DEVELOPMENTS IN FIFTH CIRCUIT EVIDENCE LAW: 2009-2010

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I. INTRODUCTION

This year featured a number of interesting developments with respect to federal evidence practice in the United States Court of Appeals for the Fifth Circuit, as well as a number of subtle changes to evidence standards. While the biggest changes were to criminal practice, the cases discussed below also impact civil practitioners. Among other things, the United States Supreme Court adopted a change to Federal Rule of Evidence

804(b)(3);[1] the Fifth Circuit clarified two important Confrontation Clause issues,[2] revised the test for excluding settlement communications evidence,[3] and addressed a number of civil claim-specific evidence issues, ranging from sexual harassment to products liability to medical malpractice.[4]

II. EVIDENCE AND THE CONFRONTATION CLAUSE

A. Use of Recorded Statements as Prior Consistent Statements Under Louisiana's Hearsay Exception Violates the Confrontation Clause

In *Jones v. Cain*, the United States Court of Appeals for the Fifth Circuit addressed a Confrontation Clause question related to recorded witness statements in the context of a petition for habeas corpus.[5] In 2001, a jury in Louisiana state court found Terrance Jones guilty of second-degree murder, and the court sentenced him to life in prison without the possibility of parole, pursuant to the state's mandatory sentencing rules.[6] Marty Martin, the victim, was shot in the chest in a car located in the town of Marrero, Louisiana.[7]

At the scene, police questioned witness James Artberry.[8] Artberry told the police in a recorded statement that he had seen Martin that night at a bar and unsuccessfully attempted to find a prostitute for Martin.[9] Artberry said that he walked home alone that night, later saw two black men pull up in front of his house, and ultimately witnessed "one of the two men shoot Martin over what appeared to be a drug deal gone wrong."[10] He provided a description of the perpetrator and the perpetrator's car—a blue Pontiac Grand Prix—but said that he could not identify the shooter.[11]

Hours later, Artberry gave a second recorded statement to the police.[12] This time, Artberry said that he failed to disclose some information earlier due to fear of reprisal by the shooter.[13] In this statement, Artberry said that after his unsuccessful search for a prostitute for Martin, he helped Martin obtain some crack cocaine.[14] Eager to assist, Artberry took Martin to a woman who signaled the Grand Prix, then Artberry rode in Martin's car as

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1. *See infra* Part X.
2. *See infra* Part III.
3. *See infra* Part VII.
4. *See infra* Parts III-VI, IX, and XI.
5. *See* Jones v. Cain, 600 F.3d 527, 531 (5th Cir. Mar. 2010).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *See id.* at 531-32.
12. *Id.* at 531.
13. *Id.*
14. *Id.* at 531-32.

it followed the Grand Prix to Artberry's block.[15] After an exchange of drugs and cash, the drug dealers apparently believed Martin stiffed them for crack, and the driver shot Martin when he went back to his car to get additional funds.[16] Artberry then identified the shooter as "Terrance," a man he claimed to have known for several years.[17]

During a police photo lineup, Artberry identified Terrance Jones as the shooter, and he did so again during a pretrial suppression hearing.[18] After the suppression hearing but before trial, Artberry died of a drug overdose.[19]

At Jones's first trial, prosecutors disclosed that they had recordings of Artberry's statements, and the court granted a mistrial requested by Jones's counsel.[20] The Louisiana Supreme Court found that the recordings were admissible under Louisiana's hearsay exception for prior recorded statements.[21]

At Jones's second trial, prosecutors offered to play the recorded statements and a transcript of the recordings, and the court admitted the evidence over Jones's hearsay and Confrontation Clause objections.[22] After his conviction, Jones exhausted state appellate remedies, and he then brought a petition for habeas corpus.[23] The United State District Court for the Eastern District of Louisiana granted the petition, and the State of Louisiana appealed that decision to the Fifth Circuit.[24]

The Fifth Circuit noted that Artberry's testimony invoked a Confrontation Clause inquiry because he was an unavailable witness who gave testimonial evidence but was not present for cross-examination.[25] Thus, Jones's Confrontation Clause rights would be violated if the statements were used to prove the truth of the matter asserted and either failed to bear "particularized guarantees of reliability" or fell within a "firmly rooted" hearsay exception.[26]

Because the State used Artberry's recorded statements throughout its case in chief and the principal detective used Artberry's statements to explain his theory of the crime, the Fifth Circuit panel found that there was

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15. *Id.* at 532.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 532-33.
22. *Id.* at 533.
23. *Id.* at 534.
24. *Id.* at 534-35.
25. *Id.* at 536-37 (citing Ohio v. Roberts, 448 U.S. 56, 66 (U.S. 1980) ("When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.")).
26. *Id.* at 538.

no question that the State offered the Artberry statements for the truth of the matter asserted.[27]

Next, the Fifth Circuit held that the recordings did not contain hallmarks of reliability for numerous reasons: (i) Artberry's statements conflicted; (ii) he had been with Martin until the shooting; (iii) the shooting occurred after he helped the victim obtain crack cocaine; (iv) the shooting occurred adjacent to his property; (v) he was found at the scene of the crime when police arrived; and (vi) his statements directly accused another of the crime.[28]

Finally, the Fifth Circuit concluded that Louisiana Rule of Evidence 801(D)(1)(b), under which Artberry's prior consistent statements were admitted as non-hearsay, was not a firmly rooted hearsay exception in light of the applicable federal standard.[29] A firmly rooted hearsay exception is one which, "in light of longstanding judicial and legislative experience . . . rests on such a solid foundation that admission of virtually any evidence within it comports with . . . constitutional protection[s]."[30] Under federal common law and the Federal Rules of Evidence, a prior consistent statement used to rebut a charge of improper motive was only admissible if the statement was made before the improper motive allegedly arose.[31] Because the Louisiana rule has no such requirement, it failed as a "firmly rooted" hearsay exception.[32]

Confirming that the erroneous admission of evidence violated his Confrontation Clause rights, the Fifth Circuit panel affirmed the district court's order granting Jones's habeas petition and remanded his case for a new trial.[33]

B. First Application of Melindez-Diaz *Lab Analysis Holding in the Fifth Circuit*

In *United States v. Rose*, the Fifth Circuit addressed the impact of *Melendez-Diaz v. Massachusetts*.[34] In its 2009 opinion in *Melendez-Diaz*,

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27. *See id.* at 533, 537.

28. *Id.* at 538 (citing United States v. Flores, 985 F.2d 770, 780 (5th Cir. 1993) (stating that where a "declarant makes accusatory statements" to uniformed police officers, there "always exists a strong possibility that the declarant has the desire to shift or spread blame, curry favor, avenge himself, or divert attention to another")).

29. *Id.* at 538-39; *see also* LA. CODE EVID. ANN art. 801(d) (2010) ("A statement is not hearsay if: . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . [c]onsistent with [the declarant's] testimony and is offered to rebut an express or implied charge against [the declarant] of recent fabrication or improper influence or motive . . . .").

30. *Jones*, 600 F.3d at 539 (quoting Lilly v. Virginia, 527 U.S. 116, 125 (1999)).

31. *Id.* at 539 (citing Tome v. United States, 513 U.S. 150, 160 (1995)).

32. *Id.*

33. *Id.* at 541-42.

