No. 24-

IN THE

Supreme Court of the United States

JOSHUA HERRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Eleventh Circuit fail to follow this Court's recent decision in *Diaz v. United States*, 602 U.S. 526 (2024) in favor of their own precedent on the scope of expert testimony under Federal Rules of Evidence 704(b) in holding that a psychological expert could not give an opinion in a prosecution under 18 U.S.C. § 2422(b) that the defendant did not generally have sexual interest in children?

RELATED PROCEEDINGS

United States v. Joshua Herrera, No. 23-13706 (11th Cir. Jan. 7, 2025)

United States v. Joshua Herrera, No. 1:20-CR-079-SDG-RDC (N.D. Ga. 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua Herrera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The panel decision of the court of appeals is available in the Westlaw database at 2025 WL 40265 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-21a. The relevant proceedings in the district court are unpublished.

JURISDICTIONAL STATEMENT

The panel decision of the court of appeals was issued on January 7, 2025. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Federal Rule of Evidence 704, entitled "Opinion on an Ultimate Issue," provides:

> (a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
>
> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone. Fed. R. Evid. 704.

INTRODUCTION

Respectfully, the Eleventh Circuit Court of Appeals ignored this Court's recent decision in *Diaz v. United States*, 602 U.S. 526 (2024) to rely on their own precedent to exclude expert testimony under Federal Rules of Evidence Rule 704. Mr. Herrera must acknowledge that the crime he was convicted of, violating 18 U.S.C. § 2422(b), does not endear him to anyone. However, the Eleventh Circuit's overly broad reading of Rule 704(b) has implications beyond just Mr. Herrera's case and will likely spill over in any case where *mens rea* is the primary issue at trial.

The Eleventh Circuit's decision is clearly contrary to this Court's decision in *Diaz* and the petition should be granted on that basis.

Additionally, there is a growing split among the circuit courts of appeals on the scope of Rule 704(b) when a defendant seeks to admit evidence that is not on the ultimate issue to be determined by the jury. The Eleventh Circuit's decision unfairly limits the ability of criminal defendants' constitutional right to present a complete defense. This Court should grant the petition on this additional basis to resolve the split among the circuit courts of appeals.

STATEMENT OF THE CASE

A. Factual Background.

This case involved a sting operation designed to catch people that use computer chat rooms to facilitate sex with underaged children. An FBI Agent posing as a

mother seeking to introduce her daughter to sex posted an advertisement/listing on fetlife.com hoping to attract people that have a sexual interest in children. (Dist. Ct. Doc. # 142, p. 397-398). Anyone interested should contact her on "Kik," which is a messenger app where people can message and share pictures. (Doc. # 142, p. 401). The Agent engages in a funneling process to see who of the responders has a genuine sexual interest in children. (Doc. # 142, p. 403).

Joshua Herrera engaged in several chats with the Agent. (Doc. # 142, p. 404-405). The messages then went into specifics of what the Agent wanted for her daughter sexually and what Mr. Herrera suggested he would do with her daughter. (Doc. # 142, p. 412-420).

Mr. Herrera suggested that they meet, and they discussed the specifics for the meeting. (Doc. # 142, p. 421-422, 425-427). They agreed to meet at a local Waffle House. (Doc. # 142, p. 428-429). Mr. Herrera arrived at the Waffle House, drove around the parking lot, and was arrested by law enforcement. (Doc. # 142, p. 367, 370). Mr. Herrera made a custodial statement during which he asserted that he was going to report the mother to law enforcement but did not have enough information. (Doc. # 142, p. 437, 439).

The defense called Dr. Tyler Whitney as an expert in clinical psychology and autism spectrum disorder. (Doc. # 143, p. 511). Dr. Whitney opined that Mr. Herrera was autistic and as a result stress can diminish his ability to communicate with others. (Doc. # 143, p. 532-535). Dr. Whitney was precluded from testifying that based upon his examination Mr. Herrera did not demonstrate an interest in children sexually. Mr. Herrera testified on his

own behalf that he went to the Waffle House because he believed that a child was in danger of being molested with the help of her mother. (Doc. # 143, p. 586-587).

Additional facts will be incorporated as needed.

B. Procedural History

1. Trial Court

On February 12, 2020, Joshua Herrera was indicted and charged with one count of using the means of interstate commerce to coerce or entice a child for sexual activity in violation of 18 U.S.C. §2422(b). (Doc. # 10).

Prior to trial Mr. Herrera, through counsel, filed a notice of intent to use an expert. (Doc. # 105). The parties briefed the admissibility of the proffered testimony of Dr. Tyler T. Whitney. (Doc. # 104, 106, 1089-110). On March 20, 2023, the Honorable Steven D. Grimberg issued a written order that allowed the testimony of Dr. Whitney in part and excluded a portion of his proffered testimony. (Doc. # 111). The District Court excluded any mention by Dr. Whitney that Mr. Herrera did not demonstrate any sexual interest in children.

On March 27-30, 2023, Mr. Herrera was tried before a jury in the Northern District of Georgia. (Doc. # 122, 124-126). During the trial the Government repeatedly tried to paint Mr. Herrera with the brush of being a child predator. (Doc. # 142, p. 396, 297, 402-403). That theme was echoed in the Government's opening statement and closing argument. (Doc. # 142, p. 352; Doc. # 144, p. 689). On March 30, 2023, the jury found Mr. Herrera guilty of the crime charged. (Doc. # 127).

On October 26, 2023, Mr. Herrera was sentenced to 235 months imprisonment and supervised release for life. (Doc. # 146, 147). A notice of appeal was timely filed on November 8, 2023. (Doc. # 148).

2. Appeal

Petitioner appealed his conviction and sentence asserting that the district court abused its discretion under Federal Rules of Evidence 704 in excluding the testimony of Dr. Whitney that Mr. Herrera did not demonstrate sexual interest in children.

