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James P. Fleissner
Mercer University School of Law, fleissner_jp@law.mercer.edu

Sarah B. Mabery

Jeanne L. Wiggins

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Constitutional Criminal Procedure

by James P. Fleissner*
Sarah B. Mabery**
and
Jeanne L. Wiggins***

I. INTRODUCTION

This Article surveys noteworthy 2000 decisions of the United States Court of Appeals for the Eleventh Circuit in the field commonly known as Constitutional Criminal Procedure. As in past years, the survey focuses on significant decisions concerning the Fourth Amendment's protection against unreasonable searches and seizures; the Fifth Amendment's privilege against self-incrimination, prohibition against double jeopardy, and guarantees of due process and grand jury screening; and the Sixth Amendment's procedural protections, including the right to counsel and the right of confrontation. Of course, most of these rights, with few exceptions, such as the right to have charges approved by a grand jury, have been held applicable to state criminal justice systems pursuant to the Due Process Clause of the Fourteenth Amendment. As a very busy appellate court, the Eleventh Circuit hears a large number of direct appeals and collateral proceedings that raise issues of the proper scope of the Fourth, Fifth, and Sixth Amendments. This Article endeavors to identify the most significant of those decisions from 2000, summarize the cases and the court's reasoning, and provide a measure of context and commentary as to the issues presented.

* Professor of Law, Walter F. George School of Law, Mercer University. Marquette University (B.A., 1979); University of Chicago Law School (J.D., 1986).
** Flagler College (B.A., 1997); Walter F. George School of Law, Mercer University (J.D., magna cum laude, 2001).
*** Tennessee Wesleyan College (B.A., 1997); Walter F. George School of Law, Mercer University (J.D., cum laude, 2001).
II. THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

A. Investigatory Stop and Frisk

The court of appeals decided several stop and frisk cases during the survey period. In United States v. Smith,² the Eleventh Circuit confronted the now routine practice of drug interdiction officers who lack reasonable suspicion that any passenger is carrying drugs: checking bus passengers for drugs by seeking their consent to search.³ Aggressive law enforcement agents capitalize on the realities of the crowded bus, where passengers may be unable to disembark and may feel constrained to cooperate because of the appearance that refusal would create for the officers and other passengers. In the crowded environment of a bus, where the passengers often lack the option of walking away from the officers, courts have the difficult task of assessing whether a reasonable bus passenger would feel free not to cooperate or whether the encounters constitute a Terry seizure, which is unlawful when not based on reasonable suspicion. Of course, if the encounters amounted to an illegal Fourth Amendment seizure, consent given by a passenger to search luggage is vitiated, and any evidence found must be suppressed.

In Smith the court examined the following issues: (1) whether the bus check was a seizure; and (2) whether the seizure was reasonable.⁴ The court held that while the bus check amounted to a seizure under the Fourth Amendment, the seizure was reasonable and, therefore, the evidence was properly admitted at trial.⁵ The agents in this case were conducting surveillance for drug activity on May 5, 1997. The agents noticed defendant engage in a quick whispered conversation with Bruton, another man in the terminal the agents had been watching. Bruton had appeared nervous, was constantly changing seats, and watched passengers as they walked through the terminal. The agents had also been watching two new, expensive looking suitcases left

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¹. U.S. CONST. amend. IV.
². 201 F.3d 1317 (11th Cir. 2000).
³. Id. at 1319.
⁴. Id. at 1322-23.
⁵. Id. at 1323.
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unattended in the terminal. Bruton later boarded a bus with the previously unattended luggage, after sliding one piece of the luggage to defendant to carry onto the bus. The agents then followed the suspects to the bus. After the two suspects deposited the luggage in the undercarriage of the bus, the agents examined the luggage and noted it belonged to a Mr. Pender. The agents then requested permission of the driver to conduct a bus check.\(^6\)

The agents boarded the bus and announced to the passengers that they were conducting a "routine public transportation safety check."\(^7\) They were in plain clothes, had their weapons concealed, but did show their badges as they boarded the bus. The agents then requested as part of the check that the passengers show their ticket, photo identification, and identify which bags belonged to them on the bus. They would approach each passenger, stand behind the passenger so as not to block the aisle, and ask if the passenger was carrying drugs, weapons, or large amounts of money. Both defendant and Bruton denied carrying drugs or weapons and denied they had checked luggage. The officers then produced the suspicious baggage tagged as belonging to Mr. Pender and asked if it belonged to anyone on the bus. Defendant and Bruton denied ownership of the luggage. The officers opened the luggage and found eleven kilograms of cocaine. Both Bruton and defendant were arrested.\(^8\)

The court first examined whether the bus check was a seizure under the Fourth Amendment.\(^9\) "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"\(^10\) The court determined that its recent opinion in another bus sweep case, United States v. Washington\(^11\) controlled as there was no

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6. *Id.* at 1320.
7. *Id.* The agents gave the following announcement:
   Good morning, ladies and gentlemen, my partner and I are both federal agents of the United States Department of Justice. Nobody is under arrest or anything like that, we're just conducting a routine public transportation safety check. When we get to you, if you would please show us your bus ticket, some photo identification, if you have some with you, please. And, most importantly, if you would identify which bags are yours on the bus, we'd appreciate it, and we'll be out of your way real quick.

*Id.*

8. *Id.* at 1320-21. Both defendants had one-way tickets from Miami, Florida to Charleston, South Carolina. *Id.* at 1320. A bus ticket with the name of Pender on it was also found in a seat near defendant and Bruton after they were arrested. *Id.* at 1321.
9. *Id.* at 1321.
11. 151 F.3d 1354 (11th Cir. 1998).
material distinction between Washington and the present case.\textsuperscript{12} In fact, the court noted that the bus check in Washington was conducted in an almost identical manner, and the very same agents were involved in both cases.\textsuperscript{13} Critically, the agents in Washington and Smith did not inform the passenger that they had a right to refuse to cooperate. Therefore, the court concluded that the bus check in this case did constitute a seizure.\textsuperscript{14}

However, the inquiry did not end there. The court then examined the issue of whether the seizure was reasonable.\textsuperscript{15} On this issue, the court held that “the totality of the circumstances created a reasonable suspicion that defendant and Bruton were engaged in criminal activity.”\textsuperscript{16} The court began this inquiry by articulating the general rule that detention, if “brief and minimally intrusive,” is permissible if there is reasonable suspicion that a crime has or is about to take place.\textsuperscript{17} The court analyzed defendant’s behavior at the bus terminal and the agents’ experience in the field of investigating narcotics and held that reasonable suspicion existed.\textsuperscript{18} The evidence the court considered important in creating reasonable suspicion was the nervousness of defendant and Bruton, the whispered conversation, the suitcases and attendant conduct regarding the suitcases, and the origination of the suitcases in Miami.\textsuperscript{19} The court held the detention and minimal intrusion on the bus was therefore reasonable under the Fourth Amendment.\textsuperscript{20} Although not discussed by the court, the suspicious and untrue responses given during the seizure gave the officers probable cause to search the suitcases.\textsuperscript{21}

Another case in which the Eleventh Circuit examined the reasonableness of a Terry stop involved a defendant who was detained for seventy-five minutes while the agents searched the residence of defendant and her husband.\textsuperscript{22} In United States v. Gil,\textsuperscript{23} the Eleventh Circuit held valid a seventy-five minute detention of defendant as a legitimate Terry stop.

\begin{itemize}
\item \textsuperscript{12} 201 F.3d at 1322. For an extended examination of Washington, 151 F.3d 1354, see James P. Fleissner & Jeffrey R. Harris, Constitutional Criminal Procedure: A Two Year Survey, 50 MERCER L. REV. 921, 936-37 (1999).
\item \textsuperscript{13} 201 F.3d at 1321.
\item \textsuperscript{14} Id. at 1322.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id. at 1323.
\item \textsuperscript{17} Id. at 1322 n.8.
\item \textsuperscript{18} Id. at 1323.
\item \textsuperscript{19} Id. The court also noted the attempt by defendant and Bruton to hide the fact that they were traveling together. Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} See id.
\item \textsuperscript{22} United States v. Gil, 204 F.3d 1347, 1349 (11th Cir. 2000).
\item \textsuperscript{23} 204 F.3d 1347 (11th Cir. 2000).
\end{itemize}
stop lasting until probable cause for her arrest could be obtained by searching defendant's residence.\textsuperscript{24} Defendant's husband, Julian Gil, arranged to buy twenty kilograms of cocaine from a confidential informant. As part of this arrangement, Julian procured five of the kilograms to take back to his home for testing before purchasing the remainder. The residence was under surveillance at this time, and defendant was seen leaving the residence fifteen minutes later with two plastic bags. The agents stopped defendant several blocks from her home. Defendant consented to a search of the car and the bags; fruit and $12,500 were found. Defendant was then placed in an agent's vehicle and returned to the residence only after the residence was secured. At that point, defendant was formally arrested.\textsuperscript{25} The main issue in this case concerned the length and circumstances of the detention prior to defendant's arrest. Defendant argued that because she was held seventy-five minutes and was placed in handcuffs in an agent's car, her detention constituted a full arrest and not a \textit{Terry} stop.\textsuperscript{26} The court first articulated the standard to be used in evaluating the reasonableness of a \textit{Terry} stop as whether, considering the "totality of the circumstances," it "was reasonably related in scope to the circumstances which justified the interference in the first place."\textsuperscript{27} The court then cited several factors that are relevant in this determination, including the "purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention."\textsuperscript{28} The court first noted that the agents only detained defendant to prevent jeopardizing the investigation of the residence and then only as long as was necessary to complete that investigation.\textsuperscript{29} The court, therefore, determined there was sufficient evidence to support detention under the first two factors.\textsuperscript{30} The court then turned to the scope and intensity of the detention and found that while the detention was intrusive in that defendant was handcuffed in the agent's car, this was reasonable under the circumstances to "maintain the safety of the officers and the ongoing investigation of the residence."\textsuperscript{31} The court emphasized that because there was no female officer present, the agents did not search defendant

\begin{thebibliography}{9}
\bibitem{24} Id. at 1350.
\bibitem{25} Id. at 1349. Defendant originally denied knowing anything about the money, but admitted during this detention that the money belonged to her husband. \textit{Id.}
\bibitem{26} Id. at 1350-51.
\bibitem{27} Id. at 1351 (quoting United States v. Sharpe, 470 U.S. 675, 682 (1985)).
\bibitem{28} Id. (quoting United States v. Hardy, 855 F.2d 753, 759 (11th Cir. 1988)).
\bibitem{29} Id.
\bibitem{30} Id.
\bibitem{31} Id.
\end{thebibliography}
for weapons, which necessitated the intensity of the detention.\textsuperscript{32} The court did not really focus on the fact that the detention lasted seventy-five minutes but instead referenced the length of the detention by noting that the detention, including the length of time, was reasonable.\textsuperscript{33} Interestingly, the court noted in a footnote that under these facts, probable cause for arrest existed after the officers discovered the money in the vehicle, so even if the seizure was illegal under \textit{Terry}, the seizure of Ms. Gil was still lawful.\textsuperscript{34} In any event, the court’s conclusion that there was probable cause was an unnecessary alternative basis for the decision because the court held the \textit{Terry} stop reasonable.\textsuperscript{35} \textit{Terry} standards do not set rigid time limits or a strict “least intrusive means” test, and \textit{Gil} demonstrates how the fluidity of the standards allow for steady expansion of the scope of the stop and frisk authority. When the party with standing to contest the stop is caught red-handed with illegal drugs, it is hardly surprising that over time there is an inexorable expansion of the authority of agents to seize persons for the purpose of investigation.

The Eleventh Circuit examined another case this year addressing both reasonable suspicion and probable cause. In \textit{United States v. Gordon},\textsuperscript{36} defendant and three co-defendants were convicted of robbery and gun charges. The robbery occurred on May 6, 1998, at a military surplus store. The clerk in the store was beaten and left handcuffed in a rear room as a result of the robbery. The defendant and his co-defendants were subsequently arrested for loitering, as a result of which the police discovered evidence of the robbery.\textsuperscript{37} The initial stop of defendant and his co-defendants occurred in an area of Miami consisting mostly of abandoned buildings and considered a suspect area for drugs. The officers approached defendants, who reacted suspiciously, according to the officers. Three of the men had been standing outside and behind the

\begin{itemize}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} at 1350 n.2. The court said specifically:
\begin{quote}
Although we need not decide this issue because we hold that the \textit{Terry} stop was reasonable, the facts support a finding that could have been made by the trial court that the police had probable cause to arrest Ms. Gil at the time that they discovered the bag containing $12,500 in her car.
\end{quote}
\item \textit{Id.}
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} 231 F.3d 750 (11th Cir. 2000).
\item \textsuperscript{37} \textit{Id.} at 752-53. The evidence of the robbery found in defendants’ car consisted of four loaded magazine clips, a flack jacket, several boxes of bullets, a gun case, and a ski mask. Defendant Jackson was identified as one of the assailants from the robbery after this evidence was found. \textit{Id.} at 753.
\end{itemize}
vehicle. After they saw the officers, they quickly got into the vehicle.\textsuperscript{38} The officers decided to stop the vehicle because they believed the men were violating Florida’s anti-loitering statute. The officers stopped the vehicle and saw several loaded magazine clips in plain view in the back seat. Defendants gave inconsistent statements about what they were doing in the area. Based upon these circumstances, the officers arrested the men, searched the car, and found evidence inculpating defendants with respect to the robbery.\textsuperscript{39}

The court began its analysis by examining the current law governing reasonable suspicion under \textit{Illinois v. Wardlow},\textsuperscript{40} a relatively recent case from the Supreme Court in which a person’s headlong flight from police in a high crime area was held to constitute reasonable suspicion. Under \textit{Wardlow}, an officer may make a brief investigatory stop “when the officer has a reasonable, articulable suspicion that criminal activity is afoot.”\textsuperscript{41} The court further explained that the officer must be able to articulate this suspicion and cannot rely upon a hunch.\textsuperscript{42} The court then explained that this suspicion “may be formed by observing exclusively legal activity.”\textsuperscript{43} The court concluded that the facts in \textit{Gordon} were very similar to those in \textit{Wardlow}.\textsuperscript{44}

The court reasoned that defendant’s presence in a high crime area, along with evidence of flight, was sufficient to establish reasonable suspicion.\textsuperscript{45} The court emphasized defendant’s flight as the determining factor.\textsuperscript{46} The court explained that “[h]eadlong flight—wherever it occurs—is the consummate act of evasion: [I]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.”\textsuperscript{47} The court noted that defendant’s location in a high crime area near abandoned buildings alone would not have established reasonable suspicion.\textsuperscript{48} However, the court found the “critical additional fact in this case [to be] the Defendant’s flight.”\textsuperscript{49} Defendant, however, argued that his flight was different from defendant’s in \textit{Wardlow} because it was

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\item \textsuperscript{38} Id. at 755. The officers said the men “resembled deer staring into an automobile’s headlights.” Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} 528 U.S. 119 (2000).
\item \textsuperscript{41} Gordon, 231 F.3d at 754 (quoting Wardlow, 528 U.S. at 123).
\item \textsuperscript{42} Id. (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).
\item \textsuperscript{43} Id. (citing Wardlow, 528 U.S. at 124-25; Terry, 392 U.S. at 22-23).
\item \textsuperscript{44} Id. at 756.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. (quoting Wardlow, 528 U.S. at 124).
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\end{itemize}
not headlong flight.50 The court reasoned that the key question is not whether flight is headlong, but "whether the flight is unprovoked."51 The court held that flight provoked by the officers in this case rose to the level of reasonable suspicion regardless of whether it was headlong.52 The court explained that

[o]bviously the speed of the suspect's movements may be relevant in the totality of the circumstances, but the fact that the suspect walked very quickly, as opposed to ran, away from the spot where he was sighted by police does not itself change the analysis where it is evident from the circumstances that he was attempting to flee upon sighting the police.53

The court's focus, as noted in a footnote, was the suspect's attempt to "'evade the officer.'"54 Therefore the court held that reasonable suspicion existed and the investigatory stop was permissible.55

The decision in Gordon prompts two comments. First, it illustrates the ramifications of the Supreme Court's decision in Wardlow, a 5-4 decision that surely is the low water mark among the Court's reasonable suspicion cases. Wardlow can be broadly read to hold that headlong flight from police in a high crime area equals reasonable suspicion.56 The court in Gordon reads Wardlow as focusing on the unprovoked nature of the flight, arguably diluting the reasonable suspicion standard even further. The second point is to note the role of the loitering statute in the court's analysis. Setting aside potential constitutional issues,57 statutes that criminalize loitering are tempting vehicles for justifying an initial seizure for purposes of further investigation of other crimes. Because police are allowed to make pretextual stops,58 loitering statutes, like the motor vehicle codes, provide police with sweeping ability to stop individuals they suspect of other crimes. The court in

50. Id. at 756-57. Defendants entered the car quickly and left. Id. at 754.
51. Id. at 757 (citing Wardlow, 528 U.S. at 124); The court noted specifically with regard to unprovoked flight:

[U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business.

