EVIDENCE: 2014–2015

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I. INTRODUCTION

During the period of this Survey, July 2014 to June 2015, the Fifth Circuit issued a number of opinions addressing evidentiary issues, including authentication, hearsay, the residual exception to hearsay, the admission of evidence of other acts under Rule 404, the admission of prior testimony of an unavailable declarant, expert testimony, and the standards for reopening evidence and inquiring into a juror's state of mind on a theory of implied bias. There were also two amendments to the Federal Rules of Evidence that took effect during the survey period.

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II. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

On April 25, 2014, the U.S. Supreme Court approved amendments to the Federal Rules of Evidence, effective December 1, 2014, under the Rules Enabling Act.[2] The amendments apply to Rule 801(d)(1)(B) (Statements That Are Not Hearsay), Rule 803(6) (Records of a Regularly Conducted Activity), Rule 803(7) (Absence of a Record of a Regularly Conducted Activity), and Rule 803(8) (Public Records).[3]

A. Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B) permits admission of a witness's prior statement as nonhearsay under certain circumstances.[4] The scope of the original Rule 801(d)(1)(B) was limited by its text, permitting statements consistent with the declarant's present testimony only "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying."[5] The 2014 amendment broadens the scope of the rule to permit use of a prior consistent statement "to rehabilitate the declarant's credibility as a witness when attacked on another ground," such as charges of inconsistency or faulty memory:[6]

1. The Federal Evidence Review maintains an excellent Rules Amendments page tracking the revisions to the Federal Rules of Evidence. *Amendments to the Federal Rules of Evidence*, FED. EVIDENCE REV., http://federalevidence.com/changing-rules (last visited Mar. 8, 2016).
2. Memorandum from Chief Justice John G. Roberts Jr. to Speaker John Bohner (Apr. 25, 2014), http://www.supremecourt.gov/orders/courtorders/frev14_3318.pdf.
3. *Id*.
4. FED. R. EVID. 801(d)(1)(B).
5. FED. R. EVID. 801(d)(1)(B) (repealed 2014).
6. FED. R. EVID. 801(d)(1)(B) advisory committee's note ¶ 2.

PRIOR RULE	CURRENT RULE
(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay: **(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement: …. **(B)** is consistent with the declarant's testimony and is offered: **(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying.	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement: …. **(B)** is consistent with the declarant's testimony and is offered: **(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying*; or* *(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.*

The Advisory Committee was careful to note, however, that the revised text is still limited to instances in which the credibility of the witness has been attacked and does not allow bolstering.[7]

B. Amendment to Rule 803(6), (7), and (8)

Rule 803(6), (7), and (8)—exceptions to the rule against hearsay for business records and public records—each permit introduction of statements in documents as an exception to hearsay when the documents show certain indicia of trustworthiness.[8] The amendments to this Rule clarify that the burden of proof to show lack of trustworthiness is on the opponent to admission:[9]

7. *See id.* ¶ 4.
8. FED. R. EVID. 803(6)–(8).
9. *See id.* advisory committee's note.

PRIOR RULE	CURRENT RULE
(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if: . . . . **(E)** neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.	**(6) Records of a Regularly Conducted Activity**. A record of an act, event, condition, opinion, or diagnosis if: . . . . **(E)** ~~neither~~ the *opponent does not show that the* source of information ~~nor~~ *or* the method or circumstances of preparation indicate a lack of trustworthiness.
(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if: . . . . **(C)** neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.	**(7) Absence of a Record of a Regularly Conducted Activity**. Evidence that a matter is not included in a record described in paragraph (6) if: . . . . **(C)** ~~neither~~ the *opponent does not show that the* possible source of the information ~~nor~~ *or* other circumstances indicate a lack of trustworthiness.
(8) Public Records. A record or statement of a public office if: . . . . **(B)** neither the source of information nor other circumstances indicate a lack of trustworthiness.	**(8) Public Records**. A record or statement of a public office if: . . . . **(B)** ~~neither~~ the *opponent does not show that the* source of information ~~nor~~ *or* other circumstances indicate a lack of trustworthiness.

The Advisory Committee recommended the revisions to (1) provide uniform rules to resolve a conflict in the case law, (2) "clarify a possible ambiguity in the rules as originally adopted and as restyled," and (3) provide a result that makes the most sense because imposing a burden on the proponent to prove trustworthiness "is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met—requirements that tend to guarantee trustworthiness in the first place."[10]

III. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON EVIDENCE

A. Relevance

In *U.S. Bank National Ass'n v. Verizon Communications, Inc.*, the Fifth Circuit addressed the relevance of evidence of corporate deficiencies offered by the trustee of a litigation trust created as part of a corporation's bankruptcy

10. ADVISORY COMM. ON CIVIL RULES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE: REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 82 (Nov. 7–8, 2013), http://www.uscourts.gov/file/15485/download.

plan in support of fraudulent transfer and breach of fiduciary duty claims against the debtor corporation's former parent and a director related to the corporation's spin-off transaction.[11] Following a bench trial, the district court entered judgment for the defendants and excluded evidence that no board of the corporation was ever appointed, that it never properly issued any stock, and that certain corporate records were backdated, all of which would affect the corporation's valuation at the relevant time period.[12] The Fifth Circuit affirmed the exclusion.[13] It first noted that 315 exhibits the trustee challenged as irrelevant were initially included on its own exhibit list, and the trustee failed to discuss the content of the admitted documents on appeal or attempt to explain why they were irrelevant.[14] Second, the Fifth Circuit noted that the relevance of the documents was limited by the district court's prior ruling at summary judgment that the corporation was a wholly owned subsidiary of the parent.[15] In ruling on a later motion in limine, the district court noted that the trustee could not "show that the failure to observe corporate formalities prior to the spin-off 'significantly affected the underlying fundamentals of the company'" such that it would affect its ultimate valuation finding.[16]

In *Slovensky v. Fluor Corp.*, the Fifth Circuit addressed the relevance of comparative evidence that the plaintiff was "less qualified, less experienced, and ranked lower on an internal metric than her colleagues" to her Title VII gender discrimination claims against her former employer.[17] The plaintiff, a thirty-year employee, was terminated as part of a reduction in workforce.[18] The plaintiff alleged that she expressed interest in some opportunities for international reassignment but was told by her supervisor that her prospects for those opportunities "didn't look good" and indicated that "she might not be a good fit for these projects because she was 'high maintenance.'"[19] Prior to trial, the plaintiff filed motions in limine to exclude comparative evidence to her colleagues.[20] The defendant countered that the plaintiff was selected for layoff "in part because she was the lowest ranked of her peers," and that employers necessarily make comparative judgments in determining who, among the available employees, should be laid off.[21] The district court overruled the plaintiff's motion in limine without comment.[22] At trial, a human resources manager testified about the defendant's ranking process,

11. U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc., 761 F.3d 409, 415, 430 (5th Cir. Sept. 2014), *cert denied*, 135 S. Ct. 1430 (2015) (mem.).

12. *Id.* at 430–31.

13. *Id.* at 431.

14. *Id.* at 430.

15. *Id.* at 431.

16. *Id.*

17. Slovensky v. Fluor Corp., 575 F. App'x 306, 306 (5th Cir. July 2014) (per curiam).

18. *Id.* at 307.

19. *Id.* (quoting the Plaintiff's Amended Complaint).

