

Evidence

by Marc T. Treadwell*

I. INTRODUCTION

During the survey year from January 1, 2009 to December 31, 2009,¹ the United States Court of Appeals for the Eleventh Circuit continued its recent trend of limiting the number of its published opinions, a trend discussed in more detail in a previous survey.² This Survey will address several unpublished—yet noteworthy—decisions. However, readers 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persuasive authority.”³ Also note that the court’s internal operating procedures suggest an even more limited role for unpublished opinions:

The court generally does not cite to its “unpublished” opinions because they are not binding precedent.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 exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case.⁴

* 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, Mercer Law Review (1979–1981); Fifth Circuit Survey Editor (1980–1981). Member, State Bar of Georgia.

1. For analysis of Eleventh Circuit evidence law during the prior survey period, see Marc T. Treadwell, *Evidence, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1211 (2009).

2. See Marc T. Treadwell, *Evidence, 2007 Eleventh Circuit Survey*, 59 MERCER L. REV. 1181 (2008).

3. 11TH CIR. R. 36-2.

4. FED. R. APP. P. 36, 11TH CIR. I.O.P. 7.

II. ARTICLE III. PRESUMPTIONS

In many previous surveys of both Eleventh Circuit and Georgia evidence decisions, the Author has placed discussion of spoliation cases in the section about presumptions.⁵ This is because historically the “adverse inference” presumption has been the remedy for spoliation of evidence. Specifically, if a party destroys or spoliates evidence, the jury can be charged that they may infer that the evidence, if it were available, would be harmful to the spoliator.⁶ However, as discussed in more recent surveys, courts have become increasingly aggressive and creative in fashioning sanctions for spoliation of evidence.⁷ This year was no exception in the Eleventh Circuit.

In *Graff v. Baja Marine Corp.*,⁸ the plaintiffs contended that a motorboat’s “gimbal housing” fractured under normal operating conditions. The plaintiffs alleged that when the gimbal housing fractured, the boat spun out of control, ejecting the plaintiffs’ decedent from the boat. The defendants contended that the gimbal housing fractured as a result of a severe impact, which in turn was caused by the operator’s misuse. Shortly after the incident, a team of experts hired by the plaintiffs removed the gimbal housing and conducted destructive testing on a portion of the gimbal housing without first notifying the defendants. Not surprisingly, when the defendants learned of the destructive testing, they contended that the plaintiffs, by allowing their experts to destroy evidence, had spoliated evidence. The United States District Court for the Northern District of Georgia agreed and excluded evidence of the test results. Without this evidence, the plaintiffs could not prove a product defect, and therefore, the district court granted summary judgment to the defendants.⁹

On appeal, the plaintiffs contended that exclusionary sanctions were inappropriate.¹⁰ The Eleventh Circuit disagreed, holding that the

5. See Marc T. Treadwell, *Evidence, 2005 Eleventh Circuit Survey*, 57 MERCER L. REV. 1083, 1089–91 (2006); Marc T. Treadwell, *Evidence, 1997 Eleventh Circuit Survey*, 49 MERCER L. REV. 1027, 1031–32 (1998); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 61 MERCER L. REV. 135, 136–38 (2009); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 136–38 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 49 MERCER L. REV. 149, 151–52 (1997).

6. See, e.g., *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 525, 484 S.E.2d 249, 251 (1997).

7. See *supra* note 5.

8. 310 F. App’x 298 (11th Cir. 2009).

9. *Id.* at 300–02.

10. *Id.* at 301.

plaintiffs' experts spoliated evidence.¹¹ The defendants were prejudiced by this destructive testing because the gimbal housing was the critical evidence in the case.¹² Moreover, the plaintiffs' experts used test samples smaller than recommended by industry standards and thus wasted what little material was available for testing. Consequently, they eliminated any opportunity to conduct more reliable tests. Whether or not the plaintiffs acted with malice, they clearly were more culpable than the defendants.¹³ Thus, the Eleventh Circuit held that the district court did not abuse its discretion when it excluded the test results from evidence.¹⁴

The decision in *Graff* is one of the most recent of an increasing number of Georgia and Eleventh Circuit decisions imposing exclusionary sanctions against both plaintiffs and defendants in civil cases for spoliating evidence.¹⁵ Smart lawyers will learn from these cases and rethink the way they, their clients, and their experts handle critical evidence.

III. ARTICLE IV. RELEVANCY

Federal Rule of Evidence 404¹⁶ 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.¹⁷ Rule 404 is intended to prevent the admission of evidence of prior misconduct solely to prove that a defendant is more likely to have committed the charged offense.¹⁸ However, Rule 404's prohibition against extrinsic act evidence is subject to broad exceptions.¹⁹ Although not admissible to prove a party's propensity to engage in misconduct, extrinsic act evidence is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."²⁰ Viewed in a practical light, it is easy to see why Rule 404 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

11. *Id.*

12. *Id.* at 302.

13. *Id.*

14. *Id.*

15. *See supra* note 5.

16. FED. R. EVID. 404.

17. *Id.*

18. *See id.*

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

20. *Id.*

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.

