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Evidence

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by Marc T. Treadwell*

I. INTRODUCTION

For seven consecutive years, the *Mercer Law Review* has been kind enough to ask the author to review Eleventh Circuit evidence decisions. While one may question the wisdom of the *Review's* annual return to the same well, seven years of reading every Eleventh Circuit decision involving evidentiary issues has allowed the author to note what may loosely be called "trends" in the Eleventh Circuit's decisions. No claim can be made that these observations are based on statistical or empirical data; they derive solely from the author's sense of the Eleventh Circuit's direction and predilections over the past seven years.

First, it seems that Federal Rule of Evidence 403, once a frequent determinative in appeals, has all but disappeared from the Eleventh Circuit's lexicon. Rule 403 permits a trial court to exclude evidence under certain circumstances, most notably when the danger of unfair prejudice substantially outweighs the probative value of the evidence. Rule 403 determinations are necessarily fact specific and, like all evidentiary determinations, are governed by the abuse of discretion standard.[1] Consequently, it would seem that the circumstances under which an appellate court would reverse a district court's Rule 403 determination would be rare. This, however, happened frequently in the mid and late 1980s. In more recent survey years, however, this has happened rarely, if at all.

In what is perhaps a related "trend", the level of scrutiny in Rule 404(b) determinations has decreased. Rule 404(b) prohibits the admission of extrinsic act evidence to prove a person's propensity to act in a particular way but allows such evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of

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1. *See* United States v. Sans, 731 F.2d 1521, 1532 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

mistake or accident."[2] Although a trend with regard to Rule 404(b) has not been as marked as the disappearance of Rule 403, the Eleventh Circuit generally seems to be much more deferential to trial court determinations admitting extrinsic act evidence.

Another area of evidence law which has seen marked change in the last seven years is the interplay of hearsay evidence and the confrontation clause of the United States Constitution. As discussed below, the constitutional limitations on the use of hearsay evidence have been, as the result more of Supreme Court decisions than Eleventh Circuit decisions, substantially relaxed.

Finally, these three specific "trends" may be related to an apparent decrease in the number of appeals in which evidentiary issues are determinative. One could conclude that the Eleventh Circuit, perhaps because of an increased case load, is focusing less on procedural and evidentiary issues and more on substantive issues.

II. Rule 103. Rulings on Evidence

Typically, the Eleventh Circuit takes literally the requirement of Rule 103 that a party timely object to a ruling admitting evidence and the somewhat less well-known requirement, in the case of a ruling excluding evidence, that the party proffering the evidence make an offer of proof. Without making an offer of proof, a party cannot successfully appeal a district court's ruling excluding evidence unless the district court committed "plain error."[3] In *United States v. Mitchell*,[4] however, the Eleventh Circuit took what some may consider a remarkably tolerant view of an appealing party's lax observance of the requirements of Rule 103. In *Mitchell* the district court excluded expert testimony that the government intended to use at trial. Apparently, the government made an offer of proof of sorts, but the record on appeal did not include this offer or defendant's arguments on a motion to exclude the testimony.[5] On appeal, the Eleventh Circuit acknowledged it was bound by the abuse of discretion standard in determining whether evidence had been improperly excluded.[6] The court continued, however, that for it to hold that the district court did not abuse its discretion "in the absence of a detailed and reported proffer by the Government, we would have to conclude that the precluded testimony could under no circumstances have been admissi-

2. Fed. R. Evid. 404(b).

3. Fed. R. Evid. 103(d); *see also* United States v. West, 898 F.2d 1493, 1498 (11th Cir. 1990), discussed in Marc T. Treadwell, *Evidence*, 42 Mercer L. Rev. 1451, 1452 (1991).

4. 954 F.2d 663 (11th Cir. 1992).

5. *Id.* at 665.

6. *Id.*

ble."[7] In other words, if the testimony would have been admissible under any conceivable scenario, then the district court's order must be vacated. Not surprisingly, the Eleventh Circuit found it could not "reach this categorical conclusion."[8] First, because it could not "eliminate the possibility that [the expert] testimony might assist the jury," the Eleventh Circuit could not conclude that the trial court did not abuse its discretion in relying upon Rule 702 to exclude the testimony.[9] Second, the Eleventh Circuit concluded that it could affirm the district court's reliance upon Rule 403 to exclude the testimony only if it

> found that there exists no possible trial scenario in which the probative value of this testimony would not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[10]

Again, the Eleventh Circuit was not prepared to make such a conclusion.

The irony of *Mitchell* is manifest. In a typical case, the abuse of discretion standard is a difficult standard to meet. In *Mitchell* the government compounded its burden by failing to make proper arrangements for the preparation of a record of its offer of proof. For this precise reason, however, the government enjoyed a standard of review on appeal that would have been difficult not to satisfy. As a practice pointer, do not rely upon *Mitchell* to avoid the consequences of an inadequate or unreported offer of proof. The Eleventh Circuit vacated the district court's order "with the instruction [to the district court] to conduct an adequate hearing on defendants' preclusion motions in the presence of a court reporter,"[11] which suggests that the goal may have been to chastise the district court rather than to benefit the government.

III. Rule 106. Remainder of or Related Writings or Recorded Statements

Rule 106, sometimes called the "rule of completeness," permits a party to insist on the introduction of an entire document when the adverse party has introduced only a portion of the document.[12] The Eleventh Circuit's decision in *United States v. Myers*[13] demonstrates that this rule is

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7. *Id.*
8. *Id.*
9. *Id.* at 666.
10. *Id.* (quoting Fed. R. Evid. 403).
11. *Id.* at 667-68.
12. Fed. R. Evid. 106.
13. 972 F.2d 1566 (11th Cir. 1992).

not without limitations. In *Myers* the government introduced a portion of defendant's pretrial statement to impeach a specific point of his trial testimony. Defendant then moved for the introduction of the entire statement, a request denied by the district court.[14] Although acknowledging Rule 106, the Eleventh Circuit held that the remaining portions of the statement were irrelevant to the government's impeachment effort.[15] Because the remainder of the statement was not explanatory or relevant to the portion introduced by the government, the Eleventh Circuit held that the district court did not abuse its discretion.[16]

