”This New-Born Babe an Infant Hercules”: The Doctrine of “Inextricably Intertwined” Evidence in Florida’s Drug Wars

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I. INTRODUCTION

The locution "inextricably intertwined," an alliterative coupling of adverb and adjective purporting to justify the introduction at a criminal trial of evidence of crimes for which the defendant is uncharged, appears nowhere in Magna Carta. It is unmentioned in connection with the reforms of Edward I, or those following the restoration of the Stuarts, or those associated with the enthronement of William and Mary. Baron Gilbert, in his seminal work on evidence in 1726, has nothing to say about it. It is not to be found in the evidentiary treatises of Starkie, Phillips, or Thayer. The Federal Rules of Evidence make no express reference to it. It is a fair summary of the history of the law of evidence to say that, until about the year 1980, no one thought that evidence of uncharged crimes could be rendered admissible by the simple expedient of describing it as "inextricably intertwined" with evidence of the crime or crimes actually pleaded in the indictment.

The past two decades have seen a jurisprudential revolution. During that time, state and federal appellate courts having jurisdiction over criminal litigation in Florida have authored some two hundred opinions considering

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the doctrine of "inextricably intertwined" evidence. Most of those federal opinions are in drug cases, and in those cases, the demised evidence is almost always found to be admissible because "inextricably intertwined." It is a fair summary of the history of the law of evidence to say that, since about the year 1980, evidence of uncharged crimes can be rendered admissible by the simple expedient of describing it as "inextricably intertwined" with evidence of the crime or crimes actually pleaded in the indictment.

It is difficult to view this doctrinal volte face as anything but result-oriented jurisprudence. This powerful neoteric rule of "inextricably intertwined" evidence—"This new-born babe an infant Hercules"—supports the admission of highly prejudicial and otherwise inadmissible other-crimes evidence. It enables the prosecution to circumvent the procedural obstacles set up by Rule 404(b) governing the admissibility of

1. As discussed infra Part IV, the term "inextricably intertwined" was spawned and continues to be nurtured in Eleventh (former Fifth) Circuit narcotics cases. The doctrine is an occasional visitor to other jurisdictions, where it may be cited in non-drug cases as well as drug cases. See, e.g., United States v. Carboni, 204 F.3d 39 (2d Cir. 2000) (business crimes); United States v. Shkolir, 182 F.3d 902 (2d Cir. 1999) (securities, mail, and wire fraud); United States v. Gonzalez, 110 F.3d 936 (2d Cir. 1997) (possession of firearm by convicted felon); United States v. King, 126 F.3d 987 (7th Cir. 1997) (tax crime); United States v. Mundi, 892 F.2d 817 (9th Cir. 1989) (fraud and related crimes); United States v. Rodriguez-Estrada, 877 F.2d 153 (1st Cir. 1989) (business crimes). The focus of this article, however, is on the state and federal courts having jurisdiction over Florida, in support of the thesis that the expansion by the Eleventh Circuit of the "inextricably intertwined" doctrine is best understood as a judicial contribution to the "war on drugs."

2. EDMOND ROSTAND, CYRANO DE BERGERAC 105 (Hooker transl., Bantam Books) ("Ce nouveau-ne, Madame, est un petit Hercule").

3. Rule 404(b) of the Federal Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

Section 90.404 of the Florida Statutes, the state law congener to Rule 404(b), provides in pertinent part:

OTHER CRIMES, WRONGS, OR ACTS—

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

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prior similar fact evidence. It prompts conviction for crimes of which an accused may be charged and innocent, on the basis of evidence of crimes of which the accused is uncharged but may be guilty. It facilitates prosecution of the "war on drugs" by depriving the defendant of one of the ancient and honorable premises of the Anglo-American system of justice: that the jury sits in judgment on the act a man is alleged to have done, not on the life a man is alleged to have led.4

II. THE COMMON LAW RES GESTAE RULE

Common law courts viewed uncharged crimes evidence as irrelevant and the introduction of such evidence as unfair, the defendant having been afforded no notice by the indictment or otherwise that such evidence would be offered.5

The [common law] rule which requires that all evidence which is introduced shall be relevant to the guilt or the innocence of the accused is applied with considerable strictness in criminal proceedings. . . . [The defendant] can with fairness be expected to come into court prepared to meet the accusations contained in the indictment only, and, on this account, all the evidence offered by

mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on limited purpose for which the evidence is received and is to be considered. After the close of evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Fla. Stat. § 90.404 (2000); see discussion infra notes 27–28, 55, and 255.

4. "[A] defendant starts his life afresh when he stands before a jury, a prisoner at the bar." People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930).

the prosecution should consist wholly of facts which are within the range and scope of its allegations. 6

Apart from the inherent unfairness of obliging an accused to defend against charges of which he has had no notice, the introduction of uncharged crimes evidence was viewed at common law as resulting in damning prejudice. Jurors:

[W]ill very naturally believe that a person is guilty of the crime with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character. And, it cannot be said with truth that this tendency is wholly without reason or justification . . . . 7

To the general rule, “applied with considerable strictness,” that no evidence could be offered of uncharged crimes, the common law made certain exceptions. One such exception was a manifestation of the res gestae rule, that many-headed hydra. When the uncharged crimes evidence was part of the res gestae—when “several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and a complete account of any one of them can not be given without showing the others . . . .” 8—then the uncharged crimes evidence was admissible. No single trope or form of words (other than the unhelpful res gestae) was used to state the test for admissibility. The general idea, however, was, as stated by Underhill: the demised other-crimes evidence must be “indivisible” from the evidence of the charged crimes, such that the tale of the charged offenses could not be told without relating the evidence of the uncharged offenses. 9 Courts allowed evidence of an uncharged crime only if it was “part and parcel of the same transaction” as the charged crime,

6. Id.; see also 1 CROOM-JOHNSON & BRIDGMAN, TAYLOR ON EVIDENCE § 326, at 228 (1931):
This rule . . . is founded on common sense and common justice . . . for, as one of the chief objects of an indictment is to afford distinct information to the prisoner of the specific charge which is about to be brought against him, the admission of any evidence of facts unconnected with that charge, would be clearly open to the serious objection of taking the prisoner by surprise. No man should be bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to submit to such an ordeal.

7. UNDERHILL, supra note 5, § 87, at 107.
8. Id. § 88, at 108–09 (emphasis added).
9. Id.
or "so directly and immediately connected with the crime for which the defendant was on trial"\(^{10}\) that it was "impossible to give a complete or intelligent account of the crime charged without referring to the other crime."\(^{11}\)

When a collateral offense, or, as it is sometimes called, an extraneous crime, forms part of the res gestae, evidence of it is not excluded by the fact that it is extraneous. As an isolated or disconnected fact, it is not relevant . . . but when offered under the exceptions to the rule, it becomes of substance with the charge on trial.\(^{12}\)

"Evidence may be given, not only of the act charged itself, but of other acts so closely connected therewith, as to form part of one chain of facts which could not be excluded without rendering the evidence unintelligible—part in fact of the res gestae."\(^{13}\) Lord Ellenborough stated the rule as follows: "If several and distinct offences [sic] blend themselves with one another, the detail of the party's whole conduct must be pursued."\(^{14}\) Wigmore limited such evidence to "other criminal acts which are an inseparable part of the whole deed."\(^{15}\) He explained:

Suppose that A is charged with stealing the tools of X; the evidence shows that a box of carpenter's tools was taken, and that in it were the tools of Y and Z as well as of X; here we are incidentally proving the commission of two additional crimes, because they are necessarily interwoven with the stealing charged, and together form one deed. The other two crimes are not offered as affecting A's character, nor do they affect his character; because all were done, if at all, as parts of a whole, and if we believe or disbelieve his doing of one part, we believe or disbelieve his doing of all. The two other crimes do not affect his character in the way forbidden by the reasons of the character-rule . . . i.e. by way of undue prejudice, in that we might condemn him now, though innocent of the act charged, because we are prejudiced by his former crimes; nor by

\(^{10}\) Killins v. State, 9 So. 711, 715 (Fla. 1891).
\(^{11}\) Nickels v. State, 106 So. 479, 489 (Fla. 1925).
\(^{12}\) 1 Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 33, at 121 (Hilton, 10th ed. 1912) (footnotes omitted) (collecting cases); see also State v. Wilson, 233 P. 259, 261 (Or. 1925).
\(^{13}\) Hawke, Roscoe's Criminal Evidence 101 (1928).
\(^{14}\) The King v. Ellis, 6 Barnwell & Cresswell 145, 147 (K.B. 1826).
\(^{15}\) 1 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 218, at 271 (1904) (emphasis omitted).
way of unfair surprise, in that he cannot be prepared to defend himself against evidence of former misconduct of which he had no notice. While thus, on the one hand, these concomitant crimes are not obnoxious to the reasons of the character rule, so also they are necessarily gone into in proving the entire deed of which the act charged forms a part. There is therefore not only a necessity for proving them, but no objection against proving them.16

Killins v. State17 and Oliver v. State18 are substantially similar to one another. In each case, the defendant shot one person to death, and at the same time shot at or menaced a bystander, who later testified against him.19 Applying the common law res gestae rule, the Oliver court explained that "[t]he shooting was done in rapid succession, and, according to the son's version of the affair, the altercation preceding it had commenced between him and the accused. It was thus all one and the same transaction, and the testimony was competent."20 The defendant in Nickels v. State21 was charged with rape.22 The testimony of the victim necessarily made incidental reference to conduct by the defendant that might have given rise to charges of robbery or burglary:

When attacked, the victim resisted her assailant with the utmost vigor and determination and a violent struggle between them occurred in the bathroom of the victim's home, in which room the actual attack was precipitated and consummated. The testimony indicates that the victim was wearing, among other things, two rings. During the course of the struggle, the assailant forcibly removed one of these rings, but was unable to remove the other, a wedding ring. The struggle continued unabated until unconsciousness on the part of the victim intervened as her assailant was about to consummate his carnal attack upon her. Immediately after the accomplishment of the latter purpose and while the victim lay upon the bathroom floor, her hands bound by a towel, her assailant visited other parts of the house where he procured several other articles of jewelry and personal paraphernalia. After thus occupying himself for about ten minutes,

16. Id.
17. 9 So. 711 (Fla. 1891).
18. 20 So. 803 (Fla. 1896).
19. In Killins, the witness was the decedent's mother; in Oliver, the decedent's son.
20. Oliver, 20 So. at 804.
21. 106 So. 479 (Fla. 1925).
22. Id. at 481.
he returned to the bathroom where the victim still lay, and after speaking briefly with her there, fled the scene.\textsuperscript{23}

The court quite properly concluded that testimony regarding the taking by the defendant of the wedding ring, as well as “other articles of jewelry and personal paraphernalia,” was within the scope of the \textit{res gestae} rule and therefore admissible.

