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Evidence

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I. INTRODUCTION

On March 8, 2004, the United States Supreme Court, in *Crawford v. Washington*,[1] rendered its most significant evidence decision in a number of years. Since the Court's 1980 ruling in *Ohio v. Roberts*,[2] holding that the Sixth Amendment's confrontation clause does not necessarily bar the admission of out of court statements in criminal trials, federal and state courts have increasingly allowed prosecutors to use hearsay statements against criminal defendants if trial judges found that the statements bore sufficient indicia of reliability. *Crawford* likely will bring an end to that.

As the author has often commented in surveys of Georgia evidence decisions, Georgia appellate courts have stretched *Ohio v. Roberts* to its absolute limits through what has become known as the necessity exception to the rule against hearsay.[3] Statements by an absent witness to police, for example, are routinely admitted under the suspect theory that statements to law enforcement officers are somehow inherently reliable.[4] In *Crawford*, the Supreme Court overruled *Ohio v. Roberts* and held that out of court statements by unavailable witnesses are not admissible at trial unless the witness is unavailable *and* the defendant had prior opportunity to cross-examine the witness; no matter how reliable the statements may be, they are not admissible absent an opportunity by the defendant to cross-examine the declarant.[5]

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1. 124 S. Ct. 1354 (2004).
2. 448 U.S. 56 (1980).
3. *See, e.g.*, Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 330-31 (2002).
4. *See, e.g.*, Jones v. State, 240 Ga. App. 723, 524 S.E.2d 773 (1999).
5. *Crawford*, 124 S. Ct. at 1374.

The precise ramifications of *Crawford* will take some time to sort out, but they no doubt will be pervasive. Clearly, it would seem, Georgia's necessity exception will fall.

The current survey period provided more evidence of an undeniable trend in the United States Court of Appeals for the Eleventh Circuit. Fewer cases had any significant discussion of evidentiary issues. Whether this is good depends on one's perspective. For example, criminal defense lawyers surely look back wistfully to the years when the Eleventh Circuit minutely scrutinized district court evidentiary decisions and freely reversed convictions on the grounds that district courts erroneously admitted, for example, extrinsic act evidence or evidence whose probative value was outweighed by its prejudicial impact. Those lawyers may argue that the Eleventh Circuit and the federal judiciary generally have become more conservative. Others, however, will argue that the Eleventh Circuit is simply applying the abuse of discretion standard as it should be applied. That a district court is wrong is not enough; the broad discretion afforded to district judges on evidentiary issues requires a higher showing. In any event, the fact that the Eleventh Circuit rarely overturns district court evidentiary decisions—or for that matter vigorously debates those decisions—is beyond dispute.

The one exception to this trend is appeals inspired by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[6] As in past years, *Daubert* figured prominently in Eleventh Circuit decisions as district courts and the Eleventh Circuit continued to struggle in their efforts to define the district court's role as gatekeeper—to block suspect expert testimony at the courthouse door.

II. ARTICLE IV: RELEVANCY

As noted in prior surveys,[7] Rule 403,[8] once a tool frequently used by the Eleventh Circuit to reverse convictions, has not been used successfully in recent years by defendants claiming that district courts improperly admitted prejudicial evidence. Nevertheless, during the past two survey periods, Rule 403 figured prominently in Eleventh Circuit decisions,[9] and that was again the case during the current survey period. These recent cases do not likely suggest a return to the days of minute scrutiny of district court evidentiary decisions, but they may offer some help to

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6. 509 U.S. 579 (1993).

7. *See, e.g.*, Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 1027, 1032 (1998).

8. FED. R. EVID. 403.

9. Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 1487, 1491-92 (2003); Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 1399, 1399-1403 (2002).

criminal defense lawyers attacking the admission of unduly prejudicial evidence.

In *United States v. Jernigan*,[10] defendant claimed he was improperly prejudiced when his co-defendant tendered evidence that defendant was a gang member.[11] The Eleventh Circuit first noted that co-defendant did not simply demonstrate that defendant was a gang member, which the court acknowledged implied that the defendant was a "bad person," but rather co-defendant introduced evidence that the gang, in which defendant was a member, often wrapped firearms in red bandanas, the gang's color.[12] Because ownership of a firearm found wrapped in a red scarf was a key issue in the case, the evidence was probative of a legitimate issue.[13] Nevertheless, the Eleventh Circuit was concerned about the prejudicial impact of evidence of gang membership.[14] "Indeed, modern American street gangs are popularly associated with a wealth of criminal behavior and social ills, and an individual's membership in such an organization is likely to provoke strong antipathy in a jury."[15] Consequently, "the Rule 403 calculus was in [the court's] view a close one, and the district court would have been justified in deciding this issue either way."[16] However, the Eleventh Circuit spent some time acknowledging and describing the district court's unique position to observe and determine first-hand the potential prejudicial impact of such evidence.[17] Some evidentiary decisions "turn on matters uniquely within the purview of the district court, which has first-hand access to documentary evidence and is physically proximate to testifying witnesses and the jury."[18] Consequently, though the question was close, the Eleventh Circuit deferred to the district court's "unique position" and refused to overturn defendant's conviction.[19]

