

Evidence

by Marc T. Treadwell*

I. INTRODUCTION

This survey year saw the continuation of what has become a clear trend in Eleventh Circuit evidence decisions. In stark contrast to the days when the Eleventh Circuit rigorously examined district court evidentiary decisions and freely reversed those decisions, the Eleventh Circuit now studiously defers to district judges. The reason for this trend can be debated. Perhaps because most evidentiary issues addressed by the Eleventh Circuit arise in the context of criminal cases, and because Eleventh Circuit judges are more conservative today, the Eleventh Circuit is less likely to reverse criminal convictions, particularly on evidentiary grounds. Or perhaps that the abuse of discretion standard of review, which governs evidentiary issues, mandates deference to district judges: something that the old “activist” judges ignored. The answer no doubt depends on one’s perspective. One thing, however, is clear—do not expect the Eleventh Circuit to flyspeck district court evidentiary rulings.

It may be argued—not by the author, but by some—that this increasingly lower level of scrutiny of district court evidentiary decisions can lead to prosecutorial sloppiness and cavalier consideration of objections.¹ For those who want to make that argument, the Eleventh Circuit’s seventy-page decision in *United States v. Baker*² provides some

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1. Some Georgia appellate judges have expressed the same concern, for example, with regard to the amazingly broad necessity exception to the hearsay rule, complaining that it has become easier for prosecutors and law enforcement officers to rely on hearsay evidence than to do the legwork necessary to get direct evidence. See Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 263, 291 (2000) (discussing *Ledford v. State*, 239 Ga. App. 237, 520 S.E.2d 225 (1999)).

2. 432 F.3d 1189 (11th Cir. 2005).

ammunition. In *Baker* eleven defendants appealed their drug-related convictions contending that the district court made numerous errors in its evidentiary rulings. The Eleventh Circuit readily agreed.³ For example, a police sergeant testified that his investigation “revealed” that several of the defendants were involved in a totally unrelated shooting that left one person dead and two wounded.⁴ Clearly, this testimony was inadmissible hearsay and inadmissible extrinsic act evidence in violation of Rule 404(b).⁵ The fact that the defendants may have been involved in an unrelated murder had nothing to do with the drug charges against them. The district court, in another ruling, allowed a homicide detective to testify that he had “‘received information’ from an anonymous caller” stating that several of the defendants were involved in another shooting.⁶ The district court admitted the evidence, not to prove the truth of the statement by the anonymous caller, but rather to explain how the detective conducted his investigations.⁷ The Eleventh Circuit was blunt: “We do not understand this reasoning.”⁸ The court held that the district court abused its discretion by admitting the testimony.⁹

Page after page, the Eleventh Circuit reviewed similar claims of errors by the district court and ruled repeatedly that the district court had abused its discretion by admitting hearsay evidence and inadmissible extrinsic act evidence. As it turned out, the Eleventh Circuit deemed most of the errors harmless; however, the court did reverse the convictions of two of the defendants.¹⁰ No extended discussion of the court’s analyses of the district court’s errors is necessary because the errors were obvious; indeed, many were so clearly erroneous they were reversed under the plain error standard.¹¹ Admittedly, this is an extreme example of the wholesale admission of clearly inadmissible evidence, but the point some would make is that decreased appellate scrutiny may lead to less circumspect district court decisions, and the district court’s ruling in *Baker* may support their point.

Several amendments to the Federal Rules of Evidence are scheduled to become effective December 1, 2006. Current information on the status

3. *Id.* at 1259.

4. *Id.* at 1208.

5. FED. R. EVID. 404(b).

6. 432 F.3d at 1208.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1259.

11. The plain error standard is discussed below.

of the proposed Rules can be found at the United States Courts' website.¹²

Rule 404,¹³ which governs the use of character evidence offered to prove conduct, will be amended to clarify that character evidence is generally not admissible in civil cases.¹⁴ Apparently, at the behest of the Criminal Division of the Department of Justice, Rule 408,¹⁵ which addresses the admissibility of evidence of conduct and statements made in compromise negotiations, will be amended to expand the use of settlement discussions in criminal cases.¹⁶ This change will be particularly relevant to Eleventh Circuit criminal law practitioners given the court's decision, discussed below, in *United States v. Arias*.¹⁷ The logic of the proposed amendment is questionable, especially if one accepts that statements made during settlement discussions, accompanied as they often are by puffing and grandstanding, are dubious evidence of fault. Also, public policy favors compromise; therefore, statements made during compromise negotiations should not be admissible. Why those statements would be more probative in a criminal case than in a civil case is questionable.

Current Rule 606(b)¹⁸ broadly bars the admission of juror testimony about jury verdicts.¹⁹ The Rule allows an exception: jurors may testify regarding "extraneous prejudicial information . . . improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."²⁰ The proposed amendment would allow a second exception that would permit jurors to testify on the issue of whether the verdict recorded is the result of a clerical mistake.²¹

Rule 609²² governs the use of convictions to impeach a witness's credibility. Currently, a witness can be impeached with a conviction if the crime "involved dishonesty or false statement."²³ The proposed

12. U.S. Courts, *Federal Rulemaking*, available at <http://www.uscourts.gov/rules/newrules6.html> (last visited Apr. 7, 2006).

13. FED. R. EVID. 404.

14. U.S. Courts, *Federal Rulemaking*, available at <http://www.uscourts.gov/rules/newrules6.html> (containing proposed amendments to FED. R. EVID. 404).

15. FED. R. EVID. 408.

16. U.S. Courts, *Federal Rulemaking*, available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page_299, at 7.

17. 431 F.3d 1327 (11th Cir. 2005).

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

19. *Id.*

20. *Id.*

21. U.S. Courts, *Federal Rulemaking*, available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=311>, at 18.

22. FED. R. EVID. 609.

23. *Id.* at 609(a)(2).

amendment to Rule 609 would permit the admission of a conviction to impeach a witness's credibility if the conviction was for a crime that "readily can be determined" to have been "an act of dishonesty or false statement by the witness."²⁴ Although the difference in language is subtle, the proposed amendment purports to resolve the conflict that now exists among the circuits of how to determine whether a conviction involves dishonesty or false statement.²⁵ Specifically, the conflict is whether courts may only examine the strict elements of the crime to determine whether the offense involves dishonesty or false statement.²⁶ The Advisory Committee opted to expand Rule 609(a)(2) to permit impeachment "if the underlying act of deceit readily can be determined from information such as the charging instrument."²⁷

The Advisory Committee on Evidence Rules has proposed a new rule, Rule 502,²⁸ regarding waiver of the attorney-client privilege. At the time of publication, the rule had just been released for comment. If adopted, this will be the first time that the drafters of the Federal Rules of Evidence have ventured into the land of privileges. Pursuant to current Rule 501,²⁹ the drafters have heretofore left it to the courts to develop rules and principles regarding privileges.³⁰ Proposed Rule 502(a) provides that the voluntary disclosure of "any significant part" of privileged attorney-client communications or work product information constitutes a waiver of the privilege or protection.³¹ However, disclosure does not constitute a waiver if (1) the disclosure is itself privileged or protected; (2) if the disclosure, under certain circumstances, was inadvertent; or (3) if the disclosure was made to a governmental agency during an investigation by that agency.³² Apparently, one principal purpose of the proposed Rule is to deal with inadvertent disclosures. The exception for inadvertent disclosures applies only if "the holder of the privilege or work product protection took reasonable precautions to

24. U.S. Courts, *Federal Rulemaking*, available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=315>, at 22.

25. *Id.* at 25.

26. *Id.*

27. U.S. Courts, *Federal Rulemaking*, available at <http://www.uscourts.gov/rules/newrules6.html>.

28. FED. R. EVID. 502.

29. FED. R. EVID. 501.

30. *Id.*

31. Proposed amendments to FED. R. EVID. 502(a), available at <http://www.lexisnexis.com/applieddiscovery/lawlibrary/ProposedRuleEvidence502.pdf>.