IV. RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

Although not mentioned expressly in the Federal Rules of Evidence, federal courts presume receipt of properly mailed documents.[17] In *In re East Coast Brokers & Packer, Inc.*,[18] appellant sought to maintain possession of commodities shipped to appellant by appellee, who subsequently filed bankruptcy. Appellant relied upon the Perishable Agricultural Commodities Act,[19] which allows a commodity merchant, dealer, or broker to maintain possession of goods and to hold these goods in trust for the benefit of unpaid suppliers or sellers.[20] However, the parties seeking to maintain possession of the goods must provide written notice to the shipper of their intent to hold the goods.[21] Appellant contended that appellee received timely notice, but appellee denied receiving this notice. However, the Department of Agriculture received copies of the notices, which showed appellee's accurate address. The trial court refused to employ the presumption of receipt of properly mailed documents and, therefore, found appellant did not demonstrate timely mailing of the requisite notices.[22]

On appeal, the Eleventh Circuit reversed.[23] The Eleventh Circuit noted that a party relying upon the presumption must first show that the document was properly addressed, stamped, and mailed.[24] Appellant attempted to establish these elements through the testimony of its general

14. *Id.* at 1575.
15. *Id.*
16. *Id.*
17. Hagner v. United States, 285 U.S. 427, 430 (1932).
18. 961 F.2d 1543 (11th Cir. 1992).
19. 7 U.S.C. §§ 499a-s (1988).
20. 961 F.2d at 1544.
21. 7 U.S.C. § 499e(c)(3) (1988).
22. 961 F.2d at 1544-45.
23. *Id.* at 1546.
24. *Id.* at 1545.

manager. The trial court rejected this testimony because the witness was not personally involved in the addressing, stamping, and mailing of the notices.[25] Although the Eleventh Circuit recognized that "unsupported conclusory statements . . . based on [an] assumption of how mail was handled . . ." is not sufficient to raise the presumption, it noted that appellant's evidence was much more specific than this.[26] Even though the witness did not have first-hand knowledge that the notices had been mailed, he testified in detail about appellant's specific procedures for handling this type of notice.[27] This, the Eleventh Circuit held, was sufficient to establish the elements of the presumption.[28]

V. Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

In the Eleventh Circuit, evidence that a criminal defendant fled authorities is relevant to demonstrate guilt.[29] In *United States v. Blakey*,[30] however, defendant contended that such evidence was improperly admitted because his flight from authorities occurred three years after the charged offense and at a time when defendant knew he was wanted by authorities for an unrelated offense.[31] The Eleventh Circuit disagreed, concluding that the evidence sufficiently demonstrated "consciousness of guilt concerning the crime charged."[32] The Eleventh Circuit relied on several factors. First, and perhaps the weakest of the factors, defendant was in Atlanta at the time he fled, the city where the charged offense allegedly occurred. Second, defendant was with an alleged co-conspirator in the charged offense at the time of the flight. This co-conspirator had been convicted for his role in the charged offense and was appealing his conviction. Finally, defendant may have known he had been indicted for the charged offense or that he was being investigated for his participation in the offense.[33]

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25. *Id.* at 1546.

26. *Id.* at 1545.

27. *Id.* at 1545-46.

28. *Id.* at 1546.

29. United States v. De Parias, 805 F.2d 1447 (11th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987).

30. 960 F.2d 996 (11th Cir. 1992).

31. *Id.* at 1000.

32. *Id.* at 1001.

33. *Id.*

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

Rule 404(b) prohibits the use of evidence of extrinsic acts to prove that a person's conduct, on the occasion in question, conforms with conduct on other occasions. For example, evidence of bad character is not admissible to prove that a defendant, being a disreputable person, is more likely to have committed the charged offense. Extrinsic act evidence is admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[34]

An important principle to remember when analyzing the admissibility of extrinsic act evidence is the necessity to determine first 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 VI, principally Rule 608, which addresses the use of character evidence and evidence of specific incidences 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 IV, principally Rule 404(b).[35]

The Eleventh Circuit's decision in *United States v. Miller*[36] is a good primer on the proper application of Rule 404(b). In *Miller* defendant contended the district court improperly admitted extrinsic act evidence; the government responded the evidence was properly admitted to prove identity or *modus operandi*.[37] In a panel decision addressed in a previous survey, a bitterly divided Eleventh Circuit reversed defendant's conviction.[38] To the author, the panel majority's Rule 404(b) analysis seemed much more stringent than warranted by previous Eleventh Circuit decisions. Apparently, the Eleventh Circuit agreed. The court vacated the panel opinion and sat en banc to reconsider defendant's contentions.[39]

The en banc court first noted the standard three-part test for evaluating the admissibility of Rule 404(b) evidence enunciated in *United States v. Beechum*.[40] First, the extrinsic act evidence must be relevant to an is-

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

35. Prior survey articles discuss in more detail the general principles governing the use of extrinsic act evidence. *See* Marc T. Treadwell, *Evidence*, 43 MERCER L. REV. 1173 (1991); Marc T. Treadwell, *Evidence*, 42 MERCER L. REV. 1451, 1455-61 (1991).

36. 959 F.2d 1535 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 382 (1992).

37. 959 F.2d at 1539.

38. United States v. Miller, 883 F.2d 1540, 1547 (11th Cir. 1989); Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 1357, 1361-62 (1990).

39. 923 F.2d 158 (11th Cir. 1991).

