Alabama Law Scholarly Commons

Articles | Faculty Scholarship

1-2021

Circuit Criminal Trial and Evidence Practice Pointers

William H. Filmore

Tobie J. Smith

J. Patrick Lamb

Follow this and additional works at: https://scholarship.law.ua.edu/fac_articles

Circuit Criminal

Trial and Evidence Practice Pointers

Judge William H. Filmore, Tobie J. Smith, and J. Patrick Lamb

Most Often Cited Rule of Evidence: 404(b)

The first sentence of Alabama Rules of Evidence Rule 404(b) gives the general rule: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But the rule goes on to say that it *may* be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The cases that are tried the most often are the ones with the most severe penalties. Rule 404(b) is most often seen in sexual assault cases involving children. This exception has been carved out in case

law, as "[the Alabama Supreme Court has] held that evidence of similar collateral sex acts with a child was admissible under Rule 404(b) to prove that the appellant was 'motivated by an unnatural sexual desire for young girls.'"[1] Needless to say, this evidence, if admitted, could be very damaging to the defendant. The court should conduct a hearing outside the presence of the jury under Rule 104(a) to determine what limits will be made to the testimony. Courts are not looking to try cases within cases. It is recommended that a limiting instruction should be given at the time of the testimony and again during the general charge. The instruction not only should attempt to limit the use of the evidence, but also attempt to explain the application of the burden of proof.

Whether the use of 404(b) is for propensity of similar collateral sex acts with a child, or for other purposes, the court should still perform a balancing test under Rule 403 to the evidence presented in each case. The court should examine the strength of the evidence, the need for the evidence, whether the evidence is too remote, the degree of similarity, and whether a limiting instruction will be sufficient.[2] Remoteness may not be as big a factor in sexual assault cases.[3] And, we don't need to forget that "the jury almost surely cannot comprehend the Judge's limiting instructions."[4] An example of a limiting instruction could be:

> Ladies and gentlemen of the jury, there was evidence offered in this case in regard to other alleged specific conduct or acts on the part of the defendant other than the charge in the indictment in this case. That evidence is not offered nor allowed in for your consideration as evidence that the defendant committed the acts that are charged in this case simply because he may have committed some other similar act at the time not in issue in this case. This evidence cannot be considered by you in passing upon whether the defendant actually committed the acts charged in this case. Nor may it be considered by you in considering the character of the accused. Such evidence may be considered by you only in passing upon what the defendant's motive, if any, may have been at any time material to the issues in this case. The state is offering this evidence for the sole purpose of showing the defendant's unnatural sexual desire for young girls as defendant's motive to commit the crime charged in the present case.

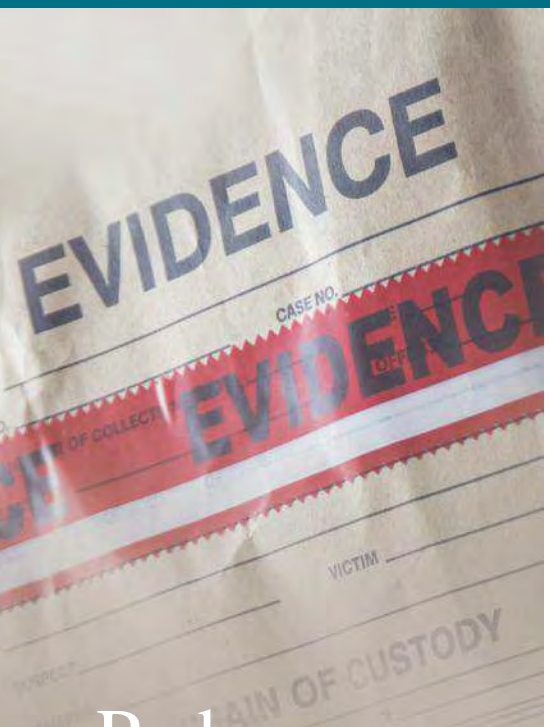
Motions to Suppress Evidence

The most significant evidentiary rule in criminal cases might not even be in the rules of evidence. The exclusionary rule is a doctrine that "forbids the use . . . at trial" of evidence obtained in violation of the Fourth Amendment[5]–*if* suppressing the evidence will "result in appreciable deterrence" of future Fourth Amendment violations.[6] In some of the most commonly prosecuted crimes, such as unlawful possession of drugs, a weapon, or other contraband, the entire case turns on the admissibility of a single piece of evidence. If the evidence is suppressed, then the prosecution cannot prove the charge and will have no choice but to dismiss.