In *United States v. Dodds*,[20] defendant, who was charged with possessing child pornography, claimed the admission of 66 of the 3400 pornographic pictures found in his possession was sufficiently prejudicial to outweigh the minimal probative value of the evidence.[21] Perhaps

10. 341 F.3d 1273 (11th Cir. 2003).
11. *Id.* at 1277-78.
12. *Id.* at 1284.
13. *Id.* at 1285.
14. *Id.*
15. *Id.* at 1284-85.
16. *Id.* at 1285.
17. *Id.*
18. *Id.*
19. *Id.*
20. 347 F.3d 893 (11th Cir. 2003).
21. *Id.* at 895-96.

tipping its hand, the Eleventh Circuit first noted that Rule 403 is an extraordinary remedy that should be invoked only sparingly and that district courts applying the 403 balancing test should favor the admission of relevant evidence.[22] The Eleventh Circuit distinguished cases relied on by defendant noting that in *Dodds*, the disputed evidence was not extrinsic, but rather constituted the crime for which defendant was charged.[23] Also, the 66 pictures introduced were a fraction of the 3400 pictures found in defendant's possession. Moreover, the Eleventh Circuit decided that *Dodds* was not a case in which defendant simply had the images in his possession but had not actually viewed them.[24] Although defendant denied that he looked at the pictures, other evidence suggested that he had.[25] The photographs were clearly probative.[26] The photographs depicted child pornography, and defendant knew the pictures depicted child pornography.[27] Thus, the photographs tended to prove defendant's intent to collect such pornography.[28] Under these circumstances, the court held that the district court did not abuse its discretion when it concluded that the probative value of the 66 photographs outweighed the prejudicial impact of their admission.[29]

The Eleventh Circuit's decision in *United States v. Harriston*[30] does not directly involve Rule 403 but demonstrates that sometimes evidence can be so prejudicial that convictions must be overturned.[31] In *Harriston* the prosecution inexplicably adduced evidence that defendant had been convicted of an unrelated murder. At trial, even the prosecution acknowledged that the testimony was inadmissible. Although the district court recognized the obvious prejudicial impact of the evidence, it denied defendant's motion for a mistrial on all counts of the indictment.[32] The Eleventh Circuit reversed, holding that defendant was entitled to a new trial.[33]

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22. *Id.* at 897.
23. *Id.* at 897-99.
24. *Id.* at 898.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 899.
29. *Id.*
30. 329 F.3d 779 (11th Cir. 2003).
31. *Id.* at 788-89.
32. *Id.* at 781.
33. *Id.* at 789.

III. ARTICLE V: PRIVILEGES

Both prosecutors and criminal defense attorneys should study carefully the Eleventh Circuit's decision in *United States v. Almeida*.[34] In *Almeida* the Eleventh Circuit attempted to provide clear guidance for co-defendants entering into joint-defense agreements.[35] Two defendants, who were charged with narcotics trafficking, entered into a joint-defense agreement and thereafter shared voluminous information, including work product and privileged attorney-client communications. However, shortly before trial, one defendant, Fainberg, pleaded guilty to one count of racketeering and agreed to testify against his co-defendant, Almeida.[36]

When Fainberg testified at trial, Almeida's attorney asked Fainberg to recite information he had provided to Almeida's attorney. The prosecutor objected on the grounds that the communications conveying the information were privileged, and recounting that information in open court would amount to a waiver of the attorney-client privilege. The district court sustained the objection, ruling that because of defendants' joint-defense agreement, Almeida's attorney could not use any information he obtained from Fainberg. The district court also ruled that the government, as an interested party, had standing to object to protect the attorney-client relationship created by the joint-defense agreement. Post trial proceedings and discovery revealed that if Fainberg had been allowed to testify, Fainberg would have provided information helpful to Almeida's defense.[37]

On appeal, Almeida primarily argued that his right to effective representation was abridged by the district court's sweeping ruling.[38] The Eleventh Circuit, however, took a different tack. The Eleventh Circuit first distinguished joint-defense agreements from situations in which one attorney jointly represents two defendants.[39] In the latter, the guilty plea of one defendant clearly places the attorney in a position of irreconcilable conflict.[40] How, the Eleventh Circuit posited, can an attorney vigorously cross-examine one client who has turned against his other client without violating his duty of loyalty to one or the other?[41]