As discussed in previous surveys, Rule 404(b) once played a significant and frequent role in Eleventh Circuit evidence decisions.²¹ This has not been the case in recent years, and the same is true for the current survey period. Only two Eleventh Circuit decisions addressing Rule 404(b) merit discussion—and then only briefly. In *United States v. Kapordelis*,²² which involved a truly sordid affair concerning a Georgia anesthesiologist’s obsession with child pornography,²³ the defendant contended that evidence of the defendant’s sexual relations with minors in the Czech Republic was improperly admitted under Rule 404(b) because his conduct was legal in the Czech Republic. Therefore, the defendant argued that because there was no crime or wrong, there was no evidence admissible under Rule 404(b).²⁴ The Eleventh Circuit dismissed this argument.²⁵ By its plain language, Rule 404(b) applies to “other crimes, wrongs, or acts” and thus is not limited to criminal acts.²⁶ The fact that the defendant’s conduct may have been lawful in the Czech Republic did not mean that evidence of those acts was inadmissible to prove the defendant committed the offenses charged in the United States.²⁷ Further, evidence of his conduct in the Czech Republic was relevant to a legitimate issue and was not offered simply to prove bad character.²⁸ The defendant denied taking pornographic pictures of minors and claimed that someone else must have downloaded the pictures to his computer.²⁹ The fact that he engaged in sexual relations with minors was admissible to refute his argument that it could not have been him who took pornographic pictures of children or downloaded such pictures to his computer.³⁰

By its terms, Rule 404(b) applies to evidence of other or extrinsic acts,³¹ therefore, evidence of acts “inextricably intertwined” with the

21. See, e.g., Marc T. Treadwell, *Evidence, 1990 Eleventh Circuit Survey*, 42 MERCER L. REV. 1451, 1455–61 (1991).

22. 569 F.3d 1291 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1315 (2010) (mem.).

23. *Id.* at 1298.

24. *Id.* at 1312.

25. *Id.* at 1314.

26. *Id.* at 1313 (quoting FED. R. EVID. 404(b)).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

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

charged offense is not considered extrinsic act evidence for purposes of Rule 404(b), a point made by the Eleventh Circuit in *United States v. Covington*.³² In *Covington* the defendant was charged with attempting to procure a “hit” on his girlfriend in an effort to prevent her from testifying in a state criminal proceeding. In the state court proceeding, the defendant had been charged with beating his girlfriend and threatening her with a gun. At trial in the federal proceeding, the United States District Court for the Middle District of Florida admitted recorded phone calls and correspondence between the defendant and his girlfriend discussing the beating, the pistol that the defendant brandished during the beating, and the girlfriend’s testimony about the beating. The defendant contended that this was evidence of other crimes, wrongs, or acts, and it should not have been admitted in his trial for charges relating to the attempted murder of his girlfriend.³³ The Eleventh Circuit disagreed.³⁴ The beating and the charges resulting from the beating provided the underlying motive for the attempted murder, and therefore, evidence related to the beating was “necessary to complete the story of the crime.”³⁵ Further, this evidence tended to prove the defendant’s motive for wanting his girlfriend dead.³⁶ Although the Eleventh Circuit held that the evidence was “admissible under Rule 404(b),”³⁷ it would have been just as accurate to say that Rule 404(b) did not apply because the evidence was not, in fact, extrinsic to the charged offense.

The Federal Rules’ version of a rape shield statute is found in Federal Rule of Evidence 412.³⁸ In *United States v. Sarras*,³⁹ the defendant contended that the district court erred when it refused to allow him to cross-examine his minor victim about her subsequent sexual relations with her boyfriend. The defendant contended that the prosecution opened the door to this testimony when the victim testified that she had been traumatized by the defendant’s sexual abuse, which involved photographs depicting the victim engaged in sexual acts with an adult

32. 565 F.3d 1336, 1346–47 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 564 (2009) (mem.).

33. *Id.* at 1340–42.

34. *Id.* at 1342.

35. *Id.* (quoting *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997)).

36. *Id.*

37. *Id.*

38. FED. R. EVID. 412. In 1994 Congress amended Rule 412 to make it applicable to civil proceedings involving alleged sexual misconduct. Pub. L. 103-322, § 40141(v), 108 Stat. 1796, 1919 (1994). Notably, Georgia’s rape shield statute, section 24-2-3 of the Official Code of Georgia Annotated (O.C.G.A.), applies only to criminal proceedings. O.C.G.A. § 24-2-3 (1995 & Supp. 2009).