Despite that, lawyers often miss opportunities to suppress crucial evidence, even when doing so could drastically transform the complexion of the case, because they either do not look for those opportunities or do not recognize them. There can be many reasons for that: inexperience,[7] unfamiliarity with the complexities of Fourth Amendment law, or simply an aversion to motions practice. But it really is not possible to effectively practice criminal defense, or to effectively prosecute crimes, without a basic understanding of Fourth Amendment rules, suppression practice, and the exclusionary rule.[8]

The law regarding unlawful searches and seizures is too elaborate to summarize here, but the basics of suppression practice are simple enough. Proving that a search or seizure was lawful–or unlawful (the party that bears the burden depends on whether the search was based on a warrant)[9]–usually requires testimony and evidence that differs from, and would not be permitted as, trial evidence. So, an oral motion at trial will not do, and a written, pretrial motion is necessary.[10]

As for the deterrence rationale underlying the exclusionary rule, the mere fact of a Fourth Amendment violation provides an argument for suppression: "to compel respect for the constitutional guaranty in the



Perhaps the most common, and most legitimate, evidentiary use of police reports is as a prior statement by a witness.

only effectively available way–by removing the incentive to disregard it."[11] But exclusion "doesn't follow automatically" from a Fourth Amendment violation;[12] it also requires a showing that under the particular facts of the case, suppression would "deter[] officer misconduct and punish[] officer culpability . . . ."[13] Ordinarily, that means a violation must have resulted from not just accidental or merely negligent disregard for Fourth Amendment protections, but rather "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[14]

At a suppression hearing, the prosecution usually should present its case first, a detail that frequently confuses judges and lawyers because of the fact that the hearing is on the defendant's motion. This order of presentation more naturally follows the burden of production and proof.[15]

Evidentiary Use of Police Reports

Police reports can be useful in a variety of ways, but are frequently misused. It is natural that prosecutors and defense attorneys alike will look to police reports as valuable sources of information. In an evidentiary setting, though, reports are seldom the right source of admissible evidence. Their main evidentiary value is to show what someone said at or near the time of an incident, and because of that, most direct uses of them would be hearsay.[16]

A police report, like any writing, may be used to refresh a witness's recollection, even that of a non-police witness.[17] But that ordinarily does not mean that a witness should be allowed to continually refer to or read from the report, notes, or any other writing while on the stand, because the purpose of refreshing recollection is to allow a *present* recollection of something the witness previously knew but cannot readily recall.[18] On the other hand, a report may be read verbatim into the record if it qualifies under the hearsay exception for a recorded recollection.[19]

Perhaps the most common, and most legitimate, evidentiary use of police reports is as a prior statement by a witness. Usually, the prior statement will be one asserted to be inconsistent with the witness's testimony and used to impeach,[20] because the permissible uses of prior *consistent* statements are more limited.[21] To qualify as a witness's prior statement, the police report's contents must have been made by the witness in some way.[22] That includes the officer who wrote the report, but it also can include another officer, witness, or person who signed it, if in doing so the person intended to adopt part or all of the contents.[23]

Scientific Evidence

Definition: Scientific evidence must rest on scientific principles, and it is distinguished from other expert testimony which relies solely on specialized knowledge. Examples of non-scientific

evidence includes print or firearm identification testimony,[24] an animal's cause of death,[25] examinations of skeletal remains,[26] crime scene analysis,[27] handwriting analysis,[28] and black light tests.[29] Non-scientific evidence is generally admitted if it satisfies the basic requirements of Rule 702: reliable expert knowledge, helpful to factfinder, and relevance.

Admissibility Tests: Traditional Alabama precedent adopts the "Frye" test[30] or the "general acceptance test."[31] This test is intended for use in admission of "novel" scientific evidence supported by scientific principles, methods, or procedures which have gained *general acceptance in the field* in which the expert is testifying. The broader *Daubert* test[32] allows admission of novel scientific evidence when 1) based on sufficient facts or data, 2) is the product of *reliable principles and methods*, and 3) the principles and methods are applied in a reliable manner. The focus on the two tests is "general acceptance" versus a "reliable" principle and method. This shift began in Alabama state courts with DNA evidence in 1994[33] and for both civil actions and felony cases in 2011.[34]

The pertinent analysis to determine the proper test for admissibility is whether the evidence is indeed "scientific" and then whether to apply the general *Frye* test or the specified *Daubert* test.