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34. 341 F.3d 1318 (11th Cir. 2003).
35. *Id.* at 1318.
36. *Id.* at 1320.
37. *Id.* at 1320-21.
38. *Id.* at 1323.
39. *Id.* at 1326.
40. *Id.* at 1323.
41. *Id.*

In a joint-defense agreement, however, each defendant has his own attorney.[42] While confidential communications made as part of the joint defense are privileged, the attorney of one defendant does not owe a duty of loyalty to a co-defendant because the attorney does not represent the co-defendant.[43] While those communications are privileged, the Eleventh Circuit noted that privileges can be waived, and it announced a broad and clear rule:

> We hold that when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence.[44]

To be certain that defense lawyers took note of this rule, the court suggested that defense attorneys "should insist that their clients enter into written joint defense agreements that contain a clear statement of the waiver rule enunciated in this case . . . ."[45]

The Eleventh Circuit also provided some instruction to attorneys seeking to raise—and protect—the attorney-client privilege in *Bogle v. McClure*.[46] In *Bogle* Atlanta-Fulton Public Library System employees brought discrimination claims, and to prove their claims, relied in part on memoranda from the Fulton County Attorney's Office providing legal advice to library board members.[47] The appeal seemed to present the issue of whether the memoranda fell within the attorney-client privilege exemption to Georgia's Open Records Act.[48] However, the Eleventh Circuit decided it unnecessary to address that issue.[49] Noting that a party invoking the attorney-client privilege must prove the privileged and confidential nature of the communications, the Eleventh Circuit held that the library had not carried its burden.[50] Although the memoranda provided legal advice, they were not designated "privileged" or "confidential," and the library presented no evidence regarding who, if anyone, other than the parties to the memoranda, had access to the memoranda

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42. *Id.*
43. *Id.*
44. *Id.* at 1326.
45. *Id.*
46. 332 F.3d 1347 (11th Cir. 2003).
47. *Id.* at 1358.
48. *Id.*; *See* O.C.G.A. § 50-18-72(e)(1) (2002 & Supp. 2003).
49. *Bogle,* 332 F.3d at 1358.
50. *Id.*

or whether the parties considered the memoranda to be confidential.[51] Therefore, because the library did not carry its burden of establishing that the memoranda were both privileged and confidential, the district court did not abuse its discretion when it admitted the memoranda.[52]

IV. ARTICLE VII: OPINION TESTIMONY

Surely many believe that the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[53] assigning district judges the role of gatekeeper to keep "junk science" out of the courtroom,[54] and the subsequent codification of *Daubert* in the Federal Rules of Evidence,[55] were beneficial developments. But others can argue that the benefits have come at some cost. District courts conduct days-long *Daubert* hearings, and appellate courts render lengthy and sometimes arguably conflicting decisions trying to define the proper gatekeeping role for district judges. Consequently, many question whether *Daubert* has been worth the judicial resources it has cost. This question is particularly pertinent during the current survey period. During this period, the Eleventh Circuit twice reaffirmed the crucial role that cross-examination, the time-honored method of getting to the truth of the matter, can play in ferreting out suspect expert testimony.[56] As an aside, Georgia courts have repeatedly refused to adopt *Daubert*,[57] a decision that seems prudent if for no reason other than the relatively limited resources available to Georgia trial courts.

The Eleventh Circuit's decision in *Hudgens v. Bell Helicopters/Textron*[58] illustrates how time consuming and frustrating *Daubert* analysis can be. In *Hudgens* plaintiffs sought in two separate cases to recover damages for injuries suffered from the crash of a military helicopter. In both cases, the district courts entered summary judgments for defendants. Both district courts struck, for *Daubert* reasons, portions of expert witness affidavits and testimony relied upon by plaintiffs. One of the critical issues, and the issue relevant to the *Daubert* analyses, was

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51. *Id.*
52. *Id.*
53. 509 U.S. 579 (1993).
54. *Id.* at 592-95.
55. FED. R. EVID. 702.
56. *See* Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333 (11th Cir. 2003); United States v. Frazier, 322 F.3d 1262, *vacated by* 343 F.3d 1293 (11th Cir. 2003).
57. *See, e.g.*, Norfolk S. Ry. Co. v. Baker, 237 Ga. App. 292, 294, 514 S.E.2d 448, 451 (1999).
58. 328 F.3d 1329 (11th Cir. 2003).

whether cracks in the fuselage of the helicopter were visible or should have been visible to inspectors.[59]

