EVIDENCE LAW

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I. INTRODUCTION

During the period of this survey, July 2011 to June 2012, attorneys adapted to new developments in federal civil procedure law. First, on December 1, 2011, amendments to the Federal Rules of Evidence became effective.[1] These amendments were implemented as part of the restyling project that has affected other sets of rules.[2]

Second, the Fifth Circuit issued opinions on a number of significant evidence-related issues, including sufficiency of evidence, hearsay, *Miranda*, the admission of evidence of other acts under Rule 404, and expert testimony. This was an interesting year for evidence issues in the Fifth Circuit.

II. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

On December 1, 2011, amendments to Federal Rules of Evidence became effective.[3] The proposed amendments were drafted by the Federal Judicial Conference Committee on Rules of Practice and Procedure and were first circulated to judges and lawyers for review and comment in August 2009.[4] Like the prior restyling changes to the Federal Rules of Civil Procedure and

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1. *See infra* Part II.

2. *See infra* Part II.

3. Order Amending the Federal Rules of Evidence (Apr. 26, 2011) [hereinafter Amending Order], *available at* http://www.supremecourt.gov/orders/courtorders/frev11.pdf.

4. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 27 (2010) [hereinafter COMMITTEE REPORT], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2010.pdf.

other federal rules, the amendments to the Evidence Rules were intended to use clearer and easier-to-understand language but not to change the substantive meaning (i.e., lead to a different result on a question of admissibility).[5] For example, the word "shall," which can mean "must," "may," or "should," depending on the context, was removed and replaced with "must," "may," or "should," depending on which one of those three words was appropriate in the context of the rule and the established interpretation of the rule.[6] Also, for readability and clarity, long block paragraphs were broken down into subparagraphs, bullet points, or numbered elements.[7]

While major bar organizations provided input before and after the proposed amendments were published for comment, the public submitted only nineteen comments, and scheduled public hearings were cancelled because no one asked to testify.[8]

On April 26, 2011, the United States Supreme Court approved the restyled amendments to the Federal Rules of Evidence.[9] Pursuant to the Rules Enabling Act, the amendments to the evidence rules became effective on December 1, 2011, due to the absence of congressional action.

While many of the amended rules look and sound similar to their pre-amendment form, the clearer language and simplified format of the rules are readily apparent for the majority of the Evidence Rules. For example, the pre-amendment form of Rule 407, regarding the admission of evidence concerning subsequent remedial measures, stated in a single block paragraph,

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[10]

Amended Rule 407 reflects the beneficial effect of the restyling effort:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

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5. *Id.* at 27-28.
6. *Id.* at 29.
7. *See id.* at 29-30.
8. *See id.* at 27.
9. *See* Amending Order, *supra* note 3.
10. FED. R. EVID. 407 (1997) (amended 2011).

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.[11]

In March 2012, the United States Court of Appeals for the Fifth Circuit saw its first challenge related to one of the restyled Evidence Rules. In *Ellis v. United States*, the panel noted, "Rule 607 was *amended* on December 1, 2011 *for clarity only*. It now reads, 'Any party, including the party that called the witness, may attack the witness's credibility.'"[12]

The United States Courts of Appeals for the First, Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all reached the same conclusion when presented with a challenge related to the restyled rules: the amendments to the evidence rules changed the style and format only, not the substance or effect of the rules.[13]

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11. FED. R. EVID. 407.

12. Ellis v. United States, 673 F.3d 367, 373 n.5 (5th Cir. Mar. 2012) (emphasis added) (quoting FED. R. EVID. 607). The former Rule 607 stated, "The credibility of a witness may be attacked by any party, including the party calling the witness." FED. R. EVID. 607 (1987) (amended 2011).

13. *See* Kenney v. Head, 670 F.3d 354, 358 n.6 (1st Cir. 2012) (noting that the amendments were "intended to be stylistic only" (quoting FED. R. EVID. 401-403 advisory committee's notes) (internal quotation marks omitted)); United States v. Scott, 677 F.3d 72, 77 n.4 (2d Cir. 2012) (noting that the amendment to Rule 404(b), according to the advisory committee note, "indicate[s] that the change was 'intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.' Our analysis would thus be identical under either version of the Rule." (quoting FED. R. EVID. 404 advisory committee's note)); United States v. Coppola, 671 F.3d 220, 244-45 n.17 (2d Cir. 2012) ("To avoid future confusion, we quote the restyled Federal Rules of Evidence, which took effect December 1, 2011, because their substance is the same as the version in effect at the time of Coppola's trial." (citing FED. R. EVID. 401 advisory committee's note)); United States v. Smith, 697 F.3d 625, 634 n.2 (7th Cir. 2012) ("Federal Rule of Evidence 702 was amended in 2011, effective December 1, 2011. The changes were merely stylistic and not intended 'to change any result in any ruling on evidence admissibility.'" (quoting FED. R. EVID. 702 advisory committee's note)); United States v. Darden, 688 F.3d 382, 385 n.2 (8th Cir. 2012) (noting that the December 2011 amendments to the Federal Rules of Evidence were "intended to be stylistic only" (quoting FED. R. EVID. 101 advisory committee's note) (internal quotation marks omitted)); United States v. Leal-Del Carmen, 697 F.3d 964, 973 n.7 (9th Cir. 2012) ("We cite to the version of the Rules of Evidence that was in place when Leal-Del Carmen was tried in November 2010. The rules discussed in this section were amended in 2011, but the changes made were stylistic only." (citing FED. R. EVID. 402 advisory committee's note)); United States v. Irvin, 682 F.3d 1254, 1265 n.8 (10th Cir. 2012) ("Beginning December 1, 2011, the wording of Rule 803 was changed to improve its clarity. The changes were 'intended to be stylistic only' and do not displace any of this court's prior holdings on evidence admissibility." (quoting FED. R. EVID. 803 advisory committee's note)); United States v. Woods, 684 F.3d 1045, 1064 n.24 (11th Cir. 2012) (per curiam) ("Rule 414 was amended in December 2011. However, even if that amendment were retroactive, the amendment was stylistic only and does not change the outcome of our inquiry." (citing FED. R. EVID. 414 advisory committee's note)).

III. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON EVIDENCE MATTERS

A. Sufficiency of Evidence

Harold Huffman filed a lawsuit under the Federal Employers' Liability Act (FELA) against his employer of nearly forty years, Union Pacific Railroad.[14] Huffman alleged that Union Pacific negligently failed to train him to perform his job to reduce avoidable physical stresses, and thus, after his years of work, he developed osteoarthritis in his knee.[15] Huffman did not present any expert testimony as to the cause of his osteoarthritis.[16] However, he did present the testimony of Dr. Robert Andres, a consultant in ergonomics, regarding the activities he performed as part of his job duties and the ergonomic risk factors associated with those activities; the testimony of Dr. Alan Smith, Huffman's treating physician, regarding his medical history and his osteoarthritis; documentary evidence of the kind of work Huffman's job required; the testimony of George Page, Manager of Ergonomics for Union Pacific, regarding the role of ergonomics in reducing musculoskeletal disorders of the lower extremities; evidence that Union Pacific gave some workers ergonomics awareness training; and the testimony of Dr. Richard William Bunch, a licensed physical therapist, who defined musculoskeletal disorders but did not specifically identify osteoarthritis or inflammation of articular cartilage in a joint.[17]

FELA provides an exclusive remedy for a railroad employee who is injured as a result, in whole or in part, of the negligence of the railroad.[18] FELA eliminated traditional defenses such as assumption of the risk and the doctrine of contributory negligence and charged railroads with providing a reasonably safe work environment for its employees.[19] Under FELA, liability arises when the railroad "caused or contributed to" the employee's injury "if [the railroad's] negligence played a part—no matter how small—in bringing about the injury."[20]

A jury found that Union Pacific was negligent and that the railroad's negligence caused Huffman's injury.[21] Union Pacific appealed the denial of its motion for judgment as a matter of law, arguing that there was insufficient evidence of causation and that the district court improperly instructed the jury as to the necessary degree of causation.[22]

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14. Huffman v. Union Pac. R.R., 675 F.3d 412, 415 (5th Cir. Mar. 2012).
15. *Id.*
16. *Id.* at 418-19.
17. *Id.* at 423-25.
18. 45 U.S.C. § 51 (2006).
19. *See Huffman*, 675 F.3d at 417.
20. *Id.* (alteration in original) (quoting CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2644 (2011)) (internal quotation marks omitted); *see* Rivera v. Union Pac. R.R., 378 F.3d 502, 507 (5th Cir. 2004).
21. *Id.*
22. *Id.*

The Fifth Circuit determined that it need not decide whether expert testimony was required to prove causation and decided only that the evidence presented was insufficient for jurors to make a finding as to causation.[23] The majority concluded that there was no evidence presented that the osteoarthritis Huffman had was a kind of musculoskeletal disorder that could occur if a railroad negligently failed to inform its employees how to perform their tasks.[24]

> Musculoskeletal disorder is too broad a category, and the evidence introduced too general, for jurors to have a basis on which to infer even the minimal degree of causation required. . . . Evidence that work performed by trainmen increased the risk of musculoskeletal disorders if not performed properly never identified osteoarthritis in the knees as one of those disorders that could result.[25]

A vigorous dissent reached the opposite conclusion.[26] The dissent argued that the majority disregarded other evidence supporting the jury's conclusion and, in doing so, contradicted the FELA standard of causation set forth by the Supreme Court and prior Fifth Circuit precedent.[27] The dissent described the majority opinion as requiring that a plaintiff present at least one witness to expressly state that there was a causal connection between the defendant's negligence and the plaintiff's injury, rather than permitting the jury to infer from all of the evidence that the defendant's negligence "played a part—no matter how small—in bringing about the injury."[28] The dissent further complained that the majority overturned the jury's verdict even though there was "an abundance, rather than an absence, of probative evidence to support the jury's verdict."[29]

Manuel Barraza, a criminal defense attorney, won the election as a state court judge in 2008.[30] In December, before he was sworn in, a former client of his, Diana Rivas Valencia (Rivas), informed a friend that she was unhappy with her current attorney and wanted to speak with Barraza.[31] Later that day, Barraza visited her in jail and promised to assist her in exchange for money and a "buffet" of women, according to Rivas's testimony.[32] By mid-January 2009, the FBI had recruited Rivas's sister, Sarait, to assist in its investigation.[33] Sarait

