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# Evidence

by Marc T. Treadwell\*

## I. INTRODUCTION

During the survey year, the United States Court of Appeals for the Eleventh Circuit continued its recent trend of sharply limiting the number of its “published” opinions. The reasoning behind this trend is discussed in more detail in last year’s survey.<sup>1</sup> This survey will address several unpublished decisions which, in the opinion of the Author, are noteworthy. However, practitioners should bear in mind Eleventh Circuit Rule 36-2, which provides that “[u]npublished opinions are not considered binding precedent, but they may be cited as persuasive authority.”<sup>2</sup> However, Internal Operating Procedure 7 suggests an even more limited role for unpublished opinions:

The court generally does not cite to its “unpublished” opinions because they are not binding precedent. The court may cite to them where they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exists in the case, to ascertain the law of the case, or to establish the procedural of history or facts of the case.<sup>3</sup>

## II. ARTICLE IV: RELEVANCY

Federal Rule of Evidence 404<sup>4</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

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1. Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 1181 (2008).
2. 11TH CIR. R. 36-2.
3. 11TH CIR. I.O.P. 7.
4. FED. R. EVID. 404.

impeachment, purposes.<sup>5</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>6</sup> Such “propensity evidence,” or character evidence, is generally not admissible to prove a defendant’s propensity to commit a criminal act.<sup>7</sup> However, Rule 404’s prohibition against extrinsic act evidence is subject to broad exceptions.<sup>8</sup> 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.”<sup>9</sup> Viewed in a practical light, it is easy to see why Rule 404(b) restricts the admission of extrinsic act evidence. In a close case, evidence that a defendant committed other crimes can have a profound impact on jurors. For example, jurors will likely take a dim view of a defendant with a long “rap sheet.” Jurors may discern a propensity on the part of such a defendant to commit crimes, or they may conclude that a man of his character must be guilty. Nevertheless, the United States Court of Appeals for the Eleventh Circuit has opened the door considerably for the admission of extrinsic act evidence during the twenty years that the Author has surveyed evidence decisions of the Eleventh Circuit.<sup>10</sup>

The Eleventh Circuit applies a three-part test, sometimes called the *Beechum*<sup>11</sup> test, to determine the admissibility of extrinsic act evidence.<sup>12</sup> First, the extrinsic act evidence “must be relevant to an issue other than the defendant’s character.”<sup>13</sup> Second, the prosecution must prove the defendant committed the extrinsic act.<sup>14</sup> Third, the evidence must survive a Rule 403<sup>15</sup> balancing test,<sup>16</sup> meaning the probative value of the extrinsic act evidence must not be substantially outweighed by its prejudicial effect.<sup>17</sup>

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5. *See id.*

6. *See id.*

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

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

9. *Id.*

10. *See, e.g.*, Marc T. Treadwell, *Evidence*, 39 MERCER L. REV. 1259, 1267-70 (1988); Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 1219, 1225-27 (2007).

11. *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc).

12. *See, e.g.*, *United States v. Mills*, 138 F.3d 928, 935 (11th Cir. 1998).

13. *Id.* at 935.

14. *Id.*

15. FED. R. EVID. 403.

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

17. *See* FED. R. EVID. 403.

The Eleventh Circuit's decision in *United States v. Lamons*<sup>18</sup> illustrates the tremendous impact of extrinsic act evidence. In *Lamons* a grand jury returned a five-count indictment against the defendant. In three counts, the grand jury charged that the defendant, while working as a flight attendant, set a fire in a lavatory on a Comair plane. Two counts of the indictment charged the defendant with making a false, anonymous threat to an AirTran flight on which the defendant was working as a flight attendant. In the defendant's first trial on all five counts, the United States District Court for the Northern District of Georgia severed the Comair counts and submitted to the jury only the counts related to the AirTran incident. The jury deadlocked on these counts and a mistrial was declared.<sup>19</sup> In a subsequent trial on the AirTran incident, a jury convicted the defendant of "conveying false information concerning a false threat" to the AirTran flight but acquitted him of "conveying false information concerning an alleged attempt to kill and injure" AirTran passengers.<sup>20</sup>

Before the trial on the Comair lavatory fire incident, the government moved in limine to admit the defendant's conviction in the trial of the AirTran incident.<sup>21</sup> Apparently, the government's case was mostly circumstantial except for statements made by the defendant himself.<sup>22</sup> When questioned about the fire by a law enforcement officer, the defendant repeated three times "that he 'did not purposely start that fire.'"<sup>23</sup> Although this statement suggested some involvement with the fire, it specifically refuted any intent to set the fire. Clearly, if jurors knew that the defendant had been convicted of threatening the death of passengers on another flight on which he served as a flight attendant, they would be more inclined to find that he intentionally set the lavatory fire. The defendant contended that the AirTran conviction failed to satisfy the first and second prongs of the *Beechum* test—the evidence was not relevant to an issue other than his character and any probative value of the evidence was substantially outweighed by its prejudicial effect. The government responded that the evidence was relevant to two issues: intent and the absence of mistake or accident.<sup>24</sup>

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18. 532 F.3d 1251 (11th Cir. 2008).

19. *Id.* at 1255, 1259-60.

20. *Id.* at 1259-60.

21. *Id.* at 1265.

22. *See id.* at 1266-67.

23. *Id.* at 1265.

24. *Id.* at 1265-66.

The Eleventh Circuit affirmed the admission of the AirTran conviction.<sup>25</sup> To the Eleventh Circuit, the key was the defendant's statement that he did not intentionally set the fire.<sup>26</sup> "Rather than creating a primary inference of [the defendant's] character or his propensity to commit criminal acts, the evidence instead permitted the inference that [the defendant] deliberately set the fire based on the improbability of accident."<sup>27</sup> Turning to the Rule 403 balancing test, the court concluded that the probative value of the AirTran incident was significant.<sup>28</sup> First, "the Government's need for the evidence was strong; it may have been determinative of the issue of willfulness."<sup>29</sup> While the two incidents involved very different facts, both involved the defendant in his "capacity as a flight attendant, targeting commercial aircraft and passengers, [and] were designed to disrupt commercial aviation."<sup>30</sup> Accordingly, the probative value of the AirTran incident was not substantially outweighed by its prejudice to the defendant.<sup>31</sup>

*United States v. Ellisor*<sup>32</sup> involved the sad case of a con artist who specialized in bilking schools and their students. The defendant sold thousands of tickets to school children and parents to attend an elaborate, but bogus, Christmas extravaganza.<sup>33</sup> At his trial for mail fraud in connection with the scam, the United States District Court for the Southern District of Florida admitted evidence of a similar scheme perpetrated by the defendant in Utah.<sup>34</sup> On appeal, the Eleventh Circuit concluded that evidence of the Utah scheme was relevant to an issue other than the defendant's character—that is, "his intent to defraud by promoting an illusory show"<sup>35</sup>—and that the probative value

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25. *Id.* at 1266.