In analyzing the district courts' exclusions of the expert testimony, the Eleventh Circuit relied on the often-cited *Daubert* test enunciated in *City of Tuscaloosa v. Harcos Chemical, Inc.*,[60] which provides that expert testimony is admissible if:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.[61]

The "majority" opinion[62] then embarked on a detailed discussion of the deposition and affidavit testimony excluded by one of the district courts.[63] One expert had opined that properly instructed inspectors would have discovered cracks during an inspection shortly before the crash.[64] The Eleventh Circuit was unsure of the precise basis for the district court's exclusion of this testimony, but surmised that the exclusion must have been due to the district court's erroneous conclusion that the expert intended to testify that the cracks were visible.[65] Properly construed, however, the court read the affidavit to mean that visible cracks would have been discovered had a particular type of inspection been conducted, not that the cracks were actually visible.[66] Based on this interpretation, the court held that the district court abused its discretion when it struck the opinion.[67] The district court had concluded that the expert was qualified and that his analysis was reliable; therefore, the district court could only have excluded the testimony based on a determination that the opinion did not satisfy the relevance prong of *Daubert* analysis.[68] To meet this element of *Daubert*, the testimony "'must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury.'"[69] Because

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59. *Id.* at 1331-32.
60. 158 F.3d 548 (11th Cir. 1998).
61. *Id.* at 562.
62. There was no majority. *See* text accompanying *infra* note 75.
63. *City of Tuscaloosa*, 158 F.3d at 563.
64. *Hudgens*, 328 F.3d at 1338.
65. *Id.*
66. *Id.* at 1340.
67. *Id.*
68. *Id.* at 1339.
69. *Id.* at 1340 (quoting *City of Tuscaloosa*, 158 F.3d at 565).

plaintiffs were attempting to prove one particular inspection was of the type that would have led inspectors to discover the crack, the expert's testimony that the proper performance of that inspection would have led to the discovery of visible cracks was clearly relevant.[70]

Turning to the testimony of another expert, the Eleventh Circuit found another error in the district court's understanding of the expert's testimony.[71] However, the majority concluded that the district court did not abuse its discretion in excluding this testimony because even when properly construed, the expert's testimony did not satisfy the reliability prong.[72]

In the case of a third expert, a portion of whose testimony had been excluded by both district courts, the Eleventh Circuit again found errors, this time in the district courts' conclusions that the expert was not qualified.[73] However, these errors did not require reversal because exclusion of the testimony was also mandated under the reliability prong.[74]

After a lengthy discussion, the Eleventh Circuit concluded, notwithstanding all the errors in the district courts' analyses, that reversal was not required because there was no admissible evidence that the cracks were visible to the naked eye before the crash.[75] The court's opinion in *Hudgens* was not truly a majority opinion on the *Daubert* issue because two of the judges on the panel, although concurring in the judgment, did not concur in the *Daubert* analysis.[76]

The Eleventh Circuit applied an equally exacting and arduous analysis in *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*,[77] but concluded that "despite the scientific complexity of the testimony in question the district court performed its critical gatekeeping function in admirable fashion . . . ."[78] The Eleventh Circuit opinion may provide some help for lawyers seeking to withstand *Daubert* challenges. Among other things, appellant in *Quiet Technology* contended that appellee's expert improperly applied applicable scientific principles. In other words, appellant did not question the reliability of the scientific principles underlying the expert's opinions, but rather contended that the expert's

70. *Id.*
71. *Id.* at 1340-41.
72. *Id.* at 1341.
73. *Id.* at 1344.
74. *Id.*
75. *Id.*
76. *Id.* at 1345 (Edmondson, C.J., concurring); *id.* (Cox, J., concurring).
77. 326 F.3d 1333 (11th Cir. 2003).
78. *Id.* at 1335.

methodology misapplied those principles.[79] The Eleventh Circuit held that the proper attack in such a situation is to vigorously cross-examine the expert, which appellant did at trial.[80] "The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination."[81] The expert's "methods and results were discernible and rooted in real science . . . [and] they were empirically testable."[82] Consequently, the expert's opinions could be tested through cross-examination.[83]

Although advocating the use of cross-examination to test questionable expert testimony, *Quiet Technology* in no way diminishes the gatekeeper role of district courts under *Daubert*. However, *Quiet Technology* does suggest an argument to counter a *Daubert* challenge. If one can prove his qualified expert is basing his opinion on valid scientific principles, and that the challenge to the testimony really attacks the expert's application of those principles, then *Quiet Technology* stands for the proposition that the attack goes to the weight of the opinion rather than its admissibility. Also *Quiet Technology* determined that in such a situation cross-examination is the appropriate means to challenge the testimony.[84]