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23. *Id.* at 418.
24. *Id.* at 425.
25. *Id.* at 426.
26. *Id.* (Dennis, J., dissenting).
27. *Id.* at 427.
28. *Id.* (quoting CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2644 (2011)) (internal quotation marks omitted).
29. *Id.* at 428 (citing Rivera v. Union Pac. R.R., 378 F.3d 502, 505 (5th Cir. 2004)).
30. United States v. Barraza, 655 F.3d 375, 378 (5th Cir. Sept. 2011).
31. *Id.* at 378-79.
32. *Id.* at 379.
33. *Id.*

and an undercover FBI agent met with Barraza on January 21.[34] Barraza told them he would try to move Rivas's case to his court and replace Rivas's court-appointed attorney with someone he trusted.[35]

On January 23, 2009, Sarait met Barraza at the courthouse and paid him $1,300; that same day, the court coordinator stopped an order transferring the case to Barraza's courtroom after discovering Barraza had previously represented Rivas.[36] In February 2009, Barraza asked Sarait for the undercover FBI agent's e-mail address and began soliciting her.[37] On February 24, 2009, Sarait and the undercover agent met with Barraza, who explained the failed transfer order, stated he was trying to find another way to get the case in his court, and asked for more money.[38] On February 27, 2009, Sarait met Barraza at the courthouse and paid him an additional $3,800.[39] The FBI interviewed Barraza in March 2009, and he denied speaking with Rivas's family after becoming a judge.[40]

Barraza was arrested, indicted, and, in February 2010, found guilty of two counts of wire fraud and honest services fraud and one count of making a false statement.[41] Barraza's motion for new trial was denied, and he appealed, arguing that the district court erred in not finding that the government improperly withheld impeachment evidence and in denying his motion for new trial based on insufficiency of the evidence of wire fraud.[42]

The Fifth Circuit held that even if the government did withhold impeachment evidence in violation of *Brady v. Maryland*, Barraza was not prejudiced.[43] Barraza asserted that Sarait had made a prior inconsistent statement of which the government was aware but did not disclose and that the government failed to disclose that it had searched his bailiff's computer.[44] The court noted prior precedent that evidence is not "suppressed" under *Brady* as long as it is received in time for effective use at trial.[45] The court pointed out that the statements were presented at trial, and Barraza's counsel cross-examined both Sarait and the FBI agent who interviewed her regarding her statements.[46] "Prior knowledge of the perceived inconsistency would not have affected Barraza's trial strategy; thus, he was not prejudiced by any withholding of information."[47] Further, the court noted that the search of the computer

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 380-81 (citing Brady v. Maryland, 373 U.S. 83 (1963)).
44. *Id.*
45. *Id.* at 381 (citing Powell v. Quarterman, 536 F.3d 325, 335 (5th Cir. 2008)).
46. *Id.*
47. *Id.*

yielded no information, and thus, Barraza's prior knowledge of the search would not have impacted the trial.[48]

In order to be convicted of wire fraud, a defendant must have devised a scheme to obtain money or property by false pretenses and used an interstate wire to transmit a signal or writing.[49] It is not necessary that the wire itself be an essential part of the scheme so long as it "contributed to the successful continuation of the scheme—and, if so, whether [it was] so intended by [the defendant]."[50] Furthermore, "the wire fraud statute encompasses 'a scheme or artifice to deprive another of the intangible right of honest services.'"[51] While the honest services theory is limited to bribes and kickbacks, furnishing sexual services is "a 'thing of value' sufficient to constitute bribery."[52]

Barraza argued that there was insufficient evidence to convict him of wire fraud because the government's evidence relied on an e-mail as the "wire" that related only to his attempts to obtain sex, rather than money.[53] The Fifth Circuit held that the e-mail contributed to his scheme to obtain money and sex in exchange for his assistance.[54] In addition, the court held that the honest-services fraud theory was more than sufficient to sustain Barraza's conviction under Count One because he "received a bribe of sexual favors in return for his" assistance to Rivas.[55]

B. Hearsay

"Shane Bellard was employed by the East Baton Rouge Sheriff's Office as a deputy sheriff and was enrolled as a cadet in the Capital Area Regional Training Academy."[56] During training, Bellard showed up late, fell asleep in class, took prescription medicine while operating firearms, and made sexual comments to two female cadets.[57]

The Sheriff's Office issued Bellard a letter of termination stating that he was being terminated for sexual harassment.[58] Bellard informed his father of his termination and the reasons for it, including the specific allegations made by the two female cadets.[59] Bellard "contacted Mike Knaps, a family friend and the Chief of Police in Baker, Louisiana," and asked him to speak to Sheriff

48. *Id.*
49. 18 U.S.C. § 1343 (2006).
50. *Barraza*, 655 F.3d at 383 (second alteration in original) (quoting United States v. Strong, 371 F.3d 225, 230 (5th Cir. 2004)) (internal quotation marks omitted).
51. *Id.* (quoting 18 U.S.C. § 1346 (2006)).
52. *Id.* at 383-84 (quoting United States v. Tunnell, 667 F.2d 1182, 1185-86 (5th Cir. 1982)).
53. *Id.* at 383.
54. *Id.*
55. *Id.* at 383-84.
56. Bellard v. Gautreaux, 675 F.3d 454, 458 (5th Cir. Mar. 2012).
57. *Id.*
58. *Id.*
59. *Id.*