Thus the common law drew a firm line between other-crimes evidence that was truly inextricable from evidence of crimes charged, and evidence that was merely adminicular.\textsuperscript{24} Evidence of uncharged misconduct was admissible only when it could not be elided from the narrative of the charged misconduct without leaving that narrative confusing, incomplete, or incomprehensible. Evidence of uncharged misconduct was not admissible, however, simply because it provided the prosecution with narrative depth or better story telling. To fall within the \textit{res gestae} rule, the demised evidence must be truly essential to the presentation of the evidence in chief. If the evidence in chief were comprehensible and told a complete tale without the other-crimes evidence, then the other-crimes evidence would be inadmissible, even if it rounded out the prosecution’s case.

This common law \textit{res gestae} rule was narrow in its scope and infrequent in its application.\textsuperscript{25} An unremarkable caterpillar, it languished for centuries. But when in 1979 it burst from its chrysalis, what emerged was not a butterfly but a bird of prey named “inextricably intertwined.”

\section*{III. Similar Crime Evidence}

Of course the \textit{res gestae} rule was not the only provision made by the common law for the admission of evidence of uncharged crimes. Long before the adoption of Rule 404(b)—indeed long before the codification of rules of evidence—the common law of Florida, as elsewhere, recognized that evidence of uncharged crimes might be admitted for the purposes set out in Rule 404(b) and section 90.404 of the \textit{Florida Statutes}: to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .”\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} I have borrowed this term from the jurisprudence of the ecclesiastical courts, because I can find no term in our common law jurisprudence that fits my meaning so precisely. Adminicular evidence bolsters and corroborates the principal evidence. It is intertwined, but not inextricably so. It confirms, fortifies, and vivifies the principal evidence; but the principal evidence is capable of being presented without it.
  \item \textsuperscript{25} See \textit{Underhill}, supra note 5, § 87; see also \textit{Wigmore}, supra note 15, § 218 n.1.
  \item \textsuperscript{26} \textit{Fed. R. Evid. 404(b)}; \textit{Fla. Stat.} § 90.404(2)(a) (2000); see, e.g., \textit{Nickels v. State}, 106 So. 479, 489 (Fla. 1925) (admitting other-crimes evidence “to establish the identity
Codification brought important limitations on the power and utility of such similar crime evidence. The prosecution became bound to provide timely notice of its intent to offer such evidence at trial.\(^\text{27}\) The defense could demand a limiting instruction at the time the evidence was admitted, and again as part of the court's charge to the jury.\(^\text{28}\) Courts became obliged to engage in a balancing test under Rules 404 and 403,\(^\text{29}\) weighing probative value against unfair prejudice, before admitting such evidence.\(^\text{30}\) At a time when prosecutorial legions were clamoring for a doomsday machine with of the person committing the crime laid in the indictment"); Ryan v. State, 92 So. 571, 573 (Fla. 1922) (admitting other-crimes evidence "as tending to show the defendant's state of mind shortly after he had [committed the charged crime], and the intent with which the act was done. It was admitted as tending to show a criminal intent in [committing the charged crime], malice and premeditation."); West v. State, 28 So. 430, 432 (Fla. 1900) (allowing evidence of other crimes to show "purpose"); Roberson v. State, 24 So. 474, 475–76 (Fla. 1898) (permitting evidence of spoliation to show guilty knowledge); Oliver v. State, 20 So. 803, 805 (Fla. 1896) (admitting evidence of uncharged crimes to "show the animus of the defendant"); Killins v. State, 9 So. 711, 715 (Fla. 1891) (holding uncharged crimes evidence admissible to "show the vicious intent, the animus, by which the defendant was actuated . . . "); see generally Williams v. State, 110 So. 2d 654 (Fla. 1959).

27. Section 90.404(2)(b) of the Florida Statutes requires the prosecution "no fewer than 10 days before trial . . . [to] furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information." \textit{FLA. STAT.} § 90.404(2)(b)1 (2000). Rule 404(b) of the \textit{Federal Rules of Evidence} was amended in 1991 to require "reasonable notice in advance of trial . . . of the general nature of any such evidence [the prosecution] intends to introduce at trial." \textit{FED. R. EVID.} 404(b). Previously, some federal district courts had enforced a notice requirement by custom, court order, or local rule. \textit{See, e.g.}, S.D. Fla. Local R. 88.10 (obliging the prosecution to "advise the defendant of its intention to introduce during its case in chief proof of evidence pursuant to Rule 404(b)," which advice is to be given "not later than fourteen (14) days after the arraignment").

28. Section 90.404(2)(b)2 of the Florida Statutes provides:

When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

\textit{FLA. STAT.} § 90.404(2)(b)2 (2000).

29. Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." \textit{FED. R. EVID.} 403.

30. \textit{See, e.g.}, United States v. Beechum, 582 F.2d 898 (5th Cir. 1979). \textit{Beechum}, for many years the cynosure of Rule 404(b) analysis in the Fifth and later the Eleventh Circuit, was decided the same year the Fifth Circuit decided \textit{Aleman}. \textit{See United States v. Aleman}, 592 F.2d 881 (5th Cir. 1979).
which to wage the war on drugs, one of their principal existing weapons, evidence of prior similar crimes, was being stripped of much of its firepower. Then, in 1979, the Fifth Circuit authored its opinion in *United States v. Aleman*.

On January 13, 1978, DEA Agent Castro arrested two individuals named Vela and Ramirez for the sale of heroin. Eleven days later, DEA Agent Reina, acting in an undercover capacity, met with Aleman to negotiate a purchase of cocaine. In the course of that meeting, Aleman made reference to the arrests of Vela and Ramirez, and indicated that he had attempted to help Vela and Ramirez sell heroin. At the conclusion of the meeting, Aleman handed Reina a sample of cocaine.

Aleman, Vela, and others were charged in a multi-count indictment with crimes relating to the distribution of heroin. There were no charges involving cocaine. At trial, however, Agent Reina testified to his conversation with Aleman about cocaine, and made reference to the cocaine sample Aleman had provided to him. On appeal, Aleman assigned the admission of this evidence as error, in that it was evidence of an uncharged crime not properly within the scope and purpose of Rule 404(b). The court of appeals, however, held that a Rule 404(b) analysis was inapplicable to other-crimes evidence where, as here, the other-crimes evidence and the evidence used to prove the crime charged are inextricably intertwined.

If by use of the trope "inextricably intertwined" the court meant to invoke the common law *res gestae* rule, its statement of the law was no doubt correct. Other-crimes evidence that is truly inextricable from, and not merely adminicular to, the principal evidence is indeed admissible without regard to the limitations of Rule 404(b). By way of illustrating this principle, the *Aleman* court posited the case of a "person [who] breaks into a house, murders the occupants, and steals a television set." Undoubtedly, evidence of the unlawful taking of the TV set would be admitted at a trial in which only the homicides were charged, just as evidence of the unlawful taking of jewelry and other personal effects was admitted at the trial in

31. 592 F.2d 881 (5th Cir. 1979).
32. Id. at 883.
33. Id.
34. Id.
35. Id.
36. *Aleman*, 592 F.2d at 883.
37. Id.
38. Id. at 884.
39. Id.
40. Id. at 885.
41. *Aleman*, 592 F.2d at 885.
Nickels in which only the rape was charged. The explanation given by the Aleman court for its ruling seems to fall within the rationale of the common law res gestae rule:

Reina's testimony would have been incomplete and confusing had he not been able to explain how, eleven days after Ramirez and Vela had been arrested for heroin dealing, he and Aleman came to discuss Aleman's participation with Ramirez and Vela in the distribution scheme. It would have detracted from the search for truth to require that Reina attempt to testify without mentioning the purpose of the meeting and what occurred in it.

There were, however, troubling suggestions that the Aleman court was departing from, or not even relying upon, the common law res gestae rule. By way of case authority, Aleman cites not to the pre-codification cases construing the res gestae rule, but to a single case from the Eighth Circuit: United States v. Calvert.

The defendant in Calvert was charged with insurance fraud. At trial, witnesses testified to other crimes or bad acts engaged in by Calvert, which misconduct related in various ways and degrees to the crimes charged. The Eighth Circuit held that this evidence was properly admitted under a variety of rationales, none of which seem to adumbrate the Aleman court's "inextricably intertwined" holding. The Calvert court began by discussing the principles of the then newly enacted Rule 404(b). The closest that the Calvert court gets to the notion of "inextricably intertwined" is in its

42. Nickels v. State, 106 So. 479, 494 (Fla. 1925).
43. Aleman, 592 F.2d at 885.
44. Id. Whether the Aleman court applied the common law res gestae rule appropriately or not is a question about which reasonable minds may differ. Presumably the trial testimony of Agent Reina took something like the following form: I was conducting an undercover investigation in cocaine trafficking; in that capacity I met with Aleman; in the course of our meeting he made reference to the heroin trafficking operation of Ramirez and Vela, whom I knew had been arrested eleven days previously; Aleman made certain statements acknowledging his complicity in that heroin trafficking operation; when we parted company, Aleman gave me a sample of cocaine to encourage me to purchase cocaine from him.

A strict application of the res gestae rule would have obliged Reina elide to the first and last facts, viz., that he was conducting an investigation into cocaine trafficking, and that Aleman gave him a sample of cocaine. Query whether such a redaction would have rendered Reina's testimony incomplete, confusing, or misleading.