32. *Id.*

prevent disclosure and took reasonably prompt measures . . . to rectify the error.”³³

Subdivision (c) of proposed Rule 502 provides that agreements between or among parties concerning non-waiver, while binding on the parties to the agreement, are not binding on non-parties unless the agreement is approved by the court.³⁴ For example, if during the course of a deposition the parties agree that a witness can testify about a particular matter and that his testimony will not constitute a waiver of the attorney-client privilege or work product protection, the parties would have to stop the deposition and get court approval of the agreement if they want their agreement to apply to nonparties. The comments to Subdivision (c) make clear that the drafters are contemplating the impact of such agreements on strangers to the case.³⁵ However, Subdivision (c) does not limit from its scope joint defense agreements or similar agreements pursuant to which parties with a common legal interest agree to share information without waiving attorney-client privilege or work product protection. However, it also appears from the comments to the new Rule that the exception in Subdivision (b)(1)—providing that a disclosure that is privileged or protected is not a waiver³⁶—is intended to encompass joint representation agreements. Because the disclosure among parties to a joint defense agreement is not itself a disclosure, then there is no waiver, regardless of whether the agreement has court approval. At least this argument is available to parties entering such agreements. The new Rule would be helpful if it explicitly recognized joint defense and similar agreements.

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.³⁷ In the absence of an objection, a party appealing the admission or exclusion of evidence must establish “plain error.”³⁸ The Eleventh Circuit’s decision in *United States v. Chau*³⁹ contains an interesting

33. Proposed amendments to FED. R. EVID. 502(b)(2), available at <http://www.lexisnexis.com/applieddiscovery/lawlibrary/Proposed Rule Evidence502.pdf>.

34. Proposed amendments to FED. R. EVID. 502(c), available at <http://www.lexisnexis.com/applieddiscovery/lawlibrary/Proposed Rule Evidence502.pdf>.

35. Proposed amendments to FED. R. EVID. 502, available at <http://www.lexisnexis.com/applieddiscovery/lawlibrary/Proposed Rule Evidence502.pdf>.

36. Proposed amendments to FED. R. EVID. 502(b)(1), available at <http://www.lexisnexis.com/applieddiscovery/lawlibrary/Proposed Rule Evidence502.pdf>.

37. FED. R. EVID. 103(a)(1).

38. FED. R. EVID. 103(d).

39. 426 F.3d 1318 (11th Cir. 2005).

plain error analysis in the context of the United States Supreme Court's landmark decision in *Crawford v. Washington*.⁴⁰ As discussed in last year's survey,⁴¹ the Supreme Court in *Crawford* overruled *Ohio v. Roberts*⁴² and held that out-of-court "testimonial" statements are not admissible at trial unless the declarant is unavailable and the defendant had prior opportunity to cross-examine the witness.⁴³

In *Chau* the defendant challenged the use of hearsay evidence at his sentencing hearing. Relying on *Crawford*, the defendant argued that the Sixth Amendment⁴⁴ barred the use of testimonial statements at sentencing hearings. First, the Eleventh Circuit noted that the only objection the defendant raised below was based on hearsay; the defendant did not specifically raise a Sixth Amendment constitutional challenge to the admission of the hearsay statement.⁴⁵ The Eleventh Circuit concluded that the defendant's hearsay objection was not sufficient to preserve a confrontation clause objection.⁴⁶ Thus, the standard of review was whether the district court committed plain error when it considered the hearsay statements at the sentencing hearing.⁴⁷ Plain error, the court noted, means that the error is clear under current law.⁴⁸ Thus, "there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving [the issue]."⁴⁹

Turning to *Crawford*, the court noted that prior to the Supreme Court's decision in *Crawford*, courts had universally held that the admission of hearsay during the sentencing process did not violate the confrontation clause.⁵⁰ The court next noted that, in *Crawford*, the court's holding applied only to trials and did not extend to sentencing hearings, and had not since been extended to sentencing hearings.⁵¹ Indeed, the court noted that other circuits have held that *Crawford* did not alter the rule that hearsay testimony is admissible at sentencing hearings.⁵² Thus, it clearly could not be said that clear precedent prohibited the use of testimonial hearsay statements during the

40. 541 U.S. 36 (2004).

41. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 213 (2005).

42. 448 U.S. 56 (1980).

43. *Crawford*, 541 U.S. at 59.

44. U.S. CONST. amend. VI.

45. *Chau*, 426 F.3d at 1321.

46. *Id.* at 1321-22.

47. *Id.*

48. *Id.* at 1322.

49. *Id.* (quoting *United States v. Lejarde-Reda*, 319 F.3d 1288, 1299 (11th Cir. 2003)).

50. *Id.* (citing *Chandler v. Moore*, 240 F.3d 907, 918 (11th Cir. 2001)).

51. *Id.* at 1323.

52. *Id.* See, e.g., *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005).

sentencing process. Therefore, the district court did not commit plain error when it considered hearsay evidence.⁵³

In *Cook v. Sheriff of Monroe County, Florida*,⁵⁴ the Eleventh Circuit sent a warning to lawyers with regard to the use of motions in limine. As discussed in more detail below, the district court in *Cook* tentatively granted the defendant's motion in limine to exclude the testimony of the plaintiff's expert.⁵⁵ At trial, the plaintiff did not attempt to tender the testimony of her expert. This potentially raised the issue of whether the defendant had waived her right to appeal the tentatively granted motion in limine. Recently amended Rule 103⁵⁶ provided some, although perhaps not much, clarity with regard to pretrial rulings on motions in limine.⁵⁷ Rule 103 now provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."⁵⁸ Although the Eleventh Circuit has not squarely addressed the issue, when a district court rules "*in limine tentatively* to exclude evidence, most courts require that the party seeking admission of the evidence offer the evidence *again* at trial in order to preserve the issue for appeal."⁵⁹

As it turned out, the court did not have to resolve that issue because the district court had assured the plaintiff that she had preserved the issue for appeal.⁶⁰ Clearly, however, prudence dictates that when a motion in limine excludes evidence, one should make a proffer of the excluded evidence at trial. Conversely, if the motion in limine is not granted, the moving party should renew his objection when the disputed evidence is tendered.

III. ARTICLE III: PRESUMPTIONS

Federal Rule of Evidence 302⁶¹ provides that "[i]n civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which [s]tate law supplies the rule of decision is determined in accordance with [s]tate law."⁶² Both

53. *Chau*, 426 F.3d at 1324.

54. 402 F.3d 1092 (11th Cir. 2005).

55. *Id.* at 1109.

56. FED. R. EVID. 103.

57. See Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 1403-04 (2001).

58. FED. R. EVID. 103 (emphasis added).

59. *Cook*, 402 F.3d at 1109.

60. *Id.*

61. FED. R. EVID. 302.

62. *Id.*

Georgia and federal law, with some differences, recognize that an adverse inference or presumption and other possible sanctions can arise from the destruction or “spoliation” of evidence. For example, the destruction of evidence by a party may give rise to a presumption that the evidence would have been harmful to that party.⁶³

In *Flury v. Daimler Chrysler Corp.*,⁶⁴ the Eleventh Circuit considered an issue of first impression within the circuit with regard to whether state or federal law governed the imposition of the sanction of dismissal for spoliation of evidence in a diversity case.⁶⁵ In *Flury* the plaintiff brought suit against the defendant for alleged defects in her automobile that she claimed exacerbated the injuries she suffered in an accident. The car was destroyed before the defendant had an opportunity to inspect the vehicle. The district court, relying on Georgia law, instructed the jury with regard to the spoliation presumption, including that the jury could balance the relative fault of the parties with regard to the destruction of the evidence and the failure of defendant to examine the evidence. As the Eleventh Circuit put it, the district court “ultimately left the issue of spoliation to the jury.”⁶⁶

After a verdict for the plaintiff, the defendant appealed.⁶⁷ The defendant probably contended, although the Eleventh Circuit does not explicitly state it, that merely instructing the jury on the spoliation presumption was insufficient, particularly in view of the fact that the district court’s instructions suggested that the defendant may bear some responsibility for its failure to examine the vehicle. In any event, the Eleventh Circuit proceeded to address the issue of whether the plaintiff’s claims should suffer the ultimate sanction, dismissal, because the plaintiff failed to preserve the vehicle.⁶⁸

The Eleventh Circuit first addressed whether the issue would be governed by federal or state law.⁶⁹ As noted, although the Eleventh Circuit never mentioned it, Rule 302 suggests that state law should govern, at least to the extent that the issue is whether the spoliation presumption is applicable.⁷⁰ The Eleventh Circuit noted that federal courts are split as to whether federal or state law governs the imposition

63. See *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 484 S.E.2d 249 (1997), discussed in Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 149, 151–52 (1997); *Penalty Kick Mgmt. Ltd. v. Coca-Cola Co.*, 318 F.3d 1284 (11th Cir. 2003).