Gautreaux on his behalf.[60] He also contacted Chief LeDuff, Chief of Police of the Baton Rouge Police Department.[61] Bellard claimed that LeDuff had already heard of his termination prior to their conversation, although LeDuff denied that this was true.[62] LeDuff testified that he did not hear anything about Bellard directly from Sheriff Gautreaux and that he only contacted the Sheriff's Office after he spoke with Bellard.[63] Dennis Bellard, Shane's father, also contacted Knaps and Sheriff Gautreaux.[64]

Bellard brought a litany of state and federal claims against Gautreaux, including a defamation claim based on his conversation with Chief LeDuff.[65] The district court dismissed all of Bellard's claims on summary judgment, and Bellard appealed and argued that the court improperly determined—and, therefore, failed to consider on summary judgment—that Bellard's statement that LeDuff told Bellard that he had already heard about Bellard's termination before their conversation was double hearsay.[66]

The Fifth Circuit affirmed the district court's ruling and explained that the statement in question was subject to two levels of hearsay, one of which was admissible but the other of which was inadmissible.[67] "The first prong, the purported statement from the Sheriff to LeDuff, would normally be considered hearsay, but is admissible non-hearsay under Rule 801(d)(2)(D) as an admission by a party-opponent."[68] However, the court pointed out that the second layer—the conversation during which Bellard claimed "that LeDuff told Bellard that [he] had already heard from the Sheriff about Bellard's termination[—was] textbook hearsay," despite Bellard's argument to the contrary, and was being offered for the truth of the matter asserted: that the Sheriff did in fact tell LeDuff about Bellard's termination and the reasons for it before Bellard told LeDuff these facts.[69] Although the statement "could be used to impeach LeDuff, impeachment evidence is not competent evidence for summary judgment."[70]

In 2008, Laredo Police Officer Pedro Martinez, III, contacted a friend and asked if he could supply cocaine to Martinez's father.[71] "Unbeknownst to Martinez, [his friend] was a confidential informant for the Bureau of Alcohol, Tobacco, and Firearms."[72] The friend put Martinez in touch with "Tony," an

60. *Id.* at 458-59.
61. *Id.* at 459.
62. *Id.*
63. *Id.*
64. *Id.* at 458-59.
65. *Id.* at 459.
66. *Id.* 459-60.
67. *Id.* at 460-61.
68. *Id.*
69. *Id.* at 461.
70. *Id.* (citing United States v. Glassman, 562 F.2d 954, 958 (5th Cir. 1977)).
71. United States v. Hale, 685 F.3d 522, 527 (5th Cir. June 2012) (per curiam).
72. *Id.* at 527-28.

undercover agent for the FBI.[73] In order to gain Tony's trust, Martinez agreed to escort a vehicle Tony stated was carrying cocaine.[74]

On October 15, 2008, Martinez escorted Tony's vehicle across town with his police cruiser.[75] A few days later, Martinez told his friend and fellow Laredo Police Officer, Hale, about the escorting.[76] On November 7, 2008, Hale, Martinez, Martinez's friend, and Tony met in a hotel room to discuss plans for cocaine escorts.[77] Everyone agreed that, in future escorts, Hale and Martinez would keep their weapons on them, use personal vehicles, use police-issued handheld radios to monitor police channels, and use Nextel push-to-talk phones to communicate.[78] The FBI made audio and video recordings of the meeting with hidden cameras.[79]

On November 13, 2008, Hale and Martinez escorted vehicles—which they were told were transporting twenty kilograms of cocaine—across town and were each paid $1,000 for their services one week later in San Antonio.[80] On September 29, 2009, FBI agents searched Martinez's father's home and interviewed Martinez's father and Martinez.[81]

On February 17, 2010, Martinez pled guilty to conspiracy to possess with intent to distribute more than five kilograms of cocaine and became a key witness against Hale.[82] On September 27, 2010, the jury returned a guilty verdict against Hale on count one of conspiracy to possess with the intent to distribute more than five kilograms of cocaine and count two of using or carrying a firearm in relation to a drug trafficking offense.[83] On appeal, Hale challenged the district court's decision to exclude several out-of-court statements made by Martinez and Martinez's father.[84]

Rule 613(b) provides that "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires."[85] Rule 804(b)(3) permits out-of-court statements that would otherwise be hearsay to be admitted when the declarant is unavailable and the statement is one a reasonable person in the declarant's position would only have made if he believed it to be true

73. *Id.* at 528.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 529.
82. *Id.*
83. *Id.* at 531.
84. *Id.*
85. *Id.* (alteration in original) (quoting FED. R. EVID. 613(b)) (internal quotation marks omitted).

because it would expose the declarant to criminal or civil liability and is supported by corroborating circumstances indicating its trustworthiness.[86]