26. *See id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1266-67. It has long been a point of irony to the Author, and no doubt one of dismay to criminal defendants, that the weaker the prosecution's case, and thus the greater the need for potent extrinsic act evidence, the more likely it is that the evidence will be admissible. This irony is not lost on the Eleventh Circuit: "As we have explained, 'if the government can do without such evidence, fairness dictates that it should; but if the evidence is essential to obtain a conviction, it may come in. This may seem like a "heads I win; tails you lose" proposition, but it is presently the law.'" *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997) (quoting *United States v. Pollock*, 926 F.2d 1044, 1049 (11th Cir. 1991)).

30. *Lamons*, 532 F.3d at 1267.

31. *Id.* at 1266-67.

32. 522 F.3d 1255 (11th Cir. 2008).

33. *Id.* at 1259, 1264.

34. *Id.* at 1264.

35. *Id.* at 1267.

of this evidence was not substantially outweighed by its prejudicial impact.<sup>36</sup> However, the defendant contended that because the prosecution was allowed to introduce evidence of a prior bad act, he should have been allowed to introduce a video purporting to establish that he produced many legitimate shows over the course of the previous ten years.<sup>37</sup> The Eleventh Circuit rejected this argument because evidence of good conduct is inadmissible to negate a defendant's criminal intent.<sup>38</sup> "The fact that Ellisor purportedly produced other shows does not bear on his intent to defraud with respect to the Christmas show, and is therefore irrelevant."<sup>39</sup> In short, the fact that the government can use evidence of a prior bad act to prove intent does not open the door for a defendant to prove prior good conduct to negate intent.<sup>40</sup>

Because virtually all appeals involving Rule 404(b) are criminal cases, it is easy to forget that Rule 404(b) applies to civil cases as well. Indeed, given the clearly prejudicial impact of evidence of other bad acts, it would seem courts should be more reluctant to admit extrinsic act evidence in criminal cases—when freedom and sometimes life are at stake—than in civil cases. The reality is that courts are much less likely to admit evidence of other transactions in civil cases. Closer examination reveals a logical basis for this disparate treatment. Civil cases rarely involve issues of intent, motive, scheme, or other similar scienter-based issues that come into play in cases of intentional misconduct. Rather, civil cases typically involve situations in which the degree of intent is much lower, certainly much less malevolent, and is often completely absent. For example, the admission of evidence of a prior automobile accident in a negligence case involving an unrelated subsequent accident only serves to prove the improper and prejudicial point that a defendant, because of negligence on a prior occasion, was more likely to have been negligent on the occasion at issue. This is exactly the type of propensity evidence that Rule 404(b) precludes. In a criminal case, on the other hand, evidence of a prior burglary involving facts similar to the charged offense may tend to prove a defendant's motive, intent, or plan in committing the charged offense.

Still, there are civil cases in which conduct on other occasions is relevant, such as *Goldsmith v. Bagby Elevator Co.*<sup>41</sup> In *Goldsmith* the plaintiff claimed that his Birmingham, Alabama employer discriminated

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36. *Id.* at 1268.

37. *Id.* at 1270.

38. *Id.*

39. *Id.*

40. *See id.*

41. 513 F.3d 1261 (11th Cir. 2008).

against him on the basis of race.<sup>42</sup> The egregious facts of the case were foreshadowed by Judge Pryor's opening paragraph, which begins with the observation that Birmingham, according to Martin Luther King, Jr., "is a symbol of segregation for the entire South."<sup>43</sup> Acknowledging the substantial racial progress in Birmingham since then, Judge Pryor noted that "this appeal . . . offers . . . an important reminder: despite considerable racial progress, racism persists as an evil to be remedied in our Nation."<sup>44</sup> Given this opening, it is not surprising that Bagby Elevator lost, and lost big, at trial.<sup>45</sup> However, Bagby Elevator contended on appeal that the United States District Court for the Northern District of Alabama erroneously admitted evidence of discrimination against the plaintiff's coworkers. The district court, relying on Rule 406,<sup>46</sup> admitted evidence of Bagby Elevator's responses to four other complaints of racial discrimination.<sup>47</sup> Rule 406 governs the admission of evidence of habit and routine practice and "provides in pertinent part that '[e]vidence of the . . . routine practice of an organization . . . is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice.'<sup>48</sup> However, the establishment of a habit or routine practice requires numerous instances of conduct that are sufficient to establish "a systematic response to specific situations."<sup>49</sup> Evidence of four instances is simply insufficient to establish systematic conduct, particularly when, as in *Goldsmith*, the four instances involved dissimilar facts.<sup>50</sup>

However, although the Eleventh Circuit held that the evidence was inadmissible under Rule 406, the court held that the evidence was admissible under Rule 404(b) to prove Bagby Elevator's intent to retaliate for complaints of racial discrimination.<sup>51</sup> Two of the incidents involved the same supervisor who discriminated against the plaintiff, and thus these incidents were probative of the supervisor's intent to discriminate.<sup>52</sup> All four instances involved a Bagby Elevator executive,

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42. *Id.* at 1267.

43. *Id.* (quoting JACK BASS, UNLIKELY HEROES 201 (1981)).

44. *Id.*

45. *See id.* at 1275.

46. FED. R. EVID. 406.

47. *Goldsmith*, 513 F.3d at 1285.

48. *Id.* (quoting FED. R. EVID. 406).

49. *Id.* (citing *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1533 (11th Cir. 1985)).

50. *Id.*

51. *Id.* at 1286.

