

# Evidence

by Marc T. Treadwell\*

## I. INTRODUCTION

During the survey year, according to a Westlaw search, the United States Court of Appeals for the Eleventh Circuit rendered 2252 opinions. However, only 375 of these opinions were “published,” which is consistent with the Eleventh Circuit’s recent trend of sharply limiting the number of published decisions. The court’s view on this issue is illustrated by Internal Operating Procedure (“IOP”) 5 in Eleventh Circuit Rule 36-2<sup>1</sup>:

The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions.<sup>2</sup>

The Eleventh Circuit applies this policy with vigor, perhaps to the disappointment of lawyers looking for helpful authority to cite when appearing before the Eleventh Circuit or the district courts within the circuit. The problem, if it can be called a problem, is exacerbated by the fact that a significant percentage of published opinions are cases that raise issues about aliens, particularly the deportation of aliens, and federal sentencing guidelines. These may well be areas of the law that are in need of precedential guidance, but lawyers looking for published cases addressing more traditional issues like evidence will find relatively few cases.

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1. 11TH CIR. R. 36-2 I.O.P. 5.
2. *Id.*

The end result, or at least the end result for those writing survey articles on Eleventh Circuit evidence decisions, is that there is not much to write about, making this Article the shortest of the Author's twenty-one Eleventh Circuit evidence survey articles.

In addition to limiting the number of published opinions, some circuits have forcefully discouraged litigants from citing unpublished opinions. The Eleventh Circuit never quite went this far, but an earlier version of its IOP made clear that “[r]eliance on unpublished opinions is not favored by the court.”<sup>3</sup> Many argued that courts should not be allowed to restrict citations to their unpublished opinions. The Judicial Conference agreed and proposed a rule prohibiting any court from enacting a rule barring parties from citing to unpublished opinions.<sup>4</sup> Newly adopted Federal Rule of Appellate Procedure 32.1<sup>5</sup> provides that courts may not prohibit the citation of unpublished federal judicial decisions issued on or after January 1, 2007.<sup>6</sup> Currently, the Eleventh Circuit allows the citation of unpublished opinions as persuasive authority but not as binding precedent.<sup>7</sup>

## II. ARTICLE IV. RELEVANCY

Federal Rule of Evidence 404<sup>8</sup> is the principal rule governing the admissibility of “extrinsic act evidence”—evidence of acts and transactions other than the one at issue—offered for substantive, as opposed to impeachment, purposes.<sup>9</sup> Rule 404 is intended to prevent the admission of evidence of prior misconduct offered solely to prove that a defendant is more likely to have committed the charged offense.<sup>10</sup> This evidence is sometimes called “propensity evidence”<sup>11</sup> and is generally not admissible to prove the defendant's propensity to commit a criminal act.<sup>12</sup> The Eleventh Circuit applies a three-part test, sometimes called the *Beechum* test, to determine the admissibility of extrinsic act

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3. 11TH CIR. R. 36-3 I.O.P. 5 (2000).

4. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (May, 6, 2005), <http://www.uscourts.gov/rules/Reports/AP5-2005.pdf>.

5. FED. R. APP. P. 32.1.

6. *Id.*

7. 11TH CIR. R. 36-2 I.O.P. 6.

8. FED. R. EVID. 404.

9. *See id.*

10. *See id.*

11. For a more detailed discussion of propensity evidence see Marc T. Treadwell, *Evidence*, 56 MERCER L. REV. 1273, 1276 (2005).

12. *See* FED. R. EVID. 404(b).

evidence.<sup>13</sup> First, the extrinsic act evidence “must be relevant to an issue other than the defendant’s character.”<sup>14</sup> Second, the prosecution must prove the defendant committed the extrinsic act.<sup>15</sup> Third, the evidence must survive a Rule 403<sup>16</sup> balancing test,<sup>17</sup> meaning the probative value of the extrinsic act evidence must be substantially outweighed by its prejudicial effect.<sup>18</sup> However, Rule 404(b) provides that extrinsic act evidence may be admitted to prove matters such as motive, preparation, knowledge, intent, scheme, or plan.<sup>19</sup>

