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Evidence

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by Marc T. Treadwell*

I. INTRODUCTION

This survey marks the fifteenth year the author has surveyed Eleventh Circuit evidence decisions. This survey year saw the continuation of what has become a clear trend in Eleventh Circuit evidence decisions. In stark contrast to the days when the Eleventh Circuit, and other courts, rigorously examined district court evidentiary decisions and freely reversed those decisions, the Eleventh Circuit now carefully defers to district judges. The reason for this trend can be debated. Perhaps, given that most evidentiary issues addressed by the Eleventh Circuit arise in the context of criminal cases, Eleventh Circuit judges are today more conservative and thus less likely to reverse criminal convictions, particularly on evidentiary grounds. Or, perhaps it is that the abuse of discretion standard of review, which governs evidentiary issues, mandates deference to district judges, something that "activist" judges ignored. The answer no doubt depends on one's perspective. One thing, however, is clear—do not expect the Eleventh Circuit to flyspeck district court evidentiary rulings.

A number of amendments to the Federal Rules of Evidence became effective December 1, 2000. Amended Rule 103[1] may provide needed clarity to the circumstances requiring a party to renew an objection or to make an additional offer of proof. The new Rule provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[2] Thus, if a court grants a motion in limine to exclude evidence, and assuming the

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1. FED. R. EVID. 103.

2. *Id.*

party wishing to propound the evidence made an adequate offer of proof, that party need not make a further offer of proof at trial. Similarly, if the trial court denies the motion in limine and rules that the evidence will be admissible at trial, the party seeking to exclude that evidence need not object at trial when the evidence is tendered. The same is true of continuing objections during trial; they are no longer necessary.

However, the new Rule has both an express and, it would seem, an implicit limitation, and cautious lawyers will likely think twice before relying on a pretrial objection to preserve an issue for appeal. The express limitation is that the ruling must be "definitive."[3] Thus, if the trial court's ruling is conditional or equivocal, the objecting or propounding party is required to act further when the evidence is tendered. The implicit limitation is that the circumstances existing at the time of the initial ruling must also exist when the issue arises at trial. For example, the district court may, based upon the record at the time of its ruling on a motion in limine, deny the motion. When the issue arises again at trial, the record may contain additional facts relevant to the issue. Similarly, a ruling excluding evidence may be entirely correct based on the facts then known to the district court, but incorrect based on additional facts developed at trial. In either event, a party should renew his objection or make another offer of proof based on the changed circumstances or additional facts.

Rule 404(a)(2) permits a defendant to offer evidence of a pertinent trait of character of his alleged victim.[4] The amendment to Rule 404(a)(2) allows the prosecution to tender its own evidence of that same character trait in rebuttal.[5]

The Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[6] has had a profound impact on the scope of admissible expert testimony. Since *Daubert*, district courts and courts of appeals have struggled to come to terms with the district courts' new gatekeeper role in determining the admissibility of expert testimony. *Daubert* has now inspired amendments to the Federal Rules of Evidence.

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."[7] In other words, the reliability require-

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3. *Id.*

4. FED. R. EVID. 404(a)(2).

5. *Id.*

6. 509 U.S. 579, 597 (1993) (holding that the trial judge must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand").

7. FED. R. EVID. 701.

ments imposed by *Daubert* on expert testimony cannot be avoided by labeling the witness a lay witness.

Amended Rule 702 basically codifies *Daubert*[8] and requires that expert testimony must be "based upon sufficient facts or data," must be the "product of reliable principles and methods," and those "principles and methods [must be applied] reliably to the facts of the case."[9]

Amended 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."[10]

The business records exception to the hearsay rule, Rule 803(6),[11] has been amended to allow the foundational requirements of the exception to be established "by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification," rather than by a "live" witness.[12] Thus, it is no longer necessary to bring a records custodian into the courtroom to establish that documents satisfy the requirements of the business records exception. To complement this amendment, subdivisions 11 and 12 have been added to Rule 902, the Rule providing the means of self-authentication.[13] Rule 902(11) permits a records custodian to certify that domestic documents meet the requirements of Rule 803(6).[14] Rule 902(12) does the same for foreign records.[15]

