EVIDENCE

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I. INTRODUCTION

During the period of this survey, July 2012 to June 2013, the Fifth Circuit issued opinions on a number of notable evidence-related issues, including hearsay, authentication, the admission of evidence of other acts under Rule 404, and expert testimony.

II. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON EVIDENCE MATTERS

A. Hearsay

In *United States v. Towns*, the defendant, Melvin Towns, was convicted of conspiracy to possess and distribute pseudoephedrine.[1] Towns argued on appeal that the district court erroneously admitted evidence of pseudoephedrine purchase logs from various pharmacies against him in violation of the business records exception to the hearsay rule and in violation of the Confrontation Clause.[2] The Fifth Circuit rejected these arguments and affirmed the trial court's evidentiary ruling.[3]

In 2009, an officer with the Texas Department of Public Safety, with the help of cooperating witnesses and informants, learned that Towns would visit multiple pharmacies to obtain large quantities of pseudoephedrine to manufacture methamphetamine.[4] At trial, the court admitted into evidence

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1. United States v. Towns, 718 F.3d 404, 406 (5th Cir. Apr. 2013).
2. *Id.*
3. *Id.*
4. *Id.*

pseudoephedrine purchase logs from various retailers after denying Towns's motion in limine and over his objection.[5] The government also presented testimony from co-conspirators, and Towns testified that he purchased the pills but denied involvement in any illegal drug manufacturing scheme.[6] Towns was convicted by a jury, his motion for new trial was denied, and he appealed.[7]

Before both the trial and appellate courts, Towns argued that the pharmacy logs did not fall within the business records exception to the hearsay rule because they were prepared for a law enforcement purpose and, thus, were not used for day-to-day business activities, and that they were improperly admitted through an officer of the State rather than a custodian of the records.[8] Towns also argued that the admission of the logs violated his Sixth Amendment rights under the Confrontation Clause, alleging that the logs were "testimonial" because they were prepared in anticipation of litigation.[9]

The Fifth Circuit held that the logs were proper business records.[10] The court noted that "the undue focus on the law enforcement purpose of the records has little to do with whether they are business records under the Federal Rules of Evidence."[11] The court cited its 1979 decision in *United States v. Veytia-Bravo*, in which the court had held that firearm records, kept as a requirement of the State, were still "business records" for hearsay purposes.[12] The court concluded that "[t]he regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage."[13]

The court also explained that the certification of the custodian of records was all that was required to authenticate the logs, and testimony by the custodian or the cashiers was not necessary.[14] The Fifth Circuit also rejected the Confrontation Clause argument, stating that "[t]he pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution."[15] Thus, because the "logs were not prepared specifically and solely for use at trial," they were not testimonial and admittance did not violate Towns's Sixth Amendment rights.[16]

A vigorous dissent disagreed that the purchase logs constituted business records because the pharmacies did not use the logs in their day-to-day business.[17] The dissent pointed out that in *Veytia-Bravo*, the firearm dealer

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5. *Id.*
6. *Id.* at 407.
7. *Id.*
8. *Id.* at 407–08.
9. *Id.* at 410 (internal quotation marks omitted).
10. *Id.* at 408.
11. *Id.*
12. *Id.* (citing United States v. Veytia-Bravo, 603 F.2d 1187, 1191 (5th Cir. 1979)).
13. *Id.* (footnote omitted) (internal quotation marks omitted).
14. *Id.* at 409–10.
15. *Id.* at 411.
16. *Id.*
17. *Id.* at 415–19 (Graves, J., dissenting).

used the records to prove it had not violated any laws and, thus, had an incentive to accurately keep the records.[18] The dissent found that the remaining evidence against Towns was weak and, thus, the court's admission was not harmless error.[19] The dissent also found in part that because the logs were not business records, they were not properly authenticated.[20] Finally, the dissent concluded that even assuming the logs were business records, they violated the Confrontation Clause because "[t]he logs were not created for the 'administration of [the pharmacies'] affairs.'"[21]

