

Evidence

by Marc T. Treadwell*

I. INTRODUCTION

Several amendments to the Federal Rules of Evidence became effective December 1, 2006. Rule 404,¹ which governs the use of character evidence offered to prove conduct, has been amended to clarify that character evidence is generally not admissible in civil cases.² Apparently at the behest of the Criminal Division of the Department of Justice, Rule 408,³ which addresses the admissibility of evidence of conduct and statements made in settlement negotiations, has been amended to expand the use of settlement evidence in criminal cases.⁴ This change will be particularly relevant to Eleventh Circuit criminal law practitioners in light of the court's decision in *United States v. Arias*,⁵ which was discussed in last year's survey.⁶ The logic of the proposed amendment is questionable. First, statements made during settlement discussions, accompanied as they often are by puffing and grandstanding, are dubious evidence of fault. It is reasonable to question why those statements would be more probative in a criminal case than in a civil case. Second, the amendment to Rule 408 runs counter to Rule 408's effort to further public policy favoring compromise.

* Partner in the firm of Adams, Jordan & Treadwell, P.C., Macon, Georgia. Valdosta State University (B.A., 1978); Mercer University, Walter F. George School of Law (J.D., cum laude, 1981). Member, State Bar of Georgia.

1. FED. R. EVID. 404.
2. FED. R. EVID. 404(a); *see also* FED. R. EVID. 404 advisory committee's note (2006 Amendment).
3. FED. R. EVID. 408.
4. *Id.*; *see also* FED. R. EVID. 408 advisory committee's note (2006 Amendment).
5. 431 F.3d 1327 (11th Cir. 2005).
6. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 1083, 1095-96 (2006).

Rule 606(b)⁷ broadly bars the admission of jurors' testimony about their verdicts.⁸ The previous version of Rule 606(b) provided two exceptions: jurors could 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."⁹ Amended Rule 606 now contains a third exception, which allows jurors to testify on the issue of "whether there was a mistake in entering the verdict onto the verdict form."¹⁰

Rule 609¹¹ governs the use of convictions to impeach a witness's credibility. Prior to the amendment of Rule 609, a witness could be impeached with a conviction if the crime "involved dishonesty or false statement."¹² Amended Rule 609 permits the admission of a conviction to impeach a witness's credibility "if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness."¹³ Although the difference in language is subtle, the amendment purports to resolve a conflict among the circuits regarding how to determine whether a conviction involves dishonesty or false statement.¹⁴ Specifically, the conflict is whether, in determining if the offense involves dishonesty or false statement, the court is limited to examination of the strict elements of the crime.¹⁵ Amended Rule 609(a)(2) makes clear that courts are not so limited.

The Advisory Committee on Evidence Rules has proposed a new rule, Rule 502,¹⁶ regarding waiver of the attorney-client privilege.¹⁷ This proposed rule was discussed in last year's survey,¹⁸ but it has been substantially revised since then.¹⁹ Revised proposed Rule 502(a)

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

8. *Id.*

9. FED. R. EVID. 606(b), 28 U.S.C. app. at 695 (2000) (amended 2006).

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

11. FED. R. EVID. 609.

12. FED. R. EVID. 609(a)(2), 28 U.S.C. app. at 768 (2000) (amended 2006).

13. FED. R. EVID. 609(a)(2).

14. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report of the Advisory Committee on Evidence Rules*, available at www.uscourts.gov/rules/comment2005/EVMay04.pdf#page+22 (last visited May 13, 2007).

15. *Id.*

16. FED. R. EVID. 502.

17. U.S. Courts, *Federal Rulemaking*, available at www.uscourts.gov/rules/newrules1.html (last visited May 13, 2007).

18. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 1083, 1086 (2006).

19. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Amendment to the Federal Rules of Evidence*, available at www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf (last visited May 13, 2007).

provides that “the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.”²⁰ Subdivision (b) provides that an inadvertent disclosure does not constitute a waiver “if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error”²¹

Subdivision (c), titled “Selective waiver,” may well excite the most comment and controversy because it can be argued that the rule will unnecessarily erode the attorney-client privilege. Subdivision (c) provides that disclosure of privileged information “to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.”²² Thus, a client can disclose privileged communications to a governmental agency without waiving the attorney-client privilege as to other parties or entities. The concern is that an across-the-board selective waiver rule will make it difficult for clients facing possible prosecution to resist the government’s request for a grant of selective waiver. To the extent that the selective waiver rule facilitates the ability of investigators to obtain privileged information, clients’ confidence that their communications with their attorneys are privileged will be diminished. The harm is exacerbated by the fact that the Rule does not bar the government from sharing the information it obtains pursuant to a selective waiver with other entities.

Subdivision (d) makes clear that information disclosed in accordance with a confidentiality order does not constitute a waiver both as to parties and nonparties to the action.²³ Subdivision (e), on the other hand, provides that agreements between or among parties concerning nonwaiver, while binding on the parties to the agreement, are not binding on nonparties unless the agreement is approved by the court.²⁴ 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

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

product protection, the parties presumably would have to stop the deposition and get court approval of the agreement if they want their agreement to apply to nonparties.

II. ARTICLE I. GENERAL PROVISIONS

Federal Rule of Evidence 103²⁵ provides that an appealing party cannot complain about a district court's erroneous evidentiary rulings unless that party objected to the admission of the evidence or, in the case of a ruling excluding evidence, made an offer of proof—that is, informed the district court of the substance of the excluded evidence.²⁶ Though easily stated, Rule 103 does not address every situation in which parties may sometimes find themselves. For example, if a district court rules that the prosecution can impeach the defendant with evidence of a prior conviction if the defendant testifies, then that defendant, for tactical reasons, might not take the stand. In that event, the conviction would not be admitted. But what if the defendant, after being convicted, wants to appeal the district court's decision to admit evidence of the conviction, arguing that the ruling erroneously prevented him from testifying? Addressing this situation in *Luce v. United States*,²⁷ the United States Supreme Court held that a pretrial ruling permitting the admission of prior conviction evidence under Rule 609 if the defendant testifies is not reviewable if the defendant does not, in fact, testify.²⁸