34. United States v. Rose, 587 F.3d 695, 695 (5th Cir. Nov. 2009).

the Supreme Court held that prosecutors violated a defendant's constitutional right to confront the witnesses against her by failing to put the analyst who prepared the blood-alcohol report on the stand, stating specifically that "sworn certificates of analysis detailing the results of forensic analyses on suspected drugs are testimonial statements for purposes of the Confrontation Clause."[35]

In *Rose*, the defendant was convicted following a bench trial of possession of crack cocaine with intent to distribute and possession of a firearm in furtherance of a drug-trafficking offense.[36] Defendant was arrested after a traffic stop during which he attempted to throw away a baggie of what was later tested and determined to be crack cocaine.[37] At trial, a supervisor at the drug laboratory testified as an expert witness about the analysis her laboratory had performed.[38] Although she was not the lab analyst who generated the report, she signed it as a "reviewer."[39] Rose's counsel cross-examined the lab supervisor on the calibration of the testing equipment but did not object to either her testimony or the report, which was admitted into evidence.[40]

Rose appealed her conviction.[41] On appeal, the Fifth Circuit held that the plaintiff's failure to assert a timely and specific objection to the lab report was limited to plain error review.[42] While the lab report in this case was clearly testimonial for purposes of the Confrontation Clause, the error in admitting the report was not plain.[43] Why? First, the record was unclear regarding whether the reviewer actually did or did not have personal knowledge of the tests performed or the results, and Rose's failure to object to that testimony or the report left the issue unclear.[44] Second, *Melendez-Diaz* did not require everyone in the chain of custody (or testing) to testify, so it was not clear, given this witness's role, whether allowing her testimony violated Rose's constitutional rights.[45]

The panel made it clear, however, that prosecutors cannot "avoid confrontation issues through the in-court testimony of any witness who

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35. Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527, 2532 (2009).

36. *Rose*, 587 F.3d at 697-98.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 700 (citing Puckett v. United States, 556 U.S. ___, 129 S. Ct. 1423, 1429 (2009), when stating that, "[a]n error or defect is plain if it was clear or obvious and affected the defendant's substantial rights").

43. *Id.*

44. *Id.*

45. *Id.* at 701 (*Melendez-Diaz* "expressly rejected the notion 'that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.'") (quoting Melendez-Diaz v. Massachusetts, 129 S. Ct. at 2532 n.1).

signed a lab report without regard to that witness's role in conducting tests or preparing the report."[46] The Fifth Circuit will instead be guided by the specific factual scenario and its fit to the express language of the *Melendez-Diaz* opinion.[47] In Rose's case, the defendant simply failed to invoke stricter scrutiny by preserving his objection or showing plain error on the face of the record.[48]

III. SUBSTANTIVE STATE LAW THAT EXPRESSLY BARS EXTRINSIC EVIDENCE

A. Fifth Circuit Enforces Mississippi Minutes Law to Bar Extrinsic Evidence that Contradicts Government Board Meeting Minutes

In *James v. City of Pontotoc, Mississippi*, the Fifth Circuit affirmed a district court's judgment granting summary judgment against H.L. James, a property developer, arising out the City of Pontotoc's messy disapproval of James's plans for a new apartment building.[49] In November 2006, the City Board of Aldermen (Board) reviewed James's plan, indicating their probable approval.[50] In its December meeting, which was recorded on videotape, the Board reviewed the plan again and indicated that it wanted a single change.[51] The acting chair of the Board then moved that "we approve the Planned Unit Development with the exception of the, ah, cul-du-sac . . . and, go ahead and get his permit. . . ."[52] The video recorded that the motion was seconded and that the motion passed without opposition.[53]

When the Board adopted its minutes for the December 2006 meeting, however, the minutes reflected something different.[54] Specifically, the minutes said that the development was not approved but was "contingent on [an] acceptable cul-de-sac being added and [the] plat being approved."[55] Unaware of the issue with the minutes, James went forward with the project and appeared at the Board's April meeting to request that the Board turn on the utilities at the property.[56] At the same meeting, he learned that his plat did not conform to the City's ordinances and building code because it lacked certain technical information.[57] The Board never approved the

46. *Id.*
47. *Id.*
48. *Id.* at 700.
49. James v. City of Pontotoc, Miss., 364 F. App'x 151, 151 (5th Cir. Feb. 2010).
50. *Id.* at 151.
51. *Id.*
52. *Id.* at 152.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

plat.[58] Ultimately, James converted the apartment building into a single-family home.[59]

Frustrated, James and his son sued in district court, alleging a violation of their due process and equal protection rights.[60] The City moved for summary judgment on the ground that James's due process rights were not violated because he lacked a property interest in the development because the Board's approval was never noted in the Board's meeting minutes.[61]

The Fifth Circuit offered James no quarter. Noting that the Mississippi Supreme Court has long held that "public boards speak only through their minutes," and that the court later characterized the minutes requirement as an "important public policy issue," the Fifth Circuit held that the Mississippi rule barring extrinsic evidence applied in this action to bar James's video evidence.[62] While the videotape was unquestionably "strong extrinsic evidence" that the Board minutes were wrong, the Mississippi minutes rule was a "substantive rule" that demanded strict compliance.[63] Despite its clear effect on the evidence in Jones's case and its express bar on extrinsic evidence, the panel said that the minutes rule was "not an evidentiary rule."[64] The panel affirmed the district court's dismissal of Jones's claim.[65]

IV. TEXAS'S PRODUCTS LIABILITY LAWS' EFFECT ON EVIDENCE

A. Fifth Circuit Attempts to Balance Texas's Comparative Responsibility Scheme with Its Prohibition on Blaming the Consumer and Also Addresses Evidence of Compliance with Industry Standards and Evidence of Similar Incidents

Jeremy Green was a student and football player at Levelland High School in Texas.[66] During a scrimmage with another team, he tackled an opposing player and suffered a severe burst fracture in one of his neck vertebra that rendered him a quadriplegic.[67] Green sued Schutt, the football helmet manufacturer, seeking damages under a variety of theories related to his injury.[68] After the district court granted summary judgment in favor of

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 153 (citing Thompson v. Jones Cnty. Cmty. Hosp., 352 So.2d 795, 796 (Miss. 1977); Butler v. Bd. of Supervisors for Hinds Cnty., 659 So.2d 578, 579 (Miss. 1995)).
63. *Id.*
64. *Id.*
65. *Id.* at 154.
66. Green v. Schutt Sports Mfg. Co., 369 F. App'x 630, 633 (5th Cir. Mar. 2010).
67. *Id.*
68. *Id.* at 633-34.

the manufacturer on a number of Green's theories, the case proceeded to a jury trial on Green's claim that the helmet was defectively designed.[69]

At trial, Schutt sought to show evidence that Green's injury was caused by his improper "head down" tackle, and, anticipating this, Green moved to bar evidence relating to comparative fault.[70] The district court overruled Green's motion.[71]

Accordingly, at the outset of its opinion, the Fifth Circuit addressed a tension in Texas products liability law in the sports context.[72] Chapter 33 of the Texas Civil Practice and Remedies Code is substantive state law that creates a proportionate responsibility scheme for tort actions and actions brought under the Texas Deceptive Trade Practices-Consumer Protection Act.[73] Under that scheme, the fact finder determines the percentage of responsibility of the plaintiff and defendant, as well as any responsible third parties, settling parties, or third-party defendants, based on each person's contribution to the underlying harm.[74] A plaintiff cannot recover damages if the fact finder determines that his responsibility is greater than fifty percent, and his recovery is reduced by the percentage of responsibility attributed to him.[75] The Texas Supreme Court, however, has held that consumers have "no duty to discover or guard against product defects, so a plaintiff's failure to discover or failure to guard against a product defect *cannot* reduce the amount of damages received by the plaintiff."[76]

The Fifth Circuit determined that lack of clarity in Texas law created a quandary.[77] Based on the nature of Schutt's evidence regarding Green's role, the "line between permissible and impermissible evidence is thin, if not blurred, when, in a case such as this," because "it is permissible to offer evidence pertinent to comparative responsibility but impermissible to offer evidence that the plaintiff failed to guard against a product's limitations."[78] While the panel noted that Green did not raise the assumption of risk defense and that Schutt did not seek an instruction under the "competitive

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69. *Id.* at 634.

70. *Id*. at 635-36, 638-39.