At trial, Hale's counsel fully cross-examined Martinez and addressed several prior inconsistent statements—but not the ones that were subject to the appeal.[87] Instead, Hale's counsel attempted to bring them up with two FBI agents, who were witnesses for the government, in an attempt to impeach Martinez's credibility.[88] The Fifth Circuit affirmed the district court's decision to sustain an objection to the admissibility of the statements because the statements were not directly inconsistent with Martinez's other statements and because Hale's counsel had an opportunity to cross-examine Martinez about his statements but failed to do so.[89] Thus, they were not admissible under Rule 613(b).[90]

As to Martinez's father's statements, Hale sought to have them introduced under Rule 804.[91] The statements made by Martinez's father were (1) that Martinez's father had told the FBI that, two years before the search of his home, Martinez had approached him about renting a room in his house to store cocaine and (2) that Martinez's father had said that Martinez had been present in uniform on several occasions when cocaine was being broken down in his house.[92] Martinez's father committed suicide in 2009 and, therefore, was unavailable at Hale's trial.[93]

The Fifth Circuit held that Hale could not establish that Martinez's father's statements would expose Martinez's father to criminal liability or that there were other corroborating circumstances to indicate the trustworthiness of the statements.[94] The court held that the statements exposed Martinez to criminal liability more so than his father but that, even if they did expose Martinez's father, they did not do so with "so great a tendency" to make them inherently reliable and there was no corroborating evidence.[95] In addition, the court found that there was enough evidence for the jury to convict Hale so that the exclusion, even if improper, was harmless.[96]

C. Miranda *and Rule 404*

On the belief that Michael Angelo Cavazos had been texting sexually explicit material to a minor female, federal, state, and local officials executed a

86. FED. R. EVID. 804(b)(3).
87. *Hale*, 685 F.3d at 539.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 540.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

search warrant on his home at approximately 5:30 a.m. on September 1, 2010.[97] Cavazos's wife answered the door, and approximately fourteen law enforcement personnel entered the home, went into Cavazos's bedroom, identified him, and handcuffed him.[98] The officers permitted him to put on a pair of pants and took him to the kitchen, handcuffed and away from his family.[99] Officers then removed the handcuffs and sat with him in the kitchen for approximately five minutes while other officers secured the home.[100] Then, they asked if there was a private place where they could speak, and Cavazos suggested his son's bedroom and stated that he preferred the door to be closed.[101]

The officers informed Cavazos that it was a "non-custodial interview" and that he was free to get something to eat or drink or use the bathroom; then, they began questioning him without reading him his *Miranda* rights.[102] After about five minutes, Cavazos asked to use the restroom.[103] After it was searched, he was permitted to use the restroom with the door slightly ajar and an officer standing outside the door.[104] Because the bathroom sink did not work, Cavazos, followed by the agent, went into the kitchen, washed his hands, and then returned to his son's bedroom where the interview continued.[105] Then, for approximately one hour, Cavazos was questioned with minor interruptions when other officers entered the room to get clothing for his children.[106] At one point, Cavazos asked to speak with his brother, his supervisor at work, and officers brought him a phone but instructed him to hold the phone so that they could hear the entire conversation.[107]

Ultimately, at the end of this process, Cavazos allegedly admitted that he had been "sexting" the victim and other minor females, and he agreed to write a statement.[108] While writing the statement, an officer stood and watched him.[109] At that point, Cavazos was interrupted and the officers formally arrested him and read him his *Miranda* rights.[110]

The district court suppressed the statements Cavazos made before being read his *Miranda* rights, and the Government filed an interlocutory appeal.[111]

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97. United States v. Cavazos, 668 F.3d 190, 191-92 (5th Cir. Jan. 2012).
98. *Id.* at 192.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 193.

The Government argued that the district court improperly weighed the evidence in finding that the interview was a "custodial interrogation."[112]

"*Miranda* warnings must be administered prior to 'custodial interrogation.'"[113] For *Miranda* purposes, an individual is in custody when placed under formal arrest or when a reasonable person would understand "the situation to constitute a restraint on freedom of movement to the degree which the law associates with formal arrest."[114] In order to determine if a situation is "custodial," the court evaluates the circumstances surrounding the questioning and determines whether a reasonable person would have felt that he had the opportunity to terminate the questioning and leave.[115]

The Fifth Circuit, viewing the totality of the circumstances, affirmed the district court's decision to suppress the statements.[116] The panel disagreed with the Government's argument and distinguished prior case law that held that an in-home interrogation is less coercive than an out-of-home interrogation.[117] The court considered the large number of officers entering his home, without his consent, early in the morning and the fact that he was constantly monitored while in his own home, even to the point of having to share his phone conversation with the officers.[118] The court further found the statement, as a non-custodial interview, to be of little relevance because those words would not have the same effect on a reasonable person in his own home as would a statement that the officers would leave upon request.[119]

In *United States v. Carrillo*, the Fifth Circuit addressed a series of evidence-related issues, including whether the defendant invoked *Miranda* and the admission of prior bad acts evidence.[120] Miguel Carrillo was a passenger in a car that was stopped by a Border Patrol agent at a checkpoint.[121] Although a drug-sniffing dog alerted to the car, no drugs were found in the vehicle, on Carrillo, or on the driver.[122] On the same day as the stop, a Midland city policeman in an unmarked car identified and followed the car in which Carrillo and his companion were traveling.[123] The officer followed the car until it began traveling "upwards of 60 miles per hour" into oncoming traffic.[124]

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112. *Id.*

113. *Id.* (quoting United States v. Bengivenga, 845 F.2d 593, 595 (5th Cir. 1988)) (internal quotation marks omitted).