In *United States v. Hall*,²⁹ discussed in a prior survey,³⁰ the Eleventh Circuit applied *Luce* to evidence ruled admissible under Rule 404(b).³¹ In *Hall*, a child pornography case, the district court ruled that a videotaped interview of a four-year-old girl who said that the defendant had engaged in sexual conduct with her was admissible pursuant to Rule 404(b) to demonstrate the defendant's intent, knowledge, and lack of mistake or accident. Weighing the benefit of raising those defenses against the horrific prejudice if jurors saw the videotape, the defendant chose not to put up any evidence, stipulating that he would not raise defenses such as intent or mistake. After his conviction, the defendant sought to appeal the district court's order that the tape could be admitted at trial.³² Applying *Luce*, the Eleventh

25. FED. R. EVID. 103.

26. FED. R. EVID. 103(a).

27. 469 U.S. 38 (1984).

28. *Id.* at 43.

29. 312 F.3d 1250 (11th Cir. 2002).

30. Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 1487, 1490-91 (2003).

31. *Hall*, 312 F.3d at 1256-57; FED. R. EVID. 404(b).

32. *Hall*, 312 F.3d at 1252-55.

Circuit held that the defendant could not appeal that ruling because the tape was never admitted.³³

During the current survey period, the Eleventh Circuit in *United States v. LeCroy*³⁴ applied *Luce* in the context of trial court rulings involving the admissibility of expert testimony.³⁵ After his conviction, and during the sentencing phase of his trial, the defendant sought to offer opinion testimony regarding his mental health. The district court ruled that if the defendant presented this testimony, the prosecution would be allowed to present rebuttal evidence, including an evaluation of the defendant's mental status prepared by a government expert. This evaluation had been sealed, but the defendant's attorney had been allowed to examine the report. Apparently, the defendant's attorney was so concerned about the content of the report that he elected not to introduce the opinion testimony of his experts. The defendant then sought to appeal the district court's ruling that the government could introduce its expert's report if the defendant presented opinion testimony.³⁶ Applying *Luce*, the Eleventh Circuit held that the defendant had nothing to appeal.³⁷ Because the defendant's experts did not testify and the government's expert report was not admitted, the court reasoned that it would be required to speculate twice: once as to the testimony of the defendant's experts and again with regard to the testimony of the government's expert.³⁸ Accordingly, "[i]t would be improper for this court to engage in such speculation, and thus we decline to reach the merits of this issue."³⁹

III. ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 403⁴⁰ allows a district court, under some circumstances, to exclude relevant evidence, most notably when the danger of unfair prejudice substantially outweighs the probative value of the evidence.⁴¹ When the Author first began surveying Eleventh Circuit evidentiary decisions in 1986, Rule 403 was fertile ground for appeals and the Eleventh Circuit did not hesitate to immerse itself deeply in minute factual examinations to determine whether district courts properly

33. *Id.* at 1258.

34. 441 F.3d 914 (11th Cir. 2006).

35. *Id.* at 928.

36. *Id.* at 927-28.

37. *Id.* at 928.

38. *Id.*

39. *Id.*

40. FED. R. EVID. 403.

41. *Id.*

admitted or excluded evidence. Most frequently, the Eleventh Circuit employed Rule 403 to reverse convictions in criminal cases on the ground that prejudicial evidence should not have been admitted. In recent years, however, Rule 403 is rarely a factor in Eleventh Circuit decisions, and when it is mentioned, it is hardly the tool for rigid scrutiny it once was.

Nevertheless, as reported in the 2003 survey,⁴² the Eleventh Circuit in *United States v. Jernigan*⁴³ came close to ruling that a defendant's conviction should be reversed because the trial court admitted evidence that the defendant was a member of a gang.⁴⁴ The court stated, "Indeed, modern American street gangs are properly associated with a wealth of criminal behavior and social ills, and an individual's membership in such an organization is likely to promote strong antipathy in a jury."⁴⁵ Nevertheless, the Eleventh Circuit could not quite bring itself to hold that the district court abused its discretion when it admitted evidence of gang membership.⁴⁶ During the current survey period, the Eleventh Circuit turned to this issue in *United States v. Bradberry*.⁴⁷

In *Bradberry* the defendant, who had been convicted of possessing a firearm in a school zone, contended that the district court abused its discretion when it admitted evidence that he was a gang member.⁴⁸ The government contended that the defendant and fellow gang members went to the school with a firearm to retaliate for an earlier incident.⁴⁹ The defendant contended that there was no evidence that he was a member of a gang and that evidence that his alleged companions were gang members was used simply to establish his guilt by association.⁵⁰ The Eleventh Circuit acknowledged the inherent prejudice, as recognized in *Jernigan*, of evidence of gang membership and seemed to acknowledge that evidence of the defendant's membership in a gang was scant.⁵¹ The court stated that "[t]he *implication* of the government's questioning regarding the Maysville soldiers was that the [defendant and his companions] were all members of the gang."⁵² However, to the extent that there was evidence that the group was in the same gang, that

42. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 1219, 1221 (2004).

43. 361 F.3d 1273 (11th Cir. 2003).

44. *Id.* at 1285.

45. *Id.* at 1284-85.

46. *Id.* at 1285.

47. 466 F.3d 1249 (11th Cir. 2006).

48. *Id.* at 1251.

49. *Id.*

50. *Id.* at 1253-54.