While the direct appeal was pending this Court decided *Diaz v. United States*, 602 U.S. 526 (2024). The Eleventh Circuit ordered supplemental briefing asking the parties to address the following question:

> **Is the Supreme Court's intervening decision in *Diaz* "clearly on point" such that the Court may depart from our prior panel precedent in *United States v. Gillis*, 938 F.3d 1181 (11th Cir. 2019)? *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Tr.*, 344 F.3d 1288, 1292 (11th Cir. 2003)).**

On January 7, 2025, the Eleventh Circuit rejected Mr. Herrera's arguments finding that it was bound to its prior precedent of *United States v. Gillis*, 938 F.3d 1181 (11th Cir. 2019) which held that evidence that a defendant showed no sexual interest in children "would do more than 'leave[an] inference for the jury to draw,' and instead veer into the impermissible territory of offering an opinion on[the defendant's] mental state." Appendix A p. 12. The

Eleventh Circuit held that this Court's decision in *Diaz v. United States* did not abrogate their decision in *Gillis* as it was not "clearly on point and clearly contrary to the panel precedent." Appendix A p. 16, quoting *Edwards v. U.S. Atty Gen.*, 97 F.4th 725, 743 (11th Cir. 2024); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003).

Additionally, the Eleventh Circuit found that another precedent from that Court, *United States v. Stahlman*, 934 F.3d 1199, 1220 (11th Cir. 2019), and other Circuits, was simply *dicta* and not controlling. *See United States v. Hite,* 769 F.3d 1154 (D.C. Cir. 2014); *United States v. Gladish*, 536 F.3d 646, 650-51 (7th Cir. 2008).

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's decision has decided an important question of federal law in a way that conflicts with this Court's decision in *Diaz v. United States*, 602 U.S. 526 (2024).

The Eleventh Circuit's reliance on the prior panel precedent rule and the holding in *United States v. Gillis* is contrary to this Court's decision in *Diaz*. This Court discussed the history and plain language of Rule 704 and found that the rule "proscribes only expert opinions in a criminal case that are about a particular person ("the defendant") and a particular ultimate issue (whether the defendant has "a mental state or condition" that is "an element of the crime charged or of a defense")". This Court further explained that the Rule does not preclude testimony about mental state ultimate issues in the abstract.

The decision in *Diaz* demonstrates that the prohibition in Rule 704(b) is far narrower than *Gillis* dictates. Because Rule 704(a) allows opinion testimony that includes the ultimate issues, Rule 704(b) only excludes a narrow "subset of those same opinions." Slip Opinion p. 12. *Gillis,* by comparison, held where a defendant offered expert testimony that the defendant was not sexually attracted to children was only a thinly veiled attempt to offer evidence on the requisite intent of 18 U.S.C. § 2422(b) and does more than allow the jury to draw an inference. *United States v. Gillis,* 938 F.3d at 1195.

In this case, whether Mr. Herrera was sexually attracted to children was not the "particular ultimate issue" that the jury had to determine, as an interest in children sexually is not an element of 18 U.S.C. §2422(b). The ultimate issue in such a case is whether Mr. Herrera acted knowingly. The elements of 18 U.S.C. § 2422(b) include that the defendant (1) "knowingly" persuades, induces, entices, or coerces a minor to engage in sexual activity, and (2) took a substantial step toward the commission of that offense." *United States v. Gillis*, 938 F.3d at 1190; *United States v. Lee*, 603 F.3d 904, 913-14 (11th Cir. 2010). Sexual interest in children is not the *sine qua non* of this crime.

Instead, the evidence of a general sexual interest in children is a kind of lack of propensity evidence. The Federal Rules of Evidence specifically allow that kind of evidence for the jury's consideration. Federal Rule of Evidence Rule 404(b) (other crimes evidence); Rule 404(a)(2) (good character evidence); Rule 406 (habit or routine practice); Rule 413 (similar crimes in sex assault cases); Rule 414 (similar crimes in a child molestation case).

The Eleventh Circuit indicated that this Court held in *Diaz* that "under Rule 704(b), then, if the charged crime requires the defendant to have "knowingly," "willfully," "intentionally," or "recklessly" acted, for instance, an expert cannot offer his opinion on that subject." Appendix A p. 11. This Court made no such holding. Rather this Court held "Rule 704(b) thus proscribes only expert opinions in a criminal case that are about a particular person ("the defendant") and a particular ultimate issue (whether the defendant has "a mental state or condition" that is "an element of the crime charged or of a defense")". *Diaz v. United States*, 144 S.Ct. at 1733.

As Justice Jackson's concurring opinion in *Diaz* made clear, there are numerous examples of how Rule 704(b) can be used by both the Government and the defense to provide evidence to the jury on the issue of *mens rea*. *Diaz v. United States*, 144 S.Ct. at 1736. The kind of evidence sought to be admitted on Mr. Herrera's behalf would not "deprive the jury of its ability to decide the last link in the inferential chain: whether (Herrera himself) had the requisite *mens rea*. But, at the same time, having all of this testimony might have helped the jury determine whether the Government had met—or failed to meet—its burden of proving that" Herrera acted knowingly. *Id*.

The Eleventh Circuit's decision directly conflicts with this Court's decision in *Diaz v. United States* and this Court should grant the petition on that basis.

B. The opinion of the Eleventh Circuit is in conflict with two other United States courts of appeals on the important matter of whether a criminal defendant can offer expert testimony on the issue that he generally has no sexual interests in children.

The Eleventh Circuit excludes this type of testimony under Rule 704(b). *United States v. Gillis*, 938 F.3d 1181, 1195 (11th Cir. 2019) (per curiam) (testimony that the defendant "was not sexually attracted to prepubescent girls was simply a thinly veiled attempt by the defense to offer an expert opinion that [the defendant] lacked the requisite intent for the enticement offense"). Cf. *United States v. Stahlman*, 934 F.3d 1199, 1220-21 (11th Cir. 2019) (excluding expert testimony explicitly stating defendant "intended" to act out a fantasy); *United States v. Hofus*, 598 F.3d 1171, 1179-80 (9th Cir. 2010) (excluding expert testimony that defendant valued sexual text messages with minors as fantasy alone).

Other Circuit courts of appeals admit this type of testimony under Rule 704(b). *United States v. Hite*, 769 F.3d 1154, 1169-70 (D.C. Cir. 2014) (admitting expert testimony that defendant had not been diagnosed with a condition making him attracted to minors); *Hofus*, 598 F.3d at 1177 (Expert allowed to testify that defendant was not a hebophile); *United States v. Gladish*, 536 F.3d 646, 650-51 (7th Cir. 2008) (admitting expert report and testimony that defendant was unlikely to have sex with a minor for attempted enticement charge).

Even the district court considering the issue in the first instance recognized that there was arguably

conflicting case law but felt bound by the precedent of *United States v. Gillis*. Pet. App. 33a.