52. *Id.*

and thus those incidents were probative of the executive's intent.<sup>53</sup> In addition, the conduct of Bagby Elevator's employees in the other incidents "was probative of the intent of Bagby Elevator to retaliate against any black employee who complained about racial slurs in the workplace."<sup>54</sup> Accordingly, the extrinsic evidence was admissible under Rule 404(b) to prove intent.<sup>55</sup>

### III. ARTICLE V: PRIVILEGES

New Federal Rule of Evidence 502,<sup>56</sup> titled "Attorney-Client Privilege and Work Product; Limitations on Waiver," became effective September 19, 2008.<sup>57</sup> The new rule provides protection for inadvertent disclosure of privileged attorney-client communications.<sup>58</sup>

### IV. ARTICLE VI: WITNESSES

Federal Rule of Evidence 615<sup>59</sup> contains the rule of sequestration.<sup>60</sup> The rule provides four exceptions to the general rule that witnesses shall be sequestered, if a party so requests, to prevent them from hearing the testimony of other witnesses.<sup>61</sup> The fourth exception, added in 1998, provides that "a person authorized by statute to be present" is not subject to exclusion from the courtroom.<sup>62</sup> In *United States v. Edwards*,<sup>63</sup> the defendant contended that the United States District Court for the Northern District of Georgia improperly allowed the alleged victims of the defendant's crimes to remain in the courtroom.<sup>64</sup> The district court refused to sequester the victims because the Crime Victims' Rights Act<sup>65</sup> provides that the victim of a crime has the right not to be excluded from a public court proceeding concerning that crime.<sup>66</sup> The defendant contended that the rule of sequestration provides a constitutionally protected right to exclude witnesses from the courtroom that

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53. *Id.*

54. *Id.*

55. *Id.*

56. FED. R. EVID. 502.

57. See Pub. L. No. 110-322, 122 Stat. 3537 (2008). The history behind Rule 502 is summarized at <http://www.uscourts.gov/rules/evidence502.html>.

58. See FED. R. EVID. 502.

59. FED. R. EVID. 615.

60. See *id.*

61. See *id.*

62. *Id.*

63. 526 F.3d 747 (11th Cir. 2008).

64. *Id.* at 755.

65. 18 U.S.C. § 3771 (2006).

66. *Edwards*, 526 F.3d at 757-58 (quoting 18 U.S.C. § 3771(a)(3)).

trumps a victim's statutory right to be present.<sup>67</sup> The Eleventh Circuit summarily rejected this argument, holding that "[a] criminal defendant has no constitutional right to exclude witnesses from the courtroom."<sup>68</sup>

#### V. ARTICLE VII: OPINION TESTIMONY

Sixteen years have passed since the United States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>69</sup> that the Federal Rules of Evidence preempted the long established "general acceptance" test for the admissibility of expert opinion evidence.<sup>70</sup> By setting a new standard for the admission of expert testimony, the Supreme Court dramatically changed the landscape of pretrial practice because *Daubert* issues are generally fought, sometimes on an attrition basis, prior to trial. To continue the warfare theme—which many feel is entirely appropriate in any discussion of *Daubert*—the Eleventh Circuit has been a major *Daubert* battleground. In *Joiner v. General Electric Co.*,<sup>71</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>72</sup> The Eleventh Circuit interpreted *Daubert* to mean it was no longer necessary that expert opinion testimony satisfy the burdensome general acceptance test; rather, such evidence was sufficient if it was "scientifically legitimate, and not 'junk science' or mere speculation."<sup>73</sup> The Eleventh Circuit in *Joiner* concluded that judges were not to assume the roles of juries and weigh facts.<sup>74</sup> This reading of *Daubert* was perhaps understandable. After all, in *Daubert* the Supreme Court rejected the pharmaceutical industry's 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

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67. *Id.* at 758.

68. *Id.* (citing *Mathis v. Wainwright*, 351 F.2d 489, 489 (5th Cir. 1965)).

69. 509 U.S. 579 (1993).

70. *Id.* at 597.

71. 78 F.3d 524 (11th Cir. 1996), *rev'd*, 522 U.S. 136 (1997).

72. *Id.* at 530.

73. *Id.*

74. *Id.*

uncompromising “general acceptance” test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.<sup>75</sup>

Of course, as we now know, *Daubert* was intended to do many things but lowering the threshold of scrutiny for expert opinion evidence was not one of them.<sup>76</sup> The Supreme Court quickly reversed the Eleventh Circuit.<sup>77</sup> Whether one agrees or disagrees, it is clear today that *Daubert* requires district judges to vigorously scrutinize expert witnesses and their opinions, notwithstanding the acknowledged capability of jurors to separate reliable expert testimony from the unreliable.

Although the opinion was not selected for publication in the *Federal Reporter*, the Eleventh Circuit in *Finestone v. Florida Power & Light Co.*<sup>78</sup> perhaps provides the best illustration of *Daubert* analysis during the survey year. In *Finestone* the plaintiffs contended that their children developed cancer as the result of a nuclear power plant’s accidental disposal of radioactive material.<sup>79</sup> To prove their case, the plaintiffs needed to establish that the defendant exceeded certain radiation dose limits. The United States District Court for the Southern District of Florida excluded the plaintiff’s expert testimony tending to show that the dose limits had been exceeded, primarily on the grounds that the experts’ conclusions conflicted with conclusions reached by the Nuclear Regulatory Commission (NRC).<sup>80</sup>

The Eleventh Circuit was skeptical of the district court’s reliance on the NRC’s test results in deciding to exclude the plaintiffs’ experts’ conclusions.<sup>81</sup> While testing an expert’s opinions or methodologies is one way to determine their reliability, the NRC’s tests did not, according to the Eleventh Circuit, test the conclusions reached by the plaintiffs’ experts.<sup>82</sup> Nevertheless, the Eleventh Circuit held that the district court properly excluded the plaintiffs’ experts.<sup>83</sup> According to the Eleventh Circuit, the plaintiffs’ experts committed the *Daubert* cardinal sin of making “leaps of faith” in reaching their conclusions.<sup>84</sup> One expert arrived at his dose calculations by utilizing a series of hypotheticals that began with the assumption that a truckload of radioactive

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

76. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142-43, 146 (1997).

77. *See id.* at 146.

78. 272 F. App’x 761 (11th Cir. 2008).

79. *Id.* at 763.

80. *Id.* at 766.

81. *See id.* at 767.