Id. at 756 (quoting Wardlow, 528 U.S. at 125).
52. Id.
53. Id. (citing United States v. Briggman, 931 F.2d 705, 709 (11th Cir. 1991)).
54. Id. at 756 n.3 (quoting Briggman, 931 F.2d at 709).
55. Id. at 758.
56. See id. at 757-58.
Gordon had little trouble finding that the officers did indeed have probable cause that the loitering statute was being violated, as is discussed further below.

The Eleventh Circuit examined another case, United States v. Powell, to determine whether reasonable suspicion exists when a suspect is seen leaving the residence of a known drug trafficker for a second time within a brief period. Defendant and her passenger visited the residence of a known drug dealer while it was under surveillance. Defendant went into the garage carrying a backpack, spoke with someone, and left the garage still carrying the backpack. Defendant then got into the passenger seat of the car, and the passenger drove around a while. The officers followed them. Defendant and her passenger returned to the residence without making any stops. Defendant went into the garage a second time and emerged without the backpack. She did not appear to be carrying anything when she left. Officers then followed the car and stopped defendant. After defendant gave consent to search, officers found $12,850 in cash. The entire stop and search lasted about forty minutes. Defendant also made several statements concerning the money during the stop. The district court granted defendant's motion to suppress evidence and statements and the government appealed.

The court held that the "totality of the circumstances justified the officers' reasonable suspicion that something related to drug trafficking had occurred." The court reasoned that, while each activity may seem ambiguous and innocent alone, "they are each relevant in the determination of whether the agents had reasonable suspicion to stop [defendant]." The court found significant the fact that the officers did not stop defendant when she first went into the garage with the backpack, came outside, switched seats with her passenger and then left. The officers did not stop defendant until she had returned, went back in, and came out without the backpack. Further, the court analogized this case to United States v. Glinton. There, the court noted that one appropriate consideration in finding reasonable suspicion was that defendant carried a bag into and out of a known drug house.

59. 222 F.3d 913 (11th Cir. 2000).
60. Id. at 916.
61. Id. at 915-16.
62. Id. at 917.
63. Id. at 918 (quoting United States v. Cruz, 909 F.2d 422, 424 (11th Cir. 1989)).
64. Id.
65. Id.
66. 154 F.3d 1245 (11th Cir. 1998).
67. Id. at 1257.
Therefore, the court concluded that the stop in *Powell* was appropriate. 8

B. Reasonable Expectation of Privacy and Standing

In *United States v. Cooper*, 69 the court examined whether defendants had a reasonable expectation of privacy in a hotel room that they did not register or pay for, but nonetheless occupied. 70 Two different individuals, Garcia and Gonzalez, registered for two rooms directly across from one another at a hotel in Orlando, Florida on January 26, 1997. Defendants were then seen entering and leaving these rooms, although they were not the guests registered to these rooms. One morning, the guests in an adjoining room complained of a ringing alarm clock, and a security officer went to one of the rooms used by defendants. The security officer did not get a response when he knocked, and he entered the room to stop the clock. The officer saw marijuana in plain view and immediately notified local law enforcement. The security officer opened the room for the police and gave the consent to search. The officers then waited in an adjoining room for defendants to return and then arrested them. Defendants filed motions to suppress based upon the warrantless search of the hotel room alleging it was invalid because there was neither valid consent to search nor exigent circumstances. The district court denied the motions on the ground that defendants had no expectation of privacy in a hotel room. 71

The court first noted that defendants must meet a threshold inquiry by establishing, through their motions to suppress, that they indeed had a reasonable expectation of privacy in the hotel room. 72 The court explained that several factors are used to determine whether an individual has an expectation of privacy in such a room. 73 These factors include "whether the individual paid and/or registered for the room or whether the individual's personal belongings were found inside the room." 74 The court noted that defendants' motions to suppress did not meet the standard necessary to establish a reasonable expectation

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68. 222 F.3d at 918.
69. 203 F.3d 1279 (11th Cir. 2000).
70. Id. at 1282.
71. Id. at 1282-83. The court also declined to grant defendants an evidentiary hearing on their motion to suppress. Id.
72. Id. at 1284 (citing *Rakas v. Illinois*, 439 U.S. 128, 131 n.1 (1978); *United States v. Sneed*, 732 F.2d 886, 888 (11th Cir. 1984)).
73. Id.
74. Id. (citing *United States v. Conway*, 73 F.3d 975, 979 (10th Cir. 1995); *United States v. Carter*, 854 F.2d 1102, 1105 (8th Cir. 1988)).
of privacy because it did not allege either of these factors. The court emphasized that "[a] motion to suppress must in every critical respect be sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim is presented . . . . A court need not act upon general or conclusory assertions." The court found that defendants' motions to suppress were conclusory and not based upon specific facts demonstrating a reasonable expectation of privacy. Defendants attempted to argue that they were overnight guests of Gonzalez and under Minnesota v. Olson were, therefore, entitled to reasonable expectation of privacy. The court declined to decide the issue because defendants did not allege this in their motions to suppress. The court then held that defendants had no expectation of privacy in the hotel room and therefore lacked standing to challenge the search of the room.

Defendants appealed the district court's refusal to grant an evidentiary hearing on the standing issue. Defendants argued that a hearing was necessary to properly demonstrate a reasonable expectation of privacy in the hotel room. The court pointed to precedent and held that

where a defendant in a motion to suppress fails to allege facts that if proved would require the grant of relief, the law does not require that the district court hold a hearing independent of the trial to receive evidence on any issue necessary to the determination of the motion.

The court concluded that because defendants' motions were "wholly lacking in sufficient factual allegations to establish standing," they were not entitled to an evidentiary hearing.

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75. Id.
76. Id. (quoting United States v. Richardson, 764 F.2d 1514, 1527 (11th Cir. 1985)).
77. Id. at 1285.
79. 203 F.3d at 1284.
80. Id. at 1285. Specifically, the court noted that "If to now allow Defendants to supplement their motion to suppress with new factual allegations on appeal would undermine the requirement enunciated in Richardson that motions to suppress be 'definite, specific, detailed, and nonconjectural' when considered by the district court." Id. (quoting Richardson, 764 F.2d at 1527).
81. Id.
82. Id. Defendants argued that they could have shown a reasonable expectation of privacy if they had been granted the hearing. Id.
83. Id. (quoting Sneed, 732 F.2d at 888).
84. Id.
C. Probable Cause and Arrest

The Eleventh Circuit also examined a case on interlocutory appeal by the government in \textit{United States v. Bervaldi},\textsuperscript{85} which presented the question of whether evidence seized from defendant's home should have been suppressed because officers entered the home on the authority of an arrest warrant for a person other than defendant.\textsuperscript{86} The court held that because the officers reasonably believed that both the residence entered was the residence of the named suspect in the warrant and that the suspect was actually in the residence, their entry did not constitute an invalid search under the Fourth Amendment.\textsuperscript{87} On March 10, 1998, several officers arrived at the home of defendant to execute an arrest warrant for a man named Bennett Deridder. The officers knocked several times and defendant came to the door. The officers identified themselves as the police and defendant slammed the door shut. At this point, the officers kicked the door in and entered the house. Upon entry, the officers realized defendant was not Deridder. A gun was found lying in plain view not far from the door, and the officers did a protective sweep of the house to determine if Deridder or any harm other than the gun was present. During the protective search, the officers noticed a strong odor of marijuana. The officers informed defendant of his \textit{Miranda} rights and questioned him about the odor. Defendant then showed the officers some marijuana. The officers asked defendant for consent to search, and defendant consented but would not sign a consent form, causing some of the officers to leave the residence to seek a search warrant. When the officers returned and executed the warrant, more than sixty pounds of marijuana, among other things, was seized from defendant's home.\textsuperscript{88} The district court granted defendant's motion to suppress based upon the finding that "the officers could not have reasonably believed that Deridder resided at the [defendant's house], but that had they reasonably believed that this was his residence, then they could have reasonably believed that Deridder was at the house when they entered it."\textsuperscript{89}

The magistrate judge, whose recommendation the district court adopted, based this conclusion on the evidence the officers presented about how they determined that Deridder lived at defendant's residence.

\textsuperscript{85} 226 F.3d 1256 (11th Cir. 2000).
\textsuperscript{86} Id. at 1258.
\textsuperscript{87} Id. at 1267.
\textsuperscript{88} Id. at 1258-59. Defendant was kept in custody and not arrested until later that evening. Id. at 1259.
\textsuperscript{89} Id. at 1262.
The officers first identified the vehicle driven by Deridder from a traffic citation. From there, the officers obtained an address. The vehicle was registered to Betty Spatten who then lived at the address later occupied by defendant. The officers had seen Deridder leaving this residence in the vehicle registered to Spatten. The officers later attempted to obtain a voice identification by approaching Deridder and asking him where he lived. Deridder provided two addresses when questioned. One address he identified as his parents’ home and the other as his own residence. He identified defendant’s address as his residence at the time. The officers also testified about several database queries made by the officers on computer systems databases, including: a highway safety database, a real estate database, drivers license records, and arrest records. Several of the databases listed defendant’s address as that of Deridder for various periods of time. Other databases listed other addresses. Some of the databases showed periods of residency for Deridder as ending in 1997. The officers testified that Deridder’s parents’ address was often used for records but that he was actually believed to reside at defendant’s address.

Defendant also offered evidence to show Deridder could not reasonably be believed to have lived at defendant’s address at the time. Defendant introduced evidence including the testimony of a private investigator about the databases used by the police, a warranty deed indicating the sale of the property, water bills, and telephone bills.

The Eleventh Circuit began the analysis with the now familiar standard from Payton v. New York that although warrantless searches and seizures made inside the home are presumptively unreasonable, “an arrest warrant founded on probably cause implicitly carries with it limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” The court then articulated the two-step analysis that must be undertaken in the warrantless search of a home. The court then held that “common sense factors”

90. Id. at 1259-61.
91. Id. at 1261. The private investigator noted that the database used by the police was not particularly reliable and that a “Dossier” search would have been more “expansive.” Id.
93. 226 F.3d at 1263 (quoting Payton, 445 U.S. at 603).
94. Id.
95. Id. (quoting United States v. Magluta, 44 F.3d 1530, 1533 (11th Cir. 1995) (internal quotation marks omitted)).
indicating residency are appropriate in these cases.\textsuperscript{96} As to the first prong, the court considered the "common sense factor" that it is not uncommon for people in their twenties to use their parents address as a permanent address for purposes of records only when they do not actually reside there.\textsuperscript{97} Based upon this common sense factor and the officers' observations and testimony, the court concluded that it was reasonable for the officers to believe that Deridder actually resided at defendant's address at the time they executed the warrant.\textsuperscript{98}

However, the court held that to meet the first prong of the test, the officers also had to have reasonably believed that Deridder still lived at defendant's residence at the time they executed the warrant, absent additional evidence and the passage of time.\textsuperscript{99} The court noted as particularly important the officers' testimony that Deridder was seen leaving defendant's residence as late as August of 1997.\textsuperscript{100} The court also reasoned that evidence from the databases that linked Deridder to defendant's address as late as August of 1997 supported this belief.\textsuperscript{101} Based upon these facts, the court concluded that the officers' belief that Deridder was residing at defendant's address in August 1997 was reasonable.\textsuperscript{102}

The court then stated that the information must be timely; in other words, the warrant could not be supported by stale information.\textsuperscript{103} The court pointed out that "[a]lthough reasonable belief is different than probable cause [the] staleness doctrine [is] instructive here."\textsuperscript{104} The court emphasized that the nature of the crime is an important factor in determining whether information in a warrant is stale.\textsuperscript{105} Another factor the court considered was that when an "affidavit recites activity indicating protracted or continuous conduct, time is of less significance."\textsuperscript{106} The court listed several other factors to consider when examining the issue of staleness, including the following: "habits of the

\textsuperscript{96} Id. (citing Magluta, 44 F.3d at 1535).
\textsuperscript{97} Id. The court gave the example of the common practice of university students retaining their parents address as a permanent address for purposes of records. Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 1264.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 1265 (internal citations omitted). The court cited and quoted several cases applying the staleness doctrine to probable cause supporting a warrant and concluded that this doctrine also applies to reasonable belief required to support a warrant. Id. at 1264-65.
\textsuperscript{105} Id. at 1265 (citing United States v. Harris, 20 F.3d 445, 450 (11th Cir. 1994)).
\textsuperscript{106} Id. (quoting United States v. Bascaro, 742 F.2d 1335, 1345-46 (11th Cir. 1984)).
accused, character of the items sought, and nature and function of the premises to be searched." The court then examined the present case in light of these factors and reasoned that residency in a home is a fairly permanent condition, or at least "not transitory." Finally, the court held, without applying a specific time limit, that it was reasonable for the officers to believe that Deridder still lived at defendant’s address six months after last having information to that effect.

The court then turned to the presence of information gained during this six-month period and the effect it had on the reasonableness of the officers’ belief. The court looked at the intervening evidence to determine whether it “eroded the reasonable belief” of the officers concerning the residency of Deridder. The officers saw a for sale sign during that six-month period that they did not see when they returned to execute the warrant. The court found that because the officers did not notice the sign missing during the predawn execution of the warrant, the significance of its absence did not make the officers’ belief unreasonable. As for other information that defendant argued could have been obtained during this period, including bill records and property records, the court concluded that “the officers, in light of the information they already had, were [not] constitutionally obligated to check these records.”

The court then held that the officers had a reasonable belief that Deridder resided at defendant’s address during the period the warrant was executed.

The court then examined whether the officers reasonably believed that Deridder was present at the precise time the warrant was executed. The court noted three factors supporting a reasonable belief by the officers that Deridder was present: (1) the early morning hour; (2) the vehicles parked in the driveway; and (3) the officers’ belief that it was

107. Id. (quoting Harris, 20 F.3d at 450).
108. Id.
109. Id. The court noted that in precedent, information 11 months old was held sufficient to support probable cause because the activities were “protracted and ongoing.” Id. at 1266 (citing United States v. Hooshmand, 931 F.2d 725, 735-36 (11th Cir. 1991)).
110. Id. at 1265-66.
111. Id. at 1266.
112. Id. During this period that the officers saw the for sale sign, they also did not see Derrider's vehicle at the residence, nor Derrider enter or leave the residence. Id.
113. Id. The court noted that the focus was on what the officers noticed, not what was actually present. Id. (citing Magluta, 44 F.3d at 1535).
114. Id. at 1267.
115. Id.
116. Id.
Deridder who answered the door. The court held that the officers’ belief that Deridder was actually at the residence was reasonable; therefore, the entry into the residence did not violate the Fourth Amendment.

