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Constitutional Criminal Procedure

by James P. Fleissner
and
Amy C. Reeder

I. INTRODUCTION

The field known as "constitutional criminal procedure" is one of the most dynamic branches of constitutional interpretation. Because most of the guarantees of the Fourth, Fifth, and Sixth Amendments have been incorporated into the Due Process Clause of the Fourteenth Amendment, the decisions of the United States Supreme Court interpreting the Bill of Rights have the effect of creating national minimum standards for both the federal and state criminal justice systems. Because every year there are many significant decisions in the field of constitutional criminal procedure, practitioners need to keep abreast of breaking developments. Of course, the Supreme Court decides only a handful of cases in the field each term. In the federalized world of constitutional criminal procedure, the United States Courts of Appeals are critically important interpreters of the key constitutional provisions. This Article surveys significant constitutional criminal procedure decisions of the United States Court of Appeals for the Eleventh Circuit handed down during 1999. In selecting "significant" decisions, we emphasize questions of first impression and other cases likely to be of interest to criminal practitioners. In keeping with the traditional format of this Article, we summarize the selected decisions and offer commentary that we hope will provide context and highlight the important aspects of the cases.

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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 Supreme Court has held that brief investigatory seizures of persons and their effects are permissible if based upon an officer's reasonable belief that "criminal activity may be afoot."² This standard, commonly referred to as "reasonable suspicion," has been referred to as that "pint-sized version of probable cause required for stop-and-frisk."³ The Supreme Court has stated that reasonable suspicion cannot be precisely defined or reduced to neat legal rules or finely tuned standards designed for legal technicians.⁴ Rather, reasonable suspicion is said to be a commonsense, nontechnical conception meant for reasonable persons dealing with the practical considerations of everyday life.⁵ Thus, the requirement of a particularized and objective basis for a seizure, sometimes termed "reasonable articulable" suspicion, is a fluid concept that takes its substantive content from the particular context in which the standard is being applied.⁶ Once a Terry stop based on reasonable suspicion begins, the duration of the stop should be limited to the time "necessary to effectuate the purpose of the stop."⁷ However, the Supreme Court has eschewed any rigid "least intrusive means" test, observing that a court can almost always conceive of some less intrusive police action and that such a test would involve courts in "unrealistic second-guessing."⁸

The Eleventh Circuit's recent investigatory stop cases illustrate the fact-sensitive nature of constitutional challenges to a Terry stop. As the two cases below demonstrate, careful examination of the nuances surrounding each stop is part and parcel of the legal question of whether

¹ U.S. CONST. amend. IV.
² Terry v. Ohio, 392 U.S. 1, 30 (1968).
⁵ Id.
⁶ Id. at 696.
there existed "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." As such, the constitutional limits to investigatory stops are defined and redefined on a case-by-case basis.

In United States v. Simmons, the Eleventh Circuit held that detaining a defendant for seventeen to twenty-six minutes longer than the time required for a "routine" traffic stop was constitutional when the officers were attempting to ascertain whether defendant was the subject of an outstanding arrest warrant. In Simmons defendant Bobby Gene Simmons was pulled over at 6:14 p.m. for failing to stop at a stop sign. Thus, the initial stop was based on probable cause to believe Simmons had committed a traffic offense. In Whren v. United States, the Supreme Court stated that under the Fourth Amendment, a decision to stop a car is reasonable when the police have probable cause to believe that a traffic violation occurred, regardless of the officer's subjective motivation for making the stop. Accordingly, after Whren it is important for the courts to focus on the duration and scope of stops based on traffic violations when the stop may be a pretext to permit the officers to act on an ulterior motive.

After Simmons refused to consent to a search of the Pontiac station wagon he was driving, Officer Frix radioed for a drug-detecting dog and was told that none were usually available until around 7:00 p.m. While Officer Frix continued to seek a narcotics dog, Officer Rahnings wrote Simmons a traffic citation and ran a routine mobile computer check looking for outstanding arrest warrants.