64. 427 F.3d 939 (11th Cir. 2005).

65. *Id.* at 943.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. FED. R. EVID. 302.

of sanctions for spoliation of evidence in a diversity suit.⁷¹ With no discussion, the Eleventh Circuit simply agreed with the Fourth and Fifth Circuits and held that federal law would govern the imposition of sanctions for spoliation of evidence.⁷² Furthermore, the court concluded that sanctions for spoliation constitute an evidentiary matter and, “in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in the federal courts.”⁷³ This is clearly true, of course, but it fails to recognize that Federal Rule of Evidence 302 specifically states that state law governs presumptions.⁷⁴ Although the court does not say it, arguably the effect of its decision is that if the court determines that the jury should be instructed that it can draw an inference against a party for the destruction of evidence, then state law would govern. If, on the other hand, a district court concludes that the sanction of dismissal is appropriate, then federal law would govern.

Ironically, after the Eleventh Circuit concluded that federal law applied, it then turned to Georgia law for guidance in determining whether the sanction of dismissal was appropriate for plaintiff’s failure to preserve her vehicle.⁷⁵ One factor in determining the consequences of spoliation of evidence is “whether the plaintiff acted in good or bad faith.”⁷⁶ Arguably, Georgia law requires less of a showing of bad faith than federal law.⁷⁷ Notwithstanding its conclusion that federal law applied, the Eleventh Circuit, relying on Georgia law, held that the facts demanded the sanction of dismissal.⁷⁸

IV. ARTICLE IV: RELEVANCY

Bizarre is not a word that one would normally use to describe Eleventh Circuit survey decisions, and the Author will not use it here. However, the two Eleventh Circuit panel decisions in *United States v. Matthews*⁷⁹ interpreting Rule 404(b)⁸⁰ are certainly out of the ordinary, and extensive discussion of the two decisions is merited.

71. *Flury*, 427 F.3d at 943.

72. *Id.*

73. *Id.* at 944 (citing *Johnson v. William C. Ellis & Sons Works, Inc.*, 609 F.2d 820, 821 (5th Cir. 1980)).

74. FED. R. EVID. 302.

75. *Flury*, 427 F.3d at 944-45.

76. *Id.* at 945 (citing *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell*, 258 Ga. App. 767, 768-69, 574 S.E.2d 923, 926 (2002)); *Penalty Kick*, 318 F.3d at 1295.

77. See *Flury*, 427 F.3d at 946 (citing *Bridgestone*, 258 Ga. App. at 768-69, 547 S.E.2d at 926-27).

78. *Flury*, 427 F.3d at 944.

79. 431 F.3d 1296 (11th Cir. 2005), *vacating* 411 F.3d 1210 (11th Cir. 2005).

80. FED. R. EVID 404(b).

First, background is appropriate. Rule 404 is the primary rule of evidence addressing the admissibility of “extrinsic act evidence,” or evidence of acts and transactions other than the one at issue. Rule 404(b) prohibits the introduction of evidence of prior misconduct offered to prove that a party is more likely to have committed the charged offense or engaged in the conduct at issue because of that prior misconduct.⁸¹ Such evidence is often called “propensity evidence.”⁸²

Although extrinsic act evidence is not admissible to prove a party’s propensity to engage in misconduct, it is admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”⁸³ The Eleventh Circuit applies a three-part test, often called the *Beechum* test, to determine the admissibility of extrinsic act evidence.⁸⁴ First, the extrinsic evidence must be relevant to an issue other than the defendant’s character.⁸⁵ Second, the prosecution must prove the defendant committed the extrinsic act.⁸⁶ Third, the evidence must survive a Rule 403⁸⁷ balancing test, that is, the probative value of the extrinsic act evidence must not be outweighed by its prejudicial effect.⁸⁸

If the Eleventh Circuit has in fact dramatically lowered its level of scrutiny of evidentiary issues, then this trend is perhaps most apparent in its Rule 404(b) decisions. When the Author first began surveying Eleventh Circuit evidence decisions, the Eleventh Circuit frequently engaged in micro-analysis and often concluded that district courts abused their discretion in admitting extrinsic act evidence. In more recent years, there have been few significant Rule 404(b) decisions, and the Eleventh Circuit has greatly expanded the use of extrinsic act evidence in criminal trials. This expansion no doubt greatly concerns the criminal defense bar because evidence that a defendant is a convicted felon clearly can have a significant impact on jurors’ mindsets.

Thus, the Eleventh Circuit’s June 8, 2005 decision in *United States v. Matthews* was no doubt met with surprised relief by the defense bar. In *Matthews* the defendant contended that the district court improperly admitted evidence of his 1991 conviction for street-level drug sales during his 2004 trial for conspiracy to distribute large quantities of

81. *Id.*

82. Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 1273, 1276 (2005).

83. FED. R. EVID. 404(b).

84. *United States v. Mills*, 138 F.3d 928, 935 (11th Cir. 1998); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

85. *Mills*, 138 F.3d at 935.

86. *Id.*

87. FED. R. EVID. 403; *Mills*, 138 F.3d at 935.

88. FED. R. EVID. 403.

cocaine. The government persuaded the district court that evidence of a 1991 conviction was relevant to prove the defendant's intent to engage in the large-scale drug trafficking activity with which he was charged. On appeal, the government argued that the defendant's mere plea of not guilty was sufficient to make intent an issue, and thus the 1991 conviction was admissible.⁸⁹ The Eleventh Circuit made clear its skepticism at the outset of its discussion: "The problem with this theory is that [it] is impossible for us to imagine a scenario under which the jury could have found that Matthews committed any of the acts described by his accusers and yet lacked the requisite guilty intent."⁹⁰ The defendant was charged with participating in numerous large cocaine deals over a period of several years.⁹¹ If the jury believed that the defendant participated in those transactions, the Eleventh Circuit continued, then there was no conceivable way that anyone could think that the defendant did not possess the intent to engage in the conspiracy.⁹² "Such conduct is not open to an innocent explanation; that is, there was no room for Matthews to say, 'Well, yes, I did those things, but I did not intend to conspire to distribute cocaine.'⁹³ In other words, there simply was no need for extrinsic act evidence to prove intent.

The government also argued that it had a great need for the extrinsic act evidence because its case rested almost entirely on co-defendants who had negotiated plea bargains. While it is true that the prosecution's need for evidence to prove its case can be a factor in the admission of extrinsic act evidence,⁹⁴ the Eleventh Circuit was not persuaded. "We do not doubt that the [g]overnment thought that it needed the extrinsic offense evidence. But it is clear that they did not need it to prove intent."⁹⁵ Indeed, the prosecution's true argument, or so thought the Eleventh Circuit, was that it needed the evidence of the 1991 conviction, not to prove intent, but rather because the prosecution feared that the jurors would not believe its witnesses at all.⁹⁶ Clearly, the court continued, the government wanted the jury to infer that the defendant

89. *Matthews*, 411 F.3d at 1224.

90. *Id.* at 1225.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* This, too, is odd to many: The weaker the government's case against a defendant, the more likely it will be able to introduce highly prejudicial extrinsic act evidence.

95. *Id.*

96. *Id.*

was dealing drugs in 1991 and was still dealing drugs.⁹⁷ “This is precisely the inference the law does not allow.”⁹⁸

The Eleventh Circuit then turned to the government’s main argument. The government argued that, pursuant to Eleventh Circuit authority, the mere plea of guilty in a drug case renders evidence of prior drug dealing admissible.⁹⁹ The Eleventh Circuit again made its skepticism clear:

The position taken seemed to be that the plea itself renders such evidence automatically admissible—subject, perhaps, to exclusion under Rule 403—regardless of the theory of the defense or the other evidence presented by the [g]overnment. This cannot be the law, and we take this opportunity to hold emphatically that it is not the law.¹⁰⁰

After dismissing the cases cited by the government, the Eleventh Circuit reached this conclusion: “Put simply, if the conduct charged is not open to a plausible innocent explanation, then extrinsic offense evidence is not admissible to show intent.”¹⁰¹ Here, if the jury believed that he committed the acts alleged, that is, that he was in possession of large quantities of cocaine, then there would be no conceivable way that the jury could not have thought that he possessed the requisite intent to distribute cocaine. Therefore, the admission of the 1991 conviction was an abuse of discretion and the court reversed the defendant’s conviction.¹⁰² On August 10, 2005, the court denied the government’s motion for reconsideration and it appeared that the Eleventh Circuit had signaled a sea change, at least as far as Rule 404(b) was concerned.