II. ARTICLE ONE: GENERAL PROVISIONS

Rule 101 provides that the Federal Rules of Evidence "govern proceedings in the courts of the United States."[16] Notwithstanding this seemingly clear statement, the precise application of the Rules can be problematic. In diversity cases, state law provides the substantive rule of decision, but federal law determines procedural issues, such as the admission of evidence. However, there are exceptions to this general rule. For example, in the case of presumptions of fact in civil cases,[17]

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8. FED. R. EVID. 702 advisory committee notes.
9. FED. R. EVID. 702.
10. FED. R. EVID. 703.
11. FED. R. EVID. 803(6).
12. *Id.*
13. FED. R. EVID. 902.
14. FED. R. EVID. 902(11).
15. FED. R. EVID. 902(12).
16. FED. R. EVID. 101.
17. FED. R. EVID. 302.

privileges,[18] and competency of witnesses,[19] if state law governs the substantive issues, then state evidentiary rules control those evidentiary issues. Also, what may nominally appear to be a state evidentiary rule is sometimes held to be a state substantive law. This has universally been the case with regard to parol evidence rules, which govern the admissibility of oral agreements to vary or contradict contractual language. During the current survey period, the Eleventh Circuit reaffirmed that parol evidence rules are rules "of substantive law, not evidence, so [they are] applied by federal courts sitting in diversity."[20]

Rule 103(a) requires a party to object timely to the admission or exclusion of evidence to preserve that issue for appeal.[21] In the absence of an objection, a party appealing the admission or exclusion of evidence must establish "plain error."[22] The Eleventh Circuit's unusually fractious decision in *United States v. Campbell*,[23] illustrates the application and effect of the "plain error" rule. In *Campbell* customs agents discovered cocaine in defendant's luggage as he attempted to enter the United States. Defendant voluntarily gave an oral statement to a customs agent who then reduced the statement to writing.[24] In the middle of the written statement, the agent wrote that "he had told Campbell that 'nobody gives this amount of cocaine to somebody they don't trust.'"[25] During the one day trial, the prosecution heavily relied on defendant's statement and the agent's hearsay opinion that defendant knew the cocaine was in his luggage. Defendant's attorney never objected to the repeated use of the agent's opinion. On appeal, however, defendant contended that the statement was hearsay and should not have been admitted.[26] In a per curiam majority opinion, the Eleventh Circuit noted that because of the absence of an objection at trial, defendant had to prove the prosecutor's use of the hearsay opinion was plain error.[27] Noting that while it did not condone the agent's conduct, the court concluded that the admission of the opinion did not meet the plain error standard.[28] The court was "unwilling to say that a trial court's failure to sua sponte redact a defendant's statement to remove

18. FED. R. EVID. 501.
19. FED. R. EVID. 601.
20. Ungerleider v. Gordon, 214 F.3d 1279, 1282 (11th Cir. 2000).
21. FED. R. EVID. 103(a).
22. FED. R. EVID. 103(d).
23. 223 F.3d 1286 (11th Cir. 2000).
24. *Id.* at 1287.
25. *Id.*
26. *Id.* at 1288.
27. *Id.*
28. *Id.*

hearsay is error," much less plain error.[29] The court determined that even if there was plain error, the admission of the statement did not, for several reasons, satisfy the second prong of the plain error standard—that the error effected defendant's "substantial rights."[30] First, the agent was subject to cross examination.[31] Second, the agent could have expressed the same opinion at trial as an expert witness.[32] Finally, there was other evidence from which the jury could conclude that defendant knew the cocaine was in his luggage.[33]

In a strongly worded dissent, Judge Godbold took the majority and the Government to task.[34] He particularly castigated the prosecution for first manufacturing evidence—the agent's hearsay opinion—and then repeatedly utilizing that evidence. To Judge Godbold, the agent's insertion of his opinion in defendant's statement "was no less egregious than police manufacture of evidence by planting a 'throw down' gun at the scene of a crime or forging a confession."[35] The heavy burden of the plain error rule, Judge Godbold argued, should not "immunize the government from the wrong of using evidence that it knows is tainted."[36] Rather, the court should have treated the matter as one of constitutional error and prosecutorial misconduct.[37] Had it done so, defendant's conviction would have been reversed and the case would have been remanded for a fair trial.[38]