51. *Id.*

52. *Id.* (emphasis added).

evidence made the government's theory of the case more likely.⁵³ Thus, the evidence did not *only* suggest that the defendant was a bad person or that because he was a gang member he was more likely to possess a gun, but rather the evidence of his gang membership helped explain why the defendant and his companions were at the school together.⁵⁴

As in *Jernigan*, the Eleventh Circuit acknowledged that evidence of gang membership in this case was a "close question."⁵⁵ The Eleventh Circuit thus concluded, as it did in *Jernigan*, that precisely because it was a close question, the district court, which had the opportunity to weigh the evidence firsthand, should be afforded broad discretion in determining whether the probative value of the evidence outweighs its prejudicial impact.⁵⁶ Therefore, the Eleventh Circuit affirmed the defendant's conviction.⁵⁷

Rule 404⁵⁸ 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.⁵⁹ 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.⁶⁰ Such inadmissible evidence is often called "propensity evidence."⁶¹ The Eleventh Circuit applies a three-part test, sometimes called the *Beechum* test, to determine the admissibility of extrinsic act evidence.⁶² First, the extrinsic act evidence "must be relevant to an issue other than the defendant's character."⁶³ Second, the prosecution must prove the defendant committed the extrinsic act.⁶⁴ Third, the evidence must survive a Rule 403 balancing test: the probative value of the extrinsic act evidence must not be substantially outweighed by its prejudicial effect.⁶⁵ Rule 404(b) specifically provides that extrinsic act evidence may be admissible

53. *Id.* at 1254.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. FED. R. EVID. 404.

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

60. *Id.*

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

62. *United States v. Mills*, 138 F.3d 928, 935 (11th Cir. 1998); *see United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc).

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

64. *Id.*

65. *Id.*

to prove such matters as motive, preparation, knowledge, intent, scheme, or plan.⁶⁶

Perhaps most frequently, the basis for admitting extrinsic act evidence is that the evidence is relevant to prove intent. For example, prosecutors may contend that evidence of prior drug dealing is admissible to prove a defendant's intent to participate in a subsequent drug conspiracy. To avoid the highly prejudicial impact of extrinsic act evidence, defendants often try to eliminate the predicate for the admission of the evidence. For example, defendants may contend that intent is not at issue, and consequently evidence of a prior conviction is not necessary to prove intent. As discussed in last year's survey,⁶⁷ this argument met with only fleeting success in *United States v. Matthews*.⁶⁸

In an initial decision, the Eleventh Circuit in *Matthews* held that in some circumstances, intent is not a legitimate issue.⁶⁹ The court stated, "Put simply, if the conduct charged is not open to a plausible innocent explanation, then extrinsic offense evidence is not admissible to show intent."⁷⁰ This holding appeared to constitute a dramatic shift in course by the Eleventh Circuit, but as noted, the change in course was remarkably short-lived. In a second panel decision, the Eleventh Circuit, in a terse opinion, held that a not guilty plea in a drug conspiracy case makes the defendant's intent a material issue.⁷¹ Thus, at least in drug conspiracy cases, a defendant necessarily makes an issue of intent, and thus subjects himself to the admission of evidence of prior drug dealings, if the defendant pleads not guilty.

In the current survey period, the Eleventh Circuit returned to this issue in *United States v. Perez*.⁷² In *Perez* the defendant, who had been charged with smuggling illegal aliens into the United States, objected to the admission of a prior conviction for alien smuggling.⁷³ However, the Eleventh Circuit held that by pleading not guilty to participating in a conspiracy to smuggle illegal aliens, the defendant made intent a material issue.⁷⁴ Consequently, evidence of the defendant's prior conviction was relevant to an issue other than his character.⁷⁵ The Eleventh Circuit noted that the defendant had not "affirmatively take[n]

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

67. Marc T. Treadwell, *Evidence*, 57 MERCER L. REV. 1083, 1092 (2006).

68. 411 F.3d 1210 (11th Cir. 2005).

69. *Id.* at 1228.

70. *Id.*

71. *United States v. Matthews*, 431 F.3d 1296, 1311 (11th Cir. 2005).

72. 443 F.3d 772 (11th Cir. 2006).

73. *Id.* at 774.

74. *Id.* at 779.

75. *Id.*

the issue of intent out of contention by stipulating that [he] possessed the requisite intent.”⁷⁶ Of course, this is a *Hopson’s* choice if there ever was one; while such a stipulation may preclude the admission of the prior conviction, it may also be tantamount to an admission of guilt.

The Eleventh Circuit’s decision in *United States v. Kennard*⁷⁷ illustrates the circumstances under which a defendant’s flight can be relevant to prove guilt and, in the process, demonstrates that the Eleventh Circuit is not above employing wry humor to make a point. In *Kennard* the defendant and his brother were charged with defrauding churches and other charitable organizations of millions of dollars by soliciting relatively nominal fees in exchange for promises of hundreds of thousands of dollars in grants that were to be distributed to the contributors. When the plan went awry and the defendant was indicted, the defendant eluded authorities for several weeks.

At his trial, the district court admitted evidence of the defendant’s flight. After his conviction, the defendant appealed, contending among other things, that the evidence of his flight was too prejudicial to be admissible.⁷⁸ The defendant’s argument, the Eleventh Circuit mused, seemed to be that the evidence was “truly prejudicial because it made [the defendant] look so guilty,” to which the Eleventh Circuit responded: “[o]f course it did.”⁷⁹ To make its point, the court borrowed from the Bible: “[t]he wicked flee when no man pursueth, [but] they really flee when law enforcement is looking for them.”⁸⁰ That, the court continued, is precisely the reason evidence of flight is admissible; it is highly probative of guilt.⁸¹ While this evidence is extremely prejudicial, it is prejudicial because it is so probative, not because it unfairly prejudices the defendant.⁸² Therefore, the court concluded that the district court properly admitted evidence of the defendant’s flight.⁸³

IV. ARTICLE VI. WITNESSES

In *United States v. Adair*,⁸⁴ the Eleventh Circuit held that if a defendant calls witnesses to testify to a relevant trait of his character, those witnesses are subject to cross-examination about the defendant’s

76. *Id.* (quoting *United States v. Costa*, 947 F.2d 919, 925 (11th Cir. 1991)).

77. 472 F.3d 851 (11th Cir. 2006).

78. *Id.* at 853-54.

79. *Id.* at 855.

80. *Id.* (quoting *Proverbs* 28:1 (King James)).