71. *Id.* at 639.

72. *Id.* at 634-38.

73. *See* TEX. CIV. PRAC. & REM. CODE § 33.002(a) (West 2010) (applicability); *Green*, 369 F. App'x at 635. Federal district courts in Texas have also applied Chapter 33's novel responsible third party designation scheme as state substantive law, but the Fifth Circuit has yet to address that issue. *See* Coachmen Indus., Inc. v. Alt. Serv. Concepts, L.L.C., 4:06-CV-0892, 2008 WL 2787310, at * 5 (S.D. Tex. July 15, 2008) (Atlas, J.) (denying motion to de-designate a responsible third party in a diversity action); Davis v. Dallas Cnty., 3:07-CV-0318-D, 2007 WL 2301585, at * 2 (N.D. Tex. Aug. 10, 2007) (Fitzwater, C.J.) (granting motion to designate in a federal question case) ("[I]n federal question cases, like diversity cases, the court will continue to apply § 33.004 . . . .").

74. *See* TEX. CIV. PRAC. & REM. CODE § 33.003(a).

75. *Id.* at §§ 33.001 (greater than 50% bar rule), 33.012(a) (reduction).

76. *Green*, 369 F. App'x at 635 (emphasis added) (citing Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 594 (Tex. 1997)).

77. *See id*. at 636.

78. *Id.*

sports doctrine" adopted by some Texas appellate courts, it determined that the district court had not erred in denying Green's motion in limine pertaining to comparative responsibility evidence.[79]

Next, the panel held that the district court's ruling admitting Schutt's evidence of compliance with industry standards was proper.[80] Citing a 1980 Texas Supreme Court case, the panel said that while Texas law does not permit compliance industry standards evidence as a defense to a product design defect claim, a manufacturer is permitted to prove industry standards and its compliance with those standards where the plaintiff asserts that a safer alternative design was technologically possible and economically feasible.[81] In 1980, the test for determining a design defect in a products liability case was the risk-utility test, which balanced a product's utility against its risk of use, in order to determine if the design was "unreasonably dangerous."[82] In 1993, however, the Texas Legislature imposed a requirement that a plaintiff had to prove a safer alternative design.[83] The panel did not address whether the 1980 jurisprudence it relied on was superseded by the change in Texas's tort laws, and practitioners may note that this holding suggests that industry standards evidence is always admissible in federal court actions applying Texas substantive law.[84]

Finally, the panel affirmed the district court's ruling allowing Schutt to discuss statistical evidence of catastrophic neck injuries in football.[85] Schutt offered this to show that 70% of catastrophic injuries result during plays where the tackler hits the opposing player with his head down.[86] Although they involved the same sport and the same general type of injury, Green objected that the evidence was framed too broadly because it did not distinguish between the type of helmet, nature of the play, or the specific type of injury that resulted.[87] Nevertheless, the Fifth Circuit re-affirmed its longstanding position in products liability actions that a court should require substantial similarity but that it should not impose a "narrow and unrealistic" view of relevance that would prevent parties, such as Schutt, from introducing evidence of football injuries except where it gets an exact

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79. *Id.* (citations omitted).

80. *See id.* at 626-37.

81. *See id.* at 636-37 (citing Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 748-49 (Tex. 1980)).

82. *See* Turner v. Gen. Motors Corp., 584 S.W.2d 844, 851 (Tex. 1979).

83. *See* TEX. CIV. PRAC. & REM. CODE § 82.005(a)(1); *see also* Gen. Motors Corp. v. Sanchez, 997 S.W.2d 584, 588 (Tex. 1999) ("A design defect renders a product unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. A plaintiff must prove that there is a safer alternative design in order to recover under a design defect theory. An alternative design must substantially reduce the risk of injury and be both economically and technologically feasible.").

84. *See Green*, 369 F. App'x at 636-38.

85. *Id.* at 638.

86. *Id.*

87. *See id.*

match of helmet, nature of the play, and identical injury.[88] Although the incidents Schutt discussed did not exactly parallel the facts of this case, the district court did not abuse its discretion by allowing Schutt some leeway to show similar incidents.[89]

Ultimately, the panel affirmed the district court's judgment on the jury's verdict, denying Green's request for a new trial.[90]

V. RULE 403 AND 404 CASES

A. General Relevance Objection Is Not Sufficient to Preserve Error on Rule 404(b)

In *United States v. Clark*, the Fifth Circuit addressed the necessary specificity of an objection under Rule 404(b).[91]

James Clark, a Lubbock, Texas minister, met Carolyne Njau in August 2005 while on a trip to Kenya.[92] Clark approached Njau, who was a prostitute at the time, in a hotel coffee shop.[93] Clark falsely claimed to be a Texas Tech University professor and a minister.[94] After chatting with Njau, Clark invited her to his hotel room on the pretense of continuing their conversation.[95] There, he touched her, and he had her pose while he took a picture of her genitals.[96] In November 2005, Clark returned to Texas, promising Njau that his church might sponsor her education in the United States.[97] When Njau informed Clark that she would be unable to afford her airfare, he agreed to pay it but suggested that she could pay him back by "serv[ing]" his friends, which she "took . . . to imply sexual services in return for money."[98]

Upon her arrival in the United States in January 2006, Clark controlled, threatened, and sexually assaulted Njau.[99] Ultimately, Njau confided in a school administrator, who contacted authorities.[100] Clark was prosecuted for importation of an alien for prostitution or other immoral purposes under 8 U.S.C. § 1328.[101]

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88. *Id.* (citing Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1070 (5th Cir. 1986)).
89. *See id.*
90. *Id.* at 641.
91. United States v. Clark, 582 F.3d 607, 607 (5th Cir. Sept. 2009).
92. *Id.* at 610.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 610-11.
97. *Id.* at 610.
98. *Id.* at 611.
99. *Id.*
100. *Id.*
101. *Id.* at 612.

At trial, a congregant of his church testified that he had "spoken in his public sermons of having shot 'hoodlums' for revenge and of being narrowly dissuaded from shooting other people who had hurt a family member."[102] Clark's counsel objected, but only generally to relevance.[103] Clark was convicted.[104]

On appeal, Clark argued "that the testimony was evidence of prior bad acts that served only to illustrate his character and so was inadmissible under Federal Rule of Evidence 404(b)."[105] The Fifth Circuit stated Clark's "general 'relevance' objection . . . does not adequately implicate rule 404(b)."[106] Reviewing the admission for plain error, the Fifth Circuit concluded that the congregant's testimony about Clark's threat of violence substantiated similar threats of Clark made to Njau to ensure compliance with his sexual demands and was relevant to show his intent to threaten Njau.[107]

B. Stipulations Do Not Preclude Presentation of Video Evidence in Child Pornography Prosecution

In *United States v. Caldwell*, the Fifth Circuit clarified its interpretation of Rule 403 in instances where a criminal defendant offers to stipulate facts that form an element of the offense charged and thereby seeks to preclude the government from publishing certain evidence to the jury.[108]

Defendant Caldwell was prosecuted for knowingly possessing and receiving child pornography.[109] At trial he stipulated that the videos found on his computer contained child pornography while defending the charge on the ground that he did not knowingly use his computer to obtain it.[110] After the stipulation was read to the jury, the government sought to introduce and have published to the jury three video excerpts of child pornography found on defendant's computer.[111] The defense objected on Rule 403 grounds, relying on the United States Supreme Court's 1997 opinion in *Old Chief v. United States*, to argue that the stipulation was conclusive proof of the fact stipulated, leaving no probative value to offset the unfair prejudice the content of the videos was likely to inspire in the

