyelia injury, Hendrix opted to dismiss with prejudice and appealed the district court's *Daubert* ruling on her experts' opinions as to the cause of the ASD.[166]

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157. FED. R. EVID. 702.
158. City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998).
159. *Id.*
160. *Id.*
161. *Id.*
162. 609 F.3d 1183 (11th Cir. 2010).
163. *Id.* at 1186-88.
164. *Id.* at 1188.
165. *Id.* at 1190.
166. *Id.* at 1190-91.

On appeal the Eleventh Circuit concluded that the district court had not abused its discretion.[167] The court conducted a step-by-step explanation of how and when expert testimony can be admitted, as well as how a district court should frame its inquiries.[168] Hendrix argued that the district court had preliminarily made the wrong inquiry.[169] Specifically, Hendrix suggested that the district court should not have asked the experts if they established whether ASD can be caused by traumatic brain injury. Instead, the inquiry should have included whether the particular neurologic deficits that led to the ASD diagnosis could have resulted from traumatic brain injury.[170] Hendrix asserted that such an inquiry was necessary because ASD was recognized and diagnosed based on its underlying impairments.[171] When the Eleventh Circuit examined the record below to determine precisely what the experts' opinions were, the court discerned that while both Dr. Surhbier and Dr. Hoffman had referred to the child's underlying impairments, the doctors opined only that the trauma was responsible for causing his ASD taken as a whole.[172] Consequently, the court held that Hendrix failed to actually bring this issue before the district court.[173]

The court then turned its attention to the reliability of Hendrix's experts' opinions and explained that courts can only admit scientific evidence in its present state due to resources, time, and information.[174] Courts are advised not to admit inference, conjecture, or speculation, that sound scientific principles cannot support.[175] Citing *Daubert* and Eleventh Circuit precedent, the court noted that absent sufficient underlying evidence, the court may "conclude that there is simply too great an analytical gap between the data and the opinion proffered" and reject profferred testimony.[176]

Hendrix's experts relied on "differential etiology" to reach their conclusions, which is a method that eliminates unlikely or impossible

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167. *Id.* at 1203.
168. *Id.* at 1193-95, 1202-03.
169. *Id.* at 1191.
170. *Id.* at 1191-92.
171. *Id.* at 1192.
172. *Id.* at 1192-93.
173. *Id.*
174. *Id.* at 1193-94 (quoting Rider v. Sandoz Pharm. Corp., 295 F.3d 1194, 1202 (11th Cir. 2002)).
175. *Id.* at 1194 (quoting Rider v. Sandoz Pharm. Corp., 295 F.3d 1194, 1202 (11th Cir. 2002)).
176. *Id.* (quoting Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)) (internal quotation marks omitted).

causes of a disease or disorder to determine the most likely cause.[177] The Court has previously acknowledged that the differential etiology method can establish a sound basis for opinions of medical causation when used under reliable circumstances.[178] Even so, the court delved into the evidence presented to the district court and pointed out that differential etiologies require experts to engage in the following two-step process: (1) "compil[ing] a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration," meaning that the expert must demonstrate general causation, and (2) ruling out all causes but one or showing specific causation.[179]

The court concluded that neither expert could provide reliable proof of general causation.[180] For example, "Dr. Hoffman fail[ed] to show how, by scientifically valid methodology, traumatic brain injury could ever be a possible cause of autism in anyone."[181] Dr. Hoffman relied on medical textbooks and epidemiological studies to demonstrate that brain trauma can cause ASD.[182] Rather than examining each of the sources relied upon in the district court, the Eleventh Circuit focused on the medical studies Hendrix emphasized on appeal.[183] In examining those sources, the court did not find a single instance where the literature demonstrated a causal link between trauma and ASD.[184] Without this connection in any of his sources, Dr. Hoffman could not show a reliable basis for "ruling-in" brain trauma as a cause of ASD and thereby failed to show general causation.[185] Because Dr. Hoffman had not ruled-in brain trauma as a cause of ASD, the court had no need to discuss his

177. *Id.* at 1194-95.

178. *Id.* at 1195.

179. *Id.* at 1195, 1197 (internal quotation marks omitted).