45. 523 F.2d 895 (8th Cir. 1975).
46. Id. at 899–900.
47. Id. at 905–06.
48. Id. at 906–07.
characterization of some of the other-crimes evidence as constituting "integral parts of the very crime for which [Calvert] was convicted." But in the same breath the court, analogizing this misconduct to "the 'casing' of several banks before robbing the most suitable target," held the evidence "properly admitted as evidence of preparation and planning." 

Calvert seems an odd choice as a foundation for the Aleman court's "inextricably intertwined" doctrine. Perhaps by way of acknowledging the problem, Aleman conducts a lengthy Rule 404(b) analysis, purporting to justify the admission of the other-crimes evidence on that basis as well as on the "inextricably intertwined" theory. This "either/or" jurisprudence serves no good purpose. Their first-blush similarity notwithstanding, Rule 404(b) evidence and "inextricably intertwined" evidence in the true res gestae sense are very different things. Evidence under Rule 404(b) is admitted only for certain limited purposes, and the jury must be so instructed; failure to instruct violates the prohibition against adducing evidence simply to damn the defendant's character. But other-crimes evidence that is truly inextricable from evidence of the charged crimes is admitted without limitation or instruction. It may be received, irrespective of any bearing on character, and yet not as evidential of design, motive, or the like. Evidence offered under Rule 404(b) is subject to the "probative versus prejudicial" balancing test of Rule 403. But other-crimes evidence that is truly inextricable cannot, as a matter of tautology, be excluded no matter how unfairly prejudicial it may be. "[O]ften... the 'inextricably intertwined' evidence... is extremely, if not ultimately, prejudicial as to the jury's understanding of the defendant's guilt. This does not affect the propriety of admitting such evidence." If evidence is genuinely inextricable from the evidence in chief, "the trial judge need not formally weigh its probity [sic; probative value] against its potential prejudice," because exclusion of such evidence would, by hypothesis, leave the evidence of the charged offenses so exiguous and incomprehensible that it would be impossible to go forward with the trial. It is these distinctions that render the

49. Calvert, 523 F.2d at 907.
50. Id. (citing Rule 404(b)). Further muddying the analysis, the court then dropped a footnote stating that, in any event, the defendant had failed to object to this particular other-crimes evidence at trial and therefore waived the issue of admissibility. See id. at 907 n.12.
51. See Aleman, 592 F.2d at 885-86.
52. Wigmore, supra note 15, § 218; see also United States v. Leichtman, 742 F.2d 598, 605 (11th Cir. 1984) (because evidence was "inextricably intertwined" rather than 404(b), "the trial judge did not err in refusing defendants' requested instructions limiting the... evidence to proof of motive").
53. United States v. Foster, 889 F.2d 1049, 1054 (11th Cir. 1989).
54. Id. at 1054 n.5.

Published by NSUWorks, 2000
"inextricably intertwined" doctrine the powerful prosecutorial weapon it has become.\(^55\)

The *Aleman* and *Calvert* opinions seem to give little, if any, consideration to these defining distinctions, treating two very different evidentiary doctrines as if they were variations on a single theme. This sin has been propagated by other courts seizing upon *Aleman*’s holding.\(^56\)

The inapplicability of 404(b)-based jurisprudence to "inextricably intertwined" evidence is apparent in a case involving evidence which is genuinely inextricable. Consider, for example, a stripped-down version of *Nickles*: A woman is assaulted on the street by a man who seeks to pull a diamond ring off her finger. They struggle violently, and the assailant succeeds in ripping the ring from the finger of his victim. He is apprehended some minutes later, but the ring is not in his possession and it is not recovered. He is charged with a single count of aggravated battery.\(^57\) At trial, the victim testifies, describing the injury done to her finger when the ring was torn off. Defense counsel need not bother objecting that this testimony constitutes evidence of the uncharged crime of strong-arm robbery.\(^58\) It does indeed, but the testimonial evidence of the strong-arm

\(^55\) Another conceptual distinction between 404(b)-type evidence and *res gestae* "inextricably intertwined" evidence that sometimes seems to give courts difficulty has to do with relevance. Rule 404(b) and section 90.404 of the *Florida Statutes* are rules of conditional or limited relevance. *See* FED. R. EVID. 404; FLA. STAT. § 90.404 (2000). Evidence admitted under these rules is typically deemed relevant for some purposes, but irrelevant for others. By contrast, where "inextricably intertwined" evidence is concerned, relevance is irrelevant. Thus if *probens* A is relevant to the proof of *probandum* X, and if X is material to the issue, A is, as a general rule, admissible; if A cannot be said without also saying B, B becomes admissible as "inextricably intertwined." And this is so whether or not B is relevant (i.e., probative of X, or of anything else material to the issue). It would be pointless even to consider the relevance or not of B.

\(^56\) *See*, e.g., United States v. McLean, 138 F.3d 1398, 1404 (11th Cir. 1998) (suggesting in dicta that any error resulting from introduction of putatively "inextricably intertwined" evidence could be remedied by a jury instruction, because "the use of . . . evidence by the jury under a Rule 404(b) theory or an 'inextricably intertwined' theory is not materially different"); United States v. Utter, 97 F.3d 509, 514 (11th Cir. 1996) (applying probative value versus unfair prejudice test to "inextricably intertwined" evidence); United States v. Fortenberry, 971 F.2d 717, 721 (11th Cir. 1992); United States v. Foster, 889 F.2d 1049, 1054 n.5 (11th 1989); United States v. Martin, 794 F.2d 1531, 1533 n.4 (11th Cir. 1986) (other-crimes evidence admitted but jury instructed that "defendants are not on trial for any act or conduct or offense not charged in the indictment"); United States v. Richardson, 764 F.2d 1514, 1522 (11th Cir. 1985) (applying probative value versus unfair prejudice test); United States v. McDowell, 705 F.2d 426, 429 (11th Cir. 1983); *see also* Consalvo v. State, 697 So. 2d 805, 813–14 (Fla. 1996) (other-crimes evidence properly admitted as "inextricably intertwined," but held error for prosecutor to argue the evidence in closing).

\(^57\) *See*, e.g., FLA. STAT. § 784.045 (2000).

\(^58\) *See* § 812.13.
robbery is genuinely inextricable (in the common law *res gestae* sense) from the evidence of the crime charged. The defense is not entitled to pretrial notice, under section 90.404 of the *Florida Statutes*, of the prosecution's intent to elicit this testimony.\(^{59}\) The defense is as much on notice of the other-crimes evidence as it is of the evidence in chief. It can scarcely be otherwise because the two classes of evidence are, by hypothesis, inextricable. The defense is not entitled to have the jurors instructed that they may receive the other-crimes evidence only for this or that limited purpose. The evidence is properly considered by the jurors without limitation or instruction in their deliberations as to the charge of aggravated battery. The defense is not entitled to a judicial determination whether the probative value of the evidence outweighs its unfair prejudice. Even if the court were to conclude that unfair prejudice outweighed probative value, there would be nothing the judge could do about it. Bowdlerizing the evidence to eliminate or reduce the prejudice would leave the remaining admissible evidence incomprehensible and therefore utterly lacking in probative value.

Conflating the jurisprudence of the common law *res gestae* rule with that of 404(b)-type evidence has no doubt been one factor contributing to the metamorphosis of the meek, mild-mannered *res gestae* rule into the plenipotent “inextricably intertwined” rule. The result is a jurisprudential mare’s nest. Did the prosecutor, whether through overwork and inadvertence or in bad faith, fail to give pretrial notice of his other-crimes evidence? Let him, even in midtrial, take refuge in the argument of last resort: the other-crimes evidence is “inextricably intertwined” with the evidence in chief.\(^{60}\) Is the judge uncertain whether to admit the preferred evidence as “inextricably intertwined?” Let him compound one error with another, admitting the evidence but instructing the jurors in typically translucent legal argot that they are to consider the evidence only for certain limited purposes. The burdens of Rule 404(b) are dispensed with, the blessings, for the erring prosecutor and the wavering judge, remain.

It is unpleasant to attribute the expansion of the “inextricably intertwined” doctrine to a judicial inability to distinguish between the proper understanding of that doctrine and Rule 404(b); or to a judicial eagerness to enable the prosecution to avoid the procedural limitations with which Rule 404(b) is burdened. It is tempting to attribute the expansion of the “inextricably intertwined” rule to another cause entirely: the common law

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59. § 90.404.

60. “[A]t the charge conference...the district court asked whether a 404(b) instruction was necessary. For the first time, the prosecutor put forward the position that the [other-crimes] evidence was admissible because it was ‘inextricably intertwined’ with the charges in the indictment.” *McLean*, 138 F.3d at 1403 (emphasis added). The evidence was admitted, and the ensuing conviction affirmed on appeal. *Id*.
res gestae rule was easy of application as long as courts were concerned only with common law crimes. A murder, rape, or robbery typically is perpetrated in a brief period of time and by a small number of persons. Determining whether evidence of a crime or crimes not charged is truly inextricable and not merely adminicular is a relatively straightforward matter. By contrast, the drug trafficking cases that have come before the federal courts in Florida and elsewhere in the past couple of decades involve crimes such as conspiracy that may persist over the course of months or even years and may involve dozens of coconspirators, named and unnamed. In such cases—so runs the argument—it is a more difficult and complicated matter to determine whether other-crimes evidence is “inextricably intertwined,” and uncertainty should be resolved in favor of a judicial determination of admissibility.

Tempting or not, this argument must be rejected. If a federal indictment is so capacious in its scope that the court is hampered in its ability to make the kinds of evidentiary determinations the law obliges the court to make, then the law provides the remedy. Counts may be severed.61 Defendants may be severed.62 But it is no remedy to deracinate the jurisprudence of the common law res gestae rule. Regrettably, however, that is just what courts proceeded to do.