Janice Edwina Demmitt and her son, Timothy Fry, ran an insurance annuity business together and were both licensed agents for a legitimate insurance company, Allianz Life Insurance Company (Allianz).[22] Demmitt and Fry secured clients and set them up with annuity policies with Allianz.[23] In 2007 and 2008, Fry began forging letters from Allianz promising a 50% or 100% match for opening a new annuity and encouraging clients to come up with the money by cashing out their existing Allianz annuities.[24] Whenever clients cashed out or borrowed against existing Allianz annuities, Demmitt or Fry would send a fax to Allianz, and Allianz would send a letter to Demmitt informing her of changes, even if Fry initiated the changes.[25] Among other evidence of Demmitt's knowledge of Fry's activities, evidence showed that money from Fry's fraudulent activities ended up in Demmitt's personal and joint accounts with Fry and was used to support Demmitt's business and personal expenses.[26]

Fry pleaded guilty to charges of money laundering, wire fraud, and conspiracy to launder money, and signed a factual resume that asserted Demmitt's involvement.[27] At her trial, Demmitt presented no evidence or witnesses and argued that Fry was the sole perpetrator of the scheme.[28] The government presented Fry as a witness and asked him whether he swore at the time that he signed the factual résumé that everything in it was true.[29] On cross-examination, Fry claimed that he did not recall Demmitt's involvement with the fraud, told the prosecutor Demmitt was not involved, and "did not [understand that] he was representing Demmitt was part of the fraud when he signed the factual resume."[30] The jury convicted Demmitt, and she appealed,

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18. *Id.* at 418.
19. *Id.* at 419.
20. *Id.* at 419–20.
21. *Id.* at 421 (alteration in original) (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009)).
22. United States v. Demmitt, 706 F.3d 665, 668 (5th Cir. Feb. 2013).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 669.
27. *Id.* at 669–70.
28. *Id.* at 670.
29. *Id.* at 671.
30. *Id.*

claiming that the district court erred in admitting Fry's factual resume as substantive evidence.[31]

On appeal, Demmitt properly raised one evidentiary issue—that the trial court erred in admitting Fry's factual resume as substantive evidence.[32] The government argued that the factual resume was admissible non-hearsay as an adoption or that admission was harmless because Fry's cross-examination created the requisite inconsistent statement, making the resume admissible as a prior inconsistent statement.[33]

The Fifth Circuit explained that a "prior statement must be acknowledged and affirmed *on the stand* in order to be admissible for substantive purposes independent of use as a prior inconsistent statement."[34] The court found that Fry did not admit on the stand that the statements were true, but merely admitted on the stand that he had previously, while not on the stand, sworn that they were true.[35] Thus, the court held that "[t]he prosecutor's careful use of the past tense when asking about the truth of the factual resume . . . is insufficient to establish Fry's affirmation on the stand at Demmitt's trial."[36] Although the Fifth Circuit ultimately found that the evidence was so overwhelming that the error was harmless, it first rejected the government's argument that the resume could be admitted as a prior inconsistent statement.[37] The Fifth Circuit explained that the government's tactic placed Demmitt in the position of either declining to cross-examine Fry about the content of the resume in hopes it would prevail that the document was impermissible hearsay, or satisfying the requirements of Rule 801.[38] The Fifth Circuit stated, "[s]uch a prosecution tactic is impermissible, and we decline to endorse it by finding that the trial court's error was ameliorated by *Demmitt's* cross-examination."[39]

B. Authentication

In 2010, agents of the Drug Enforcement Administration arrested Quincy Terry and DiCarlos Henderson, two dealers of cocaine, and seized a drug ledger containing the names of others.[40] Henderson attributed an entry in the ledger to the defendant, Johnny Winters Jr.[41] Agents subsequently obtained a search warrant for another person suspected to be in the conspiracy and found Winters at the home with a gun nearby.[42] Winters admitted that he knew Terry, but

31. *Id.* at 670.
32. *Id.* at 671.
33. *Id.*
34. *Id.* at 672.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 672–73; *see also* FED. R. EVID. 801 (defining "hearsay").
39. *Demmitt*, 706 F.3d at 673.
40. United States v. Winters, 530 F. App'x 390, 393 (5th Cir. June 2013).
41. *Id.* at 393–94.
42. *Id.* at 394.

denied knowledge of the gun or involvement with the conspiracy, although he admitted to having purchased cocaine from Terry, having another person cook the cocaine, and selling crack cocaine.[43] Agents then searched Winters's home and discovered drug paraphernalia, but no drugs or weapons.[44]

Winters was arrested and indicted for conspiracy to distribute cocaine and possession of a firearm by a felon.[45] A few days before his trial, an agent discovered web pages for Winters on Facebook and MySpace containing pictures of Winters, a photograph of firearms stacked on hundreds of thousands of dollars, and pictures of wrapped packages that resembled cocaine.[46] The photographs were admitted at trial.[47]