20. *Id.*

21. *Id.*

22. *Id.*

testifying that when faced with a layoff situation, the ranking would provide objective data in making determinations.[23] The jury found for the defendant, and the district court entered a take-nothing judgment.[24] While the plaintiff, who proceeded pro se, erroneously believed the district court's denial of her motion in limine preserved the issue for appeal and waived her right to challenge the admissibility of comparative evidence by not objecting when the evidence was admitted at trial, the Fifth Circuit nevertheless addressed the merits of her argument, finding the comparative evidence relevant to the defense against the gender discrimination claim that the reduction in force was a legitimate reason for the plaintiff's termination and not based on her gender.[25] Given the defendant's system of implementing its reduction in force based in part on employee rankings, the comparative evidence was both relevant and probative.[26]

B. Authentication

In *United States v. Ceballos*, the Fifth Circuit addressed evidentiary issues of authentication and extrinsic acts raised by the admission of a notebook offered as a smuggler's log and affirmed the defendant's "conviction for transporting, attempting to transport, and engaging in a conspiracy to transport an alien within the United States for private financial gain."[27] The defendant was caught in a sting after Customs and Border Protection detained an individual who entered the United States without authorization in El Paso and used his cellphone to communicate with the suspected smuggler, who had arranged to transport him further within the United States.[28] After agents posing as that alien confirmed the arrangement and arrested the defendant, the government found a notebook containing dates; references to "girl[s]," "guy[s]," and a "couple"; dollar amounts; and notations for "pick up," "deliver," and "food."[29] The Government introduced the notebook at trial as a smuggling ledger.[30] Regarding the admission of the notebook, the Fifth Circuit noted that the burden to show authentication under Rule 901(a), which merely requires some evidence sufficient to support a finding that the evidence in question is what its proponent claims it to be, is a low one, and the ultimate responsibility for determining whether evidence is authentic rests with the jury.[31] The Fifth Circuit analogized to its prior opinions in *United States v. Arce* and *United States v. Wake* for the

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23. *Id.*
24. *Id.* at 308.
25. *Id.* at 308–09.
26. *Id.* at 309.
27. United States v. Ceballos, 789 F.3d 607, 611–12 (5th Cir. June 2015).
28. *Id.*
29. *Id.* at 612.
30. *Id.* at 617.
31. *Id.* at 617–18.

proposition that a finding of authenticity may be based on the contents of a writing that are broadly corroborative of the offense charged and are discovered in the defendant's exclusive possession.[32] Although describing the issue as "close," the Fifth Circuit relied on testimony by a government agent that he discovered the notebook in the defendant's purse, which was inside her car at the time of her arrest, included identifying documents such as pay stubs bearing her name, and appeared to be a ledger containing names and dollar amounts that had particular evidentiary value given her alleged involvement in the smuggling scheme.[33] Thus, the Fifth Circuit held that the district court did not abuse its discretion in finding that the Government satisfied its low burden of authenticating the notebook as the defendant's smuggling ledger.[34] The defendant also challenged admission of the notebook as evidence of extrinsic acts in violation of Rule 404(b).[35] Noting the distinction between intrinsic and extrinsic acts, there was "a strong basis to conclude that the contested evidence was intrinsic to the charged conspiracy offense" because it was broadly corroborative with the Government's description of the offense: references to individuals named "Enrique" (the defendant was engaged in a call with a contact named Enrique when the agent posing as an alien to be transported approached her vehicle) and "José" (the defendant called a contact named "José ex" on the day of her arrest), "an accounting of fees and expenses, and obligations to 'pick up' and 'deliver' subjects"—all of which are at least relevant to establish how the conspiracy was structured.[36] Even if the notebook contained evidence of bad acts distinct from those charged, they at least arguably served a permissible evidentiary purpose under Rule 404(b) to show intent, preparation, plan, or knowledge of "both the conspiracy and the attempt to transport illegal aliens for private financial gain."[37]

In *Thompson v. Bank of America Nat'l Ass'n*, the Fifth Circuit affirmed the exclusion of certain online print-offs, a handwritten call log, and sworn declarations by former bank employees submitted in a separate lawsuit as summary judgment evidence.[38] In this case, mortgagors brought claims

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32. *Id.* at 618; *see also* United States v. Arce, 997 F.2d 1123, 1127–28 (5th Cir. 1993) (holding that drug ledgers were properly authenticated based on coconspirator testimony that the handwriting in the ledger was similar to the defendant's); United States v. Wake, 948 F.2d 1422, 1425, 1434 (5th Cir. 1991) (holding that circumstantial evidence found in the possession of the defendant was sufficient to authenticate documents, such as "a sheet with names, code numbers, and telephone numbers"; "a series of tally sheets . . . contain[ing] code numbers, numbers representing quantities of drugs, and amounts of money"; and "notebook pages . . . contain[ing] such statements as 'Have guns out of house,' 'throw out calendar sheets,' 'What if Mitch or Doug turns me in', and 'can I be indicted'").

33. *Ceballos*, 789 F.3d at 620.

34. *Id.*

35. *Id.* at 617.

36. *Id.* at 621.

37. *Id.*

38. Thompson v. Bank of Am. Nat'l Ass'n, 783 F.3d 1022, 1027 (5th Cir. Apr. 2015).

against a loan servicer related to the foreclosure of their home.[39] In response to a motion for summary judgment, the plaintiffs presented a print-off from an online log maintained by an entity hired by mortgagors to assist in negotiating a loan modification and a handwritten call log that appeared to have been created by one of its employees.[40] The district court excluded these exhibits as not properly authenticated under Rule 901.[41] The Fifth Circuit affirmed, noting that the plaintiffs' affidavit failed to state that they had personal knowledge of the online log or that it represented an unaltered version of the website and, similarly, made no assertion of direct knowledge of the call log.[42] Finally, as part of a separate lawsuit, the plaintiffs submitted an exhibit consisting of a number of sworn declarations by former bank employees describing various instances in which bank employees were instructed to interact dishonestly with mortgage customers.[43] The district court excluded this exhibit as inadmissible evidence of prior bad acts under Rule 404 and as unduly prejudicial under Rule 403.[44] The Fifth Circuit noted that the plaintiffs waived the issue on appeal by failing to address the district court's reasoning in their briefs and declined to address it further.[45]

C. Hearsay

In *Ward v. Jackson State University*, the Fifth Circuit addressed hearsay in affirming the district court's sua sponte exclusion as hearsay the plaintiff's testimony that a coworker told her that a supervisor was aware of the plaintiff's sexual harassment complaint prior to her termination.[46] The plaintiff argued that it was admissible nonhearsay because it was "offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed."[47] The Fifth Circuit examined the employee's work duties to determine if the allegations fell within the scope of that relationship and determined that the duties of the employee who made the alleged statement did not include handling sexual harassment reports but were exclusively secretarial in nature.[48]

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39. *Id.* at 1025.
40. *Id.* at 1027.
41. *Id.* "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901(a).
42. *Thompson*, 783 F.3d at 1027.
43. *Id.*
44. *Id.*
45. *Id.*
46. Ward v. Jackson State Univ., 602 F. App'x 1000, 1003 (5th Cir. Feb. 2015) (per curiam).
47. *Id.* at 1004; *see* FED. R. EVID. 801(d)(2)(D).
48. *Ward*, 602 F. App'x at 1004.

Similarly, in *Hamilton v. AVPM Corp.*, the Fifth Circuit addressed both hearsay and the relevance of certain deposition testimony under Rules 602 and 701 in affirming summary judgment for the defendant–employer on the plaintiff's racial discrimination claims.[49] In this case, the plaintiff, an apartment property manager who is African-American, claimed that she was terminated on the basis of race.[50] In support of her claims, the plaintiff submitted four statements excluded by the district court.[51] First, the plaintiff alleged that during her employment, the supervisor who ultimately terminated her commented that everyone on the grounds crew was African-American.[52] In his deposition, the supervisor denied making this statement but admitted "that it was possible for 'someone' who heard such a comment to think that the hypothetical speaker 'might' have racial bias."[53] The Fifth Circuit affirmed the exclusion of this testimony under Rules 602 and 701, which require lay testimony to arise from a witness's personal knowledge and be rationally based on a witness's perception.[54] The supervisor's deposition testimony on the hypothetical was mere speculation and was not based on his own perceptions, observations, or personal knowledge, and therefore was not helpful to the factfinder.[55] The plaintiff also relied on three statements made during her own deposition that she attributed to her former manager in conversations between the two of them after the plaintiff had been fired.[56] The district court excluded the statements as inadmissible hearsay.[57] On appeal, the plaintiff argued that the statements fell under the Rule 801(d)(2)(D) exception for an opposing party's statement "made by the party's agent or employee on a matter within the scope of that relationship and while it existed."[58] The Fifth Circuit noted that the plaintiff failed to respond to the defendant's evidentiary objections before the district court, and therefore waived her argument on appeal.[59]