Any relief on the part of the defense bar, however, proved to be short lived. On December 6, 2005, and apparently out of the blue, the same Eleventh Circuit panel issued a per curiam decision vacating its prior decision and affirming the defendant’s conviction.¹⁰³ The court’s Rule 404(b) discussion in the December decision was terse. The majority began by acknowledging what it had denied in its first decision: A not-guilty plea in a drug conspiracy case makes the defendant’s intent a material issue.¹⁰⁴ Thus, in one paragraph the panel abrogated all that it had said in its previous decision about the “preposterous” suggestion

97. *Id.*

98. *Id.* at 1225–26.

99. *Id.* at 1226.

100. *Id.*

101. *Id.* at 1230.

102. *Id.* at 1228.

103. *United States v. Matthews*, 431 F.3d 1296, 1298, 1313 (11th Cir. 2005).

104. *Id.* at 1311 (citing *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980)).

that a jury could believe that defendant possessed large amounts of cocaine without necessarily finding that he intended to sell the cocaine.

Judge Tjoflat, who had authored the initial panel decision, wrote a concurring opinion acknowledging that the second panel decision was “the correct application of this circuit’s precedent.”¹⁰⁵ However, Judge Tjoflat wrote to express his view “that the circuit’s doctrine with respect to admission of Rule 404(b) evidence in conspiracy cases has evolved into one that undermines Rule 404(b) itself and represents a perversion of the origins of the circuit’s doctrine in this context.”¹⁰⁶ Judge Tjoflat then, in a lengthy discussion, tracked the language of his opinion in the initial panel decision in which he argued that there was no rational basis for thinking that the defendant’s 1991 conviction was necessary to prove his intent to distribute cocaine.¹⁰⁷

Thus, by the end of the survey period, the Eleventh Circuit had returned to where it started and the scope of admissible Rule 404(b) evidence is as broad as it once was.

In 2005 the Eleventh Circuit also reviewed Rule 408¹⁰⁸ which provides that “[e]vidence of . . . furnishing . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either the validity or amount, is not admissible to provide liability for or invalidity of the claim or its amount.”¹⁰⁹ In *United States v. Arias*,¹¹⁰ the defendant contended that the district court should have applied Rule 408 to exclude, in his trial for Medicare fraud, evidence that he had admitted certain facts as part of the settlement of a state administrative proceeding brought by the Florida Department of Health. The government relied on the defendant’s settlement with the Department of Health to prove its contention that the defendant had improperly billed Medicare for prescription medications. The district court concluded that Rule 408 did not apply to criminal proceedings.¹¹¹

This was an issue of first impression for the Eleventh Circuit, and other circuits are divided on the issue. The Second, Sixth, and Seventh Circuits have concluded that Rule 408 applies only to civil cases.¹¹² The Fifth and Tenth Circuits, on the other hand, have held that Rule 408 applies to both civil and criminal proceedings.¹¹³ The Eleventh

105. *Id.* at 1313 (Tjoflat, J., concurring).

106. *Id.*

107. *Id.* at 1314.

108. FED. R. EVID. 408.

109. *United States v. Arias*, 431 F.3d 1327, 1336 (11th Cir. 2005).

110. 431 F.3d 1327 (11th Cir. 2005).

111. *Id.* at 1332-33.

112. *Id.* at 1336.

113. *Id.*

Circuit sided with the Fifth and Tenth Circuits.¹¹⁴ The court first noted that Rule 1101(b)¹¹⁵ expressly provides that the Federal Rules of Evidence are generally applicable to criminal proceedings.¹¹⁶ Second, the court noted that nothing in the language of Rule 408 specifically made the Rule inapplicable to criminal proceedings.¹¹⁷

Finally, the Eleventh Circuit concluded that, as a matter of policy, Rule 408 should apply to criminal proceedings.¹¹⁸ Rule 408, the court noted, excludes evidence of compromise based on two justifications.¹¹⁹ First, evidence of compromise is not relevant because a settlement may have been motivated by a party's desire to resolve a matter rather than an admission of fault.¹²⁰ Second, exclusion of evidence of compromise fosters settlement of disputes.¹²¹ Clearly, the court continued, a defendant would be less likely to settle a civil matter if evidence of the settlement could later be introduced against him in a criminal matter.¹²² Also, compromise of a civil dispute does not necessarily constitute an admission of liability.¹²³ "In this light, permitting the admission of civil settlement offers in subsequent criminal prosecutions actually compromises the accuracy of the jury's determination."¹²⁴ For these reasons, the court held that Rule 408 should apply to both civil and criminal proceedings.¹²⁵

Arias, however, will likely have a short life. As noted above, Rule 408, effective December 1, 2006, will be amended and the amended Rule seems tailored to address the precise situation addressed by the Eleventh Circuit in *Arias*.¹²⁶ Specifically, the new Rule will provide that statements made in compromise negotiations are not admissible "except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."¹²⁷

114. *Id.* at 1336, 1338.

115. FED. R. EVID. 1101(b).

116. *Arias*, 431 F.3d at 1336.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1337.

125. *Id.* at 1338.

126. See U.S. Courts, *Federal Rulemaking*, available at <http://www.uscourts.gov/rules/newrules6.html> (last visited Apr. 7, 2006).

127. *Id.*

V. ARTICLE VII: OPINION TESTIMONY

Daubert,¹²⁸ for better or worse, again dominated the Eleventh Circuit evidentiary landscape during the survey period. In *Daubert* the Supreme Court made district court judges gatekeepers with the assigned task of keeping “junk science” out of courtrooms.¹²⁹ While the debate over whether *Daubert* and its subsequent codification into the Federal Rules of Evidence is good or bad continues, one thing is clear: *Daubert* is a hefty consumer of judicial and litigant resources. Also, it is beginning to appear, or at least it can be argued that it is beginning to appear, that *Daubert* means one thing in a civil case and another thing in a criminal case.

For years, Georgia lawyers who did not venture into federal court had nothing to fear from *Daubert*. Georgia’s appellate courts repeatedly rebuffed appeals to adopt *Daubert* judicially.¹³⁰ In 2005, however, the Georgia General Assembly instructed Georgia judges to march in lockstep with their federal counterparts.¹³¹ Effective February 6, 2005, the General Assembly codified *Daubert* into Georgia law and even suggested to the Georgia judiciary that they should adhere to federal precedent interpreting *Daubert*.¹³² It is too soon to tell how Georgia courts, with their relatively limited resources, will cope with *Daubert*, but it is difficult to imagine superior and state court judges convening multi-day *Daubert* hearings. In one respect, however, perhaps Georgia judges have an easier task than their federal counterparts. The General Assembly, apparently at the behest of prosecutors, made *Daubert* applicable only to civil cases.¹³³ Criminal cases continue to be governed by prior Georgia law.¹³⁴ Apparently, prior law, which legislators thought allowed so much junk science into the courtroom, is sufficient to protect the rights of criminal defendants.

Daubert is codified in Rule 702,¹³⁵ which provides that expert testimony is admissible “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods

128. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

129. *See id.* at 592-93.

130. *See* Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 235, 245-46 (2004).

131. O.C.G.A. § 24-9-67.1 (1995 & Supp. 2005).

132. *Id.* § 24-9-67.1(f).

