Mercer Law Review

Volume 43
Number 4 *Annual Eleventh Circuit Survey*

Article 7

7-1992

# Constitutional Criminal Law

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## I. Introduction

Last year, the Eleventh Circuit examined some interesting constitutional issues that affect defendants in criminal cases. What follows are the most significant of those constitutional issue cases, and an additional criminal case of first impression to the Eleventh Circuit Court of Appeals. The authors have made no effort to provide an exhaustive digest of all the court's opinions for the 1991 year.

## II. First Amendment

In a criminally related civil rights case, the Eleventh Circuit held that a Georgia Department of Corrections policy forbidding employees from communicating directly with the parole board violated First Amendment rights of the parole candidates.[1] In *Harris v. Evans*,[2] the court reasoned that the policy was not necessary for the efficient operation of the prisons and, that, therefore, the trial court had properly denied defendants' motion for summary judgment.[3]

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1. Harris v. Evans, 920 F.2d 864, 868 (11th Cir. 1991).
2. 920 F.2d 864 (11th Cir. 1991).
3. *Id.* at 867-68.

The court held that plaintiff, a prison inmate, had standing to assert the First Amendment rights of a prison employee because the inmate had shown an injury-in-fact.[4] The court reasoned that were the policy not lifted, prison employees would hesitate to write on plaintiff's behalf for fear of losing their jobs.[5] Further, the court found that the inmate's personal interest in receiving favorable recommendations to the parole board made the inmate a zealous advocate of the employee's rights.[6]

The court reiterated the rule in *Connick v. Myers*[7] holding that when the government seeks to regulate employee speech regarding matters of public concern, the court must balance the employee's interest in commenting upon matters of public concern with the interest of the state in promoting the efficiency of public services it performs through state employees.[8] In *Harris* the magistrate held that the corrections officials failed to present any evidence of their need to restrict an employee's communication with the parole board and did not establish that the governmental interests were outweighed by First Amendment interests.[9] Due to the lack of evidence in the record, the Eleventh Circuit determined that the district court correctly denied the state's motion for summary judgment.[10] In a dissenting opinion,[11] Judge Brown found that the inmate lacked standing to pursue his claim and, therefore, the state policy should have been reviewed under the rule supported in *Turner v. Safley*.[12]

## III. FOURTH AMENDMENT

A majority of the Eleventh Circuit held that evidence gathered in violation of state law is nevertheless admissible in federal court.[13] In *United States v. Gilbert*,[14] the court found that constitutional considerations, rather than state law, control in determining whether there has been a reasonable search and seizure.[15] In *Gilbert* a federal agent of the Bureau of Alcohol, Tobacco, and Firearms requested a search warrant from a State Attorney to search the home of Gilbert.[16] A state judge issued a

4. *Id.* at 867.
5. *Id.* at 866.
6. *Id.* at 867.
7. 461 U.S. 138 (1983).
8. *Id.* at 140 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).
9. 920 F.2d at 867-68.
10. *Id.* at 868.
11. *Id.* at 868-75 (Brown, J., dissenting).
12. *Id.* at 868-70 (citing Turner v. Safley, 482 U.S. 78 (1987)).
13. United States v. Gilbert, 942 F.2d 1537, 1542 (11th Cir. 1991).
14. 942 F.2d 1537 (11th Cir. 1991).
15. *Id.* at 1542.
16. *Id.* at 1539.

search warrant directed to "all and singular the Sheriff or Deputy Sheriff's of Duval County, Florida."[17] However, the federal agent and two municipal police officers executed the warrant and found a .308 caliber rifle and 35 bags of cocaine in Gilbert's home.[18]

Florida law requires that state warrants be served by the officers mentioned in the warrant.[19] The Eleventh Circuit held that although the execution of the warrant may have violated Florida law, the warrant was not violative of federal law and, therefore, the search was lawful.[20] The court reasoned that because state authority clearly empowered federal agents to execute the warrant at the location searched (had the agents been listed in the warrant), the State Attorney in this case "merely neglected to include them" within the scope of those authorized to execute this particular search warrant.[21] Therefore, the court found that the State Attorney's failure was not an error of constitutional proportions and implicated "none of the interests that the Fourth Amendment protects."[22]