In *EEOC v. LHC Group, Inc.*, the Fifth Circuit addressed the admissibility of hearsay statements in an employee's Equal Employment Opportunity Commission (EEOC) charge as competent evidence for summary judgment.[60] The plaintiff, a field nurse and team leader at a home health company, was fired shortly after she had an epileptic seizure.[61] The

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49. Hamilton v. AVPM Corp., 593 F. App'x 314, 323 (5th Cir. Nov. 2014) (per curiam), *cert. denied*, 135 S. Ct. 1748 (2015) (mem.).
50. *Id.* at 318.
51. *Id.*
52. *Id.* at 317.
53. *Id.* at 319.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 320; *see* FED. R. EVID. 801(d)(2)(B).
59. *Hamilton*, 593 F. App'x at 320.
60. EEOC v. LHC Grp., Inc., 773 F.3d 688, 701 (5th Cir. Dec. 2014).
61. *Id.* at 693.

district court granted summary judgment for the employer in the EEOC suit brought on behalf of the employee.[62] The Fifth Circuit reversed in part, holding that statements in the EEOC charge were competent evidence for summary judgment and raised issues of fact concerning whether the employee was fired because of her disability.[63] The EEOC charge contained statements made to the employee by her supervisor—"We're going [to] have to let you go because you're a liability to our company" and "if [her] disability manifested again while [she] was on the job, [the employer] would be in trouble"—and a human resources representative—"We're going [to] have to let you go, because you're a liability to our company."[64] While observing that statements in EEOC charges, grievances, and claims are "inherently unreliable because the charge is drafted in anticipation of litigation," the Fifth Circuit focused on the specific statements at issue and refused to create a categorical rule regarding the admissibility of statements in an EEOC charge generally.[65] The statements in the employee's charge were made by the employer's employees speaking on behalf of the company and, therefore, fit within the Rule 801(d)(2)(D) exception to hearsay.[66] Repeating the statement regarding the employee being a liability to the company was not "offered for the truth of the matter asserted, i.e., for the proposition that [the employee] was in fact a liability" and thus fell within the Rule 801(c)(2) exception.[67] Finally, the employee "reproduced the statements in a signed, verified document based on her personal knowledge of the conversation" and thus satisfied Rule 56 of the Federal Rules of Civil Procedure.[68]

D. Residual Exception to Hearsay

In *Morton v. Yonkers (In re Vallecito Gas)*, the Fifth Circuit addressed the indicia of trustworthiness under the residual hearsay exception in an adversary proceeding in Vallecito Gas's bankruptcy proceedings.[69] In this case, the debtor corporation purchased a gas lease on Navajo Nation land in New Mexico and made various assignments that resulted in state court

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62. *Id.*

63. *Id.*

64. *Id.* at 693, 700.

65. *Id.* at 701 (quoting Walker v. Fairfield Resorts, Inc., No. 3:05–0153, 2006 WL 724555, at *8 (M.D. Tenn. Mar. 21, 2006)).

66. *Id.*; *see* FED. R. EVID. 801(d)(2)(D) ("A statement that meets the following conditions is not hearsay: . . . The statement is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.").

67. *LHC Grp.*, 773 F.3d at 701; *see* FED. R. EVID. 801(c)(2) ("'Hearsay' means a statement that: . . . a party offers in evidence to prove the truth of the matter asserted in the statement.").

68. *LHC Grp.*, 773 F.3d at 701; *see* FED. R. CIV. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

69. Morton v. Yonkers (*In re* Vallecito Gas, L.L.C.), 771 F.3d 929, 932–33 (5th Cir. Nov. 2014).

litigation that ultimately settled.[70] One of the settling parties took an assignment of the lease pursuant to a settlement agreement and began selling overriding royalty interests over the next year and a half.[71] The debtor filed for Chapter 11 bankruptcy and sought to sell the lease, its only significant asset, unaware of the overriding royalty interests.[72] Once discovered, the trustee filed an adversary proceeding against the purchasers, seeking to void the overriding royalty interests on the ground that "the Navajo Nation had not approved the transfer of those interests, as required by the Navajo Nation Code."[73] In support, the trustee submitted into evidence a letter by "an attorney in the Navajo Nation Department of Justice, stating that any 'purported overriding royalty interest is invalid under the applicable provisions of the Navajo Nation Code and is completely void.'"[74] The bankruptcy court struck the letter as inadmissible hearsay.[75] On appeal, the trustee argued that the letter was admissible under Rule 803(8),[76] Rule 803(15),[77] or the residual hearsay exception in Rule 807.[78] The Fifth Circuit held that the bankruptcy court did not abuse its discretion in excluding the letter.[79] Noting that trustworthiness is the linchpin of these hearsay exceptions, the Fifth Circuit agreed with the district court's explanation that the letter was untrustworthy, in large part because it was drafted by the

70. *Id.* at 931.
71. *Id.*
72. *Id.* at 932.
73. *Id.*
74. *Id.*
75. *Id.*
76. FED. R. EVID. 803(8) ("The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (8) Public Records. A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.").
77. FED. R. EVID. 803(15) ("The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.").
78. *In re Vallecito Gas*, 771 F.3d at 932–33; FED. R. EVID. 807 ("(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice. (b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.").
79. *In re Vallecito Gas*, 771 F.3d at 932.

trustee's counsel and was prepared after the trustee's "counsel provided the Navajo Nation official with only one side of the story."[80]

Similarly, in *United States v. Saguil*, the Fifth Circuit addressed the residual exception to the hearsay rule in affirming the defendant's conviction for production of child pornography. At trial, the government offered into evidence a video camera seized during a search of the defendant's residence that was labeled "Made in Japan" to satisfy the interstate or foreign commerce requirement of 18 U.S.C. § 2251 by showing that "the video camera traveled in, or affected, interstate or foreign commerce."[81] The district court overruled the defendant's objection, admitting the label on the basis of Rule 807, the residual exception to the hearsay rule.[82] The Fifth Circuit affirmed, noting that "[u]nder Rule 807, hearsay statements are admissible if they have circumstantial guarantees of trustworthiness similar to the other hearsay exceptions and the district court determines the statements are material, probative, and in the interests of justice."[83] Citing its recent opinion in *United States v. El-Mezain*, the Fifth Circuit noted that "the 'lodestar of the residual hearsay exception analysis' is on the 'equivalent circumstantial guarantees of trustworthiness'" and "'[t]he determination of trustworthiness is drawn from the totality of the circumstances surrounding the making of the statement,' but 'cannot stem from other corroborating evidence.'"[84] "The evidence 'must be at least as reliable as evidence admitted under a firmly rooted hearsay exception' and 'must similarly be so trustworthy that adversarial testing would add little to its reliability.'"[85] Here, the video camera label had equivalent circumstantial guarantees of trustworthiness "because such inscriptions are required by law . . . and false designations of origin give rise to civil liability."[86] Therefore, the video camera label bore significant similarities to other forms of evidence admissible under the hearsay exceptions, such as firearm records.[87] In addition, Rule 902(7) provides that "'[a]n inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin' is self-authenticating," obviating the need for extrinsic evidence of authenticity.[88] As to the remaining elements, the video camera label was

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80. *Id.* at 933 (citing United States v. Williams, 661 F.2d 528, 531 (5th Cir. 1981)); *see also* FED. R. EVID. 807(a)(1) (providing a residual exception to the hearsay rule).

81. United States v. Saguil, 600 F. App'x 945, 946 (5th Cir. Apr. 2015) (per curiam), *cert. denied*, 136 S. Ct. 251 (2015) (mem.).