Although *Daubert* and its progeny purport to require strong deference to district courts' first-hand analyses of expert testimony, the Eleventh Circuit in *United States v. Frazier*[85] concluded, over a strong dissent, that the district court abused its discretion when it excluded testimony of defendant's forensic investigator.[86] In *Frazier* defendant, who was charged with rape, wanted to adduce expert testimony that because of the absence of evidence on the victim's body of defendant's hair, blood, saliva, or semen, there was no forensic evidence to substantiate the victim's claim that she had been raped.[87] The district court, in response to the prosecution's *Daubert* motion, ruled that the expert could

79. *Id.* at 1339.
80. *Id.* at 1345.
81. *Id.*
82. *Id.* at 1346.
83. *Id.* at 1345.
84. *Id.* at 1346.
85. 322 F.3d 1262, *vacated by* 344 F.3d 1293 (11th Cir. 2003). Note that after *Frazier* was decided, the Eleventh Circuit granted Frazier's motion for rehearing en banc and vacated the panel opinion. United States v. Frazier, 344 F.3d 1293 (11th Cir. 2003). The reason for granting the motion was not stated. *Id.* at 1294.
86. *Frazier*, 322 F.3d at 1268.
87. *Id.* at 1264.

not "draw any inferences based on the absence of evidence supporting [the victim's] allegations of sexual assault."[88]

Faced with this ruling, defendant's attorney chose not to put the expert on the stand, but rather established through cross-examination of laboratory technicians that neither defendant's hair nor bodily fluids were found on the victim's body. However, in rebuttal, the prosecution elicited expert testimony from the laboratory technicians that the absence of hair and bodily fluids did not necessarily mean that defendant had not raped the victim.[89] This no doubt infuriated defendant's counsel because he could not put up his expert to establish the lack of forensic evidence of rape. However, the prosecution was allowed to present surprise expert testimony that the absence of such evidence did not undermine the victim's claim of rape.[90]

Based on the Eleventh Circuit's review of the record, the majority concluded that the district court disallowed the expert's testimony because the court found the expert lacked the necessary scientific qualifications to render the disputed opinions.[91] The Eleventh Circuit held that this was an error.[92] The district court concluded that the expert's lack of knowledge and education rendered him incompetent to testify.[93] However, the Eleventh Circuit, noting that an expert can be qualified by virtue of experience, concluded that defendant's expert, notwithstanding his lack of education, was sufficiently experienced to withstand a *Daubert* challenge.[94] The majority rejected any suggestion that it was supplanting the district court's gatekeeper role, noting the distinction between admissible expert testimony and "'shaky but admissible evidence.'"[95] The expert's conclusions may have been shaky, but they were admissible.[96] In the case of "shaky but admissible" opinion testimony, cross-examination is the traditional and appropriate means of attack, not exclusion.[97]

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88. *Id.*

89. *Id.* at 1264-65. The district court rejected defendant's contention that the prosecution had not timely identified these witnesses as expert witnesses, ruling that notice is only required when the prosecution calls an expert witness during its case-in-chief. *Id.* at 1265.

90. *Id.* at 1265.

91. *Id.* at 1266.

92. *Id.* at 1266-67.

93. *Id.* at 1266.

94. *Id.* at 1267-68.

95. *Id.* at 1268 (quoting *Daubert*, 509 U.S. at 596).

96. *Id.*

97. *Id.* (quoting *Daubert*, 509 U.S. at 596).

In his dissent, Judge Marcus argued that the majority had "eviscerate[d] the critical gatekeeping role played by the trial court in determining the admissibility of expert opinion testimony and unapologetically substitute[d] its own reliability assessment for that of the district court . . . ."[98] Judge Marcus opined that the majority completely misunderstood the district court's rationale for excluding the evidence.[99] The district court did not question the expert's qualifications, but rather disallowed the expert's opinion because the opinion failed to meet the reliability prong of the *City of Tuscaloosa* test.[100] Judge Marcus believed the expert essentially intended to testify that in a rape, "it would be expected"[101] that hair or bodily fluids would be found on a victim and because such evidence was not found, the victim was not raped.[102] In Judge Marcus's examination of the record, the district court clearly and unsuccessfully searched for some scientific or other foundation to support the reliability of this testimony.[103] Judge Marcus noted that this support need not be scientific in nature; for example, the expert could testify that based on his experience, hair or fluids were found on rape victims in a certain percentage of cases.[104] Depending on that percentage, the district court properly could have allowed the expert to testify that because of the absence of such evidence, no forensic evidence supported the rape allegation.[105] However, the expert did not offer any such support for his opinion. No evidence of the reliability of the expert's opinion existed; therefore, Judge Marcus concluded that the district court did not abuse its discretion when it excluded the expert's opinion.[106]