In prosecutions for violations of 18 U.S.C. § 2422(b), the *actus reus* is normally documented in text messages, emails and evidence of an attempt. The defense of these charges often focuses on the *mens rea* or knowingly requirement. The Eleventh Circuit's prohibition on relevant evidence that a defendant does not have a sexual interest in children ties one hand behind their back that is not contemplated by Rule 704.

Rule 704(b) is an important evidentiary rule that should play a role in criminal cases involving not just prosecutions for 18 U.S.C. § 2422(b) cases but for every case where *mens rea* is the battleground for trial.

Our Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Mr. Herrera acknowledges that the right to present a complete defense is not absolute. *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991). "[F]ederal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) ; *see Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."). Federal Rules "do not abridge an accused's right to present a defense so

long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308, 118 S.Ct. 1261 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). In other words, "the right to introduce relevant evidence can be curtailed if there is a good reason for doing that." *Clark v. Arizona*, 548 U.S. 735, 770, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006). This case presents the issue of to what extent Rule 704(b) can restrict the Constitutional ability to present a defense. This issue needs to be resolved so that parts of the country are narrowly applying Rule 704(b) consistent with this Court's opinion in *Diaz* while others apply it more broadly against criminal defendants.

This case presents a good vehicle to consider this issue as it was presented in the district court and preserved for direct appeal.

The decision of the Eleventh Circuit improperly and unfairly restricts criminal defendants from presenting a complete defense in the form of relevant evidence related to the issue of whether a defendant acted "knowingly" without presenting evidence on the particular ultimate issue.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13706

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSHUA HERRERA, a.k.a. Joshua Reuben Herrera,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cr-00079-SDG-RDC-1

Filed January 7, 2025

Before ROSENBAUM, LAGOA, and WILSON, Circuit Judges.

PER CURIAM:

A jury convicted Joshua Herrera of one count of attempting to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). As part of his defense, Herrera tried to introduce expert testimony from a

psychologist that he was not sexually attracted to children. The district court ruled that testimony inadmissible in part under Federal Rule of Evidence 704(b). That rule prohibits experts in a criminal trial from opining on whether the defendant had the required mental state to be convicted as charged. FED. R. EVID. 704(b).

Herrera now appeals his conviction, arguing the district court abused its discretion by restricting the testimony. But in *United States v. Gillis*, we held that a district court did not abuse its discretion when it barred nearly identical testimony under the same rule. 938 F.3d 1181, 1195 (11th Cir. 2019). So we affirm Herrera's conviction.

I. BACKGROUND

A. *Herrera's Conduct*

In November 2019, as part of an undercover operation against child sex crimes, the Federal Bureau of Investigation ("FBI") created an ad on FetLife.com. FetLife.com is a website that hosts classified ads for people looking to act on sexual fetishes. Posting under the username "daughterlover_11," an agent posed as a "Mom . . . looking for like minded no limits perv." Two days after posting, an account, later identified as belonging to Herrera, responded.

In their initial exchange, the undercover agent explained that she was "looking for something taboo with [her] daughter" and asked if Herrera had "any age

limits?" Herrera responded, "Not particularly. What is it? . . . what's the thing you want to do?"

Over the next three months, the agent and Herrera exchanged about 400 messages. In these messages, the agent said her daughter was eleven years old and sent a photograph of a young girl lying on a bed. The pair discussed how Herrera would teach the girl how to have sex, including oral and penetrative sex, which he would engage in with her with and without a condom. Herrera also assured the agent that he had "papers" showing he was free of sexually transmitted diseases. At no point did he contact the police or report the initial ad or these messages.

The pair arranged for Herrera to meet the "daughter" at a Waffle House in Duluth, Georgia. Then, on the planned day, Herrera drove about fifty miles from Athens, Georgia, to the restaurant. In the parking lot, law enforcement arrested Herrera and seized his cell phone.

In Herrera's phone, law enforcement discovered the messages with the agent. They also found thirty images of child erotica and suspected child pornography, as well as a document containing test results for sexually transmitted diseases. Law enforcement did not find a condom on Herrera or in his car.

B. Criminal Proceedings

A grand jury in the Northern District of Georgia charged Herrera with one count of violating 18 U.S.C. § 2422(b).

That provision, as relevant here, provides criminal penalties for "[w]hoever, using . . . means of interstate . . . commerce," "attempts to" "*knowingly* . . . entice[]" anyone under eighteen "to engage in" child molestation. 18 U.S.C. § 2422(b) (emphasis added); GA. CODE ANN. § 16-6-4.

Herrera proceeded to trial. At trial, Herrera testified that he traveled to Athens because he "thought there was a child in danger." He admitted messaging with the FBI agent but claimed he was attempting to gather information and arrange a meeting to rescue the child. He also said he didn't know how the child erotica and suspected child pornography was on his phone.

Herrera's former girlfriend, Raina Cundiff, also testified in his defense. She spoke about their relationship and her observations about Herrera's use of pornography. She also testified that, in her lay opinion, she observed that Herrera exhibited what she believed to be characteristics of autism. At one point, Herrera's attorney asked Cundiff, "Before you had sex, was there anything about your appearance or the way that you had groomed yourself that you mentioned to him?" But the government objected. Herrera's counsel responded that the question was "directly related to [Herrera's] interest in children or whether he has it or not." Without explaining its ruling, the district court sustained the government's objection.

Finally, Herrera called Dr. Tyler Whitney, a licensed clinical psychologist. Before trial, Herrera disclosed that Dr. Whitney, an expert witness, would testify that Herrera has autism spectrum disorder ("ASD"), and

that could explain his behavior here. The district court summarized Herrera's representations about the scope of Dr. Whitney's expected testimony as follows:

> Herrera has ASD, including an explanation of the methodology used to reach this diagnosis.
>
> Herrera did not receive a formal ASD diagnosis as a child, including the reason for the delayed diagnosis.
>
> Herrera exhibits certain traits that are common in individuals with ASD.
>
> Herrera's behavior in this case *could* be consistent with the inability of many autistic persons to imagine how others might view certain behavior.
>
> Herrera's behavior, though it may appear unusual to non-autistic persons, could be consistent with Herrera's statement that he was trying to save the "daughter."
>
> Herrera's psychosexual assessment showed no indications that he has a sexual interest in children of either gender.