114. *Id.* (quoting *Bengivenga*, 845 F.2d at 596) (internal quotation marks omitted).

115. *Id.* (quoting J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011)) (internal quotation marks omitted).

116. *Id.* at 194-95.

117. *Id.* at 194.

118. *Id.*

119. *Id.* at 195.

120. United States v. Carrillo, 660 F.3d 914, 922, 925 (5th Cir. Oct. 2011).

121. *Id.* at 918.

122. *Id.*

123. *Id.*

124. *Id.* (internal quotation marks omitted).

Two days later, Carrillo was arrested for violating his parole from a prior conviction.[125] At the time of his arrest, the arresting officers searched Carillo's restaurant and found methamphetamine, drug manufacturing recipes, a digital scale, and several plastic bags.[126] A Midland detective, Robby Mobley, asked to speak with Carrillo on September 9, the day of his arrest, but when Carrillo invoked his constitutional right not to be interrogated without an attorney present, Mobley stopped talking and left.[127]

On September 10, a jailer contacted Mobley and stated that Carrillo wanted to talk to him.[128] Mobley, another detective, and the officer who had followed Carrillo on September 7, traveled to the jail to talk to Carrillo.[129] After Mobley read Carrillo his *Miranda* rights, Carrillo immediately stated, "I just man, I'm not gonna lie to you I wish I had a lawyer right here knowing that you know it's gonna I mean I'm gonna work with y'all I'm telling you I'm gonna tell you everything."[130] Carrillo also stated, "I'm just see I don't want to get fucked on this shit is all I'm saying I mean I gotta work out for me too," and, in response to a question about the timing (or delay) of his meeting with the detectives, "I wanted to see if we could push this to where I could get my lawyer."[131] Shortly thereafter, Carrillo again referred to obtaining counsel, saying, "I told that man that I wanted to see if you could work with me and push this deal to where I can get a lawyer and just sit down and talk about it."[132] Detective Mobley responded that "I can't do that until you're arraigned . . . [and] nothing's gonna change until you get into the federal system and then you'll get an attorney."[133] Following that exchange, Carrillo admitted to possessing and distributing methamphetamine.[134]

Carrillo was charged with possession with the intent to distribute methamphetamine.[135] At his pretrial suppression hearing, Carrillo argued that he requested an attorney and that Detective Mobley violated his right not to be questioned without an attorney present.[136] The district court denied his motion to suppress on the ground that Carrillo did not unambiguously request an attorney and had knowingly and intelligently waived his right to be questioned without his attorney present.[137]

At trial and over Carrillo's objection, the district court allowed testimony by a man who said he smoked methamphetamine with Carrillo on the basis that

125. *Id.* at 919.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* (internal quotation marks omitted).
131. *Id.*
132. *Id.* at 920.
133. *Id.* (first alteration in original) (internal quotation marks omitted).
134. *Id.*
135. *Id.* at 917.
136. *Id.* at 920.
137. *Id.*

the testimony was relevant under Rule 404(b) to demonstrate Carrillo's mental state.[138] The court also admitted evidence that Carillo was convicted of a prior drug possession offense.[139] As with the drug-use testimony, the district court instructed the jury that the prior conviction evidence was relevant to show Carrillo's mental state but not that he committed the crime that was at issue.[140]

The jury found Carrillo guilty, and he was sentenced to more than fourteen years in prison.[141] Carrillo appealed and challenged the district court's denial of his motion to suppress the prior acts evidence and the court's instructions to the jury.[142]

The Fifth Circuit panel conducted a de novo review of the district court's conclusion that Carrillo waived his right not to be questioned without the presence of his attorney.[143] The panel noted that the United States Supreme Court's *Miranda* precedent bars further interrogation when an accused "expresse[s] his desire to deal with the police only through counsel."[144] While "*Miranda* does not require that attorneys be producible on call" or that police need to immediately provide counsel, they must stop questioning the suspect without counsel.[145]

This line of cases does contain some grey area. On the one hand, the police cannot mislead a suspect by informing him that "[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."[146] But, on the other hand, a suspect's ambiguous reference to counsel is not enough to trigger the requirement that police immediately cease the interview.[147]

Carrillo argued that his statement, "I wish I had a lawyer right here," was similar to the language that the Supreme Court used in its *Miranda* opinion, which references a suspect's indication "that he *wishes* the assistance of counsel."[148] Carrillo also demonstrated similarities between his words and those used by defendants who successfully challenged their convictions in the United States Courts of Appeals for the Sixth and Ninth Circuits.[149]