> This is a shabby case. Our government can do better than this. It would have elevated itself by confessing error, thereby sending a signal to its agent that it demands rectitude from those who gather evidence for our judicial system and those who use it. Absent that response this court should say that what occurred in this case was wrong, and that the responsibility for it should not be shifted to defense counsel but should reverse and remand for the fair trial to which defendant is entitled.[39]

The practice pointer is that the plain error rule, if rigidly applied, presents a nearly insurmountable obstacle to an appellant—an obstacle

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29. *Id.* at 1288–89.
30. *Id.* at 1289.
31. *Id.*
32. *Id.* In fact, the agent testified at trial, but he did not repeat his opinion. *Id.*
33. *Id.* at 1289.
34. *Id.* at 1290-96 (Godbold, J., dissenting).
35. *Id.* at 1291.
36. *Id.* at 1293–94.
37. *Id.* at 1293-96.
38. *Id.* at 1295-96.
39. *Id.* at 1296.

that cannot be avoided notwithstanding what may be egregious misconduct by the opposing party in the use of the suspect evidence.

III. ARTICLE IV: RELEVANCY AND ITS LIMITS

Rule 404 is the principal rule of evidence governing the admissibility of "extrinsic act evidence," or evidence of acts and transactions other than the one at issue.[40] Rule 404 is primarily intended to bar the introduction of propensity evidence or evidence of misconduct on other occasions offered to prove that a party is more likely to have engaged in the conduct at issue simply because of what he did on another occasion.[41] Although extrinsic act evidence is not admissible to prove a party's propensity to engage in misconduct, it is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[42] Extrinsic act evidence is a favorite weapon of prosecutors. For example, prosecutors frequently introduce evidence of a defendant's prior drug conviction to prove his intent to commit a subsequent drug offense. Although the evidence is ostensibly admitted to prove intent, no one could reasonably argue that the evidence does not potentially lead a juror to conclude that because a defendant committed the prior drug offense, he more likely committed the charged offense.

During the current survey period, Rule 404(b) was mentioned in only four Eleventh Circuit decisions and none of those decisions broke new ground. The Eleventh Circuit reaffirmed that Rule 404(b) does not bar the admission of extrinsic act evidence if that evidence is inextricably intertwined with the evidence of the charged offense.[43] The Eleventh Circuit also reaffirmed the relatively low level of proof required to establish the extrinsic act.[44] In *United States v. Bowe*,[45] the court held that "the uncorroborated word of an accomplice . . . provides a sufficient basis for concluding that the defendant committed extrinsic acts admissible under Rule 404(b)."[46]

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40. FED. R. EVID. 404.

41. *Id.*

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

43. United States v. Jiminez, 224 F.3d 1243, 1249 (11th Cir. 2000). Compare *United States v. Prosperi*, 201 F.3d 1335, 1346 (11th Cir. 2000), in which the Eleventh Circuit seemed to suggest that inextricably intertwined evidence is admissible pursuant to Rule 404(b) rather than in spite of it.

44. 224 F.3d at 1247-49.

45. 221 F.3d 1183 (11th Cir. 2000).

46. *Id.* at 1192. In *United States v. Huddleston*, 485 U.S. 681, 689 (1988), the Supreme Court held that the prosecution need not prove the extrinsic act by a preponderance of the evidence, but the "[e]vidence is admissible under Rule 404(b) only if it is relevant."

In *United States v. Chavez*,[47] the Eleventh Circuit held that the district court improperly admitted evidence of defendant's prior alleged assaults on his wife during his trial for allegedly assaulting his wife again.[48] The Eleventh Circuit found no permissible Rule 404(b) basis for admitting the evidence.[49] For example, intent was not an element of the charged offense, so clearly the prior offenses were not relevant to prove intent. Accordingly, the court concluded that the prosecution could only have offered the evidence to prove defendant's bad character, i.e., his propensity to assault his wife.[50] However, the court found the error harmless.[51]

