# Evidence

by Marc T. Treadwell*

## I. INTRODUCTION

Previous surveys have addressed the trend—or at least what the Author perceives to be the trend—of the Eleventh Circuit Court of Appeals in recent years to defer more to district judges' evidentiary decisions.[1] Supporters of this trend no doubt would contend that that is exactly what the abuse of discretion standard requires. Indeed, the Eleventh Circuit's current formulation of the abuse of discretion standard demands a very limited review. Specifically the Eleventh Circuit has announced: "We review the evidentiary rulings by the district for an abuse of discretion . . . . We reverse only if the complaining party establishes that the evidentiary ruling resulted in a 'substantial prejudicial effect,' thus warranting reversal of the jury's verdict."[2] One consequence of this trend is fewer evidentiary decisions, a fact illustrated by simply comparing the number of pages in various surveys. In the late 1980s and early 1990s, evidence survey articles could total thirty pages or more. Last year's survey was less than seventeen pages and this year's survey required only fourteen pages to report on significant Eleventh Circuit decisions.

## II. ARTICLE IV: RELEVANCY

When previous surveys speculated that the Eleventh Circuit was dramatically lowering the court's level of scrutiny of evidentiary issues, surveyors cited Federal Rule of Evidence 403 as perhaps the clearest indicator of this trend.[3] Rule 403 allows the court, under some

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1. *See, e.g.*, Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 1165 (2000).
2. Anderson v. WBMG-42, 253 F.3d 561, 563 (11th Cir. 2001) (citations omitted).
3. *See, e.g.*, Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 1027, 1032 (1998).

circumstances, to exclude relevant evidence, most notably when the danger of unfair prejudice substantially outweighs the probative value of the evidence. When the Author first began surveying Eleventh Circuit evidentiary decisions in 1986, the court frequently invoked Rule 403 in criminal cases to reverse convictions on the ground that prejudicial evidence should not have been admitted.[4] In more recent years, however, Rule 403 has rarely been a factor and certainly has not been the tool for rigid scrutiny that it once was. However, Rule 403 made something of a comeback during the present survey year, and, oddly enough, this comeback occurred in civil cases.

In *Anderson v. WBMG-42*,[5] plaintiff contended that her employer unlawfully discriminated against her when she was fired for "unprofessional behavior."[6] In support of her case, plaintiff unsuccessfully attempted to introduce evidence that demonstrated similarly situated employees were treated more leniently. The district court, relying on Rule 403, excluded the evidence.[7] On appeal, the Eleventh Circuit agreed with plaintiff that the evidence was relevant.[8] The Eleventh Circuit also agreed that Rule 403 should only be used sparingly to exclude relevant evidence.[9] Nevertheless, the Eleventh Circuit held that the district court did not abuse its discretion when it excluded this relevant evidence.[10] The court concluded that forays into the similar incidents "would have in effect generated a mini-trial on collateral issues which would not relate to the racial discrimination alleged" in plaintiff's claim.[11] The court's opinion also suggests, but does not make clear, that the evidence had not been developed during discovery, and therefore, the development of the evidence at trial would have been even more time consuming.

Notwithstanding the high standard of review for evidentiary appeals, the Eleventh Circuit was not willing to defer to the district court in *United States Steel, LLC v. Tieco, Inc.*[12] and thus overturned a multi-million dollar verdict.[13] In *Tieco*, a factually complex case, defendants prevailed on their counterclaims for malicious prosecution, abusive

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4. *See* Marc T. Treadwell, *Evidence*, 38 MERCER L. REV. 1253 (1986).
5. 253 F.3d 561 (11th Cir. 2001).
6. *Id.* at 562.
7. *Id.* at 562-63.
8. *Id.* at 564.
9. *Id.* at 566 (citing United States v. Cross, 928 F.2d 1030 (11th Cir. 1991); United States v. Meester, 762 F.2d 867 (11th Cir. 1985)).
10. *Id.* at 566-67.
11. *Id.*
12. 261 F.3d 1275 (11th Cir. 2001).
13. *Id.* at 1294.