The government objected to Dr. Whitney's testimony. In the government's view, the proposed testimony violated the Insanity Defense Reform Act and Federal Rules of Evidence 401, 402, 403, and 704(b). The district

court largely disagreed. It ruled that Dr. Whitney could testify, except that it excluded Dr. Whitney's opinion that Herrera's "psychosexual assessment showed no indications that he has a sexual interest in children."

In reaching this conclusion that this limited testimony would violate Rule 704(b), the district court relied on our opinion in *United States v. Gillis*, 938 F.3d at 1195. Rule 704(b) prohibits expert witnesses in criminal cases from opining on whether a defendant had the required mental state to be convicted of the charged crime. FED R. EVID. 704(b).

The district court also excluded the same testimony under Rule 403. As the district court saw things, Dr. Whitney's opinion that Herrera's "psychosexual assessment showed no indications that he has a sexual interest in children" had little probative value, and what it had was substantially outweighed by its potential prejudicial effect. Dr. Whitney ultimately testified as Herrera proposed but not to the precluded opinion.

At the end of the trial, the jury convicted Herrera as charged. The district court sentenced him to 235 months in prison.

Herrera now appeals.

II. STANDARD OF REVIEW

We review a district court's decision not to admit expert testimony for abuse of discretion. *United States*

v. Frazier, 387 F.3d 1244, 1258 (11th Cir. 2004). And we will "not reverse an evidentiary decision of a district court unless the ruling is manifestly erroneous." *Id.* (internal quotation marks and citation omitted). So "we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Id.* at 1259.

As for a constitutional challenge to the exclusion of evidence, we review that de novo. *United States v. Litzky*, 18 F.4th 1296, 1302 n.2 (11th Cir. 2021) (quoting *United States v. Sarras*, 575 F.3d 1191, 1209 n.24 (11th Cir. 2009)).

III. DISCUSSION

Herrera argues that the district court abused its discretion by wrongfully applying Federal Rules of Evidence 704(b) and 403 to exclude Dr. Whitney's testimony about his psychosexual assessment of Herrera. He also asserts that the district court abused its discretion by restricting Cundiff's testimony. And together, Herrera urges, these two errors violated his constitutional right to present his preferred defense.

We begin there. Under the Constitution, a criminal defendant has "the implicit right to present evidence in their favor." *Gillis*, 938 F.3d at 1193; *see also* U.S. CONST. amends. V, VI. To evaluate whether the district court violated this right, "we examine (1) whether the right was actually violated, and (2) if so, whether that error was harmless beyond a reasonable doubt." *Gillis*, 938 F.3d at 1193.

But the Federal Rules of Evidence also figure into this analysis. The Federal Rules of Evidence govern what evidence can be admitted at trial in federal courts. After all, the right to present a criminal defense does not include "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). So the Federal Rules of Evidence "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)).

Still, "particular applications of a generally valid rule may unconstitutionally deny a defendant his rights . . . ." *Gillis*, 938 F.3d at 1193 (quoting *United States v. Hurn*, 368 F.3d 1359, 1363 n.2, 95 Fed. Appx. 1359 (11th Cir. 2004)). But if a district court correctly excludes evidence under the evidentiary rules, to succeed on a constitutional challenge, a defendant must show "a compelling reason for making an exception" to the rules. *Id.* at 1195.

Herrera does not argue that any of the Federal Rules of Evidence are "arbitrary" or "disproportionate," and thus invalid. Instead, he contends only that the district court misapplied the Federal Rules of Evidence when it limited Dr. Whitney's and Cundiff's testimony. Herrera also does not contend that a compelling reason supports making an exception to the Federal Rules for his case.

So his constitutional challenge depends on whether the district court wrongly applied the rules.

But even there, Herrera concedes that any error in excluding Cundiff's testimony would not alone warrant the vacatur of his conviction. So his constitutional challenge hinges on whether the district court properly excluded Dr. Whitney's testimony that Herrera's "psychosexual assessment showed no indications that [Herrera] has a sexual interest in children."

For the reasons we explain below, we conclude that the district court did not abuse its discretion when it limited Dr. Whitney's testimony under Rule 704(b). And as a result, it did not violate Herrera's constitutional right to present his preferred defense. So we do not decide whether the district court also properly applied Rule 403. Nor do we decide whether the district court abused its discretion in restricting Cundiff's testimony because Herrera concedes that any error in that ruling would not alone be enough to vacate Herrera's conviction.

Our discussion proceeds in two parts. First, we explain the scope of Rule 704(b). Then, we articulate why our prior-panel-precedent in *United States v. Gillis* requires us to affirm the district court's ruling. *See* 938 F.3d at 1195.

A. The Scope of Rule 704(b)

Rule 704(b) provides that "[i]n a criminal case, an expert witness must not state an opinion about whether

the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." To explain the rule's scope, we need to walk through how and why it was adopted.

Before the adoption of Rule 704, under the common law, witnesses at trial could not testify on "ultimate issues." *See Diaz v. United States*, 602 U.S. 526, 531-32, 144 S. Ct. 1727, 219 L. Ed. 2d 240 (2024). "Ultimate issues" are "issues that the jury must resolve to the decide the case." *Id.* at 531. In a murder case, for example, the prosecution must prove that the accused intentionally killed the victim. So ultimate issues include whether the accused was the person who killed the victim, whether the victim actually died, and whether the accused *intended* to kill the victim. *Cf. id.* at 531-32 (explaining the meaning and examples of ultimate issues). And a witness could not opine on any of them under the common law. The common law sought to "prevent[] witnesses from taking over the jury's role." *Id.* at 532.

But by the 1940s, the "ultimate-issue rule" fell out of favor. *Id.* at 533. Some critics pointed out that even if witnesses testified on ultimate issues, juries could still decide whether to believe them. *Id.* Others highlighted that the rule excluded valuable testimony. *Id.* So in 1975, Congress adopted Federal Rule of Evidence 704, which permitted all ultimate-issue testimony in federal courts. *Id.*

But nine years later, Congress walked that back. *Id.* In 1981, John Hinckley, Jr., attempted to assassinate

President Ronald Reagan. *Id.* And at his trial, he argued he could not be convicted of murder because he was insane, so he could not have legally intended to kill President Reagan. *Id.* Expert witnesses for both the prosecution and defense testified about whether Hinckley was insane. *Id.* Ultimately, the jury found Hinckley not guilty by reason of insanity. *Id.*

Congress thought that the expert witnesses in the Hinckley trial had too much influence over the jury. So it adopted Rule 704(b). That rule mandates that experts can't testify to the "ultimate issue" of whether a criminal defendant had the required mental state to commit the charged crime. *See id.* at 533-34. Under Rule 704(b), then, if the charged crime requires the defendant to have "knowingly," "willfully," "intentionally," or "recklessly" acted, for instance, an expert cannot offer his opinion on that subject.