Viewed in a practical light, it is easy to understand why Rule 404(b) restricts the admission of extrinsic act evidence. In a close case, evidence that a defendant has committed or likely committed other crimes can have a huge impact on jurors. If a defendant committed prior drug offenses, jurors may think he or she is more likely to have committed the charged drug offense. Indeed, it seems that prosecutors most often resort to the use of extrinsic act evidence in drug cases. The defense will then aggressively, but usually unsuccessfully, fight to exclude the evidence of prior drug-related activity. In these cases, courts typically rule that evidence of prior, supposedly similar, drug activity is admissible to establish the defendant’s intent to engage in the charged drug activity.<sup>20</sup> In 2005 the Eleventh Circuit briefly signaled a change in its Rule 404(b) analysis in drug cases, holding that a plea of not guilty does not always open the door for the admission of prior drug convictions to prove intent.<sup>21</sup> However, four months after denying the government’s motion to reconsider its case, the Eleventh Circuit *sua sponte* vacated the decision.<sup>22</sup> The court issued a *per curiam* opinion, holding that a not guilty plea in a drug conspiracy case makes the defendant’s intent a material issue that opens the door for the admission of evidence of prior drug convictions.<sup>23</sup>

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13. *United States v. Mills*, 138 F.3d 928, 935 (11th Cir. 1998); *see United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc).

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

15. *Id.*

16. FED. R. EVID. 403.

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

18. FED. R. EVID. 403.

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

20. *E.g.*, *United States v. Matthews*, 431 F.3d 1296, 1318 (11th Cir. 2005) (*per curiam*).

21. *United States v. Matthews*, 411 F.3d 1210, 1226 (11th Cir. 2005), *vacated per curiam*, 431 F.3d 1296 (11th Cir. 2005).

22. *Matthews*, 431 F.3d at 1311.

23. *Id.*

The Eleventh Circuit's Rule 404(b) analysis in *United States v. Edouard*<sup>24</sup> is typical of the court's approach to extrinsic act evidence. In this drug conspiracy case, the defendant contended that the district court improperly admitted testimony that in 1995 and 1996 he had imported cocaine into the United States through the use of couriers.<sup>25</sup> After applying the *Beechum* test, the Eleventh Circuit disagreed.<sup>26</sup> Under the first prong, the court noted the extrinsic act evidence was admissible to prove the defendant's intent to engage in the charged conspiracy.<sup>27</sup> The defendant's not guilty plea made intent a material issue and thus opened the door for the admission of extrinsic act evidence to prove intent.<sup>28</sup> Because the same state of mind was required for both the conspiracy charge and the extrinsic offenses, the extrinsic offenses were relevant to prove the defendant's attempt to commit the charged offense.<sup>29</sup>

The second prong of the *Beechum* test—whether the government has sufficiently proven the defendant committed the extrinsic offenses—appeared to be a more problematic issue for the government.<sup>30</sup> The defendant had not been charged and, therefore, had not been convicted of committing the extrinsic offenses.<sup>31</sup> However, a conviction is not necessary to render evidence of extrinsic offenses admissible.<sup>32</sup> Rather, the prosecution may introduce evidence of extrinsic acts if a jury would be able to find, by a preponderance of the evidence, that the acts actually occurred.<sup>33</sup> The government's evidence consisted of testimony from the defendant's two brothers. In exchange for possible sentence reductions, the brothers testified that they smuggled cocaine into the United States for the defendant on commercial airlines in return for payment. The defendant presented no evidence to rebut this testimony.<sup>34</sup> The Eleventh Circuit held that this testimony was sufficient to allow a jury to conclude by a preponderance of the evidence whether the defendant committed the prior acts.<sup>35</sup> Under the third prong of the *Beechum* analysis—the Rule 403 balancing test—the defendant primarily argued

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24. 485 F.3d 1324 (11th Cir. 2007).

25. *Id.* at 1332, 1343.

26. *Id.* at 1346.

27. *Id.* at 1345.

28. *Id.*

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.* at 1344.

33. *United States v. Bowe*, 221 F.3d 1183, 1192 (11th Cir. 2000).

34. *Edouard*, 485 F.3d at 1344-45.

