

# Evidence

by Marc T. Treadwell\*

## I. INTRODUCTION

The page length of the annual survey of Eleventh Circuit evidence decisions has, over the years, become shorter and shorter. This year is no exception. There are simply fewer cases that have any significant discussion of evidentiary issues. Whether this is a good thing likely depends on one's perspective. For example, criminal defense lawyers likely think nostalgically of the years when the Eleventh Circuit micro-analyzed district court evidentiary decisions and freely reversed convictions on the ground that district courts erroneously admitted, for example, extrinsic act evidence. They may argue that the Eleventh Circuit, and the federal judiciary generally, has become more conservative. Others, however, will contend that the Eleventh Circuit is simply applying the abuse of discretion standard as it should be applied—it is not enough that a district court is wrong; the broad discretion afforded district court judges on evidentiary issues requires a higher showing. In any event, and whatever one's view may be, the fact that the Eleventh Circuit rarely overturns district court evidentiary decisions is beyond debate.

## II. ARTICLE I: GENERAL PROVISIONS

Federal Rule of Evidence 103(a) requires a party to timely object to the admission or exclusion of evidence to preserve that issue for appeal.<sup>1</sup> In the absence of an objection, a party appealing the admission or exclusion of evidence must establish “plain error.”<sup>2</sup> The Eleventh Circuit applies Rule 103 with a vengeance, and that perhaps is one

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1. FED. R. EVID. 103(a).
2. FED. R. EVID. 103(d).

reason for the dramatic decline in Eleventh Circuit decisions addressing evidentiary issues.

In addition, as illustrated by the Eleventh Circuit's decision in *Brough v. Imperial Sterling, Ltd.*,<sup>3</sup> the standards of review governing evidentiary appeals make it unlikely that a challenge to a district court's admission or exclusion of evidence will be successful. In *Brough* appellant Imperial Sterling contended that plaintiff made several references to defendants' financial status that were improper under Florida law.<sup>4</sup> With regard to defendants' timely objections to testimony and argument concerning defendants' financial status, the court noted that any error would require reversal only if (1) the district court abused its discretion in admitting the evidence or permitting the argument and (2) defendant could establish that the ruling had a substantial prejudicial effect.<sup>5</sup> While the Eleventh Circuit agreed that the district court improperly admitted this evidence, the court stated that there was other admissible evidence that would allow "the jury to determine that both [defendants] were wealthy parties" and, thus, appellant was not harmed by the admission of this evidence.<sup>6</sup>

With regard to evidence and arguments to which defendants made no objection, Imperial Sterling's appeal was governed by the plain error standard of review.<sup>7</sup> "For there to be plain error, there must (1) be error, (2) that is plain, (3) that affects the substantial rights of the party, and (4) that seriously affects the fairness, integrity, or public reputation of a judicial proceeding."<sup>8</sup> A party can rarely satisfy the plain error standard, and the appellant in *Brough* was no exception.<sup>9</sup> Plaintiff's reference in closing argument to one of the defendants as a "one hundred million dollar company" combined with the reference to

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3. 297 F.3d 1172 (11th Cir. 2002).

4. *Id.* at 1177. The court apparently assumed that Florida law governed that issue, an interesting assumption in view of Rule 101, which provides that the Federal Rules of Evidence "govern proceedings in the courts of the United States." FED. R. EVID. 101. Generally, evidentiary issues in federal court are governed by federal law, even though state law, such as in a diversity case, provides the rule of decision. *Borden, Inc. v. Fla. E. Coast Ry. Co.*, 772 F.2d 750, 754 (11th Cir. 1985). While there are some exceptions to this principle, the evidentiary issue in *Brough* appeared to be one of simple relevancy that normally would be governed by Article IV of the Federal Rules of Evidence. For a discussion of the question of when state evidentiary rules apply in federal courts, see Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 1607, 1608-10 (1997); Marc T. Treadwell, *An Analysis of Georgia's Proposed Rules of Evidence*, 26 GA. ST. B.J. 173, 173-84 (1990).