Not surprisingly, given the origins of Rule 704(b), had the rule existed during Hinckley's trial, it would have barred the experts from opining on whether Hinckley could have established the necessary intent attempt to kill President Reagan. And today, in our hypothetical murder case, expert witnesses could provide their opinion about who killed the victim and whether the victim died but not whether the accused *intended* to kill the victim.

But Rule 704(b)'s exclusionary exception is "narrow." *Id.* at 534. It blocks only "expert opinions in a criminal case that are *about* a particular person ('the defendant') and a particular ultimate issue (whether the defendant

has 'a mental state or condition' that is 'an element of the crime charged or of a defense')." *Id.* (emphasis added). It does not bar opinions that simply *relate* to the mental-state issue. *See id.* at 537.

So experts can still help the jury decide the mental-state issue by providing valuable relevant information. They just can't directly opine on the ultimate issue.

B. Herrera's Case

Under 18 U.S.C. § 2422(b), to convict Herrera, the jury had to conclude he acted "knowingly" when he allegedly tried to entice a child to engage in sexual activity. So under Rule 704(b), as an expert, Dr. Whitney, could not testify on that subject. As a result, the question we must answer is whether the district court properly concluded that Dr. Whitney's opinion that Herrera's "psychosexual assessment showed no indications that [Herrera] has a sexual interest in children" would have been a direct opinion on that topic, or whether the testimony would have only *related* to that subject.

Our prior precedent answers that question. In another 18 U.S.C. § 2422(b) case, we held that a district court did not abuse its discretion when it excluded nearly identical expert testimony under Rule 704(b). In *United States v. Gillis*, Gillis, the defendant, was charged with violating 18 U.S.C. § 2422(b). 938 F.3d at 1190. He sought for his expert psychologist to testify to her opinions after "a psychosexual evaluation." *Id.* at 1192. Gillis proffered that she would testify about his "psychosexual makeup"

and "sexual development" and that Gillis didn't "have an interest in prepubescent children." *Id.* The district court concluded that testimony would be "a thinly veiled attempt by the defense to offer an expert opinion that Gillis lacked the requisite intent for the enticement offense . . . ." *Id.* at 1195. So the court excluded it under Rule 704(b). *Id.*

Gillis brought a constitutional challenge to the exclusion of that testimony. *Id.* at 1193. Although he didn't argue that the district court improperly applied Rule 704(b), we needed to decide that question to assess the constitutional challenge. *Id.* We held that the district court did not abuse its discretion applying Rule 704(b). *See id.* at 1195. We said we saw "no clear error in the district court's determination that [the] proffered testimony would do more than 'leave[an] inference for the jury to draw,' and instead veer[] into the impermissible territory of offering an opinion on [the defendant's] mental state." *Id.* (second bracket in original).

We are bound to follow *Gillis* when it applies. Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

Herrera sought for Dr. Whitney to offer testimony indistinguishable from that of the expert in *Gillis*. Indeed, both Herrera and Gillis tried in 18 U.S.C. § 2422(b) cases to present their experts' opinions, based on psychosexual assessments, that they were not sexually attracted to

children. *See Gillis*, 938 F.3d at 1192. To be sure, as Herrera notes, the proposed expert's report in *Gillis* wasn't part of the record on appeal, but Dr. Whitney's report is. *See id.* But Herrera identifies, and we see, nothing in that report that suggests Dr. Whitney's testimony would be meaningfully different from that in *Gillis*.[1]

Because Herrera's case is not materially distinguishable from *Gillis*, we must follow *Gillis*. As a result, we must conclude that the district court did not abuse its discretion under Rule 704(b) in excluding Dr. Whitney's testimony that Herrera's "psychosexual assessment showed no indications that [Herrera] has a sexual interest in children."

Herrera tries to get out from under the prior-panel-precedent rule in four ways. None succeed.

First, Herrera notes that Gillis did not directly challenge the district court's application of Rule 704(b). Instead, Gillis argued that the application of the rule was unconstitutional. *See Gillis*, 938 F.3d at 1192-93. But we don't see how that allows us to depart from *Gillis*'s holding that expert testimony of a defendant's psychosexual assessment in a § 2422(b) case violates Rule 704(b).

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1. Herrera muses that the proposed testimony in *Gillis* may have been "far broader" than here, but he offers no basis for that speculation. And he notes the district court in *Gillis* expressed concern that the expert was overly reliant on "her clinical interview" with the defendant. *See Gillis*, 938 F.3d at 1192. But he doesn't explain, and we don't see, why that matters or how Dr. Whitney's methodology differs.

Second, Herrera also contends that in *Gillis*, we upheld the district court's exclusion of the relevant testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Herrera is mistaken. We affirmed the district court's exclusion of a *separate* expert's testimony under those standards. *See Gillis*, 938 F.3d at 1191-94. But even if we had also upheld the exclusion of the relevant testimony under Rule 702 and *Daubert*, that would make our Rule 704(b) ruling, at worst, an alternative holding. And we've explained that "an alternative holding is not dicta but instead is binding precedent." *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 484 n.3 (11th Cir. 2014).

Third, Herrera contends another of our precedents predates and contradicts *Gillis*: *United States v. Stahlman*, 934 F.3d 1199 (11th Cir. 2019). In *Stahlman*, a § 2422(b) defendant tried to have an expert testify very differently from the testimony here and in *Gillis*. Stahlman proffered that the expert would testify that he "intended to act out a fantasy, rather than have sexual contact with a minor." *Id.* at 1220. The district court excluded the testimony under Rule 704(b), and we affirmed. *Id.* at 1221-22.