40. 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

sue other than the defendant's character.[41] Second, the prosecution must prove the defendant committed the extrinsic act.[42] The prosecution need not prove this element beyond a reasonable doubt; proof by a preponderance of the evidence that the defendant committed the extrinsic act is sufficient.[43] Third, the evidence must not contravene Rule 403, meaning that the probative value of the extrinsic act evidence must not be substantially outweighed by its undue prejudice.[44] Finally, a district court's determination to admit extrinsic act evidence, like all evidentiary determinations, is governed by the abuse of discretion standard of review.[45]

In *Miller* defendant argued that the extrinsic offense was not sufficiently similar to the charged offense to be relevant to the issue of identity.[46] The panel majority reversed defendant's conviction because it agreed that the necessary degree of similarity was not present. It noted that when extrinsic act evidence is offered to prove identity, a much greater degree of similarity between the charged offense and extrinsic defense is required.[47] While the en banc court agreed that the similarities between the offenses must mark the offenses as the handiwork of the accused, its analysis was much less rigorous than the panel majority. It concluded that the offenses were sufficiently similar to satisfy the first prong of the *Beechum* test because the extrinsic act evidence was relevant to an issue other than defendant's character.[48]

Although the intensity of scrutiny under Rule 404(b) has decreased, the admission of extrinsic act evidence is still subject to some restrictions, as noted by the Eleventh Circuit in *United States v. Church*.[49] In *Church* the district court admitted a tape recording of a 1979 conversation in which defendant offered assistance to an informant who professed a desire to hire someone to murder a prosecutor. The pertinent charged offense, conspiracy to commit murder, occurred in 1983 and 1984. The government argued that the taped conversation demonstrated defendant's willingness to use violence to protect his financial interests and thus, was relevant to prove his intent to participate in the alleged conspiracy.[50] This troubled the Eleventh Circuit, which noted that the distinction be-

41. 959 F.2d at 1539.
42. *Id.* at 1540.
43. Huddleston v. United States, 485 U.S. 681, 689 (1988).
44. 959 F.2d at 1539-40.
45. *Id.* at 1538.
46. *Id.*
47. 883 F.2d at 1543.
48. 959 F.2d at 1540.
49. 955 F.2d 688 (11th Cir. 1992), *cert. denied*, Coppola v. United States, 113 S. Ct. 233 (1992).
50. 955 F.2d at 700-01.

tween intent, a relevant issue, and propensity, a goal prohibited by Rule 404(b), is sometimes difficult to discern.[51]

Nevertheless, the Eleventh Circuit assumed that the tape recording was relevant to prove intent and analyzed the tape under the Rule 403 balancing test, the third element of the *Beechum* test.[52] First, the Eleventh Circuit concluded that the 1979 conversation was simply not "highly probative" to prove acts committed in 1983 and 1984.[53] Moreover, the evidence was highly prejudicial.[54] Finally, the evidence was cumulative; the government had other evidence of defendant's intent that was not so prejudicial.[55] Recognizing that Rule 403 carries a strong presumption in favor of admissibility and the leniency of the abuse of discretion standard, the Eleventh Circuit nevertheless concluded that the district court erred in admitting evidence of the prior conversation.[56] However, the court found the error to be harmless.[57]

Using mug shots as evidence often implicates Rule 404(b). If a photograph is identifiable as a mug shot, it clearly indicates to a jury that a defendant has a prior criminal record. Interestingly enough, this issue had not been definitively addressed by the Eleventh Circuit until its decision in *United States v. Hines*.[58] In *Hines* the government tendered, and the district court admitted, mug shots of the defendant in an effort to bolster the credibility of a witness who previously identified the defendant from the mug shots. The government argued on appeal that the mug shots were relevant to prove identity.[59] The Eleventh Circuit rejected the government's argument, noting that even if evidence is admissible under a particular rule of evidence, it may nevertheless be excluded if its probative value is outweighed by its prejudicial effect.[60] Because this was an issue of first impression in the Eleventh Circuit, the court looked to and adopted the Fifth Circuit's test for the admission of mug shots.[61] First,

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51. *Id.* at 702.

52. *Id.*

53. *Id.* at 703.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 955 F.2d 1449 (11th Cir. 1992). Apparently, the government did not specifically rely upon Rule 404(b) and the Eleventh Circuit's opinion does not specifically mention Rule 404(b). Nevertheless, discussion of *Hines* in the context of Rule 404(b) is appropriate because the use of mug shots taken in connection with an unrelated arrest necessarily results in the admission of extrinsic act evidence.

59. *Id.* at 1453.

60. *Id. See supra* text accompanying notes 52-57 (discussing Rule 403 and the third prong of the *Beechum* test).

61. 955 F.2d at 1455. United States v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987).

the government must have a demonstrable need for the photographs.[62] Second, the photographs must not imply that a defendant has a prior criminal record.[63] Third, the government must admit the photographs in a way that does not draw attention to the fact that the photographs are mug shots.[64] Applying this test, the court found the district court improperly admitted the mug shots and, therefore, reversed defendant's conviction.[65]

Finally, the Eleventh Circuit reaffirmed during the survey period that not all evidence of other crimes is "extrinsic" to the charged offense. If the other crimes are "inextricably intertwined" with the charged offense, then the evidence is not considered extrinsic for purposes of Rule 404(b).[66] Of course, this evidence is still subject to the Rule 403 balancing test.[67]

VII. 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.[68] In the limited situations in which evidence of character is admissible for substantive purposes, Rule 405 provides the methods for proving character.[69] However, one must again 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.

The Eleventh Circuit's decision in *United States v. Adair*[70] demonstrates that the Federal Rules of Evidence exact a high price for the use of character evidence. If a party elects to use admissible character evidence, the witnesses attesting to this character are subject to cross-examination about that party's specific conduct pertinent to the character trait in issue.[71] In *Adair* the government, prior to trial, informed the court that if defendant called character witnesses, it intended to question these witnesses about their knowledge of defendant's prior conviction. Defendant

62. 955 F.2d at 1455.
63. *Id.*
64. *Id.* at 1455-56.
65. *Id.* at 1456-57.
66. United States v. Fortenberry, 971 F.2d 717 (11th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3479 (1993); United States v. Church, 955 F.2d 688 (11th Cir. 1992), *cert. denied*, Coppola v. United States, 113 S. Ct. 233 (1992).
67. 971 F.2d at 717; 955 F.2d at 688.
68. Fed. R. Evid. 404(b).
69. Fed. R. Evid. 405.
70. 951 F.2d 316 (11th Cir. 1992).
71. *Id.* at 319.

elected not to call these witnesses. On appeal from his conviction, defendant contended that the district court's ruling that the government could ask character witnesses about his prior conviction forced him not to call his character witnesses and was erroneous.[72] The Eleventh Circuit held that if a witness testifies about a defendant's good character, then the prosecution can ask that witness "have you heard" questions.[73] Thus, the government properly could have asked defendant's character witnesses if they had heard of defendant's prior conviction.[74]

VIII. RULE 501. PRIVILEGES

The Federal Rules of Evidence make no effort to formulate rules recognizing and defining various evidentiary privileges, and if a claim or defense is based upon state law, applicable privileges will be determined by that state's law. This rule works well, for example, in diversity cases in which all claims are based upon state law, however, it is much more difficult when some claims are based on state law and other claims are based on federal law.