82. *Id.*

83. *Id.*

84. *Id.* at 768.

waste shipped from the defendant's plant nearly ten years after the accidental discharge was indicative of levels of radiation at the site.<sup>85</sup> However, there was no evidence that this radioactive waste came from the area of the accidental discharge.<sup>86</sup> Thus, when the expert based his conclusions on the radiation concentration in a 1991 shipment and, taking into account radioactive decay, calculated a dose for the material discharged in 1982, he made "the kind of scientifically unsupported "leap of faith" which is condemned by *Daubert*."<sup>87</sup>

Two other experts retained by the plaintiffs calculated dose exposure based on the information from a spent fuel pool in a separate building from the source of the accidental discharge.<sup>88</sup> Again, there was no evidence that the spent fuel pool samples would equate to the discharged material.<sup>89</sup> Indeed, one expert would not say that his methodology was appropriate or scientifically acceptable, responding only that "it was the best thing we could go with."<sup>90</sup> Given this, the experts' conclusions were not sufficiently reliable to be admissible under *Daubert*.<sup>91</sup>

In *Wilson v. Taser International, Inc.*,<sup>92</sup> another unreported decision, the Eleventh Circuit touched on a sometimes confusing issue—the status of a treating physician as an expert for purposes of *Daubert*.<sup>93</sup> In *Wilson* the plaintiff contended that he suffered a compression fracture in his spine after he was shot in the back with a Taser during a training exercise. After treatment at an emergency room, the plaintiff consulted with a physician who specialized in family practice and occupational medicine. An MRI revealed two compression fractures in the plaintiff's thoracic spine, and the plaintiff was subsequently seen by an orthopedist. Some time after that, the original physician, after consulting with the orthopedist, determined that the plaintiff was unable to work because of his compression fractures, which he concluded were caused by the Taser. The United States District Court for the Northern District of Georgia granted the defendant's *Daubert* motion, finding that the physician's opinions were not sufficiently reliable.<sup>94</sup>

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85. *Id.*

86. *Id.*

87. *Id.* (quoting *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. No. 08-13810, 2008 WL 5215991 (11th Cir. Dec. 16, 2008).

93. *Id.* at \*3.

94. *Id.* at \*1-2.

On appeal, the plaintiff argued that the physician, because he was a treating physician, was not subject to *Daubert's* scrutiny.<sup>95</sup> The Eleventh Circuit agreed that a treating physician can testify as a lay witness about his treatment of a patient.<sup>96</sup> But, when the physician expresses an opinion unrelated to treatment “based on scientific, technical, or other specialized knowledge,” that witness is offering expert testimony for which the court must perform its essential gatekeeping function as required by *Daubert*.<sup>97</sup> The physician’s opinion about the cause of the plaintiff’s injuries was unnecessary to explain his treatment of those injuries.<sup>98</sup> As a treating physician, he could render what the Eleventh Circuit deemed a lay opinion that the plaintiff suffered a fractured spine.<sup>99</sup> However, his opinion that the Taser caused the fracture was a “hypothesis.”<sup>100</sup> Rendering opinions based on hypotheticals, the Eleventh Circuit noted, “is the essential difference between expert and lay witnesses.”<sup>101</sup> Accordingly, the physician’s opinion that the Taser caused the plaintiff’s fractured spine fell within the scope of Federal Rule of Evidence 702<sup>102</sup> and was thus appropriately subjected to *Daubert* scrutiny.<sup>103</sup>

The Eleventh Circuit then turned to the four non-exclusive *Daubert* reliability criteria: “(1) whether the expert’s methodology has been tested or is capable of being tested; (2) whether the technique has been subjected to peer review and publication; (3) the known and potential error rate of the methodology; and (4) whether the technique has been generally accepted in the proper scientific community.”<sup>104</sup> The Eleventh Circuit held that the physician’s testimony failed to satisfy any of the *Daubert* factors: there was no evidence of any testing of his opinion that Tasers can cause compression fractures; there was no evidence of any peer review or that he had used a peer reviewed source; there was no evidence of any error rate; and there was no evidence demonstrating the general acceptance of his opinion.<sup>105</sup>

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95. *Id.* at \*3.

96. *Id.*

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

98. *Id.* at \*4.

99. *Id.*

100. *Id.*

101. *Id.* (quoting *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005)).

102. FED. R. EVID. 702.

103. *Wilson*, 2008 WL 5215991, at \*4.

104. *Id.* (quoting *McDowell v. Brown*, 392 F.3d 1283, 1298 (11th Cir. 2004)).

105. *Id.* at \*5.

However, the Eleventh Circuit seemed to acknowledge that treating physicians may be granted some leeway under *Daubert*.<sup>106</sup> For example, treating physicians can employ the differential diagnosis method, pursuant to which they rule in and rule out various causes of an injury or condition.<sup>107</sup> However, the plaintiff's physician, although acknowledging that compression fractures can be caused by other conditions, did not reach his opinion by using a differential diagnosis because he did not exclude the other causes of compression fracture.<sup>108</sup> Also, the Eleventh Circuit acknowledged that a treating physician may, based on the temporal connection between an event and an injury, render an opinion that an injury usually recognized as a consequence of a common incident was in fact caused by that incident.<sup>109</sup> However, an opinion that a compression fracture resulted from a Taser shock does not fall in that category—there is no commonly recognized cause and effect relationship between the two.<sup>110</sup> Accordingly, the Eleventh Circuit affirmed the district court's conclusion that the physician's testimony was not sufficiently reliable, and absent any reliable evidence of causation, the district court properly granted the defendant's motion for summary judgment.<sup>111</sup>

Although procedural requirements relating to disclosure of expert witnesses may be a little outside the scope of this Survey, those requirements, as a practical matter, are inextricably intertwined with *Daubert*. For example, whether or not opinion testimony falls within the scope of Rule 702 determines whether the expert expressing this opinion

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106. *See id.* at \*5-6.

107. *See id.* at \*5.

108. *Id.*

109. *Id.* District Judge Ashley Royal, in *Bowers v. Norfolk Southern Corp.*, 537 F. Supp. 2d 1343 (M.D. Ga. 2007), provides an excellent example of appropriate causation testimony of this nature by a treating physician:

For example, if a woman slips on rice spilled in the rice aisle at a Publix supermarket, extends her hand to brace her fall, and ends up with a Colles' fracture of her wrist, the orthopaedist will prescribe the same treatment as he would had that same woman fallen off her bicycle, extended her hand to brace her fall, and ended up with a Colles' fracture. . . . A crucial difference between the hypothetical just described and the present case is that, in the hypothetical just described, the attorney defending Publix against the woman's premises liability claim would not file a *Daubert* motion to dispute her orthopaedist's causation testimony. A Colles' fracture is a common injury, known to result from a person's fall onto their outstretched hand. By contrast, Plaintiff's pre-injury medical history, combined with his claim that an unknown amount of vibration caused his injuries, present a more complex causation issue.