The Eleventh Circuit also examined the issue of probable cause in United States v. Gordon. Defendants were standing outside a vehicle in a high crime area of the city. When the officers approached, defendants left quickly in the vehicle. After determining the officers had reasonable suspicion to stop the vehicle involved, the court examined whether probable cause existed for defendant’s arrest for loitering in violation of Florida’s anti-loitering statute. The court stated the two elements of the statute as follows: “(1) the accused must be loitering or prowling at a place, at a time, or in a manner not unusual for law-abiding citizens; and (2) the loitering or prowling must be under circumstances that warrant a reasonable fear for the safety of persons or property in the vicinity.” The court found that probable cause existed under the first prong of the statute because defendant was standing in a high crime area, near abandoned buildings and near a parked car. In addition, the court noted that the magazine cartridges easily satisfied the second prong, combined with the “notoriety of the area for drive-by shootings, these facts justified a reasonable fear for the safety of persons or property in the vicinity.” The court then concluded that probable cause existed for the arrest, and the evidence obtained from the car was properly admitted into evidence at trial.

D. Consent Searches

In the foregoing discussion of the Eleventh Circuit’s bus sweep decision in Smith, it was noted that the court found the officers’ conduct to constitute a seizure, but nonetheless found the seizure reasonable...
under the circumstances.\textsuperscript{126} In \textit{United States v. Drayton},\textsuperscript{127} the Eleventh Circuit rejected attempts by the government to distinguish recent Eleventh Circuit decisions holding that bus sweeps constituted seizures.\textsuperscript{128} In \textit{Drayton} the court held that the consent given by defendants for a pat down search on the bus was “not sufficiently free of coercion to serve as a valid basis for a search” under the Fourth Amendment.\textsuperscript{129} The court’s analysis focused on a comparison with the court’s previous decision in \textit{United States v. Washington}.\textsuperscript{130} In \textit{Washington} two federal agents boarded a bus while the bus driver was in the station. One of the agents made an announcement to the passengers, while holding up his badge, that they were federal agents, that they were “conducting a routine bus check,” and that they would be asking to see everyone’s identification, ticket, and location of baggage.\textsuperscript{131} When the agents in \textit{Washington} reached defendant, his suspicious behavior with his baggage prompted them to seek consent from defendant for a pat down search. Defendant consented and drugs were found in containers beneath his clothing.\textsuperscript{132} The court in \textit{Washington} concluded that a seizure had occurred, emphasizing that the officers had not informed the passengers of their right not to cooperate.\textsuperscript{133} Because defendant was not free to decline the request of the officers, he was seized and his consent had no effect.\textsuperscript{134} The court in \textit{Drayton} concluded that the facts were “not distinguishable in a meaningful way from those in \textit{Washington}.”\textsuperscript{135} In \textit{Drayton} three local police officers boarded the bus while the driver was in the station. The officers, as in \textit{Washington}, were casually dressed but had badges and were armed. While on the bus, the officers approached each passenger one at a time showing law enforcement identification to each passenger, asking them to identify their luggage, and requesting permission to check the luggage. The officers became suspicious when they approached defendants and noticed they were wearing inappropriate clothing given the weather. The officers requested permission to pat

\begin{itemize}
  \item \textsuperscript{126} 201 F.3d at 1322-23. \textit{See supra} text accompanying notes 2-21.
  \item \textsuperscript{127} 231 F.3d 787 (11th Cir. 2000).
  \item \textsuperscript{128} \textit{Id}. at 790-91.
  \item \textsuperscript{129} \textit{Id}. at 788.
  \item \textsuperscript{130} 151 F.3d 1354 (11th Cir. 1998). \textit{See supra} note 11.
  \item \textsuperscript{131} \textit{Drayton}, 231 F.3d at 790 (citing \textit{Washington}, 151 F.3d at 1355).
  \item \textsuperscript{132} \textit{Washington}, 151 F.3d at 1356.
  \item \textsuperscript{133} \textit{Id}. at 1357.
  \item \textsuperscript{134} \textit{Id}.
  \item \textsuperscript{135} 231 F.3d at 788.
\end{itemize}
down defendants and they consented. Drugs were found on both defendants taped underneath their clothing.\textsuperscript{136}

The government made several arguments to distinguish the two cases. First, the government argued that the officers in \textit{Drayton} did not make an announcement to the passengers as a whole prior to requesting consent from each individually.\textsuperscript{137} The court found that while the facts differed in this respect, the show of authority on an individual basis in \textit{Drayton} was no "less coercive than [the] general bus-wide one" in \textit{Washington}.\textsuperscript{138} Further, while the officers in \textit{Drayton} did not request identification and tickets from the passengers as those in \textit{Washington} did, the court citing \textit{United States v. Guapi},\textsuperscript{139} noted that this did not reduce the coercive nature of the requests.\textsuperscript{140} Another difference between the two cases was that the officer in \textit{Drayton} testified that on previous bus searches, passengers had on occasion refused to consent to the search of their baggage or exited the bus, but the court found this unpersuasive for several reasons.\textsuperscript{141} First, the court noted parenthetically that in \textit{Guapi}, this fact was unpersuasive.\textsuperscript{142} Further, given the large number of bus stops testified to by the officer, the number of non-consents was extremely small.\textsuperscript{143} Finally, the court noted that the final distinction "actually cut[] in the defendants' favor."\textsuperscript{144} When the officers initially boarded the bus in the \textit{Drayton} case, one officer remained in the driver's seat to observe the passengers while the other officers spoke with the passengers.\textsuperscript{145} The court reasoned that the presence of the officer at an exit on the bus "might make a reasonable person feel less free to leave the bus."\textsuperscript{146}

\begin{enumerate}
\item[136.] Id. at 789-90.
\item[137.] Id. at 790.
\item[138.] Id.
\item[139.] 144 F.3d 1393 (11th Cir. 1998). The court acknowledged in a footnote that "In \textit{Guapi}, this Court stated that when officers individually approach passengers and communicate an intention to conduct a search, instead of making a general announcement, there is 'no reason to believe...that they are coercing or intimidating citizens.'" 231 F.3d at 790 n.5 (quoting \textit{Guapi}, 144 F.3d at 1396). The court explained, however, that this was dicta and not persuasive. Id.
\item[140.] 231 F.3d at 790. For more extensive treatment of \textit{Guapi}, see Fleissner & Harris, supra note 12, at 937.
\item[141.] 231 F.3d at 790-91.
\item[142.] Id. at 790 (citing \textit{Guapi}, 144 F.3d at 1394).
\item[143.] Id. at 791.
\item[144.] Id.
\item[145.] Id.
\item[146.] Id. (citing \textit{United States v. Hill}, No. 99-12662 (11th Cir., July 24, 2000) (unpublished opinion); \textit{Washington}, 151 F.3d at 1358; \textit{Guapi}, 144 F.3d at 1396)).
\end{enumerate}
The court held that because the decision in Washington was controlling precedent and the present facts were indistinguishable in any material way, the search was "not sufficiently free of coercion to serve as a valid basis for a search" under the Fourth Amendment.\textsuperscript{147} The convictions of the defendants were therefore reversed.\textsuperscript{148} In scrutinizing the recent spate of bus sweep cases, the key fact seems to be whether the officers told the passengers of their right to refuse to cooperate. Although the court renounced adopting a requirement that officers, in essence, read bus passengers their rights, the recent decisions appear to give officers little choice but to do so, a point Judge Black made in his Guapi dissent.\textsuperscript{149}

E. Exigent Circumstances and Anticipatory Warrants

Interestingly enough, the issue of anticipatory warrants was an issue of first impression before the Eleventh Circuit Court of Appeals in 2000. The issue arose in United States\textit{ v. Santa}\textsuperscript{150} in which the government argued that exigent circumstances necessitated a warrantless entry and search of a residence and that even if this was an illegal search, the subsequent consent was voluntary and therefore validated the search.\textsuperscript{151} The court concluded that exigent circumstances did not justify the search because the agents could have obtained an anticipatory warrant.\textsuperscript{152}

Defendant, Santa, and her husband, Ramirez, had been under surveillance by the Drug Enforcement Administration ("DEA"). A confidential informant arranged to buy heroin from defendant and her husband. The actual exchange was to take place at the residence of defendant and her husband located in an apartment complex. The informant was to go to the apartment, confirm that the drugs were present, and then signal the agents to that effect. All went according to plan and the informant signaled the agents when the drugs were brought into the apartment. The agents had also observed the individual who brought the drugs to the apartment complex. After the agents got the signal, they entered the apartment through the front door and through the rear sliding doors. The agents then did a protective sweep of the apartment, read Mr. Ramirez his rights, and asked him

\begin{itemize}
  \item \textsuperscript{147} Id. at 788.
  \item \textsuperscript{148} Id. at 791.
  \item \textsuperscript{149} 151 F.3d at 1358 (Black, J., dissenting).
  \item \textsuperscript{150} 236 F.3d 662 (11th Cir. 2000).
  \item \textsuperscript{151} Id. at 667.
  \item \textsuperscript{152} Id. at 674.
\end{itemize}
where the heroin was. Mr. Ramirez told the officers where the heroin was located and afterward signed a consent to search the apartment.153

The court examined several issues in this case. First, the court held that exigent circumstances did not exist allowing a warrantless entry into the apartment.154 The court began by stating the general rule that “searches and seizures inside a home without a warrant are presumptively unreasonable”155 but allowed “where both probable cause and exigent circumstances exist.”156 The court held that the agents had probable cause, but the real question was whether exigent circumstances existed.157 The court emphasized that the “exigency exception only applies when ‘the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.’”158 Further, the court stated that this was often the case with narcotics.159 But, the court also pointed out that the presence of contraband does not automatically mean exigent circumstances exist.160 The test for exigent circumstances is an objective test based upon the facts in the particular case.161

The court then turned to the facts in the present case and held that exigent circumstances did not exist in the seizure of either the heroin or Mr. Ramirez.162 The government argued that exigent circumstances existed because the agents had to prevent the destruction of the drugs, the apartment was difficult to monitor, and the suspects “would have become suspicious if the [informant had] not return[ed] promptly with the money” while awaiting a warrant.163 The court examined each argument and rejected them respectively: First, the court noted that the suspects were unaware they were under surveillance and “‘[c]ircumstances are not normally considered exigent where the suspects are unaware of police surveillance.’”164 The court also rejected the difficulty the agents had with surveillance of the apartment as necessitating warrantless entry.165 Specifically, the court said that “‘[w]e will not
hold that the warrantless search of an individual's home may be justified by the police's inability to maintain effective surveillance, particularly when no exigency has been established. Finally, the court found that regardless of whether or not the suspects expected the informant to return, "a warrantless search is [still] illegal when police possess probable cause but instead of obtaining a warrant create exigent circumstances." The court reasoned that because a search warrant could have been obtained based upon information known before the transaction was to occur, exigent circumstances did not exist.

The court then examined the constitutionality of anticipatory search warrants, an issue of first impression for the Eleventh Circuit. The court began by describing anticipatory search warrants as those that are supported by "probable cause to believe that [the contraband] will be [at the location specified] when the search warrant is executed." The court explained that the Fourth Amendment requires that warrants be reasonable and supported by probable cause. The court then reasoned that there was "nothing unreasonable about authorizing a search for tomorrow, not today, when reliable information indicates that [the contraband will reach a particular location], not now, but then." Further, the court stated that it is reasonable to "tie the warrant's search authority to the future event that brings with it the probable cause." Therefore, the court held that anticipatory search warrants were constitutional if issued in the proper circumstances.

The court then examined the present case and determined that under the circumstances, the agents had "sufficient information to obtain an anticipatory search warrant," or a warrant by telephone before they

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166. Id. (quoting Lynch, 934 F.2d at 1233 n.4). The court noted that it was unlikely that defendants would flee with their small children in the apartment. Id.

167. Id. at 671 (quoting Tobin, 923 F.2d at 1511).

168. Id.

169. Id. at 672. The court noted that every other circuit that has examined this issue has held that anticipatory search warrants are not "categorically unconstitutional." Id. (citing United States v. Ricciardelli, 998 F.2d 8, 11 (1st Cir. 1993); United States v. Garcia, 882 F.2d 699, 702-04 (2d Cir. 1989); United States v. Wylie, 919 F.2d 969, 974 (5th Cir. 1990); United States v. Rey, 923 F.2d 1217, 1221 (6th Cir. 1991); United States v. Leidner, 99 F.3d 1423, 1425-05 (7th Cir. 1996); United States v. Bieri, 21 F.3d 811, 814-15 (8th Cir. 1994); United States v. Hale, 784 F.2d 1465, 1468-69 (9th Cir. 1986)).

170. Id. (quoting Garcia, 882 F.2d at 702).

171. Id.

172. Id. (quoting United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994)).

173. Id. at 672-73 (citing Ricciardelli, 998 F.2d at 11).

174. Id. at 673.
forced entry into the apartment.\textsuperscript{175} In conclusion, the court held that "in circumstances such as those presented here, where law enforcement agents have ample time and information to secure an anticipatory search warrant, lack of time to obtain a warrant after delivery of the contraband is insufficient to justify a warrantless search."\textsuperscript{176} The ruling has significant implications for the conduct of run-of-the-mill undercover operations, such as the "buy-bust" scenario in \textit{Santa}.

This holding did not end the inquiry, however. The government argued that even if the search was illegal, the subsequent consent given by Mr. Ramirez to search the apartment validated the search.\textsuperscript{177} The court began by articulating the general rule that "[f]or consent given after an illegal seizure to be valid, the Government must prove two things: that the consent is voluntary, and that the consent was not a product of the illegal seizure."\textsuperscript{178} The court did not decide whether or not the consent was voluntary because the court disposed of this issue by holding that the "consent did not purge the primary taint of the illegal entry and arrest."\textsuperscript{179} The court stated that three factors are considered when determining whether a "voluntary consent was obtained by exploitation of an illegal seizure."\textsuperscript{180} These include: "the temporal proximity of the seizure and the consent, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct."\textsuperscript{181} The court explained that the magistrate judge had misstated the law and that the proper inquiry was not whether the will of the defendant was overborne but whether the consent was a "product" of the illegal entry.\textsuperscript{182} The presence of intervening circumstances or a lapse in time can function to eliminate the taint to the consent.\textsuperscript{183} However, the court reasoned that because there was no lapse in time nor

\begin{footnotesize}
\begin{enumerate}
\item[175.] \textit{Id.} The court articulated the test for anticipatory warrants as the following: The information to support the warrants "'must show, not only that the agent believes a delivery of contraband is going to occur, but also how he has obtained this belief, how reliable his sources are, and what part government agents will play in the delivery.'" \textit{Id.} (quoting Garcia, 882 F.2d at 703). \textit{See} FED. R. CRIM. P. 41 (authorizing telephone warrants).
\item[176.] Id. at 674.
\item[177.] Id. at 676.
\item[178.] Id. at 676.
\item[179.] Id. at 677.
\item[180.] Id. (citing United States v. Robinson, 625 F.2d 1211, 1218 (5th Cir. 1980)).
\item[181.] Id. at 677.
\item[182.] Id. This squarely places the burden at this point on the government to show the consent was not a product of the illegal entry. \textit{Id.}
\item[183.] Id. (citing United States v. Bailey, 691 F.2d 1009, 1013 (11th Cir. 1982)).
\end{enumerate}
\end{footnotesize}
intervening circumstances, the consent was gained through taint of the illegal entry and was therefore invalid. Further, the court held that the subsequent signed consent was “the result and the fruit of the first” and did not validate the search.

The most significant aspect of the court’s decision in Santa was the court’s conclusion that the possibility that an anticipatory warrant could have been obtained, perhaps by way of a telephonic warrant as allowed under Rule 41, demonstrated that exigent circumstances did not exist. This holding could have significant implications for law enforcement agents monitoring evolving drug transactions. If Santa is strictly applied, agents will need a warrant when they have probable cause to predict the location of the drugs. The exigencies of the breaking transaction would no longer allow a warrantless search. Obviously, defense counsel should consider the use of Santa in cases in which the government is relying on exigent circumstances to justify a warrantless search. Santa may represent a reinvigoration of the warrant clause and a withering of the exigent circumstances exception.