IV. “INEXTRICABLY INTERTWINED” METASTASIZES

The jurisprudence of the “inextricably intertwined” doctrine developed rapidly after the partition of the Eleventh Circuit from the Fifth Circuit.63 The defendant in United States v. Costa,64 for example, was charged with possession of cocaine with intent to distribute and conspiracy to possess cocaine with intent to distribute.65 The case against him consisted principally of the testimony of “flipped” codefendants Cole and Campbell.66

Cole sold an ounce of cocaine, obtained from Campbell, to an undercover agent of the Drug Enforcement Agency . . . . The agent pressed Cole about obtaining a kilogram of cocaine, and Cole asked Campbell whether it could be procured. After unsuccessfully attempting to acquire the kilogram from another

62. See id.
63. The Eleventh Circuit, in the en banc decision of Bonner, adopted as precedent the decisions of the Fifth Circuit decided prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).
64. 691 F.2d 1358 (11th Cir. 1982).
65. Id. at 1360.
66. Id.
source, Campbell reached Costa... and learned Costa had a kilogram he wished to sell. After a series of negotiations, first a sample and then the entire kilogram were delivered by Campbell to Cole [and then] to the agent. Upon Cole's arrest she named Campbell as her source, and he was then arrested.

Campbell cooperated with the DEA, naming Costa as his source.67

At trial, Cole and Campbell testified to the foregoing events.68 In addition, however, Campbell was permitted "to testify concerning his prior relationship with Costa, even though his testimony showed Costa previously had dealt in cocaine."69 Campbell testified as to the circumstances in which he came to know Costa as a dealer in cocaine to show why he could expect Costa to provide him with a kilogram of cocaine.70 Citing Aleman,71 the Costa court held this "prior relationship" testimony to be "inextricably intertwined" with proof of the charged crimes.72 "Campbell's testimony about Costa's previous dealing in cocaine was necessary because it formed an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted."73

The Costa court's version of the "inextricably intertwined" doctrine cannot be derived from the common law res gestae rule. Campbell testified as to the crimes charged that he learned from Cole of the existence of a willing buyer for a kilo of cocaine; that he shopped around for a willing seller, ultimately locating Costa; that after the customary negotiations, Costa delivered first a sample, then the kilo itself, to Campbell; who in turn delivered it to Cole, who delivered it to the DEA agent.74 Somewhere during or after the foregoing narrative, the prosecutor apparently succeeded in asking a question such as, "and what made you believe that you might obtain a kilogram of cocaine from Costa?" Campbell apparently succeeded in providing an answer such as, "because I had personal knowledge that on several occasions in the past Costa had engaged in drug transactions." There can be no serious suggestion that it was "impossible to give a complete or intelligent account of the crime charged without referring to the other crime[s]" or that Costa's former drug dealing and his involvement in the charged crimes were "connected so that they form an indivisible criminal

67. Id.
68. Id.
69. Costa, 691 F.2d at 1360–61.
70. Id. at 1361.
71. United States v. Aleman, 592 F.2d 881 (5th Cir. 1976).
72. Costa, 691 F.2d at 1361.
73. Id.
74. Id. at 1360–61.
transaction, and a complete account of... [the latter] cannot be given without showing [the former]." Campbell's narrative as to the charged offenses was complete, intelligible, and probative without his testimony as to uncharged antecedent misconduct.

Nor can the Costa court's departure from common law precedent be attributed to an inherent difference between common law crimes and federal drug conspiracies. This was not a multi-defendant case involving dozens of transactions extending over the course of many weeks. The entire case, from the first contact between Cole and the undercover agent to the arrest of Costa, took place during about a three week period in July of 1981. So far as appears from the opinion, there were no unindicted coconspirators and the prosecution's case in chief consisted mainly of testimony from Cole and Campbell.

In defense of the admissibility of the evidence of uncharged misconduct, the Costa court, apart from citing without comment to Aleman, observed that "Campbell's testimony about Costa's previous dealing in cocaine was necessary because it formed an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." How Campbell's testimony as to Costa's uncharged crimes was "integral" to his or any other witness's testimony as to Costa's charged crimes is left unsaid. If by "integral and natural" the court meant that the demised testimony gave contextual corroboration to the evidence in chief, the court was entirely correct. But evidence which provides such corroboration is admissibility, not inextricable. Its presence fortifies the evidence in chief, but its absence does not cripple the evidence in chief. No doubt the admission of such evidence lent force to the prosecution narrative, but this, without more, does not justify its admission. The Costa court provides no more, although its last word on the subject—perhaps most troubling of all—is one of commendation to the trial court for its "sensitivity to the problems arising under Rule 404(b)."

Costa soon proved itself no mere aberration. In a series of Eleventh Circuit cases, "inextricably intertwined" became the talisman by which evidence of uncharged crimes was rendered admissible.

The defendant in United States v. McCrary was an inmate at the Federal Correctional Institute, in Talladega, Alabama. He was charged with bribing a corrections officer, distributing a small amount of

76. Costa, 691 F.2d at 1360.
77. Id.
78. Id. at 1361 (citing United States v. Aleman, 592 F.2d 881, 886 (5th Cir 1996)).
79. See id.
80. 699 F.2d 1308 (11th Cir. 1983).
81. Id. at 1310.
methaqualone, and two counts of introducing contraband cigarettes into the prison. At trial, testimony was elicited from prosecution witnesses that McCrary “dealt in marijuana and quaaludes on several other occasions not . . . covered in the indictment.” With an incantation of the shibboleth “inextricably intertwined” and a single reference to Aleman, the court found the other-crimes evidence to have been properly admitted. In United States v. McDowell, the defendant purchased two kilos of cocaine from one Dalmau in the autumn of 1980. Unbeknownst to McDowell, Dalmau was later arrested for unrelated misconduct and agreed to become an informer for the DEA. During the summer of 1981 Dalmau (in his capacity as informer) and McDowell began negotiating another cocaine deal, which negotiations ended in McDowell’s arrest and prosecution. Evidence of the 1980 cocaine transaction was offered and received at trial. The Eleventh Circuit affirmed without discussion, citing Aleman and noting desultorily, “arguably evidence concerning the dealings between Dalmau and McDowell is ‘inextricably intertwined’ with the crime charged. Dalmau’s testimony might have been incomplete and confusing had he not been permitted to mention the first cocaine deal.” How Dalmau’s testimony about a drug deal in 1981 would have been rendered unintelligible, without testimony about an unrelated drug deal in 1980, must remain a matter of speculation. The tepid and diffident language employed in the opinion—the demised evidence “arguably” was inextricable because its absence “might have” left the evidence in chief incomplete—suggests a court embarrassed by being caught in the act of affirming on insupportable theory the conviction of an obviously guilty man.

82. Id. The cigarettes were contraband simply by virtue of their having been brought into the prison without authorization from prison officials. Id.
83. Id. at 1311.
84. McCrary, 699 F.2d at 1311. Although the court provided no analysis whatsoever on the “inextricably intertwined” issue, it did engage in “either/or jurisprudence”: “[E]ven if the evidence of Mr. McCrary’s numerous other illegal dealings is treated as ‘other acts’ evidence [i.e., is not “inextricably intertwined”], it is admissible under” Rule 404(b). Id.
85. 705 F.2d 426 (11th Cir. 1983).
86. Id. at 427.
87. Id.
88. Id.
89. Id.
90. McDowell, 705 F.2d at 429.
91. Id. Again, the court engaged in “either/or jurisprudence,” commenting that “[e]ven if the first transaction is treated as an extrinsic act, admission of the evidence was proper” under Rule 404(b) “to show intent.” Id. What particular intent was purportedly demonstrated by this evidence is not set forth in the McDowell opinion; intent to be a drug dealer, perhaps, or intent to get convicted.
92. Id.; see also United States v. Males, 715 F.2d 568 (11th Cir. 1983).
A scant three or four years after the term was coined by the *Aleman* court, "inextricably intertwined" referred to a principle that bore no recognizable resemblance to its common law antecedents. It had become a doctrinal juggernaut capable of battering down ancient evidentiary walls as surely as the cacophony made by Joshua and the armies of Israel battered down the ancient walls of Jericho. During the balance of the twentieth century, evidence admitted in Eleventh Circuit drug cases as "inextricably intertwined" fell into two general categories: evidence admitted simply because the other crimes occurred during the same time period as the charged crimes, and evidence admitted to show context, background, or the motivation of witnesses.

A. The "Same Time Period" Rule

The defendants in *United States v. Williford* were charged with conspiracy and related "offenses involv[ing] large quantities of marijuana flown into rural Georgia in small aircraft." A prosecution informant testified at trial that, during the time period of the conspiracy, he orchestrated a meeting between the defendants and an undercover agent to negotiate a sale of a kilogram of cocaine, but no sale actually occurred. On appeal, the court rejected the prosecution's argument that the testimony as to the cocaine negotiations was admissible under Rule 404(b). "Intent is the only issue to which this extrinsic act is relevant .... This evidence is insufficiently similar to establish" intent. Having characterized the other-crimes evidence as "extrinsic," and thus by definition not "inextricably intertwined" the court then ruled that the evidence was admissible as "inextricably intertwined," because it fell within the conspiracy period. "While not all bad acts occurring within the time frame of a conspiracy are automatically admissible, the fact that the cocaine negotiations occurred with a witness coconspirator during the time of the conspiracy weighs heavily toward finding the acts are intertwined."

94. 764 F.2d 1493 (11th Cir. 1985).
95. *Id.* at 1497.
96. *Id.* at 1496.
97. *Id.* at 1497.
98. *Id.*
100. *Id.* at 1499. The court misspeaks when it says that the cocaine negotiations "occurred with a witness coconspirator." The witness, one Hammond, had become a prosecution informer in June of 1982. *Id.* at 1496. The cocaine negotiations took place among the defendants, Hammond, and an undercover agent on August 3, 1982. *Id.* At that time, Hammond had ceased to be a coconspirator, although of course he still posed as one. If
A decade later, the court was no longer reticent to state frankly that all bad acts occurring within the time frame of a conspiracy are automatically admissible as "inextricably intertwined." United States v. Ramsdale involved a conspiracy to the manufacture of methamphetamine. Most of the evidence in the case concerned the purchase in Florida and transportation to Oregon by bus of phynylactic acid, a chemical necessary to manufacture methamphetamine. The trial court also allowed the testimony of a uniform patrol officer, Chantal Marie Thomas. Officer Thomas knew nothing of the charged conspiracy and had nothing to say about phynylactic acid. Her entire testimony was that on September 21, 1991, a date within the conspiracy time period, she stopped co-defendant Charles Christoferson's car for a defective rear license, and incidental to the stop, conducted a search in which she found Christoferson to be in possession of 3.05 grams of methamphetamine, $7801 in cash, a shotgun and a .9 millimeter pistol. Observing that "Christoferson's vehicle stop occurred during the time of the conspiracy as charged in the indictment," the Eleventh Circuit concluded that "[e]vidence of possession of the drug which Christoferson was accused of conspiring to manufacture, during the period of time alleged in the indictment, and under circumstances... suggest[ing] drug trafficking, is not extrinsic" and is admissible as "inextricably intertwined."