5. 297 F.3d at 1179.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

plaintiff as “an individual who has a wife who is working, who has a baby at home, a new home, who lives based upon the income that’s generated from those particular things, . . . this job, [and] his wife’s job, versus a one hundred million dollar company,” was clearly inappropriate.<sup>10</sup> Furthermore, plaintiff’s counsel argued that defendants were willing to breach their contract with plaintiff and had little concern over any resulting litigation because defendants had “at least three lawyers in place at one time, and [had] one hundred million dollars in assets to go forward with that lawsuit.”<sup>11</sup> Plaintiff, on the other hand, was simply “an individual whose living [was] based on his job.”<sup>12</sup> All of these comments were clearly inappropriate. However, the Eleventh Circuit did not reverse “because [the comments] did not seriously affect the fairness, integrity, or public reputation of the proceeding.”<sup>13</sup>

The Eleventh Circuit’s decision in *United States v. Cano*<sup>14</sup> demonstrates the precision necessary for objections. In *Cano* defendant contended that the trial court improperly allowed a detective to decipher symbols or “hieroglyphics” that had been used as a simple code.<sup>15</sup> Defendant objected on the ground that this testimony constituted expert testimony, that the detective had not been qualified as an expert, and, in any event, the prosecution had not given the required notice that the detective would testify as an expert.<sup>16</sup> However, the Eleventh Circuit concluded that the detective’s testimony “was not based on ‘scientific, technical or otherwise specialized knowledge’”<sup>17</sup> and therefore “did not constitute expert testimony within the meaning of Rule 702.”<sup>18</sup> Defendant also argued that if the testimony was not expert testimony, then it had to be lay testimony and, as lay testimony, was inadmissible under Rule 701, which requires, among other things, “that the [lay] witness’ testimony be ‘based on the perception of the witness.’”<sup>19</sup> The Eleventh Circuit agreed.<sup>20</sup> When he deciphered the hieroglyphics, the detective did not testify based on his perception; he simply took facts already in evidence and drew inferences from those facts.<sup>21</sup> In effect,

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1180.

14. 289 F.3d 1354 (2002).

15. *Id.* at 1360.

16. *Id.*

17. *Id.* (quoting FED. R. EVID. 702).

18. *Id.* at 1361.

19. *Id.* at 1362-63 (quoting FED. R. EVID. 701(a)).

20. *Id.* at 1363-64.

21. *Id.* at 1363.

he “delivered a jury argument from the witness stand.”<sup>22</sup> However, defendant did not object on the ground that the testimony was improper lay opinion testimony, and thus, this issue was subject to the plain error standard of review.<sup>23</sup> Because there was overwhelming evidence of defendant’s guilt, the Eleventh Circuit concluded that defendant could not meet the rigorous plain error standard.<sup>24</sup>

The Eleventh Circuit’s decision in *United States v. Hall*<sup>25</sup> illustrates the Hobson’s choice a defendant may face as the result of a trial court’s pretrial rulings. In *Hall* the prosecution sought to bolster its child pornography charges against defendant by introducing a videotaped interview of a four-year-old girl who said that defendant had engaged in sexual conduct with her.<sup>26</sup> The government contended that the tape was admissible pursuant to Rule 404(b)<sup>27</sup> and Rule 807.<sup>28</sup> Prior to trial, the district court ruled that the videotape was admissible to demonstrate defendant’s intent, knowledge, and lack of mistake or accident in the event defendant raised such defenses. Weighing the gain of raising those defenses against the horrific prejudice if jurors saw the videotape, defendant chose not to put up any evidence and formally informed the court that he would not raise defenses such as intent or mistake. After his conviction, defendant appealed to the Eleventh Circuit and sought to challenge the district court’s decision admitting the videotape. Defendant argued that the court’s decision forced him to forego valid defenses and thus impinged his constitutional rights. The government responded that because the tape was never introduced, the issue was not appropriate for appeal.<sup>29</sup> This precise issue raised a question of first impression in the Eleventh Circuit.<sup>30</sup> Although the United States Supreme Court previously held in *Luce v. United States*<sup>31</sup> that a pretrial ruling permitting the admission of prior conviction evidence under Rule 609 is not reviewable if the defendant does not testify and the evidence therefore is not used, the Court had not addressed this issue in the context of Rule 404(b).<sup>32</sup> Other circuits,

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22. *Id.*

23. *Id.*

24. *Id.* at 1364.