F. Warrants: Sufficiency and Good Faith

Another warrant issue examined by the Eleventh Circuit was the sufficiency of evidence necessary to constitute probable cause. In United States v. Jiminez, the court held that an affidavit based upon information obtained from a wiretap, although not detailed, was sufficient to constitute probable cause and, therefore, supported the issuance of a search warrant. Defendant Jiminez and his girlfriend were under investigation as a result of information obtained from a separate methamphetamine investigation. The officers placed a valid wiretap on the residential line of defendant and his girlfriend from May 11 to May 31, 1995. Defendant Jimenez was later arrested after he was found in his vehicle with six bricks of marijuana, along with a weapon. The investigating officers then sought a search warrant based primarily upon the information obtained from the wiretaps, which intercepted about 1200 conversations. Upon executing the warrant, more drugs, money, drug ledgers, and weapons were discovered at the residence.

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184. Id. at 678. Here, the search occurred about three minutes after the agents entered the apartment. Id. at 677. The court also held that the Miranda warnings alone could not eliminate the taint of the illegal entry. Id. at 678 (citing Robinson, 825 F.2d at 1220).
185. Id. at 678 (quoting Brown, 422 U.S. at 605).
186. Id. at 673.
187. 224 F.3d 1243 (11th Cir. 2000).
188. Id. at 1249.
Defendant first argued that the affidavit supporting the warrant was deficient because it did not show that defendant and his girlfriend were actually the individuals living at the residence described in the affidavit. The court found that one statement in the affidavit established the necessary connection between defendant and the residence to be searched: "The information indicates that Jimenez has secreted large sums of currency in the residence and the currency is derived from the distribution of methamphetamine and cannabis." The court then concluded that this statement "demonstrat[ed] the link between Jimenez's illegal activity and the house.

Next defendant argued that the affidavit only alleged conclusions obtained from the wiretap and not the necessary underlying facts; therefore, the affidavit was insufficient to support probable cause.

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189. Id. at 1245-46.
190. Id. at 1247. Defendant argued specifically that "there is a complete absence of any facts to support a finding that the residence where [defendant and his girlfriend] live and supposedly conduct their drug business is in fact the house described in the Application." Id. (citing Appellant's Brief at 25).
192. Id.
193. Id. The specific statements found in the affidavit were as follows:

During the past eighteen days your Affiant received information from a Title III Wire intercept. The information obtained indicates that Evelyn Sims and Alberto Jimenez are involved in the transportation, distribution, and sales of Methamphetamine and Cannabis on a large scale. The information indicates that Sims and Jimenez conduct the methamphetamine and cannabis transactions at their residence and also deliver the methamphetamine and cannabis to their customers on a continual basis. The information indicates that Sims and Jimenez keep records, logs, and ledgers detailing the transactions along with debts owed them for methamphetamine and cannabis by their customers at their residence. The information indicates that Jimenez has secreted large sums of currency in the residence and that the currency is derived from the distribution of methamphetamine and cannabis. The information provided indicates that Sims and Jimenez have taken stolen property, specifically firearms as payment for methamphetamine and cannabis. On 05-27-94 Your Affiant received information from the reliable source that Jimenez was en route to the Frostproof area to pick-up narcotics and return to Highlands County with them. The information resulted in a Carrol search of Jimenez's vehicle when he returned to Highlands county and the seizure of six pounds of Cannabis and the arrest of Jimenez, who has since bonded out of jail. During the Carrol Search of the vehicle a loaded 9mm semi-automatic pistol was located with the narcotics. Your Affiant noted that the six pounds of Cannabis were cut into one pound blocks and was comprised of tightly compressed "bricks" which appeared to have been part of a larger shipment.

Id. at 1248 (quoting Aff. Supp. Search Warrant).
The court first articulated the standard to be used by the district court judge in analyzing the sufficiency of a warrant as "a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." The court then examined the factual basis of the warrant as derived from the wiretap. The court noted that the affidavit was not really conclusory because it did not actually state that probable cause existed. The court then reasoned that, while perhaps the affidavit should have contained some of the conversations from the wiretap, it simply summarized the information known, and adequately stated the source of that information for purposes of veracity. The court then held that the "affidavit was neither conclusory nor unsubstantiated and provided an adequate, though perhaps not extensive, basis for the . . . court's determination that probable cause existed."

Finally, defendant argued that the arrest described in the affidavit was stale and therefore could not establish probable cause. The court, however, noted that stale information in an affidavit in support of probable cause for a search "is not fatal where the government's affidavit updates, substantiates, or corroborates the stale material." Here, the court found that the wiretap information provided in the affidavit "updated and corroborated Jimenez's involvement with drugs." The court concluded that based on the information provided in the affidavit, "there was a fair probability that Jimenez was involved with illegal activity and that evidence of that activity would be found at the house described in the warrant." This result seems sound.

The Eleventh Circuit also had occasion to examine the good faith exception to the exclusionary rule. The good faith exception first

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195. Id.
196. Id. The court noted that this distinguishes the present case from the Aguilar case.
197. Id. at 1248-49.
198. Id. at 1249.
199. Id. The arrest was provided in the affidavit as occurring in 1994 in error. The court noted that this was the information to be examined because it was what actually appeared in the affidavit. Id.
200. Id. (quoting Magluta, 198 F.3d at 1272).
201. Id.
202. Id. The court declined to address whether the good faith exception applied as argued by the government in this case because the warrant was valid. Id. at 1249 n.1.
announced in *United States v. Leon* was intended to fit those situations in which there would be no deterrent effect upon law enforcement because of "an objectively reasonable belief that their conduct did not violate the Fourth Amendment." In *United States v. Travers*, the Eleventh Circuit examined the issue of whether the good faith exception to the exclusionary rule applied to an overly broad and therefore unconstitutional warrant.

In *Travers* the Eleventh Circuit held that an overly broad search warrant articulating the items to be seized as "all documents involving real estate, litigation, property, mailings, photographs and any other material reflecting identity, and anything reflecting potential fraud," was reasonably relied upon by the executing officers as valid and therefore the good faith exception to the exclusionary rule applied. Defendant was convicted of "mail fraud, equity skimming, money laundering and bankruptcy fraud." All of these convictions were based upon defendant's activities in assuming Veterans Administration mortgages and Federal Housing Association mortgages; renting the homes; filing for bankruptcy to forestall foreclosure of the homes; and not paying the previously obtained mortgages. Upon obtaining the above described search warrant, the agents seized boxes of documents consisting of everything from deeds to birth certificates illustrating defendants use of aliases. Defendant challenged the use of this evidence at trial, and the district court concluded that while the warrant was unconstitutional because it was overly broad, the good faith exception nevertheless applied.

The court focused its inquiry on the reasonableness of relying upon the warrant on its face. The court held that the warrant was not so

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204. *Id.* at 918.
205. 233 F.3d 1327 (11th Cir. 2000).
206. *Id.* at 1329-30.
207. *Id.* at 1330-31.
208. *Id.* at 1328.
209. *Id.* at 1328-29.
210. *Id.* at 1330. The court described the scope of the warrant as follows:

[P]ermitt[ing] the officers to search for all documents involving real estate, litigation, property, mailings, photographs and any other material reflecting identity, and anything reflecting potential fraud. Pursuant to the warrant, the executing officers seized copies of warranty deeds and other documents reflecting Travers' use of false identities to purchase properties; notary public seals for signatures that Travers forged on various deeds and other legal documents; passports, birth certificates, drivers licenses, and credit cards issued in various names; business cards for businesses in various names; letters to tenants written by Travers using both his names and aliases; copies of bankruptcy pleadings,
overly broad on its face that it was unreasonable for the officers to rely on it.\footnote{211} The court first noted that based upon precedent, the good faith exception can be applied to overly broad warrants as long as the warrant is not so overly broad on its face “that the executing officers could not have reasonably presumed it to be valid.”\footnote{212} The court then looked at the complexity of the case, which involved a “complex scheme to commit financial fraud,” and reasoned that a wide variety of documentary evidence would be relevant in this type of case.\footnote{213} The court recognized that the nature of these cases requires a more “flexible reading of the [F]ourth [A]mendment particularity requirement.”\footnote{214} Given this reasoning, the court noted, as did the district court, that whether the warrant was overly broad was a close call.\footnote{215} Therefore, the court held it was not unreasonable for the executing officers to rely upon the warrant as valid on its face.\footnote{216}

This decision nicely illustrates the significant limitation on the exclusionary rule represented by \textit{Leon}. If a reasonable officer could have relied on the warrant believing it to be based on probable cause, suppression is not appropriate because suppression would not have a deterrent effect on the police. The theory is that you cannot deter an officer acting in good faith. The bottom line as a result of \textit{Leon} is that evidence will rarely be suppressed when a judge issues a warrant.

\textbf{G. Administrative Searches and Reasonable Suspicion}

The Supreme Court has held that the traditional standards of the Fourth Amendment, such as probable cause and the warrant requirement, are not required for searches and seizures that promote certain government interests (apart from criminal law enforcement). The recognized classes of so-called administrative or “special needs” searches and seizures include such government activities as housing and business inspections, drug testing of certain government employees, school searches, stops at vehicle checkpoints, and searches at the border and in jails. The Supreme Court has adopted a balancing approach to weigh the government interest against the intrusiveness of the search or

\footnotesize{letters to bankruptcy courts, and other filings reflecting Travers’ attempts to delay foreclosures; and various other documents concerning Travers’ use of aliases, mail drop boxes, and false addresses to avoid detection.}

\textit{Id.}  \footnote{211} \textit{Id.}  \footnote{212} \textit{Id.} (quoting United States v. Accardo, 749 F.2d 1477, 1481 (11th Cir. 1985)). \footnote{213} \textit{Id.}  \footnote{214} \textit{Id.} (quoting \textit{Accardo}, 749 F.2d at 1481). \footnote{215} \textit{Id.}  \footnote{216} \textit{Id. at 1331}.}
seizure and determine the quantum of suspicion, if any, and the procedure required for the government action (e.g., whether a warrant is required).

In Skurstenis v. Jones, the Eleventh Circuit examined whether two strip searches, one for weapons and one for lice, conducted as a result of plaintiff's arrest for driving under the influence, violated the Fourth Amendment as an unreasonable search. When plaintiff was arrested, the officer found a handgun in the floorboard of her car. Plaintiff had an expired permit to carry the gun. Plaintiff was then taken to the jail to remain there until 11:00 a.m. the next morning. At the jail, plaintiff was taken into a room and strip searched by a female officer. The next morning at 10:30 a.m., plaintiff was again strip searched but this time in the infirmary by a male nurse's assistant who worked part-time at the jail. The district court ruled the searches were unconstitutional under the Fourth Amendment but that the officer was entitled to qualified immunity. The district court concluded however that the sheriff and nurse's assistant were not.

The Eleventh Circuit Court of Appeals began its analysis by articulating the holding of the Supreme Court in Bell v. Wolfish that "routine strip searching of pretrial detainees [is] not a per se violation of the Fourth Amendment prohibition against unreasonable searches and seizures." Instead, the Supreme Court had applied a balancing test. A court when examining the reasonableness of these types of searches should balance the "need for the particular search against the invasion of personal rights that the search entails." The court noted several factors to consider when making this determination including, "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which [it occurred]." Finally, the court stated that the reasonable suspicion standard should be applied to determining whether a search is permissible.

The court then turned to the facts of the present case and first found that because the jail's policy required that every inmate be searched prior to placement in a cell, regardless of reasonable suspicion, the policy

217. 236 F.3d 678 (11th Cir. 2000).
218. Id. at 680-81.
219. Id.
221. 236 F.3d at 681 (citing Bell, 441 U.S. at 559).
222. Id.
223. Id. at 682 (quoting Bell, 441 U.S. at 559).
224. Id.
225. Id.
was unconstitutional. However, the court found reasonable suspicion in the present case for the initial search because police found a weapon in plaintiff's vehicle when she was apprehended. This fact alone is sufficient to constitute reasonable suspicion especially in light of the security dangers inherent in a detention facility. The court then examined the manner and place of the search. The court reasoned that because plaintiff was searched alone in a room with only a female officer observing, it was conducted with the least intrusive means. Therefore, the court held that the initial strip search was constitutional under the Fourth Amendment.

The court then examined the strip search by the male nurse's assistant. The court began its analysis by noting that under Alabama law, the sheriff has legal custody of all inmates in the jail and further has a statutory duty to "exercise every precaution to prevent the spread of disease among the inmates." The court then described the jail's procedures designed to limit the spread of disease: First, a search for signs of disease is generally to be conducted at the earliest possible time during an individual's detention. This search for disease includes a search for lice, which is difficult to contain and destroy in an inmate population if not detected early. The jail contracted with a medical center to provide the personnel to conduct these examinations. The court then explained that the procedures used to determine how the searches are to be done are those promulgated by the medical center. The procedure for the search for lice called for examination of both cranial and pubic hair with no "unnecessary contact with the inmate," including touching the genitals.

The court then applied the factors necessary to determine reasonableness under Bell. The court reasoned that because the search was

226. Id.
227. Id.
228. Id. The court noted that this is a legitimate concern recognized in other cases. Id. (citing Hughes v. Rowe, 449 U.S. 5, 11 (1980)).
229. Id.
230. Id. The court also noted that a body cavity search was not conducted. Further, the court relied upon a similar case holding that under these circumstances, the search is conducted in the "least intrusive manner." Id. (citing Justice v. City of Peachtree, 961 F.2d 188, 193 (11th Cir. 1992)).
231. Id.
232. Id.
233. Id. at 682-83 (quoting ALA. CODE § 14-6-95 (1995)).
234. Id. at 683.
235. Id.
236. Id.
237. Id.
conducted in the infirmary and no other individuals were present, the intrusion was minimal.\textsuperscript{238} The court also concluded that because of the risk inherent in the spread of lice in detention facilities, the search was justified.\textsuperscript{239} Finally, the court found the manner reasonable because medical personnel conducted the search.\textsuperscript{240} The court reasoned that while courts have not ruled on this specific issue, they have considered body cavity searches by medical personnel.\textsuperscript{241} The court noted that most courts require that medical personnel perform the searches instead of jail personnel.\textsuperscript{242} The court further noted that most courts did not even mention the sex of the medical person performing the search, emphasizing the minimal importance of this issue when the individual is a trained medical provider.\textsuperscript{243} The court then held that “it is not inappropriate for medical personnel to conduct a strip search of an inmate of the opposite sex,” and the search of plaintiff was reasonable and did not violate the Fourth Amendment.\textsuperscript{244}

Significantly, the court never focused on the fact that the plaintiff was searched for lice just minutes prior to her release.\textsuperscript{245} It would seem that this would be a relevant factor in determining whether the search was justified. The plaintiff and the district court did focus on this aspect of the search but the Eleventh Circuit noted in a footnote that “[t]he fact that the search preceded Skurstenis's release from custody by just a few minutes was merely coincidental.”\textsuperscript{246}

\section*{III. The Fifth Amendment}

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

\begin{itemize}
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id. at 684.
\item \textsuperscript{240} Id. The district court found the manner of the search particularly “offensive” because it involved the search of a female by a male. Id.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id. at 683-84 (citing Torres v. Wisconsin Dep’t of Health & Soc. Serv., 859 F.2d 1523 (7th Cir. 1988); Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986); Unwin v. Campbell, 863 F.2d 124, 136 (1st Cir. 1988); Daughtery v. Harris, 476 F.2d 292, 295 (10th Cir. 1973); Tribble v. Gardner, 860 F.2d 321, 324-25 (9th Cir. 1988); Hurley v. Ward, 584 F.2d 609, 610, 612 (2d Cir. 1978)).
\item \textsuperscript{243} Id. at 683.
\item \textsuperscript{244} Id. at 684.
\item \textsuperscript{245} Id. at 683.
\item \textsuperscript{246} Id. at 683 n.6.
\end{itemize}
jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. 247