*Id.* at 1358 n.9.

110. *Wilson*, 2008 WL 5215991, at \*5.

111. *Id.* at \*7.

is subject to the disclosure requirements of Federal Rule of Civil Procedure 26.<sup>112</sup> In two cases decided during the survey period, the Eleventh Circuit addressed the consequences of belated or incomplete disclosure of expert testimony.

The Eleventh Circuit's decision in *Romero v. Drummond Co.*<sup>113</sup> is a good example of the generally dim view taken by federal courts regarding late disclosures of expert testimony. In *Romero* the United States District Court for the Northern District of Alabama excluded the testimony of three expert witnesses because their disclosure reports did not comply with Rule 26(a)(2)(B).<sup>114</sup> The plaintiffs acknowledged that one report was incomplete, so the Eleventh Circuit focused on the two remaining reports.<sup>115</sup> According to the Eleventh Circuit, each report consisted of a single paragraph explaining the expert's opinion and the basis for the opinion.<sup>116</sup> Without elaboration, the Eleventh Circuit noted that the reports did not disclose the experts' opinions "with sufficient specificity to allow [the defendant] to prepare for rebuttal or cross-examination."<sup>117</sup> Consequently, the Eleventh Circuit held that the district court did not abuse its discretion when it excluded the experts from testifying.<sup>118</sup> Nor did the district court abuse its discretion when it refused to allow the plaintiffs to supplement their reports.<sup>119</sup> Simply put, the plaintiffs failed to meet the deadlines imposed by a scheduling order.<sup>120</sup> Thus, the decision to exclude the experts' testimony because of their inadequate reports was within the discretion of the district court.<sup>121</sup>

In *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*,<sup>122</sup> the Eleventh Circuit was substantially more forgiving. In *OFS Fitel*, the plaintiff did not produce its expert witness report until three days after the close of discovery.<sup>123</sup> The United States District Court for the Northern District of Georgia found this late disclosure "to be part of a pattern . . . of stonewalling and delaying discovery."<sup>124</sup> Thus, the district court

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112. FED. R. CIV. P. 26.

113. 552 F.3d 1303 (11th Cir. 2008).

114. *Id.* at 1323.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1323-24.

120. *Id.*

121. *See id.* at 1324.

122. 549 F.3d 1344 (11th Cir. 2008).

123. *Id.* at 1349-50.

124. *Id.* at 1351.

enforced Northern District of Georgia Local Rule 26.2(C),<sup>125</sup> which “says that, if you don’t comply, you don’t designate your experts sufficiently early in the discovery period, you don’t provide the report that allows the other side to take their deposition, the sanction is exclusion.”<sup>126</sup> The Eleventh Circuit agreed that the plaintiff violated Local Rule 26, but that was “only half the inquiry”; the remaining question was whether the district court abused its discretion when it excluded the expert from testifying.<sup>127</sup> Federal Rule of Civil Procedure 37(c)(1)<sup>128</sup> authorizes the exclusion of expert testimony for failure to comply with disclosure requirements “unless the failure was substantially justified or is harmless.”<sup>129</sup> The Eleventh Circuit acknowledged that the district court’s characterization of the plaintiff’s conduct as “stonewalling” was tantamount to a finding that the plaintiff’s failure to timely produce the expert’s report was not substantially justified.<sup>130</sup> Still, however, the Eleventh Circuit was not satisfied. The court of appeals identified five reasons supporting the conclusion that the district court abused its discretion, four of which involved factors mitigating or explaining the plaintiff’s failure to produce the report.<sup>131</sup> Perhaps most interesting, and “most important[.]” to the Eleventh Circuit, was the fact that no trial date had been set, and thus there was ample time for the defendant to depose the expert and designate a rebuttal expert.<sup>132</sup> Although the Eleventh Circuit’s analysis and conclusion in *OFS Fitel* are extremely fact specific, *OFS Fitel* still provides a rare lifeline for lawyers who have run afoul of expert witness disclosure deadlines, particularly when a trial date has not yet been set.

Rule 704(b)<sup>133</sup> prohibits an expert in a criminal case from stating an opinion about whether a defendant did or did not have the mental state constituting an element of the crime or a defense to the crime.<sup>134</sup> In *United States v. Steed*,<sup>135</sup> the defendant contended that testimony by a law enforcement officer violated Rule 704(b) during his trial for possession with intent to distribute marijuana.<sup>136</sup> The officer testified

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125. N.D. GA. R. 26.2(C).

126. *OFS Fitel*, 549 F.3d at 1351.

127. *Id.* at 1363.

128. FED. R. CIV. P. 37(c)(1).

129. *Id.*

130. *OFS Fitel*, 549 F.3d at 1363.

131. *See id.* at 1363-65.

132. *Id.* at 1364.

133. FED. R. EVID. 704(b).

134. *Id.*

135. 548 F.3d 961 (11th Cir. 2008).

136. *Id.* at 963.

that after he stopped the defendant's vehicle, he noted that the defendant was visibly shaking, was sweating even though he had been in an air conditioned vehicle, and was failing to make direct eye contact. The defendant contended that this testimony about his behavior was probative of his knowledge that drugs were in his vehicle and that because this testimony tended to prove an element of the charge against him—his knowledge that he was transporting drugs—the testimony violated Rule 704(b).<sup>137</sup> The Eleventh Circuit disagreed.<sup>138</sup> While the testimony could be taken to infer that the defendant knew he was transporting drugs, the officer did not expressly state an opinion that the defendant knew he was transporting drugs.<sup>139</sup> Therefore, the officer's testimony did not violate Rule 704.<sup>140</sup>

#### VI. ARTICLE VIII: HEARSAY

In 2004 the United States Supreme Court in *Crawford v. Washington*<sup>141</sup> overruled *Ohio v. Roberts*<sup>142</sup> and held that out-of-court “testimonial” statements are inadmissible at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness.<sup>143</sup> In *Crawford* the defendant contended that the trial court improperly allowed the jury to hear the tape-recorded statement his wife gave to police officers,<sup>144</sup> which the prosecution tendered after the wife invoked her spousal privilege and thus was unavailable to testify.<sup>145</sup> 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 Amendment<sup>146</sup> right of confrontation,<sup>147</sup> accepting the prosecution's argument that under the United States Supreme Court's decision in *Roberts*, hearsay statements are admissible if the statements “fall within a ‘firmly rooted hearsay exception’ or bear ‘particularized guarantees of trustworthiness.’”<sup>148</sup>

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137. *Id.* at 965-66.