35. *Id.* at 1345.

that the extrinsic acts were too remote and different to be admissible. His alleged prior smuggling involved human couriers, while the charged offense alleged smuggling cocaine in cargo.<sup>36</sup> However, because both schemes involved smuggling cocaine into the United States, the fact that different means were used did not render the extrinsic acts inadmissible.<sup>37</sup> The charged conspiracy allegedly began in 1998, and thus, the 1995 and 1996 activities were not too remote to be inadmissible.<sup>38</sup> Accordingly, because the extrinsic act evidence satisfied Rule 404(b), the district court did not err in admitting the evidence.<sup>39</sup>

Similarly, in *United States v. Tampas*,<sup>40</sup> the defendant contended that the district court improperly admitted extrinsic act evidence, but the Eleventh Circuit's brief treatment of this argument undoubtedly left the defendant unsatisfied. In *Tampas* the defendant was charged with conspiracy to commit embezzlement from a Young Men's Christian Association ("YMCA"). The defendant, with the aid of a YMCA employee, allegedly received payments for services that either he did not perform or had a value substantially less than the payments he received. The YMCA employee, who was charged as the defendant's coconspirator, had previously been convicted of failing to remit payroll taxes. At the defendant's trial, the government introduced evidence of the coconspirator's prior conviction.<sup>41</sup> The defendant contended that this evidence was extrinsic and inadmissible pursuant to Rule 404(b). The defendant further argued that he had not been charged with tax related crimes, yet the jury heard evidence that his coconspirator had committed tax fraud.<sup>42</sup> The Eleventh Circuit noted that the Government did not offer the evidence to implicate the defendant in the tax fraud scheme but to show that because of the coconspirator's tax fraud the YMCA had funds available to finance the kickback conspiracy.<sup>43</sup> However, the court did not discuss why it was relevant for the Government to show the reason the funds were available in addition to showing that the funds were available. The defendant likely argued that it would be sufficient to show that the conspirators arranged for the defendant to be overpaid and that the YMCA had resources to fund the kickback scheme. The court did not explain why it was necessary for the jury to know that the

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36. *Id.* at 1345-46.

37. *Id.*

38. *Id.*

39. *Id.* at 1346.

40. 493 F.3d 1291 (11th Cir. 2007).

41. *Id.* at 1295-96.

42. *Id.* at 1301-02.

43. *Id.* at 1302.

reason the YMCA had the cash on hand was because the defendant's coconspirator, in addition to engaging in the kickback conspiracy, was previously convicted of tax fraud.

The Eleventh Circuit's decision in *United States v. Doe*<sup>44</sup> is unpublished but merits discussion because it is one of the few cases in recent years in which the Eleventh Circuit held that a district court erroneously admitted extrinsic act evidence.<sup>45</sup> The case also illustrates the particularly stringent prerequisite to the admission of extrinsic act evidence to prove identity.<sup>46</sup> In *Doe* the defendant contended that the district court improperly admitted evidence of the defendant's prior convictions for cocaine possession during his trial on charges of manufacturing cocaine base and conspiring to manufacture and distribute cocaine base. The Government argued that these convictions were relevant to prove identity and intent.<sup>47</sup> Without addressing the fact that the prior convictions were for possession and the charged offense was for manufacturing, the Eleventh Circuit held that the convictions were properly admitted to prove intent.<sup>48</sup> However, the convictions were not relevant to prove identity.<sup>49</sup> This is because Rule 404(b) allows the admission of evidence to prove identity only if the extrinsic and charged offenses are so similar that the extrinsic offense "marks the offenses as the handiwork of the accused."<sup>50</sup>

Moreover, even though the prior convictions were relevant to the issue of intent, the Eleventh Circuit held that the district court abused its discretion when it admitted the possession charges "due to the combined effect of their remoteness, their factual dissimilarity, and the lack of prosecutorial need for their introduction."<sup>51</sup> The convictions occurred more than fourteen years before the beginning of the charged conspiracy.<sup>52</sup> Because the extrinsic offenses were for simple possession, they had limited probative value to prove that the defendant had engaged in manufacturing drugs.<sup>53</sup> However, the error was deemed harmless due to the other overwhelming evidence of the defendant's guilt.<sup>54</sup>

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44. 216 F. App'x 874 (11th Cir. 2007).

45. *Id.* at 879-80.

46. *See id.* at 878-80.

47. *Id.* at 878.

48. *Id.* at 879.

49. *Id.*

50. *Id.* (quoting *United States v. Lail*, 846 F.2d 1299, 1301 (11th Cir. 1988)).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 879-80.