IV. ARTICLE VI: WITNESSES

Rule 606(b)[52] sharply limits the use of juror testimony to challenge a verdict.[53] A juror may testify only with regard to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." A juror may not testify about alleged improper conduct inside the jury room.[54] In *United States v. Prosperi*,[55] defendant contended the district court improperly interpreted Rule 606(b) when it rejected defendant's efforts to attack the verdict convicting him. In *Prosperi* a dismissed alternate juror, during the course of the jury's deliberations, told defendant's counsel that a juror had told her that she was being pressured to convict defendant and that one juror made up his mind to convict defendant on the first day of testimony and had influenced the selection of a foreperson. Defendant's counsel moved for a mistrial or, in the alternative, for an inquiry. The district court refused, concluding that Rule 606(b) precluded any inquiry into the jury's deliberations other than to investigate, as the prosecution requested, whether the dismissed alternate juror had improperly influenced the juror who called her. Although, acknowledging the broad discretion of the courts in such matters, defendant contended that the district court necessarily abused its discretion when it failed to conduct

47. 204 F.3d 1305 (11th Cir. 2000).
48. *Id.* at 1317.
49. *Id.*
50. *Id.*
51. *Id.*
52. FED. R. EVID. 606(b).
53. *Id.*
54. *Id.* This differs from Georgia law, which allows jurors to testify in support of, but not against, their verdict. O.C.G.A. § 9-10-9 (1982).
55. 201 F.3d 1335 (11th Cir. 2000).

an investigation.[56] The Eleventh Circuit disagreed.[57] Rule 606(b) clearly prohibits investigations of allegations of internal influence, and the district court properly exercised its discretion not to conduct such an investigation.[58] Indeed, the Eleventh Circuit noted, investigating charges of internal influence may well have constituted reversible error.[59]

The Eleventh Circuit's decision in *United States v. Gil*,[60] addresses, barely, a little known distinction between opinion and reputation evidence of character. In *Gil* defendant contended the district court improperly excluded the testimony of her character witness. The district court disallowed the testimony because the witness had no contact with defendant during the year she was arrested and, thus, did not have an adequate basis for expressing an opinion on defendant's character. On appeal defendant contended that Rule 608(a) permitted her to call a witness to express an opinion as to her character for truthfulness.[61] The Eleventh Circuit disagreed, stating its reasoning in one sentence: "While the district court acknowledged the courts are more flexible regarding the admissibility of opinion testimony, such as this, as opposed to reputation testimony, the court properly distinguished *[United States v.] Watson* as addressing the credibility of witness testimony, not the character of a defendant."[62] The Eleventh Circuit did not elaborate on the distinction between reputation testimony and opinion testimony. Nor did it elaborate on the district court's rationale for distinguishing *Watson*.

Watson,[63] the Eleventh Circuit's leading decision on the issue, merits discussion. In *Watson* the district court excluded the testimony of six witnesses offered by defendants to give testimony regarding a critical witness' character for truthfulness. Some of the witnesses were to testify with regard to that witness' reputation for truthfulness and others were to express opinions on the witness' character for truthfulness.[64] With regard to the reputation witnesses, the Eleventh Circuit agreed that the witnesses had not known the key witness at the appropriate time to

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56. *Id.* at 1338-40.
57. *Id.* at 1340.
58. *Id.*
59. *Id.* at 1340-41.
60. 204 F.3d 1347 (11th Cir. 2000).
61. *Id.* at 1351-52.
62. *Id.* (citing United States v. Watson, 669 F.2d 1374, 1382 (11th Cir. 1982)) (internal citation omitted).
63. 669 F.2d 1374 (11th Cir. 1982).
64. *Id.* at 1381.

testify with regard to the witness' reputation for truthfulness.[65] The opinion witnesses, however, were another matter and presented "the most troubling issue in this case."[66] The court noted Rule 608 "'imposes no prerequisite condition of long acquaintance or recent information about the witness; cross examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principal witness.'"[67] An opinion witness is simply stating his impression of another witness' character for truthfulness.

Thus, it would seem, that *Watson* supported defendant's argument in *Gil*—the district court improperly required her to lay the foundation that her opinion witness had contact with her during the year of the alleged defense. However, the Eleventh Circuit concluded that *Watson* was not applicable because it addressed a witness' character rather than a defendant's character.[68] That certainly is true, but it is not necessarily clear why that makes a difference. In both situations, a witness is attempting to express his opinion on someone else's character for truthfulness.