82. *Id.*

83. *Id.* (citing FED. R. EVID. 807(a)).

84. *Id.* (quoting United States v. El-Mezain, 664 F.3d 467, 498 (5th Cir. 2011)).

85. *Id.* (quoting *El-Mezain*, 664 F.3d at 498).

86. *Id.* at 947 (citing 19 U.S.C. § 1304(a) (2012) and 15 U.S.C. § 1125 (2012)).

87. *Id.* (citing United States v. Towns, 718 F.3d 404, 408 (5th Cir. 2013)) ("[F]irearm records that gun shops were forced to maintain by law were business records [because] a company could lose corporate privileges for failing to maintain them properly.").

88. *Id.*; *see also* FED. R. EVID. 902(7) ("The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: . . . (7) Trade Inscriptions and

offered to prove a material fact—that the child pornography was produced using materials that have been transported in interstate or foreign commerce.[89] This fact was more probative "than any other evidence that could have been obtained through reasonable efforts," and admitting it "served the purposes of the Rules of Evidence and the interests of justice."[90] The Fifth Circuit thus joined the Eighth,[91] Ninth,[92] and Tenth[93] Circuits in rejecting arguments that a manufacturer's inscription on a product is inadmissible as hearsay.[94] The Fifth Circuit also noted that the district court would not have abused its discretion in treating the manufacturer's label as merely circumstantial physical evidence rather than a hearsay statement subject to the residual exception.[95]

E. Expert Testimony

In *Macy v. Whirlpool Corp.*, the Fifth Circuit affirmed the exclusion of the plaintiffs' expert reports for failure to comply with Rule 702 and granted summary judgment for the defendant for the lack of evidence of causation.[96] Noting that an "expert's testimony must be reliable at every step, including the methodology employed, the facts underlying the expert's opinion, and the link between the facts and the conclusion," the Fifth Circuit held that the district court did not abuse its discretion in precluding the general causation opinion when the expert did not adequately explain the relevance of case studies on chronic exposure to carbon monoxide at much higher levels than the low-level carbon monoxide exposure alleged to have caused the injuries at issue in this case.[97] Finally, the Fifth Circuit affirmed the exclusion of expert testimony by an "accomplished engineer with significant expertise in vehicular accident reconstruction and fire and explosion analysis" because he

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the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.").

89. *Saguil*, 600 F. App'x at 947 (citing 18 U.S.C.A. § 2251(a) (2012)).

90. *Id.* (citing FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination") and Dartez v. Fibreboard Corp., 765 F.2d 456, 462 (5th Cir. 1985) (noting Congress provided the exception "to protect the integrity of the specifically enumerated exceptions by providing the courts with the flexibility necessary to address unanticipated situations and to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies")).

91. *See* United States v. Koch, 625 F.3d 470, 480 (8th Cir. 2010).

92. *See* United States v. Alvarez, 972 F.2d 1000, 1004 (9th Cir. 1992) (per curiam) ("An inscription placed on a firearm by the manufacturer is . . . a mechanical trace and not a statement for purposes of Federal Rule of Evidence 801(c)."), *overruled by* United States v. Gomez, 302 F. App'x 596 (9th Cir. 2008).

93. *See* United States v. Thody, 978 F.2d 625, 630–31 (10th Cir. 1992) (holding that the manufacturer's imprint on the gun was not hearsay).

94. *Saguil*, 600 F. App'x at 946–47.

95. *Id.* at 947.

96. Macy v. Whirlpool Corp., 613 F. App'x 340, 341–45 (5th Cir. June 2015) (per curiam).

97. *Id.* at 344.

had no significant experience or training relating to the subject of his expert opinion in this case, namely that the range was defectively designed because it failed to comply with a particular standard for gas ranges or appliances.[98] Accordingly, he lacked qualifying training or experience and resultant specialized knowledge that was sufficiently related to the issues and evidence before the trier of fact to be helpful or to make his proposed testimony probative.[99]

In *Cooper v. City of La Porte Police Department*, the Fifth Circuit addressed the exclusion of an expert report in support of a motion for summary judgment.[100] The plaintiff brought a § 1983 action against the city and a police officer, alleging that the officer arrested her for child abandonment or endangerment without probable cause after responding to reports that she had allowed her children to ride on motorized scooters without adult supervision.[101] In response to the defendants' motion for summary judgment, the plaintiff submitted an expert report by a police lieutenant on whether the arresting officer conducted his investigation in line with what the expert believed to be adequate procedures.[102] The Fifth Circuit affirmed the exclusion of the report under Rule 702, finding it conclusory and unhelpful, largely because it did not directly "examine the primary issue in the case—whether there was probable cause to conclude" that the plaintiff committed the offense for which she was arrested.[103]

F. Expert Testimony on Criminal Intent Under Rule 704

In *United States v. Plato*, the Fifth Circuit addressed Rule 704(b)'s prohibition on expert witness testimony on a criminal defendant's intent regarding an element of a crime charged.[104] The defendant, president and CEO of a failing business that acquired and refurbished shut-in oil and gas wells, was convicted of mail fraud and conspiracy.[105] The prosecutors presented a theory that the defendant resorted to a series of investment

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98. *Id.* at 344–45.

99. *Id.* at 345.

100. Cooper v. City of La Porte Police Dep't, 608 F. App'x 195, 197–98 (5th Cir. Apr. 2015) (per curiam).

101. *Id.* at 196–97.

102. *Id.* at 198.

103. *Id.*; *see* 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; . . . and (d) the expert has reliably applied the principles and methods to the facts of the case.").

104. United States v. Plato, 593 F. App'x 364, 375 (5th Cir. Jan. 2015) (per curiam), *cert denied*, 136 S. Ct. 226 (2015) (mem.). Rule 704(b) provides: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." FED. R. EVID. 704(b).

105. *Plato*, 593 F. App'x at 367–68.

products to raise funds that bore the characteristics of a Ponzi scheme, including using new investor money to make required payments to older investors, characterized by investigators as "lulling payments" meant to placate investors.[106] An investigator for the Texas State Securities Board testified that the defendant was untruthful regarding investor awareness of his prior criminal history, that the defendant's "business practices bore characteristics of a Ponzi scheme and that certain payments had characteristics of 'lulling payments' meant to placate investors."[107] The Fifth Circuit held that the defendant had opened the door to the investigator's opinion testimony regarding the defendant's truthfulness with investors.[108] On direct examination, the investigator testified about asking the defendant if he had disclosed his criminal convictions to the investors.[109] The defendant answered "that some of the investors knew and some didn't."[110] On cross-examination, the defendant's counsel sought to establish that the defendant's statement was literally true, thus raising the issue of the accuracy of the statement, which had not been raised on direct examination.[111] The Fifth Circuit characterized the cross-examination as creating an ambiguity as to whether the response was truthful regarding investor knowledge or the defendant's disclosure of the information.[112] The investigator had subsequently learned that some investors had independently learned of the defendant's prior criminal conviction but had not been informed by the defendant, and others were unaware; thus, the Fifth Circuit held the investigator was entitled to clarify the ambiguity with his opinion on whether the defendant's answer to the direct question—whether the defendant had disclosed his criminal convictions to investors—was truthful or not.[113] Regarding the investigator's testimony that the defendant's business practices bore the characteristics of a Ponzi scheme and lulling payments, the Fifth Circuit held that the investigator's testimony was limited to addressing the definition of a Ponzi scheme, his analysis of whether a company's payments and expenses had characteristics of a Ponzi scheme, and the factual characterization of the defendant's company's payments.[114] The district court sustained an objection to more direct attribution, such as whether the investigator found characteristics of a Ponzi scheme in the records concerning the defendant's company.[115]

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106. *Id.* at 374.
107. *Id.* at 374–75.
108. *Id.* at 374.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 375.
113. *Id.* at 374–75.
114. *Id.*
115. *Id.* at 375.