In neither Williford nor Ramsdale is there any attempt to preserve a vestige of the common law res gestae rule. The informer in Williford testified at length to the particulars of, and his involvement in, the marijuana smuggling conspiracy. The single and discrete act of negotiating but not consummating a cocaine transaction was thoroughly excisable from the narrative of the marijuana conspiracy. No more was required than to instruct

Hammond's testimony as to the cocaine negotiations was admissible as "inextricably intertwined" with the evidence of the marijuana conspiracy, it must be because all other-crimes evidence occurring during the conspiracy time period is automatically "inextricably intertwined," the court's protestations to the contrary notwithstanding.

The court also found the demised evidence to be "inextricably intertwined" under the context/background/witness motivation theory. See discussion infra Part IV.B.; see also United States v. Montes-Cardenas, 746 F.2d 771 (11th Cir. 1984).

101. 61 F.3d 825 (11th Cir. 1995).
102. Id. at 827.
103. Id.
104. Id. at 829.
105. Id.
106. Ramsdale, 61 F.3d at 829.
107. Id.
108. Id. at 830.
109. Williford, 764 F.2d at 1496.
the informer to omit the matter from his testimony. Such a redaction would have left no gaping lacunae in the story of the marijuana conspiracy. It would not have affected that story at all. In Ramsdale, Officer Thomas was called to the witness stand for the sole purpose of testifying to an event that was neither pleaded as being, nor proven to be, in furtherance of the charged conspiracy.110 The proposition that the testimony of one witness about certain facts can become admissible because “inextricably intertwined” with the testimony of other witnesses about other facts is given little if any consideration in the common law res gestae cases.

The defendant in United States v. Jimenez111 was charged with conspiring to possess methamphetamine with the intent to distribute it.112 Over what must have been an apoplectic defense objection, the trial court received evidence that during the conspiracy period not only did Jimenez possess marijuana and a firearm, but he also beat his live-in girlfriend.113

In affirming, it appeared at first that the court of appeals was headed in the direction of “inextricably intertwined.” Citing Ramsdale, the court stated the general principle that uncharged other-crimes evidence is “admissible if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense.”114

The court then abandoned any attempt to demonstrate the inextricability of the other-crimes evidence, at least as to the marijuana possession. Instead, it proceeded on a theory of relevance, or more particularly of “non-irrelevance.” Evidence of possession of marijuana, said the court, “is not necessarily irrelevant to proof of methamphetamine distribution.”115 This sort of averment is difficult to rebut. It would be an interesting challenge to attempt to posit some form of conduct that is necessarily irrelevant to proof of methamphetamine distribution. On these facts, the court of appeals found the “non-irrelevance” of the marijuana evidence to arise from taped telephone conversations in which reference was made to “cupcakes with white icing” and “cupcakes with green icing.”116 Agents testified that “cupcakes with white icing” was drug slang for methamphetamine, and that

110. See Ramsdale, 61 F.3d at 829.
111. 224 F.3d 1243 (11th Cir. 2000).
112. Id. at 1245.
113. Id. at 1246.
114. Id. at 1249 (citing United States v. McLean, 138 F.3d 1398, 1403 (11th Cir. 1998) and Ramsdale, 61 F.3d at 829). What the court appears to offer as alternatives are really appositives: evidence that arose out of the same course of conduct as the charged crimes and is necessary to complete the story of the charged crimes is inextricably intertwined.
115. Id. at 1250.
116. Jimenez, 224 F.3d at 1250.
"cupcakes with green icing" was drug slang for marijuana. If "cupcakes with green icing" really did mean marijuana, said the court, then it was likely that "cupcakes with white icing" really did mean methamphetamine; if "cupcakes with white icing" really did mean methamphetamine, then it was likely that Jimenez was discussing the distribution of methamphetamine; and if Jimenez was discussing the distribution of methamphetamine, then it was likely that he was guilty of the charged crimes. Thus is demonstrated the admissibility, on the theory of "non-irrelevance," of evidence of the uncharged marijuana crime. At the conclusion of this demonstration, the court admitted that this "may not be the most obvious case for admissibility of this evidence."

But even if the foregoing analysis makes a powerful case for the admissibility of "non-irrelevant" other-crimes evidence, the fact remains that the marijuana crimes were neither charged in the indictment nor noticed under Rule 404(b). That being so, the marijuana evidence was inadmissible. If the marijuana evidence was "inextricably intertwined" with the methamphetamine evidence, then it was admissible without regard to its relevance. But the court does not even consider whether, for example, testimony that Jimenez possessed marijuana or discussed "green cupcakes" could have been excised from the prosecution's case without rendering that case confusing or unintelligible.

As to the evidence of Jimenez beating his girlfriend, the court was obliged to acknowledge that even the "same time period" version of the "inextricably intertwined" theory would not support admissibility. "[W]e find it hard to believe that the government could not have successfully redacted the abuse-related comments from [the] taped conversations." That being said, however, the court determined that it need not "actually decide whether the abuse references were inextricably intertwined with other government evidence" because the error, if any, was harmless.

With no conceptual or historical foundation, the "inextricably intertwined" doctrine sponsors into evidence testimony that is eminently extricable from the evidence in chief, apparently on the theory that any bad

117. Id.
118. Id.
119. Id. In making this remark, the court was also referring to the evidence of gun possession. It appears that when the police burst into his home, Jimenez at first drew a gun. Id. Prior to trial, however, Jimenez moved to suppress physical evidence on the grounds that the police had failed to "knock and announce." Jimenez, 224 F.3d at 1250. If Jimenez was initially unaware that the armed men entering his house were agents of the law, his instinct to reach for a weapon with which to protect his home and hearth was perfectly understandable—and in any event, not evidence of conspiring to distribute methamphetamine.
120. Id.
121. Id.
thing a drug dealer does during the time period covered by a conspiracy charge—which time period, of course, is determined by the prosecutor offering the evidence, not the alleged drug dealer against whom it is offered—is fair game. 122 This rule of admissibility has two things to commend it: it is supremely easy of application, and it provides the prosecution with an unexampled weapon with which to wage the "war on drugs."

B. The "Context, Background, and Motivation" Rule

The "same time period" rule was not the only basis for admission of the uncharged crime evidence in Williford. Testimony may be admitted as "inextricably intertwined" even though "not part of the crime charged" if it "pertain[s] to the chain of events explaining the context, motive and set-up of the crime." 123 Thus to be "inextricably intertwined," the evidence need not pertain to the crime charged. It need not pertain to the context, motive, and set-up (whatever these terms mean) of the crime charged. 124 It need not "explain . . . the context, motive, and set-up of the crime" charged. 125 It need not form a fixed and identifiable part of the chain of events explaining the context, motive, and set-up of the crime charged. It need only "[pertain] to the chain of events explaining the context, motive, and set-up of the crime" charged. 126 Is it possible to imagine any evidence so evanescent in any given case as not to pass this test?

The defendant in United States v. Gomez 127 was observed engaging in a hand-to-hand drug deal and was arrested immediately. 128 A search of his person and his car incident to the arrest revealed a loaded pistol in the glove compartment, a mobile telephone, and a book with the phone numbers of several persons then under investigation. 129 Also in Gomez's vade mecum

122. A charge of conspiracy pleaded as "beginning on a date unknown to the grand jury" and ending at the time of arrest arguably embraces the defendants' entire lives. If the prosecutor then learns in mid-trial that a defendant has done a bad thing—particularly a bad thing involving drugs—of which the prosecutor was previously unaware, there is no impediment to its admission. It is "inextricably intertwined" with the charged crimes. That the grand jury was never told of it in considering the indictment, and that the defendant has had no notice of it in preparing to meet the indictment, is no objection.
123. Williford, 764 F.2d at 1499; see also United States v. Prosperi, 201 F.3d 1335 (11th Cir. 2000).
124. Williford, 764 F.2d at 1499.
125. Id.
126. Id.
127. 927 F.2d 1530 (11th Cir. 1991).
128. Id. at 1532.
129. Id. at 1532–33.
was a listing and phone number for a man identified only as "Sammy." At trial, the prosecution was permitted to introduce evidence that, some two months after Gomez's arrest, a Sammy Zuluago, who proved to be the "Sammy" in Gomez's book, engaged in a drug transaction. "Although this evidence concerned an event which occurred after [Gomez's] arrest, this circuit has held that evidence inextricably intertwined with the chain of events surrounding the crime charged is admissible." The evidence of Zuluago's misconduct "was relevant to the scheme and chain of events surrounding the charged importation conspiracy." How, precisely, it was relevant is left unsaid. There is no suggestion that Gomez was involved in the drug transaction in which Zuluago engaged at a time when Gomez was safely behind bars. There is no suggestion that Zuluago's transaction was a part of, or a continuation of, the drug crimes for which Gomez was convicted. But "inextricably intertwined" evidence need not be intertwined, inextricably or otherwise. It need only pertain, in some fashion, to the chain of events explaining the context, motive, and set-up of the crime or crimes charged. The Gomez evidence easily met this "test." The prosecution gives "context" to the charged drug crimes by showing that at the time of his arrest for those crimes, Gomez had the phone number of a man who, two months later, would engage in an unrelated drug crime.

Similarly, in United States v. Herre, the court allowed evidence of the defendant's prior state court arrest for marijuana smuggling in a federal prosecution for criminal contempt, the contempt consisting of the defendant's failure to testify before the federal grand jury. Herre had been immunized and ordered to testify, but refused to do so. To establish the offense charged, the prosecution was obliged to prove nothing more. The prior drug arrest was deemed "inextricably intertwined," because it provided the jury "necessary background information showing why Herre had been subpoenaed and provided the jury with some basis to understand the reasons behind the charged offense."