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102. *Id.* at 616.
103. *Id.*
104. *Id.* at 617.
105. *Id.* at 616.
106. *Id.* at 616 n.15 (citing United States v. Greenwood, 974 F.2d 1449, 1462 (5th Cir. 1992); United States v. Marrero, 904 F.2d 251, 259 & n.8 (5th Cir. 1990)).
107. *Id.* at 616.
108. United States v. Caldwell, 586 F.3d 338, 342-44 (5th Cir. Oct. 2009).
109. *Id.* at 340-41.
110. *Id.* at 342.
111. *Id.*

jury.[112] The trial court overruled his objection.[113] Caldwell was convicted.[114]

In its reasoning, the Fifth Circuit first distinguished *Old Chief*, noting that the stipulation here did not obscure all probative value from the videos.[115] Specifically, the stipulation did not admit that the defendant knew the videos depicted child pornography, only that "visual depictions of minors under the age of 18, engaging in sexually explicit conduct" were found on a computer owned by the defendant.[116] The Fifth Circuit held that "the specific videos published—one of which the evidence showed was opened and previewed the morning of the search—reflected how likely it was that the defendant knew that the video depicted child pornography."[117]

Establishing some probative value, the court then took an interesting step. The weighing test that the Fifth Circuit engaged in was not a simple 403 balancing of probative value and prejudicial effect—it also took into account the government's need to satisfy the expectations of jurors and present a complete narrative of the conduct alleged:

> A foundation of the *Old Chief* decision seems to turn on the contribution of the challenged evidence to the overall narrative of the Government's case. ("Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw inferences, whatever they may be, necessary to reach an honest verdict.").
>
> Unlike *Old Chief*, child pornography is graphic evidence that has force beyond simple linear schemes of reasoning. It comes together with the remaining evidence to form a narrative to gain momentum to support jurors' inferences regarding the defendant's guilt. It provides the flesh and blood for the jury to see the exploitation of children. The general, conclusory language of the stipulation that the videos "contain visual depictions of minors under the age of eighteen, engaging in sexually explicit conduct" does not have the same evidentiary value as actually seeing the particular explicit conduct of the specific minors. Jurors have expectations as to the narrative that will unfold in the courtroom. If those expectations are not met, jurors may very well punish the party who disappoints by drawing a negative inference. For example, jurors expect to see a gun in the case of a person charged with using a firearm to commit a crime.[118]

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112. *Id.* (citing Old Chief v. United States, 519 U.S. 172 (1997)) (holding that when one party stipulates to a disputed fact, the stipulation conclusively proves that fact).

113. *Id.*

114. *Id.* at 340.

115. *Id.* at 343.

116. *Id.* at 342.

117. *Id.* at 343.

118. *Id.* (citations omitted).

Accordingly, the Fifth Circuit determined that the trial court did not abuse its discretion when it allowed the jury to see small segments of child pornography found on the defendant's computer.[119]

Lawyers presenting arguments on either side of a 403 analysis may consider whether *Caldwell* casts the necessary narrative as an independent ground on which the party offering evidence may argue for its admission or if it is simply a gloss on the existing balancing test where exclusion would itself confuse or mislead the jury. It raises the question of how courts are to consistently differentiate between an improper tendency to "induce decision on a purely emotional basis," and that which properly "comes together with the remaining evidence to form a narrative to gain momentum to support jurors' inferences regarding the defendant's guilt."[120]

C. Intrinsic Versus Extrinsic Prior Bad Acts Under Rule 404(b)

In *United States v. Watkins*, the Fifth Circuit addressed prior bad acts evidence in considering Watkins's appeal from his conviction for conspiracy to distribute cocaine and possession with intent to distribute cocaine.[121] During his trial, the district court allowed an agent who interrogated Watkins after his arrest to testify that Watkins admitted that he made previous runs to deliver marijuana in 2007 and 2008.[122] Watkins challenged the admission of this testimony under 404(b), arguing that evidence of prior marijuana deliveries were not intrinsic to the offense of conspiracy to distribute cocaine.[123]

In determining that the evidence of prior drug runs were intrinsic rather than extrinsic to a subsequent charge of conspiracy to distribute cocaine, the Fifth Circuit noted that they could be considered a single conspiracy to transport narcotics and swept away the argument that independent conspiracies existed because different drugs delivered in different time periods were involved, focusing instead on the similarity in techniques and participants.[124]

D. DOJ Report on Jail Conditions Admissible Under Rules 803(8) and 403

In *Shepherd v. Dallas County*, the Fifth Circuit analyzed the admissibility of a Department of Justice (DOJ) report on jail conditions in Dallas County under Rule 403 and upheld the district court's determination

119. *Id.* at 349.
120. *See id.* (quoting United States v. Fields, 483 F.3d 313, 354 (5th Cir. 2007)); *id.* at 343.
121. *See* United States v. Watkins, 591 F.3d 780, 784-86 (5th Cir. Dec. 2009).
122. *See id.* at 784.
123. *See id.*
124. *See id.* at 784-85.

that it was admissible.[125] The plaintiff, Stanley Shepherd, was booked into Dallas County jail as a pretrial detainee and informed the jail nurse that he had hypertension and required medication to treat that condition.[126] Over the next four months, Shepherd was left without medication or treatment for weeks at a time and suffered a series of hypertensive emergencies culminating in a stroke that left him permanently confined to a wheelchair, with slurred speech, and with impaired sight and hearing.[127] He sued.[128]

At trial, the district court admitted two reports on the health services at the Dallas County Jail (County), one commissioned by Dallas County and another prepared by the DOJ.[129] Both reports described a dysfunctional system of medical treatment including a general lack of capacity to diagnose or treat illness on intake, lack of timely review or monitoring of patients with chronic illnesses, and multiple barriers of access to care.[130] The DOJ report concluded that "the jail was operating in violation of inmates' constitutional right to adequate medical care."[131]

In rejecting the County's challenge to the report's admission on Rule 403 grounds, the Fifth Circuit noted that the DOJ report was the kind of public record and report contemplated by Rule 803(8)(C) as "containing 'factual findings resulting from an investigation made pursuant to authority granted by law.'"[132] Those findings, while "undoubtedly prejudicial to the County's cause . . . were probative as well" in describing jail conditions based on personal observation through visits, interviews, and reviews of jail policies and records.[133]

E. In Bribery Prosecution, Exclusion of Evidence About Attorney's Relationship to Judge Is Harmless Because Cumulative

In *United States v. Whitfield*, two Mississippi state court judges and an attorney were each convicted of participating in a bribery scheme, among other related misconduct, in which the attorney guaranteed and then paid on loans he arranged for the judges in order to influence the outcome of cases pending in their courts.[134] The loans were nominally for campaign expenses, but the loans were not reported in the required disclosures.[135]

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125. *See* Shepherd v. Dallas Cnty., 591 F.3d 445, 456-58 (5th Cir. Dec. 2009).
126. *See id.* at 449.
127. *See id.* at 450.
128. *See id.*
129. *See id.* at 450-51.
130. *See id.* at 451-52.
131. *Id.* at 451.
132. *Id.* at 457 (quoting FED. R. EVID. 803(8)(c)).
133. *Id.* at 457-58.
134. *See* United States v. Whitfield, 590 F.3d 325, 335-36 (5th Cir. Dec. 2009).
135. *See id.* at 336.