25. 312 F.3d 1250 (11th Cir. 2002).

26. *Id.* at 1253-54.

27. FED. R. EVID. 404(b) allows the admission of evidence of conduct other than the conduct at issue under certain circumstances.

28. FED. R. EVID. 807 is the residual exception to the rule against hearsay.

29. 312 F.3d at 1254-55.

30. *Id.* at 1257.

31. 469 U.S. 38 (1984).

32. *Id.* at 42.

however, had held that the principle applied to a Rule 404(b) ruling.<sup>33</sup> The Eleventh Circuit concluded that there was no logical reason not to apply *Luce* to a Rule 404(b) ruling.<sup>34</sup> Because the videotape was never introduced into evidence, there was not a sufficient development of the record to provide any meaningful review of the district court's pretrial decision.<sup>35</sup>

### III. ARTICLE IV: RELEVANCY

If one were to look for a single indicator that the Eleventh Circuit has dramatically lowered its level of scrutiny on evidentiary issues, the court's treatment of appeals involving Federal Rule of Evidence 403 would be a good candidate. Rule 403 allows the court, under some circumstances, to exclude relevant evidence, most notably when the danger of unfair prejudice substantially outweighs the probative value of the evidence.<sup>36</sup> At one time, the court frequently invoked Rule 403 in criminal cases to reverse convictions on the ground that prejudicial evidence should not have been admitted.<sup>37</sup> In more recent years, however, Rule 403 has rarely been a factor and certainly has not been the tool for rigid scrutiny that it once was. However, the Eleventh Circuit's decision in *United States v. Bowman*,<sup>38</sup> demonstrates there are still situations in which Rule 403 can and should play a role.

In *Bowman* the government charged defendant, the international president of a motorcycle club, with various offenses, including racketeering and conspiracy to murder. During trial, the government sought to admit the motorcycle club's constitution. Among other things, the constitution provided that membership in the club was limited to whites. Defendant asked the court to redact the whites-only provision on the ground that it was not relevant. The court admitted the document, and when the government displayed portions of the document on an overhead projector, the whites-only provision was visible to the jury. On appeal, defendant contended that this provision was so unfairly prejudicial and its probative value was so slight that it should have been excluded under

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33. *United States v. Ortiz*, 857 F.2d 900, 906 (2d Cir. 1988); *United States v. Johnson*, 767 F.2d 1259, 1270 (8th Cir. 1985).

34. 312 F.3d at 1258.

35. *Id.*

36. FED. R. EVID. 403.

37. *See, e.g.*, Marc T. Treadwell, *Evidence*, 38 MERCER L. REV. 1253 (1987).

38. 302 F.3d 1228 (11th Cir. 2002).

Rule 403.<sup>39</sup> The Eleventh Circuit agreed and sent a strong message on the subject.<sup>40</sup>

The uneasy racial history of criminal law in the United States has yielded a simple rule-of-thumb: "There is no place in a criminal prosecution for gratuitous references to race, especially when a defendant's life hangs in the balance. Elementary concepts of equal protection and due process alike forbid a prosecutor to seek to procure a verdict on the basis of racial animosity." In this case, the Government, whose interest "is not that it shall win a case, but that justice shall be done," should have scrupulously avoided the possibility that the jury's verdict might be clouded by racial issues. Furthermore, the court could have, and should have, prevented the injection of racial issues by simply redacting the whites-only policy.<sup>41</sup>

