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Evidence

by Marc T. Treadwell*

I. INTRODUCTION

For the past several years, the State Bar of Georgia has lobbied vigorously for the adoption of a new Georgia Evidence Code based upon the Federal Rules of Evidence. Few would dispute that the existing Georgia Evidence Code, which really is not a code at all but rather an amorphous amalgam of disjointed statutes and thousands of judicial decisions, is in need of revision. Apparently, however, there is considerable dispute regarding exactly what changes should be made.

The proposed Georgia Rules of Evidence is the product of an intensive study by the State Bar of the deficiencies of the existing code and possible changes. The proposed rules were first introduced in the General Assembly in 1989 and, in 1990, were approved by the Senate but not by the House. The proposed rules were reintroduced in the 1991 session and again received the approval of the Senate but languished in the House Judiciary Committee for the remainder of the session. The proposed rules carried over to the 1992 session but were never reported out of the Judiciary Committee. According to Bar officials, it is uncertain whether the proposed rules will be introduced in the 1993 session.

II. RULE 404: CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

Rule 404 is the principal rule addressing the admissibility of "extrinsic act evidence" or evidence of acts and transactions other than the one at issue. Rule 404 has probably figured in more Eleventh Circuit appeals than any other single rule of evidence, and previous surveys by the author have addressed extrinsic act evidence issues in some detail. Although the

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present survey year seemed to be an off year for extrinsic act evidence appeals, extrinsic act evidence cases, like bad pennies, always turn up. Accordingly, a brief discussion of the Federal Rules approach to extrinsic act evidence analysis is appropriate.

The starting point of extrinsic act evidence analysis is a determination of whether the evidence is being offered for a substantive purpose or to impeach or bolster a witness. If the latter, then the admissibility of the evidence is determined by the rules found in Article 6, principally rule 608, which addresses the use of character evidence and evidence of specific instances of conduct. If, however, the extrinsic act evidence is offered for a substantive purpose, then its admissibility is governed by the rules found in Article 4, principally rule 404(b). The distinction between substantive and impeachment evidence is demonstrated by the Eleventh Circuit’s decision in United States v. Farmer. In Farmer defendant contended that the district court improperly limited his cross-examination of a prosecution witness about an extrinsic act, arguing that evidence of this act demonstrated a motive on the part of the witness to testify falsely. Relying on rule 404(b)’s provision that extrinsic act evidence may be admissible to prove motive, defendant argued that he should have been allowed to examine the witness about the extrinsic act. The Eleventh Circuit easily deflected this argument, noting that the word “motive” as used in rule 404(b) refers to the motive for the commission of the charged offense and does not refer to a motive to testify falsely. If extrinsic act evidence is being offered to attack a witness’s credibility, the Eleventh Circuit continued, then rule 608(b) governs the admissibility of the evidence.

Rule 404(b) prohibits the admission of extrinsic act evidence to prove a person’s propensity to act in a particular way. However, extrinsic act evidence “may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident.”

To determine whether extrinsic act evidence is admissible under rule 404, the Eleventh Circuit uses the test established by the old Fifth Circuit in United States v. Beechum. “First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the de-

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4. 923 F.2d 1557 (11th Cir. 1991).
5. Id. at 1567.
6. Id.
7. Id.
8. Id.
fendant's character. Second, the evidence must possess probative value
that is not substantially outweighed by its undue prejudice and must
meet the other requirements of [rule 403].

This general rule, so easily stated, can be exceedingly difficult to apply,
as demonstrated by the Eleventh Circuit's decision in United States v.
Pollock. In Pollock defendant contended that the district court improp-
erly admitted evidence of his prior conviction for conspiracy to import
marijuana, arguing that this evidence was not relevant to any legitimate
issue but rather tended only to prove his propensity to commit drug
crimes. The government responded that this evidence was relevant to
prove defendant's intent to commit the charged offense. The Eleventh
Circuit, while acknowledging the difficulty of distinguishing between
"propensity" and "intent" ("what appears to one person as propensity
may be intent to another; the margin between is not a bright line"),
held that evidence of an extrinsic offense is admissible to prove intent if
the extrinsic offense requires the same intent as the charged offense.
While it may tend to prove propensity, it nevertheless is also relevant to
the legitimate issue of intent and therefore is admissible.

The Eleventh Circuit in Pollock also noted, and this no doubt seems
perverse to criminal defendants, that the more difficult it is for the gov-
ernment to prove a defendant's intent, the more likely it is that extrinsic
act evidence will be admissible. For example, the court continued, it is
often extremely difficult to prove intent in conspiracy cases and, because
of this difficulty, the government's need for additional evidence is
greater. In this situation, the extrinsic act evidence is more likely admis-
sible. If, however, the government has independent evidence to establish
intent and can obtain a conviction without evidence of the extrinsic of-
fense, then that evidence should not be admitted. In other words, the
weaker the government's case, the more likely it will be allowed patent
extrinsic act evidence. The Eleventh Circuit conceded that this is a
"heads I win; tails you lose" proposition for a defendant.

Frequently, defendants anxious to thwart the admission of extrinsic act
evidence will offer to stipulate to a particular fact or element of an of-
fense and then argue that the extrinsic act evidence should not be admit-

10. 582 F.2d at 911 (citations omitted).
12. 926 F.2d at 1047-48.
13. Id. at 1048.
14. Id.
15. Id. at 1048-49.
16. Id.
17. Id.
18. Id. at 1049.
19. Id.
ted because it is unnecessary. During the current survey period, the Eleventh Circuit reaffirmed that such a stipulation does not necessarily preclude the admission of extrinsic act evidence. The Eleventh Circuit also reaffirmed that a plea of not guilty always places the element of intent at issue. Therefore, extrinsic act evidence is admissible to prove intent unless defendant "affirmatively withdraws the element of intent from the case."