133. O.C.G.A. § 24-9-67 (1995 & Supp. 2005).

134. *Id.*

135. FED. R. EVID. 702.

reliably to the facts of the case.”¹³⁶ In determining the admissibility of expert testimony under Rule 702, the district court must conduct “a rigorous three-part inquiry,” considering whether:

(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.¹³⁷

Whether one agrees with *Daubert* or not, no better *Daubert* analysis exists, at least in a toxic tort case, than the Eleventh Circuit’s decision in *McLain v. Metabolife International, Inc.*¹³⁸ In *McLain* the jury returned a verdict in favor of the plaintiffs, who had claimed that the defendant’s weight loss supplement caused them significant injuries. After convening a *Daubert* hearing and considering the testimony of the plaintiffs’ two experts, a pharmacologist and a neurologist, the district court had essentially thrown up its hands, concluding that it lacked sufficient scientific knowledge to conclude that the testimony of the plaintiffs’ experts was inadmissible as a matter of law. On appeal, the defendant contended that the district court erroneously denied its motion to exclude the testimony of the plaintiffs’ experts.¹³⁹

On appeal, the Eleventh Circuit first held that the district court abused its discretion when it abdicated its *Daubert* gatekeeping responsibilities.¹⁴⁰ Rather than remanding the case to the district court for proper *Daubert* evaluation, the Eleventh Circuit proceeded, in effect, to conduct its own *Daubert* hearing. At this point, the Eleventh Circuit’s opinion provides an excellent primer on *Daubert* analysis in toxic tort cases. Such cases, the court noted, generally fall in one of two broad categories.¹⁴¹ First, there are those cases in which the medical community has recognized the toxicity of the substance at issue.¹⁴² Second, there are those cases in which the medical community has not generally recognized that the substance can cause the injuries a plaintiff alleges.¹⁴³ Examples of agents that fall in the first category are

136. *Id.*

137. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).

138. 401 F.3d 1233 (11th Cir. 2005).

139. *Id.* at 1237.

140. *Id.* at 1238.

141. *Id.* at 1239.

142. *Id.*

143. *Id.*

asbestos, silica, and at long last, cigarette smoke.¹⁴⁴ However, Metabolife's product, which the plaintiffs claimed contained a deadly combination of ephedrine and caffeine, fell into the second category because the medical community had not yet generally recognized that this drug combination could cause the type of injuries the plaintiffs suffered.¹⁴⁵

If the agent falls in the first category, it is not necessary to engage in an extensive *Daubert* analysis of the question of whether the agent can cause an injury.¹⁴⁶ Rather, the *Daubert* focus is on whether the known toxic agent caused the specific injuries the plaintiffs allege.¹⁴⁷ This is known as "individual causation."¹⁴⁸ In the second category, the court must determine both whether the agent *can* cause the type of injuries the plaintiffs allege (known as "general causation"),¹⁴⁹ and then whether there is admissible evidence that the agent *did* cause plaintiffs to suffer those injuries.¹⁵⁰

The court then focused on the plaintiffs' experts.¹⁵¹ The pharmacologist maintained that ephedrine constricted blood vessels, which led to increased pulse rate and increased blood pressure. Long-term use of ephedrine *could* also cause vasculitis, an inflammation or irritation of blood vessels. Vasospasm and vasculitis *can* lead to heart attacks and strokes. The pharmacologist also testified that adding caffeine made ephedrine more toxic.¹⁵² The Eleventh Circuit attacked what it called the pharmacologist's equivocation, noting the expert's repeated use of the words "can," "if," and "may."¹⁵³ For example, "sympathomimetics *can* constrict blood vessels. And *when* you constrict blood vessels, you *may* raise blood pressure."¹⁵⁴

Further, the pharmacologist could not say how Metabolife would affect an individual and what dose of Metabolife would be necessary to cause injury.¹⁵⁵ Because of the pharmacologist's "ambiguity" and "equivocation," he was unable to lay a "reliable groundwork for determining the

144. *Id.* On the one hand, it is fair to question how successful tobacco litigation would have been if early cases against the industry had to contend with *Daubert*. On the other hand, *Daubert* defenders perhaps could argue that the application of *Daubert* to tobacco company defense experts may well have led to earlier victories against the industry.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1239-40.

152. *Id.*

153. *Id.* at 1240.

154. *Id.*

155. *Id.* at 1240-41.

dose-response relationship for either ephedrine or ephedrine and caffeine. This signals a methodology problem.”¹⁵⁶ This inability to provide reliable information about dose-response levels for Metabolife’s toxicity was, to the Eleventh Circuit, a critical defect.¹⁵⁷ Indeed, the Eleventh Circuit seemed intent on establishing a requirement in toxic tort cases that a plaintiff’s expert establish the dose or level of exposure that will cause harm.¹⁵⁸ Thus, the pharmacologist, by failing to establish a dose-response relationship, failed to follow the basic methodology used by scientists to determine causation.¹⁵⁹

Drawing from an article in the *Journal of Law and Policy*,¹⁶⁰ the court suggested four scientific criteria for proving causation in toxic tort cases.¹⁶¹ First, it must be demonstrated that the substance can cause the type of illness or disease at issue, that is, general causation.¹⁶² Second, the plaintiff must have been exposed to a sufficient amount of the substance to cause the injury, that is, individual causation.¹⁶³ Third, “the chronological relationship between exposure and effect must be biologically plausible.”¹⁶⁴ For example, if a plaintiff suffered from the disease or illness in question before exposure to the substance, then the exposure could not have caused the illness or disease.¹⁶⁵ Finally, the inquiry must consider the likelihood that the disease or illness could have been caused by other factors.¹⁶⁶ This, according to the court, is the background risk.¹⁶⁷ Someone could have a heart attack, for example, not because of exposure to the substance in question, but rather, for a variety of other reasons.¹⁶⁸ Plaintiffs’ pharmacologist, the Eleventh Circuit concluded, failed to meet these four criteria.¹⁶⁹

156. *Id.*

157. *Id.* at 1241-42.

158. *Id.* at 1242.

159. *Id.*

160. David Eaton, *Science for Judges I: Papers on Toxicology and Epidemiology*, 12 J.L. & POL’Y 1, 5 n.75 (2003). In its opinion, the Eleventh Circuit praised articles published by the Federal Judicial Center in the *Journal of Law and Policy*. For lawyers with serious *Daubert* issues, these articles should be consulted. *McClain*, 401 F.3d at 1242.

161. *McClain*, 401 F.3d at 1242.

162. *Id.*

163. *Id.*

164. *Id.* at 1243 (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1244.

The Eleventh Circuit also attacked the pharmacologist's reliance on "analogy."¹⁷⁰ Based on a study of another sympathomimetic drug demonstrating that the drug could cause strokes and heart attacks, the expert testified that Metabolife could cause strokes and heart attacks.¹⁷¹ According to the Eleventh Circuit, however, the pharmacologist never offered a reliable basis for concluding that his analogy was valid, that is, that the study of one drug that could cause strokes and heart attacks necessarily meant that ephedrine could cause strokes and heart attacks.¹⁷² "He simply assumes its validity without offering any scientific evidence. As he said, one *presumes* the same effect by drugs in the same class until proven otherwise. Such presumptions do not make for reliable opinions in toxic tort cases."¹⁷³

Nor was the Eleventh Circuit impressed by the pharmacologist's reliance on other studies and reports. Examining these studies in detail, the Eleventh Circuit concluded that the pharmacologist drew "unauthorized conclusions from limited data—conclusions the authors of the study do not make."¹⁷⁴

Having spent considerable time demonstrating the lack of reliability of the pharmacologist's opinions, the Eleventh Circuit then turned to the general factors specifically mentioned in *Daubert*: "(1) whether the theory can and has been tested; (2) whether it has been subjected to peer review; (3) the known or expected rate of error; and (4) whether the theory and methodology employed is generally accepted in the relevant scientific community."¹⁷⁵ In two paragraphs, the court concluded that the pharmacologist's opinions failed to meet these criteria as well.¹⁷⁶

The plaintiffs' neurologist's opinions also failed to impress the Eleventh Circuit. For the most part, the neurologist used the same methodology that the pharmacologist used to establish the toxicity of Metabolife and thus suffered from the same defects.¹⁷⁷ In addition, the neurologist used the "differential diagnosis method" to establish that Metabolife caused the plaintiffs' injuries.¹⁷⁸ Based on his examination of the plaintiffs and their medical histories, he ruled out the usual causes for the plaintiffs' injuries and concluded that Metabolife caused

170. *Id.*

171. *Id.*

172. *Id.* at 1244-45.

173. *Id.* at 1246.

174. *Id.* at 1248.

175. *Id.* at 1251; *Daubert*, 509 U.S. at 593-94.

176. *McClain*, 401 F.3d at 1251-52.

177. *Id.* at 1252.