In the first trial on the sixteen-count indictment, the jury acquitted the attorney on six counts and one of the judges on one count but was unable to reach a verdict on any of the others; therefore, the first trial ended in a mistrial.[136] In the second trial, the jury found appellants guilty on all charges.[137] The Fifth Circuit began by noting that "the district court was not bound in any way by its evidentiary rulings in the first trial" and rejected the attempt to show bias by comparing the rulings in the first trial with the rulings in the second trial.[138]

The Fifth Circuit then addressed the exclusion of evidence intended to rebut criminal intent, specifically the following: (i) evidence of the attorney's preexisting personal relationship with Whitfield and Teel; (ii) the role of attorney contributions in state judicial elections; (iii) the attorney's expertise in the litigation at issue; (iv) the attorney's practice of guaranteeing loans for friends, and filing other cases before other judges during the time of the scheme; and (v) the legal correctness of the judge's legal opinions.[139] Rather than parse the propriety of each ruling in a manner to second-guess the district court, the Fifth Circuit noted that appellant was able to introduce other evidence on each point and thus, "even assuming the district court abused its discretion, it was harmless because the evidence on this point was cumulative."[140]

Juxtaposing this analysis against the reasoning in its opinion in *United States v. Caldwell* is interesting because perhaps the defendants were deprived of a necessary narrative in sustaining the willingness of the jurors to draw inferences. As the Fifth Circuit noted in *Caldwell*: "Jurors have expectations as to the narrative that will unfold in the courtroom. If those expectations are not met, jurors may very well punish the party who disappoints by drawing a negative inference."[141] The comparison may be illustrative, more than anything, of the deference the Fifth Circuit affords district court judges in managing trials through 401 and 403 rulings.

F. Rules 403 and 404 in the Context of an Ineffective Assistance of Counsel Complaint: A Defense Attorney May Not Be Ineffective by Failing to Object Where He or She Is Plausibly Allowing the Jury to Understand the Complete Story

In *Brooks v. Kelly*, a district court found ineffective assistance of counsel arising out of the state court conviction of a defendant for failing to object to testimony by a confidential informant of other crimes committed

136. *See id.* at 341.
137. *See id.* at 342.
138. *Id.* at 360.
139. *Id.*
140. *Id.* at 361.
141. United States v. Caldwell, 586 F.3d 338, 343 (5th Cir. Oct. 2009).

by defendant.[142] The informant, an undercover narcotics agent, testified that Brooks had sold drugs before.[143]

Relying on Mississippi law, the Fifth Circuit found the evidence of other crimes admissible "[w]here substantially necessary to present to the jury the complete story of the crime" and where the relevance was not substantially outweighed by the danger of unfair prejudice under Mississippi's Rule 403.[144] The testimony was a necessary narrative because it described the investigation that led to her arrest.[145] In the context of ineffective assistance of counsel, the Fifth Circuit also examined the procedural consequences of the failure to object, in that it would have entitled her to Rule 403 balancing and a limiting instruction.[146] The court, however, found any error to be harmless due to the weight of the evidence against her.[147] The Fifth Circuit reversed the district court and confirmed the conviction.[148]

G. EEOC Letter Inadmissible Where Discrimination Finding Was Based on Allegations That Were Flatly Contradicted in the Record

In *Harris v. Mississippi Transportation Commission*, the Fifth Circuit addressed the effect of an Equal Employment Opportunity Commission (EEOC) letter finding discrimination on a subsequent Title VII retaliation case under Rule 403.[149]

The Mississippi Transportation Commission (MTC) first suspended then later terminated the plaintiff's employment for allegedly using obscene or abusive language, threatening or coercing employees, supervisors, or business invitees, and soliciting bribes from a subcontractor.[150] Plaintiff alleged racial discrimination and retaliation in a charge with the EEOC.[151] The EEOC issued a reasonable cause determination letter finding reasonable cause to believe plaintiff had been discharged in retaliation for filing his initial discrimination charge.[152]

At trial, the district court granted MTC's motion in limine to exclude the EEOC letter and motion for summary judgment, concluding that plaintiff "failed to present a genuine issue of material fact showing that

142. *See* Brooks v. Kelly, 579 F.3d 521, 523 (5th Cir. Aug. 2009).
143. *See id.*
144. *Id.* (quoting Jones v. State, 920 So. 2d 465, 474 (Miss. 2006)).
145. *See id.*
146. *Id.* at 523 n.1.
147. *Id.* at 523.
148. *Id.* at 525.
149. *See* Harris v. Miss. Transp. Comm'n, 329 F. App'x 550, 552 (5th Cir. July 2009).
150. *Id.* at 552-53.
151. *See id.* at 553.
152. *Id.*

MTC's nondiscriminatory reasons for firing [him] were pretext for unlawful retaliation."[153]

In analyzing the EEOC letter under Rule 403, the Fifth Circuit noted that while an EEOC cause determination is "highly probative of discrimination" it does not cut short the Rule 403 analysis.[154] Here, the court found its "explanations of its conclusion [to be] diametrically opposed to the facts in the record."[155] Specifically, the EEOC letter indicated (1) that plaintiff had no adverse employment history when in fact, he had been reprimanded and suspended on at least three prior occasions, and (2) that the MTC had not conducted an investigation when in fact they did.[156] The Fifth Circuit concluded that the district court did not abuse its discretion in concluding that the contradiction was too great.[157]

VI. RULE 407: SUBSEQUENT REMEDIAL MEASURES EVIDENCE

A. No Recall Notices Evidence

Recall notices and other written notices by a manufacturer of a defect are admissible under Texas Rule of Evidence 407(b) to prove the existence of a defect, but such notices are inadmissible under Federal, Mississippi, and Louisiana Rule of Evidence 407.[158]

In *Rutledge v. Harley-Davidson Motor Co.*, the plaintiff, a Mississippi resident who was an experienced motorcycle driver, purchased a new Harley-Davidson motorcycle just before Christmas in 2006.[159] On December 29, 2006, she went for a ride with a friend in favorable road and weather conditions, but, as her motorcycle approached a curve, she was

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153. *Id.* at 553-54.

154. *Id.* at 554.

155. *Id.* at 555.

156. *See id.*

157. *Id.*

158. *See* TEX. R. EVID. 407(b). Texas Rule of Evidence 407 has both subsections (a) and (b). *See* TEX. R. EVID. 407. Subsection (b) provides: "Notification of Defect. A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof *is admissible* against the manufacturer on the issue of existence of the defect to the extent that it is relevant." *See* TEX. R. EVID. 407(b) (emphasis added).

Federal Rule of Evidence 407 and Rule 407 in Mississippi and Louisiana do not contain a subsection (b). *See, e.g.*, FED. R. EVID. 407. For example, the Louisiana Code of Evidence provides that:

> In a civil case, when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This Article does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, authority, knowledge, control, or feasibility of precautionary measures, or for attacking credibility.

LA. CODE EVID. ANN. art. 407 (2006).

159. Rutledge v. Harley-Davidson Motor Co., 364 F. App'x 103, 104 (5th Cir. Feb. 2010).

unable to steer the motorcycle.[160] The motorcycle ran off the road, and she was seriously injured.[161] Three weeks later, Harley-Davidson notified customers that the voltage regulator on the same model motorcycle could come in contact with the front fender, potentially compromising the rider's ability to steer.[162]

Rutledge sued Harley-Davidson for negligence, breach of warranty, and strict products liability, and the case proceeded in the United States District Court for the Southern District of Mississippi on the basis of diversity of citizenship.[163] Harley-Davidson moved for summary judgment.[164] Rutledge offered the defendant's recall notices, not expert testimony, to prove the defect.[165] Harley-Davidson objected to Rutledge's evidence and supported its motion with an expert affidavit stating that there was no photographic evidence showing that the voltage regulator contacted the rear of the front fender, so the condition described in the notice could not have caused Rutledge's accident.[166] The district court excluded Rutledge's evidence and granted Harley-Davidson's motion.[167]

On appeal, the Fifth Circuit noted that the recall notices at issue were sent after the accident, so they were directly within Rule 407's scope as subsequent remedial measures.[168] Also, although the rule "does not require the exclusion of [such] evidence . . . when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures," and although Rutledge said she had other purposes, the panel held that the district court did not abuse its discretion in excluding the notices where she acknowledged that the notices were offered to prove the defect.[169] The Fifth Circuit affirmed the judgment.[170] Had Rutledge purchased her motorcycle in Texas or experienced her accident in Texas and had she sued Harley-Davidson and a non-diverse defendant in Texas state court, she likely would have obtained a different result.