## III. ARTICLE V. PRIVILEGES

Rather than undertaking the daunting task of formulating rules that recognize and define various evidentiary privileges, the drafters of the Federal Rules of Evidence have yielded to the courts and allowed the federal judiciary to formulate rules of privilege in nondiversity cases.<sup>55</sup> In diversity cases, state law determines the existence of privileges.<sup>56</sup> However, consistent with the general decrease in its evidentiary decisions, the Eleventh Circuit has not found much cause to formulate rules of privilege in recent years. Indeed, in his annual survey of Eleventh Circuit evidence decisions, the Author has not discussed a privilege decision since the 2003 holding in *United States v. Almeida*.<sup>57</sup> However, during the current survey year, the Eleventh Circuit returned to the issue of privileges, and as discussed below, there have been developments on the rulemaking front as well.

In *Adkins v. Christie*,<sup>58</sup> the plaintiff, a doctor whose privileges had been terminated at Houston Medical Center in Warner Robins, Georgia, sued the hospital and others, claiming that the defendants used the peer review process in a racially discriminatory manner. During discovery, the plaintiff sought the production of documents relating to the peer review of all physicians at Houston Medical Center. The defendants objected, citing Georgia's medical and peer review privileges along with precedent that broadly shielded discovery of peer review materials in medical malpractice cases.<sup>59</sup> The district court agreed that the peer review privilege applied to federal civil rights actions. Nevertheless, it ordered the defendants to provide summaries of peer-reviewed incidents without producing the documents themselves. Further, the court limited the scope of its order by requiring disclosure only of peer-reviewed incidents during a five-year period involving physicians the hospital deemed similarly situated to the plaintiff. After the district court granted summary judgment to the defendants, the plaintiff appealed, contending that the district court improperly limited the plaintiff's discovery of the hospital's peer review files.<sup>60</sup>

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55. FED. R. EVID. 501.

56. *Id.*

57. 341 F.3d 1318 (11th Cir. 2003). *Almeida* is discussed by the Author in Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 1219, 1223-24 (2004).

58. 488 F.3d 1324 (11th Cir. 2007).

59. *Id.* at 1326-27 (citing O.C.G.A. § 31-7-143 (2006); *Emory Clinic v. Houston*, 258 Ga. 434, 437, 369 S.E.2d 913, 915 (1988) (per curiam)).

60. *Id.* at 1327.

Specifically, the plaintiff argued that the district court improperly held that federal law recognizes a peer review privilege in discrimination cases.<sup>61</sup> Although the Eleventh Circuit noted that all states have adopted peer review privileges, the court further noted that it had not yet ruled on whether federal law recognizes a peer review privilege.<sup>62</sup> Accordingly, the Eleventh Circuit proceeded to determine whether a peer review privilege should be recognized.<sup>63</sup> The court first acknowledged that privileges are generally disfavored because they deprive both litigants and the public of information.<sup>64</sup> However, the court agreed with the defendants that the peer review privilege serves other important interests.<sup>65</sup> In theory, if doctors and other medical providers are confident that their complaints and concerns will be confidential, they will more likely be truthful when discussing the competency and qualifications of their inept peers.<sup>66</sup> Nevertheless, the court held that the benefit of the peer review privilege must be considered “against a corresponding and overriding goal—the discovery of evidence essential to determining whether there has been discrimination in employment.”<sup>67</sup> The court was concise and blunt in its conclusion: “[W]e conclude that the medical peer review process does not warrant the extraordinary protection of an evidentiary privilege in federal civil rights cases.”<sup>68</sup>

In last year’s survey, the Author reported that the Advisory Committee on Evidence Rules had proposed a new rule, Rule 502,<sup>69</sup> regarding waiver of the attorney-client privilege.<sup>70</sup> The Judicial Conference of the United States subsequently recommended that Congress adopt proposed Rule 502, and on January 31, 2008, it was approved by the Senate

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61. *Id.*

62. *Id.* at 1327-28. The Fourth and Seventh Circuits have refused to recognize a peer review privilege. *Id.* (citing *Virmani v. Novant Health Inc.*, 259 F.3d 284, 293 (4th Cir. 2001); *Mem’l Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (per curiam)).

63. *Id.* at 1327.

64. *Id.* at 1328.

65. *Id.*

66. *Id.*

67. *Id.* at 1328-29.

68. *Id.* at 1329.

69. Memorandum from Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (May 15, 2004), <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf> [hereinafter Evidence Memorandum] (containing a copy of Proposed Rule of Evidence 502 along with committee notes).

70. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 1219, 1220-22 (2007).