39. 575 F.3d 1191 (11th Cir. 2009).

male.⁴⁰ The Eleventh Circuit rejected the defendant's argument for several reasons.⁴¹ First, the victim could have been traumatized by the defendant's sexual abuse regardless of whether she had other sexual relations.⁴² In other words, the mere fact that she had sexual relations was not necessarily relevant to the question of whether she had been traumatized. Second, the fact that the victim may have had sexual relations did not tend to prove that the victim had not been sexually abused.⁴³ Indeed, the photographs established sexual abuse; the only question was whether the defendant was the male seen in the photographs.⁴⁴ Finally, the defendant had ample opportunity to cross-examine the victim about any possible motives for false allegations that the defendant had sexually abused her.⁴⁵

IV. ARTICLE VII. OPINION TESTIMONY

Seventeen years have passed since the United States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁶ that the Federal Rules of Evidence preempted the long established "general acceptance" test for the admissibility of expert opinion evidence.⁴⁷ To review briefly, the Supreme Court in *Daubert* made district judges gatekeepers with the assigned task of keeping unreliable expert opinions out of courtrooms.⁴⁸ In 2000 the principles of *Daubert* were codified in Article VII of the Federal Rules of Evidence.⁴⁹ Amended Rule 701 makes clear that lay witnesses cannot give opinion testimony "based on scientific, technical, or other specialized knowledge within the scope of Rule 702."⁵⁰ In other words, the reliability requirements imposed by *Daubert* on expert testimony cannot be avoided by a lay witness label.⁵¹ Amended Rule 702 basically codified the *Daubert* test and requires that expert testimony 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."⁵² Amended

40. *Id.* at 1212-13.

41. *Id.* at 1213.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. 509 U.S. 579 (1993).

47. *Id.* at 589.

48. *Id.* at 597.

49. Pub. L. 93595, 88 Stat. 1926, 1937 (1974).

50. FED. R. EVID. 701.

51. FED. R. EVID. 701 advisory committee's note.

52. FED. R. EVID. 702.

Rule 703 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.”⁵³

It became clear that the *Daubert* decision and the new rules, by setting a new standard for the admission of expert testimony, dramatically changed the landscape of pretrial practice given that such issues are generally fought prior to trial. Whether one agrees or disagrees with the standard, it is clear today that *Daubert* requires district judges to vigorously scrutinize expert witnesses and their opinions.⁵⁴

Daubert seminar speakers looking for locker-room humor to spice up their boring subject matter will have a field day with the Eleventh Circuit’s decision in *United States v. Sarras*.⁵⁵ The opinion does, however, offer a serious message—proponents of expert testimony need to understand the precise focus of the attack on their experts and respond accordingly.

In *Sarras* the principal evidence against the defendant for child pornography offenses was a photograph, taken from the defendant’s laptop computer, of a penis—allegedly the defendant’s penis.⁵⁶ Accordingly, the principal issue at trial became one of identification—whether, in fact, the photograph depicted the defendant’s penis.⁵⁷ To refute the prosecution’s claim that the photograph showed his penis, the defendant retained a doctor who was an acknowledged expert in the field, given that he had examined 15,000 penises.⁵⁸ Based upon a comparison of veins visible in the laptop photograph with defense photographs of the defendant’s penis, the expert concluded that the laptop photograph did not depict the defendant’s penis.⁵⁹

In its *Daubert* motion, the prosecution couched the expert’s opinion as one based on “vein—comparison methodology.”⁶⁰ The prosecution argued that *Daubert* required appropriate validation of the reliability of this methodology in the medical or scientific community, and there was none.⁶¹ Apparently, the defense never quite grasped the nature of the prosecution’s attack because it simply responded that its expert was,

53. FED. R. EVID. 703.

54. See *Daubert*, 509 U.S. 579.

55. 575 F.3d 1191 (11th Cir. 2009).

56. *Id.* at 1197–98.

57. See *id.* at 1198–99.

58. *Id.* at 1205.

59. *Id.* at 1199–1200.

60. *Id.* at 1210.

61. *Id.*

based on his experience of examining 15,000 penises, qualified to render an opinion on penis identification.⁶² The Eleventh Circuit, however, clearly saw the distinction, noting that “Sarras fails to distinguish between the doctor’s qualifications to testify about penises and the method by which the doctor reaches his conclusion.”⁶³ There was, the Eleventh Circuit noted, simply no evidence in the record validating “the so-called methodology of comparing veins in erect penises as an identification technique. Perhaps blood flow or degree of arousal has no visual effect on the veins in penises. Who knows? The record is silent.”⁶⁴

In short, the defense never addressed the prosecution’s argument. While it may be unlikely that the defense could produce peer-reviewed scientific literature establishing the reliability of penis identification based on vein mapping, the defense may well have been able to elicit testimony from its expert, given his vast experience, as to why vein comparison can be a reliable means of identification. However, because the defense focused only on its expert’s qualifications, and not on the attack of his methodology, there was simply no evidence in the record to refute the prosecution’s contention that the expert’s methodology did not pass *Daubert* muster.⁶⁵ Accordingly, the Eleventh Circuit affirmed the defendant’s conviction.⁶⁶

While most *Daubert* cases turn on the reliability requirement, practitioners should not forget that *Daubert* also requires a “fit” between the proffered expert testimony and the relevant and pertinent issues in the case.⁶⁷ The Eleventh Circuit’s decision in *Boca Raton Community Hospital, Inc. v. Tenet Health Care Corp.*⁶⁸ took a careful and detailed look at whether proffered expert testimony met this fit requirement. In *Boca Raton*, the plaintiff, a not-for-profit hospital, sought to recover damages allegedly resulting from a complicated Medicare fraud scheme perpetrated by the defendant, a for-profit hospital chain. In a nutshell, the plaintiff, with assistance from government investigators, demonstrated that the defendant improperly manipulated Medicare reimbursement rates, not only defrauding the government, but also damaging other hospitals because the skewed Medicare reimbursement rate resulted in

62. *Id.* at 1211.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1221.