But Stahlman argued that the D.C. Circuit's opinion in *United States v. Hite*, 769 F.3d 1154, 413 U.S. App. D.C. 66 (D.C. Cir. 2014), supported his position. *Stahlman*, 934 F.3d at 1221. In *Hite*, as the *Stahlman* panel noted, the D.C. Circuit allowed an expert in a § 2422(b) case to testify that "the defendant . . . had not been diagnosed with any psychiatric condition that was associated with

a sexual attraction to children." *Id.* Distinguishing *Stahlman*'s facts from those of *Hite*, the panel opined that the testimony in *Hite* was permissible under Rule 704(b) because it did not "directly opine[] on the defendant's intent." *Id.*

But as the difference in outcomes between *Stahlman* and *Hite* shows, to decide the issue in *Stahlman*, the panel did not need to give its opinion on the testimony in *Hite*. That makes its comments on the admissibility of the *Hite* testimony dicta. *See United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) ("[D]icta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us.'") (quoting *United States v. Eggersdorf*, 126 F.3d 1318, 1322 n.4 (11th Cir.1997))). And unlike holdings, dicta does not bind us. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762 (11th Cir. 2010) ("We are not required to follow dicta in our own prior decisions."). So *Stahlman* does not relieve us of our obligation to follow *Gillis*.

Fourth, Herrera argues that the intervening Supreme Court decision in *Diaz v. United States* abrogated *Gillis*'s holding. *See* 602 U.S. 526, 144 S. Ct. 1727, 219 L. Ed. 2d 240 (2024). But we may depart from our precedent because of an intervening Supreme Court decision only if that decision is "clearly on point and clearly contrary to the panel precedent." *Edwards v. United States AG*, 97 F.4th 725, 743 (11th Cir. 2024) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)) (internal quotation marks omitted). That means the Supreme Court case must be "*squarely on point*"

and must "*actually abrogate or directly conflict with, as opposed to merely weaken, the holding* of the prior panel." *Id.* (quoting *Kaley*, 579 F.3d at 1255). *Diaz* doesn't satisfy these requirements.

In *Diaz*, the Supreme Court held that "[a]n expert's conclusion that 'most people' in a group have a particular mental state is not an opinion about 'the defendant' and thus does not violate Rule 704(b)." 602 U.S. at 538. The Court elaborated that Rule 704(b) bars only "opinions . . . 'about' the ultimate issue of the defendant's mental state. . . ." *Id.* at 537. And that's limited to testimony that "includes a conclusion on that precise topic, not merely if it concerns or refers to that topic." *Id.* But the Court did not decide whether an opinion on a § 2422(b) defendant's sexual attraction to minors equates to a "conclusion" on the mental state required to be convicted under the provision. So *Diaz* does not squarely contradict *Gillis*. And we can't depart from *Gillis* because of that decision.

At bottom, we are bound by our precedent in *Gillis*. So we hold the district court did not abuse its discretion when, under Rule 704(b), it excluded Dr. Whitney's testimony that Herrera's "psychosexual assessment showed no indications that [Herrera] has a sexual interest in children." And for that reason—and because Herrera does not challenge the barring of that testimony on any basis other than as an alleged improper application of the Federal Rules of Evidence—the district court did not violate Herrera's constitutional right to present a defense.

IV. CONCLUSION

For these reasons, we affirm Herrera's conviction.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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January 07, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-13706-W
Case Style: USA v. Joshua Herrera
District Court Docket No: 1:20-cr-00079-SDG-RDC-1

Opinion Issued

Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing

The time for filing a petition for panel rehearing or rehearing en banc is governed by 11th Cir. R. 40-2. Please see FRAP 40 and the accompanying circuit rules for information concerning petitions for rehearing. Among

other things, a petition for rehearing must include a Certificate of Interested Persons. See 11th Cir. R. 40-3.

Costs

No costs are taxed.

Bill of Costs

If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, *see* FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees

The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Appendix A

Clerk's Office Phone Numbers

General Information:	404-335-6100
Case Administration:	404-335-6135
CM/ECF Help Desk:	404-335-6125
Attorney Admissions:	404-335-6122
Capital Cases:	404-335-6200
Cases Set for Oral Argument:	404-335-6141

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED MARCH 20, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action No. 1:20-cr-00079-SDG-RDC

UNITED STATES OF AMERICA

v.

JOSHUA HERRERA

Filed March 20, 2023

OPINION AND ORDER

Before the Court are the Government's Supplemental Motion in Limine [ECF 102] and Renewed Motion [ECF 110] to exclude the testimony of Dr. Tyler Whitney related to autism spectrum disorder (ASD) and Defendant Joshua Herrera's ASD diagnosis. After careful review of the parties' arguments and relevant case law, the Court **DENIES IN PART AND GRANTS IN PART** the Government's Motions.

I. Background

The United States charged Joshua Herrera with using a means of interstate commerce to knowingly attempt to

persuade, induce, entice, and coerce a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b).[1] Herrera allegedly responded electronically to an advertisement on the social network Kik, posted by an undercover FBI agent purporting to be a mother looking for someone to teach her eleven-year-old daughter about sex.[2] Herrera communicated with the agent about the "daughter's" age and sexual experience and discussed plans to meet and engage in sexual acts with the "daughter."[3] Upon Herrera's arrival at the designated meet-up location, he was arrested by federal agents and taken into custody.[4]

While preparing for trial, Herrera's counsel learned from his mother that Herrera may suffer from ASD.[5] The Court continued the trial date to allow counsel to explore how Herrera's condition might affect his potential defense.[6] On December 30, 2022, Herrera's counsel sent the Government a report pertaining to a psychological evaluation of Herrera titled "Mental State at the Time of the Alleged Crimes" authored by Whitney, a licensed clinical psychologist.[7] Herrera plans to call Whitney to testify to the following:

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1. ECF 10.
2. ECF 80, at 1.
3. *Id.* at 1–2.
4. *Id.* at 2.
5. ECF 90, at 1.
6. ECF 97.
7. ECF 102, at 1.

- Herrera has ASD, including an explanation of the methodology used to reach this diagnosis.[8]

- Herrera did not receive a formal ASD diagnosis as a child, including the reason for the delayed diagnosis.[9]

- Herrera exhibits certain traits that are common in individuals with ASD.[10]

- Herrera's behavior in this case *could* be consistent with the inability of many autistic persons to imagine how others might view certain behavior.[11]

- Herrera's behavior, though it may appear unusual to non-autistic persons, *could* be consistent with Herrera's statement that he was trying to save the "daughter."[12]

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8. ECF 109, at 1.

9. *Id.* Notwithstanding the discussion below, the Court tends to agree with the Government that Whitney's proffered testimony concerning the reason for Herrera's delayed diagnosis may be inadmissible on hearsay and other grounds. The Court reserves ruling on the admissibility of this specific area of inquiry until trial.