The Eleventh Circuit's decision in *United States v. Eason* is notable for its scathing condemnation of the Office of the United States Attorney for the Southern District of Georgia for a blatantly improper use of extrinsic act evidence. In *Eason* the government, while cross-examining a witness, elicited testimony that defendant's father had been convicted of charges similar to those against defendant. This testimony greatly strengthened the case against defendant. The government argued that it did not adduce this testimony as substantive evidence of defendant's guilt, but rather to impeach the witness's testimony, an assertion that the Eleventh Circuit simply did not believe. Moreover, even if the government did intend to impeach the witness, there is no basis for impeaching a witness with someone else's conviction. In short, a conviction of a co-defendant or a co-conspirator is not admissible for substantive purposes because it is not relevant to a legitimate issue. While a witness may be impeached by his own conviction, he certainly cannot be impeached by the conviction of someone else.

Finally, the Supreme Court amended rule 404(b) during the survey period to provide that the government must give notice to an accused if he intends to introduce extrinsic act evidence. However, this notice need only be given if requested by defendant.

**III. Rule 405: Methods of Proving Character**

As discussed above, rule 404(b) broadly but not totally prohibits the use of character evidence for substantive purposes. In the limited situations in which evidence of character is admissible for substantive pur-

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22. *Id.* at 925 (quoting United States v. Hernandez, 896 F.2d 513, 522 (11th Cir.), *cert. denied*, 111 S. Ct. 159 (1990)).
23. 920 F.2d 731 (11th Cir. 1990).
24. *Id.* at 734-35.
25. *Id.* at 735.
26. *Id.*
28. *Id.*
EVIDENCE

poses, rule 405 provides the methods for proving character.\(^3\) Again, one must be careful to distinguish rules 404 and 405, which govern the use of extrinsic act evidence for substantive purposes, from rule 608, which governs the use of extrinsic act evidence for impeachment purposes.

Although rule 405 concerns only the methods of proving character and does not expressly address the admissibility of character evidence,\(^3\) the district court in United States v. Camejo\(^2\) relied on rule 405 to hold that evidence of a prior act of good conduct was "irrelevant." In Camejo the district court refused to admit evidence that defendant had refused an offer to engage in a drug transaction similar to the one with which he was charged. On appeal, defendant argued that evidence of this refusal was relevant to show his lack of mens rea to commit the charged offense.\(^3\) The Eleventh Circuit affirmed the district court\(^4\) but did not rely upon rule 405, which clearly has nothing to do with "relevancy". Rather, the Eleventh Circuit cited the well established principle that evidence of good conduct is not admissible to negate criminal intent.\(^5\) Thus, the Eleventh Circuit rejected defendant's assertion that the evidence was offered to prove lack of criminal intent and concluded that defendant simply wanted to demonstrate his good character through evidence of prior good acts.\(^6\)

IV. RULE 407: SUBSEQUENT REMEDIAL MEASURES

Rule 407 embodies one of the best known principles of evidence: Evidence of subsequent remedial measures is not admissible to prove negligence.\(^7\) However, rule 407 by itself does not prohibit the admission of evidence of subsequent remedial measures when offered for any other purpose, including impeachment.\(^8\) In Wilkinson v. Carnival Cruise

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31. See Fed. R. Evid. 405 advisory committee's note.
33. 929 F.2d at 613.
34. Id. at 612.
35. Id. at 613.
36. Id.
38. See Fed. R. Evid. 407 advisory committee's note. The emphasis of "any" is to distinguish the Eleventh Circuit's decision in Andres v. Roswell-Windsor Village Apartments, 777 F.2d 670, 674 (11th Cir. 1985), which purportedly holds that evidence of subsequent remedial measures is "admissible when offered for certain admissible uses" and that the illustrative permissible purposes expressly mentioned rules 407 and the advisory committee's notes are the only permissible uses. Fortunately, Andres, which was criticized in rather impolitic language in this author's first Eleventh Circuit survey, has not been cited for this proposition. See Marc T. Treadwell, Evidence, 38 Mercer L. Rev. 1253, 1261-62 (1987). Although
Lines, Inc., the Eleventh Circuit addressed the issue of whether a defendant opened the door to the admission of evidence of subsequent remedial measures. In Wilkinson plaintiff sought to recover damages for injuries incurred when a sliding door on defendant's cruise ship malfunctioned. After the injury, defendant locked the door in the open position. The district court initially ruled that rule 407 barred the admission of evidence of this remedial measure. However, an employee of defendant subsequently testified that he examined the door on the day of the incident and found it to be in normal operating condition. He also testified that he was not aware of any accidents either prior or subsequent to plaintiff's injury. Finally, he opined that the door had been properly maintained. Because of this testimony, the district court permitted plaintiff to establish that the door had been locked in the open position to rebut what it considered to be defendant's employee's testimony that "everything was fine and normal with the doors both before and after the accident."