In reaching its decision, the Eleventh Circuit had to consider the Fifth Circuit's decision in *United States v. Martin*.[23] In *Martin* the Fifth Circuit evaluated a faulty state warrant executed by the wrong person as a reason to suppress the evidence generated by the search.[24] However, the Eleventh Circuit distinguished the holding in *Martin* and held that the search in this case did not violate constitutional principles, even though it may not have complied with Florida State law.[25]

In his concurring opinion, Chief Judge Tjoflat reasoned that the majority opinion in *Gilbert* failed to focus on the decisive issue of whether the search constituted an unreasonable search.[26] He concluded that the search complied with the Fourth Amendment because the warrant was issued by a detached and neutral magistrate and was based upon probable cause.[27]

The Eleventh Circuit again limited the applicability of the Fourth Amendment in *United States v. Lynch*.[28] Here, the Eleventh Circuit held

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17. *Id.*
18. *Id.*
19. FLA. STAT. ANN. § 933.08 (Harrison 1991).
20. 942 F.2d at 1542.
21. *Id.* at 1541.
22. *Id.*
23. 600 F.2d 1175 (5th Cir. 1979), *overruled by* United States v. McKeever, 905 F.2d 829 (5th Cir. 1990).
24. 600 F.2d at 1177-78.
25. 942 F.2d at 1540-41.
26. *Id.* at 1542-43 (Tjoflat, C.J., concurring).
27. *Id.*
28. 934 F.2d 1226 (11th Cir. 1991).

that the exclusionary rule does not apply to sentencing procedures.[29] Lynch was convicted for possession with intent to distribute five hundred or more grams of cocaine and conspiracy to commit the substantive act. The trial court denied a motion to suppress the handguns found during a search of his home.[30] On appeal, the Eleventh Circuit held that the search of the defendant was illegal and that the trial court should have suppressed the evidence.[31] The court reasoned that the agents could have obtained a search warrant to search defendant's home and the mere presence of contraband narcotics in the home did not establish the necessary exigent circumstances to justify a warrantless search.[32] However, the court found this error harmless and upheld defendant's convictions.[33]

At sentencing, the same illegally seized guns were used to increase defendant's sentence.[34] The Eleventh Circuit found that the exclusionary rule does not apply to sentencing procedure and illegally seized evidence may be used at sentencing.[35] The only requirement at sentencing, the court explained, is that the "information has sufficient indicia of reliability"[36] and that "evidence obtained as a result of an unconstitutional search is not inherently unreliable."[37]

## IV. Fifth Amendment

### A. *Defendant's Right to Remain Silent*

In *United States v. Gomez*,[38] the Eleventh Circuit strengthened defendant's Fifth Amendment rights to remain silent by upholding the suppression of statements made by defendant minutes after defendant requested an attorney.[39] The court held that federal agents had violated defendant's Fifth Amendment right to remain silent by telling Gomez that he did not have to speak at that time, but that he might want to consider cooperating with the agents because that was the only way to reduce his exposure to a long prison sentence for drug conspiracy.[40] The court further held that even though the incriminating statements were

29. *Id.* at 1237.
30. *Id.* at 1228-30.
31. *Id.* at 1233.
32. *Id.* at 1232-33.
33. *Id.* at 1233-34.
34. *Id.* at 1229-30.
35. *Id.* at 1237.
36. *Id.* at 1236 (quoting Sentencing Guidelines § 6A2.3 (Nov. 1, 1990)).
37. *Id.*
38. 429 F.2d 1530 (11th Cir. 1991).
39. *Id.* at 1539.
40. *Id.*

"volunteered" and not in response to direct questioning, the statements should be suppressed.[41] Once an individual accused of a crime has invoked his right to counsel, the interrogation must terminate until an attorney is provided unless the defendant initiates further conversations with the agents.[42]

In *Gomez* the Eleventh Circuit held that the rule in *Edwards v. Arizona*[43] had been violated even though Gomez began the exchange of communication with the agents.[44] The court found that Gomez's remarks did not "initiate" the dialogue because his decision to speak with the agent was preceded by the agent's advice regarding cooperation.[45] Therefore, "interrogation" can be any conduct or remarks an officer should know are reasonably apt to prompt the suspect to incriminate himself. The court noted that the agent's comments amounted to a "psychological ploy" which is likely to elicit an inculpatory response.[46]