Defendant's victory, however, was pyrrhic. Noting that the offensive language was only "a single phrase in a single sentence on each of four documents admitted into evidence" and that evidence of defendant's guilt was overwhelming, the court held that although the district court erred when it admitted the language, this did not adversely affect defendant's substantial rights.<sup>42</sup> Therefore, the court found no reversible error.<sup>43</sup>

#### IV. ARTICLE VI: WITNESSES

Federal Rule of Evidence 606(b) sharply limits the use of juror testimony to challenge a verdict.<sup>44</sup> A juror may testify only with regard to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."<sup>45</sup> Thus, for example, a juror may not testify about alleged improper conduct inside the jury room.<sup>46</sup> In *United States v. Venske*,<sup>47</sup> defendants attempted to attack their convictions by alleging juror misconduct. In support of their motions for new trial, they relied on the affidavits of two private investigators. One investigator's affidavit was based on statements allegedly made to the

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39. *Id.* at 1237-40.

40. *Id.* at 1240.

41. *Id.* (quoting *Smith v. Farley*, 59 F.3d 659, 663 (7th Cir. 1995); *Berger v. United States*, 295 U.S. 78, 88 (1935)).

42. *Id.*

43. *Id.*

44. FED. R. EVID. 606(b).

45. *Id.*

46. *Id.* This differs from Georgia law, which allows jurors to testify in support of, but not against, their verdict. O.C.G.A. § 9-10-9 (1982).

47. 296 F.3d 1284 (11th Cir. 2002).

investigator by the former fiancée of a juror. The affidavit did not set forth any facts suggesting outside influence on the jury's deliberations but rather alleged that the jurors were biased and that some jurors placed pressure on others. The second affidavit was based on statements made to the investigator by the jury's foreperson, and this affidavit did suggest some extraneous influence on the jury. The investigator claimed he interviewed the jurors as part of a book-writing project sponsored by the brother-in-law of one defendant.<sup>48</sup>

The district court ruled that the first affidavit clearly could not be considered because it challenged "the jury's internal workings and deliberative process."<sup>49</sup> To the extent the affidavit suggested any external pressure that might be competent under Rule 606(b), the district court concluded that defendants had not met their burden of establishing juror misconduct. With regard to the second affidavit, the district court concluded that on its face the affidavit contained allegations that the court could consider pursuant to Rule 606(b). However, the district court refused to consider the affidavit because it found that defendants violated a local rule prohibiting parties from contacting jurors except in limited situations.<sup>50</sup> The district court, after hearing evidence, concluded that the book-writing project was a sham intended to circumvent the local rule.<sup>51</sup>

On appeal, the Eleventh Circuit affirmed the district court's ruling that the first affidavit either violated Rule 606(b) or, to the extent that it did not, it did not contain sufficient evidence of extrinsic influence on jurors.<sup>52</sup> With regard to the second affidavit, the court concluded that the district court's finding that defendants violated the local rule was not clearly erroneous.<sup>53</sup> However, defendants argued that the local rule, by limiting their contact with jurors, violated their Sixth Amendment constitutional right to trial by an impartial jury and that district courts did not have authority to enact such local rules.<sup>54</sup> The Eleventh Circuit disagreed.<sup>55</sup> Such local rules, the court reasoned, serve "the court's strong interest in protecting jurors from threats and needless harassment from unsuccessful parties."<sup>56</sup> In addition, the judiciary has a

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48. *Id.* at 1287-88.

49. *Id.* at 1288.

50. *Id.* (citing M.D. FLA. R. 5.01(d)).

51. *Id.* at 1289.

52. *Id.* at 1290.

53. *Id.* at 1291-92.

54. *Id.* at 1291.

