Evidence

**by W. Randall Bassett*
Geoffrey M. Drake**
and Madison H. Kitchens*****

I. INTRODUCTION

The 2011 term of the United States Court of Appeals for the Eleventh Circuit did not signal any new trends in the interpretation and application of the Federal Rules of Evidence,[1] which comes as no surprise given that the Rules have been in effect since 1975.[2] The 2011 term, however, did include a case of first impression for the court and several cases applying well-established law to new and unique factual scenarios. Several of these cases resulted in unpublished opinions bearing no precedential weight but, nevertheless, offering guidance to the practitioner in future cases.[3]

While the admissibility of hearsay testimony was not the subject of any groundbreaking decisions this past year, arguably the year's biggest evidence blockbuster concerned the Confrontation Clause,[4] in which the en banc court construed a defendant's right to probe a witness's bias. The court addressed the admissibility of lay opinion testimony under

* Partner in the firm of King & Spalding LLP, Atlanta, Georgia. The Citadel (B.S., 1989); University of Georgia School of Law (J.D., cum laude, 1992).

** Associate in the firm of King & Spalding LLP, Atlanta, Georgia. University of Virginia (B.A., 2002); Vanderbilt University Law School (J.D., 2005).

*** Associate in the firm of King & Spalding LLP, Atlanta, Georgia. Duke University (B.A., magna cum laude, 2004); Harvard Law School (J.D., cum laude, 2010).

1. For analysis of Eleventh Circuit evidence law during the prior survey period, see W. Randall Bassett & Susan M. Clare, *Evidence, Eleventh Circuit Survey*, 62 MERCER L. REV. 1163 (2011).

2. *See* Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

3. *See* 11TH CIR. APP. P. 36-2, 11TH CIR. I.O.P. 7.

4. U.S. CONST. amend. VI.

Rule 701[5] in several cases, including two involving convictions for materially aiding terrorist plots, two involving mortgage fraud, and one involving the testimony of a plaintiff's physicians in a product liability action. Although issues relating to the admissibility of expert opinion testimony under Rule 702[6] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[7] were less prominent on the circuit's docket than in years past, the court did address such issues in two tort cases. As always, Rule 403's[8] balancing of probative value and potential prejudice was a frequent source of dispute in cases before the Eleventh Circuit this past year. Less commonly invoked evidentiary rules, ranging from authentication requirements to juror misconduct, also consumed the court's attention in 2011, particularly in two high-profile cases involving a former Alabama governor and actor Wesley Snipes.

Notably, last year also witnessed a restyling of the Federal Rules of Evidence, which became effective on December 1, 2011.[9] The purpose of the restyling was "to make the rules clearer and easier to read, without changing substantive meaning."[10] In other words, the Amendments should not impact Supreme Court and Eleventh Circuit precedents, though time will tell whether changed wording leads to changed interpretations.

II. PROSECUTORIAL MISCONDUCT: IMPROPER QUESTIONING

This year's Survey begins by examining an interesting case of first impression, one requiring the court to pass judgment on a persuasive line of prosecutorial questioning: so-called "were-they-lying" questions. The defendant in *United States v. Schmitz*[11] was convicted of mail fraud and federal-funds theft after she allegedly "abused her position as state legislator to obtain employment" with a federally funded program for at-risk youths.[12] On appeal, defendant Suzanne Schmitz contended

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5. FED. R. EVID. 701.
6. FED. R. EVID. 702.
7. 509 U.S. 579 (1993).
8. FED. R. EVID. 403.
9. *See* Letter from John G. Roberts to John A. Boehner & Joseph R. Biden, Jr. (Apr. 26, 2011), *available at* http://federalevidence.com/pdf/2011/04-Apr/FRE.Restyling.4-26-11SCT.pdf. Pursuant to the Rules Enabling Act, the Supreme Court traditionally promulgates the Federal Rules of Evidence. *See* 28 U.S.C. § 2072 (2006), *as enacted by* Pub. L. No. 100-702, 102 Stat. 4648 (1988).
10. Report of the Judicial Conference, Committee on Rules of Practice and Procedure 27 (Sept. 2010), *available at* http://federalevidence.com/downloads/Restyle_Rules/2010-09-Standing.Committee.Report.to.the.Judicial.Conference.September.2010.pdf.
11. 634 F.3d 1247 (11th Cir. 2011).
12. *Id*. at 1251.

that, during her cross-examination, the prosecution impermissibly demanded her to opine on the truthfulness of previous witnesses. Specifically, when Schmitz attempted to explain various discrepancies between her testimony and the testimony provided by a dozen other witnesses, the prosecutor asked her whether the other witnesses had lied.[13] The prosecutor later referred to this line of questioning in closing arguments, suggesting to the jury the improbability that the defendant was the only person telling the truth in the face of numerous contradicting accounts.[14]

The Eleventh Circuit concluded that the district court erred in allowing the prosecutor to pose the "were-they-lying" questions.[15] Although acknowledging that Federal Rule of Evidence 608(a)[16] permits a witness to testify about another witness's *general reputation* for truthfulness or dishonesty,[17] the court stated that the rule does not allow a witness to declare that another witness is lying in a *particular instance*.[18] The court further pronounced that "were-they-lying questions have little or no probative value because they seek an answer beyond the personal knowledge of the witness," in contravention of Rule 602.[19] Moreover, the court concluded that such questions run afoul of

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13. The court provided a representative example:

> Q. (by the prosecutor:) [L]et's get a list going of everybody you say is lying, okay? Seth Hammett. He's a liar?
>
> A. I said I–what I answered was my answer is different from his. I never called him a liar.
>
> Q. Did he tell the truth when he said that you came to him and asked him to put money in the budget to fund your job?
>
> A. No, he did not.
>
> Q. He lied?
>
> A. I never used the word "lie."
>
> Q. Why not?
>
> A. I just don't like the word.
>
> Q. So he didn't tell the truth. Does that make you feel better?

Id. at 1267 (alteration in original).

14. *Id*. at 1267-68.

15. *Id*. at 1268.

16. FED. R. EVID. 608(a).

17. *Id.* Rule 608(a) provides: "A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." *Id.*

18. *Schmitz*, 634 F.3d at 1268.

19. *Id*. Rule 602 provides, in relevant part, that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602.

Rule 401's[20] relevancy requirement[21] because "one witness's opinion that another person has or has not lied does not make it more or less likely that the person actually lied."[22]

The court articulated other prudential concerns militating against the admission of were-they-lying questions. For example, the court declared that "were-they-lying questions invade the province of the jury, as credibility determinations are to be made by the jury, not the testifying witness."[23] In addition, such questions put testifying defendants in a "no-win situation," in which "[t]he defendant must either accuse another witness of lying or undermine his or her own version of events."[24] Although this might constitute an effective prosecutorial strategy, it may also mask alternative explanations for testimonial inconsistencies, such as "lapses in memory, differences in perception, or a genuine misunderstanding."[25]

Lastly, the court characterized were-they-lying questions as argumentative because "often their primary purpose is to make the defendant appear accusatory."[26] It is often immaterial how the defendant responds, the court suggested, because the prosecutor has already achieved the "predominate purpose" of "mak[ing] the defendant look bad."[27] In clearly denouncing these types of questions by prosecutors in criminal cases, the court did not suggest whether the same reasoning would lead the court to the same decision in a civil case.

Although the Eleventh Circuit held that "it is improper to ask a testifying defendant whether another witness is lying," it nevertheless

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20. FED. R. EVID. 401.

21. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *Id.*

22. *Schmitz*, 634 F.3d at 1269.

23. *Id*.

24. *Id*.

25. *Id*. In this regard, other courts have distinguished were-they-lying questions from similar questions that ask the defendant to appraise another witness's veracity. *See* United States v. Gaines, 170 F.3d 72, 81-82 (1st Cir. 1999) (stating that prosecutor can permissibly ask defendant if another witness is "'wrong,'" so long as he avoids using "the 'L' word"); United States v. Gaind, 31 F.3d 73, 77 (2d Cir. 1994) ("Asking a witness whether a previous witness who gave conflicting testimony is 'mistaken' highlights the objective conflict without requiring the witness to condemn the prior witness as a purveyor of deliberate falsehood, i.e., a 'liar.'").

26. *Schmitz*, 634 F.3d at 1269.