The court pointed out that once Gomez requested an attorney, the agent should have respected that request and that the agent knew that emphasizing the possible harsh sentence and benefits of cooperation to defendant would likely be interpreted by the accused as pressure to respond.[47] In reaching its decision, the court held that the issue in *Edwards* was whether the police engaged in further interrogation, not questioning.[48]

### *B. Double Jeopardy*

In *United States v. Lanier*,[49] the Eleventh Circuit held that double jeopardy did not bar convictions for both charges of conspiracy to steal government property and conspiracy to defraud the United States by obtaining payment of false claims.[50] The court determined that double jeopardy did not bar convictions for violating both a general conspiracy statute and a specific conspiracy statute even when both convictions stem from the same conspiracy.[51]

In *Lanier* the Small Business Administration subcontracted co-defendant, Stevens Oil, to supply oil to the Defense Fuel Supply Center. Spot

41. *Id.* at 1538-39.
42. *Id.* at 1539 (citing Edwards v. Arizona, 451 U.S. 476 (1981)).
43. 451 U.S. 477 (1981).
44. 927 F.2d at 1539.
45. *Id.* at 1538.
46. *Id.*
47. *Id.*
48. *Id.* at 1539.
49. 920 F.2d 887 (11th Cir. 1991).
50. *Id.* at 894-95.
51. *Id.* at 895.

checks by the government indicated that defendant had charged the government for two shipments of oil not actually delivered. The evidence also showed a conspiracy among officials of defendant's company, Stevens Oil, including the president of Stevens oil, its office manager, defendant Lanier, and certain government officials.[52] On appeal, defendant relied on *United States v. Mori*[53] and *United States v. Corral*[54] which held that double jeopardy forbids convictions of both the general conspiracy statute[55] and a specific conspiracy statute[56] when the evidence established only one conspiracy.[57]

In *Mori* and *Corral*, the Eleventh Circuit's predecessor court held that participants in one conspiracy could not be convicted under both a general and specific conspiracy statutes. After the *Mori* and *Corral* cases were decided, however, the Supreme Court, in *Albernaz v. United States*,[58] held that a defendant could be convicted under both general and specific conspiracy statutes when only one conspiracy was established.[59] In *Lanier* the Eleventh Circuit relied on the Supreme Court's reasoning in *Albernaz* that upheld a dual conviction under two specific conspiracy statutes when only one conspiracy existed.[60] The Court in *Albernaz* looked to the elements required to establish a violation of each statute and concluded that if each conspiracy statute requires an element not required by the other, a court can presume that Congress intended two crimes, even though there is only one conspiracy.[61]

In *Lanier* the Eleventh Circuit stated that the *Albernaz* decision required that the court focus solely on whether Congress intended to permit prosecution under both statutes for the same conspiracy.[62] Because the general conspiracy statute requires an overt act and the specific conspiracy statute requires proof of an agreement to defraud the government (through the particular device of obtaining payment of a false claim), each statute requires proof of one element not required by the other.[63] In accordance with *Albernaz*, the court found that convictions on both conspiracy charges did not violate the double jeopardy clause.[64]

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52. *Id.* at 889.
53. 444 F.2d 240 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971).
54. 578 F.2d 570 (5th Cir. 1978).
55. 18 U.S.C. § 371 (1988).
56. 18 U.S.C. § 286 (1988).
57. 920 F.2d 887, 891-92 (11th Cir. 1991).
58. 450 U.S. 333 (1981).
59. *Id.* at 344.
60. 920 F.2d at 892.
61. 450 U.S. at 344.
62. 920 F.2d at 893.
63. *Id.*
64. *Id.* at 895.