Judiciary Committee.<sup>71</sup> As discussed in last year's survey,<sup>72</sup> perhaps the most controversial provision of proposed Rule 502 was "selective waiver," which would have allowed a party to disclose privileged information to law enforcement agencies and other governmental entities without waiving the privilege with regard to other parties.<sup>73</sup> The Committee refused to recommend a selective waiver provision:

Unlike inadvertent waivers [addressed in Rule 502], which raise the costs and burdens of the discovery phase of litigation, an area of great concern to the rules committees, the selective waiver provision addresses policy matters, principally the effectiveness of government investigations, that are largely outside the competence and jurisdiction of the rules committees.<sup>74</sup>

Also in September, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States transmitted to Congress its "report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a 'Harm to Child' Exception to the Marital Privileges."<sup>75</sup> The report was prepared in connection with a directive from Congress that the Rules Committee "study the necessity and desirability of amending the federal rules of evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against . . . a child."<sup>76</sup> The Committee concluded that no such amendment was necessary, noting that only one case, *United States v. Jarvison*,<sup>77</sup> had upheld a claim of marital privilege in a prosecution involving a crime against a child under the care of one of the spouses.<sup>78</sup> In short, the Committee concluded that *Jarvison* was an aberration and did not constitute a sufficient split among the circuits with respect to whether there exists a child-harm

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71. Memorandum from Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (May 15, 2007), [http://www.uscourts.gov/rules/supct0108/App\\_C\\_EV\\_JC\\_Report\\_51507.pdf](http://www.uscourts.gov/rules/supct0108/App_C_EV_JC_Report_51507.pdf); U.S. Courts, Federal Rulemaking, <http://www.uscourts.gov/rules/index2.html#sen502>.

72. Treadwell, *supra* note 70, at 1220-22.

73. See Evidence Memorandum, *supra* note 69.

74. COMM. ON RULES OF PRACTICE & PROCEDURE, EXCERPT OF THE REPORT OF THE JUDICIAL CONFERENCE 3 (2007), [http://www.uscourts.gov/rules/supct0108/Excerpt\\_ST\\_Report\\_re\\_EV.pdf](http://www.uscourts.gov/rules/supct0108/Excerpt_ST_Report_re_EV.pdf) [hereinafter EXCERPT].

75. *Id.* at 5.

76. *Id.* at 4; see Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

77. 409 F.3d 1221 (10th Cir. 2005).

78. See EXCERPT, *supra* note 74, at 4-5.

exception to the spousal privilege to warrant an amendment to the Federal Rules of Evidence.<sup>79</sup>

#### IV. ARTICLE VII. OPINION TESTIMONY

It has been fifteen years since the United States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>80</sup> that the Federal Rules of Evidence preempted the long established “general acceptance” test for the admissibility of expert opinion.<sup>81</sup> By setting a new standard for the admission of expert testimony, the Rules dramatically changed the landscape of trial practice—or, perhaps more accurately, pretrial practice because *Daubert* issues are generally fought on an attrition basis prior to trial. To continue the warfare theme, the Eleventh Circuit has been a major *Daubert* battleground. In *Joiner v. General Electric Co.*,<sup>82</sup> the Eleventh Circuit held that the Supreme Court intended “*Daubert* to loosen the strictures of [the common law general acceptance test] and make it easier to present legitimate conflicting views of experts for the jury’s consideration.”<sup>83</sup> The Eleventh Circuit interpreted *Daubert* to mean it was no longer necessary for expert evidence to satisfy the burdensome general acceptance test; rather, it would be sufficient if the evidence was “scientifically legitimate, and not ‘junk science’ or mere speculation.”<sup>84</sup> In this vein, the Eleventh Circuit concluded that judges were not to assume the role of juries and weigh facts.<sup>85</sup> The Eleventh Circuit’s reading of *Daubert* was perhaps understandable. After all, it was in *Daubert* that the Supreme Court rejected pharmaceutical industry concerns that the abandonment of the general acceptance test would open the door to junk science:

In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. . . . These conventional devices, rather than wholesale exclusion under an uncompromising “general acceptance” test, are the appropriate

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79. *Id.*

80. 509 U.S. 579 (1993).

81. *Id.* at 597.

82. 78 F.3d 524 (11th Cir. 1996).

83. *Id.* at 530.