67. 509 U.S. at 591–93.

68. 582 F.3d 1227 (11th Cir. 2009).

underpayments to other hospitals. The problem faced by the plaintiff, however, was quantifying its damages.⁶⁹

After the United States District Court for the Southern District of Florida excluded the plaintiff's expert damages testimony, the plaintiff appealed, contending that the district court never fully understood its theory of recovery. The plaintiff's expert witnesses went to great lengths, using sophisticated methodologies, to calculate the defendant's overcharges.⁷⁰ The problem, however, was that the plaintiff's theory of liability was limited to *unlawful* overcharges, and not all overcharges by the defendant were unlawful.⁷¹ Therefore,

like an oversized coat, the expert opinion covered too much. Under Boca's liability theory, it is not unlawful for hospitals to overcharge (that is, to increase charges out of step with costs) as long as their audited ratios do not fall below the low National Threshold. Because Boca's expert opinion uses unaudited ratios to approximate Tenet's actual costs, it includes the outlier payments Tenet got from lawful overcharging, as well as unlawful overcharging, as part of Boca's injuries and damages.⁷²

Using an analogy to illustrate the fit problem, the Eleventh Circuit stated that "[h]aving tailored a trim-fitting liability theory for the body of its case against Tenet, Boca cannot hang a baggy injury and damages theory on it."⁷³ Thus, because the plaintiff's expert opinion, no matter how reliable its methodology, did not fit with the relevant issue, the district court properly excluded the opinion.⁷⁴

A strong argument can be made that the most determinative factor in the outcome of *Daubert* motions is whether the challenged expert, on the one hand, or the attorney cross-examining the challenged expert, on the other, is better prepared. This can be illustrated by comparing the Supreme Court's landmark decision in *Kumho Tire Co. v. Carmichael*⁷⁵ and Judge Alaimo's opinion—one of his last before his death on December 30, 2009—in *Mascarenas v. Cooper Tire & Rubber Co.*⁷⁶ In

69. *Id.* at 1229–32.

70. *See id.* at 1232–33.

71. *Id.* at 1233.

72. *Id.*

73. *Id.*

74. *Id.* at 1233–34. The Eleventh Circuit, although ruling for Tenet, made clear its opinion of Tenet's conduct: "[T]his case is about the economic harm [Tenet] did by manipulating part of the Medicare program." *Id.* at 1229. "The record shows that Tenet hospitals took advantage of a system designed to help pay for the sickest and least fortunate patients to heal." *Id.* at 1234.

75. 526 U.S. 137 (1999).

76. 643 F. Supp. 2d 1363 (S.D. Ga. 2009).

Kumho Tire, the Supreme Court held that *Daubert* applies to all expert testimony and is not limited to scientific testimony.⁷⁷ The Supreme Court then affirmed the district court's conclusion that the plaintiff's tire-failure expert's opinion that a tread separation was the result of defective design and manufacture was not sufficiently reliable to satisfy *Daubert*.⁷⁸ The Supreme Court's conclusion was based on several factors. Although the tire was five years old and had been driven seven thousand miles in the two months since the plaintiffs bought the car, the expert could not determine what impact wear and tear may have had on the tire's failure.⁷⁹ There was no evidence that the expert's methodology had been used by other experts in the field and thus no evidence of its validity.⁸⁰ Nor had he examined similar tires, and his examination of the failed tire occurred only on the morning of his first deposition.⁸¹

In *Mascarenas* the plaintiffs used the same expert who used the same methodology to reach the same conclusion he reached in *Kumho Tire*—that the tire was defective.⁸² This time, however, the outcome of the defendants' *Daubert* challenge was different. Unlike his analysis in *Kumho Tire*, this time the expert considered and rejected other possible causes of the tire's failure, including the tire's history. In *Mascarenas*, unlike in *Kumho Tire*, there was evidence that his methodology was a valid and common methodology used by tire experts, and in fact, the same methodology had been used by the defendants' expert. In *Mascarenas*, unlike in *Kumho Tire*, he examined and tested exemplar tires and performed extensive examinations of the failed tire. In short, when retained in *Mascarenas* the expert eliminated the defects noted by the Supreme Court in his analysis.⁸³ Consequently, Judge Alaimo denied the defendant's *Daubert* motion seeking the exclusion of his testimony.⁸⁴

The emphasis in *Daubert* analysis on scientific reliability, as established by such things as testability and peer review, has sometimes led to the erroneous conclusion that experience-based expert testimony can never satisfy *Daubert*, a mistake made in *American General Life*

77. 526 U.S. at 141.