In *In re Grand Jury Investigation, U.S. Attorney Matter Number 89-4-8881-J*,[65] the Eleventh Circuit held that an attorney's secretary could be a valid substitute custodian and be subpoenaed to produce a trust account and law practice records[66] and did not violate the attorney's fifth amendment rights. In arriving at its decision, the court placed particular significance on the responsibilities and conduct of the secretary.[67]

In this case, the private secretary was the attorney's legal and personal secretary and his only employee. She maintained the attorney's client and personal financial records. Furthermore, she typed all the attorney's papers, kept his court calendar, and paid both the business and personal bills. She wrote business and personal checks for his signature and received business and personal payments on his behalf. She also maintained the records of deposits and prepared the deposit slips for the attorney. In addition, she handled the attorney's bookkeeping and financial ledgers at her desk, worked with the attorney's client files, and kept financial information regarding clients as part of her duties as secretary. She was responsible for the preparation of client bills that were placed in the files. The attorney also relied upon her to provide the financial information and work with his accountant.[68]

In light of these facts, the Eleventh Circuit held that the protection of the documents by the secretary did not have the degree of "personal compulsion" sufficient to constitute an infringement of the attorney's Fifth Amendment privilege.[69] Falling somewhere between the comptroller in *In re Grand Jury Subpoena (Kent)*[70] and the record keeper in *Matter Of Grand Jury Empaneled (Colucci)*,[71] the court held that the secretary was a valid substitute custodian with respect to the law practice and to the trust account records who could be compelled by subpoena to produce those records for the grand jury.[72]

## V. Sixth Amendment

The Eleventh Circuit examined a defendant's right to enter a guilty plea against the advice of counsel in *Stano v. Dugger*.[73] Specifically, the court determined that a defendant had the right to represent himself by

65. 921 F.2d 1184 (11th Cir. 1991).
66. *Id.* at 1189.
67. *Id.*
68. *Id.* at 1188-89.
69. *Id.* at 1189.
70. 646 F.2d 963 (5th Cir. 1981).
71. 597 F.2d 851 (3d Cir. 1979).
72. 921 F.2d at 1184.
73. 921 F.2d 1125 (11th Cir. 1991).

entering a guilty plea against advice of counsel even in a death penalty case when he later argued his counsel was ineffective.[74]

Defendant, Stano, confessed to the murders of two women in Florida and was later indicted and prosecuted. At arraignment, Stano was appointed a public defender, Howard Pearl. Pearl previously had represented Stano in three other guilty pleas for first degree murder. In these earlier cases, Stano received six consecutive life sentences pursuant to a plea agreement. A plea of not guilty was entered on each of the later two indictments for first degree murder. Approximately one month later Stano changed his pleas to guilty. Stano informed the court that he wished to enter the guilty pleas even though discovery had not yet been received in his cases.[75] The Eleventh Circuit held that Stano's Sixth Amendment rights to effective assistance of counsel were not violated when he pled guilty to murder against the advice of counsel and without first obtaining complete discovery in the case.[76] Because defendant's plea was freely, voluntarily, and knowingly entered, the trial court accepted it.[77]

By Petition for Writ of Habeas Corpus, Stano claimed that he represented himself by entering guilty pleas against advice of appointed counsel, and therefore, the trial court should have engaged in the inquiry required by *Faretta v. California*[78] to determine whether he was qualified to represent himself. After eliciting testimony from Stano regarding his twelfth grade education and computer training, the trial court determined that Stano was competent and explained the ramifications of his guilty plea. The trial court also determined that Stano had spoken with his attorney about the consequences of his plea and that Stano's guilty pleas were voluntary, intelligent, and knowing. Also, the trial court determined that Stano was satisfied with his attorney.[79]

Three months later, Pearl represented Stano at his sentencing hearing. The court ordered death sentences with written factual findings supporting the sentence in both cases. On direct appeal and on post conviction relief under Florida law, defendant's convictions were upheld.[80]

Stano then Petitioned for Writ of Habeas Corpus and a federal magistrate conducted a hearing and called Pearl, Stano's attorney, to testify. At that hearing, Pearl stated that he informed Stano of the likelihood of the death penalty and that all discovery had not been received. Mr. Pearl also

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74. *Id.* at 1147.
75. *Id.* at 1128-39.
76. *Id.* at 1146.
77. *Id.* at 1148.
78. 422 U.S. 806 (1975).
79. 921 F.2d at 1130-31.
80. *Id.* at 1132.

stated that, although Stano appeared competent to stand trial, he had attempted to present some mitigating evidence of Stano's insanity during the sentencing hearings.[81]