178. *Id.* at 1252-53.

the injuries.¹⁷⁹ While the differential diagnosis method is well accepted, it can satisfy *Daubert* only if the expert can show, by reliable methods, that the substance at issue can cause a plaintiff's injuries or illnesses.¹⁸⁰ Because both the pharmacologist and the neurologist could not reliably establish this, the neurologist's use of the differential diagnosis method also failed to satisfy *Daubert*.¹⁸¹ Because neither experts' opinions met *Daubert*'s rigid standards, the Eleventh Circuit reversed the substantial verdict in plaintiffs' favor and remanded "for proceedings . . . consistent with these rulings."¹⁸²

To better understand *Daubert*, it may help to have some knowledge of something that few who graduated law school since the 1960s have had much exposure to—Latin. In *McLain* the court attacked "the blunder of the *post hoc ergo propter hoc* fallacy,"¹⁸³ which means "after this, because of this."¹⁸⁴ The court used the phrase to describe the mistake of assuming that a temporal relationship between taking Metabolife and the onset of symptoms somehow established a causal relationship.¹⁸⁵ However, perhaps the most commonly seen Latin phrase in the *Daubert* analysis is *ipse dixit*, which means "he himself said it," and which described the fatal defects suffered by the plaintiff's expert in *Cook v. Sheriff of Monroe County, Florida*.¹⁸⁶ In *Cook* the plaintiff attempted to prove the defendant's liability for the suicide of the decedent through the testimony of an expert. During a pretrial status conference, the plaintiff informed the court that she intended to offer "an expert in suicide prevention in correctional facilities."¹⁸⁷ Although the court, based on *Daubert*, expressed some reservations about the expert's testimony and noted that a *Daubert* hearing may be necessary, "notably, *Cook* never moved for such a hearing, and none was ever conducted."¹⁸⁸

After the status conference, the plaintiff submitted her expert witness report in which the expert summarized the ten opinions he intended to express at trial. Significantly, none of the summaries stated the bases for the opinions. The expert contended that: the defendant failed to

179. *Id.*

180. *Id.* at 1253.

181. *Id.*

182. *Id.* at 1236.

183. *Id.* at 1243.

184. *Id.* (citing BLACK'S LAW DICTIONARY 1186 (7th ed. 1999)).

185. *Id.*

186. 402 F.3d 1092, 1113 (11th Cir. 2005).

187. *Id.* at 1108.

188. *Id.* It is interesting that the Eleventh Circuit would suggest that there is some burden on the proponent of the expert testimony to request a *Daubert* hearing.

assess the decedent's suicidal tendencies; the defendant should have placed the inmate on close observation during the first seventy-two hours after his incarceration; the defendant's training procedures were inadequate; had the decedent been properly treated and medicated he likely would not have committed suicide; one officer should have responded to a specific request by the decedent for mental health assistance; the facility had an excessive number of suicides; cells were not suicide proofed; the defendant was deliberately indifferent to the decedent's serious medical needs; the defendant violated the decedent's constitutional rights to not suffer cruel and unusual punishment when it ignored his written request for psychiatric treatment and evaluation; and had the defendant responded appropriately to the inmate's psychiatric condition, he likely would not have committed suicide.¹⁸⁹

The defendant moved in limine to exclude the expert's opinions on the grounds that the opinions were not relevant, and that his opinions, with regard to deliberate indifference, constituted legal conclusions. The district court tentatively granted the motion and ruled that the plaintiff could not present the expert's testimony until other evidence established a strong likelihood of deliberate indifference on the part of defendant. Neither the motion nor the court's ruling on the motion mentioned *Daubert*.¹⁹⁰

The Eleventh Circuit, however, interpreted the motion and the ruling "as implicating the third prong of the Rule 702 inquiry—helpfulness to the trier of fact."¹⁹¹ Under this prong, the expert's opinion is admissible "if it concerns matters that are beyond the understanding of the average lay person."¹⁹² If the expert does nothing more than argue the plaintiff's case, which lawyers can do in their closing arguments, it is not helpful to the jury.¹⁹³ According to the Eleventh Circuit, however, the main problem with the plaintiff's expert was the *ipse dixit* problem.¹⁹⁴ A district court is not required "to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."¹⁹⁵ Turning to each of the experts' opinions, the Eleventh Circuit noted that most suffered from the *ipse dixit* defect.¹⁹⁶ The plaintiff simply failed to carry her burden of demonstrating sufficient bases for the opinions to

189. *Id.*

190. *See id.*

191. *Id.* at 1110–11.

192. *Id.* at 1111.

193. *Id.*

194. *Id.*

195. *Id.* (quoting *Michigan Miller's Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 921 (11th Cir. 1998)).

196. *Id.*

establish that they would be helpful to the jury.¹⁹⁷ Others simply stated legal conclusions, for example, that the defendant was deliberately indifferent, which jurors themselves could understand and the lawyers could argue.¹⁹⁸

The main point to be taken from *Cook* is that a party seeking to rely on expert testimony must shoulder the burden of proving that the expert's opinions satisfy *Daubert*:

Presenting a summary of a proffered expert's testimony in the form of conclusory statements devoid of factual or analytical support is simply not enough. The party offering the expert must present the witness'[s] proposed testimony in a form that persuades the trial court that the testimony will in fact assist the trier of fact. As we have held previously, carrying this burden requires more than "the *ipse dixit* of the expert."¹⁹⁹

Thus, the problem was not so much the substance of the expert's opinions (although some clearly were inadmissible), but rather that the plaintiff simply failed to carry her burden of demonstrating the admissibility of those opinions.

The Eleventh Circuit addressed another toxic tort claim in *Rink v. Cheminova, Inc.*,²⁰⁰ and the plaintiffs again came up short. In *Rink* the plaintiffs claimed that they were injured by the defendant's pesticide. The pesticide contained malathion, which, if stored improperly, can chemically decompose and produce isomalthion which is particularly toxic to human beings. To prove their case, the plaintiff's expert opined that the malathion had been stored at temperatures exceeding seventy-seven degrees. Relying on National Weather Service data, and based on evidence from one of three storage sites stating that the temperature in the facility was eighteen degrees higher than the ambient air temperature recorded by the National Weather Service, the expert added eighteen degrees to his data for each of three storage sites.²⁰¹ At the end of a five-day *Daubert* hearing, the district court concluded that the expert's methodology was flawed and thus his opinions were not reliable.²⁰²

On appeal, the plaintiffs primarily argued that the district court made credibility determinations rather than *Daubert* analysis-based

197. *Id.* at 1113.

198. *Id.* at 1111-13.

199. *Id.* at 1113 (quoting *Michigan Miller's*, 140 F.3d at 921).

200. 400 F.3d 1286 (11th Cir. 2005).

201. *Id.* at 1286-90.

202. *Id.* at 1290.

determinations when the court excluded their expert's testimony.²⁰³ Indeed, the Eleventh Circuit's opinion seemingly reads like a cross-examination of the expert. This observation highlights one criticism of *Daubert*—that it supplants the role of the jury and underestimates the utility of cross-examination in exposing weaknesses and fallacies in expert opinions. However, the Eleventh Circuit explained that rigorous examination of an expert's methodology, which *Daubert* requires, is different from criticizing an expert's credibility, which would supplant the role of the jury.²⁰⁴ The Eleventh Circuit, therefore, held that the district court acted within its discretion when it concluded that “there is simply too great an analytical gap between the data relied on by Dr. Matson and his proffered opinions.”²⁰⁵

As has been seen, the Eleventh Circuit, at least in civil cases, applies *Daubert* with a vengeance. Some would argue, however, that *Daubert* does not quite have the teeth in criminal cases that it has in civil cases. The Eleventh Circuit's decision in *United States v. Brown*²⁰⁶ may lend support to that argument.

In *Brown* the defendants were charged with distributing a substance the government alleged was “substantially similar” to the controlled substance gamma hydroxybutyric acid (“GHB”). The substance, 1,4-butanediol, was an industrial solvent that acted as a depressant, but could be used as a “‘date rape’ drug”.²⁰⁷ The sole factual issue at trial was whether 1,4-butanediol was sufficiently similar to GHB to make it a controlled substance.²⁰⁸

The government relied on two chemists to prove its case. Based on their examination of the chemical structures of GHB and 1,4-butanediol, the chemists testified that the chemical structures of the two substances were substantially similar. They also testified that after ingestion, 1,4-butanediol is converted by the body to GHB and it then has the same effect on the body as GHB. Neither chemist cited studies or other objective data to support their opinions. One chemist, no doubt to the horror of prosecutors, testified on cross-examination that this opinion was a “‘gut level thing’ or based on ‘intuition.’”²⁰⁹ He did explain, on

203. *Id.* at 1292.