The Eleventh Circuit found that the district court abused its discretion when it admitted this evidence for impeachment purposes. Although the Eleventh Circuit conceded that rule 407 specifically permits the use of evidence of subsequent remedial measures to impeach a witness, it noted that the impeachment exception is narrowly interpreted because this exception can be used as a subterfuge to prove negligence. Closely examining the testimony, the court found the fact that the door had been left open impeached nothing in the testimony of defendant's employee. The court specifically rejected the district court's conclusion that the employee's testimony suggested that the doors operated normally after the accident. It can be argued that the Eleventh Circuit's stringent analysis is inconsistent with the abuse of discretion standard. Nevertheless, if the employee's testimony did not suggest that the door was in proper operating condition after the accident, then its conclusion is undoubtedly correct.
V. FEDERAL RULE OF EVIDENCE 412: RAPE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

The Federal Rules of Evidence's version of what are commonly known as rape shield statutes is found in rule 412.44 Because rule 412 applies only to federal rape charges, it is rare that the Eleventh Circuit is required to apply rule 412, and this year was no exception. However, in Michigan v. Lucas,45 the United States Supreme Court addressed a constitutional issue raised by a state rape shield statute's limitation on the admissibility of evidence of prior sexual activity by the alleged victim. This decision merits discussion. In Lucas defendant challenged the Michigan statute's notice requirement, which barred the admission of evidence of prior sexual activity between a victim and a defendant unless the defendant gave appropriate notice within ten days after his arraignment. The Michigan Court of Appeals held that any notice requirement violated a defendant's Sixth Amendment right of confrontation. The United States Supreme Court rejected this flat prohibition against notice requirements and remanded to the state court for a determination of whether the legitimate interests served by the notice requirement outweighed the limitation of defendant's constitutional rights.46

VI. FEDERAL RULE OF EVIDENCE 501. PRIVILEGES

The Federal Rules of Evidence, rather than undertaking the daunting task of formulating rules recognizing and defining various evidentiary privileges, yields to the courts and allows the federal judiciary to formulate rules governing evidentiary privileges except in diversity cases in which state law determines the existence of a privilege.47 It is arguable that the "crime-fraud" exception to the attorney-client privilege presents a strong case for the proposition that the Federal Rules of Evidence should undertake to provide specific rules of privilege. Perhaps because appellate review of cases involving the attorney-client privilege often take place in the vacuum created by in-camera inspections, it seems that the crime-fraud exception to the attorney-client privilege is in a near hopeless state of confusion. However, the Eleventh Circuit's decision in In Re Federal Grand Jury Proceedings 89-10,48 may bring some clarity to at least one aspect of the crime-fraud exception. In Grand Jury Proceedings 89-10, the government sought the production of memoranda containing com-

44. Fed. R. Evid. 412.
46. Id. at 1748.
48. 938 F.2d 1578 (11th Cir. 1991).
munications between appellant and his attorneys. The government, rely-
ing on the crime-fraud exception, argued that these memoranda were not
privileged.\textsuperscript{49} The criminal or fraudulent activity at issue clearly ceased
prior to the creation of the memorandum. Nevertheless, the district court
ordered the production of the memoranda after concluding that they
"merely memorialize[d]" communications that occurred during the al-
leged crime or fraud.\textsuperscript{50} On appeal, the government argued that because
the actual communications would be within the crime-fraud exception,
the memorialization of the communications is also subject to disclosure.
The Eleventh Circuit disagreed.\textsuperscript{51}

The Eleventh Circuit looked not to the information communicated, but
to the communications themselves. "In other words, it is generally the
context, rather than the content, of a communication that allows invoca-
tion of the attorney-client privilege."\textsuperscript{52} Thus, although the information
found in the memoranda may not have been privileged at one point (if
made to further a crime or fraud), this information may become privi-
leged when it is the subject of a subsequent communication. After review-
ing the documents in-camera, the Eleventh Circuit concluded that the
parties intended the memoranda to be confidential and that the memo-
randa met all the criteria of the attorney-client privilege.\textsuperscript{53} Because they
were not created during or before the commission of the alleged crime or
fraud, the crime-fraud exception did not apply.\textsuperscript{54} On a practical note, the
Eleventh Circuit added that the government's "mere memorialization"
argument would effectively make it impossible for a client who has once
engaged in a communication (which would be within the crime-fraud ex-
ception) to ever discuss with counsel the crime or fraud involved.\textsuperscript{55}

Generally speaking, the identity of a client is not protected by the at-
torney-client privilege. However, the "last link" exception to this general
principle can protect a client's identity from disclosure. Unfortunately,
the last link exception has spawned only slightly less confusion than the
crime-fraud exception. Last year's survey addressed in some detail the
Eleventh Circuit's decision in \textit{In Re Grand Jury Proceedings (Rabin)}.\textsuperscript{56}

\begin{itemize}
\item[49.] The crime-fraud exception strips communications of the protection of the attorney-client privilege if the client obtained the attorney's assistance to further present or future criminal or fraudulent activity. However, the crime-fraud exception does not permit the discovery of communications concerning past or completed crimes or frauds.
\item[50.] 938 F.2d at 1581.
\item[51.] \textit{Id.} at 1582.
\item[52.] \textit{Id.}
\item[53.] \textit{Id.}
\item[54.] \textit{Id.}
\item[55.] \textit{Id.}
\end{itemize}
Rabin, which included a concurring opinion by Judge Tjoflat in which he argued that the last link exception should be abolished completely, seemed to narrow the scope of the last link exception. Specifically, the court in Rabin held that a client’s identity is protected from disclosure only if disclosure would reveal other privileged information. The Eleventh Circuit specifically and emphatically rejected the notion that a client’s identity can be privileged simply because disclosure of the client’s name could incriminate the client.