In *United States v. Kuhrt*, the Fifth Circuit again addressed the admissibility of expert opinion testimony on intent by a criminal defendant under Rules 702 and 704(b).[116] The defendants, both long-time employees of Allen Stanford's investment companies at a time during which Stanford ran a multi-billion dollar Ponzi scheme, were convicted of wire fraud and for their roles in the Ponzi scheme.[117] The defendants offered opinion testimony by accounting experts on a number of topics, characterized by the Fifth Circuit as testimony on "(1) the roles, responsibilities, and reasonable beliefs of persons in a similar position to [the defendants] and [the defendants] themselves; and (2) whether [the defendants] had a duty to disclose the fraud under any accounting ethics rules or norms."[118] On a motion in limine, the district court excluded expert "testimony on [the defendants'] specific roles, responsibilities, knowledge, beliefs, or reasonableness of [the defendants'] subjective beliefs," permitted expert testimony on common practice in the industry, and reserved for ruling on a case-by-case basis testimony regarding a hypothetical person in the defendants' positions.[119] Although a number of the proposed topics would appear precluded by Rule 704(b), which bars expert opinion testimony on a criminal defendant's mental state regarding an element of a charged offense or defense, the Fifth Circuit's analysis focused primarily on harmless error analysis, merely noting in passing that "the district court should have permitted some of the expert testimony" on the summarized topics.[120] The Fifth Circuit noted that at most, the defendants' experts "could have testified about what a typical person in [the defendants'] positions would have likely known" about the accuracy of the financial statements or reports based on common practice in the industry.[121] In contrast, the government presented ample evidence of what the defendants actually did, making any error in excluding this evidence harmless.[122] Similarly, any error in the exclusion of expert testimony on the defendants' duty to disclose Stanford's fraud under accounting ethics and principles was harmless because the case was not about a failure to disclose but about active participation in the fraud and affirmative acts to perpetuate or conceal Stanford's theft.[123]

G. Lay Opinion Testimony

In *United States v. Macedo-Flores*, the Fifth Circuit once again addressed lay opinion testimony by government agents offering opinion

116. United States v. Kuhrt, 788 F.3d 403, 418–22 (5th Cir. June 2015).
117. *Id.* at 408.
118. *Id.* at 420.
119. *Id.* at 418.
120. *Id.* at 420.
121. *Id.* at 421.
122. *Id.*
123. *Id.* at 422.

testimony regarding the meaning of certain words based on experience in drug investigations.[124] The government convicted Reynaldo Macedo-Flores for possession of cocaine and methamphetamine with intent to distribute, obstruction of justice, and two counts of perjury.[125] Following a number of drug buys from Macedo-Flores by an undercover agent, detectives obtained a warrant to tap Macedo-Flores's phone.[126] On these calls, investigators heard a number of references to "la doña" and "la señora," Spanish terms for "lady."[127] In a subsequent transaction, Macedo-Flores instructed the undercover agent to retrieve the drugs from a particular residence, which turned out to be the home of Macedo-Flores's mother, from whom the agent obtained the drugs.[128] At trial, Agent Torres, the lead investigator, testified that Macedo-Flores referred to his mother as "la doña" and "la señora" based on the information learned during the investigation.[129] On appeal, Macedo-Flores challenged the admission of Agent Torres's lay opinion testimony, arguing that he possessed no special familiarity with the recorded language and his opinion was not sufficiently helpful under Rule 701 because he had no more insight into the meaning of the coded words than the jury.[130] Macedo-Flores further argued that "la doña" and "la señora" were not coded words at all, merely the Spanish words for lady, the meaning of which the jury was equally equipped to interpret, and that the Fifth Circuit had never permitted government agents to offer opinion testimony on the meaning of language that was not coded.[131] The Fifth Circuit noted its string of recent opinions admitting lay testimony by government agents on the meaning of

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124. United States v. Macedo-Flores, 788 F.3d 181, 183 (5th Cir. June 2015), *cert. denied*, 2016 WL 763358 (Feb. 29, 2016).

125. *Id*.

126. *Id.*

127. *Id.* at 184.

128. *Id.*

129. *Id.* at 185. Incidentally, Macedo-Flores's mother, Austreberta Macedo-Flores, was also convicted for conspiracy to possess methamphetamine with intent to distribute. United States v. Macedo-Flores, 599 F. App'x 215, 217 (5th Cir. Apr. 2015) (per curiam). Her conviction was affirmed on appeal because the Fifth Circuit held that the district court did not err due to the nondisclosure of recorded conversations or failure to authenticate them when they were not played for the jury or introduced into evidence. *Id.*

130. *Macedo-Flores*, 788 F.3d at 191–92. Lay opinion testimony is limited to the witness's opinion and must 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." FED. R. EVID. 701(a)–(c).

131. *Macedo-Flores*, 788 F.3d at 192.

coded words in *United States v. Akins*,[132] *United States v. El-Mezain*,[133] and *United States v. Miranda*,[134] determining that analogous to the agents in those cases, Agent Torres was the lead investigator in the case, was a native Spanish speaker whose duties in the case included "listening and just being up-to-date on all the wire interception phone calls," and that "his opinion about what Macedo meant with the terms 'la doña' and 'la señora' . . . was based on his substantial involvement in the investigation of the drug conspiracy."[135] The Fifth Circuit held that Agent Torres had "a unique perspective and insight into the conspiracy from which the jury could benefit" not only because he was a native Spanish speaker but also because he oversaw the entire investigation and listened to all of the intercepted phone calls.[136] Notably, the Fifth Circuit rejected Macedo-Flores's argument that the court never allows an officer to testify that language is not coded: "Whether the agent testifies to the true meaning of coded words or instead testifies that such 'coded' words are to be given their ordinary meaning makes no difference."[137]

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132. United States v. Akins, 746 F.3d 590, 598–99 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 707 (2014) (mem.). The Fifth Circuit noted "that in the context of drug conspiracies, '[d]rug traffickers' jargon is . . . a fit subject for expert testimony.'" *Id.* at 599 (quoting United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997)). However, the Fifth Circuit has also recognized "that testimony about the meaning of drug code words can be within the proper ambit of a lay witness with extensive involvement in the underlying investigation." *Id.* (internal citation omitted). In *Akins*, the lead investigator on a drug conspiracy investigation testified at trial as a lay opinion witness about "his understanding of the meanings of various code words used in recorded wiretapped conversations." *Id.* at 597. He testified that the meanings he ascribed to the code words were gleaned from "the course of the investigation as well as his career experience." *Id.* The Fifth Circuit held that the district court did not abuse its discretion in permitting the testimony. *Id.* at 599–600. It further held that "[t]o the extent that certain portions of [the investigator's] testimony . . . crossed the line into drawing exclusively on his expertise, it was cumulative of other testimony [in the record] and therefore harmless." *Id.* at 600.

133. United States v. El-Mezain, 664 F.3d 467, 514 (5th Cir. 2011). Similarly, in *El-Mezain*, two agents were extensively involved in the investigation of a conspiracy and testified to their understanding of the events in that case. *Id.* The Fifth Circuit held that "[t]estimony need not be excluded as improper lay opinion, even if some specialized knowledge on the part of the agents was required, if it was based on first-hand observations in a specific investigation." *Id.*

134. United States v. Miranda, 248 F.3d 434, 441 (5th Cir. 2001). In *Miranda*, the appellant claimed that an FBI agent, who had not been designated as an expert witness, testified to the meanings of various code words heard on intercepted phone calls and thereby "'crossed the line' from lay to expert opinion testimony." *Id.* In rejecting that argument, the Fifth Circuit again held that the agent's testimony was permissible under Rule 701 because the agent's "extensive participation in the investigation of this conspiracy, including surveillance . . . and the monitoring and translating of intercepted telephone conversations, allowed him to form opinions concerning the meaning of certain code words used in this drug ring based on his personal perceptions." *Id.*

135. *Macedo-Flores*, 788 F.3d at 192.