The district court held that Stano's counsel advised him not to plead guilty, warned him of the likelihood of imposition of the death penalty, and told him that there was no ineffective assistance of counsel. Regarding Stano's claim that he acted pro se when entering his guilty pleas because his counsel did so little to help him, the District Court also found that the two part test of *Strickland v. Washington*[82] applied.[83] The court reasoned that because Stano did not meet the prejudice prong of the *Strickland* test, he could not prove ineffective assistance of counsel.[84] The court further held that "Stano himself limited the effectiveness of his counsel by entering guilty pleas against Mr. Pearl's advice."[85]

At its first hearing, the Eleventh Circuit reversed the district court and granted Stano's Writ of Habeas Corpus.[86] In that opinion, the Eleventh Circuit reasoned that because Stano essentially represented himself at his guilty pleas, the court should have conducted an inquiry pursuant to *United States v. Cronic*[87] and *Faretta*.[88]

The Eleventh Circuit granted a rehearing en banc.[89] At that rehearing, the court denied Stano's petition for Writ of Habeas Corpus.[90] In its final opinion, the Eleventh Circuit found that Rule Eleven of the Federal Rules of Criminal Procedure set forth the minimum requirements for a knowing and voluntary plea in federal court and that Stano's plea satisfied those requirements.[91]

The Eleventh Circuit also found that the trial court correctly inquired into Stano's waiver of counsel, which is preeminent over the right to self representation as required in *Faretta*.[92] Citing its own opinion of *Dorman v. Wainright*,[93] the Eleventh Circuit found:

> To invoke his Sixth Amendment right under *Faretta* a defendant does not need to recite some talismanic formula . . . . [P]etitioner must do no more than state his request, either orally or in writing, unambiguously to

81. *Id.* at 1134-35.
82. 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).
83. 921 F.2d at 1138-39.
84. *Id.* at 1139.
85. *Id.*
86. *Id.*
87. 466 U.S. 648 (1984).
88. 921 F.2d at 1139.
89. *Id.*
90. *Id.* at 1154.
91. *Id.* at 1141-42 (citing FED. R. CRIM. P. 11).
92. *Id.* at 1142.
93. 798 F.2d 1358, 1366 (11th Cir. 1986).

> the court so that no reasonable person can say that the request was not made. In this Circuit, the court must then conduct a hearing on the waiver of the right to counsel to determine whether the accused understands the risks of proceeding pro se.[94]

Furthermore, the court in *Stano* stated that the court need not determine whether a defendant is proceeding pro se.[95] The defendant must tell the trial court of his desire to exercise the right to self representation to trigger the trial courts obligation to conduct an inquiry under *Faretta*.

## VI. Case of First Impression

The threshold issue in the case of *United States v. Hill*,[96] was whether the government must go forward with an exception under 21 U.S.C.A. § 952,[97] covering the importation of cocaine or whether the initial burden of proof is on the defendant to produce clear and convincing evidence of the exception. This was a case of first impression before the Eleventh Circuit. The court concluded that the defendant has the burden of producing by clear and convincing evidence that the Attorney General authorized the importation of cocaine and thus the exception existed.[98]

The facts in *Hill* are unusual. Ceasar and Hill told Cavenaugh that they wanted to import cocaine from Haiti to the United States. Cavenaugh said he was not interested.[99] Later, however, Cavenaugh's friend, Greyser, was arrested by the Drug Enforcement Agency. In an effort to help Greyser obtain a more favorable sentence, Cavenaugh gave the DEA information about Hill's intentions to import cocaine to the United States.[100] Cavenaugh approached Hill and Hill's son, Dobson, about importing cocaine. A deal was made. Cavenaugh received word from DEA agents that arrangements had been made with United States Customs and Dea in Miami, as well as the Haitian government, to permit entry of the cocaine into the United States.[101]

Although the evidence showed that a DEA agent had consented for Cavenaugh to bring the cocaine into the United States, there was no evidence that the Attorney General consented to the importation as required by the statutory exception. Therefore, the Eleventh Circuit held that the defense had not proven the exception by clear and convincing evidence

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94. 921 F.2d at 1143.
95. *Id.*
96. 935 F.2d 196 (11th Cir. 1991).
97. 21 U.S.C. § 952 (1991).
98. 935 F.2d at 197.
99. *Id.* at 200.
100. *Id.* at 197.
101. *Id.*

and therefore the government did not have to prove the nonapplicability of the exception beyond a reasonable doubt.[102]

102. *Id.* at 200.