Rule 701[107] governs lay opinion testimony, and in 2000 the Supreme Court amended Rule 701 to provide that lay opinion testimony cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[108] As discussed in a previous survey,[109] the amendment, on its face, appears to bar lay opinion testimony based on

98. *Id.* at 1274 (Marcus, J., dissenting).
99. *Id.* at 1271 (Marcus, J., dissenting).
100. *Id.* at 1271-72 (Marcus, J., dissenting).
101. *Id.* at 1272 (Marcus, J., dissenting).
102. *Id.* at 1272-73 (Marcus, J., dissenting).
103. *Id.* at 1273 (Marcus, J., dissenting).
104. *Id.* at 1274 (Marcus, J., dissenting).
105. *Id.* (Marcus, J., dissenting).
106. *Id.* (Marcus, J., dissenting).
107. FED. R. EVID. 701.
108. *Id.* at 701(c).
109. Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 1399, 1408 (2002).

a witness's prior experience.[110] The Eleventh Circuit addressed this issue in *United States v. Novaton*,[111] which was tried before the effective date of the 2000 amendment. The court held that law enforcement agents, based on their experience, could testify about the meaning of certain jargon used by defendants.[112] The Eleventh Circuit rejected defendants' argument that because the testimony was based on the agent's prior experiences, it was not proper lay testimony, but rather should have been evaluated as expert testimony under Rule 702.[113] The Eleventh Circuit, relying on pre-amendment case law, held that the agent's testimony was proper lay testimony, but left open the question of whether the 2000 amendment would require a different conclusion.[114]

The Eleventh Circuit returned to this issue during this survey period in *Tampa Bay Ship Building & Repair Co. v. Cedar Shipping Co.*[115] In *Tampa Bay*, defendant contended that the district court improperly allowed plaintiffs to testify that their charges for work performed were reasonable. Defendant contended plaintiffs' testimony was in effect based upon industry standards, and only properly qualified experts could give such testimony.[116]

The Eleventh Circuit acknowledged that the 2000 amendment to Rule 701 was intended, as the Advisory Committee noted, "'to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.'"[117] However, the Advisory Committee also noted that business owners or officers could testify as lay witnesses: "Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis."[118] This established, to the satisfaction of the Eleventh Circuit, that "opinion testimony by business owners and officers is one of the prototypical areas intended to remain undisturbed."[119]

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110. *Id.*
111. 271 F.3d 968 (11th Cir. 2001).
112. *Id.* at 1009.
113. *Id.*; *see* FED. R. EVID. 702.
114. *Novaton*, 271 F.3d at 1008-09.
115. 320 F.3d 1213 (11th Cir. 2003).
116. *Id.* at 1215-16.
117. *Id.* at 1222 (quoting FED. R. EVID. 701 Advisory Committee's notes).
118. *Id.* (quoting FED. R. EVID. 701 Advisory Committee's notes).
119. *Id.*

Interestingly, although the Eleventh Circuit based its holding on Advisory Committee notes relating specifically to business owners and officers, the Eleventh Circuit equated its conclusion that the disputed testimony was not within the scope of Rule 702 with its holding in *Novaton*.[120] "Like the police officers in *Novaton* . . ., Tampa Bay's witnesses testified based upon their particularized knowledge garnered from years of experience within the field."[121] The implication is that although *Novaton* was a pre-amendment case, its holding survives the amendment to Rule 701 even though no precise guidance from the amendment or Advisory Committee notes exists, unlike guidance with regard to testimony by business owners or officers.

V. HEARSAY

Defendants in *United States v. Hasner*[122] raised a creative, albeit futile, argument in an attempt to convince the Eleventh Circuit that the district court erroneously admitted co-conspirator statements under Rule 801(d)(2)(E).[123] In *Hasner* the district court, as is commonly done, provisionally admitted alleged co-conspirator statements offered by the prosecution subject to the prosecution later establishing the elements of the co-conspirator exception to the hearsay rule. Defendants argued that the discretion to provisionally admit co-conspirator statements was abolished by a 1997 amendment to Rule 801(d)(2)(E).[124] The Eleventh Circuit rejected this argument.[125] The 1997 amendment simply codified the holding of *Bourjaily v. United States*.[126] In *Bourjaily* the Supreme Court held that the contents of a co-conspirator statement must be considered by district courts in determining the existence of a conspiracy and the declarant's participation in the conspiracy.[127] While the amendment also provided that the contents of the statement could not alone be sufficient to establish the conspiracy, nothing in *Bourjaily* or the 1997 amendment addressed the issue of whether co-conspirators' statements could be provisionally admitted.[128]

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120. *Id.* at 1223.
121. *Id.*
122. 340 F.3d 1261 (11th Cir. 2003).
123. *Id.* at 1274; *see* FED. R. EVID. 801(d)(2)(E).
124. *Hasner*, 340 F.3d at 1274-75.
125. *Id.* at 1275.
126. 483 U.S. 171 (1987).
127. *Id.* at 180; *see* Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 1027, 1041 (1998).
128. *See Bourjaily*, 483 U.S. 171; FED. R. EVID. 801(d)(2)(E).