136. *Id.*

137. *Id.*

H. Prior Bad Acts

In *United States v. Wallace*, the Fifth Circuit addressed the admission of prior convictions for possession and manufacture of illegal drugs in a subsequent trial for conspiracy to distribute illegal drugs.[138] In this case, the jury convicted two individuals of conspiracy to possess with intent to distribute and for distributing methamphetamine (meth).[139] Before the trial, the Government informed the Court of its intent to introduce evidence of separate prior state court convictions—one for possession of meth by one defendant and another for manufacturing meth by the other defendant.[140] Both objected to the relevance of prior convictions for possession and manufacture to charges involving distribution.[141] The district court overruled the objection, and the Fifth Circuit affirmed, holding that the convictions were admissible (with an appropriate limiting instruction) to show knowledge, intent, and absence of mistake—in this case, that the two alleged coconspirators "'knew each other as more than friends,' and were familiar with the other's involvement in the meth business."[142] Noting its two-part test to determine whether a prior bad act is admissible under Rule 404(b)—namely, (1) "whether the extrinsic offense evidence is relevant to an issue other than the defendant's character," and (2) "whether the probative value of the evidence is substantially outweighed by undue prejudice"—the Fifth Circuit announced what appears to be a categorical rule: "A prior conviction for narcotics possession or manufacture is probative to a defendant's intent when he is charged with conspiracy to distribute."[143] Thus, while the Fifth Circuit noted that it had previously "held that the probative value of evidence related to a defendant's prior drug-related activity is not substantially outweighed by unfair prejudice in a drug conspiracy case,"[144] the opinion in *Wallace* represents another step in the precedential progression by establishing authority for the relevance of any narcotics conviction.[145] The Fifth Circuit cautioned, however, that its holding "does not render all prior narcotics convictions per se admissible in a drug conspiracy case" because "[t]he government continues to maintain the burden of demonstrating—in every case—that a prior conviction is relevant and admissible under 404(b)."[146]

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138. United States v. Wallace, 759 F.3d 486, 493 (5th Cir. July 2014).

139. *Id.* at 488.

140. *Id.* at 493.

141. *Id.*

142. *Id.*

143. *Id.* at 493–94 (quoting United States v. Mitchell, 484 F.3d 762, 774 (5th Cir. 2007)).

144. *Id.* at 494 (citing United States v. Booker, 334 F.3d 406, 411–12 (5th Cir. 2003) ("holding that evidence of the defendant's prior possession of 178 kilograms of marijuana was not unfairly prejudicial where the defendant was charged with conspiracy to distribute cocaine base")).

145. *Id.*

146. *Id.* (citing United States v. Yeagin, 927 F.2d 798, 803 (5th Cir. 1991)).

Similarly, in *United States v. Avila-Gonzalez*, the Fifth Circuit affirmed the admission of a 2012 state court conviction for attempted possession of a controlled substance as intrinsic evidence, noting that intrinsic evidence does not implicate Rule 404(b)'s balancing test.[147] "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged," and are thus admissible to "complete the story of the crime by proving the immediate context of events in time and place" and to "evaluate all of the circumstances under which the defendant acted."[148] The Fifth Circuit held that "[a]dmission of the conviction did not violate [Avila-Gonzalez's] due process rights or the Double Jeopardy Clause because 'the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.'"[149]

In *United States v. Schaffer*, the Fifth Circuit addressed the admission of a prior arrest for possession of a "distributable amount" of cocaine in a subsequent trial charging the defendant with possession of cocaine with intent to distribute.[150] In affirming the conviction, the Fifth Circuit noted in its Rule 404(b) analysis that the defendant had been previously arrested with 1.9 grams of cocaine within the time period charged for the conspiracy at issue in the second trial, and that the arresting officer testified that 1.9 grams was "too much to do in one night" and was a "distributable amount."[151] While the lower court did not rule that the evidence was admissible under Rule 404(b), instead considering it intrinsic to the charged offense, the Fifth Circuit focused its analysis on Rule 404(b) as evidence of intent to participate in the conspiracy at issue.[152]

I. Admission of Prior Testimony of Unavailable Declarant Under Rule 804(b)(1) and the Confrontation Clause

In *United States v. Richardson*, the Fifth Circuit held as a matter of first impression that admission at a second trial of testimony from a witness at the first trial, elicited in contravention of the defendant's right of self-representation, did not violate the Confrontation Clause.[153] The

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147. United States v. Avila-Gonzalez, 611 F. App'x 801, 804 (5th Cir. May 2015) (per curiam) (citing United States v. Rice, 607 F.3d 133, 141 (5th Cir. 2010)), *cert denied*, 136 S. Ct. 700 (2015) (mem.).

148. *Rice*, 607 F.3d at 135, 141 (quoting United States v. Coleman, 78 F.3d 154, 156 (5th Cir. 1996); United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990); and United States v. Randall, 887 F.2d 1262, 1268 (5th Cir. 1989)).

149. *Avila-Gonzalez*, 611 F. App'x at 804 (quoting United States v. Felix, 503 U.S. 378, 387 (1992)).

150. United States v. Schaffer, 582 F. App'x 468, 474–75 (5th Cir. Sept. 2014) (per curiam).

151. *Id.* at 471.

152. *Id.*

153. United States v. Richardson, 781 F.3d 237, 239–50 (5th Cir. Mar. 2015), *cert. denied*, 136 S. Ct. 159 (2015) (mem.).

defendant was convicted of drug possession with intent to distribute based in part on the testimony of a confidential informant who purchased fifty doses of ecstasy from the defendant while wearing a wire and using marked bills.[154] On the defendant's first appeal, the Fifth Circuit reversed and remanded, concluding that the district court violated the defendant's Sixth Amendment right of self-representation by denying his request to proceed pro se.[155] Following a second trial, the defendant was again convicted.[156] Between the first and second trial, the confidential informant who testified at the first trial was murdered in an unrelated failed drug transaction.[157] The defendant moved to exclude the informant's prior testimony, which the district court denied, finding no violation of Rule 804(b)(1) or the Confrontation Clause.[158] The defendant argued that the violation of his right of self-representation in his first trial deprived him of the opportunity to cross-examine the confidential informant sufficient to satisfy the Confrontation Clause and that his trial counsel did not properly cross-examine him.[159] The Fifth Circuit affirmed, noting that the Sixth Amendment guaranteed an "adequate" or "effective" opportunity for cross-examination and the defendant could not show that he lacked such an opportunity.[160]

In *United States v. Vasquez*, the Fifth Circuit addressed the admissibility of a fellow inmate's testimony concerning the defendant's confession to a conspiracy to possess meth.[161] In that case, the court tried the coconspirators jointly.[162] Both testified in the first trial, which resulted in a deadlocked jury.[163] Neither testified in the second trial, but the court read transcripts of their testimony from the first trial into the record.[164] At the second trial, an inmate was permitted to testify that one of the defendants confessed to him that both defendants had participated in the conspiracy to sell meth.[165] Because neither defendant testified, the non-confessing defendant had no

154. *Id.* at 240–41.

155. United States v. Richardson, 478 F. App'x. 82, 83 (5th Cir. 2012) (per curiam).

156. *Richardson*, 781 F.3d at 241.

157. *Id.*

158. *Id.* Rule 804(b)(1) permits, as an exception to hearsay, former testimony from a declarant who is now unavailable as a witness that "(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had . . . an opportunity and similar motive to develop it in direct, cross-, or redirect examination." FED. R. EVID. 804(b)(1)(A), (B). The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Clause bars the introduction of testimonial evidence against a criminal defendant unless the proponent shows both that the declarant is unavailable and that the defendant had "a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 68 (2004).

159. *Richardson*, 781 F.3d at 245.

160. *Id.*

161. United States v. Vasquez, 766 F.3d 373, 377–78 (5th Cir. Sept. 2014), *cert. denied*, 135 S. Ct. 1453 (2015) (mem.).

162. *Id.* at 375.

163. *Id.* at 376.