138. *See id.* at 977.

139. *Id.*

140. *Id.*

141. 541 U.S. 36 (2004).

142. 448 U.S. 56 (1980).

143. *Crawford*, 541 U.S. at 68-69; *see also* Marc. T. Treadwell, *Evidence*, 57 MERCER L. REV. 187, 213 (2005).

144. *Crawford*, 541 U.S. at 38.

145. *Id.* at 40.

146. U.S. CONST. amend. VI.

147. *Crawford*, 541 U.S. at 40-41.

148. *Id.* at 40 (quoting *Roberts*, 448 U.S. at 66).

The Supreme Court overruled *Roberts* and held that the Sixth Amendment applies to out-of-court testimonial statements.<sup>149</sup> Testimonial statements include affidavits, examinations, prior testimony, and “similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”<sup>150</sup> In subsequent decisions, both state and federal courts attempting to interpret *Crawford* have largely focused on what constitutes a testimonial statement.<sup>151</sup>

The Supreme Court returned to *Crawford* during the survey period in *Giles v. California*<sup>152</sup> and addressed the ancient forfeiture by wrongdoing exception to the rule against hearsay.<sup>153</sup> In *Giles* the prosecution, during the defendant’s trial on charges of murdering his girlfriend, introduced statements made by the victim to police officers three weeks before her death. The victim made these statements to the officers investigating her report that the defendant had abused her. Over the defendant’s objection, the trial court admitted these statements, ruling they were sufficiently trustworthy. However, after the defendant’s conviction, the Supreme Court decided *Crawford* and held that the Confrontation Clause did not allow the admission of statements by unavailable witnesses simply because they were trustworthy.<sup>154</sup> The defendant appealed to the California Court of Appeals, which subsequently held that the victim’s statements were nevertheless admissible “because *Crawford* recognized a doctrine of forfeiture by wrongdoing.”<sup>155</sup> Because the victim’s unavailability to testify at trial was due to her murder by the defendant, the court of appeals concluded that he forfeited his right to confront the witness. The California Supreme Court affirmed, and the United States Supreme Court granted certiorari.<sup>156</sup>

The Court acknowledged that common law, at the time of the Sixth Amendment adoption, allowed the admission of two forms of testimonial statements—dying declarations and statements by a “witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.”<sup>157</sup> However, after a detailed examination of those common law

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149. *Id.* at 68-69.

150. *Id.* at 51.

151. See generally Marc T. Treadwell, *Evidence*, 60 MERCER L. REV. 135, 175-77 (2008); Marc T. Treadwell, *Evidence*, 59 MERCER L. REV. 157, 182-85 (2007); Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 1219, 1235-38 (2007).

152. 128 S. Ct. 2678 (2008).

153. See *id.* at 2682.

154. *Id.* at 2681-82.

155. *Id.* at 2682.

156. *Id.*

157. *Id.* at 2682-83.

precedents, the Court concluded that the forfeiture by wrongdoing exception contemplated only situations in which a defendant engaged in conduct that was intended or designed to keep the declarant from testifying.<sup>158</sup> Like the Federal Rules' codification of the forfeiture by wrongdoing doctrine,<sup>159</sup> the common law doctrine essentially applies to witness tampering.<sup>160</sup> Accordingly, a majority of the Supreme Court "decline[d] to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter."<sup>161</sup> Because the defendant's murder of the declarant was not intended to prevent her from testifying, the forfeiture by wrongdoing exception did not allow the admission of her previous statements, and thus, their admission violated his right to confront the witnesses against him.<sup>162</sup>

In *United States v. Lamons*,<sup>163</sup> the Eleventh Circuit, instead of addressing whether a statement was testimonial, tackled the question of whether the statement was, in fact, a "statement" as contemplated by *Crawford*.<sup>164</sup> As discussed in Part II of this Survey, two juries convicted the defendant in *Lamons*, a flight attendant, of charges arising from threats to the safety of airline passengers.<sup>165</sup> In one incident, the defendant allegedly called AirTran and told a gate attendant "that everyone on Flight 278 was going to die."<sup>166</sup> In anticipation of the defendant's trial, investigators secured from AirTran's telephone provider a compact disk of data establishing that ten calls were made from the defendant's cell phone to AirTran's toll-free number at the approximate time of the threatening phone call.<sup>167</sup> Each of the calls was made in a way that prevented the caller's number and name from being displayed to the person receiving the call.<sup>168</sup> The defendant contended that this data constituted testimonial hearsay within the scope of *Crawford* and therefore the admission of the data violated his Sixth Amendment right to confrontation.<sup>169</sup> The Eleventh Circuit disagreed, reasoning that the evidence neither constituted a "statement" contemplated by the Sixth Amendment nor did the disk fall within the

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158. *See id.* at 2683-91.

159. *See* FED. R. EVID. 804(b)(6).

160. *Giles*, 128 S. Ct. at 2687.

161. *Id.* at 2693.

162. *See id.* at 2684-93.

163. 532 F.3d 1251 (11th Cir. 2008).

164. *See id.* at 1262-63.

165. *Id.* at 1255.

166. *Id.* at 1256.

167. *Id.* at 1262.

168. *Id.* at n.21.