81. *Id.*

82. *Id.*

83. *Id.*

84. 951 F.2d 316 (11th Cir. 1992).

prior conduct pertinent to the character trait in issue.⁸⁵ Such questions are sometimes referred to as “have you heard” questions because the prosecution is allowed to ask a character witness if he has heard that, for example, a defendant was convicted of a prior criminal offense.⁸⁶ During the survey period, the Eleventh Circuit addressed the limits of “have you heard” questions in *United States v. Ndiaye*.⁸⁷

In *Ndiaye*, the defendant called three character witnesses who apparently testified to the defendant’s character for truthfulness.⁸⁸ The government then cross-examined each of the defendant’s character witnesses about a letter the defendant wrote to a neighbor seeking to establish an amorous relationship.⁸⁹ On appeal, the defendant contended that because his character witness had only testified about the defendant’s character for truthfulness, the government should not have cross-examined those witnesses about alleged infidelity.⁹⁰ The government argued that the defendant’s attempt to engage in a relationship with a woman who was not his wife was, in fact, relevant to his character for honesty and truthfulness.⁹¹ The Eleventh Circuit rejected the government’s argument.⁹² While the letter could possibly suggest that the defendant “was not being entirely candid with his wife, it does not directly relate to the [defendant’s] truthfulness and honesty.”⁹³ However, the court concluded that the error was harmless.⁹⁴

V. ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

*Daubert v. Merrill Dow Pharmaceuticals, Inc.*⁹⁵ once again figured most prominently in Eleventh Circuit evidence decisions. In *Daubert* the Supreme Court made district court judges gatekeepers with the assigned task of keeping “junk science” out of courtrooms.⁹⁶ In 2000, the principles of *Daubert* were codified in the Federal Rules of Evidence.

85. *Id.* at 319.

86. See Marc T. Treadwell, *Evidence*, 44 MERCER L. REV. 1209, 1217-18 (1993).

87. 434 F.3d 1270 (11th Cir. 2006).

88. *Id.* at 1289. A defendant may offer evidence of a pertinent trait of character for substantive purposes pursuant to Rule 404(a)(1). See FED. R. EVID. 404(a)(1). Pursuant to Rule 608(a), the credibility of a witness may be attacked or supported by evidence of his character for truthfulness or untruthfulness. See FED. R. EVID. 608(a).

89. *Ndiaye*, 434 F.3d at 1289.

90. *Id.*

91. *Id.*

92. *Id.* at 1290.

93. *Id.*

94. *Id.*

95. 509 U.S. 579 (1993).

96. *Id.* at 589-90.

Amended Rule 701⁹⁷ makes clear that lay witnesses cannot give opinion testimony based on “scientific, technical, or other specialized knowledge within the scope of Rule 702.”⁹⁸ In other words, the reliability requirements imposed by *Daubert* on expert testimony cannot be avoided by labeling a witness a lay witness. Amended Rule 702⁹⁹ basically codifies *Daubert* and requires that expert testimony must be “based upon sufficient facts or data,” must be the “product of reliable principles and methods,” and those “principles and methods [must be applied] reliably to the facts of the case.”¹⁰⁰ Amended Rule 703¹⁰¹ provides that facts or data, although relied upon by an expert, cannot be disclosed to the jury by the proponent of the testimony unless the court determines that the probative value of the facts or data “in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”¹⁰²

This year saw the continuation of the trend discussed in previous surveys—a tendency to permit the expansion of expert testimony in criminal cases, at least when offered by the prosecution, and a simultaneous tendency to restrict the use of expert testimony in civil cases. Whether this represents a *Daubert* bias against civil plaintiffs and criminal defendants is well beyond the scope of this survey. However, it is beyond debate that, for whatever reason, criminal defendants and civil plaintiffs do not fare well in *Daubert* decisions.

In *United States v. Garcia*,¹⁰³ the defendant contended that the district court erroneously permitted the government’s expert witness, a Drug Enforcement Agency agent who testified as an expert on the meaning of coded language used by drug dealers, to testify about the out of court statement of one of the defendant’s alleged coconspirators.¹⁰⁴ Much of the agent’s expert testimony was unremarkable and consistent with relatively recent Eleventh Circuit decisions permitting law enforcement agents to testify as experts with regard to code words used by criminal defendants. The agent was on solid ground so long as he testified that various terms were used as code words by drug conspirators on a common and frequent basis.¹⁰⁵ However, one code word for cocaine—“t-shirt”—was apparently specific to the drug conspiracy in

97. FED. R. EVID. 701.

98. *Id.*

99. FED. R. EVID. 702.

100. *Id.*

101. FED. R. EVID. 703.

102. *Id.*

103. 447 F.3d 1327 (11th Cir. 2006).

104. *Id.* at 1334.

105. *Id.* at 1334-35, 1336-37.

which the defendant was alleged to have participated.¹⁰⁶ In fact, the agent only learned that “t-shirt” meant cocaine when he interviewed a cooperating coconspirator. Thus, the agent was allowed to testify as an expert at trial that “t-shirt” meant cocaine when the sole basis for this “opinion” was a statement made to the agent by a coconspirator. Not surprisingly, the defendant contended on appeal that the coconspirator’s statement was inadmissible hearsay.¹⁰⁷ The Eleventh Circuit disagreed.¹⁰⁸

The court noted that Rule 703 permits an expert witness to base his opinion on information that is otherwise inadmissible and that information can even be disclosed to the jury.¹⁰⁹ Law enforcement agents testifying as experts may reasonably rely upon information obtained during the course of interviewing criminals.¹¹⁰ The Eleventh Circuit held that this includes information obtained from a coconspirator in the very conspiracy in which a defendant is charged.¹¹¹ Accordingly, the Eleventh Circuit held that the district court did not abuse its discretion in concluding that the agent

had applied his expertise in relying on, among other sources, his interview with [the coconspirator] to determine the meaning of coded language. An experienced agent [. . .] by virtue “of his professional knowledge and ability, [was] competent to judge for himself the reliability of” statements made by an admitted drug trafficker in post-arrest debriefings in forming an expert opinion about the drug traffickers’ use of coded language.¹¹²

In *United States v. Dulcio*,¹¹³ the prosecution used law enforcement agents to give both lay and expert opinions. First, the district court permitted one agent to testify that individuals picking up shipments of drugs generally are aware of the contents of the shipment.¹¹⁴ Although the defendants objected to this testimony on several grounds at trial, on appeal they apparently only contended that the testimony violated Rule 704(b) because the agents expressed an “opinion or inference as to whether the defendants did or did not have the mental

106. *Id.* at 1333.