V. ARTICLE VII: OPINIONS AND EXPERT TESTIMONY

As discussed in previous surveys, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[69] dramatically changed the landscape of expert testimony.[70] For the first time since *Daubert* was decided, the survey period did not include a significant *Daubert* related decision by the Eleventh Circuit. Indeed, *Daubert* was only mentioned by the Eleventh Circuit in two cases[71] and neither is noteworthy.

VI. ARTICLE VIII: HEARSAY

In years past, the inherent conflict between hearsay evidence and the Confrontation Clause of the Sixth Amendment has provided fertile ground for Eleventh Circuit and Supreme Court decisions. However, if

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65. *Id.* at 1381-82.

66. *Id.* at 1382.

67. *Id.* (quoting United States v. Lollar, 606 F.2d 587, 589 (5th Cir. 1979)).

68. *Gil*, 204 F.3d at 1352.

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

70. Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 1165, 1177-83 (2000); Marc T. Treadwell, *Evidence*, 50 MERCER L. REV. 1019, 1025-31 (1999); Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 1027, 1039-41 (1998); Marc T. Treadwell, *Evidence*, 48 MERCER L. REV. 1607, 1618-23 (1997).

71. *See* Tool v. Baxter Healthcare Corp., 235 F.3d 1307 (11th Cir. 2000); Johnson v. DeSoto County Bd. of Comm'rs, 204 F.3d 1335 (11th Cir. 2000).

the Eleventh Circuit's decision in *United States v. Rodriguez*,[72] is any indication, the level of judicial scrutiny of this issue, as with other evidentiary issues, has been lowered. In *Rodriguez* defendant objected on hearsay grounds to the admission of evidence that the prosecution used to establish that defendant's alleged robbery of six motels impacted interstate commerce, an element of the charged offense. Specifically, the district court allowed motel employees to testify that they registered out of state or foreign guests. On appeal defendant also argued that the admission of this evidence violated his Sixth Amendment right to confront his witnesses.[73] The district court admitted the testimony pursuant to Rule 807, the catchall or residual exception to the hearsay rule. Defendant argued that the statements were not sufficiently trustworthy to satisfy Rule 807's requirement that the statement have "circumstantial guarantees of trustworthiness" equivalent to the trustworthiness of statements admissible pursuant to Rule 803 or 804.[74] The Eleventh Circuit held that the district court did not abuse its discretion in finding the requisite trustworthiness.[75] Had the Eleventh Circuit considered the merits of defendant's Confrontation Clause claim, it may have faced an interesting issue. The Confrontation Clause does not bar the admission of hearsay statements against a criminal defendant if they bear "adequate 'indicia of reliability.'"[76] In *Bourjaily v. United States*,[77] the Supreme Court held that the requisite reliability could be assumed if the evidence "'falls within a firmly rooted hearsay exception.'"[78] If it does not, the circumstances surrounding the statement have to be examined to determine if the statement is sufficiently trustworthy. In this event, the reliability of the statement cannot be established by corroborating evidence, but rather the statement "must possess indicia of reliability by virtue of its inherent trustworthiness."[79]

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72. 218 F.3d 1243 (11th Cir. 2000), *cert. denied*, United States v. Rodriguez, No. 00-7223, 2001 WL 12992 (Jan. 8, 2001).

73. There is a practice pointer in the Eleventh Circuit's pointed comment that defendant did not raise the Confrontation Clause issue at trial. *Id.* at 1246. While it may seem implicit that a hearsay objection in a criminal trial implicates a defendant's right to confront his witnesses, the mere objection on the grounds of hearsay does not raise the constitutional issue.

74. 218 F.3d at 1244-46.

75. *Id.* at 1246.

76. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

77. 483 U.S. 171 (1987).

78. *Id.* at 183 (quoting *Roberts*, 448 U.S. at 66).