160. *Id.* at 104, 107.
161. *Id.* at 104.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 105-06.
169. *Id.* at 105 (quoting FED. R. EVID. 407).
170. *Id.* at 108.

VII. RULE 408: SETTLEMENT COMMUNICATIONS

A. Fifth Circuit Alters Its Prior Standard, Ruling that Settlement Communications Are Inadmissible in Separate Suits Where the Suits Share a Factual Nexis

In *Lyondell Chemical Co. v. Occidental Chemical Corp.*, a Fifth Circuit panel reviewed a judgment in a bench trial in which settlement evidence from a prior case was admitted.[171] This multi-party action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) involved liability at a waste-dumping site located at Turtle Bayou, a waste site that they used when a site located along U.S. Route 90 (Highway 90) was busy or unavailable.[172]

The parties to the current suit, chemical and industrial companies, had previously resolved another CERCLA dispute related to the Highway 90 site.[173] During the federal and state government's investigation of the Highway 90 site, the parties formed a "task group" in an attempt to avoid litigation and to allocate and settle their liability.[174] Occidental Chemical Corporation, one of the task group members, took issue with the allocation assessed against it, and it assigned its representative, Gary Smythe, to investigate and report on all of Occidental's waste at the site.[175] Smythe's reports were provided to the group as part of Occidental's effort to "narrow the gap" between the group's proposal and what it believed to be a fair assessment.[176]

During trial of the Turtle Bayou dispute, El Paso Tennessee Pipeline Company offered the Smyth Reports.[177] Occidental objected that the Smythe Reports were inadmissible settlement communications under Federal Rule of Evidence 408.[178] The parties agreed that the Smythe Reports were made during settlement negotiations, and Occidental conceded that the reports concerned Highway 90, not Turtle Bayou.[179] Relying on Wright and Graham's *Federal Practice and Procedure*, El Paso argued and the district court agreed, that Rule 408 only bars the "use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, *not some other claim*."[180] Accordingly,

171. Lyondell Chem. Co. v. Occidental Chem. Corp., 608 F.3d 284 (5th Cir. June 2010).
172. *Id.* at 289-90.
173. *Id.* at 289.
174. *Id.* at 295-96.
175. *Id.* at 296.
176. *Id.*
177. *Id.* at 294.
178. *Id.*
179. *Id.* at 295-96.
180. *Id.* at 296 (emphasis added) (citing 23 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5314 (Supp. 2010)).

because the Smythe Reports concerned the Highway 90 dispute, not the Turtle Bayou dispute, the district court deemed them admissible to prove Occidental's liability for the Turtle Bayou dispute. The district court then used the Smythe Reports to develop an intermediate estimate of Occidental's Turtle Bayou waste.[181]

On appeal, the panel stated that Rule 408 provides for the exclusion of certain settlement evidence on two bases. First, "the relevancy of settlement communications is thought to be suspect because they may have been an attempt to purchase peace rather than an admission of liability."[182] Second, "the rule's exclusion of settlement evidence furthers public policy by promoting voluntary settlement of disputes, which would be discouraged if evidence of compromise were later used in court."[183]

Rule 408 protects "conduct or statements made in compromise negotiations" regarding a "claim that was disputed as to validity or amount."[184] Its protection extends to legal arguments, factual statements, internal memoranda, and other work of lawyers and non-lawyers provided that the communications were "intended to be part of . . . negotiations toward compromise."[185] The burden falls on the objecting party to establish the preliminary facts needed to show the inadmissibility of the compromise.[186]

Based on the jurisprudence that existed at the time of trial, El Paso's argument was almost certainly correct. The United States Court of Appeals for the Fifth Circuit and three other circuits had all held that Rule 408 applied to claims arising out of a common event,[187] but these courts had not gone further—as the Fourth, Seventh, Eighth, Ninth, and Tenth Circuits had—to hold that Rule 408 barred evidence that arose out of a common relationship, factual nexus, or otherwise related circumstances.[188]

After examining the contrasting views of Rule 408, the panel determined that the term "claim" in the rule should be viewed in a fact specific, non-rigid manner, giving consideration to the purposes of the rule.[189] Here, the panel found that the Highway 90 and Turtle Bayou sites were related in time and space, by the parties that used them for dumping,

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181. *Id.*

182. *Id.* (citing FED. R. EVID. 408 advisory committee's note at ¶ 1).

183. *Id.* at 294-95.

184. *Id.* at 295 (quoting FED. R. EVID. 408).

185. *Id.* (citing Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106-07 (5th Cir. 1981)).

186. *Id.* (citing 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5315 (Supp. 2010)).

187. *Id.* at 297-98 (citing Branch v. Fid. & Cas. Co. of N.Y., 783 F.2d 1289, 1294 (5th Cir. 1986) (remaining citations omitted)).

188. *Id.* (citing Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 655 (4th Cir. 1988); Zurich Am. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682 (7th Cir. 2005); Williams v. Fermenta Animal Health Co., 984 F.2d 261 (8th Cir. 1993); Hudspeth v. Comm'r, 914 F.2d 1207 (9th Cir. 1990); Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987)).

189. *Id.* at 298.

as well as by the similarity of the issues between the CERCLA actions.[190] Moreover, El Paso's counsel conceded that liability at one site was germane to liability for the other, and the Smythe Reports were, in fact, only offered to prove liability for Turtle Bayou using contamination data for Highway 90.[191]

Ultimately, the Fifth Circuit concluded that offering "settlement evidence arising out of a shared factual nexus and bearing directly on present issues of liability . . . falls within Rule 408's prohibition."[192] The district court's consideration of the Smythe Reports constituted an abuse of discretion which required remand.[193]

VIII. RULE 410

A. Defendant May Waive Rule 410, Barring Use of Plea Statements

In *United States v. Sylvester*, the Fifth Circuit held in a matter of first impression that the prosecution could use defendant's statements made in the course of plea negotiations in its case-in-chief, when the defendant knowingly and voluntarily waived all rights under Rule 410 to object to such use.[194]

In *Sylvester*, a defendant sought to overturn his conviction for the murder of a federal witness who was to testify in a drug conspiracy case.[195] After the government obtained an arrest warrant, Sylvester voluntarily surrendered, met with prosecutors, and after consulting with his lawyer, waived his objection to the admission of his incriminating statements at trial in the event plea negotiations failed.[196] Shortly after this meeting, Sylvester changed his mind about accepting a plea bargain and decided to go to trial.[197]

The Fifth Circuit began its analysis against the backdrop of *United States v. Mezzanatto*, in which the Supreme Court upheld a more limited waiver of Rule 410.[198] In *Mezzanatto*, the Supreme Court held that a presumption exists that "legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement," but a court must determine whether Congress intended to proscribe waiver.[199] In its dicta, a majority of the justices "expressed doubt as to whether a waiver

190. *Id.*
191. *Id.* at 298-99.
192. *Id.* at 299.
193. *Id.* at 300.
194. United States v. Sylvester, 583 F.3d 285, 288 (5th Cir. Sept. 2009).
195. *Id.*
196. *Id.* at 287.
197. *Id.*
198. *Id.* at 289 (citing United States v. Mezzanatto, 513 U.S. 196 (1995)).
199. *Mezzanatto*, 513 U.S. at 203-04.

could be used to admit the defendant's statements in the government's case-in-chief."[200]

Turning to the matter before it, the Fifth Circuit concluded that there is no legislative proscription on the prosecution's use of statements made by a defendant during plea negotiations in its case-in-chief.[201] It examined the validity of the waiver at issue, including the defendant's consultation with his counsel and the nature of the waiver as a pre-condition to plea negotiations.[202] And it rejected Sylvester's public policy arguments, after considering the numerous "loaded decisions for defendants" in the context of a prosecution and the contrasting views of sister circuit courts.[203] The panel found no reason to bar the use of plea statements made voluntarily as part of a bargained-for agreement, and, accordingly, it affirmed the trial court's evidentiary ruling and judgment.[204]