130. Id. at 1533.
131. Id.
132. Gomez, 927 F.3d. at 1535 (citing United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).
133. Id.
134. Id.
135. 930 F.2d 836 (11th Cir. 1991).
136. Id. at 837.
137. Id.
139. Herre, 930 F.2d at 838.
Both *Gomez* and *Herre* cite Williford's "chain of events" language. Neither *Gomez* nor *Herre* explains what is meant by this language.\(^{140}\) What sort of chain must exist between the uncharged crimes evidence and the charged offenses? How far may the chain extend, and how attenuated may each succeeding link be from the charged crimes? In *Gomez*, the uncharged-crime evidence consisted of proof that a person with whom Gomez apparently had some involvement committed a crime in which Gomez apparently had no involvement.\(^{141}\) Whether this evidence would have been admissible under traditional Rule 401/403, balancing of probative versus unfair prejudicial value is a nice question. Fortunately for prosecutors, "inextricably intertwined" is a means for end-running that balancing test. The prosecution in *Herre* could easily have demonstrated that Herre was duly subpoenaed; was immunized pursuant to section 6001 of Title 18 of the *United States Code*; appeared before the grand jury; and refused to testify. That the subject matter of the subpoena was drug smuggling was surely irrelevant to the act of contumacy. Herre would have been just as much in violation of section 401 of Title 18 of the *United States Code* if he had unlawfully refused to testify about a parking meter violation. But if Herre's trial jury had any reluctance to convict him, that reluctance was surely overcome when the jurors learned that Herre was himself a drug smuggler. If evidence that in all likelihood could not withstand scrutiny under Rules 401, 403, and 404(b) can avoid such scrutiny and gain admission on the bare allegation that it relates in some fashion to a chain of events explaining the context, motive, and set-up of charged crimes, then nothing remains of the fundamental Anglo-American legal principle that evidence of uncharged crimes is presumptively inadmissible.

That certainly appeared to be the case after *United States v. Fortenberry*.\(^{142}\) Although not a drug case, *Fortenberry* makes bold use of the "inextricably intertwined" doctrine. Police suspected Fortenberry in two murders.\(^{143}\) No murder charges were ever brought, but federal authorities prosecuted Fortenberry for, *inter alia*, unlawful possession of a Mossberg 500 twelve-gauge shotgun.\(^{144}\) Prior to trial, the prosecution notified Fortenberry of its intent to introduce, pursuant to Rule 404(b), evidence of Fortenberry's participation in the murders to establish his illegal possession of the shotgun which the prosecution believed was used to commit the murders.\(^{145}\) In its case in chief, the prosecution "presented numerous witnesses linking Fortenberry to the double murder and the murder weapon

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140. See *Gomez*, 927 F.2d at 1535; *Herre*, 930 F.2d at 837–838.
141. *Id.*
142. 971 F.2d 717 (11th Cir. 1992).
143. *Id.* at 719.
144. *Id.*
145. *Id.* (footnote omitted).
Hirsch: "This New-Born Babe an Infant Hercules": The Doctrine of "Inextricably Intertwined"

The trial court's analysis was a hodgepodge of Rule 404(b) and the "inextricably intertwined" theory. The district court found the murder evidence to be "inextricably intertwined" with evidence of the charged possession count subject only to Rule 403 limitations—which limitations, by definition, have no applicability to evidence truly inextricable from the evidence of charged offenses. The district court, at the time it admitted evidence of the murders, cautioned the jury that Fortenberry was on trial not for murder but only for possessing firearms. "The district court explained that the murder evidence was admissible solely for the jury to determine whether it created an inference that Fortenberry possessed the shotgun in question." Genuinely inextricable evidence neither requires nor invites a cautionary instruction.

The Eleventh Circuit affirmed. Evidence of the double murder was properly admitted on the charge of possession of a firearm. The homicide evidence was "inextricably intertwined" with the evidence of possession, because it was "an essential part of the chain of events explaining the context, motive, and set-up of the possession charge and was necessary to complete the story of the crime for the jury." Again, the court offers no definition or explication of the terms "context, motive, and set-up" upon which it relies. The closest the court gets to amplifying these terms is to say that the other-crimes evidence "explained the context of how and why Fortenberry acquired possession of the shotgun." Whatever "context" and "set-up" mean, they must mean a great deal. Their use enabled the prosecution to adduce on a trial of simple possession of a firearm otherwise inadmissible proof of a double homicide. Because this proof was offered as demonstrating "context, motive, and set-up," it must be inextricable; because inextricable, it must be admissible. The long-standing general rule that only evidence of charged offenses is admissible has been reduced to an inconsequential exception (if it has any continued vitality at all) to the

146. Id.
147. Fortenberry, 971 F.2d at 721.
148. Id. at 720-21.
149. Id. at 721.
150. Id. at 720.
151. Id.
152. Fortenberry, 971 F.2d at 720.
153. Id. at 721.
154. Id.
155. Id.
156. Id.
157. Fortenberry, 971 F.2d at 721.
new general rule that any evidence of any bad act or crime is admissible if it can be said in some fashion to pertain to a chain of events bearing upon the context, motive, and set-up (terms helpfully undefined, therefore all the more capaciously applied) of the crime charged.\textsuperscript{158}

Stranger even than "context" and "set-up" is "motive." Most of the cases in which the Eleventh Circuit employs the "inextricably intertwined" rule are drug cases. Drug crimes are not crimes of passion; they are crimes of financial gain. Motive is seldom an issue. The defendant sold the drugs for money, or he bought the drugs to use and to sell for more money to buy more drugs. Knowledge and intent may be at issue, particularly in possession cases, but motive is clear. In \textit{United States v. Foster},\textsuperscript{159} a DEA agent in Savannah, Georgia received a tip that three people would deplane from Miami carrying cocaine.\textsuperscript{160} The agent observed Foster and his traveling companions Stephanie Davis and Jeffrey Smith arrive at the airport, and detained them there.\textsuperscript{161} A subsequent search of Ms. Davis revealed that she had a kilo of cocaine secreted in her girdle.\textsuperscript{162} Prior to Foster's trial, Davis made a deal with the prosecution and agreed to testify.\textsuperscript{163} She was permitted, as part of her trial testimony, to relate that two and a half weeks prior to her arrest with Foster, she had carried drugs at Foster's direction in the same girdle while flying from Miami to Savannah.\textsuperscript{164} In holding that this evidence was properly admitted, the court of appeals seemed to speak the language of Rule 404(b), e.g., the testimony was "relevant to Mr. Foster's opportunity, intent, preparation, planning, and knowledge."\textsuperscript{165} But the reason for the court's ruling was that the other-crimes evidence was necessary to explain the witness's, not the defendant's, motive.\textsuperscript{166}

Ms. Davis' explanation of the [earlier] transaction was necessary in order for the jury to understand why Davis agreed to hide the cocaine for Mr. Foster on the [later] trip with little or no advance notice or apparent reflection on her part. Evidence concerning the success of the [earlier] venture and the payment of $500.00 from

\textsuperscript{158} See also \textit{United States v. Pessefall}, 27 F.3d 511 (11th Cir. 1994) (holding other-crimes evidence occurring \textit{eight years} prior to charged crimes admissible as "inextricably intertwined").

\textsuperscript{159} 889 F.2d 1049 (11th Cir. 1989).

\textsuperscript{160} Id. at 1050.

\textsuperscript{161} Id.

\textsuperscript{162} Id.

\textsuperscript{163} Id. at 1051.

\textsuperscript{164} Foster, 889 F.2d at 1051.

\textsuperscript{165} Id. at 1053.

\textsuperscript{166} Id.
Foster to Davis explains her willingness to participate in the [later] transaction. 167

This entirely artificial rationale highlights just how false the doctrine of "inextricably intertwined" really is. Those unwilling to pretend that the emperor is wearing new clothes know perfectly well why the testimony regarding the first drug deal was admitted: to show that the defendant is a habitual drug dealer, and someone the jury should have no hesitation in convicting. At a stretch, the evidence could be justified under Rule 404(b) as going to negate mistake or accident, and as showing a pattern of conduct. But to suggest that testimony regarding the earlier drug deal is somehow "inextricable" from testimony regarding the latter drug deal, and admissible as such, is untenable. In what sense is it "inextricable?" Clearly, Davis could relate the events of the second drug transaction in full without so much as a passing reference to the first transaction. The other-crime evidence bore not at all upon any element of the actus reas. And to the extent it bore upon the mens rea, it was alleged to bear, not upon the mens rea of the defendant, but upon the mens rea of the witness. A witness's motive to testify may be at issue, but Davis' motive to engage in the crime about which she was testifying was of no relevance at all. And even if somehow it could be made relevant, what could be plainer than the source of her motivation to act as a drug courier? Davis did it for money. Nor is there much force to the suggestion that the jury needed to learn why Davis acted "with little or no advance notice or apparent reflection on her part." 168 Davis received all the notice, and indulged all the reflection, she required when she was promised five hundred dollars.

V. "INEXTRICABLY INTERTWINED" IN STATE COURT

Given Florida's central importance as a battlefield in the "war on drugs," and given the number of federal cases deploying the "inextricably intertwined" doctrine as a weapon in that war, the paucity of drug cases in the state courts of Florida in which the applicability of that doctrine has been raised is remarkable. Remarkable, too, is the constancy with which Florida courts have resisted the temptation to distort the notion of "inextricably intertwined" out of all proportion in order to permit the introduction of any and all prosecution evidence.

"Inextricably intertwined" evidence did not make its first appearance in Florida jurisprudence until 1986, in an opinion captioned Tumulty v. State. 169

167. Id. at 1050.
168. Id. at 1053.
169. 489 So. 2d 150 (Fla. 4th Dist. Ct. App. 1986).
Jean Tumulty had participated in three drug smuggling ventures with the same group of colleagues. These individuals undertook a fourth such venture in which Tumulty was not involved. Although marijuana was successfully brought into the United States, the importers were unable for some reason to sell it. The pilot, one Marrs, refused to relinquish possession of the airplane until he was paid, thus rendering all future smuggling business impossible. Tumulty solved this problem by arranging to have Marrs murdered. It was for the murder, and not for drug smuggling, that Tumulty was charged. The court of appeal determined that evidence of the drug smuggling, however, was properly admitted at trial.