Winters argued on appeal that the trial court abused its discretion in admitting the photographs "because the government failed to lay a proper foundation and [the photographs] were unfairly prejudicial."[48] The Federal Rules of Evidence permit a photograph to be admitted if "authenticated by someone other than the photographer 'if [the person] recognizes and identifies the object[s] depicted and testifies that the photograph [is accurate].'"[49]

Although Price testified that he found the photos on Winters's websites and Winters admitted that the websites were his, the Fifth Circuit explained that they were inadmissible.[50] The court noted that the government sought to introduce the photos for more than their mere existence on the web sites and that:

> A photograph's appearance on a personal webpage does not by itself establish that the owner of the page possessed or controlled the items pictured. Because Price was not able to recognize and identify the objects in the photos or show that Winters, let alone any member of the Terry conspiracy, had possession or control of the pictured items, a proper foundation was not laid.[51]

The court further found that the photos had little probative value because they could not be tied to Winters or the conspiracy and were highly prejudicial.[52] The court, however, ultimately concluded that the government had submitted overwhelming evidence of Winters's guilt and this resulted in the error being harmless.[53]

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43. *Id.*
44. *Id.*
45. *Id.* at 393.
46. *Id.* at 394.
47. *Id.*
48. *Id.* at 395.
49. *Id.* (quoting United States v. Clayton, 643 F.2d 1071, 1074 (5th Cir. Unit B 1981)) (citing FED. R. EVID. 901).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 396–97.

In *United States v. Daniels*, a jury convicted defendants Ramon Daniels, JeCarlos Carter, Tenisha Carter, Antonio Furlow, Gransihi Mims, and Auburn Thomas "for conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine."[54] Through a confidential informant, surveillance, and wire taps, the defendants were tied to a cocaine conspiracy.[55] A jury found them guilty of the charges, and five of the six defendants appealed, asserting that the government had failed to prove that the conspiracy involved more than five kilograms of cocaine and had failed to follow the authentication requirements of business records under Rule 902(11).[56]

First, the Fifth Circuit held that there was insufficient evidence to support the jury's finding that the defendants conspired to distribute more than five kilograms of cocaine.[57] The court agreed, however, with the decisions of its sister circuits that the quantity is not an element of the crime itself, but only pertains to sentencing.[58] The court then rejected various defendants' other arguments regarding the sufficiency of the evidence before addressing the authentication issue.[59]

The defendants argued that the trial court erred in admitting business records with declarations for authentication purposes because the government failed to give written notice as required by Rule 902(11).[60] The government produced the attestation documents it intended to use to authenticate the business records at the beginning of the second day of trial.[61] After the defendants' objections, the trial court suggested that it could either issue subpoenas for the record custodians to come and testify, or it could grant a continuance for one full day so that defense counsel could evaluate the attestations and obtain witnesses.[62] Three days later, the government introduced the documents.[63]

The Fifth Circuit distinguished its 2008 decision in *United States v. Brown* and explained that the situation more closely resembled its 2011 decision in *United States v. Olguin*, in which it held that written notice provided five days before trial was sufficient.[64] The court explained that the district court's suggested solutions and the three days between the notice and the admission

54. United States v. Daniels, 723 F.3d 562, 564 (5th Cir. July 2013), *reh'g in part*, 729 F.3d 496 (5th Cir. Sept. 2013).

55. *See id.* at 564–65.

56. *Id.* at 571, 579; *see* FED. R. EVID. 902(11).

57. *Daniels*, 723 F.3d at 571.

58. *Id.* at 572–73.

59. *Id.* at 574–79.

60. *Id.* at 579.

61. *Id.*

62. *Id.* at 580.