180. *See id.* at 1201, 1203.

181. *Id.* at 1198 (alteration in original) (quoting Hendrix v. Evenflo Co., 255 F.R.D. 568, 598 (N.D. Fla. 2009)) (internal quotation marks omitted).

182. *Id.*

183. *Id.* at 1199.

184. *See id.* at 1199-1202. For instance, the court examined an article cited by Dr. Hoffman that discussed traumatic brain injury in children. *Id.* at 1200. Although the article associated trauma with neurologic impairments, it drew an important distinction between inflicted trauma (such as "shaken baby syndrome") and unintentional trauma (such as the car accident at issue in *Hendrix*). *Id.* The article explained that while one child in that study did develop ASD after suffering trauma, the child also "had significant exposure to alcohol in utero." *Id.* Another of Dr. Hoffman's sources, a textbook, did not link traumatic brain injuries to ASD but instead only "provide[d] some support for the idea that even minor injuries sustained by newborn brains can result in more severe neurologic impairments than one would expect from the initial extent of the injury." *Id.* at 1201.

185. *Id.* at 1201.

attempts at specific causation and determined that the district court had not abused its discretion in excluding his testimony.[186]

Dr. Suhrbier's evidence was even less reliable than Dr. Hoffman's because Dr. Suhrbier failed to provide evidence to establish general causation between ASD and traumatic brain injury.[187] In the light of these unsubstantiated assertions, the court found no difficulty in affirming the district court's conclusion that the experts' opinions were unreliable under *Daubert*.[188]

Hendrix is instructive for several reasons. First, the case demonstrates the extent to which federal courts are obliged to assess the scientific basis for expert testimony, even to the point of federal judges developing some expertise themselves.[189] The case also illustrates that novel or unsubstantiated theories (like trauma-induced ASD) are not fit for federal courts: "The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it."[190] Second, the court's opinion shows that unless experts performing differential diagnoses can show both general and specific causation supported by reliable medical literature, their testimony is little more than unfounded conjecture and is therefore rightly excluded.[191] Finally, the *Hendrix* decision directs district courts to be vigorous in ascertaining reliability, urging them to remember that "[m]erely demonstrating that an expert has experience . . . does not automatically render every opinion and statement by that expert reliable."[192]

In *Kilpatrick v. Breg, Inc*.,[193] just a few weeks after issuing the opinion in *Hendrix*, the court once again offered an extensive explanation of *Daubert* reliability. *Kilpatrick* was a products liability case, centered on a pain pump manufactured by Breg, Inc., the defendent, which released a steady stream of anesthetic directly into a targeted area of the body-the shoulder in the plaintiff Kilpatrick's case. Kilpatrick's sole expert, Dr. Poehling, testified that the use of Breg's pain pump caused glenohumeral chondrolysis-the dissolution of cartilage-in Kilpatrick's shoulder joint. Breg moved to exclude Dr. Poehling's testimony and for summary judgment on the grounds that Kilpatrick failed to prove both

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186. *Id.* at 1202.

187. *Id.* at 1203.

188. *Id.*

189. *See id.* at 1199-1201 (discussing scientific literature on head trauma and its physiological effects on the brain).

190. *Id.* at 1203 (quoting Rider v. Sandoz Pharm. Corp., 295 F.3d 1194, 1202 (11th Cir. 2002)) (internal quotation marks omitted).

191. *See id.* at 1195, 1201.

192. *Id.*

193. 613 F.3d 1329 (11th Cir. 2010).

general and specific causation. The Southern District of Florida agreed, excluded Dr. Poehling's testimony, and entered judgment in favor of Breg.[194]

On appeal, Kilpatrick argued that because Dr. Poehling's methods-reviewing the "differential diagnosis" methodology and medical literature-used to reach his determinations were not new or novel, the district court should not have assessed the reliability of Dr. Poehling's methods, the district court should have only focused on whether Dr. Poehling was qualified to give expert testimony.[195] The Eleventh Circuit flatly rejected this argument, stating that "[s]uch an approach goes against the law of this Circuit, which has reversed trial courts who abdicate their gatekeeper role and refuse to assess reliability."[196] Instead, the court explained that it was necessary and entirely proper for the district court to scrutinize Dr. Poehling's methods and the reliability of his sources.[197] To hold differently would induce courts to "rubber stamp the opinions of expert witnesses," after the witness is proven an expert.[198]