process, and similar claims. Defendants largely relied on a trial court opinion from a previous proceeding between the parties that was extraordinarily favorable to defendants, no doubt because it was drafted by defendants' attorneys. Plaintiffs argued that the district court should have excluded the opinion pursuant to Rule 403.[14] The Eleventh Circuit first noted that plaintiffs had failed to raise, and thus had waived, their best argument—that the opinion was hearsay.[15] Nevertheless, the court, relying on Rule 403, concluded that the district court abused its discretion when it admitted the opinion.[16] First, and notwithstanding the fact that plaintiffs did not raise a hearsay objection, the court reasoned that the hearsay nature of the document was still pertinent to its Rule 403 analysis.[17] Hearsay, the court noted, is generally unreliable, and the opinion was, in the court's view, particularly unreliable and misleading.[18] Because the opinion had been prepared for the trial judge by defendants' attorney, the opinion virtually was tantamount to testimony by defendants, which, not surprisingly, was extremely self-serving. The fact that a judge had accepted the opinion as his own only made the document even more prejudicial because this acceptance gave the document judicial weight.[19] Thus, the court concluded, the prejudicial impact of the opinion outweighed its probative value, and the district court abused its discretion when the court admitted the opinion.[20]

Rule 404 is the principal rule of evidence governing the admissibility of "extrinsic act evidence"—evidence of acts and transactions other than the one at issue—offered for substantive, as opposed to impeachment, purposes.[21] The Rule is intended to prevent the admission of evidence of misconduct on other occasions solely to prove that a defendant is more likely to have committed the charged offense.[22] The admissibility of

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14. *Id.* at 1279-81, 1287.

15. *Id.* (citing United States v. Jones, 29 F.3d 1549 (11th Cir. 1994)). The court noted that the opinion was clearly inadmissible pursuant to Rule 801(c). *Id.*

16. *Id.* at 1288.

17. *Id.* at 1287-88.

18. *Id.* at 1287.

19. *Id.*

20. *Id.* at 1288.

21. Rule 404 governs the admissibility of extrinsic act evidence offered for substantive purposes. If the extrinsic act evidence is offered to impeach or bolster a witness, 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 incidents of conduct relevant to character.

22. Although Rule 404(b) is not limited by its terms to criminal cases, the Rule is rarely mentioned in civil cases, even though the admissibility of extrinsic act evidence is frequently an issue in civil cases. For example, a plaintiff in a personal injury case may

extrinsic act evidence is determined by a three part test sometimes called the *Beechum* test.[23] First, the extrinsic act evidence must be relevant to an issue other than the defendant's character.[24] Second, the prosecution must prove the defendant committed the extrinsic act.[25] The prosecution need not prove this element beyond a reasonable doubt; proof by a preponderance of the evidence is sufficient.[26] Third, the evidence must not contravene Rule 403; the probative value of the extrinsic act evidence must not be substantially outweighed by its undue prejudice.[27]

In *United States v. Dickerson*,[28] the Eleventh Circuit considered whether the district court properly admitted evidence of defendant's possession of cocaine after the defendant allegedly committed the charged offense of conspiracy to possess cocaine.[29] The court first noted that it made no difference that the extrinsic offense took place after the charged offense; the Rule 404(b) test is the same.[30] Here, the prosecution tendered evidence of the extrinsic offense to prove intent, and thus, the first question was whether the extrinsic offense required the same intent as the charged offense.[31] Given that both offenses involved the possession of large quantities of cocaine, the court had no difficulty concluding that the intent involved in both offenses was the same.[32] With regard to the second prong, whether the government proved defendant committed the extrinsic offense, the court decided that although the offense was proved through the uncorroborated testimony of an accomplice, that was sufficient.[33] Finally, the court concluded that the probative value of the evidence substantially outweighed its possible prejudicial effect.[34] In this regard, the court relied on an aspect of the Rule 404(b) analysis that must be particularly perverse to defendants: The weaker the government's case, the greater the

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rely on evidence of prior similar accidents to demonstrate a defendant's notice of a defective condition. *See, e.g.*, Hessen v. Jaguar Cars, 915 F.2d 641, 650 (11th Cir. 1990).

23. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

24. *Id.* at 911.

25. *Id.* at 912-13.

26. Huddleston v. United States, 485 U.S. 681, 689 (1988).

27. *Beechum*, 582 F.2d at 911.

28. 248 F.3d 1036 (11th Cir. 2001).

29. *Id.* at 1039.

30. *Id.* at 1046.

31. *Id.* at 1047.

32. *Id.*

33. *Id.* (citing United States v. Bowe, 221 F.3d 1183 (11th Cir. 2000)).