During the present survey period, the Eleventh Circuit revisited the last link exception in In Re Grand Jury Proceedings (GJ90-2). The author, who does not practice criminal law, will leave it to lawyers who do to decide whether Rabin and GJ90-2 can be reconciled. In GJ90-2 the client sought legal advice from an attorney concerning drug charges pending against the client’s friend. The client was concerned that he also might be criminally responsible for the drug transaction that gave rise to the charges against his friend. In addition, the client wanted to know whether he would be implicated in the drug transaction if he assisted his friend in obtaining legal representation. The attorney declined to represent the client but, when subsequently subpoenaed by a grand jury, the attorney nevertheless refused to reveal the client’s name. The district court ordered the attorney to reveal the client’s identity and, when he refused, found him in contempt of court. The district court reasoned that the last link exception did not justify the attorney’s refusal to testify because the client’s motive for seeking legal advice was already known. Therefore, the disclosure of the name would not reveal other privileged information. Although this reasoning seems consistent with Rabin, the Eleventh Circuit reversed, concluding that this reasoning was “inconsistent with binding precedent”. However, In Re Grand Jury Proceedings (Jones) was the only binding precedent cited by the court and, in Rabin, the Eleventh Circuit went to great lengths to emphasize that Jones protects a client’s identity only when disclosure of the identity would reveal other privileged information. Nevertheless, in GJ90-2 the Eleventh Circuit rejected as “disingenuous” the government’s argument that revelation of the client’s identity would not disclose privileged information.

57. 896 F.2d at 1273.
58. Id. at 1273-74.
59. 946 F.2d 746 (11th Cir. 1991).
60. Id. at 747-48.
61. Id. at 748.
62. 517 F.2d 666 (5th Cir. 1975).
63. In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.
64. 896 F.2d 1267, 1271-73 (11th Cir. 1990).
because it already knew the client's incriminating motive for seeking legal advice. 78 Judge Tjoflat, in his Rabin concurrence, urged the Eleventh Circuit to sit en banc and "take a careful and critical look at [the] ill-conceived [last link] doctrine." 79 This may be the only way that lawyers practicing criminal law can obtain a clear statement of the parameters of the last link exception.

VII. RULE 602: LACK OF PERSONAL KNOWLEDGE

The principle that lay witnesses may only testify to facts of which they have personal knowledge is, more than any other single rule of evidence, the foundation of the common law's evidentiary scheme. In the Federal Rules of Evidence, this principle is found in rule 602. 67 Typically, the application of rule 602 is clear; either a witness has personal knowledge of a fact (for example, he saw the collision) or he does not.

In United States v. Van Dorn, 65 however, the Eleventh Circuit faced a more difficult determination of whether rule 602 barred the admission of testimony. In Van Dorn a government witness testified that defendant was a member of an organized crime family. Defendants contended that the district court improperly admitted this testimony because the witness did not have first-hand knowledge of any facts supporting this testimony. 66 The Eleventh Circuit, however, disagreed. 70 The Eleventh Circuit reviewed numerous discrete facts testified to by the witness which supported his statement that the defendant was a member of the organized crime family. 71 The Eleventh Circuit concluded that this evidence demonstrated sufficient connection between defendant and the crime family to support the district court's conclusion that the witness had sufficient knowledge to permit him to testify. 72

It would be easy to nitpick the Eleventh Circuit's conclusion. One can argue that no single fact cited by the witness constituted personal first-hand knowledge that the defendant was a member of the organized crime family. However, such a technical analysis ignores the reality of the situation. The Eleventh Circuit's opinion simply seems to recognize that one can be so pervasively involved in an enterprise that he clearly has suffi-
sufficient knowledge to testify to a matter even though no single fact upon which his testimony is based constitutes "firsthand knowledge."

VIII. RULE 606: COMPETENCY OF JUROR AS WITNESS

Rule 606(b) deems a juror incompetent to testify as to the validity of a verdict except with regard to extraneous prejudicial information or influence injected into the jury's deliberation.73 Last year's survey discussed the Eleventh Circuit's decision in United States v. Cuthel,74 in which the court held that defendant had not shown a sufficient basis for the district court to inquire into the validity of a verdict by examining the jurors.75 During the survey period, the Eleventh Circuit, in a companion case, addressed the issue of whether rule 606(b) and a local district court rule prohibiting contact with jurors violated a defendant's First and Sixth Amendment rights.76 The Eleventh Circuit held that the state's interests in ensuring that a defendant is tried by a jury whose deliberations cannot be publicly exposed outweighed whatever constitutional rights a defendant may have to interview jurors or to require a court to inquire into the validity of a verdict.77 The Eleventh Circuit stressed that neither the local rule nor rule 606(b) categorically prohibited juror contact, but rather placed reasonable limits upon such contact.78

IX. RULE 608: EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

As discussed above,79 rule 404(b) governs the admission of extrinsic act evidence for substantive purposes and rule 608 governs the admissibility of extrinsic act evidence to impeach a witness. Rule 60880 can be a trap for the unwary, and careless analysis of extrinsic act evidence offered to impeach a witness can lead to hopeless confusion. Accordingly, a brief review of the relevant considerations in analyzing impeachment evidence is appropriate.

First, rule 608(b) applies to evidence offered to impeach only the general credibility of a witness.81 It does not prohibit the admission of extrinsic act evidence to impeach a witness's specific testimony as to a ma-
Indeed, the limitation of rule 608(b) is narrow and precise. It prohibits the admission of "extrinsic evidence" of specific instances of conduct of a witness to impeach or bolster the witness’s general credibility. However, a party may, by cross-examination (that is, by intrinsic evidence), inquire into specific instances of conduct if the specific instances of conduct shed light on the witness’s character for truthfulness or untruthfulness, or on the character for truthfulness or untruthfulness of another witness as to whose character the witness being cross-examined has testified.

The application of these principles can be demonstrated by a review of the Eleventh Circuit’s decision in United States v. Ramos. In Ramos defendants, who were arrested after authorities found a large amount of cocaine, a cache of firearms, drug paraphernalia, and cash in their home and car, protested that they were the victims of a plot orchestrated by Miami drug agents and an informant. At trial, defendants attempted to elicit testimony from a witness concerning his knowledge of a similar plot concocted by the informant with New York drug agents. The district court refused to admit the testimony. On appeal, defendants argued that rule 608(b) did not bar the admission of the evidence because the testimony was offered to contradict a witness’s testimony as to a material fact. However, the Eleventh Circuit concluded that the testimony was not offered to impeach the witness’s testimony as to a material fact, but rather constituted extrinsic evidence of a specific instance of conduct offered for the purpose of attacking the informant’s credibility. Consequently, rule 608(b) specifically prohibited the admission of this testimony. The Eleventh Circuit’s opinion does not reveal the substance of the informant’s testimony and thus it is impossible to tell precisely why the proffered testimony was offered to attack general credibility rather than the witness’s testimony as to a material fact.