The Eleventh Circuit addressed such a situation in *Hancock v. Hobbs*,[75] a section 1983 action with pendent state law claims. Appellant contended that the district court admitted evidence of her psychiatric treatment in violation of a privilege created by Georgia law.[76] The Eleventh Circuit noted, however, that federal common law does not recognize a psychiatric patient privilege.[77] Thus, while appellant's psychiatric treatment might have been privileged under Georgia law, it was not protected by federal law. Unfortunately, "Rule 501 is not clear as to which rule of decision should be followed when the federal and state laws of privilege are in conflict."[78] Other circuits that have considered the issue, the court continued, have held that the federal law of privilege governs even though the evidence in question is relevant to a pendent state claim.[79] The Eleventh Circuit found this authority persuasive and held "the federal law of privilege provides the rule of decision in a civil proceeding where the court's jurisdiction is premised upon a federal question, even if the witness-testi-

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72. *Id.*

73. *Id. See* Marc T. Treadwell, *Evidence*, 38 MERCER L. REV. 1253, 1261 (1987).

74. The prosecution must, of course, have a good faith factual basis for its "have you heard" questions. 951 F.2d at 319.

75. 967 F.2d 462 (11th Cir. 1992).

76. *Id.* at 466; O.C.G.A. § 24-9-21 (1982).

77. 967 F.2d at 466.

78. *Id.*

79. *Id.* at 466-67.

mony is relevant to a pendent state law count which may be controlled by a contrary state law of privilege."[80]

The misleadingly named "last link" exception to the attorney/client privilege continues to receive considerable attention from the Eleventh Circuit. During the present survey period, the Eleventh Circuit appeared to revert to its previous course, a course that may eventually lead to the abolition of the last link exception. To understand the status of the last link exception in the Eleventh Circuit, it is helpful to review briefly the exception's history. Generally, the identity of a client or fee information is not protected by the attorney/client privilege.[81] The last link exception, which was conceived by the Ninth Circuit in *Baird v. Koerner*[82] and adopted by the Fifth Circuit prior to the split of the Fifth Circuit in *In re Grand Jury Proceedings (Jones)*,[83] protects fee and identity information from disclosure in certain narrow circumstances.[84]

In *In re Grand Jury Proceedings (Rabin)*,[85] the Eleventh Circuit carefully examined the last link exception and concluded that the test for determining whether a client's identity or fee information is privileged is not whether the information would be incriminating, as some courts have suggested, but rather is whether the disclosure of this information would necessarily result in the disclosure of privileged information.[86] In a concurring opinion in *Rabin*, Chief Judge Tjoflat urged the abolition of the last link exception because of "its inherent inconsistency with the crime/fraud exception to the attorney-client privilege."[87] When the Ninth Circuit decided *Baird*, Chief Judge Tjoflat argued the crime-fraud exception excluded only communications concerning future criminal or fraudulent conduct from the protection of the attorney/client privilege.[88] According to Chief Judge Tjoflat, however, the crime-fraud exception now is much broader and includes, in proper circumstances, communications with an attorney intended to conceal evidence of prior misconduct.[89] Thus, the identity of a client could never be privileged if the client retained the attorney in an effort to conceal a past crime, which is what happened in

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80. *Id.* at 467.

81. *In re* Grand Jury Proceedings, David R. Damore, 689 F.2d 1351, 1352 (11th Cir. 1982).

82. 279 F.2d 623, 633 (9th Cir. 1960).

83. 517 F.2d 666 (5th Cir. 1975). 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.

84. 517 F.2d at 672.

85. 896 F.2d 1267 (11th Cir. 1990).

86. *Id.* at 1273.

87. *Id.* at 1279 (Tjoflat, C.J., concurring).

88. *Id.* at 1280 (Tjoflat, C.J., concurring).

89. *Id.* (Tjoflat, C.J., concurring).

Baird. Consequently, Chief Judge Tjoflat argued, a court today considering a situation similar to that in *Baird* would reach a result different than that reached in *Baird*.[90] Chief Judge Tjoflat urged the Eleventh Circuit to sit en banc and "take a careful and critical look at [the] ill-conceived [last link] doctrine."[91]

Notwithstanding *Rabin* and in particular Chief Judge Tjoflat's concurrence, the following year the Eleventh Circuit, in *In re Grand Jury Proceedings (G.J. 90-2)*,[92] reached a result that simply cannot be reconciled with *Rabin*. The Eleventh Circuit rejected the government's argument in *G.J. 90-2* that revelation of a client's identity would not disclose privileged information as "disingenuous" and, thus, would not fall within the ambit of the last link exception.[93] In *G.J. 90-2*, the Eleventh Circuit seemed to hold that because the client's identity would be incriminating, this alone was sufficient to make it privileged.[94]

During the present survey period, the Eleventh Circuit's last link exception decisions seemed more in line with the decision in *Rabin*. In *United States v. Leventhal*,[95] the Eleventh Circuit, in a per curiam opinion delivered by a panel that included Chief Judge Tjoflat, held that the last link exception applies only when disclosure of nonprivileged attorney/client communications would also reveal privileged information.[96] In a footnote, the court noted that "[m]odern expansion of the crime-fraud exception . . . threatens the continued vitality of the last link doctrine."[97] Similarly, in *In re Grand Jury Matter No. 91-01386*,[98] the Eleventh Circuit held that the last link exception prevented disclosure of a client's identity only when the revelation of the identity would reveal the privileged motive for the client to seek legal advice.[99]

Perhaps, as Chief Judge Tjoflat suggested, the Eleventh Circuit should sit en banc to decide definitively the status of the last link exception. However, it would seem safe to say that the broad interpretation applied by the Eleventh Circuit in *C.J. 90-2* is no longer valid law in the Eleventh Circuit.