27. *Id*. Notably, the court did not discount the possibility that were-they-lying questions might be appropriate in other contexts, such as when a defendant has already opened the door to such line of questioning "'by testifying on direct that another witness was lying.'" *Id*. at 1270 (quoting United States v. Harris, 471 F.3d 507, 512 (3d Cir. 2006)).

denied Schmitz's evidentiary challenge.[28] Because Schmitz's counsel did not object to the were-they-lying questions at trial, or the prosecution's related comments in closing argument, the court analyzed Schmitz's challenge under the plain error standard of review.[29] The court noted that, even though the weight of authority from other circuits suggested the impropriety of were-they-lying questions,[30] neither the Eleventh Circuit nor the United States Supreme Court had previously ruled on the issue.[31] Accordingly, the court held that the district court did not commit plain error.[32]

III. THE CONFRONTATION CLAUSE

Just as a criminal defendant may be prejudiced when a court allows improper questioning, a defendant's rights may also be violated when a court permits too *little* questioning. The Sixth Amendment to the United States Constitution provides that the accused in a criminal prosecution "shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[33] To enable the effective exercise of this right, the Confrontation Clause[34] mandates that a defendant be afforded the opportunity to probe a witness's bias or motivation to lie. Courts have struggled to

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28. *Id*. at 1268, 1271.

29. *Id*. at 1268.

30. *Id.*; *see, e.g.*, United States v. Harris, 471 F.3d 507, 511 (3d Cir. 2006) (holding that "asking one witness whether another is lying is inappropriate" because "[s]uch questions invade the province of the jury and force a witness to testify as to something he cannot know, i.e., whether another is intentionally seeking to mislead the tribunal"); United States v. Thomas, 453 F.3d 838, 846 (7th Cir. 2006) (citation omitted) ("Because the evaluation of witness credibility is the province of the jury, it is improper to ask one witness to comment on the veracity of the testimony of another witness.") (internal quotation marks omitted); United States v. Williams, 343 F.3d 423, 438 (5th Cir. 2003) (characterizing were-they-lying questions as "inappropriate"); United States v. Sanchez, 176 F.3d 1214, 1219-20 (9th Cir. 1999) (concluding prosecutor utilized improper cross-examination tactic by forcing defendant to call U.S. marshal a liar); United States v. Boyd, 54 F.3d 868, 871 (D.C. Cir. 1995) ("[I]t is . . . error for a prosecutor to induce a witness to testify that another witness, and in particular a government agent, has lied on the stand."); United States v. Akitoye, 923 F.2d 221, 224 (1st Cir. 1991) ("It is not the place of one witness to draw conclusions about, or cast aspersions upon, another witness'[s] veracity. The 'was-the-witness-lying' question framed by the prosecutor in this case was of that stripe. It should never have been posed . . . .") (citations omitted); United States v. Richter, 826 F.2d 206, 209 (2d Cir. 1987) (stating that "prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying").

31. *Schmitz*, 634 F.3d at 1271.

32. *Id*.

33. U.S. CONST. amend. VI.

34. *Id.*

find an appropriate balance between this constitutional requirement and the gate-keeping function of the Federal Rules of Evidence.

The Supreme Court has declared that a defendant establishes a Confrontation Clause violation when "[a] reasonable jury might have received a significantly different impression" of a witness's credibility if a prohibited line of questioning had been permitted.[35] At the same time, the Supreme Court has been mindful of countervailing evidentiary concerns, including a trial court's authority "to impose reasonable limits on such cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant."[36] The Eleventh Circuit recently sought to clarify the contours of these opposing principles in *Childers v. Floyd*.[37] Sitting en banc, the court vacated a prior panel's broad reading of the Confrontation Clause, opting instead for an expansive interpretation of a trial court's inherent discretion to place limits on cross-examination.[38]

As discussed in last year's Survey,[39] defendant Wyon Dale Childers was a Florida county commissioner convicted of bribery.[40] At trial, Childers's counsel sought to impeach the testimony of the prosecution's key witness, Willie Junior, a fellow county commissioner whom Childers allegedly bribed for his vote to approve the purchase of a soccer complex.[41] Junior had earlier entered into a plea agreement that granted him partial immunity in exchange for his testimony. In a prior trial, Junior testified against Joe Elliot, the soccer complex owner who had allegedly arranged the kickback payments.[42] After Elliot's acquittal, and with Childers's trial pending, Junior augmented his testimony with additional details he had not previously provided.[43] In light of these revisions, the government sought to revoke its plea agreement, which required Junior to provide truthful and complete

35. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

36. *Id*. at 679.

37. 642 F.3d 953 (11th Cir. 2011) (en banc).

38. *Id*. at 966, 977-78.

39. Last year's Survey primarily addressed the panel opinion in *Childers*. *See* W. Randall Bassett & Susan M. Clare, *Evidence, Eleventh Circuit Survey*, 62 MERCER L. REV. 1163, 1171-73 (2011). In this year's Survey, we chiefly concentrate our discussion on the Eleventh Circuit's en banc opinion.

40. *Childers*, 642 F.3d at 958.

41. *Id*. at 958, 960-61.

42. *Id*. at 958.

43. *Id*. at 958-59. The court cited four ways in which Junior altered his testimony between trials. These alterations likely raised the prospects of conviction because, according to Junior's revised account, the bribe's terms had been expressly articulated by Childers (not merely implied, as per Junior's prior testimony). *Id*.

statements. After the trial court declined its request for revocation, the prosecution filed a motion in limine to prevent the introduction of Elliot's acquittal into evidence in Childers's case. The trial court ruled that evidence relating to the acquittal and subsequent plea revocation attempt were inadmissible. Childers was ultimately convicted by a jury and sentenced to forty-two months in jail.[44]

After exhausting his state court appeals, Childers sought federal habeas relief, challenging his conviction on Confrontation Clause grounds.[45] The federal district court denied the habeas petition,[46] but an Eleventh Circuit panel reversed, holding that "the trial court's restrictions of Junior's cross-examination substantively frustrated [Childers's] attempts to expose Junior's potential motivations for altering his prior testimony"–motivations which "lie at the heart of" a defendant's confrontation rights.[47] After a poll, the Eleventh Circuit agreed to hear the issue en banc.[48]

Reviewing the state court's adjudication through the deferential lens of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[49] the en banc court concluded that the state court's exclusion of the evidence was not contrary to, or an unreasonable application of, the Supreme Court's Confrontation Clause precedents.[50] In so holding, the

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44. *Id*. at 959-63.

45. *Id.* at 965.

46. *See* Childers v. Floyd, No. 3:07cv243, 2008 WL 2945555, at *1-2 (N.D. Fla. July 24, 2008) (magistrate judge's report and recommendation denying habeas petition); Childers v. Floyd, No. 3:07cv243, 2008 WL 4371322, at *1 (N.D. Fla. Sept. 19, 2008) (district court order adopting magistrate judge's report and recommendation).

47. *See* Childers v. Floyd, 608 F.3d 776, 793 (11th Cir. 2010), *vacated by* Childers v. Floyd, 625 F.3d 1319 (11th Cir. 2010) (en banc).

48. *Childers*, 625 F.3d at 1320.

49. Pub L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered tits. of the U.S.C.). AEDPA places significant constraints on a federal court's ability to grant habeas relief to prisoners held in state custody. Most notably, AEDPA provides that a federal court shall not grant habeas relief on "any claim that was adjudicated on the merits in State court proceedings" unless the state court's decision was (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2006).

A threshold issue on appeal concerned whether AEDPA deference was even required. *See Childers*, 642 F.3d at 967-71. The Eleventh Circuit's resolution of this issue is beyond the scope of this Survey. We note merely that the precedential impact of *Childers* may be limited by the habeas posture of the case. A future court facing a similar fact pattern on *direct review* might accord less deference–without necessarily violating circuit precedent–to a trial court's restrictions on a defendant's cross-examination.

50. *Childers*, 642 F.3d at 977.

court examined three Supreme Court cases–*Davis v. Alaska*,[51] *Delaware v. Van Arsdall*,[52] and *Olden v. Kentucky*[53]–which analyzed the extent to which trial courts may bar cross-examination into a witness's possible biases without violating a defendant's confrontation rights.[54] According to the Eleventh Circuit's interpretation, these Supreme Court cases collectively established two "rules": (1) "trial courts may not prohibit all questioning into witnesses' biases"; and (2) "trial courts have wide discretion to limit cross-examination when they have allowed the defendant to expose some evidence of bias."[55] So long as the Florida District Court of Appeal did not flout these rules in upholding Childers's conviction, he was not entitled to habeas relief.