82. Id.; see also United States v. Opager, 589 F.2d 799 (5th Cir. 1979).
83. Unfortunately, the phrase “extrinsic evidence” as used in rule 608(b) has an entirely different meaning from the phrase “extrinsic act evidence.” The latter refers to evidence of acts other than the act or incident in question. Both rule 404(b) and rule 606(b) address permissible use of extrinsic act evidence. Rule 608(b), however, also addresses whether such acts may be proved by “extrinsic evidence” or whether a party is limited to establishing the extrinsic act through cross-examination. The prohibition against extrinsic evidence of extrinsic acts is intended to prohibit time consuming forays into ancillary issues. See 10 James Wm. Moore & Helen I. Bendix, MOORE’S FEDERAL PRACTICE § 608.21 (2d ed. 1988 & Supp. 1991).
84. FED. R. EVID. 404(b).
85. 933 F.2d 968 (11th Cir. 1991).
86. Id. at 969-75.
87. Id. at 975.
88. Id.
than to disprove the informant's testimony as to a material fact. The point, however, is that the record demonstrated to the satisfaction of the Eleventh Circuit that defendants were attempting to attack a witness's credibility with extrinsic evidence of a specific instance of conduct. Therefore, the Eleventh Circuit held that the district court properly rejected the evidence.

The Eleventh Circuit's decision in United States v. Costa, also provides an excellent example of proper rule 608(b) analysis. In Costa the district court refused to admit exculpatory testimony offered by defendants. The excluded testimony tended to establish that defendants were not participants in a series of conspiracies to import cocaine. The district court concluded that this testimony concerned unrelated conspiracies and concluded that the evidence would confuse the jury and therefore relied upon rule 403 to exclude the testimony. The district court also concluded that the evidence was inadmissible under rule 608(b) because the evidence constituted extrinsic evidence of specific conduct offered for the purpose of impeaching the character of government witnesses. The Eleventh Circuit rejected this conclusion.

Rule 608(b), the Eleventh Circuit explained, only excludes extrinsic evidence offered to impeach the general credibility of a witness. It does not exclude extrinsic evidence to "disprove a specific fact material to the defendant's case."

As discussed above, the Eleventh Circuit takes a dim view of a prosecutor adducing evidence of a co-defendant or co-conspirator's guilty plea or conviction. However, there are circumstances when it is proper to allude to such convictions or guilty pleas. In United States v. Hernandez, the prosecutor elicited testimony from a government witness that he had pled guilty to drug conspiracy charges and that his co-conspirators included defendant. The Eleventh Circuit, citing the seminal case of United States v. King, noted that while evidence of guilty pleas and

89. Nor does the opinion address whether the extrinsic act could have been admissible under rule 404(b) as substantive evidence.
90. 933 F.2d at 975.
91. 947 F.2d 919 (11th Cir. 1991).
92. The Eleventh Circuit reluctantly affirmed the district court's rule 403 holding after "giving the district court the 'broadest discretion.'" 947 F.2d at 924. However, the Eleventh Circuit cautioned that rule 403 should rarely be invoked to exclude exculpatory evidence, particularly in conspiracy cases. Id.
93. 947 F.2d at 922-23.
94. Id. at 924-25.
95. Id. at 925.
96. Id. (quoting United States v. Calle, 822 F.2d 1016, 1021 (11th Cir. 1987)).
97. See supra text accompanying notes 85-90.
99. 921 F.2d at 1582.
100. 505 F.2d 602 (5th Cir. 1974).
convictions of conspirators or co-defendants is generally inadmissible, such evidence may be admissible for legitimate purposes. For example, evidence of a witness’s guilty plea or conviction may be admissible for the purpose of rehabilitating or bolstering the witness’s credibility if the defense invites the admission of the plea or conviction and the government does not improperly emphasize the plea or the conviction. The Eleventh Circuit concluded that defendant invited the testimony by his cross-examination of other prosecution witnesses concerning immunity extended to them. The Court obviously felt that the prosecution elicited the evidence in anticipation of defendant’s cross-examination about the witness’s plea. Finally, the Eleventh Circuit was particularly swayed by the fact that the government did not emphasize the plea and never referred to it again. While one can question whether it was necessary for the prosecution to establish that defendant was a co-conspirator in the conspiracy to which the witness pled guilty, the Eleventh Circuit nevertheless concluded that the district court did not abuse its discretion by overruling defendant’s objection.