78. *Id.* at 142–43.

79. *Id.* at 154–55.

80. *Id.* at 157.

81. *Id.* at 155.

82. Compare *Kumho Tire*, 526 U.S. 137 (discussing the expert testimony of Dennis Carlson), with *Mascarenas*, 643 F. Supp. 2d 1363 (discussing the expert testimony of Dennis Carlson).

83. 643 F. Supp. 2d at 1372.

84. *Id.* at 1378.

Insurance Co. v. Schoenthal Family, LLC.⁸⁵ In *American General*, the beneficiaries of a life insurance policy argued that the insurer's underwriting standards expert based his opinions solely on his experience in the industry, and the beneficiaries argued that experience alone cannot establish the requisite reliability of expert testimony.⁸⁶ The Eleventh Circuit disagreed, noting that standards for scientific reliability do not necessarily apply to non-scientific expert testimony.⁸⁷ Given the expert's substantial education and experience in insurance matters, particularly underwriting, the Eleventh Circuit held that the United States District Court for the Northern District of Georgia did not abuse its discretion when it held that the expert's opinions were sufficiently reliable to be admissible.⁸⁸

V. ARTICLE VIII. HEARSAY

It has been six years since the United States Supreme Court in *Crawford v. Washington*⁸⁹ altered the playing field with regard to the use of hearsay in criminal cases. In *Crawford* the defendant contended that the trial court improperly allowed the jury to hear his wife's tape recorded statement to police officers. The prosecution tendered this evidence after the defendant's wife invoked her spousal privilege and thus was unavailable to testify.⁹⁰ The trial court and the Washington Supreme Court held that the circumstances of the statement were sufficiently reliable to overcome the defendant's argument that the admission of the out-of-court statement violated his Sixth Amendment⁹¹ right of confrontation.⁹² The prosecutors argued that since the Supreme Court's decision in *Ohio v. Roberts*,⁹³ courts have allowed the admission of hearsay statements if the statements "fall within a 'firmly rooted hearsay exception'" or if they "bear 'particularized guarantees of

85. 555 F.3d 1331 (11th Cir. 2009).

86. *Id.* at 1338.

87. *Id.*

88. *Id.* at 1338–39. *See also* Dishman v. Wise, 79 Fed. R. Evid. Serv. (West) 1608 (M.D. Ga. 2009), in which Judge Lawson noted "that experience may provide a sufficient foundation for expert testimony." *Id.* at 1614 (citing FED. R. EVID. 702 advisory committee's note). However, if "the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.* (quoting FED. R. EVID. 702 advisory committee's note).

89. 541 U.S. 36 (2004).

90. *Id.* at 40.

91. U.S. CONST. amend. VI.

92. *Crawford*, 541 U.S. at 40–41.

93. 448 U.S. 56 (1980), *overruled by Crawford*, 541 U.S. 36.

trustworthiness.’”⁹⁴ As discussed in many prior surveys, this bypass around the Sixth Amendment came to be known in Georgia as the “necessity exception” to the hearsay rule.⁹⁵ For a time, it seemed the rapid expansion of the necessity exception, to exaggerate only a bit, was on the verge of supplanting live testimony entirely.⁹⁶ In *Crawford*, however, the Supreme Court concluded that the Sixth Amendment right of confrontation is not limited to in-court testimony but also applies to out-of-court “testimonial” statements.⁹⁷ Testimonial statements include affidavits, custodial examinations, prior testimony, and “similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”⁹⁸ Thus, a testimonial out-of-court statement is no longer admissible if the defendant has not had an opportunity to cross-examine the declarant.⁹⁹

The Supreme Court’s holding in *Crawford* quickly called into question the widespread practice of admitting laboratory test results into evidence without the in-court testimony of the technician who actually performed the tests, an issue addressed recently by the Georgia Court of Appeals in *Dunn v. State*.¹⁰⁰ In *Dunn* the defendant contended that the trial court improperly allowed a laboratory supervisor to testify that a white substance found in the defendant’s possession contained methamphetamines. However, the supervisor did not actually perform the test establishing the composition of the substance. Rather, the actual testing was done by a technician. The prosecution contended that the supervisor’s testimony was admissible because she reviewed the data from the testing and came to an independent conclusion that the substance contained methamphetamines.¹⁰¹

94. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

95. Marc T. Treadwell, *Evidence, 2002 Eleventh Circuit Survey*, 55 MERCER L. REV. 1219, 1219 (2003); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 56 MERCER L. REV. 235, 247–48 (2004); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 48 MERCER L. REV. 323, 351, 354 (1996).

96. Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 60 MERCER L. REV. 135, 174–75 (2008); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 59 MERCER L. REV. 157, 181–82 (2007); Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 56 MERCER L. REV. 235, 247–48 (2004).

97. *Crawford*, 541 U.S. at 50–51, 68.

98. *Id.* at 51 (internal quotation marks omitted) (quoting Brief of Petitioner at 23; *Crawford*, 541 U.S. 36 (No. 02-9410)).

99. *Id.* at 68.