204. *Id.* at 1293.

205. *Id.* at 1290, 1297.

206. 415 F.3d 1257 (11th Cir. 2005).

207. *Id.* at 1260.

208. *Id.*

209. *Id.* at 1267.

redirect, that his opinion was based on his long years of experience as a chemist.²¹⁰

The district court, sitting without a jury, accepted the government's experts' opinions, and thus found that the chemical structure of 1,4-butanediol was substantially similar to GHB. As a result, the district court found defendants guilty of conspiracy to distribute a controlled substance. On appeal, the defendants contended that the government's experts did not meet the requirements of *Daubert*. Indeed, of the four *Daubert* factors (whether the experts' theories had been tested; whether they had been subjected to peer review and publication; the known or potential error rate of the theories; and whether they are generally accepted in the field), the experts' theories satisfied only the fourth factor.²¹¹ "The question, then, is whether expert opinion evidence that does not meet three of the four *Daubert* factors nevertheless can be admitted. In the right circumstances, the answer to that question is 'yes.'"²¹²

The court explained that the *Daubert* factors are flexible.²¹³ After spending considerable time noting the broad discretion afforded district judges in their *Daubert* determinations, the Eleventh Circuit affirmed.²¹⁴ The Eleventh Circuit noted:

Given the circumstances of this case, and given the heavy thumb—really a thumb and a finger or two—that is put on the district court's side of the scale, we conclude that it was not an abuse of discretion to admit the expert opinions of the two government witnesses in this case.²¹⁵

Perhaps seeking to limit the impact of its holding, the district court put considerable emphasis on the fact that the trial was a bench trial.²¹⁶ "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."²¹⁷

In a paragraph that will likely be particularly grating to lawyers in civil cases who have been on the wrong side of *Daubert* decisions, the Eleventh Circuit, quoting *Daubert*, noted that its conclusion "is consistent with the 'liberal thrust of the Federal Rules and their general

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1268.

215. *Id.*

216. *Id.* at 1269.

217. *Id.*

approach of relaxing the traditional barriers to opinion testimony.’²¹⁸ Indeed, the Eleventh Circuit noted an anomaly in *Daubert*’s evolution. A fair reading of *Daubert* would lead to the conclusion that it was intended to expand the scope of admissible expert testimony, and that was the way the Eleventh Circuit initially read it. In *Joiner v. General Electric Co.*,²¹⁹ the Eleventh Circuit concluded that *Daubert* was intended to lower the threshold for the admissibility of expert testimony, a conclusion the Supreme Court quickly shot down.²²⁰ Thus, it is perhaps ironic that the Eleventh Circuit would again reference the discredited “relaxing the traditional barriers to ‘opinion’ testimony”²²¹ dicta in *Daubert*.

In another criminal appeal involving *Daubert*, the Eleventh Circuit tackled the issue of whether fingerprint evidence satisfied *Daubert*’s rigid requirements. In *United States v. Abreu*,²²² the district court did not think much of the defendant’s argument that fingerprint evidence was not sufficiently reliable.²²³ Without bothering to convene a *Daubert* hearing, the district court summarily rejected defendant’s challenge and the Eleventh Circuit affirmed.²²⁴ As in *Brown*, the Eleventh Circuit noted that all four *Daubert* factors need not be present and are only illustrative.²²⁵ Here, the court noted, the district court based its decision primarily, perhaps exclusively, on the general acceptance factor.²²⁶ In a short opinion, remarkably short for a *Daubert* opinion, the Eleventh Circuit held that the district court did not err when it determined that fingerprint evidence was sufficiently reliable to be admissible.²²⁷

In *United States v. Henderson*,²²⁸ another criminal appeal, the Eleventh Circuit addressed two expert testimony issues, one of which will be of particular interest to civil lawyers. In *Henderson* the defendant, a former law enforcement officer, was charged with using excessive force in the arrest of a suspect. After his conviction, he appealed, alleging, among other things, that the district court (1) improperly allowed an oral surgeon to give opinion testimony when she

218. *Id.* at 1268 (quoting *Daubert*, 509 U.S. at 588).

219. 78 F.3d 524 (11th Cir. 1996).

220. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

221. *Daubert*, 509 U.S. at 588.

222. 406 F.3d 1304 (11th Cir. 2005).

223. *Id.* at 1305.

224. *Id.*

225. *Id.* at 1307.

226. *Id.*

227. *Id.*

228. 409 F.3d 1293 (11th Cir. 2005).

had not been properly identified as an expert witness and (2) that the district court erred when it failed to admit into evidence the results of two polygraph examinations.²²⁹

The first issue, whether the treating oral surgeon was an expert for purposes of disclosure requirements, arises often in civil cases. Specifically, the issue is whether a plaintiff must make Rule 26²³⁰ disclosures with regard to the testimony of his treating physicians. In *Henderson* the Eleventh Circuit looked to Rule 701²³¹ to resolve this issue.²³² Rule 701 provides that lay witnesses can give opinion testimony only if their opinions “are (a) rationally based on the perception of the witness, [and] (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”²³³ The question, then, is whether a treating physician’s testimony is expert or lay testimony. The answer, the Eleventh Circuit held, is essentially “it depends.”²³⁴ “A treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party.”²³⁵ If the physician proceeds to answer hypothetical questions or express opinions about causation, then he or she is testifying as an expert.²³⁶

In *Henderson* the oral surgeon testified that the victim had a hairline fracture and that the fracture resulted from a blow to the left side of the face.²³⁷ The Eleventh Circuit agreed that the testimony about the hairline fracture was lay testimony, but the physician crossed the line to expert testimony when she testified about the cause of the hairline fracture.²³⁸ However, the Eleventh Circuit concluded that, even if the district court erred in allowing the expert testimony, the error was harmless.²³⁹

With regard to the polygraph issue, the magistrate judge concluded that the polygraph evidence did not meet the requirements of *Daubert*. As a result, the magistrate judge refused to admit polygraph examina-

229. *Id.* at 1297.

230. FED. R. CIV. P. 26.

231. FED. R. EVID. 701.

232. *Henderson*, 409 F.3d at 1300.

233. *Id.* (quoting FED. R. EVID. 701).

234. *Id.*

235. *Id.* (quoting *Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir. 1999)).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

tions of the defendant. The defendant contended that the results of the polygraph examinations supported his version of events. The defendant argued that the Eleventh Circuit's decision in *United States v. Piccinonna*²⁴⁰ had resolved the issue and that polygraph evidence, given the right circumstances, was admissible.²⁴¹ In *Piccinonna*, the Eleventh Circuit held that polygraph evidence was not per se inadmissible and could be used to impeach or corroborate a witness's trial testimony.²⁴² That decision, however, predated *Daubert*, and the Eleventh Circuit, in *Henderson*, noted that *Piccinonna* did not limit the court's discretion to exclude polygraph evidence on other grounds.²⁴³

Here, the magistrate judge found that polygraph evidence failed to meet four of the five *Daubert* factors. The theories of polygraphy could not be adequately tested. The error rate of polygraph testing "is not much more reliable than random chance"²⁴⁴ and thus did not meet the second *Daubert* factor. The magistrate judge noted that standards governing polygraph examinations are "self-imposed, and that effective countermeasures existed to defeat accurate [polygraph] results."²⁴⁵ Finally, the judge found that polygraphy had not been generally accepted by the scientific community.²⁴⁶ The Eleventh Circuit concluded that the magistrate judge did not abuse her discretion in her *Daubert* determination that polygraph evidence was not sufficiently reliable.²⁴⁷

Thus, it seemed that the Eleventh Circuit had held that polygraph evidence was not sufficiently reliable to meet *Daubert's* standards. This led to a dissent by Judge Hill, who argued that the court's decision in *Piccinonna* precluded the magistrate judge's *Daubert*-based conclusion that polygraph evidence was unreliable.²⁴⁸ Judge Hill noted that *Piccinonna* had held that "the science of polygraphy has progressed to a level of acceptance sufficient to allow the use of polygraph evidence in limited circumstances where the danger of unfair prejudice is minimized."²⁴⁹ Thus, Judge Hill could only read the majority's opinion to have reversed *Piccinonna* because the majority "agrees with the

240. 885 F.2d 1529 (11th Cir. 1989); see Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 1019, 1027 (1999).