The computer turned up a worthless-check warrant for a "Bobby Simmons" in Brevard County. The physical description on the warrant

10. 172 F.3d 775 (11th Cir. 1999).
11. Id. at 780.
12. Id. at 776.
14. Id. at 810.
15. 172 F.2d at 776. In a footnote, the court noted that both officers at the scene had received prior information from two sources implicating Simmons as a drug dealer. They also had information that a man driving a station wagon similar to the one Simmons was driving regularly sold drugs in the area. Id. at 777 n.2. The Court refused to reach the Government's contention that the information regarding possible drug violations constituted reasonable suspicion justifying the wait for the drug-detecting dog. Id. at 776 n.1. Of course, the use of a drug-detecting dog during the Terry stop justified by the traffic stop or the attempt to check the "Bobby Simmons" warrant was permissible without any suspicion of drug activity because a dog sniff is not a search. See United States v. Place, 462 U.S. 696, 707 (1983).
16. 172 F.3d at 776-77.
matched that of defendant, but the birth date was different. The arrest warrant listed the subject's birth date as October 10, 1957; however, defendant's date of birth was August 23, 1953, making the subject of the warrant four years younger than defendant. Because of the discrepancy, Officer Rahmings attempted to determine whether the Brevard County warrant was actually for defendant. He radioed in the request and was put on hold; he used his mobile computer to request a teletype be sent to Brevard County; and he tried to contact his supervisor for instructions as to how to proceed. It was not until 7:32 p.m., forty-five minutes after the original stop, that Brevard County responded to the teletype, reporting that it had no further information about the Bobby Simmons listed on the warrant.17

While Officer Rahmings continued trying to determine whether the warrant was actually for defendant, a drug dog was dispatched to the scene. At approximately 7:00 p.m., the drug dog arrived and alerted on Simmons's car. The officers searched the car and found thirty small bags of cocaine under the driver's seat and a loaded handgun beneath a sheet of paper in the center console.18

The district court found that the police officers acted diligently in verifying whether Simmons was the subject of the warrant, and that there was no undue delay in that endeavor. Further, the district court found that the police acted diligently in securing the drug dog and that there was no unreasonable delay in getting the dog to the scene. However, the district court held that the officers lacked reasonable suspicion to believe that Simmons was the actual subject of the warrant and, accordingly, that the stop was an unconstitutional detention. It reasoned that the distances between where the warrant was issued and where Simmons was stopped, the differing birth dates, and the fact that the officers could have arrested Simmons later if the warrant turned out to be correct, gave rise to insufficient grounds for reasonable suspicion.19

The Eleventh Circuit reversed, holding that there was reasonable suspicion for the continued detention.20 Although the court of appeals accepted the lower court's factual findings, it concluded that the totality of the circumstances weighed in favor of reasonable suspicion justifying the detention.21 The court refrained from second guessing officers

17. Id. at 777.
18. Id.
19. Id. at 777-78.
20. Id. at 778.
21. Id. at 779.
22. Id. at 780.
at the scene, noting that "reasonable suspicion 'does not deal with hard
certainties, but with probabilities.'"\(^2\) The court held that it was legal
for the officers to run the routine computer check for warrants and that
even with the indicia that defendant may not have been the same Bobby
Simmons as the subject of the warrant, it was not unreasonable for the
officers to hold defendant for seventeen to twenty-six minutes to
investigate.\(^3\) The argument that the police officers could have arrested
Simmons later if the warrant was determined to be for him was quite
rightly dismissed by the court as having no basis in law.\(^4\)

The court of appeals concluded that "the length of the delay consumed
in the conduct of the investigative detention must have been 'sufficiently
limited in scope and duration to remain within the bounds' permitted by
Terry."\(^5\) The court held that the law enforcement purpose of determin-
ing whether Simmons was the subject of the warrant was done in a way
"that was likely to confirm or dispel their suspicions quickly, and with
a minimum of interference."\(^6\) Also, it held that the scope and
intrusiveness of the detention was relatively minor because Simmons sat
in his own car during the stop.\(^7\) Lastly, the court looked to its own
precedent in *United States v. Hardy*,\(^8\) which held that a fifty-minute
investigative stop was not excessive under the circumstances, and held
the seventeen to twenty-six minutes that it took the officers to check on
the warrant was not an excessively long detention.\(^9\) *Simmons* clearly
demonstrates the potent combination punch provided to law enforcement
by Supreme Court decisions in the areas of pretextual stops based on
traffic violations, the permissible temporal scope of such stops, and the
use of drug-detecting dogs.