164. *Id.*

165. *Id.*

opportunity to cross-examine the confessing defendant about the inmate's testimony.[166] The court convicted both defendants on retrial and the Fifth Circuit affirmed.[167] Regarding the admission of the inmate's testimony, the Fifth Circuit noted that it was a nonhearsay party admission under Rule 801(d)(2)(A) as to the confessing defendant.[168] As to the non-confessing defendant, the Fifth Circuit noted that applicable Supreme Court precedent described "statements from one prisoner to another" as "clearly nontestimonial" for Sixth Amendment purposes and, therefore, held *Bruton v. United States* and *Crawford v. Washington* inapposite.[169]

In *United States v. Octave*, the Fifth Circuit addressed the admission of recorded statements of a deceased witness and the admission of a prior conviction under Rule 404(b).[170] The defendant was convicted of conspiracy to distribute cocaine base (crack) based in part on recordings of purchases of crack from the defendant made by a confidential informant who died before trial.[171] The Government offered transcripts and recordings of the audio–video surveillance of the controlled purchases.[172] The defendant challenged admission of the transcripts and recordings as violating the Sixth Amendment's prohibition on testimonial statements of a witness who does not appear at trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination.[173] As to the recordings, the court admitted the defendant's side of the recorded conversations as an admission by a party opponent under Rule 801(d)(2)(A); the deceased confidential informant's recorded statements were admitted not for the truth of the statements but for the limited purpose of providing context

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166. *Id.*
167. *Id.* at 376, 380.
168. *Id.* at 377.
169. *Id.* at 378 (quoting Davis v. Washington, 547 U.S. 813, 825 (2006)). The court in *Crawford* expressly left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" Crawford v. Washington, 541 U.S. 36, 68 (2004). *Crawford* held that the Confrontation Clause applies to witnesses against the accused—those who "bear testimony"—and provided some examples, such as "*ex parte* in-court testimony or its functional equivalent—that is, 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" while contrasting it with nontestimonial statements, such as "business records or statements in furtherance of a conspiracy." *Id.* at 51, 56 (quoting Brief of Petitioner at 23). *Crawford* further held that the admission of testimonial statements of an unavailable witness violates the Confrontation Clause unless there was a prior opportunity for the defendant to cross-examine the declarant. *Id.* at 59. In *Bruton*, the Supreme Court held that a defendant's Sixth Amendment rights were violated when the government introduced a nontestifying codefendant's confession incriminating the defendant at their joint trial. Bruton v. United States, 391 U.S. 123, 126 (1968).
170. United States v. Octave, 575 F. App'x 533, 539 (5th Cir. July 2014) (per curiam).
171. *Id.* at 535–36.
172. *Id.* at 537.
173. *Id.*

for the defendant's statements.[174] The Fifth Circuit found no plain error in the admission of these statements.[175]

J. Suppression Not a Proper Remedy for Improperly Obtained Historical Cell Site Location Data

In *United States v. Guerrero*, the Fifth Circuit affirmed Guerrero's conviction for the commission of two murders in aid of racketeering over his objection to the court's admission of historical cell site location data and an alleged constructive amendment to his indictment that the Fifth Circuit considered more properly classified as an objection to evidence offered to show bad character in violation of Rule 404(b).[176] Thirty-three witnesses testified against Guerrero to the effect that by age seventeen, he had risen through the ranks of the Texas Mexican Mafia, a criminal enterprise funded by extortion of drug traffickers, to be a sergeant in charge of operations in Uvalde, Texas.[177] In 2009, twelve individuals were indicted for crimes related to the Texas Mexican Mafia; all but two, including Guerrero, pled guilty, and a number of those testified about Guerrero's involvement in the murder of Christopher Mendez, a fellow member whom Guerrero wrongly believed to be cooperating with police.[178] As it pertains to the evidentiary issues raised on appeal, the Government introduced historical cell site location data to show that Guerrero's cellphone was used near the location where Mendez's body was found at the time that he was killed.[179] The Government also introduced evidence of the murder of Jesse "Pos" Rodriguez, who had been killed about a week before Mendez and whose body was found in roughly the same area.[180] Guerrero's brother, also a member of the Texas Mexican Mafia, testified that Guerrero had orchestrated the murder of Rodriguez because he was also suspected of being an informant.[181]

As to the historical cell site location evidence, the Government conceded that it had not complied with the procedure mandated in the Stored Communications Act, which requires the Government to obtain a court order on "an application identifying 'specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication . . . are relevant and material to an ongoing criminal investigation.'"[182] Instead, the Government obtained Guerrero's

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174. *Id.* at 538.
175. *Id.*
176. United States v. Guerrero, 768 F.3d 351, 353–54 (5th Cir. Sept. 2014), *cert. denied*, 135 S. Ct. 1548 (2015) (mem.).
177. *Id.* at 354–56.
178. *See id.* at 355–56.
179. *Id.* at 357.
180. *Id.* at 355.
181. *Id.*
182. *Id.* at 358 (quoting 18 U.S.C. § 2703(d) (2012)).

historical cell site location data from state officials, who used a subpoena rather than a § 2703(d) order.[183] However, the Fifth Circuit held that suppression was not a remedy provided by the Stored Communications Act (unlike the Wiretap Act) and was available only upon a showing that the data was obtained in violation of the Fourth Amendment and the Stored Communications Act itself.[184] In holding that the Fourth Amendment was not violated in this case, the Fifth Circuit revisited its 2013 opinion in *In re Application of the U.S. for Historical Cell Site Data*, which analogized historical cell site information—which can be used to identify the location at which a user places and terminates a call on a particular cellphone—to the pen registers at issue in *Smith v. Maryland*.[185] The Fifth Circuit concluded that cellphone users "understand that their service providers record their location information when they use their phones" in the same way that the customers in *Smith* understood that the phone company recorded the numbers they dialed.[186] Accordingly, the Fifth Circuit held that historical cell site information was not subject to a reasonable expectation of privacy that implicates the Fourth Amendment.[187] Guerrero contended that the recent Supreme Court decision in *Riley v. California* constituted an intervening change in the law that overruled the rule announced in *Historical Cell Site*.[188] The Fifth Circuit dismissed this challenge, noting that *Riley* did not "unequivocally overrule prior precedent," and distinguished the conclusion in *Riley*—that the search-incident-to-arrest doctrine did not permit the Government to search an arrestee's cellphone without a warrant—because the "*Riley* defendant indisputably had an expectation of privacy in the contents of his personal cell phone" and the search-incident-to-arrest exception did not overcome that privacy interest.[189] The Fifth Circuit noted, however, that the Eleventh Circuit in *United States v. Davis* and Third Circuit in *In re Application of the U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government* had decided the issue differently, suggesting that the Supreme Court may soon take up the issue of adapting *Smith* and *United States v. Robinson* to modern technology once again.[190]

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183. *Id.*

184. *Id.*

185. *Id.* at 358–61; *see* Smith v. Maryland, 442 U.S. 735, 738 (1979); *In re* Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 602 (5th Cir. 2013).

186. *Guerrero*, 768 F.3d at 358.

187. *See id.* at 361.

188. *Id.* at 359.