107. *Id.* at 1334.

108. *Id.*

109. *Id.* at 1336.

110. *Id.*

111. *Id.* at 1336-37.

112. *Id.* at 1337 (quoting *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971)).

113. 441 F.3d 1269 (11th Cir. 2006).

114. *Id.* at 1273.

state. . .constituting an element of the crime charged.”¹¹⁵ The Eleventh Circuit acknowledged that some courts have ruled that such testimony violates Rule 704(b), but rather than discussing the defendants’ contention, the Eleventh Circuit concluded that any error was harmless.¹¹⁶

Two other agents were allowed to give what the district court considered lay opinion testimony regarding the modus operandi of people involved in the drug business.¹¹⁷ Another agent testified, again as a lay witness, that “persons picking up a high value narcotics shipment ‘knew what was in there.’”¹¹⁸ It is not clear why this agent was giving lay testimony while the other agent who testified about the knowledge of people picking up drug shipments was giving expert testimony. In any event, because Rule 704(b)’s prohibition against opinion testimony about defendants’ mental states or conditions applies only to expert witnesses, the rule did not bar lay opinion testimony about the defendants’ states of mind regarding the contents of a “high value narcotics shipment.”¹¹⁹

However, the Eleventh Circuit agreed that the lay opinion testimony of the two agents was based on specialized knowledge.¹²⁰ Thus, the agents’ testimony violated the prohibition of Rule 701(c), which prevents lay witnesses from giving opinion testimony when their testimony is based on “scientific, technical, or other specialized knowledge.”¹²¹ This error, however, was harmless.¹²²

A similar issue was raised in *United States v. LeCroy*.¹²³ In *LeCroy* the defendant claimed that the prosecution and the district court violated expert witness disclosure requirements when it allowed a Georgia Bureau of Investigation (“GBI”) agent to give opinion testimony. The agent testified that a blood stain on a shirt appeared to have been made by someone wiping a bloody knife on the shirt. Although the prosecution did not disclose the GBI agent as an expert, the district court allowed him to testify as a lay witness.¹²⁴ The Eleventh Circuit affirmed.¹²⁵ To the Eleventh Circuit, testimony that a blood stain was

115. *Id.* (quoting FED. R. EVID. 704(b)).

116. *Id.* at 1273-74.

117. *Id.* at 1274.

118. *Id.*

119. *Id.*

120. *Id.* at 1275.

121. *Id.* (quoting FED. R. EVID. 701(c)).

122. *Id.*

123. 441 F.3d 914 (11th Cir. 2006).

124. *Id.* at 926-27.

125. *Id.*

made by a knife being wiped on the shirt clearly did not constitute expert opinion under Rule 702.¹²⁶ Rather, it was an opinion “‘rationally based on the perception of the witness [. . .] helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and [. . .] not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.’”¹²⁷ Although the agent’s experience and qualifications may have qualified him as an expert witness, that did not make the agent’s opinion testimony expert opinion testimony.¹²⁸

This issue was raised yet again in *United States v. Hamaker*.¹²⁹ In *Hamaker* the prosecution again failed to identify a government agent, this time an FBI financial analyst, as an expert witness. The government then called the agent to give opinion testimony based on his review of financial records. The district court permitted the analyst to testify as a lay witness.¹³⁰ Carefully examining the analyst’s testimony, the Eleventh Circuit concluded that he did not testify as an expert.¹³¹ The analyst

simply added and subtracted numbers from a long catalog of . . . records, and then compared those numbers in a straightforward fashion. As [the analyst] himself explained at trial, while his expertise and the use of computer software may have made him more efficient at reviewing [the] records, his review itself was within the capacity of any reasonable lay person.¹³²

Therefore, the analyst’s testimony was permissible lay testimony.¹³³

For those looking for support for the argument that the Eleventh Circuit applies *Daubert* differently in civil cases than in criminal cases, the Eleventh Circuit’s decision in *Thomas v. Evenflo Co.*¹³⁴ may be instructive. As discussed above, the Eleventh Circuit held in *United*

126. *Id.*

127. *Id.* at 927 (quoting FED. R. EVID. 701).

128. *Id.*

129. 455 F.3d 1316 (11th Cir. 2006).

130. *Id.* at 1330-31. The district court did exclude summary charts that the government intended to use to bolster the analyst’s testimony because those charts were not produced until the morning of the first day of trial. *Id.* at 1330. The district court stated, “[H]ow can there be a fair trial for the defendant if the defense attorney is not given a key exhibit prior to the morning of trial?” *Id.* No doubt, the defendant asked the same question about the government’s failure to identify the analyst as an expert witness and to disclose the substance of, and bases for, his opinion testimony.

131. *Id.* at 1331-32.

132. *Id.*

133. *Id.* at 1332.

134. 205 F. App’x 768 (11th Cir. 2006).

*States v. Garcia*¹³⁵ that a prosecution expert could give opinion testimony even though the opinion was based on the hearsay statement of the defendant's alleged coconspirator.¹³⁶ In *Thomas* the personal representative of an infant's estate brought suit against the manufacturer of the infant car seat in which the child, J.T., was sitting when he asphyxiated. The plaintiff contended, for several reasons, that the seat was defective and proximately caused the infant's death. The plaintiff retained an expert, a consulting engineer, who rendered several opinions regarding defects in the car seat,¹³⁷ only one of which will be discussed here.