63. *Id.*

64. *Id.* at 579–81 (citing United States v. Olguin, 643 F.3d 384, 390–91 (5th Cir. 2011); United States v. Brown, 553 F.3d 768, 792–93 (5th Cir. 2008)).

cured any untimeliness by providing "defendants the opportunity to test the adequacy of the foundations established by the declarations."[65]

C. "Other Acts" Under 404(b)

In *United States v. Hamilton*, the Fifth Circuit reversed the conviction of defendant Marcus Hamilton for unlawful possession of a firearm as a convicted felon after concluding that the district court abused its discretion in admitting testimony describing Hamilton's alleged gang membership and attempting to connect it with illegal firearms.[66]

On July 18, 2009, an undercover officer, suspecting a possible drug deal, followed defendant Marcus Hamilton until he abruptly turned into a convenience store and parked his car between two empty spaces.[67] Another police officer observed Hamilton, while sitting in his car, appearing to throw something out of the window before exiting his vehicle.[68] After several minutes of walking around various stores, Hamilton returned to his vehicle, left the parking lot, promptly made an illegal lane change, and an officer stopped him.[69] The officer found what appeared to be marijuana inside the vehicle and discovered that Hamilton had $1,800 in cash on his person.[70] Suspecting that he had thrown drugs out of his car, officers returned to the parking lot and found a pistol under the front tire of an SUV parked adjacent to the spot in which Hamilton's car had been parked.[71] During his trial and over his objection, the court admitted evidence that Hamilton was a member of the BD gang and that BD members often carry guns for the purpose of establishing a motive.[72]

After hearing testimony about gang membership and reviewing documentation showing that Hamilton was affiliated with the BD and that members of the BD carry guns similar to the one Hamilton was accused of possessing, the district court concluded that gang membership was probative of Hamilton's motive to possess a firearm, not simply his character, and that any prejudice was not unfair because he was a gang member.[73] An officer testified that Hamilton was listed in a database as having been affiliated with the BD since 1998, but that Hamilton claimed he was no longer affiliated with the

65. *See id.* at 581.
66. United States v. Hamilton, 723 F.3d 542, 543 (5th Cir. July 2013).
67. *Id.*
68. *Id.* at 543–44.
69. *Id.* at 544.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 545.

gang.[74] The officer testified that he had never known a gang member to leave the gang.[75] The district court did not give a limiting instruction to the jury.[76]

The Fifth Circuit noted that there was no evidence that Hamilton was currently affiliated with the BD—or any other gang—but only that he had previously been a member.[77] The Fifth Circuit explained that, had the testimony been limited to his previous membership, it would have been intrinsic to the case and, thus, admissible.[78] The further testimony of his probable current gang membership and the connection between gang membership and the motive for possession of a gun, however, was extrinsic testimony subject to the test set forth in the Fifth Circuit's 1979 decision in *United States v. Beechum*.[79] The Fifth Circuit compared Hamilton's case with its 2007 analysis in *United States v. Sumlin*, in which the court found it was error to admit testimony of suspicion of the defendant's transportation of narcotics.[80] The court noted that in *Sumlin*, because the evidence was insufficient to prove the defendant guilty of the crime charged, the testimony was only relevant to the defendant's character.[81] Thus, the evidence of Hamilton's current gang membership, because not proven, only went to his character.[82] The Fifth Circuit also noted that this "was a close case, based entirely on circumstantial evidence," thus increasing the prejudicial value of the testimony and leading to the conclusion that the error was not harmless.[83]

D. Experts

In *Borden v. United States*, Linda Borden, an inmate proceeding to trial pro se, filed an action for medical malpractice against the government.[84] Borden fell and broke her hand and foot, but the prison refused to perform x-rays for several days.[85] Once x-rays revealed broken bones in her hand, Borden was scheduled to be placed in a cast, "but [the] prison staff refused to take her to the appointment."[86] Although she eventually received treatment for her hand approximately three weeks after the fall, it was too late for her to heal properly.[87] Another week passed before she was seen by an outside orthopedist

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 546.
78. *See id.*
79. *Id.* (citing United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1979)).
80. *Id.* (citing United States v. Sumlin, 489 F.3d 683, 689 (5th Cir. 2007)).
81. *Id.*
82. *See id.*
83. *See id.*
84. Borden v. United States, No. 12-10903, 2013 WL 3971458, at *1 (5th Cir. Aug. 5, 2013) (per curiam).
85. *Id.*
86. *Id.*
87. *Id.*

for her foot; despite the diagnosis of a "shattered" foot, Borden was unable to have surgery until five months after the incident.[88]

Borden filed suit in the spring of 2011, and a scheduling order set trial for October 2012.[89] In the summer of 2012, about two weeks before Borden's expert designation deadline, Borden filed a motion for a 120-day continuance of both the trial and expert deadlines, explaining that she would be released on home confinement in approximately one month, which would ease her ability to obtain experts and prepare for trial.[90] The district court denied Borden's motion, and Borden failed to designate a medical expert in time.[91] After the expert designation deadline passed, Borden moved for a continuance of that deadline alone, which was also denied.[92] The government then moved for summary judgment, which the court granted.[93]