84. *Id.*

85. *Id.*

safeguards where the basis of scientific testimony meets the standards of Rule 702.<sup>86</sup>

Of course, as we now know, *Daubert* was intended to do anything but lower the threshold of admissibility of expert opinion, and the Supreme Court quickly reversed the Eleventh Circuit.<sup>87</sup>

Indeed, it is well established today that *Daubert* demands district judges to rigorously scrutinize expert witnesses, notwithstanding the apparent capability of jurors to discern the reliable expert testimony from the unreliable.<sup>88</sup> This notion is perhaps so well established that during the current survey period there were no noteworthy Eleventh Circuit *Daubert* decisions. That is not to say, however, that *Daubert* does not continue to have a profound impact. On the contrary, it has become clear that district courts must scrutinize expert opinion and that their *Daubert* rulings enjoy the formidable protection of the abuse of discretion standard. Thus, the front has simply moved from the Eleventh Circuit to the district courts. For example, a Westlaw search of all Georgia district court decisions during 2006 revealed fifty-nine opinions containing the search term “Federal Rules of Evidence.” A search for decisions or opinions containing “Daubert” yielded thirty-seven results.

#### V. ARTICLE VIII. HEARSAY

Hearsay, once a frequent issue in Eleventh Circuit decisions, appeared in only one noteworthy decision during the survey period. In *United States v. Vance*,<sup>89</sup> the defendant contended that the district court improperly prevented him from questioning a witness who could corroborate the defendant’s trial testimony by speaking about prior consistent statements the defendant had made. The defendant, who had responded to an undercover agent’s ruse to attract child molesters, claimed that he responded to the agent’s overtures because he wanted to help children who were victims of abuse. At trial, the defendant attempted to question his witness, an acquaintance, about a prior statement allegedly made by the defendant to the acquaintance.<sup>90</sup> The district court sustained the government’s hearsay objection, and the defendant’s counsel did not offer proof or even suggest to the court a

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86. *Daubert*, 509 U.S. at 596.

87. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997).

88. *Daubert*, 509 U.S. at 593.

89. 494 F.3d 985 (11th Cir. 2007).

90. *Id.* at 990-93.

valid reason for eliciting testimony about this prior statement.<sup>91</sup> That inaction by the defendant's counsel presented the first problem for the defendant on appeal. Because there had not been an offer of proof in the record, the standard of review on appeal was whether the district court committed plain error.<sup>92</sup> "Plain error exists 'only where (1) there is an error; (2) the error is plain; (3) the error affects the defendant's substantial rights in that it was prejudicial and not harmless; and (4) the error seriously affects the fairness, integrity or public reputation of a judicial proceeding.'"<sup>93</sup>

The Eleventh Circuit held that the testimony at issue clearly constituted hearsay.<sup>94</sup> Although the defendant allegedly made the pretrial statement, it is well established under the Federal Rules of Evidence that even a party's own prior statement is hearsay unless it is defined as nonhearsay pursuant to Rule 801.<sup>95</sup> The defendant contended that the statement was admissible pursuant to Rule 801(d)(1)(B) as a prior consistent statement "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."<sup>96</sup> However, as discussed in the Author's 2004 survey,<sup>97</sup> the United States Supreme Court, in *Tome v. United States*,<sup>98</sup> held that a prior consistent statement is not admissible to rebut a charge of recent fabrication unless the prior statement was made before the motive to fabricate arose.<sup>99</sup> In *Vance* at the time the defendant talked to his acquaintance he had already made arrangements with the undercover agent to travel to the Caribbean to meet with underage girls for the purpose of engaging in illegal sexual conduct.<sup>100</sup> Accordingly, at the time of his prior statement, it is likely he would have already had a motive to fabricate the reason for his trip.<sup>101</sup> Therefore, the district court did not commit plain error when it sustained the Government's objection to the defendant's attempt to elicit testimony about the defendant's out-of-court statement.<sup>102</sup>

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91. *Id.* at 992.

92. *Id.* at 993.

93. *Id.* (quoting *United States v. Prieto*, 232 F.3d 816, 819 (11th Cir. 2000)).

94. *Id.* at 994.

95. *Id.* at 993; FED. R. EVID. 801.

96. *Vance*, 494 F.3d at 993 (quoting FED. R. EVID. 801(d)(1)(B)).

97. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 1219, 1234-35 (2004).

98. 513 U.S. 150 (1995).

99. *Id.* at 167; see Treadwell, *supra* note 97, at 1234-35.

100. *Vance*, 494 F.3d at 994.

101. *Id.*

102. *Id.*