X. ARTICLE VIII: HEARSAY

A discussion of Eleventh Circuit decisions concerning the admission of hearsay evidence must necessarily begin with a discussion of the constitutional issues inherent in hearsay analysis. By definition, the admission of hearsay evidence means that a criminal defendant is unable to confront the witnesses against him. Accordingly, courts frequently must resolve the question of whether the admission of hearsay evidence violates a defendant’s Sixth Amendment right to confront his accusers. The Eleventh Circuit addressed this issue in a case that will have considerable impact on Georgia criminal trials. In Horton v. Zant, a state trial court allowed a witness to testify that defendant’s co-conspirator told him that defendant actually “did the shooting.” Although this statement was made several days after the alleged crime, the witness’s testimony was admissible under Georgia law because it was made while the conspirators were still concealing their identity. Defendant, conceding that the statement was admissible under Georgia’s co-conspirator exception to the hearsay rule,

101. 921 F.2d at 1582 (citing United States v. King, 505 F.2d 602 (5th Cir. 1974)).
102. Id.
103. Id. at 1583.
104. Id.
105. Id.
107. 941 F.2d at 1463. Horton concerned the murder of the Bibb County District Attorney. The Eleventh Circuit’s decision received considerable publicity, primarily because of its principal holding that the prosecution improperly excluded black jurors from the jury.
nevertheless contended that the admission of this testimony violated the Confrontation Clause.\textsuperscript{108}

The Eleventh Circuit began its analysis by reviewing the principal United States Supreme Court cases addressing this issue.\textsuperscript{109} In \textit{Ohio v. Roberts},\textsuperscript{110} the Supreme Court held that the admission of hearsay evidence does not violate a defendant's Sixth Amendment rights if the statement is marked with sufficient "indicia of reliability" to indicate its trustworthiness.\textsuperscript{111} In \textit{Bourjaily v. United States},\textsuperscript{112} the Supreme Court held that the trustworthiness requirement of \textit{Roberts} is satisfied if the hearsay statement "falls within a firmly rooted hearsay exception."\textsuperscript{113} Coincidently, the Court in \textit{Bourjaily} noted that the Georgia co-conspirator exception, which significantly expanded the traditional common law co-conspirator exception, could not be considered a firmly rooted hearsay exception and thus evidence admitted pursuant to Georgia's co-conspirator exception must be subjected to independent examination to determine whether the evidence had sufficient indicia of reliability to comply with the requirements of the Confrontation Clause.\textsuperscript{114} In \textit{Horton} the Eleventh Circuit found that the evidence in question did not meet this test.\textsuperscript{115} Accordingly, for this and other reasons, the Eleventh Circuit concluded that the district court erred by not granting defendant's petition for habeas corpus.\textsuperscript{116}

The Eleventh Circuit's decision in \textit{Horton} does not mean that evidence admitted under Georgia's co-conspirator exception to the hearsay rule is necessarily constitutionally infirm. Rather, \textit{Horton} stands for the proposition that Georgia's co-conspirator exception is not so firmly established that it precludes constitutional attack. Accordingly, trial and appellate courts now must evaluate evidence admitted under the exception on a case by case basis to determine whether the dictates of the Confrontation Clause are satisfied.

So called \textit{Bruton} violations also frequently present the courts with conflicts between the admission of hearsay evidence and the Confrontation

\textsuperscript{108} \textit{Id.} at 1464.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} 448 U.S. 56 (1980).
\textsuperscript{111} \textit{Id.} at 66 (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)). As discussed in previous survey articles, \textit{Roberts} also held that hearsay evidence is not admissible unless the declarant is unavailable. \textit{Id.} However, in \textit{United States v. Inadi}, 475 U.S. 387 (1986), the Supreme Court held that in situations involving the admission of co-conspirator's statements, the prosecution need not show unavailability. See Treadwell, \textit{supra} note 56, at 1471.
\textsuperscript{112} 483 U.S. 171 (1987).
\textsuperscript{113} \textit{Id.} at 183 (quoting \textit{Roberts}, 448 U.S. at 66).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} 941 F.2d 1449, 1465 (11th Cir. 1991).
\textsuperscript{116} \textit{Id.} at 1467.
Clause. In *Bruton v. United States*, the United States Supreme Court held that the admission of a nontestifying co-defendant's confession violates the Confrontation Clause. However, the confession may be admitted if it does not directly incriminate a defendant and if the defendant's name and any reference to the defendant is redacted from the confession. In *United States v. Vasquez*, a decision reviewed in a previous survey, the Eleventh Circuit held that the trial court properly admitted a statement that had been redacted to replace defendant's name with a neutral pronoun because the "confession does not compel a direct implication of the complaining defendant." During the present survey period, the Eleventh Circuit, in *United States v. Van Hemelryck*, again addressed this issue. In *Van Hemelryck*, government agents testified to statements made by a nontestifying co-defendant. Although this testimony did not mention defendant, the statement nevertheless "could reasonably be understood only as referring" to defendant. Thus, notwithstanding the fact that the testimony did not explicitly name defendant, it nevertheless incriminated him and therefore was inadmissible. However, the court found the admission of the statement to be a harmless error.

The Federal Rules of Evidence provide that hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Frequently, trial lawyers will argue that evidence of an out-of-court statement should be admitted because it is not being offered to prove the truth of the matter asserted. The Eleventh Circuit's decision in *T. Harris Young & Associates v. Marquette Electronics* demonstrates that trial lawyers sometime takes this argument too far. In *T. Harris Young*, an antitrust action, plaintiff sought to prove the extent of defendant's interference with plaintiff's customers through the testimony of plaintiff's employees who had interviewed these customers. The employees testified that the customers told them that defendant's employees had made disparaging comments about plaintiff's product. Plaintiff argued that the

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118. 391 U.S. at 126.
120. 874 F.2d 1515 (11th Cir. 1989), cert. denied, 493 U.S. 1046 (1990).
122. 874 F.2d at 1518.
123. 945 F.2d 1493 (11th Cir. 1991).
124. Id. at 1502.
125. Id. at 1503.
126. Id.
127. Fed. R. Evid. 801(c).
statements by the customers were not hearsay because they were not offered to prove the truth of the matter asserted. Indeed, plaintiff argued, it expressly denied that the disparaging statements were true. The Eleventh Circuit rejected this absurd argument. Clearly, the out-of-court statements were offered to prove that defendant's employees made the disparaging comments. Thus, the "matter asserted" was that defendant's employees made the comments to the customers. The customers' out-of-court statements were offered to prove this assertion. Therefore, the employees' accounts of these statements were hearsay.