In that opinion, the expert stated in his report as follows: "One side of the harness became disengaged and [J.T.] moved such that he had both of his legs on one side of the crotch strap. His body slid forward causing the harness tie to load against his neck. This loading resulted in his asphyxiation."¹³⁸ The district court struck this opinion on the grounds that it was unreliable because the plaintiff had not sufficiently established the methodology used by the expert or whether the expert correctly applied methodologies referenced in articles he had attached to his report.¹³⁹ The Eleventh Circuit affirmed, but on different grounds.¹⁴⁰ The Eleventh Circuit observed "reasons more fundamental to the principles governing the admissibility of evidence in the federal courts" to conclude that the opinion was inadmissible.¹⁴¹ Specifically, the opinion was not based on the expert's personal knowledge and therefore was inadmissible under Rule 602,¹⁴² which requires that a witness have personal knowledge of the facts to which he testifies.¹⁴³ The Eleventh Circuit also generally cited Rules 801 through 807,¹⁴⁴ which, of course, address hearsay.¹⁴⁵

However, the opinion acknowledges that the expert's knowledge was based on photographs of the scene, deposition testimony, an autopsy report, and discovery responses.¹⁴⁶ Perhaps there are facts missing from the Eleventh Circuit's opinion, but it is difficult to understand why

135. 447 F.3d 1327 (11th Cir. 2006).

136. *Id.* at 1336-37.

137. *Thomas*, 205 F. App'x at 769-70.

138. *Id.* at 770.

139. *Id.* at 772.

140. *Id.*

141. *Id.*

142. FED. R. EVID. 602.

143. *Thomas*, 205 F. App'x at 772.

144. FED. R. EVID. 801 to 807.

145. *Thomas*, 205 F. App'x at 772.

146. *Id.*

the Eleventh Circuit did not acknowledge or address, as it did in *Garcia*, Rule 703, which allows experts to give testimony based on facts proved by others or even inadmissible hearsay.¹⁴⁷

Moreover, the court continued, the expert's "recitation of the circumstances of J.T.'s death would have been cumulative and therefore would not have assisted the trier of fact. In fact, the suggestion of [the expert's] presence at the incident would be misleading and unduly persuasive."¹⁴⁸ Again, perhaps there is something missing from the opinion. It would seem highly unlikely that the plaintiff was suggesting that his expert was present when the infant died. Rather, the expert was attempting to offer an opinion, based on facts provided to him, regarding how the infant was able to move his body in a fashion that resulted in his death.¹⁴⁹

Finally, the Eleventh Circuit held that the expert's opinion that the infant asphyxiated when his body slipped forward "causing the harness tie to load against his neck" was inadmissible because nothing in the expert's qualifications made him qualified to render such an opinion.¹⁵⁰ Although the Eleventh Circuit acknowledged that medical training is not necessary to offer an opinion as to cause of death, the court nevertheless held that the opinion was inadmissible because the opinion "could have been premised only upon information elsewhere available to the trier of fact, who would be free to draw similar or differing conclusions based upon the same evidence."¹⁵¹ Therefore, for reasons not even based on *Daubert*, but quite frankly for reasons that are difficult to understand, the Eleventh Circuit affirmed the district court's decision.¹⁵²

VI. ARTICLE VIII. HEARSAY

As first discussed in the 2005 Georgia Evidence survey,¹⁵³ the Supreme Court in *Crawford v. Washington*¹⁵⁴ overruled *Ohio v. Roberts*¹⁵⁵ 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.¹⁵⁶ In *Crawford*

147. FED. R. EVID. 703; *Garcia*, 447 F.3d at 1336-37.

148. *Thomas*, 205 F. App'x at 772 (citing FED. R. EVID. 403).

149. *See id.* at 770-72.

150. *Id.* at 770, 772-73.

151. *Id.* at 773.

152. *Id.*

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

154. 541 U.S. 36 (2004).

155. 448 U.S. 56 (1980).

156. *Id.* at 68-69.

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.¹⁵⁷ 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 Amendment¹⁵⁸ right of confrontation, accepting the prosecution's argument that under the Supreme Court's decision in *Roberts*, hearsay statements are admissible if the statements fall within a "firmly rooted hearsay exception" or if they bear "particularized guarantees of trustworthiness."¹⁵⁹ The United States Supreme Court granted certiorari in *Crawford* and held that the Sixth Amendment applies to out of court testimonial statements.¹⁶⁰ Testimonial statements include affidavits, custodial examinations, prior testimony, and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially."¹⁶¹ Subsequent decisions in both state and federal courts attempting to interpret *Crawford* have largely focused on what constitutes a testimonial statement.

In *United States v. Underwood*,¹⁶² the district court admitted recorded conversations between the defendant's brother and a confidential informant during the defendant's trial for alleged possession of cocaine with intent to distribute. The district court ruled that the statements were statements of a coconspirator and thus admissible pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence.¹⁶³ The Eleventh Circuit easily concluded that the brother's statement was, in fact, a statement by a coconspirator made during the course of and in furtherance of the conspiracy and thus was admissible under Rule 801(d)(2)(E).¹⁶⁴ The court took a little more time to examine the defendant's contention that the statement was inadmissible pursuant to *Crawford*. The court agreed that even though a statement may meet the elements of the coconspirator exception, it is inadmissible under *Crawford* if the statement is testimonial.¹⁶⁵

157. *Crawford*, 541 U.S. at 38-42.

158. U.S. CONST. amend. VI.

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

160. *Id.* at 42, 68.

161. *Id.* at 51.

162. 446 F.3d 1340 (11th Cir. 2006).

163. *Id.* at 1345; FED. R. EVID. 801(d)(2)(E).

164. *Underwood*, 446 F.3d at 1345-46.

165. *Id.* at 1346.