One can safely assume that few lawyers will ever encounter the speech or debate privilege extended to members of Congress.[100] For those inter-

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90. *Id.* at 1281 (Tjoflat, C.J., concurring).
91. *Id.* at 1283 (Tjoflat, C.J., concurring).
92. 946 F.2d 746 (11th Cir. 1991).
93. *Id.* at 748.
94. *Id.*
95. 961 F.2d 936 (11th Cir. 1992).
96. *Id.* at 941.
97. *Id.* at 940 n.10.
98. 969 F.2d 995 (11th Cir. 1992).
99. *Id.* at 999.
100. U.S. CONST. art. I, § 6, cl. 2.

ested in this privilege, however, the Eleventh Circuit's lengthy opinion in *United States v. Swindall*[101] will be of great interest. To most practitioners the practical utility of this privilege is virtually nil. Since the practicle utility of the privilege to this author is even more nil, this survey will only acknowledge this significant decision.

IX. Rule 608. Evidence of Character and Conduct of Witness

Rule 608(b) prohibits the admission of evidence of specific instances of conduct to impeach the general credibility of a witness.[102] It does not, however, prohibit the admission of such evidence to impeach a witness' specific testimony as to a material fact.[103] The Eleventh Circuit's decision in *United States v. Wright*[104] provides a clear illustration of the proper application of Rule 608(b).

In *Wright* the government's chief witness denied on cross examination any involvement in two prior burglaries. Defendants subsequently sought to call a witness who would testify that the government's witness admitted his involvement.[105] The Eleventh Circuit held that this testimony constituted extrinsic evidence of a specific instance of bad conduct offered to undermine the general credibility of a witness and, therefore, fell squarely within Rule 608(b).[106] Defendants argued that the proffered testimony was material because another witness had testified that the government's witness was a first time offender, and the evidence of the prior burglaries rebutted the government witness' testimony that he was instructed by one of the defendants how to commit the charged offense.[107] The Eleventh Circuit rejected this argument, noting only that the evidence did not contradict the government's witness' testimony.[108]

X. Rule 609. Impeachment by Evidence of Conviction of Crime

In *United States v. Pritchard*,[109] defendant contended the district court erred when it permitted the government to use a thirteen year old

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101. 971 F.2d 1531 (11th Cir. 1992).
102. Fed. R. Evid. 608(b).
103. *See, e.g.*, United States v. Opager, 589 F.2d 799 (5th Cir. 1979). For a fuller discussion of Rule 608(b), see Marc T. Treadwell, *Evidence*, 43 Mercer L. Rev. 1173, 1183-84 (1992).
104. 968 F.2d 1167 (11th Cir. 1992).
105. *Id.* at 1169.
106. *Id.* at 1170.
107. *Id.*
108. *Id.*
109. 973 F.2d 905 (11th Cir. 1992).

conviction to impeach his general credibility.[110] Specifically, defendant argued the admission of this evidence contravened Rule 609(b), which prohibits the admission of a conviction more than ten years old "unless the court determines . . . that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."[111] In *Pritchard* the government faced an uphill struggle because the Eleventh Circuit recognizes a strong presumption against the use of convictions over ten years old.[112] Relying upon a decision from the Sixth Circuit, however,[113] the Eleventh Circuit held the district court properly considered the factors pertinent to the determination of whether such a conviction should be admitted and did not abuse its discretion when it admitted evidence of the conviction.[114] First, the Eleventh Circuit noted, the central issue in the case was credibility—whether the jury should believe defendant's testimony or the testimony of his accomplice who testified on behalf of the government.[115] The criminal record of the accomplice had been admitted into evidence and this made defendant's criminal record particularly significant.[116] Second, the government's need for the impeaching evidence was great and this militated in favor of the admission of the conviction.[117] Finally, the court noted the prior conviction, although somewhat similar to the charged offense, was not so similar that a jury would consider it evidence defendant had committed the charged offense (a conclusion prohibited by Rule 404(b)).[118]

XI. Rule 611. Mode and Order of Interrogation and Presentation

Rule 611(b) permits the cross examination of a witness on "matters affecting the credibility of the witness."[119] District courts retain, however, broad discretion to determine the permissible scope of cross examination.[120] This discretion, as illustrated by the Eleventh Circuit's decision in *United States v. Lankford*,[121] is not unlimited.

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110. *Id.* at 907.

111. Fed. R. Evid. 609(b). It should be emphasized that Rule 609 applies only to convictions offered to impeach general credibility and does not apply to convictions admitted to contradict a defendant's material testimony. *See, e.g.*, United States v. Vigliatura, 878 F.2d 1346 (11th Cir. 1989).

112. 973 F.2d at 908.

113. United States v. Sloman, 909 F.2d 176 (6th Cir. 1990).

114. 973 F.2d at 909.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Fed. R. Evid. 611(b).

120. *See, e.g.*, United States v. Jones, 913 F.2d 1552, 1564 (11th Cir. 1990).

121. 955 F.2d 1545 (11th Cir. 1992).

In *Lankford* defendant, a former sheriff of Fulton County, Georgia, was convicted of extortion and filing false income tax returns. The charges stemmed from a series of alleged payments to defendant by the witness, Jack LeCroy, and the government's case largely rested on LeCroy's testimony.[122] Although the district court allowed extensive examination of LeCroy, including examination about the grant of immunity to LeCroy in exchange for his cooperation with the government, it refused to allow defendant to question LeCroy about the unrelated arrest of LeCroy's sons by state authorities on charges of possession with intent to distribute marijuana.[123]

While acknowledging the district court's broad authority to limit cross examination, the Eleventh Circuit noted this authority is not as extensive when a criminal defendant questions a witness testifying against the defendant.[124] In this situation, the court must allow questioning that would permit "a jury to adequately assess the witness' credibility . . . ."[125] The Eleventh Circuit concluded the arrest of his sons may have provided LeCroy with a motive to testify falsely to protect his sons.[126] The court cited no evidence in the record of such a motive and appeared concerned that LeCroy's sons already had pleaded guilty to the state charges and were on probation at the time of defendant's trial.[127] Because the prosecution of the sons was over, certainly one could question how this incident could have provided LeCroy with a motive to lie about his dealings with defendant. To overcome this problem, the Eleventh Circuit, in a footnote, noted it is "common knowledge" that state and federal law enforcement officers worked closely together and that it is not "unusual" for federal officers to pursue charges in federal court even though the state charges have been resolved.[128]