The en banc majority observed that, although the jury never learned about Elliot's acquittal or the prosecution's plea revocation attempt, the trial judge permitted Childers's counsel to cross-examine Junior about other aspects of his alleged bias.[56] For instance, the jury was apprised of the terms of Junior's plea agreement and the substantial reduction in potential sentence he received for his testimony.[57] Furthermore, the jury heard testimonial evidence about the inconsistencies between Junior's prior statements and his embellished account at trial.[58] Because the jury was aware of at least some aspects of Junior's possible motive to lie, the court concluded that Childers's case was readily distinguishable from *Davis*, *Van Arsdall*, and *Olden*, in which the trial courts had completely barred cross-examination into a witness's bias.[59]

Nevertheless, Childers contended that the Elliot acquittal and the attempted plea revocation constituted separate sources of bias distinct from the bias created by the plea agreement itself.[60] The Florida District Court of Appeal had concluded that the attempted revocation and the acquittal were inextricably linked to the plea agreement. As a result, all three effectively expressed the same bias and were not independent sources of bias for separate points of cross-examination.[61] The Eleventh Circuit majority acknowledged that a trial court cannot withstand a Confrontation Clause challenge by permitting cross-

51. 415 U.S. 308 (1974).
52. 475 U.S. 673 (1986).
53. 488 U.S. 227 (1988) (per curiam).
54. *Childers*, 642 F.3d at 973.
55. *Id*. at 975.
56. *Id*. at 977.
57. *Id*.
58. *Id*.
59. *See id*. at 975.
60. *Id*. at 977.
61. *Id.* at 978.

examination into one source of bias while foreclosing all inquiry into a separate source.[62] However, because Supreme Court precedent did not define a source of bias, the Florida court had license under AEDPA to adopt its own reasonable interpretation.[63] Accordingly, the court agreed with the Florida court's reasoning.[64]

Judge Barkett's dissenting opinion[65]–joined by Judge Martin–examined the Confrontation Clause issue de novo because she disagreed with the majority's holding that the case warranted AEDPA deference.[66] According to Judge Barkett, the trial court impermissibly limited the scope of Childers's cross-examination.[67] In her view, jurors could have reached markedly different credibility assessments had they been exposed to the excluded evidence: "Believing that a witness has now recalled additional facts, or even generally favors one side, leaves a jury with a much less damaged and different impression than if the jury believed that the witness was motivated to intentionally fabricate specific pieces of incriminating evidence."[68] The dissent also accused the majority of misconstruing the holdings of *Davis*, *Van Arsdall*, and *Olden* as dicta.[69] The dissent surmised that, under the majority's reading of Supreme Court precedent, trial courts could adopt overly malleable definitions of bias in which wholly disparate motives would all qualify as the "same general bias."[70] This resulted in a "much too cramped view" of the Confrontation Clause.[71]

IV. OPINION TESTIMONY

Although most witness testimony involves the recital of facts and narratives, the Federal Rules of Evidence also permit "opinion testimony" from both lay and expert witnesses.[72] Federal Rule 701[73] requires

62. *Id*. at 977-78 (citing United States v. Lankford, 955 F.2d 1545, 1549 (11th Cir. 1992)).
63. *Id*. at 978.
64. *Id.*
65. *Id*. at 988 (Barkett, J., dissenting). Judge Wilson filed a concurring opinion in which he objected to the majority's "overbroad" articulation of AEDPA's "adjudication on the merits" requirement, but agreed that the trial court's restriction on cross-examination did not violate the Confrontation Clause. *See id.* at 980-88 (Wilson, J., concurring).
66. *See id*. at 988-92 (Barkett, J., dissenting) (discussing AEDPA issue).
67. *Id*. at 993.
68. *Id*.
69. *Id*. at 994.
70. *Id*. at 994-95.
71. *Id*. at 995.
72. *See* FED. R. EVID. 701.
73. FED. R. EVID. 701.

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."[74] In essence, Rule 701 requires a party to navigate between presenting testimony so specialized that it qualifies as expert testimony and presenting testimony so lacking in observational substance as to invade the province of the jury.

This precarious balance was well illustrated in 2011 in *United States v. Jayyousi*.[75] This high-profile case involved the appeals of alleged "dirty bomber" José Padilla and his two co-defendants, who were convicted of providing material support to terrorists. One of the more contentious issues in the case concerned whether testimony provided by the government's key witness, FBI Agent John Kavanaugh, was properly admitted as lay opinion testimony.[76] Agent Kavanaugh proffered his interpretations of alleged code words employed by the defendants to mask their terrorist plotting.[77] The defendants contended that Agent Kavanaugh's testimony violated Rule 701 because he was not present during the intercepted phone calls and, as a result, could not have formed a rationally based perception of their meanings. Instead, Agent Kavanaugh's testimony was based primarily on his review of wiretap summaries and transcripts that had been translated from Arabic into English–documents that were largely already admitted into evidence.[78]

In rejecting the defendants' arguments, the court declared that the Eleventh Circuit had "never held that a lay witness must be a participant or observer of a conversation to provide testimony about the meaning of coded language used in the conversation."[79] To the

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74. *Id*. In 2000, the Advisory Committee amended Rule 701 by adding subsection (c), intending "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." FED. R. EVID. 701 advisory committee's note (2000 amendment); *cf*. FED. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.").

75. 657 F.3d 1085 (11th Cir. 2011).

76. *Id*. at 1091-92.

77. *Id*. at 1095. Agent Kavanaugh testified that the defendants, who suspected their phone lines were being monitored, used words such as "tourism" to signify jihad, "students" to refer to the Taliban, and "the first area" to denote Afghanistan. *Id*.

78. *Id*. at 1101-02.

79. *Id*. at 1102.

contrary, the court had previously held that testimony was "rationally based on the perception of the witness" even in instances in which the witness did not himself create the documents or participate in the activity about which he testified.[80] In so holding, the court cited cases in which an FBI financial analyst reviewed and summarized financial documents[81] and in which a businessman examined the billing records of another company.[82]

The Eleventh Circuit also determined that Agent Kavanaugh's testimony satisfied the "helpfulness" prong of Rule 701(b).[83] According to the court, the testimony at issue added contextual understanding for the jury by connecting the code words to discrete acts of material support, including checks and wire transfers.[84] The court distinguished this case from *United States v. Cano*,[85] circuit precedent in which a testifying government agent interpreted the meaning of symbols used in a defendant's phone book.[86] In *Cano*, the Eleventh Circuit barred the testimony because the jury could have easily deciphered the code themselves. By contrast, Agent Kavanaugh's five-year investigation enabled him to reach inferences the jurors could not readily draw.[87]

Lastly, and importantly, Agent Kavanaugh limited the scope of his testimony to inferences that he developed during the Padilla investigation itself, not based on training he acquired over years in the field.[88] In the majority's estimation, this aspect rendered his testimony sufficiently removed from the type of technical, specialized knowledge that Rule 701(c) properly confines to expert testimony.

In a dissenting opinion, Judge Barkett did not dispute the majority's reasoning on this latter point.[89] Instead, she focused her criticism on subparts (a) and (b) of Rule 701, contending that Agent Kavanaugh's lay opinion testimony "was not based on firsthand knowledge" and "was merely the government's closing argument in disguise."[90] According to Judge Barkett, Agent Kavanaugh's testimony was not rationally based on his perception because he was neither "a personal participant in a conversation as an undercover agent" nor "a listener to a conversation

80. *Id*. (internal quotation marks omitted).
81. *See id*. (citing United States v. Hamaker, 455 F.3d 1316 (11th Cir. 2006)).
82. *See id*. (citing United States v. Gold, 743 F.2d 800 (11th Cir. 1984)).
83. *Id*. at 1103.
84. *Id*.
85. 289 F.3d 1354 (11th Cir. 2002).
86. *See Jayyousi*, 657 F.3d at 1103.
87. *Id*.
88. *Id*. at 1104.
89. *Id*. at 1120 (Barkett, J., dissenting).
90. *Id*. at 1119-20.

while observing a defendants' [sic] behavior in real time to coordinate the conversation with the conduct."[91]

Furthermore, Judge Barkett concluded that Agent Kavanaugh's testimony was not helpful within the meaning of Rule 701 because he "never explained what knowledge or perception he gained during the investigation that allowed him to interpret the conversations any better than the jury."[92] Instead, the dissent proclaimed that Agent Kavanaugh's testimony offered jurors little more than an exercise in "choosing up sides."[93]