79. Idaho v. Wright, 497 U.S. 805, 822 (1990).

Residual exceptions to the hearsay rule, such as Rule 807, are not considered firmly rooted hearsay exceptions, and thus statements admitted pursuant to those exceptions are not deemed reliable for purposes of the Confrontation Clause.[80] Thus, *Rodriguez* potentially presented the issue of whether the Confrontation Clause requirement of trustworthiness is different than Rule 807's requirement of trustworthiness. However, the Eleventh Circuit did not address this issue. The court simply held that there was no "plain error in evaluating defendant's Confrontation Clause claim."[81]

The Eleventh Circuit also addressed Confrontation Clause issues in *United States v. Siddiqui*,[82] a case presenting interesting and unique facts. In *Siddiqui* defendant faced charges arising from his efforts to secure a half million dollar research grant from the National Science Foundation. Defendant submitted an application over the name of Dr. Hamuri Yamada nominating defendant for the award. The application listed three references, including a Dr. von Gunten. In response to a letter from the National Science Foundation confirming his support for defendant's nomination, von Gunten said that he had never submitted such a letter. The National Science Foundation alerted authorities, who soon discovered that defendant had falsely submitted the nomination. Both Yamada and von Gunten lived abroad and the prosecution moved the court for permission to take their depositions. In support of its motion, the prosecution offered evidence that the witnesses would not appear in the United States for a trial. Defendant opposed the depositions on several grounds, including the ground that Indian travel restrictions for its citizens living abroad prevented him from traveling outside the United States. Because of these restrictions, defendant argued, his relatives residing in India could be subject to religious prosecution if he traveled abroad. A magistrate ruled that the depositions could proceed. Defendant's attorneys appeared at each deposition and, at one deposition, were in telephone contact with defendant.[83]

On appeal of his conviction, defendant contended that the admission of Yamada's and von Gunten's deposition testimony violated his Sixth Amendment right of confrontation.[84] However, the Eleventh Circuit noted that defendant made no request of either the magistrate judge or the Government for assistance in arranging travel abroad under

80. United States v. Deeb, 13 F.3d 1532, 1538 (11th Cir. 1994).
81. *Rodriguez*, 218 F.3d at 1246.
82. 235 F.3d 1318 (11th Cir. 2000).
83. *Id.* at 1320-21.
84. *Id.* at 1324.

circumstances that would not put his family at risk.[85] This indicated, to the Eleventh Circuit, that defendant made a calculated decision not to alert Indian authorities by seeking to lift travel restrictions.[86] "After failing to authorize the government to proceed on his behalf, Siddiqui cannot now claim that his confrontation rights were violated by the government's failure to act unilaterally."[87] Moreover, the Eleventh Circuit noted that defendant's counsel appeared at the depositions and cross-examined the witnesses and that defendant was in telephone contact with his lawyer during the Yamada deposition.[88] While depositions are generally disfavored in criminal cases, particularly depositions in foreign countries, they are permissible depending on the circumstances. Given the circumstances of the depositions in *Siddiqui*, the court refused to find that defendant's Confrontation Clause rights were impinged.[89]

Defendant also argued that the magistrate judge's determination that von Gunten and Hamuri Yamada were unavailable to testify at trial violated defendant's right to confront the witnesses.[90] The Eleventh Circuit's legal analysis of this issue illustrates an interesting point. Stating the classic *Ohio v. Roberts*[91] test, the Eleventh Circuit said the Confrontation Clause requires the prosecution "to show (1) that the out-of-court declarant is unavailable to testify despite [the prosecution's] good faith efforts to obtain his presence at trial, and (2) that the out-of-court statements bear sufficient indicia of reliability to provide the jury with an adequate basis for evaluating their truth."[92] However, the unavailability requirement has largely disappeared from Confrontation Clause analysis. In *United States v. Inadi*,[93] the Supreme Court held that *Roberts* does not stand for the blanket proposition that "no out-of-court statement can be introduced . . . without a showing that the declarant is unavailable."[94] Then, in *White v. Illinois*,[95] the Supreme Court held that *Roberts* should be limited to its facts.[96] Thus a

85. *Id.* at 1323.
86. *Id.*
87. *Id.*
88. *Id.* at 1324.
89. *Id.* at 1325.
90. *Id.* at 1324.
91. 448 U.S. 56, 65-66 (1980).
92. *Siddiqui*, 235 F.3d at 1324 (citing United States v. Chapman, 866 F.2d 1326, 1330 (11th Cir. 1989)).
93. 475 U.S. 387 (1986).
94. *Id.* at 394.
95. 502 U.S. 346 (1992).
96. *Id.* at 354.

showing of unavailability must be made only when hearsay is admitted pursuant to the exception for statements made in the course of a prior judicial proceeding, the hearsay exception at issue in *Roberts*.[97]