In dissent, District Court Judge Walter E. Hoffman scoffed at the suggestion LeCroy's testimony could have been influenced by his sons' arrest, noting the lack of "one scintilla of evidence" to support this conclusion.[129] Moreover, Judge Hoffman argued the "majority's attempts to raise the specter of 'joint task forces' between federal and state authorities is simply unbelievable in a case of this nature."[130] Judge Hoffman concluded

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122. *Id.* at 1547.
123. *Id.* at 1548-49.
124. *Id.* at 1548.
125. *Id.*
126. *Id.* at 1548-49.
127. *Id.* at 1549 n.7.
128. *Id.* at 1549 n.8.
129. *Id.* at 1555 (Hoffman, J., dissenting).
130. *Id.* (Hoffman, J., dissenting).

the district court did not abuse its discretion and, even if it did, the error was harmless.[131]

The Eleventh Circuit's decision in *United States v. Williams*[132] perhaps provides a clearer example of improper limitations on a defendant's right of cross examination. In *Williams* the district court did not permit defendant to establish that an informant received almost $450,000 in reward money.[133] The Eleventh Circuit, clearly incensed at the amount of this payment, reversed defendant's conviction, concluding a defendant is entitled to question a witness about possible motivations.[134] Responding to the government's argument that the introduction of this evidence would be prejudicial, the court declared:

> If the amount paid an informant is felt by the government to be too prejudicial for an American jury to hear about, the solution is for the government to make reasonable payments; the solution is not for the court to rule the evidence irrelevant as too prejudicial. We have never approved of a rule which makes small payments to informants admissible, but large, outrageous payments inadmissible. The large and outrageous payments may be just the kind that are of the most help to the jury in arriving at the truth.[135]

Enough said.

XII. Federal Rule of Evidence 704. Opinion on Ultimate Issue

Rule 704(a) provides that opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[136] Nevertheless, the Eleventh Circuit frequently struggles with the issue of whether experts should be permitted to opine on such questions as whether a party was negligent or whether a collision was an accident, and the court has sometimes reached arguably conflicting results.[137] This issue again surfaced in *United States v. Myers*.[138] In *Myers* two witnesses with law enforcement backgrounds testified that defendant, also a law enforcement officer, used unreasonable and unjustified force against plaintiff.[139]

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131. *Id.* at 1563 (Hoffman, J., dissenting).
132. 954 F.2d 668 (11th Cir. 1992).
133. *Id.* at 671.
134. *Id.* at 672.
135. *Id.*
136. Fed. R. Evid. 704.
137. *See* discussion of these issues in Marc T. Treadwell, *Evidence*, 40 Mercer L. Rev. 1291, 1311-12 (1989); Marc T. Treadwell, *Evidence*, 41 Mercer L. Rev. 1357, 1370 (1990); Marc T. Treadwell, *Evidence*, 42 Mercer L. Rev. 1451, 1469-70 (1991).
138. 972 F.2d 1566 (11th Cir. 1992).
139. *Id.* at 1576.

The Eleventh Circuit agreed that a witness invades the province of the jury when testifying that force was unreasonable or unjustified, but nevertheless held that an expert witness can testify as to the prevailing standards in the field of law enforcement.[140] The Eleventh Circuit reasoned that "in light of the questioning and answers given," the opinions were properly framed in accordance with prevailing police standards.[141]

Rule 704(b) prohibits an expert in a criminal case from stating an opinion about whether defendant did or did not have the mental state constituting an element of the crime or a defense to the crime.[142] As discussed in previous surveys, this provision has proved difficult to apply.[143] Although the majority opinion in *United States v. Lankford*[144] does not mention Rule 704(b), it no doubt will add to the difficulties of applying Rule 704(b).

In *Lankford* the district court excluded defendant's proffered expert testimony that he reasonably could have believed that a $1,500 check was a gift rather than taxable income. The majority, noting defendant was charged with willfully filing a false income tax return, concluded "[e]xpert testimony of the reasonableness of Lankford's belief would be highly relevant to the assessment of whether Lankford willfully violated the tax laws."[145] In a detailed dissent partially relying on Rule 704, Senior District Court Judge Walter E. Hoffman vigorously disputed the majority's conclusion. Judge Hoffman argued that defendant's expert's testimony, shorn of its frills, amounted to nothing more than a pronouncement that defendant did not have the requisite mental state to violate the law. Judge Hoffman worried the "effect of today's decision will be to open the door in cases not involving a disease of the mind to expert testimony as to what a person was thinking at a certain point in time."[146] Whether or not this will be the effect of *Lankford*, it no doubt will lead criminal defendants to at least attempt to use such expert testimony.

XIII. ARTICLE VIII. HEARSAY

Given the Eleventh Circuit's large criminal case load, a survey of its decisions concerning hearsay must open with a discussion of the seem-

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140. *Id.* at 1577.

141. *Id.*

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

143. *See, e.g.*, Marc T. Treadwell, *Evidence*, 39 MERCER L. REV. 1259, 1276-78 (1988); Marc T. Treadwell, *Evidence*, 40 MERCER L. REV. 1291, 1309-11 (1989); Marc T. Treadwell, *Evidence*, 41 MERCER L. REV. 1357, 1370 (1990); Marc T. Treadwell, *Evidence*, 42 MERCER L. REV. 1451, 1469-70 (1991).

144. 955 F.2d 1545 (11th Cir. 1992).

145. *Id.* at 1551.