Questions concerning the proper scope of lay opinion testimony were also at issue in *United States v. Augustin*,[94] another case involving defendants convicted of conspiring to provide material support to terrorists.[95] This time, however, the defendants complained that the district court had unduly *restricted* the testimony of a witness called upon to interpret jargon. The witness was a professor of Inner City Studies who had been immersed in Chicago's gang scene as a youth. As a consequence, he claimed a familiarity with its cultural and linguistic habits. The district court permitted the professor to comment on some subjects, such as his observations on gang attire or the fact that he had heard certain gang words used outside of gang contexts. Yet, the court precluded him from testifying on other assorted topics, predominately relating to the manner in which gang terminology had diffused to the wider popular culture of Chicago.[96] On appeal, the Eleventh Circuit held that the professor was properly permitted to speak only upon matters about which he had firsthand knowledge, concluding that the district court "carefully distinguished between proper lay testimony based on perception, and impermissible opinion testimony based on expertise."[97]

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91. *Id*. at 1123. Judge Barkett contrasted the case with *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001), where law enforcement officers testified that the defendants' references to a "fifteen year old girl" was code language signifying fifteen kilograms of cocaine. *Jayyousi*, 657 F.3d at 1123 (Barkett, J., dissenting). Unlike *Jayyousi*, the testifying officers in *Novaton* "conducted real-time video and foot surveillance of the several suspected drug conspirators, while simultaneously listening to their conversations." *Id*. Thus, they were able to confirm by first-hand observation that no fifteen-year-old girl was present. *Id*.

92. *Id*. at 1122.

93. *See id*. at 1125; FED. R. EVID. 701 advisory committee's note (1972 proposed rules).

94. 661 F.3d 1105 (11th Cir. 2011) (per curiam), *cert. denied*, Abraham v. United States, 2012 WL 1106877, 80 U.S.L.W. 3613 (Apr. 30, 2012).

95. *Id*. at 1110.

96. *Id*. at 1126-27.

97. *Id*. at 1127.

The Eleventh Circuit once again took a capacious view of lay opinion testimony in *United States v. Hill*.[98] The case concerned an alleged mortgage fraud scheme perpetrated by various defendants.[99] At trial, the government called numerous representatives of lending institutions, which had been allegedly defrauded by the defendants, to testify about how misrepresentations in a loan application would affect their approval decisions. One defendant objected to this line of questioning, arguing that the witnesses first needed to be qualified as experts in order to provide such testimony.[100] He asserted that "the ability to answer hypothetical questions is the essential difference between expert and lay witnesses."[101]

The court observed that "Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences."[102] Indeed, in amending Rule 701, the Advisory Committee expressly recognized a business officer's ability to testify as to the manner in which a company conducts its business, so long as the testimony is based on particularized knowledge acquired in the witness's corporate role.[103] The court pronounced that there was little indication that the testimony was presented for the purpose of evading *Daubert* reliability requirements because "it does not take any specialized or technical knowledge to realize that lending institutions would be reluctant to approve a loan application if they knew that it contained false statements about material facts."[104] Meanwhile, the court implied (without affirmatively stating) that the district court erred by admitting the testimony of witnesses who had no personal involvement with the lending transactions at issue.[105] Nevertheless, any error in such admission was harmless because that testimony was duplicative of

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98. 643 F.3d 807 (11th Cir. 2011), *cert. denied*, 2012 WL 1048563, 80 U.S.L.W. 3596 (Apr. 23, 2012).

99. *Id*. at 820-23.

100. *Id*. at 840.

101. *Id*. at 841 (quoting United States v. Henderson, 409 F.3d 1293, 1300 (11th Cir. 2005)).

102. *Id*.

103. *Id*.; *see also* FED. R. EVID. 701 advisory committee's note (2000 amendment) (citation omitted) ("[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.").

104. *Hill*, 643 F.3d at 842.

105. *Id*.

the testimony provided by financial representatives who *were* personally involved with similar transactions.[106]

The Eleventh Circuit reached a comparable conclusion in *United States v. Graham*,[107] which also involved a mortgage fraud scheme. This time, the witness in question was a former attorney who testified about fraudulent real estate loans based on his own prior participation in such schemes.[108] Once again, the court determined that the testimony was admissible lay opinion testimony because it concerned precisely the type of first-hand, experiential knowledge required by Rule 701.[109] The court did, however, hint that a more "general" question–in which the witness was asked about the definition of a real estate purchase option–potentially fell outside the ambit of Rule 701.[110] However, because the defendant himself invited this question, no reversible error occurred.[111]

Meanwhile, in the products liability case *Williams v. Mast Biosurgery USA, Inc.*,[112] the court considered the thin lines between expert testimony, lay opinion testimony, and testimony that is wholly inadmissible.[113] Plaintiff Wanda Williams underwent a laproscopic procedure to drain an ovarian cyst, which revealed dense adhesions stemming from a prior surgery. In a subsequent procedure to correct the problem, gynecologist Dr. Adcock inserted four pieces of SurgiWrap, a medical device produced by defendant Mast, into Williams's abdomen to prevent adhesions.[114]

Soon thereafter, Williams complained of a host of medical problems and was referred to gastroenterologist George Yared, who observed pieces of plastic in Williams's colon. Because Dr. Yared was unable to remove all of the plastic pieces, Williams was referred to Dr. Robert Brown, a general surgeon, who extracted the small plastic pieces and removed a damaged portion of the plaintiff's colon. A fourth doctor, pathologist Robert Nelms, examined and described the extracted plastic materials, though the foreign bodies were never subjected to testing in order to ascertain their composition or identity.[115]

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106. *Id*.
107. 643 F.3d 885 (11th Cir. 2011).
108. *Id*. at 896. In fact, the witness testified that he had previously engaged in fraudulent loaning practices for one of the defendant's co-conspirators. *Id*. at 897.
109. *Id*. at 898.
110. *Id*.
111. *Id*.
112. 644 F.3d 1312 (11th Cir. 2011).
113. *Id.* at 1313.
114. *Id*. at 1313-14.
115. *Id*. at 1314.

Williams sued Mast, alleging a manufacturing defect.[116] The district court significantly limited the testimony proffered by Williams's treating physicians[117] and permitted only the expert testimony of Dr. Yared that the foreign bodies he removed caused Williams's injuries.[118] The court declined to allow Dr. Yared to testify that SurgiWrap was the source of the foreign bodies, as he lacked foundation for this conclusion.[119] The court ultimately granted summary judgment in favor of Mast because Williams had produced no admissible evidence that the SurgiWrap was defective.[120]

On appeal, the Eleventh Circuit commented that "[t]he testimony of treating physicians presents special evidentiary problems that require great care and circumspection by the trial court."[121] This is particularly true when physician testimony may "purport to provide explanations of scientific and technical information not grounded in their own observations and technical experience."[122] Applying *United States v. Henderson*,[123] the court observed that the testimony of a treating physician may be admitted as lay opinion when it concerns personal observations regarding the doctor's decision-making process in treating the patient.[124] The court noted, however, that "when a treating physician's testimony is based on a hypothesis, not the experience of treating the patient, it crosses the line from lay to expert testimony, and it must comply with the requirements of Rule 702 and the strictures of *Daubert*."[125]

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116. *Id*.

117. *See id*. at 1315. Although the district court admitted as lay opinion testimony Dr. Adock's observations regarding his treatment of Williams, the court declined to admit his statements that the SurgiWrap had failed to dissolve as intended. According to the district court, Dr. Adcock lacked experience with either SurgiWrap or plastics generally, and had not reviewed medical literature or conducted tests. Furthermore, Dr. Brown's testimony constituted lay opinion, and he admitted he did not know what caused Williams's colon perforation. Lastly, while Dr. Nelms produced a report professing that the removed materials were SurgiWrap, he based this statement solely on the label of the sample provided to him and not based on his own verification of its composition. *Id*.

118. *Id*. According to the court, Dr. Yared performed a differential diagnosis, ruling out alternative causal factors until he was left with the opinion that foreign bodies caused the fistula. This constituted an established methodology for *Daubert* purposes. *Id*.

119. *Id*.

120. *Id*. at 1316. Though Dr. Adcock asserted that the product was defective, his testimony on this subject was barred. *Id*.