A. Privilege Against Self-Incrimination

Last term in Dickerson v. United States, 248 the Supreme Court reaffirmed the holding of Miranda v. Arizona. 249 As a result, courts must continue to interpret the Miranda standards. During the survey period, the Eleventh Circuit Court of Appeals decided two noteworthy cases dealing with the Miranda procedures. The first case, United States v. Muegge, 250 dealt with the issue of what constitutes custody, 251 which is important because an individual’s Miranda rights are not triggered until the individual is in custody. 252

In Muegge the court reversed the district court’s order granting defendant’s motion to suppress his statements because the court of appeals concluded that defendant was not in custody during the interrogation. 253 Defendant worked as a civilian employee at Robins Air Force Base in Warner Robins, Georgia, when the Air Force Office of Special Investigations (“OSI”) investigated reported use of government computers for looking at child pornography. Defendant was directed by his supervisor to go to the OSI detachment building for questioning. The OSI building is locked at all times and all visitors are escorted during their visit. The interview lasted about two and a half hours, during which time defendant was twice accompanied outside the building by an OSI agent to have a cigarette. The OSI interviewers informed defendant that he was free to leave and did not have to answer any questions. Ultimately, defendant admitted to viewing pornography, including child pornography, on government computers and at home, consented to a search of his home, and signed a written statement. Also, at the end of the interview, defendant initialed an interview form, which contained a statement of his Miranda rights, but he had not been advised of those rights prior to or during the interview. It was not until more than eight months after the interview that defendant was arrested and charged

247. U.S. Const. amend. V.
248. 120 S. Ct. 2326 (2000).
249. Id. at 2329; 384 U.S. 436, 490-91 (1966).
250. 225 F.3d 1267 (11th Cir. 2000).
251. Id. at 1271.
252. See Miranda, 384 U.S. at 478-79.
253. 225 F.3d at 1271.
with two counts of possession of child pornography. The district court found the interrogation to be custodial.\textsuperscript{264}

The court of appeals began by recognizing that under \textit{Miranda}, prior to any interrogation, an individual taken into custody must be advised of his right to remain silent and his right to counsel.\textsuperscript{265} Formal arrest is not required for an interrogation to be custodial.\textsuperscript{266} Rather, the standard is whether "under the totality of the circumstances, a reasonable man in the suspect's position would feel a restraint on his freedom of movement fairly characterized as that degree associated with a formal arrest to such extent that he would not feel free to leave."\textsuperscript{267} A reasonable person is a reasonable innocent person.\textsuperscript{268} In applying this test, the court of appeals concluded that the district court placed too much weight on the fact that defendant was ordered to go to the OSI building because "such an order, absent other coercive elements, did not constitute the type of restraint on [defendant's] freedom associated with a formal arrest."\textsuperscript{269} The court of appeals held that "if the individual being questioned were innocent, and was told directly he might leave, in the absence of evidence to the contrary the interrogation was non-custodial as a matter of law."\textsuperscript{270} Here, the mere fact that the interrogation took place at a secure facility was not enough to make the interrogation custodial because defendant was never arrested or physically restrained.\textsuperscript{271} Being ordered to the OSI building did not make it custodial given that defendant came and left of his own accord.\textsuperscript{272} Being escorted during the two cigarette breaks defendant received did not make the interrogation custodial because all visitors are escorted while in the OSI building.\textsuperscript{273} While the building was locked, no key was needed to leave.\textsuperscript{274} Finally, defendant left when the interview was over and was not arrested until almost eight months later.\textsuperscript{275} All of these facts led the court of appeals to conclude that

\textsuperscript{264} \textit{Id.} at 1268-69.
\textsuperscript{265} \textit{Id.} at 1269-70 (citing \textit{Miranda}, 384 U.S. at 478-79).
\textsuperscript{266} \textit{Id.} at 1270.
\textsuperscript{267} \textit{Id.} (quoting United States v. Phillips, 812 F.2d 1355, 1360 (11th Cir. 1987)) (internal quotation marks omitted).
\textsuperscript{268} \textit{Id.}
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.} at 1271. The court of appeals indicated that while the district court assumed without making any finding of fact that defendant was informed that he could leave, a contrary finding of fact would have been clearly erroneous. \textit{Id.} at 1270.
\textsuperscript{271} \textit{Id.} at 1271.
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{Id.}
defendant was not in custody. This conclusion is consistent with the Eleventh Circuit's prior holding that an interrogation that occurs in a police station can be noncustodial. Cases involving a suspect in a police station or similar facility deserve close scrutiny, particularly if it appears that the questioners capitalized on the environment to pry a confession out of the suspect. But it is certainly not the case that suspects must be deemed in custody because the location of an interview is a police station.

In the second case, *Mincey v. Head*, the court addressed allegations that the police officers violated *Edwards v. Arizona*. In *Edwards* the Supreme Court held that when an individual is in custody, once the individual requests an attorney, all interrogation must stop. But what constitutes a request for counsel? In *Mincey* defendant sought a writ of habeas corpus vacating his convictions on several grounds, including that the police continued questioning him and gained incriminating statements after he requested an attorney. Defendant was arrested by officers Bob Boren and Clifton Spires, and as they were taking defendant to the Bibb County Law Enforcement Center ("LEC"), Boren read defendant his *Miranda* rights. Defendant claimed that he also said, "[G]o ahead and run the lawyers," but Boren and Spires denied this. At LEC, Spires again read defendant his rights, which defendant said he understood. Spires asked defendant to sign a waiver of rights form, but even after the lines "fully understand my right to an attorney," and "to make a statement to the officers" were crossed out, defendant refused to sign it. Defendant claimed that he told Spires that he "needed a lawyer before [he] did anything," but Spires denied being told this. Following defendant's refusal to sign the waiver, defendant confessed. Defendant was then interviewed by Boren and Deputy Sheriff Micheal Smallwood, who again read defendant his rights. In response to a request for a signed statement, defendant said, "I'm not going to sign anything . . . . I need forty-five lawyers

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266. *Id.*
268. 206 F.3d 1106 (11th Cir. 2000), *en banc* rehe'g denied, 229 F.3d 1171 (11th Cir. 2000).
269. 451 U.S. 477 (1981); 206 F.3d at 1131-32.
270. 451 U.S. at 484-85.
271. 206 F.3d at 1117.
272. *Id.* at 1127 (internal quotation marks omitted).
273. *Id.* at 1128 (internal quotation marks omitted).
274. *Id.* (internal quotation marks omitted).
275. *Id.*
to get out of this stuff." At this point, the officers stopped questioning defendant.

An evidentiary hearing was held, and the trial court found that the statements were freely and voluntarily given, and thus admissible. The trial court did not believe defendant told Spires that he needed an attorney after refusing to sign the waiver. However, "the court acknowledged that [defendant] indicated in the patrol car and again at the LEC that he wanted a lawyer, but found that he never asked for a lawyer." In addition, the statement about needing forty-five lawyers "was not such a request but merely an offhand remark." On direct appeal, the Georgia Supreme Court affirmed. On habeas corpus, the district court adopted the state trial court's findings of fact and reached the same conclusion.

The court of appeals began by acknowledging that it was bound by the state trial court's findings of fact, but that it reviewed a district court's determination of the questions of law and mixed questions of law and fact de novo. Although defendant argued that he did not waive his right to silence or his right to an attorney, the court concluded that defendant was really contending that after he invoked his right to counsel the officers improperly continued to question him. The court began with the rule from *Miranda* that once an individual who is in custody asserts his right to counsel, all questioning must stop. To resolve defendant's claim, the court had to decide whether, under *Davis v. United States*, defendant's statement constituted a request for an attorney. Under *Davis* "although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Thus, "if the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to

276. Id. (internal quotation marks omitted).
277. Id.
278. Id. at 1129.
279. Id. (internal quotation marks omitted).
280. Id. (internal quotation marks omitted).
281. Id.
282. Id. at 1131.
283. Id.
284. Id. (citing *Miranda*, 384 U.S. at 474).
286. 206 F.3d at 1131-32.
287. 512 U.S. at 459 (internal citation omitted).
stop questioning him." Based on this, the Court in *Davis* held that the suspect's statement, "Maybe I should talk to a lawyer," was not an unambiguous request for an attorney. Therefore, in *Mincey* the court of appeals concluded that defendant's claim that he was questioned after asking for an attorney turned upon whether "'go ahead and run the lawyers' constituted an 'unambiguous or unequivocal request for counsel.'" The court reached that conclusion because the questioning stopped after defendant's statement about needing forty-five attorneys and because the trial court did not believe defendant told Spires that he needed an attorney. The court held that "go ahead and run the lawyers," obviously did not constitute an "unambiguous or unequivocal request for counsel." The court also was unpersuaded by defendant's argument that his refusal to sign the waiver was "an immediate demand for counsel."

While it is hardly surprising that the court would find that defendant's statement was ambiguous, defendant's statement could be distinguished from the statement in *Davis*. Here, defendant worded his statement as a command and made it in the context of discussing *Miranda*, whereas in *Davis* the statement held to be ambiguous was like a question. When, in the context of discussing *Miranda*, an obviously inarticulate suspect says "go ahead and run the lawyers," it would be reasonable for the officers to interpret such a command as a request for an attorney. At the very least, a reasonable officer might want to clarify the statement. After all, it would be untenable for the court to hold that a command such as "go ahead and call the lawyers" was not an unambiguous request for an attorney. However, because this defendant used the unusual verb "run," his command regarding an attorney is deemed ambiguous. Thus, while suspects are not required to be Oxford dons, it appears they must be at least as articulate as high school graduates to be fully protected by *Miranda*.

Another interesting aspect of this case was the findings made by the state trial court. The trial court found that defendant made the statement "go ahead and run the lawyers," despite the fact that the officers denied that defendant said it. By finding that defendant

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288. *Id.* at 461-62.
289. *Id.* at 462.
290. 206 F.3d at 1132 (quoting *Davis*, 512 U.S. at 462) (internal quotation marks omitted).
291. *See id.* at 1132 n.61.
292. *Id.* at 1132 (internal quotation marks omitted).
293. *Id.*
294. *Id.* at 1128-29.
made the statement, the trial court implicitly found that the officers' statements were false. Moreover, the trial court found that defendant "indicated . . . that he wanted a lawyer, but found that he never asked for a lawyer." Thus, the apparently false (or at least discounted) statements by the officers, a finding that defendant indicated he wanted an attorney, or a combination of the two was not enough to exclude defendant's statements.

B. Grand Jury

The Fifth Amendment guarantees the right to be indicted by a grand jury. Thus the Fifth Amendment has been interpreted as limiting amendments to an indictment. Constructive amendments, which occur when the jury instruction provides a greater basis to convict than does the indictment, violate a defendant's right to be indicted by a grand jury.

In United States v. Simpson, defendant claimed that the trial court constructively amended his indictment when it instructed the jury. Counts IV and VI of the indictment charged that defendant "did knowingly use and carry a firearm in relation to a drug trafficking crime." The trial court instructed the jury that defendant could be convicted if the jury found that defendant "used or carried a firearm in relation to a drug trafficking offense." Defendant claimed that by changing "and" to "or," the district court denied him due process by lessening the government's burden of proof.

In determining if jury instructions misstate the law or prejudice the defendant by misleading the jury, the court reviews them de novo. The court of appeals looked to its earlier case, United States v. Poarch, for the standard for when a jury instruction constructively amends an indictment: "[a] constructive amendment to the indictment occurs where the jury instructions so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the indictment." Such an error is reversible error per

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296. Id. at 1129 (internal quotation marks omitted).
297. U.S. CONST. amend. V.
299. See United States v. Diaz, 190 F.3d 1247, 1251 (11th Cir. 1999).
300. 228 F.3d 1294 (11th Cir. 2000).
301. Id. at 1299 (internal quotation marks omitted) (emphasis added by court).
302. Id. at 1298.
303. Id. (internal quotation marks omitted) (emphasis added by court).
304. 878 F.2d 1355 (11th Cir. 1989).
305. 228 F.3d at 1299 (quoting Poarch, 878 F.2d at 1358) (alteration in original).
While defendant’s indictment charged him with “use and carry,”
the statute only requires proof of defendant’s “use or carry.”
Therefore, the court found that because defendant was charged with
more than was required, there was no risk that he would be convicted
on a ground not alleged in the indictment. Moreover, the court
stated that it is well established law that when “an indictment charges
in the conjunctive several means of violating a statute, a conviction may
be obtained on proof of only one of the means, and accordingly the jury
instruction may properly be framed in the disjunctive.” The court
thus applied the proper standard. Statutes list ways of violating the law
in the disjunctive. Indictments, which are to inform the defendant of all
the theories he must meet at trial, list the ways of violating the law in
the conjunctive. Jury instructions revert to the disjunctive because the
statute allows conviction based on only one of the ways of violating the
statute.

C. Double Jeopardy

The court of appeals addressed the doctrine of multiplicity, a creature
of the Double Jeopardy Clause, in United States v. Smith. Multiplic-
ity occurs when a single crime is charged in more than one count. For Double Jeopardy purposes, two counts charge a single crime unless
both counts require proof of an element or of a fact that the other does not. The Double Jeopardy infirmity of multiplicitous indictments is
that they subject a defendant to the possibility of multiple punishments
for what is the same crime under the Double Jeopardy Clause.

In Smith Count One charged defendants, Smith and Tyree, with
conspiring to vote more than once by fraudulently casting absentee
ballots. Count Two charged them with voting more than once. Counts
Three through Thirteen charged that in violation of 42 U.S.C. § 1973i-
cither one or both of them gave false information on either an
application for absentee ballot or an affidavit of an absentee voter
concerning Angela Hill, Eddie Gilmore, Willie Carter, Cassandra Carter,
Shelton Braggs, and Sam Powell. The district court denied Smith and Tyree's motion to dismiss the indictment because of selective prosecution based on race and political affiliation.\textsuperscript{315}

Issues of multiplicitous indictments are reviewed de novo.\textsuperscript{316} "Multiplicity is the charging of a single offense in more than one count."\textsuperscript{317} Two evils may arise with multiplicitous counts: (1) "the defendant may receive multiple sentences for the same offense," and (2) the jury may be improperly prejudiced by the suggestion that the defendant committed several crimes instead of just one.\textsuperscript{318} The first step in reviewing for multiplicity is determining the "allowable unit of prosecution."\textsuperscript{319} Defendants claimed that the allowable unit of prosecution for Section 1973i(c) is all the steps in preparation of casting a ballot regardless of the number of false documents.\textsuperscript{320} Therefore, because one count charged giving false information on the application for a particular voter's absentee ballot and charged giving false information on the affidavit of the same voter in another count, defendants contended the counts were multiplicitous.\textsuperscript{321} However, the court of appeals found that absentee ballot applications and absentee voter affidavits are different documents with different purposes; therefore, "[a] count charging the giving of false information on an application of absentee ballot requires different proof than a count charging the giving of false information on an affidavit of absentee voter."\textsuperscript{322} Because they are different offenses, the indictment was not multiplicitous.\textsuperscript{323}

D. Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments have been interpreted to guarantee a plethora of procedural safeguards for criminal trials.\textsuperscript{324} The Eleventh Circuit addressed several due process issues during the survey period.

1. Equal Protection. Although based on its text, the Equal Protection Clause of the Fourteenth Amendment applies only to the

\textsuperscript{315} 231 F.3d at 806. For discussion of defendants' claim of selective prosecution, see infra text accompanying notes 335-55.
\textsuperscript{316} 231 F.3d at 807.
\textsuperscript{317} Id. at 815 (quoting United States v. Langford, 946 F.2d 798, 802 (11th Cir. 1991)).
\textsuperscript{318} Id. (quoting Langford, 946 F.2d at 802).
\textsuperscript{319} Id.
\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Id.
\textsuperscript{323} Id.
\textsuperscript{324} See Fleissner & Harris, supra note 12, at 949.
states, the Supreme Court has applied the equal protection guarantees to the federal government by finding it to be a component of the Due Process Clause of the Fifth Amendment. During the survey period, the court of appeals decided two cases involving equal protection challenges.