It was relevant because it was "inextricably intertwined" in the scenario of the fourth trip to show the context of the crime. It was "inseparable crime" evidence that explains or throws light upon the crime being prosecuted. In order to present an orderly, intelligible case the state had to show the relationship between [the owner of the plane] and Tumulty, close personal friends and business associates, supplier and middleman. The motive for the killing was directly related to the "conversion" of [the] airplane by Marrs and the urgent need for [Tumulty and the others] to get it back in service.

In support of this proposition, the Tumulty court cites, not the common law cases—not Killins and Oliver—but Professor Ehrhardt’s treatise on Florida evidence. Ehrhardt, in turn, cites to Aleman and progeny. But there was no need to rely upon Aleman or other federal authorities. Tumulty falls squarely within the res gestae version of "inextricably intertwined" evidence. The defendant’s motive to commit the charged offense (as opposed to a witness’s motive to testify at the trial of the defendant for the charged offense) is inseparable from the charged offense itself. Although a defendant’s motive is often obvious, it is not always

170. Id. at 151.
171. Id.
172. Id.
173. Id.
174. Tumulty, 489 So. 2d at 151.
175. Id.
176. Id. at 153.
177. Id.
178. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 404.16, at 206 (2000 ed.).
179. Id.
180. Willie Sutton famously observed that his motivation for robbing banks was because that was where the money was. In Sutton’s autobiography he confessed that this oft-quoted remark was not really his own. WILLIE SUTTON & EDWARD LINN, WHERE THE MONEY

https://nsuworks.nova.edu/nlr/vol25/iss1/8
so—as in *Tumulty*. In such cases, evidence of uncharged crimes to establish motive as to charged crimes may be admissible under the *res gestae* rule.

[Fl]acts and circumstances...will [sometimes] warrant a presumption that the [charged offense] grew out of, and was, to some extent, induced by...[the uncharged offense]; in which case, such circumstances connected with the [uncharged offense] as are calculated to show the *quo animo* or motive by which the [defendant] was actuated or influenced in regard to the [charged crime], are competent and legitimate testimony.\(^{181}\)

And again:

> When the acts form one transaction, the evidence is admissible.... Where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged; and proof of such guilty knowledge, or malicious intention, is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused, as tend to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime.\(^{182}\)

Although *Tumulty* was undoubtedly correctly decided, it would be a dangerous oversimplification to say that evidence of uncharged crimes is “inextricably intertwined” whenever such evidence bears upon the defendant’s motive as to the charged crimes. The test for “inextricably intertwined” evidence—the proper *res gestae* test—is whether the evidence in chief is rendered unintelligible, confusing, or misleading without the other-crimes evidence. If the tale of the charged crimes can be told without including the other-crimes evidence, then the other-crimes evidence is not inextricable. Thus where the defendant’s motive as to the charged crime is readily inferred from the evidence in chief, or is otherwise not in issue, it would be wrong to admit other-crimes evidence as “inextricably intertwined” to establish motive.\(^{183}\)

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\(^{182}\) Id. at 445.

\(^{183}\) The tendency of the courts to blur the conceptual distinction between Rule 404(b) evidence and “inextricably intertwined” evidence may be attributable in part to the difficulty...
Although it was possible to narrate the events of Marrs' murder without describing the prior drug deals that led up to it—although they were separated in terms of time, place, manner, victim, and the like—it is probably true that the narrative of Marrs' murder would have made little sense without the evidence of the prior drug dealings. Tumulty, after all, did not choose Marrs out of the telephone book. Unlike the federal cases, here, the other-crimes evidence of "motivation" was not offered to show the motivation of witnesses, but to show the motivation of the defendant.

_Tumulty_ was decided by an intermediate appellate court. The Supreme Court of Florida had no occasion to give consideration to the "inextricably intertwined" principle until it decided _Griffin v. State_ in 1994. Griffin was accused of a variety of serious felonies, including the theft of an automobile which he used during burglaries. The car in question had been rented by one Marshall. At trial, Marshall testified:

> [O]n the evening of April 23, 1990, he returned to the Miami Beach hotel where he was staying, placed the car keys on the dresser, and retired for the evening. When he awoke the next morning, Mr. Marshall found that the car keys and the car were gone. Griffin concedes that his possession of the automobile was admissible because grand theft was a charge the jury was considering. However, Griffin argues that the testimony relating to the missing keys was inadmissible... because it suggested that the hotel room had been burglarized, and was used by the State to show that Griffin had a propensity to burglarize motel rooms.

Clearly the evidence of the taking of Marshall's keys was admissible. Griffin was charged with theft of the car, and stealing the keys was the means by which he stole the car. Perhaps the matter might have been different if there were, for example, evidence that the car had been "hot wired," or towed away, or that someone else had a second set of keys. But on the facts reflected in the opinion, Griffin's taking of the keys was as

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184. _See, e.g.,_ United States v. Foster, 889 F.2d 1049 (11th Cir. 1989).
186. _Griffin v. State_, 639 So. 2d 966 (Fla. 1994).
187. _Id. at_ 967.
188. _Id. at_ 969.
189. _Id._
inseparable from his taking of the car as was the defendant's taking of the victim's ring and other personal items in the course of the rape prosecuted in Nickels; as inseparable as the taking of Y's and Z's tools in connection with the theft of X's toolbox in Wigmore's example. 190

The Supreme Court of Florida's dispositive treatment of "inextricably intertwined" evidence is presented in the companion cases of Hartley v. State191 and Ferrell v. State. 192 Hartley and Ferrell were tried separately for a murder and kidnapping they committed together. At Hartley's trial, a police officer "testified that when he arrested Hartley and Ferrell for the victim's murder, Hartley denied knowing the victim. The police officer then testified that he told Hartley they knew he had robbed the victim two days before the murder."193 The Supreme Court of Florida had no difficulty concluding that the officer's testimony was improperly admitted, whether on a theory of "inextricably intertwined" or otherwise. 194 The court reasoned that "[t]he officer was not testifying to the fact that Hartley admitted robbing the victim; the officer was merely repeating the officer’s own statement that he knew Hartley robbed the victim two days before the murder."195 At Ferrell's trial, however, the court admitted "evidence that Ferrell and Hartley robbed the victim two days before the murder."196 This evidence was admitted as "explain[ing] Ferrell’s motivation [for the murder] in seeking to prevent retaliation by the victim" for the prior robbery.197

The Florida courts have hewed to the common law version of "inextricably intertwined," admitting other-crimes evidence only when it is truly inseparable from the actus reas of the charged crime, or from the mens rea of the charged crime, 198 or both. 199 In less than a handful of instances, Florida courts have spoken the language of their federal counterparts, admitting other-crimes evidence by way of a general reference to "context."200

190. WIGMORE, supra note 15, § 218.
191. 686 So. 2d 1316 (Fla. 1996).
192. 686 So. 2d 1324 (Fla. 1996).
194. Id. at 1320.
195. Id.
196. Ferrell, 686 So. 2d at 1328.
197. Id. at 1329.
200. See, e.g., Coolen v. State, 696 So. 2d 738, 743 (Fla. 1997). In Coolen the court found "the testimony was necessary to establish the entire context out of which the crime
In Griner v State,201 the defendant perpetrated two separate robberies within two blocks and twenty-two minutes of each other.202 Admitting evidence of the first robbery at the trial of the second was error. The two were not "inextricably intertwined." "The most we can say about the relationship between these two events is that one occurred very soon after the other, which is not sufficient to make the evidence regarding the first incident admissible . . ."203

In Porter v. State,204 the police received a call regarding an incident of domestic violence at the Porter residence.205 When Officer Walters arrived on the scene, Mrs. Porter called out, "[h]e's trying to kill me."206 Walters and another officer separated the Porters, ultimately finding it necessary to put handcuffs and leg restraints on Mr. Porter.207 His manacles notwithstanding, Porter continued to assault and struggle with the officers.208 He was charged with resisting an officer with violence and battery on a law enforcement officer.209 The court of appeal determined that the wife's cry for help "was not inextricably intertwined with the crimes for which Porter was charged."210 This was so because:

There was a clear break between the wife's statement and Porter's altercation with the [officers]. The only relevance [of] the wife's out-of-court statement was to explain the [officers'] presence at the Porter residence. However, the [officers'] presence was sufficiently explained by . . . Walter's testimony that he received a call concerning a domestic violence incident. There was no need to reveal the wife's statement . . . 211

The flip-side of Porter was Carrillo v. State.212 Carrillo was arrested for a domestic incident with his live-in girlfriend and charged with aggravated

arose. [The] testimony was relevant and was not unduly prejudicial. Therefore, we find no error in the admission of this testimony." Id.; see also Shively v. State, 752 So. 2d 84, 85 (Fla. 5th Dist. Ct. App. 2000); Osborne v. State, 743 So. 2d 602, 602 (Fla. 4th Dist. Ct. App. 1999); T.S. v. State, 682 So. 2d 1202, 1202 (Fla. 4th Dist. Ct. App. 1996).

201. 662 So. 2d 758 (Fla. 4th Dist. Ct. App. 1995).
202. Id. at 759.
203. Id.
204. 715 So. 2d 1018 (Fla. 2d Dist. Ct. App. 1998).
205. Id. at 1019.
206. Id.
207. Id.
208. Id.
209. Porter, 715 So. 2d at 1019.
210. Id. at 1020.
211. Id.
212. 727 So. 2d 1047 (Fla. 2d Dist. Ct. App. 1999).
battery. In the police car as he was being taken away Carrillo kicked, struck his head against the window, cursed, and threatened, "if I'm going to jail for this bitch, I might as well kill her." Rightly rejecting the argument that this conduct was "inextricably intertwined" as bearing upon "motive" or anything else, the court ruled that "Carrillo's threats and disruptive behavior in the police car were so far removed in time from the incident [of domestic violence that] they had little probative value as to his intent or state of mind at the earlier time. Furthermore, the two incidents were not inextricably intertwined.