Rule 801 also provides that certain classes of out-of-court statements are not hearsay. For example, rule 801(d)(2)(D) provides that an employee's statement "concerning a matter within the scope of the agency or employment, made during the existence of the relationship," is not hearsay. In Wilkinson v. Carnival Cruise Lines, Inc., the Eleventh Circuit took what some would consider a narrow view of this provision. In Wilkinson plaintiff claimed that she was injured when a sliding glass door on defendant's cruise ship malfunctioned. To prove defendant had notice of the malfunctioning door, plaintiff's friend testified that a cabin steward told her that the ship had experienced prior problems with the door. The district court admitted this testimony as an admission by a party opponent. The Eleventh Circuit disagreed. The Eleventh Circuit acknowledged that statements by low level employees could be admitted as admissions, but rejected the district court's conclusion that the statement was admissible simply because it was made by an employee. Although the Eleventh Circuit recognized that it is not necessary to show that an employee has "speaking authority" as a prerequisite to the admission of a statement against an employer, the court nevertheless stated the issue as whether the cabin steward "was authorized to act for his principal, Carnival, concerning the matter about which he allegedly spoke." Relying upon an affidavit submitted by defendant to support its motion for summary judgment, the Eleventh Circuit concluded that the cabin steward's

129. 931 F.2d at 826.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id. at 826-27.
137. 920 F.2d 1560 (11th Cir. 1991).
138. Id. at 1563.
139. Id. at 1562-63.
140. Id. at 1565.
141. Id. at 1566-67.
statement did not concern a matter within the scope of his employment.\textsuperscript{144} Moreover, in response to plaintiff's argument that defendant had waived any right to appeal on this issue, the Eleventh Circuit held that plaintiff, as the proffering party, had the burden of laying a foundation for the admission of the statement.\textsuperscript{148} Plaintiff, the court continued, "offered not one wit of evidence" to establish this foundation and therefore rejected plaintiff's argument.\textsuperscript{144} One can wonder whether the trial court, having agreed with plaintiff's argument that the statement was admissible, would have had much patience with further efforts by plaintiff to lay the foundation for evidence already ruled admissible.

Statements by co-conspirators are another class of out-of-court statements which, pursuant to rule 801(d)(2)(E), are not hearsay.\textsuperscript{145} In previous surveys, the author has speculated that the Supreme Court's relaxation of the test for the admission of co-conspirator statements has been responsible for a decrease in the number of appeals to the Eleventh Circuit concerning co-conspirator statements. Regardless of whether this speculation is accurate, the current survey year again saw a decrease in such appeals. In \textit{United States v. Christopher},\textsuperscript{146} however, the Eleventh Circuit made a salient, if obvious, point: To be admissible as a co-conspirator statement, it must first be established who made the statement.\textsuperscript{147}

The Eleventh Circuit also reaffirmed its holding in \textit{United States v. Byrom},\textsuperscript{148} discussed in last year's survey,\textsuperscript{149} that an entire conversation between a co-conspirator and an informant is admissible even though the informant does not testify at trial.\textsuperscript{150} The informant's comments are not hearsay because they are not offered to prove their truth but rather to place the conversation in proper context.\textsuperscript{151}

As discussed above,\textsuperscript{152} in \textit{T. Harris Young}, the Eleventh Circuit held that out-of-court statements of customers recounting disparaging comments allegedly made by defendant's employees constituted inadmissible hearsay.\textsuperscript{153} The Eleventh Circuit also rejected plaintiff's argument that this evidence was admissible under the business records exception to the

\begin{footnotes}
\footnotetext[142]{Id.}
\footnotetext[143]{Id.}
\footnotetext[144]{Id.}
\footnotetext[145]{\textit{Fed. R. Evid.} 801(d)(2)(E).}
\footnotetext[146]{923 F.2d 1545 (11th Cir. 1991).}
\footnotetext[147]{Id. at 1551.}
\footnotetext[148]{910 F.2d 725 (11th Cir. 1990).}
\footnotetext[149]{\textit{See} Treadwell, supra note 56, at 1474-75.}
\footnotetext[150]{910 F.2d at 734.}
\footnotetext[151]{Id. at 737.}
\footnotetext[152]{\textit{See} supra text accompanying notes 128-34.}
\footnotetext[153]{\textit{T. Harris Young & Assoc. v. Marquette Electronics, Inc.}, 931 F.2d 816, 826-27 (11th Cir. 1991).}
\end{footnotes}
The Eleventh Circuit reasoned that the out-of-court statements could not be considered business records "[b]ecause it was not the regular course of business for the various out-of-court declarants to report to" defendant's employees. This reasoning must be contrasted with the Eleventh Circuit's decision in Baxter Health Care Corp. v. Healthdyne, Inc. In Baxter Health Care, plaintiff alleged that defendant's product was defective and, as a result, plaintiff's products, which included defendant's product as a component, did not operate properly. To support its claim, plaintiff admitted records of customer complaints about plaintiff's product. The person who compiled these records for plaintiff testified that she talked to various customers about problems they experienced with plaintiff's product. This employee testified that these individuals were the persons responsible for the product, that these individuals reported these problems in the regular course of their business, and that these individuals complained in order to document that they encountered problems. The Eleventh Circuit held that the district court properly admitted this evidence as plaintiff's business records. The business records exception, the court noted, does not require that the identity of the person with firsthand knowledge of the pertinent entry be identified. It is sufficient that the information is obtained pursuant to a regular "business practice to obtain the pertinent information from individuals with first-hand knowledge." Referring to T. Harris Young, the Eleventh Circuit acknowledged that all involved in the preparation of the business records must be acting in the regular course of business. The court distinguished T. Harris Young on the grounds that the out-of-court declarants there were not acting in the regular course of their business. It would seem that the difference between T. Harris Young and Baxter Health Care is that in the latter, plaintiff's counsel were astute enough to elicit testimony that the complaining customers were acting in the regular course of their respective businesses (although it could be argued that this itself is hearsay). Perhaps cognizant of the apparent similarity between the excluded evidence in T. Harris Young and the evidence admitted in Baxter Health Care, the Eleventh Circuit further noted that the