189. *Id.*

190. *Id.* at 360; *see also* United States v. Robinson, 414 U.S. 218, 236 (1973) (announcing the search-incident-to-arrest exception by noting, "Having in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it."); United States v. Davis, 754 F.3d 1205, 1217 (11th Cir. 2014) (distinguishing *Historical Cell Site* and *Smith* and holding that "cell site location information is within the subscriber's reasonable expectation of privacy"), *vacated and rehearing en banc granted*, 573 F. App'x 925 (11th Cir. 2014) (mem.); *In re* Application of the U.S. for an Order Directing

Guerrero also argued that the Government had constructively amended the indictment by introducing evidence related to Rodriguez's murder and other "acts of extortion and drug trafficking that Guerrero committed when he was seventeen."[191] Noting that the jury charge clearly set out the crimes and predicate acts Guerrero was charged with, the Fifth Circuit characterized this argument as an objection to evidence of bad character under Rule 404(b).[192] The Fifth Circuit rejected that challenge, noting that under Fifth Circuit precedent, the "government is not limited in its proof of a conspiracy or racketeering enterprise to the overt or racketeering acts alleged in the indictment," and "evidence 'of an uncharged offense arising out of the same transactions as the offense charged in the indictment is not extrinsic evidence within the meaning of Rule 404(b).'"[193]

K. District Court's Discretion to Control Witness Examination Under Rule 611

In *United States v. Fields*, the Fifth Circuit addressed the propriety of requiring a practice cross-examination of a witness to rule on objections prior to permitting the approved questions to be posed to the witness in front of the jury.[194] The defendant, who represented himself pro se, was convicted of escape from federal detention, carjacking, and murder and sentenced to death.[195] During the trial, the defendant cross-examined his girlfriend, drawing numerous objections to form, relevancy, and content as the defendant argued with the witness, asked repetitive questions, sought to elicit hearsay evidence, read from documents not in evidence, offered his own commentary, and made arguments in the guise of asking questions.[196] The district court dismissed the jury and required the defendant to read his questions from his list of prepared questions, hear objections, and remove those questions for which the court sustained the objections from the questions that the defendant would be permitted to ask the witness the next day.[197] On appeal, the defendant argued that the process "required him to reveal privileged trial strategy in violation of his Fifth, Sixth, and Eighth Amendment rights."[198]

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a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 620 F.3d 304, 317 (3d Cir. 2010) (distinguishing *Smith* on the grounds that a "cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way").

191. *Guerrero*, 768 F.3d at 364.

192. *Id.* at 365; FED. R. EVID. 404(b).

193. FED. R. EVID. 404(b); *Guerrero*, 768 F.3d at 364 (quoting United States v. Krout, 66 F.3d 1420, 1425 (5th Cir. 1995)).

194. United States v. Fields, 761 F.3d 443, 470–75 (5th Cir. July 2014), *cert. denied*, 135 S. Ct. 2803 (2015) (mem.).

195. *Id.* at 450, 476.

196. *Id.* at 471.

197. *Id.*

198. *Id.* at 470.

The Fifth Circuit noted that Rule 611 provides: "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment" so as to "permit[] courts to preclude questions that obscure truth because they are ambiguous, confusing, misleading, argumentative, compound, or assume facts not in evidence."[199] In this case, the district court's decision to deal with the defendant's unsuccessful attempts to examine the witness through a "dry run" cross-examination was within its discretion under the circumstances and did not impinge the defendant's rights under the Confrontation Clause, which is satisfied when the defendant is permitted to expose to the jury "the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."[200]

L. Reopening Evidence

In *Aransas Project v. Shaw*, the Fifth Circuit addressed the standard for reopening evidence after trial.[201] In this case, an environmental conservation organization sued the Texas Commission on Environmental Quality (TCEQ) under the Endangered Species Act, alleging that TCEQ's regulation of water diversion in the San Antonio and Guadalupe River systems had caused the deaths of whooping cranes.[202] The plaintiff presented evidence of the mortality rates of the whooping cranes gathered by a biologist performing annual aerial population surveys.[203] After the trial, TCEQ moved to introduce a United States Fish and Wildlife Service (FWS) report critical of the biologist's survey methodology.[204] After reviewing and considering the survey, the district court denied the motion.[205] The Fifth Circuit identified the test for deciding whether to reopen evidence as weighing "the importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party."[206] The Fifth Circuit determined that the exclusion of the survey was error because the district court did not consider the second two factors: "the reason for the moving party's failure to introduce the evidence earlier" (in this case, the report had not yet been published) and the possibility

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199. *Id.* at 471–72 (quoting FED. R. EVID. 611(a) and 28 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 6164 (2d ed. 2014)).

200. *Id.* at 471 (quoting United States v. Restivo, 8 F.3d 274, 278 (5th Cir. 1993)).

201. Aransas Project v. Shaw, 775 F.3d 641, 654–56 (5th Cir. Dec. 2014) (per curiam).

202. *Id.* at 645–46.

203. *Id.* at 653.

204. *Id.* at 654.

205. *Id.*

206. *Id.* at 655 (quoting Chieftain Int'l (U.S.), Inc. v. Se. Offshore, Inc., 553 F.3d 817, 820 (5th Cir. 2008)).

of prejudice (none).[207] The Fifth Circuit further noted that the district court had improperly acted as the trier of fact, rather than as a gatekeeper, because it "acted as if the evidence had been admitted, then weighed it against the evidence presented."[208] The district court issued a detailed order denying the motion to reopen the evidence, finding that the report focused on population count rather than the mortality count evidence produced by the biologist, conflicted with evidence produced at trial about the crane's territoriality, relied on unconvincing data, described itself as preliminary, and had an unacceptable error rate.[209] While declining to reopen the evidence was error, the district court's same careful consideration and factual findings also established that its ultimate findings were unaffected, and the error was therefore harmless.[210]

M. Testimony Prohibited on Juror State of Mind

In *United States v. Scott*, the Fifth Circuit addressed the application of Rule 606(b) to a unique situation—"[w]hether the district court should have conducted an evidentiary hearing regarding [a juror's] in-trial thoughts or feelings toward the [prosecutor]."[211] Following the defendant's conviction for possession of marijuana and conspiracy to possess marijuana with intent to distribute, the defendant learned that one of the jurors in his case contacted one of the Assistant United States Attorneys involved with the prosecution, who ceased contact and notified the district court after he discovered she was a former juror.[212] The district court held an ex parte hearing, during which the juror was interviewed, and the court determined "that there had been no inappropriate contact between the prosecution and the juror prior to or during the trial."[213] The district court denied the defendant's subsequent request for a hearing.[214] The Fifth Circuit affirmed, determining that the district court properly held that the testimony sought was barred by Rule 606(b)(1).[215] The defendant argued that the juror's efforts to develop a relationship with the

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207. *Id.*
208. *Id.* at 655–56.
209. *Id.* at 655.
210. *Id.* at 656.
211. United States v. Scott, 576 F. App'x 409, 412–13 (5th Cir. Aug. 2014) (per curiam), *cert denied*, 136 S. Ct. 913 (2016) (mem.).
212. *Id.* at 411.
213. *Id.*
214. *Id.* at 413.
215. *Id.* Rule 606(b)(1) provides in relevant part, "during an inquiry into the validity of a verdict . . . a juror may not testify about . . . any juror's mental processes concerning the verdict." FED. R. EVID. 606(b)(1). In the seminal United States Supreme Court case on the application of the rule, *Tanner v. United States*, the Court held that Rule 606(b)(1) prohibited examination of jurors despite testimony that jurors consumed excessive amounts of alcohol during recesses, smoked marijuana regularly during the trial (one juror sold a quarter pound of marijuana to another juror during the trial), and took marijuana, cocaine, and drug paraphernalia into the courthouse. Tanner v. United States, 483 U.S. 107, 115–16 (1987).

prosecutor after the trial evidenced implied bias in favor of the prosecution during the trial.[216] While noting that it had recognized implied bias in certain instances,[217] the Fifth Circuit has now expressly limited implied bias principles to "situations of developed relationships such as those of family or professional connections," characterizing the scope of its application to "extreme situations of existing relationships that were undisclosed during *voir dire* with the possibility of the field of implied bias expanding on the right facts."[218]

216. *Scott*, 576 F. App'x at 414.

217. *See* Solis v. Cockrell, 342 F.3d 392, 395 (5th Cir. 2003); United States v. Fred-Scott, 854 F.2d 697, 698–700 (5th Cir. 1988) (recognizing implied bias as a valid construct and applying it to a situation in which, during voir dire, a potential juror failed to disclose that his brother was a deputy sheriff in the office that performed some of the investigation in the case).

218. *Scott*, 576 F. App'x at 414 (emphasis omitted).