In fact, it is probably fair to say that the availability of the out-of-court declarant is not a factor in Confrontation Clause analysis. It is, however, a factor in Rule 804 analysis, which provides hearsay exceptions when the declarant is unavailable. Even though the testimony was given in depositions convened as a part of the criminal prosecution, they nevertheless were hearsay pursuant to Rule 801 because they were "statement[s] other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."[98] Rule 804(b)(1) recognizes this and provides an exception for former testimony "given as a witness . . . in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[99] Clearly, the depositions in *Siddiqui* fell within this exception. Thus, the only question was whether the facts were sufficient to demonstrate that the witnesses were unavailable, and the Eleventh Circuit concluded that they were.[100] However, the unavailability showing was not required by the Confrontation Clause, as the Eleventh Circuit arguably suggested, but by Rule 804(b)(1).[101]

Rule 801(b)(1)(B) provides that a prior consistent statement is not hearsay if it is offered to rebut a charge of recent fabrication or improper influence or motive. For example, a party may successfully tender a witness' prior statement that is consistent with his trial testimony to demonstrate that the trial testimony is truthful. In *Tome v. United States*,[102] the Supreme Court, resolving a conflict among the circuits, held that a prior consistent statement is not admissible to rebut a charge of recent fabrication unless the prior statement was made before the motive to fabricate arose.[103]

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97. *Id.* at 356.
98. FED. R. EVID. 801(c).
99. FED. R. EVID. 804(b)(1).
100. *Siddiqui*, 235 F.3d at 1324.
101. *Id.*; *see also* FED. R. EVID. 804(b)(1).
102. 513 U.S. 150 (1995).
103. *Id.* at 167. For a discussion of *Tome*, see Marc T. Treadwell, *Evidence*, 47 MERCER L. REV. 837, 845–46 (1996).

In *United States v. Prieto*,[104] the Eleventh Circuit addressed an issue of first impression spawned by *Tome*.[105] In *Prieto* the prosecution successfully tendered a witness' post-arrest statement that was consistent with his trial testimony to rebut a charge that the trial testimony was motivated by the witness' cooperation agreement with the Government.[106] The post-arrest statement was made before the execution of the cooperation agreement, but defendant argued that "any post-arrest statement is necessarily tinged with a motive to lie in order to curry favor with the government."[107] In other words, as the Eleventh Circuit put it, the defense sought the creation of a "bright line, per se rule barring the admission of any prior consistent statements made by a witness following arrest."[108] The Eleventh Circuit concluded that post-arrest statements are not automatically contaminated by a motive to fabricate.[109] Rather, a witness's post-arrest statement can be driven by a variety of motives and reasons, including, for example, the witness' conscience.[110] Thus, whether a post-arrest statement is motivated by a desire to obtain favorable treatment depends on the facts surrounding the statement and must necessarily be decided on a case-by-case basis. Because the district court carefully examined the facts surrounding the post-arrest statement and concluded that the witness was not motivated by an anticipated cooperation agreement with the Government, the Eleventh Circuit did not find any error in this factual conclusion.[111]

Rule 801(d)(2)(E) provides that statements by a co-conspirator are admissible against a conspirator if made during the course and in furtherance of the conspiracy.[112] In *United States v. Bowe*,[113] defendant argued that Rule 801(d)(2)(E) is limited in its application to the conspiracies alleged in an indictment. Thus, defendant argued, the district court improperly admitted a co-conspirator's statement made in furtherance of a conspiracy that was not charged in the indictment.[114] The Eleventh Circuit disagreed, holding that "the conspiracy that forms

104. 232 F.3d 816 (11th Cir. 2000).
105. *Id.* at 820.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 820-21.
111. *Id.* at 822.
112. FED. R. EVID. 801(d)(2)(E).
113. 221 F.3d 1183 (11th Cir. 2000).
114. *Id.* at 1193.

the basis for admitting a co-conspirator's out of court statements need not be the same conspiracy for which the defendant is charged."[115]