In *United States v. Pruitt*,\(^10\) the court confronted another traffic-stop
scenario, but this one was complicated by concerns that the police had
engaged in a form of "racial profiling."\(^11\) In *Pruitt* the Eleventh Circuit
reversed the convictions of two defendants to the extent that the
convictions turned on an unconstitutional detention and search.\(^12\) The

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23. Id. (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).
24. Id. at 779.
25. Id. (stating, "we can discern no valid legal principle or compelling fact requiring" that the police let Simmons go and arrest him later).
26. Id. at 780 (quoting United States v. Hardy, 855 F.2d 753, 758 (11th Cir. 1988)).
27. Id. (quoting *Hardy*, 855 U.S. at 758).
28. Id.
29. 855 F.2d 753 (11th Cir. 1988).
30. 172 F.3d at 780.
31. 174 F.3d 1215 (11th Cir. 1999).
32. Id. at 1221.
33. Id.
court held the police officer's continuing detention of the two Hispanic defendants was an unconstitutional "fishing expedition," citing concerns that this case was another in which "a driver, once stopped, is unreasonably detained because of his/her race or national origin."34

The stop and search occurred around midnight when Officer Moore pulled over defendants Pena and Garrido for speeding. The video of the stop, which was automatically recorded on the officer's videocamera, was admitted into evidence at trial. It showed the following sequence of events: Moore asked Pena to get out of the van and told him that he was speeding. He told Pena to accompany him to the police car so he could check Pena's driver's license and issue him a speeding ticket. Once in the car, Moore asked Pena several questions unrelated to the stop—for example, where Pena's family lives in Memphis. Then the officer exited the car and went to the van to ask Garrido, who was sitting in the front passenger seat, for the registration and insurance papers from the van. While there, he also asked two other passengers whom they were visiting in Memphis and that street address. Moore returned to the police car where, instead of completing Pena's ticket, he asked Pena: who were the three other van passengers; how much he paid for the van; what kind of work he did; whether Garrido was his brother; and why they had different last names. Again, failing to write the ticket, Moore asked Pena if he had anything illegal in the van. When Pena said "no," Moore asked if he had any weapons, and, again, Pena denied having any. Finally, Moore asked a third time if there were any drugs in the van, and Pena again said "no."35

Next, Moore asked to search Pena's van, and Pena refused to consent. Moore then told Pena he needed even more time to write the ticket. Instead of writing the ticket, however, he called in on the radio, "I have a refusal"—a code phrase indicating the need for a drug dog. While waiting for the dog to arrive, Moore detained Pena, Garrido, and the other passengers for more than fifteen minutes while issuing them a courtesy warning. Nearly thirty minutes after the initial stop, the drug dog arrived and alerted positively for drugs outside the van. Subsequently, the van was searched, revealing approximately eighty-one pounds of marijuana.36

The court of appeals first dealt with its own precedent, United States v. Tapia,37 and consistent Tenth Circuit authority in United States v.
indicating that under the totality of the circumstances Officer Moore did not have more than an "inchoate 'hunch'" that criminal activity was afoot. The court recited the familiar standard that a detention is only permissible if the officer's reasonable-suspicion determination is objectively reasonable or if the initial detention has become a consensual encounter. The court of appeals did not, however, mention its unwillingness to second guess police determinations made at the scene—a standard relied heavily upon in the Simmons opinion.