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138. *Id.* at 920-21.
139. *Id.* at 921.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 922.
144. *Id.* (quoting Edwards v. Arizona, 451 U.S. 477, 485 (1981)) (internal quotation marks omitted).
145. *Id.* (quoting Duckworth v. Eagan, 492 U.S. 195, 204 (1989)) (internal quotation marks omitted).
146. *Id.* (alteration in original) (quoting *Duckworth*, 492 U.S. at 198)) (internal quotation marks omitted).
147. *Id.* (citing Davis v. United States, 512 U.S. 452, 459 (1994)).
148. *Id.* at 922-23 (second quote quoting Miranda v. Arizona, 384 U.S. 436, 472 (1966)) (internal quotation marks omitted).
149. *Id.* at 923 (citing Alvarez v. Gomez, 185 F.3d 995, 998 (9th Cir. 1999) ("Can I get an attorney right now, man?" (internal quotation marks omitted)), and Kyger v. Carlton, 146 F.3d 374, 379 (6th Cir. 1998) (holding that "police should have stopped questioning a suspect when the suspect stated he would 'just as soon have an attorney'" (quote from *Carrillo*, 660 F.3d at 923 (quoting *Kyger*))).

However, despite the "apparent similarities between what Carrillo said and the language found in *Miranda*, *Alvarez*, and *Kyger*," the panel concluded that the following facts showed that Carrillo "clearly knew that he could bring the interview to an end by saying he did not want to talk to the detectives further without an attorney present": (1) Carrillo's express request for an attorney when Mobley attempted to question him on September 9; (2) Carrillo's initiation of the September 10 questioning, due to his request that the jailer contact Mobley; and (3) the ambiguity of Carrillo's statements that he wished he had a lawyer but that he was "gonna tell [the officers] everything" anyway.[150] All of these circumstances tended to suggest that Carrillo wanted to talk to the detectives—or "at least that he was still making up his mind about whether to keep talking[—]and that he knew he could end the interview at any time if he chose to do so."[151] Carrillo's *Miranda*-based challenge failed.

Next, the panel addressed the district court's admission of a witness's testimony that Carrillo smoked methamphetamine with him during the two months prior to the incident at issue at trial.[152] Carrillo objected at the time that the evidence was inadmissible under Rule 404(b).[153] The panel noted that "[e]vidence in criminal trials must be strictly relevant to the particular offense charged" and that the admission of evidence under Rule 404(b) is subject to a heightened abuse of discretion review.[154]

The court rejected the government's argument that the testimony was intrinsic to the crime, and therefore, Rule 404(b) did not apply.[155] The court held instead that testimony about drug use in months prior to a possession offense was not "inextricably intertwined" with the evidence of Carrillo's charged crime, so Rule 404(b) was implicated.[156] Next, the court found that the government failed to comply with Rule 404(b)'s notice requirement and that the government did not claim that its failure was excused.[157] Therefore, the district court abused its discretion by allowing the testimony.[158] But such error was harmless in light of the other evidence, including Carrillo's detailed confession, so the error did not require upsetting the conviction.[159]

Finally, the appeals court considered Carrillo's challenge to the district court's admission of evidence related to Carrillo's 2005 conviction for possession of cocaine.[160] The panel found that the conviction "arguably had no

150. *Id.*
151. *Id.*
152. *Id.* at 926.
153. *Id.*
154. *Id.* (quoting United States v. Templeton, 624 F.3d 215, 221 (5th Cir. 2010)) (internal quotation marks omitted).
155. *Id.* at 927-28.
156. *Id.* at 927 (quoting United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990)) (internal quotation marks omitted).
157. *Id.* at 927 & n.5.
158. *Id.* at 928.
159. *Id.*
160. *Id.*

legitimate relevance" to any probative fact and likely only showed Carrillo's "bad character or propensity toward selling illegal drugs."[161] Using prior bad acts to establish bad character and to suggest a defendant's propensities are precisely the types of issues that the rule drafters intended to prevent through Rule 404(b).[162] Although the admission was erroneous, the district court's error was harmless and mitigated by its instruction to the jury regarding how it should consider the prior offense.[163] In the end, none of the evidentiary or other issues Carrillo raised were enough to overturn his conviction.[164]

D. Experts

Gregory Scott Johnson worked as a machine repairman at Owens Illinois Inc.'s (Owens) glass bottling plant in Waco, Texas, where, in June and July 2007, he was directed to work in close proximity with a C-4 Hood, a vacuum hood designed, manufactured, and installed by Arkema, Inc. (Arkema).[165]

The C-4 Hood is used by Owens to capture vapors of Certincoat, a compound made of monobutyltin trichloride (MBTC), which is applied to the glass bottles as they travel along a conveyor belt.[166] The by-products of MBTC are hydrochloric acid (HCl) and tin oxide.[167] Johnson alleged that the C-4 Hood he was working near failed to function properly and resulted in exposure to Certincoat and its chemical by-products, which caused acute symptoms, including sore throat, watery and burning eyes, chest pain, difficulty breathing, and long-term restrictive lung disease and pulmonary fibrosis.[168] A few days after the date in June when he worked near the C-4 Hood for approximately five hours, Johnson was diagnosed with pneumonia.[169] Approximately one month after working near the C-4 Hood in July, Johnson was diagnosed with chemical pneumonitis.[170] At some point, he was diagnosed with severe restrictive lung disease and pulmonary fibrosis.[171] Johnson brought suit.[172]