10. *Id.* at 2.

11. *Id.* at 2-3.

12. *Id.* at 3-4.

- Herrera's psychosexual assessment showed no indications that he has a sexual interest in children of either gender.[13]

The Government filed a motion *in limine* to exclude Whitney's testimony on the grounds that it violates the Insanity Defense Reform Act, Fed. R. Evid. 401, 402, 403, and 704(b), and renewed its motion following the pretrial conference in response to Herrera's written proffer of Whitney's testimony.[14]

II. Legal Standard

"A motion *in limine* is 'any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.'" *Benjamin v. Experian Info. Sols., Inc.*, No. 1:20-CV-2466-RWS, 2022 U.S. Dist. LEXIS 97950, 2022 WL 1697876, at *1 (N.D. Ga. Mar. 25, 2022) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)). In fairness to the parties and their ability to put on their case, a court should exclude evidence *in limine* only when it is clearly inadmissible on all potential grounds. *Luce*, 469 U.S. at 41. The movant has the burden of demonstrating that the evidence is inadmissible on any relevant ground. *In re Seroquel Prod. Liab. Litig.*, No. 606MD-1769-ORL-22DAB, 2009 U.S. Dist. LEXIS 134900, 2009 WL 260989, at *1 (M.D. Fla. Feb. 4, 2009). "Unless evidence meets this high standard, evidentiary

13. *Id.* at 4.

14. *See generally*, ECFs 102, 110.

rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id.* Denial of the motion means the court cannot determine whether the evidence in question should be excluded outside the trial context. *Id.* (internal citation omitted). It does not mean that all evidence contemplated by the motion necessarily will be admitted at trial. *Id.* At trial, the court may alter its ruling based on the proceedings or on its sound judicial discretion. *Id.*

III. Discussion

A. Whitney's testimony is admissible for the purpose of providing context for Herrera's actions and communications.

The Government moves to exclude expert testimony regarding Herrera's ASD diagnosis pursuant to FRE 402 and 403 to the extent Herrera plans to rely on it to negate his *mens rea*.[15] The Government argues that this testimony is only appropriately considered as part of an insanity defense, which Herrera is not pursuing, and therefore, it is not helpful to the trier of fact.[16] Moreover, because Herrera has not raised an insanity defense, the Government argues that Whitney's testimony should be excluded as irrelevant since "it is akin to justification or excuse and does not negate the *mens rea* of enticement."[17]

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15. ECF 102, at 2.

16. ECF 110, at 1.

17. ECF 102, at 6.

In response, Herrera makes clear that he does not intend to argue that he was incapable of forming the requisite specific intent. Rather, Whitney's testimony will provide the jury with an "understanding of [] Herrera's neurological deficits,"[18] which is relevant to the jury's determination of whether he formed the requisite intent to entice a child. In other words, Herrera plans to use evidence of his diagnosis to provide necessary context to attack the specific intent element of the charged offense, not to argue that he did not (or could not) have the capacity to form such intent.

Interpreting the body of relevant case law on this issue requires parsing concepts along numbingly nuanced lines. The Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). Of course, that right is not absolute and must sometimes be abridged to ensure fairness and the reliability of evidence. "The right to introduce relevant evidence can be curtailed if there is a good reason for doing that." *Clark v. Arizona*, 548 U.S. 735, 770, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006).

Lawmakers have found good reason for curtailing a defendant's right to offer psychiatric evidence in his defense. Congress enacted the Insanity Defense Reform Act (IDRA) in 1984, making it an affirmative defense to argue that, "at the time of the commission of the acts

18. ECF 104, at 2-3.

constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." Evidence of a defendant's mental disease or defect cannot otherwise provide a defense. *Id.*

The Eleventh Circuit has interpreted the IDRA "to prohibit the presentation of evidence of mental disease or defect, short of insanity, to excuse conduct." *United States v. Westcott*, 83 F.3d 1354, 1358 (11th Cir. 1996). However, it has also held that "psychiatric evidence is still admissible where it negates the *mens rea* of a specific intent crime." *United States v. Bates*, 960 F.3d 1278, 1288 (11th Cir. 2020). Working within these bounds is challenging. Defendants must show how the psychiatric evidence they wish to offer "would negate intent and not merely present a dangerously confusing theory of defense more akin to justification and excuse than a 'legally acceptable theory of lack of *mens rea*.'" *United States v. Cameron*, 907 F.2d 1051, 1067 (11th Cir. 1990) (quoting *United States v. Pohlot*, 827 F.2d 889, 906 (3d Cir. 1987)).

In *Cameron*, the Eleventh Circuit delineated two types of psychiatric evidence: "affirmative defense psychiatric evidence" and "psychiatric evidence to negate specific intent," making clear that the two are distinct. "Affirmative defense" evidence of mental impairment must be raised by the defendant and can justify or excuse conduct that is otherwise criminal. 907 F.2d at 1067. Psychological evidence aimed at negating a defendant's specific state of mind at the time he committed the alleged crime "by contrast, is not an affirmative defense but is

evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime—at least when specific intent is at issue." *Id.* at 1063. The latter, the Eleventh Circuit held, is not *per se* inadmissible.

An additional distinction is required. Where psychiatric evidence is admissible, evidence that a defendant lacks the *capacity* to form *mens rea* is to be distinguished from evidence that the defendant *actually* lacked *mens rea*. Though the two may be logically related, "only the latter is admissible to negate the *mens rea* element of an offense." *Westcott*, 83 F.3d at 1358. This distinction was fundamental to the court's holding in *United States v. Huan Doan Ngo*, No. CR H-17-413, 2020 U.S. Dist. LEXIS 44459, 2020 WL 1234186, at *3 (S.D. Tex. Mar. 13, 2020). The defendant's expert in that case proffered that her training and experience would help the court in "determining the capacity of an individual to form [intentional] criminal responsibility and criminal culpability." *Id.* The expert then proffered that both autistic individuals and the defendant lacked *capacity* to understand the social environment around them or develop adequate social problem-solving skills. *Id.* The court excluded the expert's testimony because it could "only [serve to] confuse the jury as to whether [the defendant] could ever form the intent required, not elucidate whether he had formed the *mens rea* during the period in the indictment." *Id.*

Expert testimony related to psychiatric evidence was also excluded in *United States v. Litzky*, 18 F.4th 1296,

1303 (11th Cir. 2021). There, the defendant was charged with various specific-intent child-pornography offenses. The defendant attempted to offer expert psychological testimony that her intellectual disability coupled with her history of victimization placed her in a position of extreme vulnerability. The Eleventh Circuit affirmed the trial court's order excluding this evidence because the defendant "failed to demonstrate how her psychiatric evidence would negate intent and not merely present a dangerously confusing theory of defense more akin to justification and excuse." *Id.* Because the evidence did not focus on the defendant's specific state of mind at the time of the charged offenses, it thus "fail[ed] to show how defendant was unable to form the required *mens rea.*" *Id.* The issue was not whether the defendant, as a general matter, had mental health issues or was vulnerable o manipulation, but whether she "knew what she was doing when she produced the pornographic images of her children." *Id.* at 1305. The proffered expert testimony regarding her psychiatric health ultimately did not bear on this question and thus, was irrelevant and inadmissible.