The Eleventh Circuit further relied on the Supreme Court decision in Knowles v. Iowa. In Knowles the Supreme Court invalidated a car search under the Fourth Amendment and reversed the driver's drug conviction "because '[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.'" Noting that the situation in Pruitt was analogous to Knowles, the court of appeals held that at the time Pena and Garrido were stopped, all the officer had before him was evidence of speeding. His questions should have been limited to those necessary to effectuate the traffic citation. The court stated, "In such circumstances, additional 'fishing expedition' questions such as 'What do you do for a living?' and 'How much money did your van cost?' are simply irrelevant, and constitute a violation of Terry."

The court of appeals held that Moore was acting on "an unsupported hunch instead of a reasonable suspicion." It further stated that "[a]lthough [it] resist[ed] the temptation to read an improper motive into Moore's conduct," it was concerned that this was another case of racial or national origin discrimination. Accordingly, the court reversed the convictions to the extent that they turned on Moore's unconstitutional detention and search.

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38. 135 F.3d 1345 (10th Cir. 1998).
39. 174 F.3d at 1219.
40. Id. at 1220.
42. 174 F.3d at 1220 (quoting Knowles, 525 U.S. at 118).
43. Id. at 1221.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
Taking both Simmons and Pruitt together, it appears that the Eleventh Circuit is willing to defer to officers' suspicions formulated at the scene as long as some objective basis exists for them—for example, the outstanding warrant. However, when the police extend a traffic stop based on an unparticularized hunch, the court will declare limits on the scope of the stop, especially when the hunch may be tainted by racial stereotypes. Outcomes like that in Pruitt are necessary if the Supreme Court's traffic-stop jurisprudence is to be kept from evolving into an unlimited license for law enforcement.

B. Reasonable Expectations of Privacy and Standing

United States v. Chaves\(^49\) presented the Eleventh Circuit with several issues surrounding codefendants' reasonable expectations of privacy and the issuance of warrants based in part on unconstitutionally gathered information. In Chaves Drug Enforcement Administration ("DEA") agents, relying on information from a confidential informant, followed defendant Chaves as he drove a van provided for him by a DEA informant and designated for use in picking up and delivering drugs. Chaves went first to a warehouse and then to a restaurant. While at the restaurant, DEA agents looked in the van and saw several boxes that were not in the van prior to the pick up. The agents arrested Chaves and searched the van. They seized ten boxes of cocaine, money, and keys belonging to Chaves.\(^50\)

Shortly after Chaves was taken into custody, defendant Garcia and another man were arrested at the warehouse. Both men were armed at the time of their arrest. The door of the warehouse was locked, and the agents waited outside for about forty-five minutes before conducting a warrantless sweep of the warehouse lasting approximately five to ten minutes. While inside the building, agents saw boxes similar to the ones found in the van. Following the sweep an affidavit was drafted on information gathered both before and as a result of the warrantless entry. The agents obtained and executed a search warrant for the warehouse. They found four hundred kilograms of cocaine, packaging material, boxes, gloves, and items belonging to Chaves. Chaves and Garcia were tried and convicted on drug and firearm charges.\(^51\)

The court of appeals was presented with two issues regarding defendants' reasonable expectations of privacy. First, the court examined whether Garcia had a reasonable expectation of privacy in the

\(^{49}\) 169 F.3d 687 (11th Cir. 1999).
\(^{50}\) Id. at 689.
\(^{51}\) Id. at 688-89.
van Chaves drove. The court found that Garcia advanced no facts to support an expectation of privacy other than a claim that the contraband in the van belonged to him. It held that simply being aggrieved by an illegal search of a third-person’s property does not give rise to an infringement of Fourth Amendment rights absent a reasonable expectation of privacy in the thing searched. The district court had considered Garcia’s claim under the rubric of standing, but the court of appeals properly analyzed the issue according to the Supreme Court’s modern approach, which merges the concept of standing into the inquiry about whether a defendant has a reasonable expectation of privacy in the place or vehicle searched.