"Like the brute Mongo in Mel Brooks's 1974 comedy classic *Blazing Saddles*, Roberto Duran once knocked out a horse with a single punch."[129] If ever an opening sentence in a judicial opinion grabbed readers' attention, this one from the Eleventh Circuit's decision in *United States v. Samaniego*[130] is it. The opinion, which reads more like a *New Yorker* piece than a judicial decision, provides a fascinating synopsis of Duran's remarkable thirty-four year boxing career and the championship belts he won in four different weight classes.[131] Tragically, those championship belts were stolen from his home by his brother-in-law, and that is the point of the decision.[132]

The federal government, in a sting operation, came into possession of the belts and filed an interpleader action to determine the belts' rightful owner. The critical issue was whether the belts had been stolen, and the strongest evidence was the hearsay statements of the alleged thief, admitted through the testimony of Duran and several members of his family. Specifically, these witnesses testified that the brother-in-law apologized in their presence for stealing the belts.[133] The district court admitted this testimony pursuant to Rule 803(3),[134] which allows the admission of a declarant's out of court statement concerning his "then existing state of mind, emotion, sensation, or physical condition . . . ."[135] The jury sided with Duran, and it seemed the belts would be returned to the man who had worked so hard and long to earn them. Unfortunately, the memorabilia dealer, who claimed he had come by the belts honestly, appealed, and the Eleventh Circuit held that the district court erred when it relied on Rule 803(3) to admit the brother-in-law's apology. Thus, it appeared that Duran, having successfully fought to regain his belts, was only to lose them again.[136]

The Eleventh Circuit reasoned that while Rule 803(3) permits the admission of a statement that shows state of mind, the rule does not permit evidence demonstrating the reason for the state of mind.[137] The brother-in-law's statement, while evidence of his remorseful state of mind, also established why his mind was in that state—for instance, that he was remorseful because he had stolen the belts.[138] Clearly, the

129. United States v. Samaniego, 345 F.3d 1280, 1281 (11th Cir. 2003).
130. *Id.* at 1280.
131. *Id.* at 1281.
132. *Id.* at 1281-82.
133. *Id.* at 1282.
134. FED. R. EVID. 803(3).
135. *Id.*
136. *Samaniego,* 345 F.3d at 1282.
137. *Id.*
138. *Id.*

statement was offered to prove the brother-in-law had stolen the belts, not that he was remorseful. Therefore, the apology was not admissible pursuant to Rule 803(3).[139]

But Duran was only down, not out, and the story was to have a happy ending. Although Rule 803(3) was not applicable, the Eleventh Circuit proceeded to consider whether the brother-in-law's apology was a statement against interest by a declarant unavailable at trial and admissible under Rule 804(b)(3).[140] Clearly, to the Eleventh Circuit, the statement was against the brother-in-law's interest because the statement would "subject the declarant to civil or criminal liability."[141] However, for the statement to be admissible, Duran had to establish that his brother-in-law was unavailable pursuant to Rule 804(a).[142] Of the five tests of unavailability set forth in Rule 804(a), only one was relevant to the court's inquiry: whether the brother-in-law was "absent from the hearing and [Duran] has been unable to procure the declarant's attendance (. . . or testimony) by process or other reasonable means."[143] In this regard, Duran's wife, the alleged thief's sister, testified that she and her mother had tried to locate her brother on five occasions, but they had been unsuccessful.[144] The mother also testified that she had once tried to contact her son but was unable to locate him.[145] This testimony, the Eleventh Circuit held, was "a reasonable means of attempting to locate Iglesias in Panama and persuade him to travel to the United States to testify."[146] The district court rightfully admitted the apology, albeit for the wrong reason, and Duran's quest came to a successful end.[147]

Rule 801(b)(1)(B)[148] provides that a prior consistent statement is not hearsay if the statement is offered to rebut a charge of recent fabrication, improper influence, or motive.[149] For example, a party may use a witness's prior statement that is consistent with his trial testimony to demonstrate that the trial testimony is truthful. In *Tome v. United States*,[150] the Supreme Court, resolving a conflict among the circuits,

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139. *Id.* at 1283.
140. *Id.* at 1284; *see* FED. R. EVID. 809(b)(3).
141. FED. R. EVID. 804(b)(3).
142. *Samaniego*, 345 F.3d at 1283; *see* FED. R. EVID. 804(a).
143. FED. R. EVID. 804(a)(5).
144. *Samaniego*, 345 F.3d at 1283.
145. *Id.*
146. *Id.*
147. *Id.* at 1284.
148. FED. R. EVID. 801(b)(1)(B).
149. *Id.*
150. 513 U.S. 150 (1995).