The court then itself examined the reliability of the medical literature and differential diagnosis methodology Dr. Poehling used to arrive at his conclusions.[199] As the court explained in *Hendrix*, differential diagnoses require an expert to demonstrate a causal chain between an injury or event and the alleged injury in a given case, both in terms of general and specific causation.[200]

Upon reviewing the literature, the Eleventh Circuit, like the district court, determined that it was neither extensive nor corroborative enough to render reliable Dr. Poehling's conclusion that the use of pain pumps can cause glenohumeral chondrolysis generally.[201] Dr. Poehling had conducted no tests himself, none of the articles he relied upon were based on epidemiological studies, only one of the articles was a comparative study that included patients who had undergone surgery similar to Kilpatrick's, and no article reached a conclusion as to the general cause of glenohumeral chondrolysis.[202] The court emphasized

194. *Id.* at 1333-34.
195. *Id.* at 1336.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 1337-40.
200. 609 F.3d at 1189.
201. *Kilpatrick*, 613 F.3d at 1337.
202. *Id.* at 1336-37.

that the lack of testing and corroborative epidemiological tests made establishing general causation more difficult but not fatal.[203]

After further examination of each of the studies upon which Dr. Poehling relied, the court observed that the studies lacked "statistical context," were valuable only for studying injuries in rabbits, or were inconclusive.[204] The court also specifically noted that none of the articles took into account the background risk for glenohumeral chondrolysis, finding that Dr. Poehling's failure to consider this factor "placed the reliability of [his] conclusions in further doubt."[205]

The court also examined the reliability of Dr. Poehling's specific causation conclusion that Berg's pain pump had caused Kilpatrick's chondrolysis.[206] The court stated that "Dr. Poehling could point to nothing other than the . . . temporal relationship between Kilpatrick's initial surgery and his chondrolysis" and that "[s]uch specific causation testimony has been found to be inherently unreliable in this Circuit."[207] Instead, the court explained that an expert conducting a differential diagnosis must compile a comprehensive list of all possible causes of the disease at issue and then systematically and scientifically rule out causes until only one suspected cause remains.[208] Because Dr. Poehling testified "he could not explain why potentially unknown, or idiopathic alternative causes were not ruled out" and because he "admitted that neither he nor anyone else in the medical community 'understands the physiological process by which [chondrolysis] develops and what factors cause the process to occur,'" the court found that "the key foundation for applying differential diagnosis was missing."[209] Given the total lack of evidence supporting a causal link between the pain pump and destruction of cartilage generally or specifically in Kilpatrick's case, the court concluded that there was no abuse of discretion and affirmed.[210]

The court concluded by noting the relatively restrictive nature of its *Daubert* reliability jurisprudence and by emphasizing the importance of the abuse of discretion standard.[211] As the court explained, "We are

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203. *Id.*
204. *Id.* at 1337-40.
205. *Id.* at 1342.
206. *Id.* at 1342-43.
207. *Id.* at 1342.
208. *Id.*
209. *Id.* at 1343 (alteration in original).
210. *Id.* The court noted that meeting the burden of proving general and specific causation required the use of expert testimony. *Id.* at 1334 n.4.
211. *Id.* at 1341, 1343-44 (quoting United States v. Brown, 415 F.3d 1257, 1268 (11th Cir. 2005)) ("'[T]he heavy thumb-really a thumb and a finger or two-that is put on the

aware that courts in other circuits have taken a more expansive approach and permitted expert testimony in similar situations."[212] Regardless of what other courts consider appropriate, *Hendrix* and *Kilpatrick* demonstrate that the Eleventh Circuit is exacting when it comes to reliable scientific opinions and that the strong deference to district judges as *Daubert* gatekeepers is not easily overcome.

district court's side of the scale,' the court concludes that it was not an abuse of discretion to exclude the expert opinion of Dr. Poehling in this case.").

212. *Id.* at 1343.