121. *Id*.

122. *Id*. at 1317.

123. 409 F.3d 1293 (11th Cir. 2005).

124. *Williams*, 644 F.3d at 1317.

125. *Id*. at 1317-18; *see also* FED. R. EVID. 702.

With this doctrinal understanding, the Eleventh Circuit assessed Williams's contention that the district court should have admitted as lay testimony the physician statements identifying the removed foreign substances as SurgiWrap.[126] The court determined, contrary to Williams's argument, that the *nature* of the substance did not impact the physicians' treating decisions.[127] Indeed, the physicians discarded the extracted pieces and never sought to identify their provenance. Rather, the physicians were concerned with the mere presence of the foreign substance and its possible health ramifications.[128]

The court also examined the only testimony in which a witness ascribed a defect to SurgiWrap: Dr. Adcock's statements that the device failed to perform as intended.[129] The Eleventh Circuit agreed with the district court that such an opinion was "outside the ken of a lay witness because it must be premised on scientific or other specialized knowledge."[130] Given that Williams produced no evidence that a manufacturing defect caused her injury, the Eleventh Circuit affirmed the district court's summary judgment ruling.[131]

As the *Williams* opinion makes clear, one of the hallmarks of expert testimony is the witness's ability to propose a hypothesis to jurors–a privilege denied to lay opinion witnesses. Because a hypothesis entails the attendant risk of error, courts seek to ensure that an expert witness arrives at the hypothesis by reliable methods that jurors may credit. To meet this objective, the Eleventh Circuit has adopted a "rigorous three-part inquiry" requiring courts to ensure the following: (1) the expert is qualified to testify competently on the subject matter; (2) the testimony helps the trier of fact to understand the evidence or determine a fact at issue, by applying scientific, technical, or specialized expertise; and (3) the methodology satisfies *Daubert*'s reliability criteria.[132] In examining a methodology's reliability, *Daubert* instructs courts to appraise various non-exhaustive factors, including the following: "(1) whether the expert's

126. *Williams*, 644 F.3d at 1318.
127. *Id*.
128. *Id*.
129. *Id*.
130. *Id*. The court did not read Williams's appeal as challenging the district court's *Daubert* analysis, and thus had no occasion to review those conclusions. *See id*. at 1318 n.5.
131. *Id*. at 1321.
132. United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (quoting City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998)). The proponents of the expert testimony bear the burden of proving each requirement by a preponderance of the evidence. *See* Hendrix *ex rel*. G.P. v. Evenflo Co., 609 F.3d 1183, 1194 (11th Cir. 2010).

theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community."[133] Although *Daubert* decisions were arguably overshadowed by lay opinion decisions in the Eleventh Circuit's 2011 term, two *Daubert* cases warrant a brief mention.

In *Sumner v. Biomet, Inc.*,[134] plaintiff Elizabeth Sumner was injured after undergoing a hip replacement surgery involving the installation of a hip prosthesis manufactured by defendant Biomet. In a post-operative appointment, x-rays revealed that particulate debris had surrounded the prosthesis. After experiencing severe pain, Sumner had the prosthesis removed and replaced. Sumner filed a strict liability claim against Biomet, claiming the hip prosthesis was defective.[135]

Sumner retained only one expert witness, Dr. Rex McLellan, a metallurgist. Dr. McLellan photographed the prosthesis, analyzed it under a scanning electron microscope, and used energy dispersive x-ray scans to map out its chemical composition. Dr. McLellan provided an expert report in which he detailed his theory that scratches and gouges on the ball of the hip prosthesis were caused by metal particles that had become dislodged or ejected from the hip prosthesis due to the uneven chemical composition of the metal.[136] At deposition, Dr. McLellan acknowledged that he had no confirmable explanation for how the metallic ejection occurred.[137] Dr. McLellan's theories largely corresponded with that of a defense expert, who testified that tungsten carbide may have caused the scratching and gouging on the prosthesis.[138] Unlike Dr. McLellan, however, the defense experts submitted that the tungsten resulted from a source external to the hip prosthesis, possibly introduced during surgical implantation.[139]

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133. McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir. 2002) (citing *Daubert*, 509 U.S. at 593-94).

134. 434 F. App'x 834 (11th Cir. 2011) (per curiam).

135. *Id*. at 835-36.

136. *Id*. at 836.

137. *Id*. at 837. Specifically, Dr. McLellan testified that he "d[id] not understand the basic micro-mechanism of how material is ejected or ablated" and could not identify how the ejections occurred "without doing experiments or . . . calculations, which would be incredibly difficult to do." *Id*. Although he opined that pressure applied to the prosthesis may have generated the ejections, he warned that this hypothesis was only "speculation." *Id*. (internal quotation marks omitted).

138. *Id*. at 838 n.3.

139. *Id*. Dr. McLellan, by contrast, concluded that the tungsten carbide must have derived from the manufacturing process because no evidence suggested it was introduced during surgery. *Id*. at 838.

The district court granted Biomet summary judgment after concluding that Sumner had failed to prove that Dr. McLellan used a reliable methodology to reach his conclusions.[140] On appeal, the Eleventh Circuit affirmed, declaring that the plaintiffs "provided no basis for assessing the reliability of Dr. McLellan's opinion"–a conclusion strengthened by the fact that Dr. McLellan's "exact opinion of the defect that caused the prosthesis to fail is itself difficult to ascertain from the record."[141] Turning to *Daubert*'s reliability factors, the court stated that Dr. McLellan's theory was "virtually incapable of being tested," as confirmed by his own testimony.[142] Moreover, Dr. McLellan could not identify publications or studies corroborating his theory that lack of chemical homogeneities can affect metal alloys and lead to particle dislodgement.[143] This also meant that Sumner failed to prove that the theory had been subjected to peer review.[144] In light of the apparent paucity of scientific studies, Sumner also failed to satisfy the third and fourth *Daubert* factors: the known or potential rate of error of the particular scientific technique and the theory's general acceptance in the scientific community.[145] The court also commented that the district court did not abuse its discretion by considering the fact that Dr. McLellan appeared to have developed his theory for purposes of the litigation.[146] He had never tested or published anything related to the theory, the court observed, and there was no evidence he developed the theory in research conducted separate from the litigation.[147]

Although courts must engage in a "rigorous three-part inquiry"[148] before admitting expert testimony under Rule 702, the Eleventh Circuit has also instructed that "it is not the role of the district court to make

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140. *Id*. at 840.
141. *Id*. at 841.
142. *Id*. at 842.
143. *Id*.
144. *Id*.
145. *Id*. The plaintiffs contended they produced five citations from a professional journal describing the scientific principles underlying Dr. McLellan's theory. The court did not consider these citations, however, because Dr. McLellan never mentioned these citations in his deposition and the plaintiffs never filed them with the court (although Biomet received the list of citations and attached it to a reply brief). *See id*. at 842 n.9.
146. *Id*. at 842-43.
147. *Id*.; *see also* FED. R. EVID. 702 advisory committee's note (2000 amendment) (quoting Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)) (stating that *Daubert* analysis concerns "[w]hether experts are 'proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying'").
148. *Frazier*, 387 F.3d at 1260.

ultimate conclusions as to the persuasiveness of the proffered evidence."[149] This distinction proved pivotal in *Rosenfeld v. Oceania Cruises, Inc.*,[150] in which the Eleventh Circuit ruled that the district court abused its discretion by precluding the plaintiff's expert from testifying.[151] The plaintiff in *Rosenfeld* sought to recover damages from a cruise operator for injuries incurred when she slipped on a ceramic tile floor. The plaintiff offered the testimony of a floor-safety specialist, who performed coefficient-of-friction tests to ascertain the slip resistance of the ship's flooring surfaces. According to the specialist, the flooring surfaces were inadequate because, under wet conditions, the low coefficient-of-friction posed a high risk of slip-and-fall accidents. The district court, however, barred the testimony, reasoning that questions concerning whether the floor was unreasonably safe for its intended use were conclusions properly left to the trier of fact.[152]

In reversing the lower court, the Eleventh Circuit concluded that "[a] qualified expert who uses reliable testing methodology may testify as to the safety of a defendant's choice of flooring."[153] While the district court found that the expert's testimony would be unhelpful to the jury, the Eleventh Circuit pronounced instead that "matters of slip resistance and surface friction are 'beyond the understanding and experience of the average lay citizen.'"[154] The court further determined that, based on the facts of the case, the defendant's specific objections concerning the reliability of the floor specialist's methods touched upon the witness's persuasiveness, not admissibility.[155] Lastly, the court concluded that the district court's error was not harmless because the court had barred the plaintiff from admitting evidence to prove the inadequacy of the flooring surface–the central issue of the negligence claim.[156]

V. RELEVANCY AND PREJUDICE

The gate-keeping function of the Federal Rules of Evidence is perhaps best exemplified by controversies rooted in Rule 403,[157] in which the

149. Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003).