The Eleventh Circuit also applied the modern approach to the district court’s finding that Chaves lacked standing, holding that Chaves, because of his “connection” to the warehouse, did have a reasonable expectation of privacy there even though he did not own it. It noted that a defendant could demonstrate a legitimate expectation of privacy by demonstrating “an unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee.” The circumstances led the court to conclude that Chaves was more than an invitee and was closer to one who maintained both custody and control of the warehouse. He had the only key, giving him the control to exclude others, and he kept his personal and business papers in the warehouse. The court found these facts sufficient to provide a reasonable expectation of privacy.

The court of appeals was unpersuaded by the Government’s argument that Chaves lacked a reasonable expectation of privacy because the warehouse was not his principal place of business. The court noted that the Fourth Amendment does not limit an individual to a reasonable expectation of privacy in a single place of business. Rather, it extends
the expectation to multiple locations.\textsuperscript{63} Furthermore, acknowledging that there is a lowered expectation of privacy in a business, the court held that Chaves still maintained an expectation of privacy, thus implicating the Fourth Amendment.\textsuperscript{64}

The court of appeals then examined whether Chaves's Fourth Amendment rights were violated by the warrantless entry of the warehouse during the so-called "protective sweep."\textsuperscript{65} Under \textit{Maryland v. Buie},\textsuperscript{66} a protective sweep is permissible "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."\textsuperscript{67} This sweep is to protect the safety of the officer against ambush by persons hiding in a place where a suspect is arrested.\textsuperscript{68} The Eleventh Circuit held that, here, the Government's own actions undermined the claim that the agents had a protective purpose.\textsuperscript{69} The officers sat in their cars for forty-five minutes without fear of ambush.\textsuperscript{70} Further, the court found no "'specific articulable' facts that would lead a reasonably prudent officer to believe that . . . a sweep was necessary for protective purposes."\textsuperscript{71} The officers had no information about the inside of the warehouse at all.\textsuperscript{72} The fact that Garcia and the other man were armed did not affect the court's analysis because the touchstone of the protective-sweep analysis is whether there are sufficient facts giving rise to suspicion of danger from attack by a third party, not defendant.\textsuperscript{73} Thus, the court held the sweep violated Chaves's Fourth Amendment rights.\textsuperscript{74}

Chaves won the first two legal battles, but lost the war. Like Garcia's conviction, Chaves's conviction was upheld because the court of appeals held the search warrant was valid under the independent source doctrine.\textsuperscript{75} Under Eleventh Circuit precedent in \textit{United States v. Glinton},\textsuperscript{76} a search warrant based partly on information acquired as a

\begin{itemize}
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} \textit{Id.}
  \item \textsuperscript{65} \textit{Id.} at 691-92.
  \item \textsuperscript{66} \textit{494 U.S.} 325 (1990).
  \item \textsuperscript{67} \textit{Id.} at 337.
  \item \textsuperscript{68} \textit{169 F.3d} at 691-92.
  \item \textsuperscript{69} \textit{Id.} at 692.
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} \textit{Id.}
  \item \textsuperscript{72} \textit{Id.}
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} \textit{Id.}
  \item \textsuperscript{75} \textit{Id.} at 692-93.
  \item \textsuperscript{76} \textit{154 F.3d} 1245 (11th Cir. 1998).
\end{itemize}
result of an illegal entry must be supported by other information sufficient to support a probable cause finding.\textsuperscript{77} The court held that discounting the portion of the affidavit describing information obtained from the warrantless search, the balance of the affidavit supported a finding of probable cause.\textsuperscript{78} The combination of the information provided by the informant, the cocaine found in the previously empty van, and the seizure of Garcia supported the search warrant.\textsuperscript{79} Furthermore, the court held the officers were not prompted to seek the warrant based on what they had seen during the entry.\textsuperscript{80} Of course, the test for probable cause, like its cousin reasonable suspicion, is a fluid test that gauges whether, under the totality of the circumstances, the facts are sufficient to warrant a person of reasonable caution to believe that contraband will be found.\textsuperscript{81} The court's analysis of the information in the warrant application not derived from the illegal sweep seems a straightforward, reasonable application of the test. However, as for the issue of whether the officers would have obtained the warrant in any event, the court simply said it could not say otherwise.\textsuperscript{82} The court based its conclusion on the availability of other probable cause, but it did not have district court findings or specific facts in the record concerning whether the agents were prompted to seek the warrant by what they had seen in the warehouse. The court seems to have finessed this finding without solid support in the record. A remand for factfinding on that issue may well have been appropriate.\textsuperscript{83}