100. 292 Ga. App. 667, 665 S.E.2d 377 (2008). For additional discussion of this case, see Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law*, 61 MERCER L. REV. 135, 164–65 (2009).

101. 292 Ga. App. at 667–69, 665 S.E.2d at 378–79.

The court of appeals noted that courts across the country had struggled with this issue since the Supreme Court's decision in *Crawford*.¹⁰² Some courts have held that laboratory reports are essentially business or public records, and their admission does not impinge the right of confrontation.¹⁰³ Other courts have reached an opposite conclusion, ruling that a laboratory technician's test results are testimonial and thus inadmissible.¹⁰⁴ A third group of courts has followed the reasoning of decisions holding that 911 calls are non-testimonial because they are "a contemporaneous recordation of observable events rather than the documentation of past events," and thus do not run afoul of *Crawford*.¹⁰⁵

In *Dunn* the supervisor's testimony was properly admitted because she "came to her own independent conclusion that the substance was methamphetamine based on the chemical 'fingerprint' from the [gas chromatography mass spectrometer] GCMS test."¹⁰⁶ The court then noted the evolving Georgia authority allowing experts to base their opinions on hearsay.¹⁰⁷ True enough, but this seemed to miss the defendant's point. The question was not whether the test results were hearsay but admissible pursuant to an exception allowing an expert to rely on hearsay, but whether they were testimonial statements, the admission of which violated the defendant's Sixth Amendment rights. Although not entirely clear, the court's opinion suggests that it was persuaded by the reasoning of the 911 cases and that routine laboratory test results and conclusions of laboratory personnel based on laboratory tests are not testimonial.¹⁰⁸ Quoting from one of those cases, the court reasoned that "the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made."¹⁰⁹ Thus, presumably, the circumstances surrounding laboratory tests suggest that the tests are more the recordation of observable events than documentation of past events, and the admission of the results does not run afoul of *Crawford*.

If the Georgia Court of Appeals in *Dunn* intended to create an exception to *Crawford* for "routine" laboratory test results, that effort appears to have been in vain. In *Melendez-Diaz v. Massachusetts*,¹¹⁰

102. *Id.* at 670, 665 S.E.2d at 380.

103. *Id.* (citing *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005)).

104. *Id.* (collecting cases).

105. *Id.* (quoting *People v. Geier*, 161 P.3d 104, 139 (Cal. 2007)).

106. *Id.* at 671, 665 S.E.2d at 380.

107. *Id.*

108. *See id.* at 669–71, 665 S.E.2d at 379–80.

109. *Id.* at 672, 665 S.E.2d at 381 (quoting *Geier*, 161 P.3d at 140).

110. 129 S. Ct. 2527 (2009).

the United States Supreme Court in a 5-4 majority dropped the other *Crawford* shoe and held that laboratory analysts' certificates of drug test results fall within the scope of *Crawford* and thus are inadmissible.¹¹¹ In *Melendez-Diaz*, the Supreme Court addressed the question of whether these "affidavits," as the majority termed them, "are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment."¹¹² The Supreme Court essentially answered the question by concluding that the certificates of analysis were affidavits.¹¹³ Affidavits are testimonial statements, the precise out-of-court statements barred by *Crawford*.¹¹⁴

The majority rejected the argument that the Confrontation Clause distinguishes between testimony recounting historical events and dispassionate and neutral accounts of scientific testing.¹¹⁵ "This argument is little more than an invitation to return to our overruled decision in *Roberts*, which held that evidence with 'particularized guarantees of trustworthiness' was admissible notwithstanding the Confrontation Clause."¹¹⁶ The point of the Confrontation Clause, the majority continued, is not that evidence be reliable but that the reliability of evidence be determined by cross-examination.¹¹⁷ In any event, the majority did not accept, as a blanket proposition, that scientific testing is necessarily neutral or reliable.¹¹⁸ Not only is it possible that analysts can harbor fraudulent intent, but they may also be incompetent.¹¹⁹ In short, the Constitution assures that confrontation is the appropriate means to test the reliability of analysts' conclusions.¹²⁰

The Supreme Court also rejected the argument that laboratory test results were akin to official and business records that were admissible at common law.¹²¹ Such test results are not kept in the regular course of business, as required by Federal Rule of Evidence 803(6),¹²² because they are specifically prepared for use at trial.¹²³ This distinction

111. *Id.* at 2542.

112. *Id.* at 2530.

113. *Id.* at 2532.

114. *Id.* at 2542.

115. *Id.* at 2536.

116. *Id.* (citation omitted) (quoting *Roberts*, 448 U.S. at 66).

117. *Id.*

118. *Id.*

119. *Id.* at 2537.

120. *Id.* at 2536.

121. *Id.* at 2538.