In the first case, United States v. Cordoba-Mosquera, defendants alleged that the prosecution's peremptory strike of a juror violated Batson v. Kentucky. In Batson the Supreme Court held that a defendant may object to the prosecution's use of peremptory challenges on the ground that the challenges are being used to strike jurors because of their race, an impermissible basis. Subsequent cases recognized the right of the prosecution to object to the defendant's peremptory challenges and recognized that gender and ethnicity also are impermissible bases for peremptory challenges. Under Batson once the party challenging the strikes makes out a prima facie case of impermissible purpose, which is usually based on a pattern of strikes, the party making the strikes must prove a race-neutral or gender-neutral basis for the strikes.

Regarding defendant's Batson challenge in Cordoba-Mosquera, the court of appeals held that the trial court did not commit clear error in finding that the prosecution presented a race-neutral reason to rebut defendants' prima facie case. When asked by the district court for the reason for the peremptory strike, the prosecutor stated, "I didn't like the way he was acting in court, his mannerisms. And I didn't think he wanted to be a juror, so I struck him." The court of appeals stated that "a prospective juror's inattentiveness is a proper race-neutral reason for using a peremptory strike," and that the trial court's determination that race did not motivate the peremptory strike should receive great deference. The court also stressed that when the race-neutral

325. See Fleissner, supra note 311, at 1515-16 (citing Schlesinger v. Ballard, 419 U.S. 498 (1975)).
326. 212 F.3d 1194 (11th Cir. 2000).
328. Id. at 93-95.
330. 476 U.S. at 97.
331. 212 F.3d at 1197.
332. Id. (internal quotation marks omitted).
333. Id. at 1198.
reason focuses on inattentiveness signaled by body language and mannerisms, deference is particularly warranted.334

In the second case, *United States v. Smith*, the court addressed defendants Smith and Tyree's claim that they were selectively prosecuted based on race (they are black) and based on political affiliation.335 For the selective prosecution claim, the district court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo.336 The court of appeals began by examining the standards set out in *United States v. Armstrong*,337 which govern a selective prosecution claim.338 The Supreme Court in *Armstrong* recognized that prosecutors have broad discretion in deciding who to prosecute and there is a strong "presumption of regularity" supporting such decisions.339 However, the prosecutor is bound by the Equal Protection Clause of the Fifth Amendment.340 To prevail on a selective prosecution claim, a defendant must present "clear evidence" that the prosecutor violated the Equal Protection Clause.341 A selective prosecution claim has two prongs: discriminatory effect and discriminatory purpose.342 To establish discriminatory effect, the claimant must prove similarly situated individuals were not prosecuted.343

Defendants in *Smith* first contended that they need only prove both prongs by a preponderance of the evidence, but the court of appeals quickly concluded that the "clear evidence" language in *Armstrong* means clear and convincing evidence.344 Defendants next contended that the magistrate erred in concluding that they did not prove selective prosecution because there was the possibility of future prosecutions, and the court of appeals agreed that the possibility of future prosecutions was not a sufficient basis for dismissing the claims.345

The court then examined whether defendants presented enough evidence to prove both prongs of their claim.346 Defendants attempted

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334. *Id.*
335. 231 F.3d at 806. For discussion of defendant's multiplicity claim see *supra* text accompanying notes 310-23.
336. 231 F.3d at 806.
338. 231 F.3d at 807.
339. 517 U.S. at 464.
340. *Id.*
341. *Id.* at 465.
342. *Id.*
343. *Id.*
344. 231 F.3d at 808.
345. *Id.* at 808-09.
346. *Id.* at 809.
to prove the discriminatory effect prong by showing that similarly situated whites were not prosecuted, and similarly situated blacks who were politically allied with whites were not prosecuted. The court recognized the novelty of a selective prosecution claim based on members of defendants' same race not being prosecuted because of their political alliance with whites, but declined to decide if this was a valid basis for a selective prosecution claim because even if it was, defendants failed to meet their burden.

The court defined "similarly situated person" as:

one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant—so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant.

Defendants failed to meet their burden because the individuals they claimed were similarly situated had committed different voting crimes than those committed by Smith and Tyree. The court went further, closely examining the record to find if there were any individuals who had committed the same type of crimes as Smith and Tyree. While the court found some such individuals, they were not similarly situated as to the number of crimes they committed, and the record did not reveal the strength of the evidence against them.

In addition to failing to meet prong one, defendants failed to establish discriminatory intent. Defendants argued that the decision to bring the case in federal court was made to avoid a black jury, but the court rejected this as lacking "even a shred of evidence." The court also rejected defendants' contention that the district court's rejection of the government's peremptory strike of one black venire member showed that the prosecution was motivated by bias.

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347. Id. at 809-10.
348. Id. at 810.
349. Id.
350. Id. at 811.
351. Id. at 812.
352. Id. at 812-13.
353. Id. at 813.
354. Id.
355. Id.
2. Continuance. In *United States v. Bowe*, the court of appeals upheld the district court's denial of a continuance. Defendant was extradited from the Bahamas and his trial was initially set for February 1, 1993. When his attorney withdrew, the trial was rescheduled for June 1993, but defendant could not find a new attorney until May. Therefore, the trial was rescheduled for November 1, 1993. Defendant hired three attorneys, Rosemarie Robinson, David Rowe, and David Markus, but only Robinson filed a notice of appearance. In August 1993, Markus was arrested and entered drug rehabilitation. On September 7, Markus called the prosecution asking her to relay to the court a request for a continuance. A status conference was held on September 14, at which Robinson and Rowe were present but not defendant. At the conference the continuance was discussed. The court asked defendant's attorney to file a formal motion. Robinson did so, and it contained affidavits from Markus and defendant. The court denied the motion.

The court of appeals began by addressing the standard of review, which it held to be abuse of discretion. Defendant argued that based on *Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co.*, when illness of counsel is the basis for the continuance, there is an exception to the general rule that decisions on continuances are within the judge's discretion. The court rejected defendant's argument because a closer evaluation of *Smith-Weik* revealed that the court in *Smith-Weik* was really applying an abuse of discretion standard.

The court recognized as "undisputed that one aspect of the right to counsel protected by the Due Process Clause is the defendant's right to choose his or her attorney." However, that right is balanced against "the general interest in the prompt and efficient administration of justice," so that "[d]efendants . . . are only guaranteed 'a fair or reasonable opportunity' to select the attorney of their choice." There were six factors the court considered in determining if defendant's right was impinged:

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356. 221 F.3d 1183 (11th Cir. 2000).
357. Id. at 1191.
358. Id. at 1187-88.
359. Id. at 1189.
360. 423 F.2d 842 (5th Cir. 1970).
361. 221 F.3d at 1189.
362. Id. at 1189-90.
363. Id. at 1190.
364. Id. (quoting *Gandy v. Alabama*, 569 F.2d 1318, 1323, 1324 (5th Cir. 1978)).
(1) the length of the delay, (2) whether the counsel who becomes unavailable for trial has associates adequately prepared to try the case, (3) whether other continuances have been requested and granted, (4) the inconvenience to all involved in the trial, (5) whether the requested continuance is for a legitimate reason, and (6) any unique factors.\textsuperscript{365}

In this case, the delay would have been long, defendant still had two attorneys familiar with his case, and Markus entered rehabilitation two months before the trial date, and even with the denial of the continuance a month before the trial date, there was ample time to find additional counsel.\textsuperscript{366} Therefore, the court concluded that, under the circumstances, defendant's attorneys had plenty of time to prepare and the district court did not abuse its discretion.\textsuperscript{367} This probably was a fair result, given that defendant had several attorneys.

3. Prosecutorial Misconduct. The Eleventh Circuit confronted allegations of prosecutorial misconduct in two cases during the survey period. In \textit{Cordoba-Mosquera}, discussed above in connection with a \textit{Batson} issue, the court of appeals once again faced the issue of improper remarks by the prosecutor during a jury trial.\textsuperscript{368} The court upheld the district court's denial of defendants' new trial motion based on the prosecution's closing argument.\textsuperscript{369} The court began by stating the standard applied to challenges based on prosecutorial misconduct: "Prosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused."\textsuperscript{370} In addition, the court recognized that it "gives 'considerable weight to the district court's assessment of the prejudicial effect of the prosecutor's remarks and conduct.'"\textsuperscript{371} Here, defendants challenged several remarks by the prosecutor during closing arguments that referred to defendants' failure to explain certain things.\textsuperscript{372} The district court instructed the jury to disregard the comments, stated that the comments were "totally improper," stressed that the prosecutor had the burden of proof, and asked the jurors

\textsuperscript{365} \textit{Id}.
\textsuperscript{366} \textit{Id} at 1190-91.
\textsuperscript{367} \textit{Id} at 1191.
\textsuperscript{368} 212 F.3d at 1198. \textit{For discussion of defendants' Batson claim see supra text accompanying notes 327-34.}
\textsuperscript{369} \textit{Id}.
\textsuperscript{370} \textit{Id} (quoting United States v. Reed, 887 F.2d 1398, 1402 (11th Cir. 1989)).
\textsuperscript{371} \textit{Id} (quoting United States v. Herring, 955 F.2d 703, 710 (11th Cir. 1992)).
\textsuperscript{372} \textit{Id}.
individually if they could disregard the comments. The court of appeals held that the court could best determine the effect of the comments and how helpful the curative instruction was; therefore, defendants failed to show that their substantial rights were affected.

This case reflects the ongoing struggle the courts face regarding how to control improper arguments by the prosecutor. While it would be contrary to notions of the efficient administration of criminal law to grant a defendant a new trial when the errors did not affect the outcome, if the errors are almost always deemed harmless, how can prosecutorial misconduct be deterred? As suggested two years ago in this survey article, in addition to formal sanctions, the court could identify by name the offending attorney and chastise that attorney in the published opinion. Although such public condemnation might prove a strong incentive for prosecutors to keep their closing arguments well within bounds, courts seldom employ this sort of sanction.

What might have been a routine affirmance, United States v. Campbell, turned into a heated debate between a dissenting judge and a panel majority over what actions constitute misconduct, illustrating the point that there can be widely differing views as to what is misconduct under the flexible contours of the Due Process Clause. The court of appeals addressed whether it was error to admit a Customs agent’s hearsay opinion that was contained in defendant’s written statement. Defendant flew from Jamaica to Miami, and when he went through Customs, one of his suitcases was searched. The Customs agent found two packages of cocaine in defendant’s bag, and arrested defendant. Another Customs agent read defendant his Miranda rights, and defendant signed a waiver, agreeing to make a statement. The agent wrote defendant’s statement for him, in the third person. In addition to including defendant’s comment that no one put anything in his luggage, the agent “inserted his personal opinion in the statement, commenting that he had told [defendant] that ‘nobody gives this amount of cocaine to someone they don’t trust.’” After reading the statement and having a few additions made, defendant signed the statement. At trial, the primary issue was whether defendant knew about the cocaine

373. Id.
374. Id. at 1198-99.
375. See Fleissner & Harris, supra note 12, at 954.
376. Id.
377. 223 F.3d 1286 (11th Cir. 2000).
378. Id. at 1290, 1295-96 (Godbold, J., dissenting).
379. Id. at 1288.
380. Id. at 1287.
381. Id.
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in his bag prior to the search. While the agent who wrote out defendant's statement testified, the government had the agent read the whole statement. The government then commented on the hearsay statement three times during the agent's testimony and again during closing arguments.\textsuperscript{8}

The court of appeals applied the plain error standard because defendant did not object at trial.\textsuperscript{383} Under the plain error standard, defendant had to prove "(1) an error, (2) that is plain, and (3) that affects substantial rights."\textsuperscript{384} To affect substantial rights, the error "must have affected the outcome of the district court proceedings."\textsuperscript{385} The court of appeals concluded that defendant failed to prove any of the three prongs of the plain error standard.\textsuperscript{386}

First, the court would not recognize as error the trial court's failure to sua sponte redact defendant's statement.\textsuperscript{387} Second, even if it was error, the court concluded that it was not plain because defendant cited no authority for the premise that it was an error for the trial court to fail to sua sponte redact the statement.\textsuperscript{388} Finally, the court concluded that even if it was error and it was plain, it did not affect defendant's substantial rights because (1) the "agent testified and was cross-examined"; (2) the "agent could have stated the same opinion as an expert witness"; and (3) the other evidence was sufficient for the jury to conclude defendant had knowledge.\textsuperscript{389}

The most interesting part of this case was the scathing dissent written by Judge Godbold. He began by stating, "The government cannot be proud of this conviction."\textsuperscript{390} According to the dissent, the misconduct by the government denied defendant due process, and the misconduct consisted of a government agent "manufactur[ing] evidence tending to show defendant's guilt . . . [and] the government, with notice that the evidence was manufactured, utilized it repeatedly to strike at the heart of defendant's defense."\textsuperscript{391}

Judge Godbold then took the majority to task for its failure to "adequately treat an error of constitutional dimension. It minimizes the governmental misconduct. It does not

\textsuperscript{8} Id. at 1287-88.
\textsuperscript{383} Id. at 1288.
\textsuperscript{384} Id.
\textsuperscript{385} Id. (quoting United States v. Olano, 507 U.S. 725, 734 (1993)).
\textsuperscript{386} Id. at 1288-89.
\textsuperscript{387} Id. at 1288.
\textsuperscript{388} Id. at 1288-89.
\textsuperscript{389} Id. at 1289.
\textsuperscript{390} Id. at 1290 (Godbold, J., dissenting).
\textsuperscript{391} Id.
recognize that government manufacture of evidence plus subsequent use of it at trial with knowledge of its taint is a constitutional wrong.\textsuperscript{392}

The dissent would have held that the manufacture of incriminating evidence by the government and its subsequent use at trial, which knows it to be tainted, is a constitutional error not subject to the harmless error rule.\textsuperscript{393} In other words, it would be reversible error per se.\textsuperscript{394} Even if the harmless error rule applied, a constitutional error must be harmless beyond a reasonable doubt.\textsuperscript{395} The dissent then applied five factors from \textit{United States v. Mills}\textsuperscript{396} to conclude that the error was not harmless:

1. How important was the witness' testimony to the prosecution's case? It was vital.  
2. Was other testimony cumulative? No.  
3. Was there corroborating evidence to the testimony in question? No.  
4. What was the extent of cross-examination? Minimal or none on the subject matter.  
5. What was the overall strength of the prosecution's case? Very thin.\textsuperscript{397}

The dissent concluded that it was the prosecution's duty not to use evidence known to be manufactured, and the trial court should be alert to ensure that manufactured evidence is not used.\textsuperscript{398} Judge Godbold concluded by calling this "a shabby case."\textsuperscript{399}

4. 