150. 654 F.3d 1190 (11th Cir. 2011).

151. *See id*. at 1194.

152. *Id*. at 1191-92.

153. *Id*. at 1193.

154. *Id*. at 1194 (quoting United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985)).

155. *Id*. (quoting *Quiet Tech*., 326 F.3d at 1346) (stating that "Oceania can raise these arguments on retrial through 'vigorous cross-examination' and 'presentation of contrary evidence'").

156. *Id*.

157. FED. R. EVID. 403.

interplay between relevance and prejudice is thrown into sharp relief. Whereas Rules 401[158] and 402[159] underscore the truth-seeking function of relevant evidence, Rule 403 cautions that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[160] Invariably, the Eleventh Circuit's criminal docket is teeming with controversial subjects that threaten to inflame passions and distract jurors from their proper role as impartial adjudicators. The court's 2011 term contained no shortage of such cases, with issues playing upon violence, sex, and class-based stereotypes.

In *United States v. Langford*,[161] the former mayor of Birmingham was convicted on sixty-one counts of corruption, ranging from bribery to tax fraud.[162] He challenged his conviction on various evidentiary grounds, largely related to prejudice. Specifically, Langford argued that the district court abused its discretion by admitting tax records documenting his sizable gambling winnings–winnings with no direct relation to his alleged malfeasance.[163] Langford asserted that exposing jurors to this evidence led them to infer that his winnings were rigged by his bribers or would otherwise negatively influence the jurors' notions of his character.[164]

The trial court concluded that the tax records *as a whole* were highly relevant to the tax fraud charges at issue because they revealed that Langford failed to report the cash, clothing, and jewelry he allegedly received from corrupt sources. At trial, Langford sought to cure this obvious difficulty by stipulating that the cash, clothing, and jewelry had not been reported.[165] On appeal, the Eleventh Circuit pronounced that the government had every right to decline his offer because a stipulation may have blunted the full evidentiary force of the government's case.[166]

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158. FED. R. EVID. 401. Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *Id.*

159. FED. R. EVID. 402. According to Rule 402, all relevant evidence is admissible unless its inclusion is proscribed by the U.S. Constitution, a federal statute, other provisions of the Federal Rules of Evidence, or other rules promulgated by the Supreme Court. *Id.*

160. FED. R. EVID. 403.

161. 647 F.3d 1309 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1121 (2012).

162. *Id*. at 1314.

163. *See id*. at 1323-24. Langford's tax returns from 2003 to 2005 reported gambling earnings of $28,040, $4,200, and $80,510, respectively. *Id*.

164. *Id*. at 1324.

165. *Id*.

166. *Id*. (citing Old Chief v. United States, 519 U.S. 172, 186-87, 189 (1997)).

Langford also sought to redact the gambling entries, and the district court refused, reasoning that redaction might have exacerbated the prejudice by prompting jurors to speculate that Langford was engaged in more illicit activities than legal gambling.[167] On this issue, the Eleventh Circuit determined that the district court had acted within its discretion in declining to redact the gambling entries.[168]

United States v. Bradley[169] presented an even starker illustration of the Eleventh Circuit's general hesitance to find error under Rule 403.[170] *Bradley* concerned a massive Medicaid fraud scheme allegedly perpetrated by owners of a pharmaceutical wholesaler.[171] At trial, the government sought to introduce "wealth evidence," including photographs of the defendants' real estate, vehicles, watercraft, and aircraft. The district court allowed the evidence over the defendants' objections.[172] On appeal, the defendants argued that the government's strategy served only to foment class enmity, pitting "a mostly working-class jury against the wealthier defendants."[173]

The Eleventh Circuit acknowledged that the introduction of wealth evidence created a risk that jurors would convict on grounds unrelated to guilt.[174] But, nonetheless, the court observed that "evidence of wealth or extravagant spending may be admissible when relevant to issues in the case and where other evidence supports a finding of guilt."[175] In weighing Rule 403's probative-prejudice balance, the court determined that the wealth evidence was probative of motive, "even if

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167. *Id*.

168. *Id*.

169. 644 F.3d 1213 (11th Cir. 2011), *cert. denied*, 2012 WL 94088, 80 U.S.L.W. 3443 (May 14, 2012).

170. *See, e.g.*, United States v. Merrill, 513 F.3d 1293, 1301 (11th Cir. 2008) (stating that "Rule 403 is an extraordinary remedy which should be used only sparingly").

171. *Bradley*, 644 F.3d at 1226-27.

172. *Id*. at 1270.

173. *Id*. at 1270-71.

174. *See id*. at 1271 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239 (1940)) ("Use of a defendant's wealth to appeal to class bias can be 'highly improper' and can deprive that defendant of a fair trial.").

175. *Id*. The court reached an analogous holding in *United States v. Hill*, which we discussed above. In *Hill*, one of the defendants argued that the district court erred by admitting evidence of the *amount* of loss resulting from the mortgage fraud and money laundering schemes. The defendant contended that the large sums were prejudicial and irrelevant because only the *fact* of loss needed to be proven. *Hill*, 643 F.3d at 843. The Eleventh Circuit disagreed, stating that "the victims' loss is related enough to the defendants' gain to bear on the motive that the defendants had for committing the fraud." *Id*. The court commented that "with financial crimes, the more money, the more motive." *Id*.

only slightly so."[176] In proving motive, the government needed to explain why the defendants would engage in fraudulent practices even though their company's legitimate operations comprised more than 97.5% of their business.[177] To do so, the government had to demonstrate not only that the defendants derived substantial profits from the fraudulent activity, but that the fraud furthered their lavish lifestyle.[178] On the other side of the coin, the court reasoned that the wealth evidence was "only slightly prejudicial."[179] To the extent jurors could be influenced by class bias, the record already reflected the substantial profits earned by the defendants' company, which clearly established their affluence.[180] Thus, the court held that the district court did not abuse its discretion in finding that the wealth evidence's probative value was not substantially outweighed by the risk of prejudice.[181]

The disputed evidence in *United States v. Gamory*[182] proved to be a different matter entirely. Defendant Edgar Gamory was convicted on drug-related offenses for which he received a life sentence.[183] On appeal, Gamory challenged the district court's admission of a rap video produced by his music studio, Hush Money Entertainment.[184] In the video, rap artist Tone Flowa recited expletive-laden lyrics referencing drugs, sex, violence, and threats against police. Gamory himself was not present in the video.[185] The government argued the video was, nonetheless, relevant because: (1) it disconfirmed Gamory's assertions that he ran legitimate businesses because the lyrics linked drug money to Hush Money and suggested his businesses were covers for a drug ring; (2) the lyrics mentioned "an off-white crib with a Rover parked out front," which possibly alluded to Gamory's car and studio; and (3) the artist wore a necklace with a "JB"[186] insignia, resembling cuff links seized from Gamory's house.[187]

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176. *Bradley*, 644 F.3d at 1272.
177. *Id*.
178. *See id*. The court's opinion was silent regarding whether the prosecution presented evidence that the defendants' luxuries were themselves the fruits of the fraud.
179. *Id*.
180. *Id*.
181. *Id*.
182. 635 F.3d 480 (11th Cir.), *cert. denied*, 132 S. Ct. 826 (2011).
183. *Id*. at 489.
184. *Id*. at 488, 492.
185. *Id*. at 488.
186. "JB" was one of Gamory's nicknames. *Id*. at 485.
187. *Id*. at 488 n.9.