55. *Id.*

56. *Id.* at 1292.

strong interest in preserving the finality of verdicts.<sup>57</sup> These interests are served by such local rules. Although not specifically mentioned by the court, the local rule did not absolutely prohibit contact with jurors but rather set forth a procedure for a party to follow if he believes grounds exist for challenging a verdict. This factor was significant in a previous Eleventh Circuit decision, *United States v. Cuthel*,<sup>58</sup> upholding a similar rule.<sup>59</sup>

#### V. ARTICLE VII: OPINIONS AND EXPERT TESTIMONY

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>60</sup> dramatically changed the landscape of expert testimony. In *Daubert* the Supreme Court held that the Federal Rules of Evidence preempted decades of court decisions governing the admission of expert testimony.<sup>61</sup> Specifically, the Rules supplanted the longstanding test for the admissibility of scientific testimony established in *Frye v. United States*.<sup>62</sup> In *Frye* the United States Court of Appeals for the District of Columbia held that the admissibility of expert testimony is determined by whether the subject matter of the testimony has been generally accepted as reliable in the relevant scientific community.<sup>63</sup> The Supreme Court in *Daubert* held that the *Frye* “general acceptance” test was “incompatible with the Federal Rules of Evidence.”<sup>64</sup> Instead, the Court stated that district courts must serve as gatekeepers to ensure that only reliable expert testimony reaches the jury.<sup>65</sup> After *Daubert* (the principles of which have now been codified in the Federal Rules of Evidence),<sup>66</sup> lower federal courts struggled to define the finer points of *Daubert* analysis. During this time, the Eleventh Circuit saw two of its more significant *Daubert* decisions reversed by the Supreme Court.<sup>67</sup> However, things have settled somewhat, and the application of *Daubert* has become more routine, although, in the view of some, no less draconian.

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57. *Id.*

58. 903 F.2d 1381 (11th Cir. 1990). *Cuthel* is discussed in Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 1173, 1183 (1992).

59. 903 F.2d at 1382-83.

60. 509 U.S. 579 (1993).

61. *Id.* at 597.

62. 293 F. 1013 (D.C. Cir. 1923).

63. *Id.* at 1014.

64. 509 U.S. at 589.

65. *Id.* at 589-90.

66. FED. R. EVID. 702.

67. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997).

The exacting and demanding character of the gatekeeper role assigned to district courts by *Daubert* is demonstrated by the Eleventh Circuit's decision in *Rider v. Sandoz Pharmaceuticals Corp.*<sup>68</sup> In *Rider* plaintiffs contended that the drug Parlodel caused them to suffer hemorrhagic strokes. To support this contention, plaintiffs relied on five expert witnesses, two of whom testified during a three-day *Daubert* hearing—all to no avail. The district court concluded that plaintiffs' expert evidence did not meet the reliability requirement of *Daubert*.<sup>69</sup> It is beyond the scope of this Article to discuss in depth the factual details of plaintiffs' expert evidence. It is sufficient to say that plaintiffs adduced voluminous evidence tending to support their theory of causation. Unfortunately, plaintiffs could not adduce clear epidemiological evidence of a causal relationship. This was significant to the Eleventh Circuit.<sup>70</sup> “[T]his case presents the difficult question of whether the evidence submitted to prove causation, in the absence of epidemiology, was sufficient to meet the requirements of *Daubert*.”<sup>71</sup> Plaintiffs relied heavily on case reports, which the Eleventh Circuit characterized as “anecdotal evidence.”<sup>72</sup> Case reports, the Eleventh Circuit responded,

may rule out other potential causes of the effect, but they do not rule out the possibility that the effect manifested in the reported patient's case is simply idiosyncratic or the result of unknown confounding factors. As such, while they may support other proof of causation, case reports alone ordinarily cannot prove causation.<sup>73</sup>

Plaintiffs also relied on “dechallenge/rechallenge data.”<sup>74</sup> If successful, the dechallenge/rechallenge test demonstrates that a condition disappears when exposure to an agent ceases and reappears upon re-exposure.<sup>75</sup> The Eleventh Circuit took a dim view of this evidence.<sup>76</sup> While the tests suggested “a possibility that Parlodel may cause localized vasoconstriction, and may suggest that it causes hypotension,” the tests did not involve strokes.<sup>77</sup> Therefore, it could not be considered reliable evidence of a relationship between Parlodel and strokes.<sup>78</sup> Moreover,

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68. 295 F.3d 1194 (11th Cir. 2002).