4. Burden of Proof. The court of appeals, in \textit{United States v. Deleveaux}\textsuperscript{400} addressed whether a justification defense to 18 U.S.C. § 922(g)(1),\textsuperscript{401} the felony-in-possession statute, is available and, if so, who has the burden of persuasion on it.\textsuperscript{402} The government and defendant stipulated to defendant being a convicted felon and to the pistol being a firearm in or affecting commerce, and it was undisputed that defendant took the pistol out of his attic crawl space, fired it and returned it to the crawl space. Defendant claimed that he possessed the

\textsuperscript{392} \textit{Id.} at 1294.  
\textsuperscript{393} \textit{Id.}  
\textsuperscript{394} \textit{Id.}  
\textsuperscript{395} \textit{Id.}  
\textsuperscript{396} 138 F.3d 928 (11th Cir. 1998).  
\textsuperscript{397} 223 F.3d at 1295 (Godbold, J., dissenting).  
\textsuperscript{398} \textit{Id.} at 1296.  
\textsuperscript{399} \textit{Id.}  
\textsuperscript{400} 205 F.3d 1292 (11th Cir. 2000).  
\textsuperscript{401} 18 U.S.C. § 922(g)(1)(1994). In relevant part, Section 922(g)(1) provides, "It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year... to... possess in or affecting commerce, any firearm." \textit{Id.}  
\textsuperscript{402} 205 F.3d at 1296.
pistol to protect himself and his family from a threat of death or serious bodily injury, and therefore, he was justified. The government and defendant presented conflicting evidence as to who started the altercation. Defendant claimed that his neighbor shot first, while the government's evidence showed that defendant fired first. The district court determined that justification is an affirmative defense and instructed the jury that defendant bore the burden of proof. Defendant was found guilty.

The court of appeals "reviews de novo whether the district court misstated the law when instructing the jury or misled the jury to the prejudice of the defendant." The court of appeals began by following other circuits to hold that justification may be available as a defense to Section 922(g)(1), but only in extraordinary circumstances.

The court then stated the elements of the defense as follows:

(1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not neglectingly or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

To determine whether justification is an affirmative defense, the court examined the elements of Section 922(g)(1), which are (1) the defendant was a convicted felon; (2) the defendant "was in knowing possession of a firearm; and (3) . . . the firearm was in or affecting interstate commerce." It concluded that justification is an affirmative defense because it does not negate any element of Section 922(g)(1), but rather is a legal excuse based on facts and circumstances distinct from the elements of the crime. In doing so, the court rejected defendant's argument that "knowingly" for purposes of Section 922(g)(1) means

403. Id. at 1294.
404. Id. at 1296.
405. Id.
406. Id.
407. Id. at 1297 (citing United States v. Paolello, 951 F.2d 537, 541 (3rd Cir. 1991); United States v. Singleton, 902 F.2d 471, 472 (6th Cir. 1990); United States v. Gomez, 92 F.2d 770, 774-75 (9th Cir. 1996)).
408. Id. (citing Paolello, 951 F.2d at 542; Singleton, 902 F.2d at 472; United States v. Perez, 86 F.3d 735, 737 (7th Cir. 1996)).
409. Id.
410. Id.
411. Id. at 1297-98.
possessing the pistol with the intent to break the law. The prosecution is only required to prove that defendant knew the pistol was a firearm to show that defendant acted knowingly; therefore, "[Section] 922(g)(1) has no mens rea requirement for the justification defense to negate."  

The court then examined whether it was proper to put the burden upon defendant. Defendant has a due process right to have the prosecutor prove every element of an offense beyond a reasonable doubt; therefore, the burden of proving or disproving an element cannot be shifted to defendant. If defendant asserts a defense that negates an element of the offense, the prosecutor must bear the burden of disproving the defense beyond a reasonable doubt, but if the defense is an affirmative defense that does not negate an element, defendant can be required to prove it by a preponderance of the evidence. The court rejected defendant's argument that "federal courts generally require the government to negate non-statutorily created defenses" because there are well-established exceptions to that general requirement based on the offense charged and the type of affirmative defense. In addition, the court recognized a practical consideration in favor of placing the burden on defendant: defendant is in the best position to get the evidence of justification.  

While under Supreme Court precedent it is permissible to place the burden of proof on a defendant for certain defenses, for most nonlawyers, and even some lawyers, it is suprising that any burden be placed on a defendant. But the practice is now well entrenched and countenanced by the Supreme Court's due process jurisprudence.  

5. Apprendi Cases. In June 2000, the United States Supreme Court issued an opinion in Apprendi v. New Jersey in which it held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The issue left open by Apprendi, and the subject of much litigation, is whether Apprendi should be read narrowly as only applying to the
setting of maximum penalties or whether it should be read broadly and taken to its logical conclusion that all facts that increase a sentence must be proved to a jury. As a result the Eleventh Circuit Court of Appeals heard several cases dealing with sentencing and what facts should be submitted to the jury.

In *United States v. Rogers*, defendant was convicted under 21 U.S.C. § 841(a)(1) for possession of cocaine base with the intent to distribute. The Pre-Sentence Investigation Report ("PSI") attributed forty-one grams of cocaine base to defendant. Defendant objected to the PSI because it attributed an amount of cocaine to him that was not in the indictment or decided by the jury. The district court, at the sentencing hearing, found that defendant possessed forty-one grams of cocaine base and sentenced him accordingly. At the hearing, defendant argued that he should be sentenced under 21 U.S.C. § 841(b)(1)(B), not 21 U.S.C. § 841(b)(1)(A), but the trial court rejected that argument.

The court of appeals began by recognizing that defendant should have been sentenced under Section 841(b)(1)(B), but that the inquiry did not end there because defendant's conviction had to be examined in light of *Apprendi*. The court proceeded to examine the Supreme Court cases leading up to *Apprendi*. The court concluded that the rule in *Apprendi* must be used when determining what the sentencing judge may decide by a preponderance of the evidence, what must be included in the indictment, and what the jury must decided beyond a reasonable doubt. The court concluded that a defendant cannot be "sentenced to a greater sentence than the statutory maximum based upon the quantity of drugs, if such quantity is determined by the sentencing judge...

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421. 228 F.3d 1318 (11th Cir. 2000).
423. 228 F.3d at 1319-21.
424. 21 U.S.C. § 841(b)(1)(B) (1994 & Supp. IV 1998). "[S]ection 841(b)(1)(B)(iii) governs quantities of cocaine base containing '5 grams or more.' The term of imprisonment dictated by section 841(b)(1)(B) is five years to forty years. If there is a prior felony drug conviction, however, the sentence increases to ten years to life." 228 F.3d at 1321 n.7 (quoting 21 U.S.C. § 841(b)(1)(B)(iii)).
425. 21 U.S.C. § 841(b)(1)(A) (1994 & Supp. IV 1998). "Section 841(b)(1)(A)(iii) covers quantities of cocaine base containing '50 grams or more.' Section 841(b)(1)(A) sets the term of imprisonment at ten years to life, but if there is a prior felony drug conviction, the sentence is twenty years to life." 228 F.3d at 1321 n.7 (quoting 21 U.S.C. § 841(b)(1)(A) (iii)).
426. 228 F.3d at 1321.
427. Id. at 1321-22.
428. Id. at 1322-26.
429. Id. at 1326.
rather than the trial jury,” and that the statutory maximum is determined without reference to the quantity. In short, the “drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt” in order for the sentence to comport with Apprendi. Because defendant was convicted without reference to the quantity of drugs, he can “only be sentenced under section 841(b)(1)(C), which provides punishment for conviction of an undetermined amount of crack cocaine.” In this case, the Eleventh Circuit applied the basic holding of Apprendi: If a finding of fact results in the increase in the maximum penalty, then those facts must found by a jury beyond a reasonable doubt. Because the federal drug statute hinges the maximum penalty on the amount of drugs possessed, Apprendi requires that the amount of drugs be found by the factfinder like an element of the offense.

Having applied Apprendi to the federal drug statute, the Eleventh Circuit addressed several other issues raised in post-Apprendi litigation. In these decisions, the claims based on Apprendi met with limited success. In United States v. Nealy, defendant challenged his sentence for possession of cocaine base with the intent to distribute based on the fact that the quantity of drugs was not submitted to the jury. At his trial, Nealy requested that the jury be instructed regarding drug quantity. The court of appeals reviewed defendant's Apprendi claim de novo. The court concluded that under 21 U.S.C. § 841(b)(1)(C), which provides the terms of imprisonment for undermined quantities of drugs, the maximum sentence available for defendant was thirty years because he had a prior drug felony conviction. Defendant was sentenced to thirty-two years; therefore, the district court erred. However, the court of appeals held that Apprendi did not create a structural error so that the error did not require per se reversal. Instead, the court of appeals applied the harmless error standard, which is that “a constitutional error is harmless if [it is] clear beyond a

430. Id. at 1327.
431. Id.
432. Id. at 1328.
433. Id.
434. Id.
435. 232 F.3d 825 (11th Cir. 2000).
436. See id. at 828.
437. Id. at 829.
438. Id.
439. Id.
440. Id.
reasonable doubt that a rational jury would have found the defendant guilty absent the error.\footnote{Id. (quoting Neder v. United States, 527 U.S. 1, 18 (1999)).} Therefore, the court would only reverse if it found evidence in the record "that could rationally lead to a contrary finding with respect to drug quantity."\footnote{Id. at 830.} Defendant was convicted for drugs he possessed when the police searched his home and found 14.8 grams of cocaine base. At trial and sentencing, the amount was uncontested; therefore, the court concluded that a rational jury could not have convicted defendant of possession and found that he possessed less than five grams, which is the amount necessary for the increased statutory maximum of life.\footnote{Id.}

In United States v. Gerrow,\footnote{232 F.3d 831 (11th Cir. 2000).} defendants failed to raise at the trial level the issues of not including the drug quantity in the indictment and not submitting the drug quantity to the jury.\footnote{Id. at 833.} Therefore, the court of appeals applied the plain error standard and held that "there is no error, plain or otherwise, under Apprendi where the term of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity."\footnote{Id. at 834.} And, in United States v. Shepard,\footnote{235 F.3d 1295 (11th Cir. 2000).} the court of appeals refused to reverse a sentence that fell within the statutory maximum authorized by section 841(b)(1)-(C) even though the district court applied section 841(b)(1)(B) in violation of Apprendi.\footnote{Id. at 1297.}

In United States v. Swatzie,\footnote{228 F.3d 1278 (11th Cir. 2000).} the court faced a situation similar to Rogers. Defendant challenged his life sentence on the ground that the jury did not determine the amount or the kind of drugs he possessed, he was sentenced for possessing both cocaine base and powder, and the amount and kind of drugs were elements of the crime and should have been in the indictment.\footnote{Id. at 1281.} Because defendant did not object to the indictment or to the jury instructions in a timely manner, the court reviewed his case for plain error.\footnote{Id.} In order for the court to reverse based on a error not raised at trial, "there must be (1) error, (2) that is
plain, and (3) that affect[s] substantial rights.” Even if those three requirements are met, the court need not notice the error if it does not “seriously affect[] the fairness, integrity, or public reputation of judicial proceedings.” Even though defendant was sentenced prior to Apprendi and the issue of the sufficiency of the indictment was not addressed in Apprendi, the court assumed that failing to include the quantity and kind of drugs in the indictment and failing to submit it to the jury was error and it was plain. However, the court proceeded to find that the error did not affect defendant’s substantial rights because there was no serious dispute that defendant possessed at least five grams of cocaine base, which was enough for the increased statutory maximum, and no reasonable jury would have found him guilty and not found that he possessed both cocaine powder and base. With regard to the sufficiency of the indictment, defendant was provided with notice before the trial, and defendant did not argue that he did not know that the quantity and type of drugs would affect his sentence. Finally, the court concluded that because the evidence against defendant was overwhelming, the error did not “seriously affect the fairness, integrity or public reputation of judicial proceedings.”

The court of appeals established an important principle in In re Joshua. Defendant sought an order that would authorize the district court to consider his second habeas corpus petition. Defendant could only get such an order if his second motion relied “on a new rule of constitutional law made retroactive to cases on collateral review.” Defendant claimed that Apprendi was such a rule. The court of appeals held that Apprendi did not apply retroactively to a case on collateral review because the Supreme Court did not declare that it so applied. “For a new rule to be retroactive, the Supreme Court must make it retroactive to cases on collateral review.” Moreover, even if it was enough that the Court established the new rule on a

452. Id. (quoting Johnson v. United States, 520 U.S. 461, 466-67 (1997)) (alteration in original).
453. Id. (quoting Johnson, 520 U.S. at 467) (internal quotation marks omitted).
454. Id. at 1281-82.
455. Id. at 1282-83.
456. Id. at 1283.
457. Id. at 1284 (internal quotation marks omitted).
458. 224 F.3d 1281 (11th Cir. 2000).
459. Id. at 1281.
460. Id.
461. Id. at 1282.
462. Id. at 1283.
463. Id.
collateral appeal for the rule to apply retroactively to collateral review, the Court heard *Apprendi* on direct appeal, not collateral appeal.\(^{464}\) Therefore, *Apprendi* does not apply retroactively to cases on collateral review.\(^{465}\)

Finally, in *United States v. Pounds*\(^ {466}\) the court of appeals addressed whether *Apprendi* applied to 18 U.S.C. § 924(c)(1)(A)(iii).\(^ {467}\) Defendant and another individual robbed a Checkers in Atlanta, Georgia. During the robbery, defendant's accomplice fired several shots. Defendant pleaded guilty to robbery and use of a firearm in the commission of a violent crime. The district court sentenced defendant under section 924(c)(1)(A)(iii) because the firearm was discharged during the crime, concluding that discharging the firearm was a sentencing factor, not an element of the offense. The discharge of the firearm was not in the indictment, nor was it submitted to the jury, and defendant contended that this violated *Apprendi*.\(^ {468}\) Section 924(c)(1)(A) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . .
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.\(^ {469}\)

The court concluded that *Apprendi* was inapplicable because Section 924(c)(1)(A) has a statutory maximum sentence of life regardless of which subsection a defendant is sentenced under.\(^ {470}\) "The discharge of a firearm does not increase the maximum possible penalty of life under [Section] 924(c)(1)(A); rather, it increases only the mandatory minimum penalty."\(^ {471}\)

The theme of the preceding cases is that the Eleventh Circuit will construe *Apprendi* narrowly, using the plain and harmless error standards as well as denying retroactive application of *Apprendi* to

\(^{464}\) *Id.*  
\(^{465}\) *Id.*  
\(^{466}\) 230 F.3d 1317 (11th Cir. 2000).  
\(^{468}\) 230 F.3d at 1318-19.  
\(^{470}\) 230 F.3d at 1319.  
\(^{471}\) *Id.*
collateral appeals to uphold sentences imposed in violation of Apprendi. Most critically, as the comparison of Rogers and Pound suggest, the Eleventh Circuit is narrowly construing the holding in Apprendi: Apprendi addresses the situation in which the statutory scheme increases the maximum penalty when certain facts are found. If a factual finding merely affects the setting of the sentence within the statutory maximum, Apprendi allows the facts to be found by a sentencing judge on a preponderance of the evidence standard. This narrow reading of Apprendi is subject to the criticism that the right to a jury determination of critical facts will depend on the whim of the statute's draftsmen. For example, the federal drug statute could be rewritten to allow for a maximum sentence of life, and the judge would then be allowed to set the sentence at the various levels based on the judge's factual findings as to drug amount. One answer to this criticism is that a broader reading of Apprendi, requiring facts that affect the length of defendant's sentence to be found by the trier of fact using a preponderance standard and without being limited by the rules of evidence, would signal an end to the Supreme Court's longstanding tradition of holding that judges are free to consider all probative evidence in determining sentence. The broad reading of Apprendi would bring a revolution in sentencing, including the demise of guideline sentencing systems. The Eleventh Circuit has taken the narrower view, under which Apprendi will not mean fundamental change. What is more, the Eleventh Circuit is construing the harmless error and plain error doctrines to limit the viability of Apprendi claims, thus quelling any hope held by prisoners that Apprendi will give them a chance for new, shorter sentences.