On appeal, the Eleventh Circuit held that the district court erred by admitting the video.[188] The court acknowledged that the rap video bore some relevancy but determined its probative value was "minimal at best."[189] Gamory did not appear in the video,[190] and the government produced no evidence that Gamory wrote the lyrics or agreed with the song's message.[191] Turning to prejudice, the court commented that the violent, profane, sexualized, and misogynistic nature of the rap lyrics posed a "substantial danger of unfair prejudice."[192] Measuring the Rule 403 balance, the court concluded that the video's probative value was substantially outweighed by unfair prejudice.[193] Ultimately, however, the court held that the district court's error was harmless, as the record reflected overwhelming evidence of Gamory's guilt.[194]

VI. AUTHENTICATION

Article IX of the Federal Rules of Evidence delineates the burden of authentication, which is a party's duty to "produce evidence sufficient to support a finding that the item is what the proponent claims it is."[195] Though the restyling effort of the Advisory Committee sought to add clarity to the Rules, the opaque and indeterminate wording of the original Rule 901 remains. Thus, courts are potentially afforded significant interpretive discretion to decide what counts as adequate authentication.

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188. *Id*. at 494.

189. *Id*. at 493.

190. *Id*. at 488. A comparable issue arose in the *Jayyousi* opinion discussed above. In that case, the district court allowed the jury to watch a CNN interview with Osama bin Laden, despite the fact that (as in *Gamory*) none of the defendants actually appeared in the video. *See Jayyousi*, 657 F.3d at 1107-08. Defendants Hassoun and Jayyousi had mentioned the video in a telephone conversation, though there was no evidence that defendant Padilla discussed it or even watched it. *Id*. at 1108. In *Jayyousi*, the Eleventh Circuit ruled there was no Rule 403 error because the district court "mitigated the prejudice to the defendants by instructing the jury to consider the video not for its truth, but rather as state of mind evidence against Hassoun and Jayyousi [but not Padilla]." *Id*.

191. *Gamory*, 635 F.3d at 493.

192. *Id*.

193. *See id*. The court also found that the rap video constituted inadmissible hearsay, in violation of Rule 801(c). *Id*.; *see also* FED. R. EVID. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). Based on evidence in the record, the court determined that both the government and the district court considered the video relevant in proving the truth of the matters asserted by the rap lyrics. *Gamory*, 635 F.3d at 493.

194. *See id.* at 494 (discussing testimony from Gamory's co-conspirators detailing his involvement in drug trafficking).

195. FED. R. EVID. 901(a).

The Eleventh Circuit underscored the importance of proper authentication methods in *Burchfield v. CSX Transportation, Inc*.[196] The case stemmed from a railcar accident that left plaintiff Doug Burchfield without the use of his legs. Prior to sustaining his injuries, Burchfield had helped transport a railcar between tracks while employed at a General Mills cereal processing plant. Shortly thereafter, the railcar rolled down a hill and crashed into other railcars, which then collided with Burchfield. Burchfield sued CSX Transportation, which had delivered the railcar to General Mills. At trial, Burchfield contended that the railcar's sudden descent was caused by a defective hand brake.[197] CSX countered that the accident was instead precipitated by Burchfield's failure to properly apply the hand brake.[198] The jury entered a verdict in CSX's favor.[199]

On appeal, the parties argued over the district court's admission of a post-accident video.[200] The video purported to show the same railcar involved in the accident stationed in two locations: (1) the site where the brake failure allegedly occurred; and (2) a location with an even steeper slope.[201] In both instances, the railcar remained stationary when the hand brake was activated.[202] Burchfield contended that the video was presented at trial as a "recreation" of the accident, and as such, CSX was required to lay a proper foundation[203] and ensure that the testing was performed under "substantially similar conditions."[204] For its part, CSX asserted that the video was properly authenticated under Rule 901 and that no showing of substantial similarity is required when

196. 636 F.3d 1330 (11th Cir. 2011) (per curiam).

197. *Id*. at 1332.

198. *Id*. at 1336.

199. *Id*. at 1333.

200. *Id*. The video was produced by a railroad expert hired by General Mills, which solicited the video in conjunction with an Occupational Safety and Health Administration investigation of the accident. *Id*. at 1332-33.

201. *Id*. at 1333.

202. *Id*.

203. *See* Barnes v. General Motors Corp., 547 F.2d 275 (5th Cir. 1977). In *Bonner v. City of Prichard*, the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

204. *Burchfield*, 636 F.3d at 1334; *see also Barnes*, 547 F.2d at 277 (citations omitted) ("As a general rule, the district court has wide discretion to admit evidence of experiments conducted under substantially similar conditions. However, the burden is upon the party offering evidence of out-of-court experiments to lay a proper foundation demonstrating a similarity of circumstances and conditions.").

experimental tests are introduced merely to demonstrate "general scientific principles."[205]

According to the Eleventh Circuit, CSX's own statements at trial contradicted its claims that the video was not presented to jurors as a recreation.[206] On numerous occasions, CSX described the video to jurors as having "utilized the same car with the same load and the same mechanical condition at two locations."[207] Furthermore, during cross-examination of Burchfield's expert witnesses, defense counsel suggested that the video simulated accident conditions and asked the experts to weigh in on the tests.[208]

Having found that CSX introduced the video as a recreation, the Eleventh Circuit next concluded that CSX failed to lay a proper foundation.[209] In this regard, CSX's witness provided only visual observations of the testing conditions and did not testify as to how the tests were actually conducted.[210] Lastly, having found that the district court abused its discretion, the court determined that the error was not harmless.[211] Rather, the video "spoke directly to the ultimate disputed issue in the case"–as highlighted by CSX's repeated allusions to its contents.[212] The Eleventh Circuit held that the harm to Burchfield could only be cured by reversing the district court and remanding the case for a new trial.[213]

The burden of authentication took center stage again in *United States v. Lanzon*.[214] Defendant Keith Lanzon was sentenced to sixty months imprisonment for attempting to coerce a minor to engage in sexual

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205. *Burchfield*, 636 F.3d at 1334 (quoting Muth v. Ford Motor Co., 461 F.3d 557, 566 (5th Cir. 2006) ("When the demonstrative evidence is offered only as an illustration of general scientific principles, not as a reenactment of disputed events, it need not pass the substantial similarity test."); McKnight *ex rel.* Ludwig v. Johnson Controls, Inc., 36 F.3d 1396, 1401 (8th Cir. 1994) ("[W]here the experimental tests do not purport to recreate the accident, but instead the experiments are used to demonstrate only general scientific principles, the requirement of substantially similar circumstances no longer applies.")).

206. *Id*. at 1335.

207. *Id.* (quoting CSX's closing argument) (internal quotation marks omitted). Defense counsel also implied that the video proved the brake met efficiency standards. *See id*. at 1336 (quoting same) ("'That, ladies, is an efficient handbrake.'").

208. *Id*.

209. *Id*. at 1337.

210. *Id*. For instance, the witness could not describe the manner in which the hand brake was applied in the video. *Id*.

211. *Id*.

212. *Id*.

213. *Id*. at 1338.

214. 639 F.3d 1293 (11th Cir.), *cert. denied*, 132 S. Ct. 333 (2011).

activity.[215] On appeal, he argued that the district court erred by admitting into evidence instant message transcripts of conversations between Lanzon and undercover detective George Clifton, who had posed as a male offering a sexual liaison with a fourteen-year-old.[216]

Lanzon argued that exclusion of the instant message transcripts was necessary because Detective Clifton had deliberately destroyed the original chat logs. At trial, Detective Clifton testified that he pasted the instant message conversations into a Microsoft Word document and transferred the file onto a floppy disc from which a hard copy could be printed. Detective Clifton never saved the Word document onto his hard drive, however. According to Lanzon's forensic expert, this meant that the document's metadata was not preserved; thus, it could not be determined whether Detective Clifton manipulated the original. For his part, Detective Clifton testified to the following: (1) he saved the transcripts on a floppy disc rather than his hard drive to conserve memory; (2) his preservation methods conformed with protocol he learned at the police department; and (3) he knew the conversations had been recorded in their entirety because, when he transferred the transcript, he compared the Word document with the original chat screens.[217]

Lanzon attempted to discredit the chat logs through various evidentiary challenges, all of which were rejected by the Eleventh Circuit.[218] The court determined that the chat transcripts did not violate Rule 901's authentication requirement because the evidence had been confirmed by the "testimony of a witness with knowledge."[219] It was immaterial that the authenticating witness, Detective Clifton, was the very person Lanzon accused of document tampering because circuit precedent confirmed that transcripts may be admitted "even when a person who was involved with creating them testified about their authenticity."[220]

Nor did destruction of the chat log violate the best evidence rule because Rule 1004 provides that duplicates may suffice so long as the original document was destroyed through no act of bad faith.[221]

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215. *Id*. at 1296, 1298.

216. *See id*. at 1296.