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 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

\textsuperscript{77} Id. at 1254-55.
\textsuperscript{78} 169 F.3d at 693.
\textsuperscript{79} Id.
\textsuperscript{80} Id. This finding is critical because if the decision to seek the warrant is caused by the observations made during the illegal entry, the fruit from the warrant would not be "genuinely independent" of the illegal entry. See Murray v. United States, 487 U.S. 533, 542 (1988).
\textsuperscript{81} See Ornelas, 517 U.S. at 695-96.
\textsuperscript{82} 169 F.3d at 693.
\textsuperscript{83} That action was taken by the Supreme Court in Murray. See 487 U.S. at 543-44.
property, without due process of law; nor shall private property be taken for public use, without just compensation.84

A. The Right Against Self-Incrimination

The Eleventh Circuit decided two notable cases involving the right against self-incrimination. In the first of these, United States v. Burgess,85 the court reversed a conviction on the ground that the judge failed to give a requested “no-adverse-inference” instruction to the jury.86 This sort of instruction seeks to reinforce the defendant’s right to remain silent by instructing the jury that it may not draw any adverse inference from the defendant’s exercise of the right to remain silent. In Burgess the trial court judge omitted a requested no-adverse-inference jury instruction, and defense counsel timely objected to its omission.87 The judge stated he believed he had given the instruction, and defense counsel did not press the point any further.88

On appeal the court held the objection was sufficient to preserve the issue for appeal without further action by the defense attorney, that the omission was a classic trial error subject to the harmless error standard, and that the evidence, absent the unconstitutional omission, was insufficient to establish the guilt of the accused beyond a reasonable doubt.89

The court of appeals held first that defense counsel’s objection to the omission was sufficient.90 In Carter v. Kentucky,91 the Supreme Court held that the Fifth Amendment requires judges to give a no-adverse-inference instruction when requested by defense counsel.92 Further, 18 U.S.C. § 3481 gives defendants the right to receive an instruction that failure to testify in one’s own defense does not create a negative presumption.93 When a court fails to give the requested instruction, counsel must object with “precision sufficient to inform the trial judge as to the matter about which the objection is raised and the grounds therefor.”94 The Eleventh Circuit held defense counsel’s objection that the requested instruction was omitted was sufficient for the court to

84. U.S. CONST. amend. V.
85. 175 F.3d 1261 (11th Cir. 1999).
86. Id. at 1264, 1269.
87. Id. at 1264.
88. Id. at 1264-65.
89. Id. at 1264-69.
90. Id. at 1265.
92. Id. at 300.
93. 175 F.3d at 1264 n.4.
94. Id. at 1265 (quoting United States v. Haynes, 573 F.2d 236, 241 (5th Cir. 1978)).
understand the substance of the objection and to give the court a chance to correct the error before sending the case to the jury. The court of appeals also noted that the judge's good-faith belief that the instruction was given does not excuse the error.

The crux of the opinion, however, is the court's discussion of the appropriate remedy for the omission. The court noted that, since the Supreme Court's decisions in *Arizona v. Fulminante* and *Chapman v. California,* the proper analysis for most trial errors is the constitutional harmless error standard. Only major structural defects, such as total deprivation of the right to counsel, will result in automatic reversal. Trial errors occurring during presentation of the case to the jury may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." Upon review of the record, the court of appeals was "not convinced beyond a reasonable doubt that the district court's error in failing to deliver the requested cautionary instruction did not contribute to the conviction."