Social Media

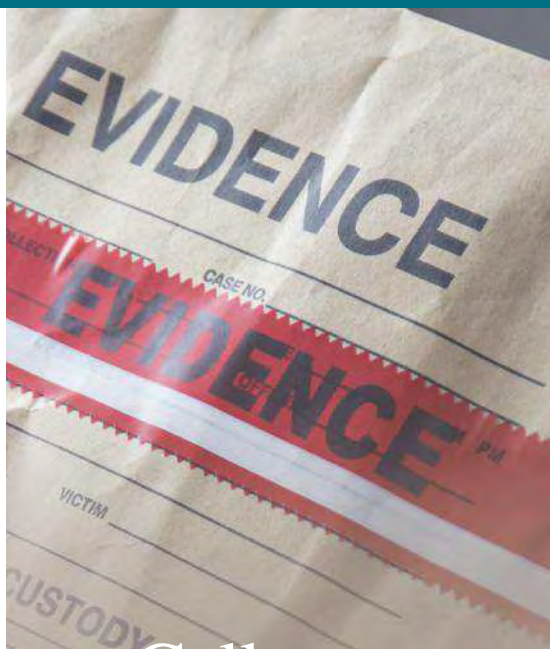
Social media evidence such as Facebook, Twitter, and other platforms have become a regular part of criminal investigations and prosecutions. Similarly, digital communications such as emails or text messages are common place in all manner of trial settings. They may be admitted similarly to other forms of evidence and must overcome authentication, hearsay, relevance, and best evidence. Examples in Alabama of proper foundations include a detective who took screen shots of a material posting in conjunction with a media search and corroborating circumstances;[35] and printouts of emails explained by domestic victim who helped set up the account and which included photographs of sender, his initials, and personal references in the content.[36] Such evidence may also be admitted as a business record by a provider of cell service or similar digital provider.[37]

Admissibility is not the only concern for social media or digital evidence. The weight of the evidence may become a concern if the authenticating witness has a bias.

Cell Towers[38]

Cell tower historical information revealing the location of cell phones or similar devices has become common place in serious felony prosecutions.

4th Amendment: Historical cell tower location data is generally governed by federal law[39] which is adopted by state statute.[40] In interpreting these laws, the United States Supreme Court in *Carpenter v. United States*[41] that a search warrant based upon probable cause is required to obtain location information from cell tower records.



Cell tower historical information revealing the location of cell phones or similar devices has become common place in serious felony prosecutions.

Prior to this opinion, 18 U.S.C. § 2703(d) provided for disclosure of cell tower records based upon "specific and articulable facts showing that there are reasonable grounds" as opposed to probable cause. Pre-*Carpenter* cases have allowed admission due to the "good faith" exception.[42] Post-*Carpenter* location records should be obtained by a search warrant or proper exception. Evidence obtained in violation of the Fourth Amendment should be challenged by a suppression motion.

Authentication: Records, including cell tower records, must be authenticated prior to their admission. Authentication is satisfied by "evidence sufficient to support a finding" that the record is what the proponent claims.[43] Cell tower records are typically admitted as business records[44] and as such may be self-authenticating depending upon the certification.[45] It is noteworthy that the self-authentication rule requires prior notice.

Qualifications and Presentation: Cell tower records may be interpreted by a witness who is properly qualified.[46] This would include training and experience, but does not necessarily require "expert" testimony. Cell tower location testimony is limited; however, the location of the cell tower is generally admissible.[47] Limitations as to how precise location testimony is are largely based upon the quality of the expert and reliability of the method.[48] ▲