34. *Id.*

government needs extrinsic act evidence.[35] This analysis enhances the probative value of the evidence.[36] Thus, the court concluded that the district court properly admitted evidence of defendant's subsequent possession of cocaine.[37]

Rule 404(b) does not apply to evidence, even though extrinsic to the indictment, that is inextricably intertwined with the charged offense.[38] During the survey period, the Eleventh Circuit apparently relied on this principle to affirm the district court's admission of defendant's drug transactions at his trial for unlawful possession of firearms in *United States v. Thomas*.[39] In *Thomas*, the defendant, perhaps understandably, argued that his prior drug activity had nothing to do with the elements of the offense of unlawful possession of a firearm.[40] The Eleventh Circuit disagreed.[41] Relying on authority from the Eighth and Ninth Circuits, the court noted the "known correlation between drug dealing and weapons."[42] Defendant argued that those cases were distinguishable because his drug activity was unrelated to his alleged possession of a firearm—when the weapons were found, no drugs were found.[43] The Eleventh Circuit was unpersuaded: "We hold, however, that the evidence of his drug trafficking was in sufficiently close proximity, temporally and physically, to be relevant to proving that he knowingly possessed the weapons."[44] Finally, the court refused to concede that the evidence of defendant's drug activity was admitted to impugn his character: "The evidence of Thomas' drug trafficking was admitted to prove knowing possession of the firearms, not character."[45]

## III. ARTICLE V: PRIVILEGES

The Federal Rules of Evidence, rather than undertaking the daunting task of formulating rules that recognize and define various evidentiary privileges, yield to the courts and allow the federal judiciary to formulate

35. *Id.*
36. *Id.*
37. *Id.*
38. United States v. Martin, 794 F.2d 1531, 1532-33 (11th Cir. 1986) (citing United States v. Weeks, 716 F.2d 830 (11th Cir. 1983)).
39. 242 F.3d 1028, 1032-33 (11th Cir. 2001).
40. *Id.* at 1031.
41. *Id.* at 1033.
42. *Id.* at 1031-32 (citing United States v. Butcher, 926 F.2d 811 (9th Cir. 1991); United States v. Simon, 767 F.2d 524 (8th Cir. 1985)).
43. *Id.* at 1032.
44. *Id.*
45. *Id.* at 1033.

rules of privilege in nondiversity cases.[46] In diversity cases, state law determines the existence of privileges.[47]

In *United States v. Singleton*,[48] the Eleventh Circuit addressed an issue of first impression—whether communications between permanently separated spouses fall within the scope of the marital communications privilege.[49] In *Singleton*, defendant's spouse, in cooperation with the FBI, wore a recording device to tape a conversation with defendant during which defendant made incriminating statements. Overruling defendant's objection, the district court admitted the tape recorded conversation after concluding that the parties were permanently separated, and thus, defendant was not entitled to assert the marital communications privilege. On appeal, defendant argued that, for various policy reasons, the court should adopt a bright line test and hold that any communications between spouses are protected by the marital communications privilege even though they are permanently separated.[50] The Eleventh Circuit declined to adopt such a test, siding instead with the policy that privileges should be narrowly construed because they impede the search for truth.[51] Moreover, the court concluded that the policy reasons underlying the marital communication privilege are largely absent when the spouses are permanently separated.[52] The court then adopted a three part test for district courts to use when determining whether spouses are permanently separated at the time of communication: "(1) Was the couple cohabitating?; (2) if they were not cohabitating, how long have they been living apart?; and (3) had either spouse filed for a divorce?"[53] However, these factors, although "especially important," are not exclusive, and the court may consider other objective evidence of the parties' intent or lack of intent to reconcile.[54] If, after considering this evidence, the district court concludes that the couple is permanently separated, then neither can assert the marital communications privilege.

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46. FED. R. EVID. 503.
47. *Id.*
48. 260 F.3d 1295 (11th Cir. 2001).
49. *Id.* at 1297.
50. *Id.* at 1297-98.
51. *Id.* at 1300 (citing United States v. Nixon, 418 U.S. 683 (1974); United States v. Chapman, 866 F.2d 1326 (11th Cir. 1989)).
52. *Id.*
53. *Id.* at 1301.
54. *Id.* (citing United States v. Cameron, 556 F.2d 752 (5th Cir. 1977)).