IX. EXPERT OPINION TESTIMONY

A. Expert Testimony of Policeman's Knowledge of Alleged Policy Regarding Use of Force Properly Excluded as Speculation

In *James v. Harris County*, the family of a motorist who was shot and killed by a deputy sheriff, William Wilkinson, during a traffic stop brought an action under 42 U.S.C. § 1983 against Harris County, Texas, alleging that the County was liable for the use of excessive force during the arrest and that the County had a policy of failing to investigate or under-investigating officer shootings.[205] After a ten-day trial, the jury was unable to reach a verdict on the issue of excessive force.[206] Instead of granting a new trial, the district court granted judgment as a matter of law in favor of Harris County, finding that irrespective of whether the officer used excessive force, the family's evidence was insufficient to establish the County's liability for Wilkinson's actions.[207]

During the trial, the family relied on a criminologist's expert opinion that "line officers tend to break institutional rules if they are not enforced" in order to establish causation between municipality's conduct, as the policymaker, and the constitutional violation as required under § 1983.[208] The criminologist, Dr. Klinger, testified that a substantial number of the Harris County officer-involved shootings he reviewed fell below

200. *Sylvester*, 583 F.3d at 289.
201. *Id.* at 289-90.
202. *Id.* at 290, 294.
203. *Id.* at 290-92.
204. *Id.* at 294-95.
205. James v. Harris Cnty., 577 F.3d 612, 614-15 (5th Cir. Aug. 2009).
206. *Id.* at 615.
207. *Id.* at 615-16.
208. *Id.* at 618-19.

investigatory standards.[209] He then opined that "established sociological theory suggested that informal networks of communication serve to inform people at the 'bottom of the organization' of what kinds of conduct are permissible."[210] In granting the county's Rule 50 motion, the district court found that neither Dr. Klinger's testimony nor any other trial evidence showed that Wilkinson himself had personal knowledge of the alleged policy, nor that the alleged policy was so widely known that it created in the department an expectation of impunity for the use of excessive deadly force.[211]

The Fifth Circuit panel rejected the family's theory that a reasonable jury could find such a policy was "so widely known among the department's deputies that Wilkinson's personal knowledge of the policy could be assumed."[212] The Fifth Circuit also found that the district court acted within its discretion when it "expressly forbade Dr. Klinger from opining that Wilkinson had knowledge of the alleged policy, on the grounds that there was no evidence from which this fact could be established."[213] In order to warrant submission to the jury, some empirical evidence was necessary to "connect his general theory to the facts of this case."[214] Dr. Klinger lacked such evidence and was essentially speculating.[215] The panel believed that the district court acted properly to bar the jury from hearing such unreliable opinion testimony.[216]

B. Government's Mortgage Fraud Witness Was Not Qualified but District Court's Error Was Harmless

In *United States v. Cooks*, the Fifth Circuit concluded that the extrinsic evidence of a repeated scheme is relevant to intent, knowledge, motive, and plan and was supported by sufficient evidence.[217]

Cooks was convicted of mortgage fraud in a scheme in which he recruited real estate investors to purchase houses that he first purchased himself and then resold to the investors at fraudulently inflated prices.[218] To do so, Cooks worked with mortgage brokers to assist the purchasers in falsifying mortgage loan applications that overstated both the value of the property and the financial assets of the borrower and induced the borrowers to participate by promising to make the payments from the profits he

209. *Id.* at 619.
210. *Id.*
211. *Id.* at 616.
212. *Id.* at 619.
213. *Id.*
214. *Id.*
215. *See id.*
216. *Id.*
217. United States v. Cooks, 589 F.3d 173, 183 (5th Cir. Nov. 2009).
218. *Id.* at 178.

realized on the sale.[219] Ultimately, he abandoned the straw purchasers with an outsized mortgage, soon to be forced into foreclosure.[220]

Cooks objected to the qualification of a Federal Deposit Insurance Company agent as an expert, on the ground that he lacked sufficient experience to testify on the subject of mortgage fraud.[221] The trial court allowed the testimony, but the Fifth Circuit concluded that much of the agent's testimony should not have been admitted.[222] Rejecting outright the government's argument that the agent's limited experience as a white-collar fraud investigator and fraud examiner qualified him as an expert in mortgage fraud, the Fifth Circuit focused on whether he had sufficient "knowledge, skill, experience, training, or education" in the *particular* area covered to meet the *Daubert* reliability test.[223] It found he did not, noting the agent's lack of specialized training and lack of awareness of "basic statutes and literature which govern the field."[224]

While noting that much of the disputed testimony was merely descriptive and summarized factual information acquired through his investigation for which it would be permissible for him to testify as a lay witness, it noted other areas "specifically his opinion regarding the legality of Cooks's scheme" for which specialized 'knowledge, skill, experience, training, or education' in mortgage fraud" was required.[225] Despite finding error, the panel said that the error was harmless because there was other extensive evidence that the transactions were fraudulent and that Cooks was the major beneficiary.[226]

C. Magistrate Judge's Exclusion of Medical Causation Testimony Harmful Error

In *Huss v. Gayden*, a medical malpractice case, the Fifth Circuit reversed a judgment on a $3.5 million jury award and remanded the case for new trial.[227] The court found that a magistrate judge improperly prohibited a doctor named as an expert witness from expressing opinions on medical causation on the grounds that he lacked the particular experience or training to testify about whether a particular drug could cause cardiomyopathy.[228]

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219. *Id.*
220. *Id.*
221. *Id.* at 179.
222. *Id.* at 180.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. Huss v. Gayden, 571 F.3d 442, 456 (5th Cir. June 2009), *reh'g denied*, 585 F.3d 823 (5th Cir. Oct. 2009).
228. *Id.* at 455.

The district court focused on the lack of "experience in obstetrics and gynecology," noting specifically that he had "no experience whatsoever with Terbutaline."[229] In contrast, the Fifth Circuit focused its analysis on the nature of the testimony:

> Dr. Reddix did not need to be board-certified in cardiology or toxicology to explain that the studies relied on by the Husses do not prove a causative relationship—especially given the very small number of patients in those studies. Dr. Reddix's training and experience as a medical professional qualify him to tell the jury why the literature does not establish a causal link.[230]

The Fifth Circuit took care to note that the aim of Reddix's testimony was to rebut an untenable conclusion on plaintiff's theory of causation rather than offering a distinct theory requiring any specialized knowledge or experience with Terbutaline.[231]

Plaintiff petitioned for a rehearing en banc that was denied as the result of an evenly divided eight-to-eight vote.[232] In a spirited dissent, Judge Higgenbotham questioned whether the magistrate judge had excluded testimony of general and specific causation or only specific causation, concluding that he had excluded only testimony regarding specific causation and was within his discretion to do so.[233] Determining further that the point of contention was only general causation, Judge Higgenbotham concluded that the exclusion of testimony on specific causation, even if improper, could not have been reversible error.[234] Judge Owen, however, concurring in the denial of rehearing, reiterated that the panel majority held the exclusion to be error because it addressed general causation rather than specific.[235]

X. HEARSAY

A. Change to Rule 804 in Criminal Cases

This year, the Supreme Court approved a change to Federal Rule of Evidence 804(b)(3). Prior to the change, Rule 804(b)(3) stated:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

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229. *Id.*
230. *Id.*
231. *Id.*
232. *Huss*, 585 F.3d 823, 828 (5th Cir. Oct. 2009).
233. *Id.* at 829-32 (Higgenbotham, J., dissenting).
234. *Id.* at 831.
235. *Id.* at 824 (Owen, J., concurring).