Examining the examples of testimonial statements given by the Supreme Court in *Crawford*, the Eleventh Circuit agreed with the Second Circuit, noting that “all of these formulations involve statements made under circumstances which would lead the declarant to believe that the statement would be available for use at a later trial.”¹⁶⁶ The challenged statements consisted of conversations between the brother and the confidential informant regarding the purchase of cocaine.¹⁶⁷ These statements “clearly were not made under circumstances which would have led [the brother] reasonably to believe that his statement would be available for use at a later trial.”¹⁶⁸ In addition, the Eleventh Circuit noted that in *Crawford* the Supreme Court established, albeit in dicta, that most “hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.”¹⁶⁹ Accordingly, the Eleventh Circuit held that the brother’s statement was not testimonial in nature and therefore *Crawford* did not apply.¹⁷⁰

In *Espy v. Massac*,¹⁷¹ the Eleventh Circuit addressed for the first time the issue of whether *Crawford* applies retroactively. In *Espy*, a habeas action, the defendant was convicted of armed robbery in state court. In the state court trial, the trial court admitted, pursuant to the *res gestae* exception, statements made by two witnesses to a police officer approximately fifteen to twenty minutes after the robbery.¹⁷² These were precisely the type of testimonial statements that *Crawford* intended to address. However, the defendant’s state court trial took place prior to the Supreme Court’s decision in *Crawford*, and therefore, the court of appeals had to address whether *Crawford* applied retroactively.¹⁷³

166. *Id.* at 1347 (citing *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004)).

167. *Id.*

168. *Id.*

169. *Id.* (quoting *Crawford*, 541 U.S. at 55).

170. *Id.* at 1347-48. See also *United States v. Brown*, in which the Eleventh Circuit held as nontestimonial a private telephone conversation between the defendant and his mother during which the mother, apparently based on statements made to her by her son during the telephone conversation, made statements that were overheard and which suggested that the defendant had just told his mother that he had committed the crime with which he was charged. 441 F.3d 1330, 1359-60 (11th Cir. 2006). The Eleventh Circuit held that a “private telephone conversation between mother and son, which occurred while [the mother] was sitting at her dining room table with only her family members present, was not testimonial.” *Id.* at 1360.

171. 443 F.3d 1362 (11th Cir. 2006).

172. *Id.* at 1364.

173. *Id.* at 1365-66.

The test for determining whether a court's decision applies retroactively is found in *Teague v. Lane*.¹⁷⁴ The first element of the test is whether the decision constitutes a new rule of law.¹⁷⁵ "A case establishes a new rule 'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'"¹⁷⁶ Clearly, *Crawford*, which overruled *Roberts*, created a new rule of law.¹⁷⁷ However, the second element of *Teague* holds that a new rule of law should not be applied retroactively unless "it either (1) immunizes certain private, individual conduct from criminal regulation; or (2) 'requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.'"¹⁷⁸ Clearly, *Crawford* did not immunize conduct from criminal regulation and therefore the first exception was not applicable.¹⁷⁹

The second exception applies to "watershed rules of criminal procedure, . . . without which the likelihood of an accurate conviction is seriously diminished."¹⁸⁰ The Eleventh Circuit could find no decision since *Teague* that met the strict standard established by this exception and noted that the Supreme Court has suggested only the decision of *Gideon v. Wainwright*,¹⁸¹ requiring assistance of counsel in felony prosecutions, as the type of new rule that might meet the *Teague* standard.¹⁸² Compared to *Gideon*, the Eleventh Circuit concluded that while *Crawford* certainly impacts the accuracy of criminal convictions, it was not a watershed rule.¹⁸³ Moreover, the court noted that other circuits had concluded or suggested that *Crawford* cannot be applied retroactively.¹⁸⁴ Accordingly, the court held that the defendant could not rely on *Crawford*.¹⁸⁵ Thus, the determination of whether the admission of the hearsay statements violated a defendant's Sixth Amendment rights had to be based on the law at the time of the defendant's trial.¹⁸⁶ Prior to *Crawford*, hearsay statements were

174. 489 U.S. 288 (1989).

175. *Espy*, 443 F.3d at 1366 (citing *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir. 2001)).

176. *Id.* (quoting *Teague*, 489 U.S. at 301).

177. *Id.*

178. *Id.* (quoting *Teague*, 489 U.S. at 307).

179. *Id.* at 1367.

180. *Id.* (quoting *Teague*, 489 U.S. at 311, 313).

181. 372 U.S. 335 (1963).

182. *Espy*, 443 F.3d at 1367.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

admissible if, generally, they fell within a firmly rooted hearsay exception.¹⁸⁷ Interestingly, the court held that Georgia's *res gestae* doctrine was a firmly rooted hearsay exception,¹⁸⁸ a point with which some may disagree.

Rule 804(b)(1)¹⁸⁹ provides that testimony from a prior civil proceeding is admissible in a criminal case if the declarant is unavailable and the party against whom the testimony is offered in the criminal case "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" in the prior proceeding.¹⁹⁰ In *United States v. Kennard*,¹⁹¹ the defendants, during their trial for mail fraud, money laundering, conspiracy, and other offenses, contended that the district court improperly excluded from evidence the deposition testimony that their former attorney gave in a Securities and Exchange Commission ("SEC") investigation.¹⁹² As discussed above, the charges against the defendants arose from a scheme in which the brothers solicited payments from churches or similar organizations in exchange for promises that the participants would receive hundreds of thousands of dollars in grants. These grants, of course, never materialized. The deposition was taken by the SEC during the course of civil proceedings filed by the SEC against the defendants and their company.¹⁹³ The Eleventh Circuit agreed that the former attorney was "unavailable" because he had refused to testify at the defendants' trial on the grounds that his testimony could incriminate him.¹⁹⁴

However, because the prosecution did not participate in the deposition, the defendants still had to establish that the SEC, when it deposed the attorney, had motives similar to the government's motives in its prosecution of the defendants.¹⁹⁵ The defendants argued that the SEC's investigation overlapped the criminal charges, particularly with regard to an escrow account set up by the attorney in which the fraudulently obtained funds were deposited.¹⁹⁶ But the Eleventh Circuit concluded that the defendants had not met their burden.¹⁹⁷ Essentially, the defendants relied on the deposition transcript itself and

187. *Id.* (citing *White v. Illinois*, 502 U.S. 346, 355-56 (1992)).

188. *Id.* at 1367-68.

189. FED. R. EVID. 804(b)(1).

190. *Id.*

191. 472 F.3d 851 (11th Cir. 2006).