## IV. ARTICLE VI: WITNESSES

Rule 608 governs the use of extrinsic act evidence offered to impeach or bolster a witness. As discussed above, if the evidence is offered for substantive purposes, Rule 404 determines its admissibility. Rule 608(b) provides that witnesses cannot be impeached or bolstered by extrinsic evidence of specific instances of prior conduct by the witness. However, a witness can be examined about specific instances of conduct if that conduct is probative of truthfulness or untruthfulness. The Eleventh Circuit's decision in *United States v. Novaton*[55] illustrates that parties, including criminal defendants, do not have an unfettered right to cross-examine witnesses about alleged prior misconduct.[56] In *Novaton*, defendants contended the district court improperly barred them from cross-examining law enforcement officers about their alleged prior misconduct. In the case of one officer, defendants wanted to cross-examine him about his alleged involvement in a police scandal even though the officer had been cleared six years before the trial. Defendants represented to the district court that "they had information that there might be an ongoing investigation into the scandal"[57] that possibly implicated the officer.[58] In the case of another officer, defendants argued they should have been allowed to cross-examine him about an investigation pending at the time of their trial. However, the officer had already been cleared of this allegation in a previous investigation, and the second investigation was based on the same allegation from the same source.[59] The Eleventh Circuit began its analysis by acknowledging that the Sixth Amendment's Confrontation Clause presumptively affords criminal defendants the right to free cross-examination of star prosecution witnesses with regard to possible bias or motive.[60] Qualifying this statement, the court asserted that defendant's Sixth Amendment right and Rule 608 are tempered by Rule 403, which allows the court to exclude such testimony if the probative value of the evidence is outweighed by the danger of unfair prejudice.[61] The Eleventh Circuit concluded that the district court acted well within its discretion when the court barred defendants from cross-examining the law enforcement

55. 271 F.3d 968 (11th Cir. 2001).
56. *Id.* at 1006.
57. *Id.* at 1004-05.
58. *Id.*
59. *Id.* at 1005.
60. *Id.* at 1005-06.
61. *Id.* at 1006.

officers about their alleged prior misconduct.[62] It was significant to the court that Rule 608(b) contemplates acts such as forgery, perjury, and fraud.[63] The conduct at issue in *Novaton*, the court reasoned, did not rise to that level, and "'[t]o infer untruthfulness from any unethical act paves the way to the exception which will swallow the rule.'"[64] Even if the allegations of wrongdoing were grave, the court could also consider, in balancing the probative value of the evidence with undue prejudice, that no finding of guilt was made. In that instance, jurors could place undue weight on the unproven allegations of misconduct. The Eleventh Circuit concluded that the district court acted well within its discretion and, accordingly, affirmed defendants' convictions.[65]

## V. ARTICLE VII: OPINIONS AND EXPERT TESTIMONY

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*[66] dramatically changed the landscape of expert testimony. Since *Daubert* (the principles of which, as reported in last year's survey, have now been codified in the Federal Rules of Evidence),[67] lower federal courts have struggled to define the finer points of the *Daubert* analysis. During this time, the Eleventh Circuit has seen two of its more significant *Daubert* decisions reversed by the Supreme Court.[68] However, things have settled somewhat, and the application of *Daubert* has become more routine. Nevertheless, several decisions during the survey period are noteworthy.

The Eleventh Circuit's decision in *United States v. Hansen*[69] provides guidance on how to raise a *Daubert* challenge. In *Hanson*, defendants were convicted of conspiring to commit violations of various environmen-

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62. *Id.*

63. *Id.* (citing Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 37 F.3d 1460, 1464 (11th Cir. 1994)).

64. *Id.* (quoting *Ad-Vantage Tel. Directory Consultants, Inc.*, 37 F.3d at 1464 (internal quotation omitted)).

65. *Id.* at 1006, 1018.

66. 509 U.S. 579 (1993).

67. Marc T. Treadwell, *Evidence*, 52 MERCER L. REV. 1403, 1404-05 (2001). Deceptively simple, new Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the fact of the case.

68. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 147 (1997).