169. *Id.* at 1260-61.

scope of Rule 801(a)'s<sup>170</sup> definition of "statements."<sup>171</sup> The plain language of the Confrontation Clause, according to the Eleventh Circuit, establishes that it applies only to witnesses who provide testimony against an accused.<sup>172</sup> Consequently, the Eleventh Circuit concluded, the confrontation clause applies only to human witnesses.<sup>173</sup> Further, the court noted that Rule 801(a) defines a statement as an "(1) oral or written assertion or (2) nonverbal conduct of a *person*, if it is intended by the person as an assertion."<sup>174</sup> Turning to laboratory test results for an analogy, the Eleventh Circuit reasoned that although a physician's diagnosis based on laboratory reports may be testimonial, the test results themselves are basically machine-generated data, not statements.<sup>175</sup> Because the AirTran telephone records were machine-generated data and not the statements of persons, the data were not statements for purposes of hearsay analysis.<sup>176</sup> Accordingly, the Eleventh Circuit held that machine-generated statements are not statements for purposes of either the Confrontation Clause or hearsay analysis.<sup>177</sup>

Rule 804(b)(3)<sup>178</sup> provides for the admission of statements against penal interest.<sup>179</sup> If the statement is not testimonial in nature and thus does not run afoul of *Crawford*, then the statement can be admitted against a criminal defendant if the following are true: (1) the declarant is unavailable, (2) the statement is corroborated by circumstances clearly indicating trustworthiness, and (3) the statement "so far tend[s] to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."<sup>180</sup>

In *United States v. Westry*,<sup>181</sup> the defendant contended that the United States District Court for the Southern District of Alabama erroneously allowed a witness to testify about statements made by another witness, who subsequently died, about the source of cocaine the declarant was about to use. According to the witness, the declarant said

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170. FED. R. EVID. 801(a).

171. *Lamons*, 532 F.3d at 1263.

172. *Id.*

173. *Id.*

174. *Id.* (quoting FED. R. EVID. 801(a)).

175. *Id.* (quoting *U.S. v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008)).

176. *Id.* at 1263-64.

177. *Id.*

178. FED. R. EVID. 804(b)(3).

179. *Id.*

180. *Id.*

181. 524 F.3d 1198 (11th Cir. 2008).

that he was waiting on the defendant to bring him cocaine.<sup>182</sup> The Eleventh Circuit focused on the requirement that a reasonable man in the declarant's position must have believed that his statements would have subjected him to criminal liability.<sup>183</sup> The court acknowledged that, on the surface, the declarant likely "would not have believed his statements would subject him to criminal liability" because he had a close relationship with the witness.<sup>184</sup> However, the court noted that a statement against penal interest need not necessarily be made to a person who would likely cause the decedent's prosecution.<sup>185</sup> "Under the circumstances presented here, we do not think a reasonable man would falsely admit to waiting for cocaine at [a known drug haunt], a serious crime, knowing there was a chance, albeit slight, that the admission could be used to subject him to severe penalties."<sup>186</sup> This would seem to be a fairly low threshold for establishing a reasonable belief that a statement could lead to criminal prosecution.

On August 8, 2008, the Judicial Conference of the United States released for public comment a proposed amendment to Rule 804(b)-(3).<sup>187</sup> Currently, Rule 804(b)(3) requires only that criminal defendants prove corroborating circumstances clearly indicating the trustworthiness of evidence of a statement against penal interest.<sup>188</sup> Thus, the current rule places a higher burden on a criminal defendant who wishes to tender evidence of a declarant's statement against penal interest. The proposed rule would extend this burden to the prosecution.<sup>189</sup>

The Author treads carefully when discussion of Eleventh Circuit evidence decisions implies criticism. However, the Eleventh Circuit's decision in *United States v. Jacques*<sup>190</sup> must be carefully examined, particularly in view of the Supreme Court's strong bias against testimonial hearsay. Prosecutors sometimes argue that out-of-court

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182. *Id.* at 1214.

183. *See id.* at 1215.

184. *Id.*

185. *Id.*

186. *Id.*

187. Memorandum from the Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States to the Bench, Bar, and Public (Aug. 8, 2008), available at [http://www.uscourts.gov/rules/2008-08-Memo\\_to\\_Bench\\_Bar\\_8\\_8\\_08.pdf](http://www.uscourts.gov/rules/2008-08-Memo_to_Bench_Bar_8_8_08.pdf); see also Federal Rulemaking, What's New: Proposed Amendments Published for Public Comment, <http://www.uscourts.gov/rules/index2.html#proposed0808>.

188. FED. R. EVID. 804(b)(3).

189. Memorandum from Robert L. Hinkle, Chair of the Advisory Comm. on Evidence Rules, to the Honorable Lee H. Rosenthal, Chair of the Standing Comm. on Rules of Practice and Procedure 1 (May 12, 2008), available at [http://www.uscourts.gov/rules/Reports/EV\\_Report.pdf](http://www.uscourts.gov/rules/Reports/EV_Report.pdf) (attaching proposed amendment).

190. 266 F. App'x 824 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 772 (2008).

statements are admissible as nonhearsay to explain a law enforcement officer's conduct.<sup>191</sup> This argument is suspect, and Georgia courts have firmly rejected it 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."<sup>192</sup> Simply put, why a law enforcement officer does something is generally not relevant to the issue of whether a defendant committed a crime, and an incriminating statement by a confidential informant that "explains" why an investigation centered on a defendant is highly prejudicial. Such statements, it would seem, are classic testimonial hearsay. Indeed, as discussed in the 2007 *Evidence* survey,<sup>193</sup> the Eleventh Circuit summarily dismissed the argument that statements explaining an officer's conduct are admissible as nonhearsay.<sup>194</sup> In *United States v. Arbolaez*,<sup>195</sup> the Eleventh Circuit held that such statements, even when purportedly offered to explain a law enforcement officer's conduct, are still inadmissible hearsay.<sup>196</sup>

When faced with the same argument in *United States v. Jacques*,<sup>197</sup> the Eleventh Circuit came to an entirely different conclusion.<sup>198</sup> In *Jacques* the government successfully tendered at trial evidence of statements made by a "cooperating source" to explain the conduct of investigators.<sup>199</sup> The defendant contended that the admission of the cooperating source's out-of-court statement was hearsay and violated his Sixth Amendment right to confront the witnesses against him.<sup>200</sup> With little discussion, the Eleventh Circuit rejected both arguments.<sup>201</sup> The statements were not hearsay because they were not offered to prove the truth of the matter asserted in the statements.<sup>202</sup> The Eleventh Circuit did not elaborate on the substance of the cooperating source's statements, but the statements apparently led the officers to the defendant.<sup>203</sup> Therefore, it is safe to assume that the source implicated the defendant. However, because the testimony was offered for a

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191. See, e.g., *Teague v. State*, 252 Ga. 534, 536-37, 314 S.E.2d 910, 912 (1984).

192. *Id.* at 536, 314 S.E.2d at 912; see also Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 274 (2003).

193. Marc T. Treadwell, *Evidence*, 58 MERCER L. REV. 1219 (2007).

194. *Id.* at 1240-41; see *United States v. Arbolaez*, 450 F.3d 1283, 1290 (11th Cir. 2006).