192. *Id.* at 855.

193. *Id.* at 853-54.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 855-56.

argued that the questions and answers were sufficient to establish that the subject matter of the deposition was similar to the subject matter of the criminal prosecution.¹⁹⁸ Even accepting this similarity, however, the Eleventh Circuit noted that there was no evidence of the SEC's motive in questioning the attorney and certainly not sufficient evidence to establish that the SEC's motive was similar to the prosecution's motive.¹⁹⁹ Therefore, the Eleventh Circuit concluded that the district court had not abused its discretion when it refused to admit the deposition.²⁰⁰

In *United States v. Arias-Izquierdo*,²⁰¹ six Cuban nationals were convicted of various charges based on the hijacking of a domestic Cuban airliner that had been forced to fly to Key West.²⁰² On appeal, the defendants contended that the district court improperly admitted a document prepared by Cubana Airlines that revealed that five of the defendants had previously been passengers on the flight that they later commandeered. The document simply listed the flights the defendants had taken on Cubana Airlines in 2003.²⁰³ The document was authenticated at trial by means of a separate document entitled "Certification of Foreign Commercial Registries."²⁰⁴ This contained a foreign records certification, pursuant to Federal Rule of Evidence 902(12),²⁰⁵ certifying that the attached documents "were prepared on or about the day that the event transpired, by persons with knowledge and in the ordinary course of business."²⁰⁶ The certification further stated that the airline maintained handwritten records documenting the passengers on its flights. Thus, the document was actually a summary or recitation of information contained in records maintained by the airline. These records were not produced at trial.²⁰⁷ The government argued that the document was admissible pursuant to Rule 803(6),²⁰⁸ the business records exception.²⁰⁹ The district court agreed, finding that the

198. *Id.* at 856.

199. *Id.* at 855-56.

200. *Id.* at 856.

201. 449 F.3d 1168 (11th Cir. 2006).

202. *Id.* at 1173.

203. *Id.* at 1182-83.

204. *Id.* at 1183.

205. FED. R. EVID. 902(12).

206. *Arias-Izquierdo*, 449 F.3d at 1183.

207. *Id.*

208. FED. R. EVID. 803(6).

209. *Arias-Izquierdo*, 449 F.3d at 1183.

document was a report or data compilation from the company's own records and was thus admissible as a business record.²¹⁰

On appeal, the defendants argued that the document was prepared for litigation and thus could not have been a business record.²¹¹ The Eleventh Circuit agreed; Rule 803(6) requires that records admitted pursuant to the business records exception must have been maintained in the ordinary course of business and not for litigation.²¹² The court rejected the government's argument that although the trial exhibit was prepared for litigation, it nevertheless was admissible as a business record because it simply contained information found in records that were maintained in the ordinary course of business.²¹³ The government argued that the summary was essentially the same as a computer printout of digitally stored data, and such a document is admissible as a business record.²¹⁴ The Eleventh Circuit did not accept this analogy.²¹⁵ Rather than a simple computer printout, the court determined the document was a typed summary of handwritten business records prepared specifically for use at trial.²¹⁶ The exhibit simply was not a business record.²¹⁷ However, the court held that the error was not sufficiently prejudicial to reverse the defendants' convictions because there was ample evidence to support the charges even without the erroneously admitted summary.²¹⁸

Prosecutors sometimes argue that hearsay is admissible to explain a law enforcement officer's conduct. Georgia courts have firmly rejected that argument on the grounds that it is only in the rarest of circumstances "that a prosecution will properly concern itself with *why* an investigating officer did something."²¹⁹ Simply put, why a law enforcement officer does something is not relevant to the issue of whether a defendant committed a crime.

During the survey period, the Eleventh Circuit addressed a similar situation. In *United States v. Arbolaez*,²²⁰ the district court admitted statements made by a nontestifying coconspirator to a Drug Enforcement

210. *Id.*

211. *Id.*

212. *Id.* at 1183-84 (citing FED. R. EVID. 803(6)).

213. *Id.* at 1184.

214. *Id.*; see *United States v. Fujii*, 301 F.3d 535, 539 (7th Cir. 2002).

215. *Arias-Izquierdo*, 449 F.3d at 1184.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Teague v. State*, 252 Ga. 534, 536, 314 S.E.2d 910, 912 (1984); see also Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 274 (2003).

220. 450 F.3d 1283 (11th Cir. 2006).

Administration agent. The agent testified that the coconspirator told him that he had supplied the defendant with marijuana, that he had obtained marijuana from the defendant, and various other things that implicated the defendant.²²¹ The district court admitted the testimony as an “exception” to the hearsay rule—the testimony was not offered to prove the truth of what the agent was told, “but only that it was told to him.”²²² The prosecution argued to the jury that the statements were admitted to explain the agent’s conduct after he heard them.²²³ The Eleventh Circuit noted the district court’s confusion over whether the evidence was admissible as an “exception” to the hearsay rule or as nonhearsay.²²⁴ It appeared to the Eleventh Circuit that the statements were actually admitted as nonhearsay pursuant to Rule 801(c)²²⁵ because they were not offered “to prove the truth of the matter asserted.”²²⁶

Having determined the basis for the admission of the statements, the Eleventh Circuit easily concluded that their admission constituted error.²²⁷ With little elaboration, the court held that out of court statements to explain why a law enforcement officer does something are hearsay notwithstanding a contention that they are being offered to prove why the law enforcement officer did something, that is, to explain his conduct.²²⁸ Although the Eleventh Circuit did not go so far, it is likely that the rationale for its conclusion is identical to the Georgia court’s rationale for excluding such evidence; there is simply no need, in determining whether a defendant committed a crime, to explain why an investigating officer did something.

221. *Id.* at 1289-90.

222. *Id.* at 1290.

223. *Id.*

224. *Id.*

225. FED. R. EVID. 801(c).

226. *Arbolaez*, 450 F.3d at 1290; FED. R. EVID. 801(c).

227. *Arbolaez*, 450 F.3d at 1290.

228. *Id.*