69. 262 F.3d 1217 (11th Cir. 2001).

tal laws. At trial, the government relied on expert testimony regarding employee exposure to hazardous substances. Prior to trial, the defendants moved to convene a *Daubert* hearing to challenge this testimony.[70] The district court refused to convene the hearing.[71] On appeal the Eleventh Circuit first noted that a district court's denial to hold a *Daubert* hearing is subject to the abuse of discretion standard.[72] The court, however, acknowledged that a district court "should conduct a *Daubert* inquiry when the opposing party's motion for hearing is supported by 'conflicting medical literature and expert testimony.'"[73] The district court denied the motion to convene a hearing because the motion did not identify the source, substance, or methodology of the challenged testimony, and therefore, the district court concluded, there was nothing for the court to assess. The Eleventh Circuit agreed.[74] The practice pointer to be taken from *Hansen* is that requests for *Daubert* hearings should be very detailed; should identify the source, substance or methodology of the challenged testimony; and should be supported with contrary data or testimony.

The Eleventh Circuit's decision in *Maiz v. Virani*[75] will come as good news to parties seeking to prove lost profits and similar types of damages that are difficult to prove with any degree of certainty. In *Maiz*, plaintiffs, who had invested in the defendants' real estate venture, contended that the defendants defrauded them. To prove their damages, the plaintiffs relied on an economist who calculated the money they allegedly would have earned if their money had been invested in a legitimate real estate venture. He based his testimony on the estimated return of funds invested in a real estate investment trust ("REIT"). Clearly, plaintiffs were trying to bring some certainty to their damages calculations, and thus avoid the prohibition against the recovery of speculative damages. The defendants contended that *Daubert* required the exclusion of this testimony, because the economist was not qualified to testify as an expert and his analysis was unreliable.[76] The Eleventh Circuit summarily rejected both contentions, noting that the economist held a doctorate degree in economics from Yale University; had extensive experience as a professional economist generally and in estimating

70. *Id.* at 1232-33.
71. *Id.* at 1233.
72. *Id.* (citing United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999)).
73. *Id.* at 1234 (quoting Tanner v. Westbrook, 174 F.3d 542, 546 (5th Cir. 1999)).
74. *Id.* at 1233-34.
75. 253 F.3d 641 (11th Cir. 2001).
76. *Id.* at 650-52, 662.

damages in particular; and that his methodology, which relied on a broad based REIT index, was sufficiently reliable.[77]

Although attorneys are eager to bolster their cases by relying on expert testimony, a proclivity that no doubt inspired, at least in part, *Daubert*, there are limits to the subjects that are appropriate for expert testimony. During the survey period, the Eleventh Circuit held that it would be inappropriate for a lawyer, as an expert witness, to testify before a jury about matters of domestic law.[78] The determination of domestic law, the court reasoned, is a matter for the court, and although it is conceivable that the court could entertain expert testimony in that regard, the court must itself determine the applicable law and instruct the jury accordingly.[79]

Rule 701 provides that nonexperts can give opinion testimony if the opinions are "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony for the determination of a fact in issue."[80] A 2000 amendment to the Rule added that lay testimony cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[81] Thus, Rule 701 appears to bar opinion testimony based on a witness' prior experience; that was the contention in *United States v. Novaton*.[82] Specifically, defendants contended that the district court erred when it allowed, pursuant to Rule 701, law enforcement agents to testify about the meaning of certain jargon used by defendants in conversations tape-recorded by authorities. Defendants argued that because the testimony was based on the agent's prior experiences, it should have been subject to Rule 702, which governs expert testimony, and procedural rules requiring the prosecution to identify expert witnesses.[83] The Eleventh Circuit rejected this argument, citing a number of cases directly holding that lay witnesses could give opinion testimony based on their prior experiences.[84] However, the court noted that defendants were tried

77. *Id.* at 665-66.
78. United States v. Oliveros, 275 F.3d 1299 (11th Cir. 2001).
79. *Id.* at 1306-07.
80. FED. R. EVID. 701.
81. *Id.*
82. 271 F.3d 968 (11th Cir. 2001).
83. *Id.* at 1007.
84. *Id.* at 1008-09 (citing Agro Air Assocs. v. Houston Cas. Co., 128 F.3d 1452 (11th Cir. 1997) (affirming admission of lay witness testimony based on observation, knowledge, and experience in the aviation industry); United States v. Awan, 966 F.2d 1415 (11th Cir. 1992) (affirming the admission of testimony by an undercover agent regarding the meaning of statements in tape recorded conversations with the defendants); United States v. Myers, 972 F.2d 1566 (11th Cir. 1992) (affirming that a witness' past experiences qualify as

before the amendment of Rule 701, and thus, its holding leaves open the question of whether the 2000 amendment will require a different conclusion.[85]