155. 931 F.2d at 828.
156. 944 F.2d 1573 (11th Cir. 1991).
157. Id. at 1576-77.
158. Id. at 1576.
159. Id. at 1577.
160. Id.
161. Id.
162. Id.
circumstances surrounding the Baxter complaints "carried higher indicia of reliability than the statements in T. Harris Young."\textsuperscript{163}

Exceptions to the rule against hearsay are found in rules 803\textsuperscript{164} and 804.\textsuperscript{165} The exceptions in rule 804 are applicable only if the declarant is "unavailable".\textsuperscript{166} In United States v. Curbello,\textsuperscript{167} the Eleventh Circuit discussed in some detail the unavailability requirement and the extent of the government's burden to establish unavailability. In Curbello defendant was charged with conspiracy to import cocaine into the United States. However, defendant was arrested in the Bahamas and therefore it was necessary for the government to prove that the defendant intended to smuggle the seized cocaine into the United States. The government's only proof of this element of the offense was the testimony of Bahamian police officers concerning post arrest statements made by defendant's co-conspirator. Because the statement was made after the co-conspirator's arrest, it was not admissible as a statement of a co-conspirator in furtherance of the conspiracy.\textsuperscript{168} However, the district court admitted the statement under rule 804(b)(3) as a declaration against interest by an unavailable declarant. On appeal, defendant argued that the government had not established that the co-conspirator was unavailable. The only evidence that the co-conspirator was not available to testify was a representation by the prosecutor that the co-conspirator was imprisoned in the Bahamas.\textsuperscript{169} The Eleventh Circuit referred to rule 804(a), which includes among its illustrative examples of unavailability a situation in which a declarant "is absent from the hearing and the proponent of his statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."\textsuperscript{170} Noting that the government had known for two weeks prior to trial that defendant would object to the statements, the Eleventh Circuit held that the government had not demonstrated that it had been unable to arrange for the co-conspirator to testify at trial.\textsuperscript{171} There was no evidence of unsuccessful attempts to bring the co-conspirator to trial.\textsuperscript{172} Nor was there any evidence that the co-conspirator had refused to testify.\textsuperscript{173} Furthermore, the government, the court noted, could have deposed the co-conspirator or obtained his testimony through

\textsuperscript{163} Id.
\textsuperscript{164} FED. R. EVID. 803.
\textsuperscript{165} FED. R. EVID. 804.
\textsuperscript{166} FED. R. EVID. 804(b).
\textsuperscript{167} 940 F.2d 1503 (11th Cir. 1991).
\textsuperscript{168} FED. R. EVID. 801(d)(2)(E).
\textsuperscript{169} 940 F.2d at 1504-05.
\textsuperscript{170} Id. at 1505.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 1506.
\textsuperscript{173} Id.
In short, the government simply failed to establish that the co-conspirator was unavailable and therefore the Eleventh Circuit held that the district court improperly admitted evidence of his out-of-court statements.\[^{176}\]

Rule 804(b)(3), which provides for the admission of statements against interest, states a special qualification for statements against penal interest that are offered to exculpate an accused.\[^{176}\] Under these circumstances, statements tending to subject the declarant to criminal liability are not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement."\[^{177}\] The Eleventh Circuit addressed this qualification in United States v. Gomez.\[^{178}\] In Gomez defendant offered evidence of the post arrest statement of a co-conspirator to demonstrate that he was unaware of the illegal purpose of a trip. This statement was made only in the presence of defendant and his sister.\[^{179}\] The Eleventh Circuit held that this was insufficient to satisfy the trustworthiness requirement of rule 804(b)(4).\[^{180}\] Conversely, in United States v. Taggart,\[^{181}\] the Eleventh Circuit held that a statement against penal interest was sufficiently corroborated because it was made to a law enforcement officer and confirmed by another individual involved in the illegal enterprise.\[^{182}\]

XI. Rule 901: Requirement of Authentication of Identification

The Federal Rules of Evidence take a generally liberal, and certainly practical, view of the requirement that a party authenticate a document as a prerequisite to its admissibility.\[^{183}\] The Eleventh Circuit's decision in United States v. Smith\[^{184}\] illustrates this flexible approach. In Smith the district court admitted various ledger books even though the authors of these books were not identified.\[^{185}\] The Eleventh Circuit affirmed, noting that identification by the author of a document is not necessary; a document may be authenticated by circumstantial evidence or by the docu-

\[^{174}\] Id.
\[^{175}\] Id. at 1505.
\[^{176}\] Fed. R. Evid. 804(b)(3).
\[^{177}\] Id.
\[^{178}\] 927 F.2d 1530 (11th Cir. 1991).
\[^{179}\] Id. at 1536.
\[^{180}\] Id.
\[^{181}\] 944 F.2d 837 (11th Cir. 1991).
\[^{182}\] Id. at 840.
\[^{183}\] Fed. R. Evid. 901.
\[^{185}\] 918 F.2d at 1510.
ment's distinctive characteristics. In Smith the color of the ledgers and notations found in the ledgers were similar to other documents seized from one of the defendants. Moreover, the ledgers were found at the scene of the criminal activity or at the homes of some of the defendants. This, the Eleventh Circuit held, tended to establish that the author of the ledgers was involved in the criminal activity and this was sufficient authentication for purposes of rule 901.