Endnotes

1. *Towles v. State*, 168 So. 3d 133 (2014).
2. Goode and Welborn, *Courtroom Evidence Handbook*, p. 98.
3. *McClendon v. State*, 813 So. 2d 936 (Ala. Crim. App. 2001).
4. *Michelson v. United States*, 335 U.S. 469, 484 (1948).
5. *Herring v. United States*, 555 U.S. 135, 139 (2009) (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)).
6. *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).
7. Even seasoned lawyers may lack experience in this area if they have never gotten in the habit of looking for suppression issues.
8. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (defense counsel's performance was constitutionally deficient where he "failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce" crucial incriminating evidence arguably seized in violation of Fourth Amendment).
9. 6 Wayne R. LaFave, *Search & Seizure* § 11.2(b) (5th ed. 2019) ("[M]ost states follow the rule utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution."); *Ex parte Hergott*, 588 So. 2d 911, 914 (Ala. 1991) ("The State has the burden to prove that a warrantless search was reasonable.").
10. See F. R. Crim. P. 12(b)(3)(C); Ala. R. Crim. P.3.13; 15.6.
11. *Elkins v. United States*, 364 U.S. 206, 217 (1960).
12. *United States v. Taylor*, 935 F. 3d 1279, 1289 (11th Cir. 2019).
13. *Id.* at 1290 (emphasis omitted) (citing *Herring*, 555 U.S. at 142).
14. *Herring*, 555 U.S. at 144.
15. *See* LaFave, *supra note* 5.
16. Ala. R. Evid. 803(8)(B) and F.R.E. 803(8)(A)(ii) both provide that police reports are not admissible by the prosecution under the public-records exception to the hearsay rule. The federal exclusion applies to both parties, while the Alabama rule applies only where the report is "offered *against* the defendant," Ala. R. Evid. 803(8)(B) (emphasis added).
17. See F.R.E 612; Ala. R. Evid. 612.
18. *See, e.g., Crusoe v. Davis*, 176 So. 3d 1200, 1205 (Ala. 2015) (trial court properly barred officer from testifying about contents of police report where he "admitted he had no independent recollection of the contents").
19. *See* Ala. R. Evid. 803(5); Fed. R. Evid. 803(5).
20. *Id.* at 801(d)(1)(A); Fed. R. Evid. 801(d)(1)(A).
21. *See* Ala. R. Evid. 801(d)(1)(B); Fed. R. Evid. 801(d)(1)(B).
22. *See* Fed. R. Evid. 801(b), (d)(1)(A); Ala. R. Evid. 801(b), (d)(1)(A).
23. *See* Ala. R. Evid. 801(a); Fed. R. Evid. 801(a).
24. *Revis v. State*, 101 So.3d 247 (Ala. Crim. App. 2011).
25. *Courtaulds Fibers, Inc. v. Long*, 779 So.2d 198 (Ala. 2000).
26. *Ex parte Dolvin*, 391 So.2d 677 (Ala. 1980).
27. *Simmons v. State*, 797 So.2d 1134 (Ala. Crim. App. 1999).
28. *West v. State*, 793 So.2d 870 (Ala. Crim. App. 2000).
29. *Stewart v. State*, 601 So.2d 491, 499 (Ala. 1993).
30. *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). See *Ex parte Perry*, 586 So.2d 242 (Ala. 1991).
31. See *Swantstrom v. Teledyne Cont'l Motors, Inc.*, 43 So.3d 564, 580 (Ala. 2009).
32. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993).
33. Ala. Code § 36-18-30.
34. *Id.* at § 12-21-160 (2012).
35. *Knight v. State*, 2018 WL 3805735 (Ala. Crim. App. 2018).
36. *Culp v. State*, 178 So.3d 378 (Ala. Crim. App. 2014).
37. *Pettibone v. State*, 91 So.3d 94 (Ala. Crim. App. 2011).
38. Note that these issues were largely addressed in an opinion issued by the court of criminal appeals in January 2020, *Watson v. State*, —-- So. 3d —--, 2020 WL 113366 (Ala. Crim. App. 2020.
39. The Stored Communications Act, 18 U.S.C. § 2701, et. seq.
40. Ala. Code §§ 13A-8-115 and 15-5-40.
41. *Carpenter v. United States*, 138 S.Ct. 2206, 201 L.Ed. 2d 507 (2018).
42. See *United States v. Carpenter*, 926 F. 3d 313 (6th Cir. 2019).
43. Rule 901(a) of the Alabama Rules of Evidence.
44. Ala. Code §12-21-43 and Rules 803(6), 902(11), and 1001 of the Alabama Rules of Evidence.
45. Alabama Rule of Evidence 902(11), (13), and (14).
46. *Woodward v. State*, 123 So. 3d 989, 1014-16 (Ala. Crim. App. 2011).
47. *Id.*
48. Recently discussed in *United States v. Frazier*, 442 F. Supp. 3d 1012 (M.D.Tenn. 2020).

Judge William H. Filmore

Judge Bill Filmore is the presiding circuit judge for the 33rd Judicial Circuit and has 37 years of trial experience.

Tobie J. Smith

Tobie Smith is an attorney with the Office of the Federal Public Defender in Birmingham and has 18 years of trial experience.

J. Patrick Lamb

Patrick Lamb is general counsel for the Alabama Office of Prosecution Service and has 27 years of trial experience.