69. *Id.* at 1196.

70. *Id.* at 1198-99.

71. *Id.* at 1199.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.*

77. *Id.* at 1200.

78. *Id.*

even if the tests did involve strokes, “dechallenge/rechallenge tests are still case reports and do not purport to offer definitive conclusions as to causation.”<sup>79</sup>

Plaintiffs also offered evidence that drugs in the same class as Parlodel caused vasoconstriction.<sup>80</sup> However, this class of drugs was broad and varied, and the court refused to conclude that the district court abused its discretion when it concluded that plaintiffs failed to establish why the mechanism that might cause some drugs in that class to act as vasoconstrictors would likely be the same mechanism by which the main constituent of Parlodel would cause vasoconstriction.<sup>81</sup>

Next, the court concluded that animal studies offered by plaintiffs, which tended to establish that the main constituent of Parlodel caused vasoconstrictive properties in animals, did not amount to evidence that this constituent could cause strokes.<sup>82</sup>

Finally, the fact that the Food and Drug Administration withdrew approval of Parlodel was not evidence that Parlodel caused strokes but rather was simply a statement that “possible risks outweigh[ed] the limited benefits of the drug. This risk-utility analysis involves a much lower standard than that which is demanded by a court of law.”<sup>83</sup>

In conclusion, the court acknowledged that epidemiological studies are not necessary to prove medical causation but held that the extensive evidence offered by plaintiffs was not sufficient to prove reliably that Parlodel could cause hemorrhagic strokes.<sup>84</sup>

To admit the plaintiffs’ evidence, the Court would have to make several scientifically unsupported “leaps of faith” in the causal chain. The *Daubert* rule requires more. Given time, information, and resources, courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. “The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.”<sup>85</sup>

The harsh implications of *Daubert* are also illustrated by the Eleventh Circuit’s decision in *McCorvey v. Baxter Healthcare Corp.*<sup>86</sup> In *McCorvey* plaintiff asserted that a catheter manufactured by defendant was

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79. *Id.*

80. *Id.*

81. *Id.* at 1200-01.

82. *Id.* at 1201.

83. *Id.*

84. *Id.* at 1203.

85. *Id.* at 1202 (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996)).

86. 298 F.3d 1253 (11th Cir. 2002).

defective because the catheter spontaneously erupted after plaintiff's physician had inserted the catheter in his bladder. Perhaps not incidentally, the physician had filled the catheter with a volume of water greater than recommended by defendant to test the bladder. In response to defendant's motion for summary judgment, plaintiff offered affidavits from two medical experts and one engineering expert. Each affidavit contended that the catheter was defective and was not safe for its intended use. Defendant moved to strike the engineer's affidavit on the basis of Rule 702. The district court struck the affidavit after concluding that the engineer had not tested alternative designs, had not talked with medical personnel, did not cite scientific literature supporting his opinions, and did not consider or test other possible explanations for the catheter's failure. Plaintiff contended that defendant's criticism went to the weight of the affidavit rather than its admissibility and that the district court improperly weighed the credibility of the engineer's affidavit.<sup>87</sup> The Eleventh Circuit concluded that this argument did nothing more than attack the gatekeeper function of the trial courts in weighing the admissibility of expert testimony.<sup>88</sup> This, the court concluded, was contrary to *Daubert*, which "inherently require[d] the trial court to conduct an exacting analysis of the proffered expert's methodology."<sup>89</sup> The question, the court noted, is whether the trial court abused its discretion when it concluded that the affidavit failed to meet the requirements of Rule 702.<sup>90</sup> Noting that it was plaintiff's burden to demonstrate that the engineer was qualified to competently render the opinions contained in his affidavit, that the engineer's methodology was sufficiently reliable, and that the testimony would assist the trier of fact, the court held that it could not conclude that the district court abused its discretion.<sup>91</sup>