VII. ARTICLE IX: AUTHENTICATION AND IDENTIFICATION

The Eleventh Circuit's decision in *Siddiqui* presented another interesting issue, this one involving the authentication of email.[116] In *Siddiqui* Yamada testified that she received an email from defendant. Yamada knew the email came from defendant because it contained his address and it ended with defendant's nickname "Mo." Later, Yamada received another email from defendant requesting that she confirm that she had permitted defendant to sign the nomination form on her behalf. Defendant also telephoned Yamada on this subject. During Yamada's cross-examination, defendant's counsel introduced an email from Yamada to defendant that contained the same email address for defendant as the email sent by defendant to Yamada. Von Gunten also testified that he received an email from defendant and that he replied to this email by using the reply function of his email program, meaning that his response was simply returned to the sender. Defendant's email to von Gunten also was signed "Mo." In addition, the information contained in the email messages revealed that they had been authored by someone familiar with defendant's conduct with regard to the research grant. Finally, the telephone calls between Yamada and von Gunten, both of whom testified that they recognized defendant's voice, were consistent with the substance of the email.[117] Under these circumstances, the Eleventh Circuit held that the district court did not err in ruling that the email had been properly authenticated.[118]

VIII. ARTICLE X: CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1006 provides that the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."[119] In *United States v. Richardson*,[120] defendant contended that

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115. *Id.*

116. *Siddiqui*, 235 F.3d at 1322.

117. *Id.* at 1322-23.

118. *Id.* at 1323. Defendant also contended that the email contained hearsay, an objection not made at trial and which, in any event, the Eleventh Circuit found to be wholly without merit. *Id.* Once authenticated as messages from defendant, they became admissions of a party opponent pursuant to Rule 801(d)(2)(A). *Id.*

119. FED. R. EVID. 1006.

120. 233 F.3d 1285 (11th Cir. 2000).

the district court improperly admitted the prosecution's charts summarizing evidence because of the conclusory headings of the charts. Each summary chart included one column of activity that was characterized as "unauthorized." The district court instructed the jury that the question of whether the activity was in fact unauthorized was a matter for them to decide. After the ninth summary chart was offered into evidence, the prosecution changed the heading from "unauthorized transaction" to "questioned transaction."[121] The Eleventh Circuit held that the district court did not abuse its discretion in admitting the charts, but it acknowledged the potential for abuse with summaries of evidence and cautioned that they should be carefully scrutinized.[122] The court noted that while it is not necessary that the information contained in summaries or charts be free of any assumptions, those assumptions must be supported by evidence in the record.[123] Also, the court stated that the trial court should instruct the jury, as the district court did, that the ultimate decision must be made by the jury.[124]

IX. MISCELLANEOUS

In *United States v. Richardson*,[125] the Eleventh Circuit addressed, apparently for the first time, whether a trial court can allow jurors to ask questions during the course of a trial.[126] During defendant's six week trial, the district court asked witnesses twenty-three sets of questions that had been submitted by jurors.[127] The Eleventh Circuit rejected defendant's contention that juror-posed questions deprived defendant of the constitutional right to a fair trial.[128] Nevertheless, the Eleventh Circuit noted the possible danger inherent in the practice.[129] For example, permitting jurors to ask questions may have the effect of turning a juror into an advocate with a mission to obtain information that would advance his cause. Also, the process of formulating questions may induce a juror to begin prematurely his evaluation of the evidence.[130] Accordingly, the Eleventh Circuit

121. *Id.* at 1293.
122. *Id.* at 1293-94.
123. *Id.* at 1294.
124. *Id.*
125. 233 F.3d 1285 (11th Cir. 2000).
126. *Id.* at 1288-91.
127. *Id.* at 1288.
128. *Id.* at 1291.
129. *Id.*
130. The evidence for and against juror questioning appears to be anecdotal. In the author's one experience with juror questioning during a lengthy trial, the district court eventually was forced to discharge one juror and to instruct the remaining jurors that no

suggested the following guidelines for juror-questioning: (1) questions should be factual in nature and should not question or test legal issues or theories; (2) jurors should submit their questions in writing to the trial judge rather than questioning the witness directly, thus allowing the court the opportunity to screen the question and the parties to voice objections; (3) the jury should be instructed on the proper use of questions and admonished not to allow their questioning to lead them to prejudge the issues; and (4) juror questions should be limited to the most important factual points.[131]

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further questions would be accepted.

131. 233 F.3d at 1290-91.

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