195. 450 F.3d 1283 (11th Cir. 2006).

196. *Id.* at 1290.

197. 266 F. App'x 824 (11th Cir. 2008).

198. See *id.* at 827-28.

199. *Id.*

200. *Id.*

201. See *id.* at 828.

202. *Id.*

203. See *id.* at 827-28.

nonhearsay purpose, the Eleventh Circuit reasoned that the Confrontation Clause was not implicated.<sup>204</sup> To make the obvious rejoinder, it is only necessary to turn to the Eleventh Circuit's decision in *Arbolaez*:

We have ruled that testimony as to the details of statements received by a government agent and later used as the basis for an affidavit in support of a search warrant, even when purportedly admitted “not . . . for the truthfulness of [what the informant said but] to show why [the agent] did what he did” after he received that information, constitutes inadmissible hearsay.<sup>205</sup>

The Eleventh Circuit in *Arbolaez* went on to hold that the hearsay statements were testimonial, and thus, their admission violated the Confrontation Clause.<sup>206</sup>

#### VII. ARTICLE IX: AUTHENTICATION

As Judge Jack Weinstein and Professor Margaret Berger suggest:

An exhibit is not admissible simply because it has been authenticated. The proponent must still clear the other hurdles to admissibility. For example, if a document is being offered to prove the truth of assertions made in it, the proponent must show that it is not barred by the hearsay rule.<sup>207</sup>

Indeed, all lawyers learn in law school—or if not, then after their first trials—that simply authenticating a document does not make the document admissible. For example, as Judge Weinstein and Professor Berger tell us, if the document contains hearsay, the authenticated document is admissible only if it falls within an exception to the hearsay rule.<sup>208</sup> Given this, the Eleventh Circuit decision in *United States v. Deverso*<sup>209</sup> is a little difficult to understand.

In *Deverso* the defendant faced charges arising from alleged sexual relations with a minor, specifically a Filipino girl who was less than a month shy of her eighteenth birthday.<sup>210</sup> To prove the girl's age, the prosecution tendered a birth certificate that stated, “Beverly Regidor

204. *Id.* at 828.

205. *Arbolaez*, 450 F.3d at 1290 (alterations in the original) (quoting *United States v. Rodriguez*, 524 F.2d 485, 487 (5th Cir. 1975)).

206. *Id.* at 1291. The district court's error in *Arbolaez*, however, was harmless. *Id.* at 1291-92.

207. 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 901.02[1] (2d ed. 1997).

208. *Id.*

209. 518 F.3d 1250 (11th Cir. 2008).

210. *Id.* at 1252-53.

Datanagan who was *allegedly* born on November 10, 1986 . . . appears in the National Indices for birth.”<sup>211</sup> The prosecution contended that the document was admissible as a foreign public document pursuant to Federal Rule of Evidence 902(3).<sup>212</sup> The defendant contended that the document was, if anything, a business record containing hearsay for which the prosecution did not lay a proper foundation for admission. The defendant also contended that the document was not properly authenticated because it stated that the girl was “allegedly born”—rather than “born”—on a certain date.<sup>213</sup> The Eleventh Circuit held that the document was properly authenticated pursuant to Rule 902(3), which provides for the authentication of foreign public documents.<sup>214</sup> First, the government provided sufficient evidence that the document was what it purported to be: a certificate of the girl’s birth.<sup>215</sup> Second, there was sufficient evidence establishing that the officials vouching for the document were who they claimed to be.<sup>216</sup>

With regard to the defendant’s hearsay objection, the Eleventh Circuit had this to say: “[b]ecause the Government met the requirements for self-authentication of the foreign document, it did not have to lay a foundation for admission of the document as a business record.”<sup>217</sup> However, Rule 902<sup>218</sup> merely provides for the admission of documents without “[e]xtrinsic evidence of authenticity.”<sup>219</sup> Rule 902 does not address hearsay issues. This is illustrated by the Eleventh Circuit’s opinion in *United States v. Koziy*.<sup>220</sup> In *Koziy* the United States District Court for the Southern District of Florida admitted Ukrainian police personnel forms during a deportation proceeding brought against the defendant.<sup>221</sup> On appeal the defendant contended that the personnel records had not been properly authenticated and, in any event, contained hearsay.<sup>222</sup> The Eleventh Circuit concluded that the defendant’s authentication objection was without merit because the documents were authenticated both pursuant to Federal Rule of Evidence 901-

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211. *Id.* at 1255 (ellipsis in original) (internal quotation marks omitted).

212. FED. R. EVID. 902(3).

213. *Deverso*, 518 F.3d at 1254-55.

214. *Id.* at 1256.

215. *Id.*

216. *Id.*

217. *Id.*

218. FED. R. EVID. 902.

219. *Id.*

220. 728 F.2d 1314 (11th Cir. 1984).

221. *Id.* at 1317 & n.2.

222. *Id.* at 1321.

(a)<sup>223</sup> by extrinsic evidence and pursuant to Rule 902(3) as foreign public documents, like the birth certificate in *Deverso*.<sup>224</sup> The Eleventh Circuit then turned to the hearsay objection and concluded that the hearsay was cured by the ancient document exception created by Rule 803(16).<sup>225</sup>

In *Deverso* several hearsay exceptions potentially applied. With proper testimony or with a certification from a records custodian as provided by Rule 902(11)<sup>226</sup> or Rule 902(12),<sup>227</sup> the birth certificate may have been admissible as a business record pursuant to Rule 803(6).<sup>228</sup> Indeed, this appeared to be the defendant's point in *Deverso*; the necessary foundation had not been laid to cure the hearsay if the prosecution was tendering the record as a business record.<sup>229</sup> It is also possible that the birth certificate may have been admissible as a public record under Rule 803(8)<sup>230</sup> or a record of vital statistics under Rule 803(9).<sup>231</sup> The defendant's point, however, was the alleged birth certificate, even if properly authenticated, still contained hearsay, and the government did not lay a foundation for curing the hearsay.<sup>232</sup>

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223. FED. R. EVID. 901(a).

224. *Koziy*, 728 F.2d at 1321-22.

225. *Id.*; FED. R. EVID. 803(16).

226. FED. R. EVID. 902(11).

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

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

229. *See Deverso*, 518 F.3d at 1254.

230. *See* FED. R. EVID. 803(8).

231. *See* FED. R. EVID. 803(9).

232. *See Deverso*, 518 F.3d at 1254-55.