Defendant was on trial for traveling in interstate commerce with intent to engage in a sexual act with a juvenile in violation of 18 U.S.C. § 2423(b). The charge arose from conversations held over the Internet between defendant and a girl who claimed to be thirteen years old but who was actually a police officer. Defendant raised the defense of entrapment and attacked the Government's ability to prove that he actually believed the girl to be underage. The Eleventh Circuit found that there was sufficient evidence in the record to prove both entrapment and that defendant lacked the necessary mental state to commit the crime. At best, the court of appeals found that the

95. *Id.*
96. *Id.*
98. 386 U.S. 18 (1967).
99. 175 F.3d at 1266-67.
100. 499 U.S. at 309.
101. *Id.* at 307-08.
102. 175 F.3d at 1267.
103. 175 F.3d at 1263, 1267-68. "Maggie284," the screen name of the nonexistent thirteen-year-old, was chatting with defendant between 11 p.m. and midnight on a school night and at 11:46 a.m. on a school day, times that a thirteen-year-old girl would be unlikely to be surfing the Internet. Maggie also gave defendant inconsistent information about herself at different times. Thus, there was evidence that defendant did not in fact believe Maggie was a young girl. The jury did not resolve this fact in his favor. *Id.* at 1268-69.
104. *Id.* at 1268-69.
evidence against defendant was not "overwhelming." During deliberations, the jury sent a question to the judge indicating a need for further instruction on the law of entrapment and stating that they believed there might be reasonable doubt on that issue. Given the request for further information by the jury and the other possibly exculpatory evidence in the record, the court held that the doubts of the jury may have been resolved in favor of defendant if he had testified. The court of appeals stated, "It is thus not unreasonable to imagine that the jurors, not having been instructed to draw no adverse inference from Burgess's decision not to testify, resolved their doubts against him because of his failure to take the stand in his own defense." One can easily imagine Burgess coming out the other way. Defense counsel's failure to press for the jury instruction or correct the judge's mistaken impression could have been deemed a waiver. Furthermore, errors are often found harmless beyond a reasonable doubt, and a court may well not have engaged in the extensive speculation about the possible effect on the verdict. As a pragmatic matter, a court may have reached opposite conclusions influenced by a skepticism that the no-adverse-inference instruction provides a meaningful protection to defendants. Indeed, the reason Carter leaves the choice to defendants rather than requiring such an instruction is that many trial lawyers believe the instruction is counterproductive because it reminds the jurors that the defendant did not testify.

The court confronted another Fifth Amendment issue in United States v. Chastain. That decision teaches that counsel must be careful not to ask questions in the cross-examination of witnesses that allow a response revealing defendant's invocation of this right because if counsel opens the door, the witness will be allowed to comment about matters otherwise inadmissible. In Chastain the Eleventh Circuit held that a government agent's direct response to defense counsel's questions, which revealed that defendant invoked his right to remain silent, was responsive and not "manifestly intended" to be a comment on defendant's exercise of his privilege and was, therefore, permissible.

In Chastain defense counsel asked the agent whether he had spoken to defendant during the course of investigating the charged offense. In response to this question, the agent replied he did not see defendant

105. Id. at 1268.
106. Id.
107. Id.
108. Id.
109. 198 F.3d 1338 (11th Cir. 1999).
110. Id. at 1351-52.
until he went to defendant's attorney's office to take him into custody. The agent stated that at the time he picked up defendant he was told not to ask defendant any questions, and he did not. The Eleventh Circuit held that under the circumstances these comments were "direct responses to defense counsel's open-ended question, and cannot be construed to be 'manifestly intended' to be a comment on [defendant's] exercise of his privilege . . ., and a rational jury could not take it to be so." As is usually the case, it would have been difficult to establish that the witness's answer was a gratuitous swipe at defendant's rights. Absent such facts, any damage from the comment will be dismissed as a self-inflicted wound.