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

123. *Melendez-Diaz*, 129 S. Ct. at 2538 (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)).

proved the majority's point. True business records are not Confrontation Clause infirm because they are not testimonial.¹²⁴ True business records are not created to prove a fact at trial; they simply are prepared as a part of the business's routine business activity.¹²⁵ Results of testing of seized drugs, on the other hand, are clearly offered to prove a fact critical to the defendant's guilt and thus are testimonial.¹²⁶

Finally, the majority addressed the argument that the practical consequences of its holding would unduly burden the criminal justice system.¹²⁷ Noting that many states had already adopted, after *Crawford*, rules similar to its holding, the majority stated that "[p]erhaps the best indication that the sky will not fall after today's decision is that it has not done so already."¹²⁸ The majority also noted that there were practical alternatives available to lessen the burden of its holding and still preserve a defendant's right to confrontation.¹²⁹ It is permissible, the Court announced, for states to adopt rules requiring a defendant, upon receipt of notice of the prosecution's intent to use a forensic analysis report, to assert his Confrontation Clause right.¹³⁰ If a defendant truly suspects the accuracy of the test results, he can, pursuant to these "notice and demand" rules, insist that the analyst appear at trial.¹³¹ The Court said that nothing in its holding bars such schemes.¹³²

It seemed for a while that there was one more *Crawford* shoe to drop. On the same day that the Supreme Court rendered its opinion in *Melendez-Diaz*, the Court granted certiorari in *Briscoe v. Virginia*¹³³ to address the following question:

[i]f a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?¹³⁴

124. *Id.* at 2539–40.

125. *Id.*

126. *See id.* at 2540.

127. *Id.*

128. *Id.*

129. *See id.* at 2541.

130. *Id.*

131. *Id.*

132. *Id.*

133. 129 S. Ct. 2858 (2009) (mem.).

134. Brief of Petitioners at I, *Briscoe*, 129 S. Ct. 2858 (No. 07-11191).

At the January 11, 2010 oral argument in *Briscoe*, Justice Scalia questioned why certiorari had been granted in *Briscoe*, suggesting that *Melendez-Diaz* had answered the question.¹³⁵ Indeed, as discussed above, it seems that *Melendez-Diaz* clearly countenanced “notice and demand” statutes. Two weeks later, the Court, in a per curiam memorandum opinion, acknowledged as much and in a one-sentence decision remanded the case for further action by Virginia courts in light of its decision in *Melendez-Diaz*.¹³⁶

The Eleventh Circuit’s decision in *United States v. Jiminez*¹³⁷ addresses a now frequently encountered *Crawford* issue: may a law enforcement officer recount out-of-court statements made to him, not for the purpose of proving the truth of the statement, but rather to explain the officer’s conduct?¹³⁸ The argument that such testimony is admissible to explain the officer’s conduct is generally suspect and has been firmly rejected by Georgia courts because it is only in the rarest of circumstances “that a prosecution will properly concern itself with *why* an investigating officer did something.”¹³⁹ Why a law enforcement officer does something is generally not relevant to the issue of whether a defendant committed a crime.¹⁴⁰ Moreover, an incriminating statement by a confidential informant, for example, that “explains” why an investigation centered on a defendant is highly prejudicial.¹⁴¹ Such statements, it would seem, are classic testimonial hearsay. In *United States v. Arbolaez*,¹⁴² the Eleventh Circuit agreed, holding that such statements, even when purportedly offered to explain a law enforcement officer’s conduct, are still inadmissible hearsay.¹⁴³

In *Jiminez* the defendant contended on appeal that the United States District Court for the Middle District of Florida improperly allowed a detective to testify about a co-conspirator’s statement to the detective to the effect that the defendant was a participant in a scheme to grow and distribute marijuana. At trial, the defendant objected to this testimony only on the grounds that it was hearsay—not on the grounds that it

135. Oral Argument at *58, *Briscoe*, 129 S. Ct. 2858 (No. 07-11191).

136. *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (mem.).

137. 564 F.3d 1280 (11th Cir. 2009).

138. *Id.* at 1286–87.

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

140. *Teague*, 252 Ga. at 536, 314 S.E.2d at 912.

141. Transcript of *United States v. Arbolaez*, 450 F.3d 1283, 1290 (11th Cir. 2006).

142. 450 F.3d 1283 (11th Cir. 2006).

143. *Id.* at 1290.

violated the Confrontation Clause.¹⁴⁴ This is still a common mistake, even though the Eleventh Circuit has repeatedly held that a hearsay objection does not preserve a Confrontation Clause objection.¹⁴⁵ Because the defendant did not properly object to the testimony, the standard of review for the defendant's appeal on this issue was plain error.¹⁴⁶

In *Jiminez* police officers searched a house in which the defendant was present and found considerable evidence of marijuana manufacture and distribution. On the stand, the detective testified that the defendant had admitted his role in the operation. On cross-examination, defense counsel attacked the defendant's alleged confession, citing evidence that the defendant had in his first interview denied any knowledge of the operation.¹⁴⁷ The Eleventh Circuit reasoned that the defendant was attempting to impeach the detective's credibility, suggesting that the detective was lying about the circumstances surrounding the interviews of the defendant.¹⁴⁸ On redirect, and in an effort to rehabilitate the detective, the prosecution elicited the detective's testimony that he reinterviewed the defendant because of information discovered in an interview with the co-conspirator in which the accomplice detailed the defendant's involvement in the operation. Thus, the prosecution argued, the testimony was not offered to prove the truth of the co-conspirator's statement, but rather to explain why the detective reinterviewed the defendant.¹⁴⁹