The district court dismissed Johnson's negligence and strict liability claims against Arkema after adopting the magistrate judge's opinion excluding the testimony of Dr. Richard Schlesinger, Johnson's expert toxicologist, and limiting the testimony of Dr. Charles Grodzin, Johnson's expert

161. *Id.* at 929.
162. *See id.* at 929 & n.7 (citing Old Chief v. United States, 519 U.S. 172, 181 (1997)); *see also* FED. R. EVID. 404(b) advisory committee's note.
163. *Carrillo*, 660 F.3d at 929.
164. *See id.* at 930.
165. Johnson v. Arkema, Inc., 685 F.3d 452, 457 (5th Cir. June 2012) (per curiam).
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

pulmonologist.[173] The district court excluded Dr. Schlesinger's testimony because (1) he could not cite to any human studies showing that either MBTC or HCI caused restrictive lung disease or pulmonary fibrosis; (2) the two animal studies on which he relied were easily distinguishable from the facts of the case; and (3) there were no peer-reviewed articles or other scientific literature concluding that MBTC or HCI exposure would result in chronic lung disease.[174] Johnson appealed and argued that the district court improperly excluded his experts who would have opined as to causation.[175]

Federal Rule of Evidence 702 provides that an expert, qualified

> by knowledge, skill, experience, training, or education[,] may testify . . . if: (a) [his] . . . knowledge will help the trier of fact to understand the evidence . . . ; (b) [his] testimony is based on sufficient facts or data; (c) [his] testimony is the product of reliable principles and methods; and (d) [he] has reliably applied the principles and methods to the facts of the case.[176]

Under the Supreme Court's *Daubert* precedent and its progeny, district courts act as gatekeepers and must ensure that expert opinions are based on the scientific method rather than mere speculation or belief.[177]

Johnson argued that Dr. Schlesinger's opinions should not have been excluded because (1) MBTC and HCI are part of a class of chemicals that cause pulmonary fibrosis; (2) Dr. Schlesinger relied on animal studies, material safety data sheets (MSDS), and regulatory guidelines relating to HCI to support his conclusions; (3) Dr. Schlesinger relied on MSDS and regulatory guidelines relating to MBTC to support his conclusions; and (4) the close temporal connection between Johnson's exposure and illness supports Dr. Schlesinger's theory.[178]

The Fifth Circuit rejected Johnson's first argument on the grounds that Dr. Schlesinger, rather than explaining a direct correlation between Certincoat and the known scientific data concerning exposure to any specific irritants, simply noted Certincoat's classification as an irritant along with other chemicals classified as such.[179]

The court rejected the use of the MSDS issued by Airgas, Inc., a company with no HCI-related connection to Arkema, and the MBTC-related MSDS issued by Arkema.[180] The court held that a district court could treat as unreliable an MSDS without supporting scientific data.[181] The court rejected

173. *Id.* at 458.
174. *Id.* at 460.
175. *Id.*
176. *Id.* at 459 (quoting FED. R. EVID. 702) (internal quotation marks omitted).
177. *Id.* (citing Curtis v. M&S Petrol., Inc., 174 F.3d 661, 668 (5th Cir. 1999)).
178. *Id.* at 459-60.
179. *Id.* at 462.
180. *Id.* at 463-65.
181. *Id.* at 465.

the reliability of a baboon study on which Dr. Schlesinger relied because there was only one study; humans have unique respiratory tracts; and the duration, length, and level of exposures were different in the baboon study and in Johnson's case.[182] The court also upheld the district court's conclusion that the MBTC-related MSDS issued by Arkema was unreliable when it was supported by only one rat study; this study was unpersuasive because there was no correlation between duration and length of exposure of the rats from the study and those in Johnson's case and because the study did not make any specific findings about restrictive lung disease and pulmonary fibrosis.[183] The court further noted the "limited usefulness of animal studies" in toxicity cases.[184]

Furthermore, the court rejected Johnson's reliance on the regulatory guidelines of permissible exposure to HCl and MBTC set by the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH).[185] The court noted that such guidelines are promulgated by agencies with a significantly lower threshold of proof than that of tort law and, thus, are not necessarily reliable.[186] The court pointed out that Johnson did not provide any additional data to support either that the OSHA and NIOSH guidelines' conclusions regarding HCl exposure limits or that the limits exist to protect against severe restrictive lung disease and pulmonary fibrosis.[187] The court also pointed out that the OSHA guidelines applicable to MBTC were based more on the general classification of organotin than on MBTC specifically, according to Dr. Schlesinger.[188]

Last, the court rejected Johnson's temporal argument and found both that a "temporal connection standing alone is entitled to little weight in determining causation" and that Johnson had failed to present any supporting evidence.[189]

182. *Id.* at 463-64.

183. *Id.* at 465-66.

184. *Id.* at 463 (quoting Allen v. Pa. Eng'g Corp., 102 F.3d 194, 197 (5th Cir. 1996)) (internal quotation marks omitted).

185. *Id.* at 464.

186. *Id.* (citing *Allen*, 102 F.3d at 198).

187. *Id.* at 464, 466.

188. *Id.* at 466.

189. *Id.* at 467 (quoting Curtis v. M&S Petrol., Inc., 174 F.3d 661, 670 (5th Cir. 1999)) (internal quotation marks omitted).