241. *Henderson*, 409 F.3d at 1301.

242. *Piccinonna*, 885 F.2d at 1536-37.

243. *Henderson*, 409 F.3d at 1302.

244. *Id.* at 1303.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1303 n.7.

249. *Id.* at 1309 (Hill, J., dissenting) (quoting *Piccinonna*, 885 F.2d at 1537).

magistrate judge's conclusions that such evidence is inherently unscientific."²⁵⁰ However, Judge Hill argued, only an *en banc* court can reverse Eleventh Circuit authority.²⁵¹ On the other hand, Judge Hill noted that the "majority appears to believe that *Daubert* overruled *Piccinonna*."²⁵² If that is what the majority believed, then Judge Hill disagreed with this conclusion as well.²⁵³ The simple adoption of a new test, which is what *Daubert* did, without any mention of *Piccinonna*, could hardly have overruled *Piccinonna*.²⁵⁴

VI. ARTICLE VIII: HEARSAY

As discussed above, the United States Supreme Court, in *Crawford v. Washington*,²⁵⁵ held that out of court "testimonial" statements are not admissible at trial unless the declarant is unavailable and the defendant had prior opportunity to cross examine the witness.²⁵⁶ In *Crawford* the defendant contended that the trial court improperly allowed the jury to hear his wife's tape-recorded statement to police officers, which the prosecution tendered after the wife invoked her spousal privilege, and thus, was unavailable to testify. The trial court and the Washington Supreme Court held that the circumstances surrounding the statement were sufficiently reliable to overcome the defendant's argument that the admission of the out of court statement violated his Sixth Amendment²⁵⁷ right of confrontation.²⁵⁸

Prosecutors argued that, since the Supreme Court's decision in *Ohio v. Roberts*,²⁵⁹ courts have increasingly allowed the admission of hearsay statements if the statements fell within a "firmly rooted hearsay exception" or if they bore "particularized guarantees of trustworthiness."²⁶⁰ The United States Supreme Court granted certiorari in *Crawford* and held that the Sixth Amendment applied to out of court testimonial statements.²⁶¹ Testimonial statements included affidavits, custodial examinations, prior testimony, and "similar pretrial statements that declarants would reasonably expect to be used

250. *Id.* at 1310.

251. *Id.*

252. *Id.* at 1310 n.3.

253. *Id.*

254. *Id.*

255. 541 U.S. 36 (2004).

256. *Id.* at 68.

257. U.S. CONST. amend. VI.

258. *Crawford*, 541 U.S. at 38-43.

259. 448 U.S. 56 (1980).

260. *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66).

261. *Id.* at 68.

prosecutorially.²⁶² Not surprisingly, subsequent decisions have come to focus on what constitutes a testimonial statement.

In *United States v. Cantellano*,²⁶³ the Eleventh Circuit addressed the issue of whether a deportation warrant constituted testimonial hearsay.²⁶⁴ In *Cantellano* the government, to prove its charge that the defendant had illegally entered the country, tendered a previous deportation warrant which, on its face, established that the defendant had been deported. However, the immigration enforcement agent who authenticated the warrant had no firsthand knowledge of the information contained in the warrant. On appeal, the defendant contended that the deportation warrant constituted testimonial hearsay, a question of first impression in the Eleventh Circuit. A deportation warrant, the court noted, simply records facts about where, when, and how a deportee left the country.²⁶⁵ This was sufficient to persuade the Eleventh Circuit that “a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence.”²⁶⁶ The information in a warrant of deportation is recorded routinely and is not prepared for use at a criminal trial.²⁶⁷ Thus, for purposes of the confrontation clause, a warrant of deportation is not adversarial.²⁶⁸

Rule 801(d)(2)(E)²⁶⁹ 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.”²⁷⁰ Decisions interpreting Rule 801(d)(2)(E) also provide some insight on why evidentiary issues figure less and less prominently in criminal appeals. 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-conspirator’s statements. In *United States v. James*,²⁷¹ 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

262. *Id.* at 51 (quoting Brief for Petitioner at 23, 541 U.S. 36 (July 24, 2003)).

263. 430 F.3d 1142 (11th Cir. 2005).

264. *Id.* at 1145.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* In *Cantellano* the Eleventh Circuit also held that *Crawford* does not apply to sentencing hearings in non-capital cases. *Id.* at 1146.

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

270. *Id.*

271. 590 F.2d 575 (5th Cir. 1979).

the co-conspirator made the statements in furtherance of the conspiracy.²⁷² However, the Supreme Court, in *Bourjaily v. United States*,²⁷³ 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.²⁷⁴ 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.²⁷⁵ 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.

The Eleventh Circuit's decision in *United States v. Magluta*,²⁷⁶ however, bucks that trend. While it is doubtful that the Eleventh Circuit is sending a signal that the co-conspirator exception should not be read as broadly as it has been, it is clear that the Eleventh Circuit's co-conspirator exception analysis in *Magluta* contrasts sharply from co-conspirator exception decisions of the last few years.

In *Magluta* the defendant was convicted on numerous offenses and was sentenced to 205 years in prison. Although most of the convictions were drug related, defendant was also convicted of obstruction of justice and conspiracy to obstruct justice based on the defendant's alleged bribery of the jury foreman in a previous state court trial. To prove those counts, the government relied on out of court statements made by the jury foreman. The statements were made by the foreman to an undercover FBI agent who told the foreman that he had been sent by the defendant to ensure that the foreman kept quiet about the bribe. During the course of discussions with the undercover informant, the foreman acknowledged that he had accepted the bribe and assured the undercover agent that he would not cooperate with authorities.²⁷⁷

272. *Id.* at 581.

273. 483 U.S. 171 (1987).

274. *Id.* at 183-84.

275. *Id.*

276. 418 F.3d 1166 (11th Cir. 2005).

277. *Id.* at 1172-73.

The defendant argued that even if he and the foreman engaged in a conspiracy to obstruct justice, that conspiracy ended when the jury returned its verdict in favor of the defendant in the prior trial. Because the conversation between the undercover agent and the foreman took place two years later, that conversation was not made during the course of the conspiracy.²⁷⁸

The Eleventh Circuit reached back to the United States Supreme Court's 1957 decision in *Grunewald v. United States*.²⁷⁹ In *Grunewald* the Court held that once the purpose of the conspiracy has been attained, a conspiracy to conceal the crime "may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."²⁸⁰ Thus, the Eleventh Circuit agreed that because the central purpose of the obstruction of justice conspiracy was to secure the defendant's acquittal, that conspiracy ended when the verdict was rendered.²⁸¹ Although both the defendant and the foreman understood that it would be necessary to conceal their criminal conduct, *Grunewald* made clear that simply maintaining that secret does not constitute a concealment conspiracy for purposes of admitting a co-conspirator's statement. Consequently, the foreman's statement to the undercover agent was not in furtherance of the conspiracy to obstruct justice through juror bribery.²⁸²

The government next argued that the foreman's statements were also made in furtherance of another conspiracy—a conspiracy to launder drug proceeds. This conspiracy, the government argued, began when defendant paid the foreman with drug money. The problem with this argument, the Eleventh Circuit responded, was that even if the foreman's acceptance of the bribe somehow made him a participant in the drug laundering conspiracy, the foreman's statements to the undercover agent, pursuant to *Grunewald*, were not made during the course of and in furtherance of the money laundering conspiracy.²⁸³

Thus, the district court abused its discretion when it admitted evidence of the foreman's statement and its error was not harmless.²⁸⁴ The defendant had received a ten-year sentence for the bribery

278. *Id.*

279. 353 U.S. 391 (1957).

280. *Magluta*, 418 F.3d at 1178 (quoting *Grunewald*, 353 U.S. at 402).

281. *Id.*

282. *Id.* at 1178-79.

283. *Id.* at 1179.

284. *Id.* at 1180.

convictions, and thus the effect of the Eleventh Circuit's reversal was to reduce his sentence from 205 years to 195 years.²⁸⁵

285. *Id.* at 1183.