This, it would seem, is an example of the proper use of out-of-court testimony to prove the reasons for an officer's conduct. While it may be true that, generally speaking, why an investigator does something is not relevant to the issue of a defendant's guilt, the reasons for conduct may become relevant based upon the particular facts and circumstances of a case. In *Jiminez* the defendant challenged the detective's credibility apparently by raising suspicions about the detective's several interviews of the defendant.¹⁵⁰ Thus, the reason why the detective reinterviewed the defendant became relevant.¹⁵¹ He reinterviewed the defendant because the co-conspirator gave a statement implicating the defen-

144. *Jiminez*, 564 F.3d at 1286.

145. *Arbolaez*, 450 F.3d at 1291 n.8; see also *United States v. Emmanuel*, 565 F.3d 1324, 1333 (11th Cir.), cert. denied, 130 S. Ct. 1032 (2009) (mem.).

146. *Jiminez*, 564 F.3d at 1286.

147. *Id.* at 1283–84.

148. *Id.* at 1287.

149. *Id.*

150. *Id.*

151. *Id.*

dant.¹⁵² The fact that this evidence may have been highly prejudicial does not necessarily make it inadmissible.¹⁵³ The Eleventh Circuit held that because the probative non-hearsay value of the evidence was not substantially outweighed by the danger of unfair prejudice, the district court properly allowed the detective to testify about the co-conspirator's statement.¹⁵⁴

In *United States v. US Infrastructure, Inc.*,¹⁵⁵ the Eleventh Circuit addressed appeals of convictions arising from Jefferson County, Alabama's notorious sewer and wastewater treatment projects.¹⁵⁶ The prosecution alleged that the corporate defendant, US Infrastructure (USI), and its defendant officers bribed county officials in an effort to secure county contracts.¹⁵⁷ County Commissioner Jewell McNair had been indicted with the defendants, but his case was severed from the USI defendants.¹⁵⁸ At trial, another contractor testified that McNair told him that USI's president had bribed him by helping him to pay his mortgage. McNair told the contractor he needed help because USI had stopped paying his mortgage. McNair asked the contractor to pick up the bribe where USI had left off. The contractor then agreed to buy a piece of art from McNair's private business, an art studio.¹⁵⁹ There was some confusion over the basis for the admission of this testimony in the district court.¹⁶⁰ The defendants assumed that the statement had been admitted pursuant to Federal Rule of Evidence 801(d)(2)¹⁶¹ as a co-conspirator statement.¹⁶² On appeal, however, the prosecution argued that the testimony was admissible as a statement against interest pursuant to Federal Rule of Evidence 804(b)(3),¹⁶³ and that was the argument considered by the Eleventh Circuit.¹⁶⁴

Rule 804(b)(3) contains three elements for the admission of a statement against interest. First, the declarant must be unavailable.¹⁶⁵ Second, the declarant's statement must "so far tend[] to

152. *Id.*

153. *Id.* at 1288.

154. *Id.*

155. 576 F.3d 1195 (11th Cir. 2009), *cert. denied*, 78 U.S.L.W. 3540 (U.S. Mar. 22, 2010) (No. 09-967).

156. *Id.* at 1202.

157. *Id.*

158. *Id.* at 1203 n.1.

159. *Id.* at 1205.

160. *See id.* at 1207–08.

161. FED. R. EVID. 801(d)(2).

162. *US Infrastructure, Inc.*, 576 F.3d at 1208.

163. FED. R. EVID. 801(d)(2).

164. *US Infrastructure, Inc.*, 576 F.3d at 1208.

165. *Id.*

subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true.”¹⁶⁶ Finally, the statement must be corroborated by circumstances clearly indicating its trustworthiness.¹⁶⁷

First, McNair’s statement satisfied the unavailable criterion because he was a co-defendant and could not be compelled to testify.¹⁶⁸ Second, McNair’s admission to the contractor that USI had been paying his mortgage was clearly against McNair’s penal interest because it suggested that he had been accepting bribes.¹⁶⁹ Finally, the circumstances surrounding the statement sufficiently established the trustworthiness of the statement.¹⁷⁰ McNair and the contractor had previously conspired to fix county contracts and the contractor had paid bribes to McNair.¹⁷¹ Hence, the contractor was a confidant of McNair’s.¹⁷² Although there is no indication that the defendants raised a *Crawford* objection to the testimony, the Eleventh Circuit nevertheless noted that because the statement was part of a private conversation, it was not a testimonial statement and therefore did not fall within the scope of *Crawford*.¹⁷³

166. *Id.* (quoting *United States v. Costa*, 31 F.3d 1073, 1077 (11th Cir. 1994)).

167. *Id.*

168. *Id.* at 1208.

169. *Id.*

170. *Id.* at 1209.

171. *Id.*

172. *Id.*

173. *Id.*