Federal Rule of Evidence 703 allows experts to rely upon data which itself would not have been admissible if this data is "of a type reasonably relied upon by experts in the particular field in forming opinions."<sup>92</sup> The Eleventh Circuit construed Rule 703 broadly in *United States v. Brown*.<sup>93</sup> In *Brown* a Drug Enforcement Agency ("DEA") agent testified, at defendant's trial for cocaine possession with intent to distribute, as "an expert in the field of drug valuation, that the

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87. *Id.* at 1255-57.

88. *Id.* at 1257.

89. *Id.*

90. *Id.* at 1256.

91. *Id.* at 1257.

92. FED. R. EVID. 703.

93. 299 F.3d 1252 (11th Cir. 2002).

wholesale value in Bermuda of the cocaine base with which Brown had been found was approximately \$217,000.<sup>94</sup> Although this agent had substantial experience investigating narcotics smuggling, he had never been assigned to Bermuda.<sup>95</sup> On cross-examination, he admitted that he could not have given his valuation testimony “without information provided to him by an intelligence agent in another DEA office, who herself had conferred with Bermuda authorities to arrive at an estimated value.”<sup>96</sup> The Eleventh Circuit ruled that the agent’s testimony was based on his experience and expertise and that the information he received from other law enforcement agents and Bermuda authorities was the type of information regularly relied upon in valuing narcotics.<sup>97</sup> Moreover, when testifying on questions of value, the federal courts have long recognized that a witness may base his opinion on hearsay information.<sup>98</sup>

The Eleventh Circuit then addressed the constitutional implications of the admission of hearsay testimony.<sup>99</sup> The confrontation clause bars the introduction of hearsay evidence against criminal defendants unless the hearsay falls within a “‘firmly rooted hearsay exception’ or the hearsay statement at issue carries a ‘particularized guarantee[] of trustworthiness.’”<sup>100</sup> In view of Rule 703 and common law precedent holding that valuation witnesses may rely on hearsay in forming their opinions, the Eleventh Circuit concluded that the agent’s testimony was based on a firmly rooted exception to the hearsay rule and therefore did not violate defendant’s constitutional right.<sup>101</sup>

#### VI. ARTICLE VIII: HEARSAY

Federal Rule of Evidence 801(d)(2)(E) provides that out of court statements by co-conspirators are not hearsay if they were made “during the course and in furtherance of the conspiracy.”<sup>102</sup> Decisions interpreting Rule 801(d)(2)(E) perhaps provide some insight on why evidentiary issues figure less and less prominently in criminal appeals.

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94. *Id.* at 1255.

95. *Id.* at 1256.

96. *Id.* (footnote omitted).

97. *Id.* at 1257.

98. *Id.* at 1258.

99. *Id.*

100. *Id.* (alteration in original) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). The inherent conflict between hearsay evidence and the confrontation clause has been a recurring issue that has generally been resolved in favor of the prosecution. See, e.g., Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 1165, 1183-86 (2000).

101. 299 F.3d at 1257.

102. FED. R. EVID. 801(d)(2)(E).

When the Author began this annual survey of Eleventh Circuit evidence decisions seventeen years ago, the Eleventh Circuit applied the so-called *James* test to determine the admissibility of co-conspirators' statements. In *United States v. James*,<sup>103</sup> the old Fifth Circuit held that a co-conspirator's statements were not admissible unless the prosecution showed, by evidence other than the statement itself, that a conspiracy existed, that the declarant and defendant were members of the conspiracy, and that the co-conspirator made the statements in furtherance of the conspiracy.<sup>104</sup> However, the Supreme Court, in *Bourjaily v. United States*,<sup>105</sup> overruled *James* to the extent that it prohibited district courts from relying on a co-conspirator's statements when making preliminary factual determinations concerning the existence of a conspiracy.<sup>106</sup> In other words, the Supreme Court held that the co-conspirator's statement itself could prove the existence of the conspiracy, and thus, the government did not have to offer independent evidence proving the conspiracy's existence.<sup>107</sup> After *Bourjaily* the number of appeals in which Rule 801(d)(2)(E) has been a factor have dramatically decreased, and it has been a number of years since the Eleventh Circuit has reversed a defendant's conviction because of the erroneous admission of a co-conspirator's out of court statement. Indeed, during the Author's years of surveying Eleventh Circuit evidentiary decisions, the Author has encountered no Eleventh Circuit decision rendered since *Bourjaily* reversing a defendant's conviction because of the erroneous admission of a co-conspirator's statement.