The proffered expert testimony in this case is different from the testimony in both *Ngo* and *Litzky*. Unlike the expert in *Ngo*, Whitney will not opine on Herrera's general capacity to *ever* develop the requisite intent. Whitney also will not testify to the general ability of an individual with ASD to *ever* develop the capacity to commit the charged offense. And, unlike in *Litzky*, the proffered testimony in this case is relevant to Herrera's formation of the necessary specific intent at the time of the charged conduct, not a general opinion about Herrera's mental health untethered to any element of the offense.

The Court concludes that allowing this evidence for the limited purpose of evaluating Herrera's *mens rea* to commit the charged offense does not impermissibly side-step the IDRA. While the line is fine, Whitney's testimony falls on the admissible side because it leaves the ultimate question of Herrera's actual intent within the purview of the jury. Whitney may contextualize Herrera's behaviors and provide insight into his mental state. But the jury will determine whether, in light of all the evidence, the government proved beyond a reasonable doubt that Herrera developed the specific intent required for conviction. Whitney's proffered testimony falls within the latter of the two categories described in *Cameron*: "psychiatric evidence to negate specific intent." The Government's motion to exclude this evidence in advance of trial is denied.[19]

B. Whitney's proffered testimony that Herrera's psychosexual assessment showed no indications that he has a sexual interest in children is excluded.

Herrera also plans to have Whitney testify to his finding that Herrera's psychosexual assessment showed no indications that he has a sexual interest in children. The Court concludes that under Eleventh Circuit precedent, this opinion qualifies as inadmissible ultimate opinion testimony under Fed. R. Evid. 704(b). Additionally, even if this testimony were admissible under Rule 704(b), its

19. The Court invites the Government to propose a limiting jury instruction concerning Whitney's testimony, to be delivered at the time of the testimony or as part of the final charge, or both.

probative value is substantially outweighed by the danger of unfair prejudice and is excluded under Fed. R. Evid. 403.

Rule 704(b) prohibits experts in criminal cases from offering opinions about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged. "An expert may, consistent with Rule 704(b), give testimony 'that supports an obvious inference with respect to the defendant's state of mind if that testimony does not actually state an opinion on [the] ultimate issue, and instead leaves this inference for the jury to draw.'" *United States v. Stahlman*, 934 F.3d 1199, 1220 (11th Cir. 2019) (quoting *United States v. Augustin*, 661 F.3d 1105, 1123 (11th Cir. 2011)).

The Eleventh Circuit opinion in *United States v. Gillis* is on point with the issue presented. There, like here, the defendant was charged with attempting to knowingly induce or entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). 938 F.3d 1181, 1195 (11th Cir. 2019). The district court excluded the expert's proffered opinion that the defendant was not sexually attracted to prepubescent girls. According to the district court, this opinion was nothing more than a "thinly veiled attempt" by the defense to offer an expert's opinion on the ultimate issue of intent. The Eleventh Circuit found no clear error in the district court's ruling, finding that allowing such testimony would have prevented the jury from drawing its own inference and "veered into the impermissible territory of offering an opinion on [the defendant's] mental state." *Id.*

While there is arguably conflicting case law,[20] the Court follows *Gillis* here. Herrera makes a strong argument that testimony regarding his lack of interest in children is not directly opining on his intent for the crime with which he is charged and, therefore, the jurors can still draw their own inference. Again, the line here is thin. But faced with this factually (nearly) identical precedent, the Court follows *Gillis* and excludes Whitney's testimony regarding Herrera's psychosexual analysis on the grounds that it offers an opinion on an ultimate issue.

The Government is on stronger ground with its Rule 403 argument. The fact that Herrera's assessment showed no indication of sexual attraction to children has very little probative value to the questions the jury must resolve. It provides no context for Herrera's specific intent in this case—his general inclinations and proclivities (or lack thereof) will not help a jury make a determination as to whether he had the requisite intent *here*. The potential prejudicial impact, on the other hand, is substantial and undue; it could confuse the issues and mislead the jury

20. In *United States v. Hite*, 769 F.3d 1154, 1169, 413 U.S. App. D.C. 66 (D.C. Cir. 2014), the D.C. Circuit held that the issue of sexual attraction to children is generally relevant to the element of intent in enticement cases. In *United States v. Stahlman*, 934 F.3d 1199, 1220 (11th Cir. 2019), the same year it issued the *Gillis* opinion, the Eleventh Circuit credited the reasoning in *Hite*, noting that expert testimony that a defendant had not been diagnosed with any psychiatric condition associated with sexual attraction to children *did not* amount to an opinion on the defendant's intent nor violate 704(b). Under the facts presented here, Undersigned is unable to meaningfully square the dicta in *Stahlman* with the holding in *Gillis*.

by causing it to conflate Herrera's general propensity to commit sexual crimes against children with his specific intent to commit the crime with which he is charged in this case. Accordingly, in addition to excluding Whitney's opinion regarding Herrera's psychosexual assessment under Rule 704(b), it is also excluded under Rule 403, as the potential prejudicial effect substantially outweighs any probative value. In fact, the Court concludes that Rules 403 alone is a sufficient and independent basis to exclude Whitney's proffered testimony in this regard.

IV. CONCLUSION

The Government's Supplemental and Renewed Motions in Limine to exclude Dr. Whitney's expert testimony [ECFs 102, 110] are **DENIED IN PART AND GRANTED IN PART**.

SO ORDERED this 20th day of March, 2023.

/s/ Steven D. Grimberg
Steven D. Grimberg
United States District Court Judge