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.[151]

In *United States v. Prieto*,[152] the Eleventh Circuit addressed an issue of first impression spawned by *Tome*.[153] In *Prieto* the prosecution successfully tendered a witness's post-arrest statement, which was consistent with his trial testimony, to rebut a charge that the trial testimony was tainted by the witness's agreement to cooperate with the government in exchange for a more lenient punishment.[154] The post-arrest statement was made before the execution of the cooperation agreement, but defendant argued "any post arrest statement is necessarily tinged with a motive to lie in order to curry favor with the government."[155] In other words, as the Eleventh Circuit described, 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."[156] The Eleventh Circuit declined to adopt such a rule, holding that post-arrest statements are not automatically contaminated by a motive to fabricate.[157] Rather, a witness's post-arrest statement can be driven by a variety of motives and reasons. 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.[158]

During the current survey period, a defendant in *United States v. Drury*[159] contended that the district court violated *Prieto* because the court applied a "bright line test" and excluded a prior consistent statement made by a witness for the defense.[160] Although the Eleventh Circuit could not find the precise reason in the record, or for that matter even a general reason, for the district court's exclusion of the testimony, the Eleventh Circuit nevertheless held that the record was sufficient to establish that defendant had adequate "motive and opportunity to fabricate" his prior consistent statement.[161]

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151. *Id.* at 150.
152. 232 F.3d 816 (11th Cir. 2000).
153. *Id.* at 819.
154. *Id.* at 818.
155. *Id.* at 820.
156. *Id.*
157. *Id.* at 821.
158. *Id.* at 822.
159. 344 F.3d 1089 (11th Cir. 2003), *vacated by* 358 F.3d 1280 (11th Cir. 2004).
160. *Id.* at 1093.
161. *Id.* at 1108. After the close of the survey period, the Eleventh Circuit granted Drury's motion for rehearing en banc and vacated the panel opinion. United States v.

Thus, in determining the admissibility of a prior consistent statement to rebut a suggestion that trial testimony is false, the critical factor is whether the witness had a motive to fabricate at the time he made the prior statement.[162] Yet, in *United States v. Ettinger*,[163] the Eleventh Circuit did not address this element.[164] In *Ettinger* defendant, who was charged with assaulting a federal officer, contended that the district court improperly admitted, as a prior consistent statement, a statement made by an officer who witnessed the assault.[165] When this officer prepared his report on the day of the assault, the officer did not mention an alleged statement by defendant to the victim that defendant was "'going to get him.'"[166] However, at trial, the officer testified that he heard defendant say, after the assault, that defendant had told his victim that defendant was "'going to get him.'"[167] When defendant's counsel pointed out on cross-examination that the officer had not mentioned this statement in his report, the district court allowed the government to introduce a statement the witness gave to an FBI agent, which did include defendant's threat to his victim. Although the trial court did not indicate as such, obviously that statement to the FBI agent was made after the officer prepared his report.[168]

On appeal, the Eleventh Circuit held that the statement was "admitted properly to rebut an implied charge of recent fabrication, pursuant to [Rule] 801(d)(1)(B)."[169] The Eleventh Circuit did not discuss whether the statement was made before or after the witness may have developed a motive to fabricate.[170] However, defendant's point seemed to be that the officer had not included the statement in his official report, made the day of the assault. Also, the fact that the officer later told an FBI agent about the threat does not rebut defendant's specific point, that if the statement had been made, the statement logically would have been included in the report. Presumably, the prosecution contended that the prior consistent statement to the FBI agent was admissible to rebut the suggestion that because the threat was not mentioned in the officer's report, the threat must have been

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Drury, 358 F.3d 1280 (11th Cir. 2004). The reason for granting the motion was not stated. *Id.* at 1280.

162. *See Drury*, 344 F.3d at 1108-09.
163. 344 F.3d 1149 (11th Cir. 2003).
164. *Id.* at 1149.
165. *Id.* at 1160.
166. *Id.* at 1152.
167. *Id.*
168. *Id.* at 1152-53.
169. *Id.* at 1161.
170. *Id.* at 1160-61.

fabricated. Defendant likely countered that the officer, by the time the FBI entered the picture, probably would have been inclined to embellish his story.[171] But, because the Eleventh Circuit did not mention these contentions and issues, we will never know.[172]

171. *Id.*
172. *Id.*

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