This trend continued during the current survey period. In *United States v. Miles*,<sup>108</sup> defendant, who had been convicted of narcotics offenses, contended that the district court erroneously admitted a statement by an alleged co-conspirator. A witness testified that the alleged co-conspirator told him that he could provide him with "speed" and that defendant was the source of the drug.<sup>109</sup> The Eleventh Circuit acknowledged that to be admissible under Rule 801(d)(2)(E), the prosecution must prove by a preponderance of the evidence that a conspiracy existed, that the conspiracy included the declarant and the defendant, and that the statement was made during the course of and

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103. 590 F.2d 575 (5th Cir. 1979).

104. *Id.* at 581.

105. 483 U.S. 171 (1987).

106. *Id.* at 183-84.

107. *Id.*

108. 290 F.3d 1341 (11th Cir. 2002).

109. *Id.* at 1351.

in furtherance of the conspiracy.<sup>110</sup> Defendant contended that the government had not proved that the statement met the third prong of the test.<sup>111</sup> The Eleventh Circuit disagreed, concluding that the evidence would support a finding by the district court that the statement was made during and in furtherance of the conspiracy.<sup>112</sup> However, the district court did not expressly make such a finding.<sup>113</sup> Nevertheless, the Eleventh Circuit held that express findings were not necessary and that the district court “implicitly found that [the co-conspirator’s] statement was made in the course of, and in furtherance of, a conspiracy.”<sup>114</sup>

Defendant in *Miles* also contended that the district court erroneously admitted testimony of a witness from a previous trial. At that trial, the district court granted defendant’s motion for judgment of acquittal on certain counts and mistried all remaining counts. The witness primarily testified at the first trial about defendant’s relationship with a methamphetamine laboratory in Atlanta. On cross-examination, defendant’s attorney focused on defendant’s relationship with that laboratory but also probed extensively defendant’s motives to lie. The district court acquitted defendant on charges relating to that laboratory. Because the witness was unavailable at the second trial, the prosecution relied on his testimony from the first trial to prove that defendant conspired to distribute methamphetamine with other manufacturers. Defendant objected, contending that the testimony was offered at the second trial to prove a different conspiracy than at the first trial.<sup>115</sup>

Under Rule 804(b)(1), a witness’s former testimony is admissible if the party against whom the testimony is being offered had an opportunity and similar motive to develop testimony at the first trial.<sup>116</sup> The Eleventh Circuit acknowledged that the prosecution had to establish that defendant at the second trial had a motive to cross-examine similar to his motive at the first trial.<sup>117</sup> However, this does not mean identical motive, and the determination of whether the motives are sufficiently similar is inherently factual.<sup>118</sup> The Eleventh Circuit concluded that the prosecution at both trials offered the testimony to prove defendant’s

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1352.

114. *Id.*

115. *Id.* at 1345, 1352.

116. *Id.* at 1352-53 (citing FED. R. EVID. 804(b)(1)).

117. *Id.*

118. *Id.* at 1353.

involvement in a methamphetamine conspiracy.<sup>119</sup> Even though charges relating to the Atlanta laboratory were dismissed at the first trial, the Eleventh Circuit nevertheless concluded that defendant's motives to cross-examine defendant were sufficiently similar in both trials.<sup>120</sup>

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119. *Id.*

120. *Id.*