## VI. ARTICLE VIII: HEARSAY

In 1997 Congress codified the "waiver by misconduct" exception to the hearsay rule. This exception, now found in Rule 804(b)(6), provides that a statement is admissible as an exception to the hearsay rule if the statement is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The Eleventh Circuit had its first opportunity to address this codification in *United States v. Zlatogur*.[86] In *Zlatogur*, defendant argued that binding precedent required the prosecution to show by clear and convincing evidence that a defendant's misconduct brought about the unavailability of the witness.[87] The Eleventh Circuit acknowledged that its decision in *United States v. Thevis*[88] adopted the clear and convincing evidence standard.[89] However, the Advisory Committee notes to Rule 804(b)(6) provide that the codified version of the exception is subject to the preponderance of the evidence standard established by Federal Rule of Evidence 104(a).[90] Accordingly, the Eleventh Circuit concluded that its prior decision had been superseded by the statutory adoption of the waiver by misconduct exception.[91] Therefore, the prosecution need only show by a preponderance of the evidence that defendant procured the unavailability of the witness, and the court held that the prosecution had met this burden.[92]

In *United States v. Dickerson*,[93] the Eleventh Circuit addressed a relatively novel application of the co-conspirator exception to the rule

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rational perceptions under Rule 701); United States v. Davis, 787 F.2d 1501 (11th Cir. 1986) (affirming admission of opinion evidence under Rule 701 that defendant's statement that "he wanted to make a trip," was in reference to an illegal act); United States v. Russell, 703 F.2d 1243 (11th Cir. 1983) (affirming admission of agents' testimony interpreting tape recorded conversations with defendants)).

85. *Id.* at 1009 n.9.

86. 271 F.3d 1025 (11th Cir. 2001).

87. *Id.* at 1028.

88. 665 F.2d 616 (5th Cir. Unit B 1982).

89. *Id.* at 631.

90. *Zlatogur*, 271 F.3d at 1028 (citing FED. R. EVID. 804 (b)(6) advisory committee's note).

91. *Id.*

92. *Id.* at 1028-29.

93. 248 F.3d 1036 (11th Cir. 2001).

against hearsay.[94] In defendant's drug conspiracy trial, the district court admitted a telephone/address book found by police in a car belonging to one of defendant's alleged co-conspirators. This alleged co-conspirator testified that the book belonged to another alleged co-conspirator who had died long before the trial. This book contained the name "Frank," defendant's first name.[95] The district court admitted the telephone/address book pursuant to the co-conspirator exception and the Eleventh Circuit affirmed.[96] The court concluded that testimony of the second co-conspirator "to the effect that the book belonged to the third co-conspirator" provided sufficient circumstantial evidence to support the district court's conclusion that the third co-conspirator wrote the entries in the book.[97] Further, the testimony was sufficient to establish, for purposes of the admission of the statement, that defendant and the alleged co-conspirators were, in fact, a part of the conspiracy.[98] The fact that the owner of the book continued to carry the book with him was sufficient to establish that the entries he made in the book were made during the course of the conspiracy. With regard to whether the entries were in furtherance of a conspiracy, as required by the co-conspirator exception, the court noted that a "'liberal standard'"[99] applied.[100] Although the district court did not ennunciate the bases for its factual conclusion that the book was a statement in furtherance of the conspiracy, the Eleventh Circuit held that the district court "apparently concluded that anytime Hanks relied on the phone numbers of co-conspirators inscribed in the book, the objectives of the conspiracy would have been furthered by facilitating communication among co-conspirators to engage in the unlawful ends of the conspiracy, for example, the scheduling of cocaine deliveries."[101] Thus, the court concluded that the district court did not abuse its discretion when it admitted the book into evidence.[102]

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94. *Id.* at 1049. A statement by a co-conspirator is admissible against a defendant if the government proves that a conspiracy existed; that both the defendant and the declarant were members of the conspiracy; and that the statement was made during the course and in furtherance of the conspiracy. FED. R. EVID. 801(d)(2)(E). *See* Bourjaily v. United States, 483 U.S. 171, 176 (1987).

95. 248 F.3d at 1049.