> (3) *Statement against interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[236]

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed a change to Rule 804(b)(3) because of an inconsistency in the rule's application in criminal cases. As the May 2009 report from the Advisory Committee on Evidence stated, the previous rule only required a defendant to show corroborating circumstances in order to admit an unavailable declarant's statement.[237] The change extends the corroborating-circumstances requirement to the government and was unopposed by the Department of Justice.[238] The amendment does not affect civil cases.[239]

As approved by the Supreme Court of the United States on April 28, 2010, subsection (3) to Rule 804(b) now provides:

> (3) Statement against interest. A statement that:
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.[240]

The re-formulated rule will take effect on December 1, 2010.[241]

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236. FED. R. EVID. 804(b)(3) (effective Dec. 1997 to 2010).

237. Report of the Advisory Committee on Evidence Rules (May 6, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202010/2009-Supreme%20Court-EV-Committee%20Report%20Excerpt.pdf.

238. *Id.* at 1.

239. *Id.*

240. FED. R. EVID. 804(b)(3).

241. *Id.*

B. In Discrimination and Retaliation Action, Hearsay Evidence Was Admissible to Demonstrate that Other Individuals Filed Harassment Claims and that Claims Were Met with Retaliation; Other Hearsay Testimony Not Harmful

In *Alaniz v. Zamora-Quezada*, the Fifth Circuit addressed the admissibility of hearsay and prior bad acts evidence in a sex discrimination case.[242]

Zamora owned and operated two clinics as part of his osteoporosis and arthritis practice.[243] Four employees brought Title VII actions against Zamora and his clinics, alleging a hostile work environment, quid pro quo, and retaliation claims.[244]

While the employees' allegations varied due to their individual circumstances, each of their experiences reflected a long series of harassing conduct.[245] Zamora's father-in-law, serving as office supervisor, stared at one employee's body parts, called her "mamacita," and suggested that she wear more revealing clothing.[246] Zamora's conduct toward that employee was similar.[247] Her complaints to the office manager did not help matters.[248] After the employee initiated a complaint with the Equal Employment Opportunity Commission, Zamora terminated her on the pretense that she missed a meeting and was recruiting witnesses for a lawsuit against him during business hours.[249]

Another employee was, among other things, demoted after refusing to have sex with Zamora.[250] Zamora asked the third employee to wear short skirts, promised to reward her with anything she wanted if she was loyal and good to him, and, on one occasion, grabbed her and pushed his pelvis against hers.[251] Ultimately, she was reprimanded and demoted after Zamora learned that she reported him to the human resources manager, thereby becoming, in Zamora's words, a "sexual harassment spy."[252]

Zamora requested separate trials, partially on the basis that allowing each of the plaintiffs to testify about their particular circumstances would undermine Rule 404(b)—prohibiting proof of plaintiff's harassment by the

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242. Alaniz v. Zamora-Quezada, 591 F.3d 761, 773-75 (5th Cir. Dec. 2009).

243. *Id.* at 767.

244. *Id.* One employee only alleged quid pro quo. *Id.* The panel reversed the money judgment in favor of her because she failed to show a tangible employment action. *Id.* at 772-73. The remainder of the discussion addresses only the other three employees' claims. *See id.* at 773-75.

245. *See id.*

246. *Id.* at 768.

247. *See id.*

248. *Id.* After her reports, Zamora informed her that she could keep her job if she would have sex with him. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 768-69.

252. *Id.* at 769.

introduction of evidence of other alleged acts of harassment.[253] The district court denied his request and admitted the other plaintiffs' testimony.[254] The Fifth Circuit approved, saying that the evidence was admissible for non-propensity purposes.[255] Specifically, the testimony showed Zamora's *modus operandi* as an intimidating boss who operated in a similar manner in making sexual overtures to his female subordinates.[256]

Over Zamora's timely objection, the district court admitted testimony by a non-party former employee in the human resources department recounting an out-of-court statement by a third-party who experienced sexual harassment by Zamora's father-in-law.[257] The Fifth Circuit held this admissible because it was not offered to prove the truth of the matter asserted but rather "offered to demonstrate (1) that other individuals had filed harassment claims through proper channels but that no action was taken, or (2) that an employee's decision to investigate a harassment claim caused Zamora to retaliate."[258]

The district court also allowed some inadmissible hearsay testimony.[259] The plaintiffs' former co-workers testified about the harassing experiences related to them by the plaintiffs and the harassment of four non-parties who did not testify at trial.[260]

The Fifth Circuit panel held that much of this testimony was inadmissible hearsay and sometimes contained multiple layers of hearsay.[261] Due to the substantial amount of admissible evidence, however, the panel did not believe that the erroneously admitted hearsay testimony "had more than a slight effect on the jury's verdict," and therefore, it fell below the quantum of evidence needed to show reversible error.[262] Due to the negligible errors, the judgment survived.[263]

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253. *Id.* at 773-74.
254. *Id.* at 774.
255. *Id.* at 774-75.
256. *Id.* at 775.
257. *Id.*
258. *Id.* at 775-76.
259. *Id.* at 776.
260. *Id.*
261. *Id.*
262. *Id.* (citing Price v. Rosiek Constr. Co., 509 F.3d 704, 707 (5th Cir. 2007) (harmless error standard)).
263. *Id.* at 780.

XI. IMPROPER ARGUMENT AT CLOSING

A. Context and Rebuttal of Defensive Theory Saves Potentially Improper Argument

In *United States v. Vargas*, the Fifth Circuit held that it was not clear error for a prosecutor to comment in his closing argument on the defendant's failure to offer an exculpatory explanation when he was arrested because it was in response to a defense theory first offered in its closing that defendant had been duped by a witness who was the real culprit.[264]

Border patrol agents stopped defendant Vargas, a tractor-trailer driver, at a checkpoint, and detection dogs discovered 1,400 pounds of marijuana in his trailer.[265] After his arrest and *Miranda* warnings had been read to him, Vargas told police he had borrowed the trailer from a friend and denied knowing anything about the drugs found inside.[266]

In response to prosecutor's motion in limine, the court limited the introduction of exculpatory statements by defendant to that effect if he invoked his right to not testify.[267] The first trial ended in a hung jury.[268] During the second trial, the defense argued in closing that the friend had duped defendant into delivering the drugs.[269] Prosecutors countered with an argument raising the question of why defendant did not implicate the friend when talking to police:

> [H]e didn't say anything differently to the Border Patrol at that time, didn't say he went to [Garza's], "I got it from him." He never said that. . . . Everything he did on the night of his arrest says to you the defendant knew, because you never heard, "Enrique Garza did it, let me tell you about him." Wouldn't that be reasonable? Wouldn't that be the reasonable thing to say at that time?[270]

In its opinion, the Fifth Circuit first dispensed with the argument that it was an impermissible comment on defendant's post-arrest silence, reasoning that after the *Miranda* warnings had been given, continuing to answer questions made both defendant's answers and omissions "fair game."[271]

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264. United States v. Vargas, 580 F.3d 274, 279-80 (5th Cir. Aug. 2009).
265. *Id.* at 277.
266. *Id.*
267. *Id.*
268. *Id.* at 276.
269. *Id.* at 277.
270. *Id.*
271. *Id.* at 278.

The Fifth Circuit then differentiated between the effect of the statement had it been made to suggest that the defendant did not deny knowledge of the drugs—that "would have been plainly improper"—and the effect of the statement in response to the defense's argument that defendant had been duped by his friend.[272] Noting that the "high ground" would have been to steer clear of the argument, the context saves it: "Alone, the argument suggested no exculpatory statement was made, when the government knew it had. But in the context of the argument, it answered the defense's theory of the case first raised in its closing."[273] The panel affirmed the convictions.[274]

272. *Id.* at 278-79.
273. *Id.* at 279.
274. *Id.* at 280.