146. *Id.* at 1562.

ingly inherent conflict between the use of hearsay evidence in criminal cases and the confrontation clause of the Sixth Amendment.[147] If the out of court statement of an unavailable declarant is admitted into evidence, the defendant will not "be confronted with the witnesses against him."[148] For a number of years, the Supreme Court's landmark decision in *Ohio v. Roberts*[149] was understood to hold the Sixth Amendment imposed two limitations on the use of hearsay evidence.[150] First, hearsay evidence is not admissible unless the prosecution proves the declarant is unavailable.[151] Second, the hearsay statement must bear "adequate 'indicia of reliability.' "[152] In *United States v. Inadi*,[153] however, the Supreme Court concluded *Roberts* does not stand for the proposition that "no out-of-court statement can be introduced . . . without a showing that the declarant is unavailable."[154] In *Inadi* the Court held the confrontation clause does not require a showing of unavailability as a prerequisite to the admission of a co-conspirator statement under Rule 801(d)(2)(E).[155] The Supreme Court again visited this issue in *Idaho v. Wright*.[156] In *Wright* the out of court declarant, a child, was admittedly unavailable to testify. Therefore, the issue became whether the out of court statement satisfied the reliability requirement of the second prong of the *Roberts* test.[157] The decision in *Roberts* suggested, and the Supreme Court later confirmed, that the requisite indicia of reliability could be found if the evidence fell within a firmly rooted hearsay exception.[158] In *Wright* the lower court admitted the out of court statement under Idaho's residual exception to the hearsay rule, an exception that the Supreme Court concluded was not sufficiently rooted to establish automatically the requisite reliability.[159] Therefore, the circumstances surrounding the statement had to be examined to determine if the statement was sufficiently trustworthy. Significantly, the Court noted that the reliability of the statement could not be established by corroborating evidence, but rather the statement "must possess indicia of reliability by virtue of its inherent trustworthiness."[160]

147. U.S. CONST. amend. VI.
148. *Id.*
149. 448 U.S. 56 (1980).
150. *Id.* at 66.
151. *Id.*
152. *Id.*
153. 475 U.S. 387 (1986).
154. *Id.* at 394.
155. *Id.* at 399-400.
156. 497 U.S. 805 (1990).
157. *Id.* at 816.
158. Bourjaily v. United States, 483 U.S. 171 (1987).
159. 497 U.S. at 817.
160. *Id.* at 822.

During the present survey period, the Supreme Court again examined the conflict between hearsay evidence and the confrontation clause. In *White v. Illinois*,[161] the state trial court admitted testimony from several witnesses concerning statements made to them by a child who allegedly had been sexually molested by defendant. The court admitted the testimony of these witnesses (a babysitter, the child's mother, an investigating officer, an emergency room nurse, and a doctor) pursuant to Illinois' hearsay exceptions for spontaneous declarations and statements made in the course of securing medical treatment. Defendant argued that the admission of this evidence violated his right to confront his accuser.[162]

The Supreme Court first rejected the argument of the United States as amicus curiae that the confrontation clause should be narrowly read to apply only to a practice common in sixteenth and seventeenth century England: the use of ex parte affidavits to prove a defendant's guilt.[163] Thus, the United States argued the confrontation clause should not restrict the admission of hearsay evidence generally but should only apply to "witnesses against" a defendant.[164] The Court summarily rejected this argument, noting "[s]uch a narrow reading of the Confrontation Clause, which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by our prior cases."[165]

Turning to defendant's contentions, the Supreme Court first addressed whether it was necessary to demonstrate the child's unavailability.[166] The Court acknowledged that its decision in *Roberts* suggested the confrontation clause generally required the declarant's unavailability be proved.[167] Noting its decision in *Inadi*, however, the Court concluded that *Roberts* stood only for the proposition that a witness' unavailability must be proven when the out of court statement is admitted pursuant to a hearsay exception for statements made in the course of a prior judicial proceeding.[168] In other words, the *Roberts*' unavailability requirement is now officially restricted to its facts.

The Court then concluded that statements admitted pursuant to hearsay exceptions for spontaneous declarations and statements made in the course of receiving medical care do not require a demonstration of a declarant's unavailability.[169] Such statements are reliable because they are

161. 112 S. Ct. 736 (1992).
162. *Id.* at 739-40.
163. *Id.* at 740.
164. *Id.*
165. *Id.* at 741.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 742.

made in situations that provide substantial guarantees of their trustworthiness. The factors which make these statements reliable, spontaneity and the desire to impart accurate information to facilitate medical treatment, would not be present when a declarant testifies in court.[170] "To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrong-headedness, given that the Confrontation Clause has as a basic purpose the promotion of the 'integrity of the fact-finding process.' "[171]

In a concurring opinion, Justices Thomas and Scalia agreed with the United States' argument and urged the Court, in an appropriate case, to reconsider fundamentally the relationship between the confrontation clause and the admission of hearsay evidence.[172]

The Eleventh Circuit addressed the interrelationship between the confrontation clause and the admission of hearsay evidence in *United States v. Accetturo*.[173] In *Accetturo* the declarant borrowed and then failed to repay money to defendants. After being physically threatened, the declarant gave a statement to authorities and began cooperating with their investigation of defendants. The declarant disappeared two days before defendants' trial began and was found murdered five days later.[174] The district court admitted his statement pursuant to Rule 804(b)(5), the residual hearsay exception. However, in determining the trustworthiness of the declarant's statement, the district court relied upon independent corroborative evidence,[175] a process that defendants contended contravened *Idaho v. Wright*.[176]

On appeal, the Eleventh Circuit acknowledged that the decision in *Wright* prohibited the use of independent evidence to evaluate the trustworthiness of hearsay evidence.[177] The court also acknowledged that the residual exception to the hearsay rule is not a firmly rooted hearsay exception that would raise a presumption of trustworthiness.[178] Thus, the court determined whether the circumstances surrounding the statement, rather than the corroborative evidence relied upon by the district court, were sufficient to establish the requisite reliability of the statement.[179] The court found that it was.[180]

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170. *Id.*
171. *Id.* at 743 (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988)).
172. *Id.* at 748 (Scalia & Thomas, JJ., concurring).
173. 966 F.2d 631 (11th Cir. 1992).
174. *Id.* at 632.
175. *Id.* at 633.
176. 497 U.S. 805 (1990).
177. 966 F.2d at 634.
178. *Id.*
179. *Id.*
180. *Id.* at 636.