On appeal, Borden challenged the district court's denial of continuances and argued that an expert witness should have been appointed for her.[94] The Fifth Circuit concluded that the district court had not abused its discretion in denying the continuances and subsequently granting the government's motion for summary judgment after Borden failed to designate a medical expert.[95]

The Fifth Circuit noted that the expert testimony was necessary to Borden's case because "[t]he proper mode of treatment for broken bones is neither a matter of common knowledge nor in the average lay person's experience."[96] The court also held that "[n]o statute or court rule provides for the court to appoint an expert to assist in a litigant's case" and noted that neither Federal Rule of Evidence 706, which permits the court to appoint an expert for its own use, nor 28 U.S.C. § 1915, which governs indigent proceedings, requires the court to appoint an expert for an indigent litigant.[97] "Federal Rule of Evidence 706 allows the court to appoint an expert to assist in its own understanding of the issues, but not for the sole benefit of a party."[98]

In *Brown v. Illinois Central Railroad*, the District Court for the Southern District of Mississippi granted summary judgment in favor of a railroad company after excluding the plaintiff's expert testimony and concluding that the railroad crossing was not so unusually dangerous as to require the railroad to install additional signaling devices.[99] An Amtrack passenger train struck Brown, the appellant, when he was driving "his garbage truck across railroad tracks . . . maintained by Illinois Central Railroad Company"; Brown then sued,

88. *Id.* (internal quotation marks omitted).
89. *Id.*
90. *See id.* at *2.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at *2, *4.
95. *Id.* at *2–*3.
96. *Id.* at *2.
97. *Id.* at *4.
98. *Id.*
99. Brown v. Ill. Cent. R.R., 705 F.3d 531, 531, 539 (5th Cir. Jan. 2013).

alleging that the crossing was unsafe.[100] The crossing had an advance warning sign twenty-two feet from the tracks and a "railroad crossbuck" sign fifteen feet from the tracks.[101]

Evidence presented by the railroad company showed "that the view between the train and the truck was unobstructed," the train was not traveling at a speed above the federally mandated limit, and the train applied its emergency break between 232 and 239 feet from impact.[102] Two of Brown's own experts testified that the "train was about 1145 feet from the crossing [approximately] nine seconds before impact" and that visibility exceeded 2000 feet.[103] In support of Brown's claim that the railroad company should have installed active signaling devices, Brown sought to admit testimony from Dr. Gary Long, but the district court granted the railroad company's motion to exclude it.[104]

Reviewing the trial court's decision for abuse of discretion, the Fifth Circuit upheld the district court's decision.[105] Dr. Long's report to the district court stated that the crossing was "narrow," at a "skewed angle," with a "rough" surface and "steep incline," and "fail[ed] to satisfy the sight-distance guidelines [set] by the U.S. Department of Transportation."[106] During the *Daubert* hearing, however, Dr. Long admitted that the visibility exceeded the guidelines but insisted his testimony was reliable because it was based on education and experience.[107]

The Fifth Circuit noted that an expert has the burden of establishing "some objective, independent validation of [his] methodology."[108] The court stated that the expert's own "assurances that he has utilized generally accepted [principles] is insufficient."[109] Dr. Long's report listed a number of public and private guidelines and publications but failed to explain how those authorities supported his conclusions.[110] The court did not find Dr. Long's reliance on his education and experience, or his statement that all standards need not be adopted by an official agency in order to exist, to be convincing.[111] The court further held that "[w]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible."[112]

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100. *See id.* at 533.
101. *Id.* (internal quotation marks omitted).
102. *Id.*
103. *Id.* at 534.
104. *Id.* at 535.
105. *Id.* at 535–37.
106. *Id.* at 536 (internal quotation marks omitted).
107. *Id.*
108. *Id.* (alteration in original) (quoting Moore v. Ashland Chem. Inc., 151 F.3d 269, 276 (5th Cir. 1998)) (internal quotation marks omitted).
109. *Id.* (alteration in original) (quoting *Moore*, 151 F.3d at 276) (internal quotation marks omitted).
110. *Id.*
111. *See id.* at 536–37.
112. *Id.* at 537 (alteration in original) (quoting Hathaway v. Bazany, 507 F.3d 312, 318 (5th Cir. 2007)) (internal quotation marks omitted).