217. *Id*. at 1296-97.

218. *Id*. at 1298.

219. *Id*. at 1301; FED. R. EVID. 901(b)(1).

220. *Lanzon*, 639 F.2d at 1301 (citing United States v. Puentes, 50 F.3d 1567, 1577 (11th Cir. 1995)).

221. *Id*. at 1301-02; *see also* FED. R. EVID. 1004(a) (providing that "[a]n original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith"). In addressing a separate due process argument, the court had earlier ruled

Lastly, the admission of the transcripts did not infringe Rule 106's completeness requirement because Lanzon produced no evidence that the transcript had been altered and did not suggest how any additional material would "'qualify, explain, or place into context' the portion admitted into evidence."[222]

VII. JUROR MISCONDUCT

Among the common law principles undergirding the Federal Rules of Evidence, few have proven more enduring than the judicial values embraced by Rule 606(b).[223] Rule 606(b) seeks to ensure the secrecy of jury deliberations by placing strict limits on the admission of juror testimony to impeach a verdict.[224] Because an absolute bar on such testimony would run afoul of a criminal defendant's Sixth Amendment[225] right to an impartial jury,[226] the Rule allows a juror to testify about whether: "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."[227] Federal courts have generally interpreted these exceptions narrowly.[228] Even so, the risk of a juror being exposed to an improper influence is magnified in high profile cases where media coverage threatens to penetrate the black box of jury deliberations. The Eleventh Circuit heard appeals in two such cases in 2011.

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that Lanzon adduced no evidence that Detective Clifton destroyed the original files in bad faith. *See Lanzon*, 639 F.3d at 1300-01.

222. *Id*. at 1302 (quoting United States v. Simms, 385 F.3d 1347, 1359 (11th Cir. 2004)); *see also* FED. R. EVID. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part–or any other writing or recorded statement–that in fairness ought to be considered at the same time.").

223. FED. R. EVID. 606(b).

224. *See id.* Rule 606(b)(1) provides: "*Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters." FED. R. EVID. 606(b)(1).

225. U.S. CONST. amend. VI.

226. *Id.* ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

227. FED. R. EVID. 606(b)(2).

228. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 122 (1987) (holding that juror intoxication is not an "outside influence" about which jurors may testify under Rule 606(b)).

United States v. Siegelman[229] involved the appeals of former Alabama governor Don Siegelman and HealthSouth CEO Richard Scrushy, who were convicted on counts of federal funds bribery and honest-services fraud.[230] In a post-trial motion, the defendants attached news articles and juror affidavits suggesting that some jurors were exposed to extraneous information during the trial. Based upon this evidence, the district court concluded that the defendants had made a colorable showing of extrinsic influence. The court held a hearing and questioned jurors regarding what they had seen. Ultimately, the district court determined there was credible evidence that jurors had been exposed to extraneous information but concluded these influences were harmless.[231]

The Eleventh Circuit agreed.[232] Without much difficulty, the court held harmless the jurors' exposure to extrinsic materials explaining the proper role of a foreperson.[233] The information was accessed from the district court's own website, had been introduced by a juror as opposed to an outside influence, and was unrelated to the substantive issues in the case.[234] Potentially more problematic, some jurors had also been exposed to an *unredacted* superseding indictment, again accessed via the court's website.[235] This, too, was deemed harmless.[236] The charging document had merely been edited to remove duplicative counts; thus, exposure to the unredacted version would not have yielded any ancillary information, factual or legal.[237] There was also evidence that some jurors had been inadvertently exposed to media coverage about the trial.[238] These media exposures, however, were quite minimal, and there was no evidence that the jury discussed the press coverage during deliberations.[239]

Having disposed of the defendants' extrinsic evidence challenges, the court next turned to what it characterized as "a very different prob-

229. 640 F.3d 1159 (11th Cir. 2011).
230. *Id*. at 1164.
231. *Id*. at 1182-83.
232. *Id*. at 1183.
233. *See id*.
234. *Id*.
235. *Id*. at 1183-84.
236. *See id*. at 1184.
237. *Id*.
238. *Id*. ("These jurors testified that, despite their best efforts, they had overheard snippets of television coverage or seen headlines regarding the case in newspapers or online.").
239. *Id*. at 1184-85.

lem."[240] In anonymous mailings, the defendants had allegedly been sent copies of e-mail exchanges between jurors.[241] The defendants contended these e-mails proved that jurors had both prematurely deliberated and deliberated outside the presence of the full jury, thereby violating the Sixth Amendment.[242]

Rejecting this challenge,[243] the court alluded to the "near-universal and firmly established common-law rule *flatly prohibiting* the use of juror testimony to impeach a verdict."[244] By shielding juror deliberations from public scrutiny, the court continued, Rule 606(b) encourages full and frank discussions in the jury room, prevents post-trial jury tampering and harassment, ensures finality, and restores public confidence in the verdict.[245] In light of these strong policy considerations, the court declared that the law "both anticipates and tolerates some level of imperfection in the [jury] system."[246]

Unlike the exposures to extraneous information, there was no evidence the e-mail exchanges implicated any of the exceptions to Rule 606-(b).[247] Therefore, even assuming the e-mails were both authentic and clearly demonstrated juror misconduct, jurors could not even be questioned about their contents.[248] Moreover, even if premature deliberations occurred, there was no reasonable possibility of prejudice.[249] The government's case was strong, the jurors deliberated at length, and the split nature of the verdict–where Siegelman was acquitted on many of the charges–suggested that the jurors carefully weighed the evidence.[250] Accordingly, the court concluded that no new trial was warranted.[251]

In *United States v. Snipes*,[252] the Eleventh Circuit was confronted with even graver allegations of juror misconduct. After actor Wesley Snipes was convicted of tax evasion, his lawyers were allegedly sent e-

240. *Id*. at 1185.
241. *Id*.
242. *Id*.
243. *See id.*
244. *Id*.
245. *Id*. at 1185-86.
246. *Id*. at 1185. In this regard, the court remarked that the judiciary does not inquire into whether a verdict was the product of compromise or mistake and that it even tolerates inconsistent verdicts and jury nullification. *Id*. at 1185 & n.36.
247. *Id*. at 1186 n.37.
248. *Id*. at 1187.
249. *Id*.
250. *Id*.
251. *Id*.
252. 440 F. App'x 709 (11th Cir. 2011) (per curiam).

mails from former jurors detailing misconduct during jury deliberations.[253] The e-mails described how some jurors admitted they had judged Snipes's guilt before trial. The e-mails additionally alleged that, to reach a unanimous verdict, the jurors compromised by convicting Snipes only on the lesser counts. The jurors also speculated about Snipes's possible punishment. Snipes filed motions for a new trial and leave to interview jurors.[254]

In appealing the district court's denial of these motions, Snipes offered two reasons why Rule 606(b) did not bar his motions. First, the e-mails were outside the scope of Rule 606: they were not offered to show errors in the jurors' deliberative process, but rather to demonstrate that the jurors committed perjury in voir dire by swearing that they accepted the presumption of innocence. Second, even if Rule 606(b) did apply, the e-mails fell within Rule 606(b)'s exceptions concerning extraneous information or improper influences.[255]

The Eleventh Circuit indicated that, notwithstanding Snipes's voir dire argument, Rule 606(b)'s general exclusionary provision covered "any matter or statement occurring during the course of the jury's deliberations."[256] Citing *Siegelman*, the court held that "although it is improper for jurors to consider a defendant's potential penalty during deliberations, proof of such conduct does not establish grounds for a new trial."[257] Circuit precedent also established that Rule 606(b)'s exception for extraneous information "does not permit testimony that a juror admitted, during deliberations, that she prejudged the defendant's guilt."[258] Finally, even if the e-mails could be admissible, the district court did not abuse its discretion in finding that the juror misconduct fell short of the "clear, strong, substantial and incontrovertible evidence of the type of misconduct that would warrant a new trial."[259]

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253. *Id*. at 710. The emails were sent over two years after the deliberations, leading the district court to question their veracity. *Id*.

254. *Id*.

255. *Id*. at 710-11.

256. *Id*. at 712; FED. R. EVID. 606(b).

257. *Snipes*, 440 F. App'x at 711 (citing *Siegelman*, 640 F.3d at 1187).

258. *Id*. at 712 (citing United States v. Venske, 296 F.3d 1284, 1287-88, 1290 (11th Cir. 2002)).

259. *Id*.