The statement was in the declarant's own handwriting, it was made voluntarily, and it was given to law enforcement authorities, whom the declarant knew would likely investigate his statements. In addition, the declarant, after giving the statement, agreed to allow his conversations with defendants to be recorded. Also, the statement was in narrative form and, thus, the declarant was not responding to leading questions. The declarant was the victim of the defendant's alleged crimes and, therefore, had ample opportunity to witness the events in his statement. Finally, the statement was made while the events were fresh in the declarant's mind. Most important to the Eleventh Circuit, the declarant feared for his life and, therefore, had no incentive to fabricate a story that would only lead to further investigation by authorities.[181] Considering these factors, the court concluded that "the indicia of reliability are strong enough to overcome the presumption against the admissibility of hearsay evidence pursuant to a residual hearsay exception."[182]

The Federal Rules of Evidence's version of the business records exception to the rule against hearsay is found in Rule 803(6). In *United States v. Jacoby*,[183] the Eleventh Circuit addressed the issue of whether *unusual* business activity can fall within the business records exception.[184] In *Jacoby*, a criminal prosecution arising from a savings and loan failure, the district court admitted a memorandum prepared by a real estate attorney. In his memorandum to the file, the attorney recounted in some detail a telephone conversation with one of the defendants in which the defendant asked him to close several loans notwithstanding apparent irregularities. The attorney did not testify at trial and the government established the foundation for the admission of the evidence through the attorney's secretary and a paralegal.[185] The district court did not admit the memorandum under Rule 803(6) because of its concern that the memorandum was "not a routine type of thing."[186] The court did, however, admit the memorandum under Rule 804(b)(5), the residual exception.[187]

On appeal, the Eleventh Circuit chose not to analyze the memorandum under Rule 804(b)(5) but rather proceeded to determine whether the memorandum was an admissible business record.[188] Defendant contended

181. *Id.* at 635.
182. *Id.* at 636.
183. 955 F.2d 1527 (11th Cir. 1992).
184. *Id.* at 1535.
185. *Id.* at 1534-35.
186. *Id.* at 1535.
187. *Id.*
188. *Id.* The reason why the court did not rely upon Rule 804(b)(5) merits note. Defendant contended that the admission of the out of court statement violated his constitutional right to confront the witnesses against him. The limitations of the use of hearsay evidence in criminal prosecutions is discussed above and, as noted, hearsay evidence meets the re-

the memorandum could not be a business record because it did not record a routine event.[189] The Eleventh Circuit responded that because a document is not routine does not necessarily mean it cannot be within the business records exception.[190] Rather, nonroutine records may still be admissible if they otherwise meet the requirements of Rule 803(6), and the trial court finds them to be sufficiently trustworthy.[191] The Eleventh Circuit also found that while the memorandum recorded an unusual event, it was the attorney's regular practice to prepare such memoranda to document unusual events.[192] Therefore, the district court properly admitted the memorandum albeit for reasons different than originally stated.[193]

Rule 801(d)(2)(E) provides that statements by co-conspirators are not hearsay.[194] In previous surveys, the author has speculated that the Supreme Court's decision in *Bourjaily v. United States*,[195] which substantially relaxed the test for the admission of co-conspirator statements, was responsible for the fact that Rule 801(b)(2)(E) did not figure prominently in appeals to the Eleventh Circuit. Indeed, because the Eleventh Circuit now applies a very liberal standard for the admission of co-conspirator statements, the likelihood of reversal of a conviction because of improper admission of such a statement has been reduced considerably. The Eleventh Circuit's decision in *United States v. Blakey*[196] demonstrates, however, that this liberal standard has some limitations.

In *Blakey* the district court admitted the statement of a co-conspirator implicating defendant. A bank officer testified that the co-conspirator, when questioned about the authenticity of a check, said that defendant gave him the check. The evidence sufficiently established that both defendant and the co-conspirator were members of the conspiracy.[197] The question, however, was whether the statement was made in furtherance of the conspiracy. While the Eleventh Circuit acknowledged that statements concealing a conspiracy are considered to be made in furtherance of the conspiracy, it noted statements that simply shift the blame from one co-conspirator to another are not considered to have been made to advance

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quirements of the confrontation clause if it falls within a firmly rooted hearsay exception. Residual exceptions are not considered to be sufficiently firmly rooted. Business records exceptions are, however, and for this reason the Eleventh Circuit evaluated the memorandum under the requirements of Rule 803(6). 955 F.2d at 1535-38.

189. 955 F.2d at 1535.
190. *Id.*
191. *Id.* at 1537.
192. *Id.*
193. *Id.* at 1536.
194. FED. R. EVID. 801(d)(2)(E).
195. 483 U.S. 171 (1987).
196. 960 F.2d 996 (11th Cir. 1992).
197. *Id.* at 998.

any objective of the conspiracy.[198] Thus, statements that the Eleventh Circuit termed "spill the beans" statements are not admissible under the co-conspirator exception to the hearsay rule.[199] After examining the evidence, the Eleventh Circuit concluded the co-conspirator's statement was simply an effort to shift the blame to defendant and, therefore, was not admissible under Rule 801(d)(2)(E).[200]

XIV. Rule 1002. Requirement of Original

The Federal Rules' version of the best evidence rule is found in Rule 1002 that simply provides "to prove the content of a writing, recording or photograph, the original . . . is required . . . ."[201] Although the best evidence rule is often seized as the basis for any objection to the use of a copy of a document, its actual application is very narrow, as demonstrated by the Eleventh Circuit's opinion in *United States v. Howard*.[202] In *Howard* a government witness who taped a conversation between defendant and an informant testified about the taped conversation. The district court first allowed the tape to be played for the jury, but the explanatory testimony was necessary because a portion of the tape was inaudible. Defendant contended this violated the best evidence rule.[203] The Eleventh Circuit disagreed, reasoning that the witness' testimony was not offered to prove the content of the tapes but rather to prove what he heard defendant say.[204] In the Eleventh Circuit's view, the witness' testimony was simply a "testimonial recollection of the conversation . . . ."[205] Thus, because the testimony was admitted to prove the contents of the conversation rather than the contents of the tape, the best evidence rule did not apply.[206]

198. *Id.*
199. *Id.*
200. *Id.* at 999. Notwithstanding the Eleventh Circuit's reversal of defendant's conviction in *Blakey*, the court continues to apply a very liberal standard for the admission of the coconspirator statements. *See, e.g.*, United States v. Thompson, 976 F.2d 666 (11th Cir. 1992).
201. Fed. R. Evid. 1002.
202. 953 F.2d 610 (11th Cir. 1992).
203. *Id.* at 612.
204. *Id.*
205. *Id.*
206. *Id.* at 613.