IV. THE SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.472

472. U.S. CONST. amend. VI.
A. The Right to Counsel

In *Jones v. United States*, the Eleventh Circuit held that failing to argue for a suppression of wiretap evidence when the evidence was not immediately sealed under 18 U.S.C. § 2518(8)(a) fell below an "objective standard of reasonableness." Defendant was under investigation by the government, which obtained a valid wiretap in July 1988. Defendant later was arrested on drug charges. The tapes of the recorded conversations were not sealed for at least thirty-one days. Under the law at the time defendant was arrested and went to trial, challenging the introduction of evidence at trial based on improper sealing under 18 U.S.C. § 2518(8)(a) required the defendant to prove he was prejudiced or "the integrity of the recordings was disturbed." Defendant's counsel elected not to argue for the suppression of the evidence at trial. However, the Eleventh Circuit noted that prior to defendant's trial, the Supreme Court granted certiorari to determine whether it is necessary to show prejudice to the defendant when there has been improper sealing under 18 U.S.C. § 2518(8)(a). Defendant's counsel moved to suppress evidence a month after the Supreme Court granted certiorari but did not mention improper sealing as a ground. The motion was denied and the tapes were admitted at defendant's trial. Defendant was convicted and counsel filed a notice of appeal. The same day the notice of appeal was filed, the Supreme Court decided *United States v. Ojeda-Rios*. In *Rios* the Supreme Court held that defendant did not have to show prejudice under 18 U.S.C. § 2518(8)(a) to succeed on a motion to suppress based upon delayed sealing. Applying the Supreme Court's holding to *Jones*, the government would be required to show either "prompt sealing of tapes or a reasonable excuse for not doing so" in order to use the tapes at trial. Defendant's attorney never mentioned this issue on the appeal.

473. 224 F.3d 1251 (11th Cir. 2000).
474. Id. at 1257.
475. Id. at 1253.
476. Id. at 1253 n.4 (citing United States v. Diadone, 558 F.2d 775, 780 (5th Cir. 1977)).
477. Id. at 1254.
478. Id. at 1253-54.
479. Id. at 1254.
481. Id. at 264-65.
482. 224 F.3d at 1254 n.7.
483. Id. at 1254.
Defendant then filed under 28 U.S.C. § 2255 alleging ineffective assistance of counsel. The Eleventh Circuit expanded defendant’s certificate of appealability in order to hear this issue on appeal. The court articulated the now familiar standard from Strickland v. Washington that must be met before a defendant can succeed on a claim of ineffective assistance of counsel. Defendant must “show that his counsel was deficient” in that “[the] representation fell below an objective standard of reasonableness,” and prejudice as a result of this deficiency. However, the court emphasized that circumstances changed drastically. The Supreme Court’s decision made the law clear and applicable retroactively to those cases still pending on direct appeal. The court reasoned that defendant’s attorney had not even written the brief for the appeal when the decision was announced; further, there was no mention of it to the court on appeal. Because of this, the court concluded that defendant’s attorney’s failure to argue for suppression fell below an “objective standard of reasonableness.” The court remanded the case so the district court could determine whether the error prejudiced defendant’s trial. The court noted that “[i]f the wiretap evidence was crucial to [defendant’s] conviction, the district court must then determine whether the government had a ‘satisfactory explanation’ for the thirty-one day delay.”

484. Id.
485. Id. Ordinarily, under the Antiterrorism and Effective Death Penalty Act of 1996, the appellate court is limited in its review to the issues “specified in the [Certificate of Appealability].” Id. The court permitted defendant to expand his Certificate of Appealability because he properly requested expansion by express motion and further because “he ... made a substantial showing that he was denied his constitutional right to effective assistance of counsel.” Id. at 1256.
487. 224 F.3d at 1257.
488. Id. (quoting Williams v. Taylor, 529 U.S. 362, 363 (2000) (internal quotation marks omitted)).
489. Id. at 1258.
490. Id.
491. Id.
492. Id. The court also noted parenthetically that “when [the] Supreme Court applies [a] rule of federal law, that rule ‘must be given full retroactive effect in all cases still open on direct review’” Id. (quoting Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 97 (1993)).
493. Id.
494. Id. at 1258-59.
495. Id. at 1259 (citing Ojeda-Rios, 495 U.S. at 265).
government cannot show such an explanation, the court explained, defendant is entitled to relief.\textsuperscript{496}

The Eleventh Circuit examined another case involving the issue of ineffective assistance of counsel. In \textit{Helton v. Secretary for the Department of Corrections},\textsuperscript{497} the court held that defendant received ineffective assistance of counsel and affirmed the grant of writ of habeas corpus.\textsuperscript{498} Defendant was convicted of second degree murder in the death of a child. The case was based solely on circumstantial evidence. The twenty-two month old child was found lying outside the home at the bottom of the steps. The case originally had been overturned only to be reinstated on rehearing by a Florida appellate court. Defendant then filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in federal district court. The district court, after an evidentiary hearing, granted defendant's motion in spite of defendant's failure to satisfy the statute of limitations for the writ.\textsuperscript{499} The Eleventh Circuit then affirmed.\textsuperscript{500}

The Eleventh Circuit began by examining the tolling of the statute of limitations.\textsuperscript{501} The court examined precedent and held that "[t]he period of limitations . . . may be equitably tolled 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.'\textsuperscript{502} In this case, defendant argued that his attorney was to blame for missing the deadline to file the petition.\textsuperscript{503} While the court noted that ordinarily this would not be sufficient to equitably toll the statute of limitations, this case was different and several other facts were involved which warranted the tolling.\textsuperscript{504} One of these additional facts consisted of the inadequacy of the prison library to enable defendant to discover the

\textsuperscript{496} Id.
\textsuperscript{497} 233 F.3d 1322 (11th Cir. 2000).
\textsuperscript{498} Id. at 1327.
\textsuperscript{499} Id. at 1324. The district court granted the writ finding specifically that trial counsel was ineffective for failing to challenge the time of death and present the gastric evidence. As to the issue of timeliness, the district court found that equitable tolling was warranted in this case based on: 1) the petitioner's diligent pursuit of his legal rights on appeal; 2) the misinformation by Helton's counsel as to the expiration of the statute of limitations; 3) the inadequacy of the prison library; and 4) the "strange history of this case."

\textsuperscript{500} Id.
\textsuperscript{501} Id.
\textsuperscript{502} Id. (quoting Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000)).
\textsuperscript{503} Id.
\textsuperscript{504} Id. at 1325.
information concerning the statute of limitations himself.\textsuperscript{506} Further, the court noted that under Supreme Court precedent, whether or not defendant has "actively pursued his legal remedies" is an appropriate consideration.\textsuperscript{506} Finally, the court considered as an additional factor in determining whether to equitably toll the statute of limitations the history of the case in the lower courts.\textsuperscript{507} A Florida appellate court originally reversed defendant's sentence but then vacated that opinion.\textsuperscript{508} Even after the opinion was vacated, one judge dissented and felt that evidence not presented at trial would have resulted in a different verdict.\textsuperscript{509}

The Eleventh Circuit then turned to the analysis necessary when federal law has been applied at the state level.\textsuperscript{510} The court began by articulating the familiar standard from \textit{Strickland} for claims of ineffective assistance of counsel: "petitioner must . . . demonstrate that counsel's performance was deficient, falling below a constitutional minimum standard . . . . [and] a reasonable probability that, but for counsel's errors, the result of the trial would have been different."\textsuperscript{511} The court then examined the standard from \textit{Neely v. Nagle}\textsuperscript{512} requiring deference to state court decisions on the merits later adjudicated on a petition for writ of habeas corpus.\textsuperscript{513} The court noted that the standard is explicit in the statute as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.\textsuperscript{514}

\textsuperscript{506} Id.
\textsuperscript{507} Id. (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990)).
\textsuperscript{508} Id.
\textsuperscript{509} Id. In the Florida appellate court, the dissenting judge stated "that he would reverse the conviction and award a new trial, based largely on the gastric evidence. That jurist concluded, 'There can be no doubt that this evidence might have affected the verdict rendered.'" Id. at 1324 (quoting Helton v. State of Florida, 641 So. 2d 146, 156 (Fla. Dist. Ct. App. 1994) (Nesbitt, J., dissenting)).
\textsuperscript{510} Id. at 1327.
\textsuperscript{511} Id. at 1326.
\textsuperscript{512} 138 F.3d 917 (11th Cir. 1998).
\textsuperscript{513} 233 F.3d at 1326.
\textsuperscript{514} Id. (quoting 28 U.S.C. § 2254(d)(1) (Supp III 1997)).
The Eleventh Circuit noted that under this standard, there is a three-part inquiry which must be met to grant relief under 28 U.S.C. § 2254.\textsuperscript{515} This inquiry begins by examining "whether the federal law applicable to the petitioner's claim has been clearly established."\textsuperscript{516} The district court must then "determine whether the state court's adjudication of the claim was contrary to the established federal law."\textsuperscript{517} Finally, the district court must examine "the objective . . . reasonableness of the state court's decision."\textsuperscript{518} The court found under the first prong that the law applicable to cases of ineffective assistance of counsel has been clearly established for some time; therefore, this prong was certainly met.\textsuperscript{519} As to the second prong, because there were no written opinions at the state level, the Eleventh Circuit found that "it was justified in finding and concluding that federal law was ignored in the state level review."\textsuperscript{520} Beyond this, the Eleventh Circuit found no error by the district court in finding the decision by the state court unreasonable.\textsuperscript{521}

The court then examined the substantive issue presented in the petition—the ineffective assistance of counsel allegation.\textsuperscript{522} Defendant argued that his attorney provided ineffective assistance by failing to present at trial gastric evidence of the child's time of death.\textsuperscript{523} The court noted that the attorney was not an experienced defense attorney and that the evidence "had the potential of being persuasive proof of [defendant's] innocence."\textsuperscript{524} The court emphasized the impact of the evidence in this case was great because the case was circumstantial and this was physical evidence tending to negate defendant's guilt.\textsuperscript{525} The court concluded that defendant received ineffective assistance of counsel and affirmed the grant of writ of habeas corpus.\textsuperscript{526}

\textsuperscript{515} Id.
\textsuperscript{516} Id.
\textsuperscript{517} Id. (quoting Neelley, 138 F.3d at 924).
\textsuperscript{518} Id. (citing Williams v. Taylor, 529 U.S. 362, 373-74 (2000)).
\textsuperscript{519} Id.
\textsuperscript{520} Id. at 1327.
\textsuperscript{521} Id.
\textsuperscript{522} Id.
\textsuperscript{523} Id.
\textsuperscript{524} Id.
\textsuperscript{525} Id.
\textsuperscript{526} Id.
B. Confrontation Clause

In a recent edition of this survey, the Confrontation Clause and the so-called *Bruton* doctrine were explained as follows:

In general, the Supreme Court's modern Confrontation Clause jurisprudence has produced a correspondence between the traditional law of hearsay and the defendant's right to confront the witnesses against him. If an out-of-court statement is offered for a nonhearsay purpose, that is, not to prove the truth of the matter asserted in the statement, or if the out-of-court statement fits a "firmly rooted" hearsay exception, the Supreme Court has found the statements reliable enough to pass muster under the Confrontation Clause. Despite the general parallelism of the Confrontation Clause and the law of evidence governing hearsay, lawyers practicing criminal law must pay attention to confrontation issues . . . .

Perhaps the most prominent modern Confrontation Clause doctrine is the so-called "*Bruton* doctrine," which holds that the admission of A's confession to authorities implicating B, at a joint trial of A and B, infringes of B's confrontation rights . . . . A's voluntary confession is admissible against A as A's direct admission under the hearsay rules; however, A's confession does not fall within a traditional hearsay exception so as to be admissible against B . . . . In *Bruton* the Supreme Court held that the jury could not be trusted to follow a jury instruction limiting consideration of such a confession to A's guilt and that the decision to offer A's confession would require separate trials or other remedial measures to protect B's rights . . . . It is a bit odd to speak of denying B's right to confront evidence that is not admissible against B, but the modern *Bruton* doctrine is based on the theory that the jury will inevitably use A's statement against B, so admission of A's statement in a joint trial compromises B's right to confrontation.527

In *United States v. Doherty*,528 the Eleventh Circuit addressed one such Confrontation Clause issue. In *Doherty* defendants were convicted of charges ranging from conspiracy to defraud the IRS and making false statements to the IRS to making false statements to a grand jury. At trial, an agent testified to a statement made by defendant Gaudet that inculpated defendant Doherty.529 The district

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528. 233 F.3d 1275 (11th Cir. 2000).
529. Id. at 1277-79. The statement as read from the agent's notes consisted of the following:

Gaudet stated that he would get his instructions on where to deliver the fuel from Ray Young or Doherty; all paperwork would go to John Doherty; that Gaudet
court ruled that the statement was not a *Bruton* statement because it did not "directly inculpate the other co-defendants."\(^{530}\) The court refused to redact the statement and allowed the testimony. However, the entire testimony was later stricken from the record because of alleged threats made by the agent against another witness at the trial. While the court struck the agent’s testimony during closing arguments, it did not address this in the jury instructions.\(^{531}\)

The Eleventh Circuit began the analysis of the *Bruton* issue by stating the now familiar holding by the Supreme Court that the "admission of a confession or statement by a non-testifying defendant which inculpates a co-defendant violates the co-defendant’s Sixth Amendment right to confront a witness."\(^{532}\) The court held the statement in this case was inculpatory against defendant Doherty and prejudicial.\(^{533}\) Specifically, the court noted that in the statement, Doherty’s co-defendant expressly admitted that he knew his activities were illegal and that he was following Doherty’s instructions in these matters.\(^{534}\) The court further held that the judge’s instruction to consider the statement only against the defendant to which it is attributed was not sufficient to alleviate the prejudice in this case.\(^{535}\)

The court then went on to hold that the error was not harmless.\(^{536}\) First the court noted that a *Bruton* error can be considered harmless only "if the properly admitted evidence of guilt is so overwhelming, and

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\(^{530}\) Id. at 1279.

\(^{531}\) Id. at 1280.

\(^{532}\) Id. The actual trial testimony of the agent consisted of the following:

He [Gaudet] stated that he received instructions from—as to what to pull and where to deliver—from Mr. Young and Mr. Doherty. He also stated that all the paperwork from the fuel loads was given to Mr. Doherty and that he very rarely ever saw Mr. Young. He said there came a time when he realized that what he was doing was illegal, and that that occurred prior to the time that the Internal Revenue Service executed a search warrant on Fuel Depot in October 1991. He also advised that around the same time he realized that he was being followed and he had told Mr. Doherty that he was being followed, and Mr. Doherty at the time told him that Dry Tortuga Marina was under investigation by the Internal Revenue Service.

\(^{533}\) Id. at 1281 (alteration in original).

\(^{534}\) Id. at 1281 (citing *Bruton* v. United States, 391 U.S. 123, 125-26 (1968)).

\(^{535}\) Id. at 1282.

\(^{536}\) Id. at 1282.
the prejudicial effect of the co-defendant's statement is so insignificant, that beyond any reasonable doubt the improper use of the statement was harmless. Here, the court noted the circumstantial nature of the case and the lack of any direct evidence other than the statement itself. Because the evidence was so strongly circumstantial, the court concluded that the statement likely had a significant impact on the jury. The court also concluded that the error was not cured by striking the agent's testimony. The court found that the decision to strike was relayed to the jury during closing arguments and could not have removed the taint of the testimony from the minds of the jury in this way. Further, the government was permitted to allude to this testimony in closing although it had been stricken. Finally, defendants were prevented from presenting evidence of the agent's threats and therefore bias, which would have lessened the impact of the agent's testimony on the jury. Therefore, the court concluded that the admission of the testimony was not harmless error. Of course, harmless error standard on direct appeal for constitutional error is that the error be harmless beyond a reasonable doubt, a more rigorous standard than is applied to evidentiary errors. This heightened harmless error standard is a strong reason for counsel to couch hearsay objections in Confrontation Clause terms as well as evidentiary terms if at all possible.

537. Id.
538. Id. at 1283.
539. Id. at 1282-83.
540. Id. at 1283.
541. Id. The court quoted the Supreme Court with regard to evidence of a confession and its impact on the jury, noting that "specific testimony that 'the defendant helped me commit the crime' is . . . difficult to thrust out of mind." Id. (quoting Richardson, 481 U.S. at 208).
542. Id.
543. Id.
544. Id.