96. *Id.* at 1050.

97. *Id.*

98. *Id.*

99. *Id.* (quoting United States v. Santiago, 837 F.2d 1545, 1549 (11th Cir. 1988)).

100. *Id.*

101. *Id.*

102. *Id.*

In *United States v. Grant*,[103] the Eleventh Circuit had a rare opportunity to interpret Rule 806, which allows an opponent the opportunity to attack the credibility of the declarant of a statement admitted pursuant to Rule 801(d)(2)(C), (D), or (E). In *Grant*, the trial court admitted out of court statements of defendant's alleged co-conspirator through the testimony of an undercover agent who had talked with the co-conspirator during defendant's alleged conspiracy to distribute drugs. The officer's testimony was admitted pursuant to the co-conspirator exception, Rule 801(d)(2)(E). In response, defendant attempted to introduce an affidavit from the co-conspirator to impeach the co-conspirator's statements admitted through the testimony of the officer. The district court refused, concluding that the affidavit statements were not "inconsistent," in the sense required by Rule 806, with the statements admitted through the officer's testimony. The undercover agent's statements did not specifically identify defendant as a co-conspirator, and the affidavit statements simply made clear that defendant was not the declarant's co-conspirator. Because the agent did not identify defendant as a co-conspirator, his testimony, according to the district court, was not inconsistent with a statement that defendant was not a co-conspirator.[104] This concept of inconsistency, the Eleventh Circuit concluded, was much too narrow.[105] First, while the government was careful in the agent's testimony to never elicit testimony that defendant was the co-conspirator, the agent's testimony about the statements from the co-conspirator made it clear that he had conspired with others, and other testimony identified defendant as that conspirator. Rule 806 does not require that the inconsistent statements relate specifically to the identity of co-conspirators. Rather, the Rule provides for the admission of "any evidence which would be admissible" for purposes of attacking the declarant's credibility. Thus, the test is whether the out of court statements would have been admissible for impeachment purposes had the co-conspirator's statements been delivered from the witness stand by the co-conspirator himself. Here, the government used the co-conspirator's alleged statement to the agent to establish the existence of a conspiracy. However, his affidavit statements were inconsistent with the existence of a conspiracy, and thus, were inconsistent with the statements admitted at trial. Therefore, the statements were admissible pursuant to Rule 806.[106]

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103. 256 F.3d 1146 (11th Cir. 2001).

104. *Id.* at 1152-53.

105. *Id.* at 1153.

106. *Id.* at 1156. The Eleventh Circuit also rejected the government's argument that the impeaching statements were inadmissible pursuant to Rule 403 because the

In a footnote, the court carefully noted that it was not addressing whether the government could introduce supporting testimony, such as the co-conspirator's grand jury testimony, once the affidavit statements came in to evidence.[107] Specifically, the court declined to expound upon whether the co-conspirator, by giving an affidavit, waived his privilege against self incrimination, and whether the affidavit statements would be admissible if the co-conspirator refused to testify.[108]

In *Chandler v. Moore*,[109] the Eleventh Circuit rejected the habeas corpus petition of a Florida death row inmate who contended, among other things, that the admission of hearsay evidence at his sentencing hearing violated the Confrontation Clause of the Sixth Amendment.[110] The Eleventh Circuit, which had not squarely addressed the issue of whether hearsay evidence can be used at sentencing hearings, sided with the Seventh Circuit and held that the Confrontation Clause does not bar the use of hearsay evidence at sentencing hearings.[111] However, the court reiterated that the defendant must be given the opportunity to rebut the hearsay evidence.[112]

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statements, if believed, would constitute a complete defense, rather than merely impeaching the co-conspirator's statements admitted at trial. *Id.* at 1155. The probative value of the affidavit statements, attacking as they did a key element of the government's case, was significant, and the Eleventh Circuit did not agree that this probative value would be outweighed by any prejudicial impact of the affidavit statements. *Id.* Moreover, any prejudicial impact would have been cured by an appropriate instruction, if requested, informing the jury that the affidavit statements were admissible only to impeach the admitted statements. *Id.* at 1156.

107. *Id.* at 1155 n.6.

108. *Id.*

109. 240 F.3d 907 (11th Cir. 2001).

110. *Id.* at 918.

111. *Id.* (citing Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363 (7th Cir. 1994)).

112. *Id.*