As the foregoing cases illustrate, most of the development of the "inextricably intertwined" doctrine in Florida has been in non-drug cases. But Huhn v. State involved a falling-out among drug dealers that led to armed kidnapping and aggravated assault. Relying upon the Fourth District's opinion in Tumulty, the prosecution offered evidence of previous drug transactions in which the victim and the perpetrators of the kidnapping/assault had participated together. The Huhn court, however, distinguished Tumulty. In that case, the prior drug dealing provided the motive for an otherwise inexplicable murder; the murder was simply the consequence—in effect, the dramatic conclusion—of a falling-out during the previous drug transactions. In Huhn, the previous drug deals had been consummated uneventfully, and formed no part of the crimes of kidnapping and assault for which the defendant was charged.

In D.M. v. State, the court of appeal for the Third District found evidence to have been properly admitted as "inextricably intertwined" in a drug case.

During a period of fifteen minutes, a surveillance officer observed D.M. and A.E. standing on a sidewalk in front of a duplex. On three occasions, someone approached the duo and handed money to A.E. A.E. handed the money to D.M. While D.M. remained on

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213. Id. at 1047.
214. Id. at 1048.
216. 511 So. 2d 583 (Fla. 4th Dist. Ct. App. 1987).
217. Id. at 584.
218. Id. at 586–87.
219. Id. at 590.
221. Huhn, 511 So. 2d at 590; see also Adams v. State, 743 So. 2d 1216 (Fla. 4th Dist. Ct. App. 1999); Selver v. State, 568 So. 2d 1331 (Fla. 4th Dist. Ct. App. 1990).
222. 714 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1998).
223. Id. at 1119.
the sidewalk, A.E. walked to a utility room at the rear of the
duplex, returned from the utility room, and handed over a small
object to the person who had paid the money.224

After a fourth such transaction, one of D.M.'s customers was arrested and
found to be in possession of a cocaine rock.225 The police then arrested
D.M. and A.E.226 The two juveniles were charged with sale of cocaine in the
fourth transaction and—crucially for the "inextricably intertwined" issue—
possession with intent to sell a supply of packaged-for-sale cocaine rocks
found in the utility room.227 At trial, the prosecution offered in evidence the
first three sales viewed by the surveillance officer.228 Evidence of the
conduct giving rise to these sales was genuinely inseparable from the
charged possession offense.229 To prove the possession crime as against
both defendants, the prosecution:

[W]as required to show dominion and control by the [defendants]
over the drugs in the utility room. During the fifteen-minute
surveillance, the officer observed four transactions and four trips to
retrieve objects from the utility room. The evidence of the
trips... was inextricably intertwined with the evidence of the
sidewalk transactions.230

This analysis is unimpeachable.

VI. CONCLUSION

"The law," said no less an authority than Benjamin Nathan Cardozo,
"has outgrown its primitive stage of formalism when the precise word was
the sovereign talisman...."231 Nearly a century later, the phrase
"inextricably intertwined" has taken on the status of a sovereign talisman
which, with primitive formalism, conjures up the admission of inadmissible
evidence.

Meantime, the expression "res gestae" has been cast aside by all
courts.232 Wigmore himself describes the phrase as:

224. Id. at 1118.
225. Id.
226. Id.
227. D.M., 714 So. 2d at 1118.
228. Id.
229. Id. at 1119.
230. Id. at 1119–20.
[U]nsatisfactory, first, because it is obscure and indefinite, and needs further definition and translation before either its reason or its scope can be understood; and, secondly, because its very looseness and obscurity lend too many opportunities for its abuse. It is not too much to say that it is nowadays most frequently used merely as a cover for loose ideas and ignorance of principles... [T]he result is only to make rulings on evidence arbitrary and chaotic, when we ignore the correct purposes of admission and substitute an indefinite and meaningless phrase of this sort.

There is irony here. Having rejected, as "obscure and indefinite," as "need[ing] further definition and translation," as a mere "cover for loose ideas" the term res gestae, the Eleventh Circuit has simply substituted in its place the term "inextricably intertwined"—a figure of speech as obscure and indefinite, as much in need of definition and translation, as likely to shelter loose ideas, as any form of words ever visited upon the law.

Such figures of speech have their purpose. If the jurisprudential goal is a rule of law so capacious and indefinite as to provide all drug convictions with a safe harbor on appeal, "inextricably intertwined" is ideal. If, however, the jurisprudential goal is clarity of thought and expression, and a due regard for the fair trial rights of accused citizens, the "inextricably intertwined" rule as presently applied in the Eleventh Circuit is very far from ideal.

Without reverting to the term res gestae, the courts in the Eleventh Circuit should revert to the common law understanding of what is today termed "inextricably intertwined" evidence. Evidence of uncharged misconduct should be admitted only when such evidence cannot be redacted from the narrative of the charged misconduct without leaving that narrative confusing or incomplete. "Inextricably intertwined" evidence should be received infrequently, as a narrow exception to the general rule against the admission of evidence of uncharged crimes.

That the "inextricably intertwined" rule, properly defined and understood, is a necessary part of our evidentiary jurisprudence cannot be gainsaid. In United States v. Kerris, undercover agent Flagg was investigating a stolen car ring, and in that capacity came to Florida to obtain a stolen auto for delivery to New York. In his undercover role, Flagg met Kerris. When Flagg told Kerris that he (Flagg) was taking two kilos of

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234. 748 F.2d 610 (11th Cir. 1984).
235. Id. at 613.
236. Id.
cocaine to New York with him, Kerris offered to supply all of Flagg’s future cocaine needs.237

Kerris then introduced Flagg to DeMeo, Kerris’ partner and future codefendant.238 It was DeMeo who supplied Flagg with the stolen vehicle to be transported to New York.239 At the time Flagg took delivery of the car, DeMeo asked Flagg if he needed additional cocaine.240 Flagg answered that he did not but, should a need arise in the future, he would be in touch.241 Flagg then drove the auto to New York, telephoning Kerris several times along the way to discuss both the delivery arrangements for the car and plans for future cocaine transactions.242 As a result of these discussions, cocaine was later delivered to Flagg in New York.243 Finally, Flagg “had several telephone conversations with both Kerris and DeMeo... in which Flagg [discussed] ... pay[ing] $250,000 in exchange for five kilograms of cocaine and two stolen cars.”244 Kerris and DeMeo were charged with drug crimes, but no count in the indictment expressly referenced the stolen vehicles.245 On these facts, however, the court quite properly found the evidence of the misconduct involving the cars to be inextricable from that of the drug offenses.246 Flagg’s testimony would have been expurgated beyond all recognition if he had been obliged to delete references to the stolen autos.247

Compare United States v. Chilcote.248 There, an undercover agent named Matthews had infiltrated a cocaine operation in which Chilcote was involved.249 On an occasion when Chilcote and Matthews “were engaged in weighing and analyzing the cocaine, they had a conversation in which Matthews asked [Chilcote] whether he was a pilot. [Chilcote] replied that he was not a pilot, but that he had once flown a DC-3 to Colombia and back.”250 The inference, of course, was that Chilcote’s unlicensed flight to Colombia was for the purpose of a prior drug deal. Rejecting the application of the

237. Id.
238. Id.
239. Kerris, 748 F.2d at 613.
240. Id.
241. Id.
242. Id.
243. Id.
244. Kerris, 748 F.2d at 613.
245. Id.
246. Id. at 615.
247. Id. (inexplicably citing to United States v. Beechum, 582 F.2d 898 (5th Cir. 1979), the controlling authority for admissibility of evidence under Rule 404(b)); see also United States v. King, 126 F.3d 987 (7th Cir. 1997) (applying the doctrine of res gestae/inextricably intertwined in a non-drug case).
248. 724 F.2d 1498 (11th Cir. 1984).
249. Id. at 1500.
250. Id. at 1501.
"inextricably intertwined" doctrine (one of the few such instances in a drug case in the history of the Eleventh Circuit), the court ruled that "agent Matthews' testimony about [Chilcote's] involvement in the crime charged would have been completely comprehensible without the testimony regarding [Chilcote's] claimed flight to Colombia. The evidence regarding the flight was entirely unrelated to the transaction at issue here and constitutes extrinsic evidence . . . "251

Had the Chilcote court been inclined to do so, it could easily have treated the evidence of the prior flight to Colombia as giving "context" to the charged offense. The chain of induction from Chilcote’s admission that he had unlawfully piloted a plane to Colombia and back, to the conclusion that he was a practiced and determined drug smuggler was no more attenuated than the chain of induction required to link the other-crimes evidence to the charged crimes in McDowell,252 for example, or Herre253 or Foster.254 Commendably, the Eleventh Circuit excluded the other-crimes evidence, and did so on the correct grounds: that proof of the charged offenses "would have been completely comprehensible without the testimony regarding [Chilcote's] claimed flight to Colombia."255

Thus application of the correct test for "inextricably intertwined" evidence proves to be no more difficult than many of the other evidentiary determinations courts routinely make in drug cases. That being conceded, there can be no justification for admission of evidence on the "same time period" theory or the "context, background, or witness's motivation" theory. If proof of the charged crimes is not rendered incomprehensible, confusing, or misleading without the other-crimes evidence, then the other-crimes evidence is not admissible as "inextricably intertwined."256

251. Id.
254. United States v. Foster, 889 F.2d 1049 (11th Cir. 1985).
255. Chilcote, 724 F.2d at 1501.
256. When the prosecution seeks to offer evidence under Rule 404(b) or section 90.404 of the Florida Statutes, it must give pretrial notice of that intent. See supra note 3. Such pretrial notice affords the trial court an opportunity to devote mature reflection to the issue of admissibility, and to fashion a ruling (necessarily provisional, but still providing guidance to counsel and litigants) tailored to the facts and circumstances of the case. Such a ruling is necessarily better considered than one made in the hurly-burly of trial. Extending this pretrial notice requirement to evidence sought to be admitted as "inextricably intertwined" would be similarly salutary. Courts should view putatively "inextricably intertwined" evidence with an even more jaundiced eye than they do evidence offered under Rule 404(b) or section 90.404 of the Florida Statutes. The former is subject to redaction or limitation under the Rule 403 balancing test; the latter, by definition, cannot be elided or limited without rendering the evidence in chief incomprehensible, misleading, or confusing.