B. Due Process: The Prosecution's Duty to Disclose Evidence

In Wright v. Hopper, the Eleventh Circuit held that the State did not withhold evidence when defense counsel could have discovered it with reasonable diligence. In Wright defendant was convicted in Alabama for robbery and murder and sentenced to death. Although defendant identified four separate pieces of evidence allegedly wrongfully suppressed by the State, the testimony of Mary Johnson is of note. Johnson was a witness at the scene who identified a third person other than defendant in both a photo spread and later in a line-up. The State indicted the person she identified, but later dismissed the case on the ground that Johnson had misidentified him. Based on Brady v. Maryland, defendant argued that the State wrongfully suppressed this evidence.

To establish a Brady violation, a defendant must demonstrate:

"(1) that the Government possessed evidence favorable to the defendant (including impeachment evidence) . . .; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence . . .; (3) that the prosecution suppressed the favorable evidence . . .; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different."
Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."\(^{118}\)

The court of appeals first held that the Government did not suppress the evidence.\(^{119}\) Defense counsel testified that he knew of the third party's indictment for the same crime and that he knew of Johnson's existence because he put her on the witness list.\(^{120}\) The court noted that nothing prevented defense counsel from discovering the transcript of the earlier hearing involving the third party or interviewing Mary Johnson.\(^{121}\) The court held that "the State is not required to furnish a defendant with exculpatory evidence that is fully available through the exercise of due diligence."\(^{122}\) Further, the court held that even if the State did suppress the evidence, it was not material because it did not indicate that defendant was not present at the scene of the crime, and it did not impeach the testimony of witnesses claiming defendant was the triggerman.\(^{123}\)

Obviously, the court's opinion includes two independent bases for rejecting defendant's claim. The court's analysis of the suppression issue is persuasive. The evidence at issue was available, and although the prosecution did not flag the evidence for the defense, neither did the Government conceal the evidence. Defense counsel clearly could have obtained the evidence. Although the court's alternative materiality analysis was unnecessary to the holding, it is open to question. Would the court have reached the same conclusion regarding materiality if it had been established that the prosecution did suppress the evidence? The evidence would establish that an eyewitness identified someone else as the perpetrator and that the person identified previously was charged with the crime. The court concluded, "The defense would have had a remote chance of convincing the jury that Roberts was involved in the murders."\(^{124}\) Of course, to undermine confidence in the outcome, the issue is whether the suppressed evidence might have caused the jury to have a reasonable doubt. Had the prosecution actually played a role in suppressing the evidence, the court's approach to materiality might have been less generous.

\(^{118}\) Id. (quoting United States v. Stewart, 820 F.2d 370, 374 (11th Cir. 1987)).
\(^{119}\) Id. at 702.
\(^{120}\) Id.
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
C. Sufficiency and Constructive Amendment of Indictments

The sufficiency of an indictment raises Fifth Amendment double jeopardy issues and Sixth Amendment notice issues. In *United States v. Steele*, the Eleventh Circuit held an indictment that failed to specify precise dates, locations, drug amounts, and purchasers of various illegal prescription drug transactions was sufficient:

An indictment is sufficient "if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." The court further explained that "alleging that an offense occurred within a judicial district . . . is sufficient to describe the location of the offense." Also, "the amount of drugs involved in an offense is not an element of the offense but rather is a factor to be considered upon sentencing, and therefore need not be alleged in the indictment.

In *Steele* defendant was charged and convicted under 21 U.S.C. § 841(a)(1) on four counts of knowingly dispensing controlled substances. The court noted that time, location, drug amount, and the name of the purchaser are not elements of the offenses charged. Further, although the Government ordinarily specifies the date of the alleged offense, failure to do so does not always preclude the defendant from preparing a defense. In some circumstances, referring to a certain duration of time is sufficient. Here, Steele had records and receipts of the transactions to which he could refer to specify the dates of the alleged offenses. The Eleventh Circuit stated that it "would have preferred that the Government provide more precise dates in the four

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125. 178 F.3d 1230 (11th Cir. 1999).
126. Id. at 1233-34 (quoting United States v. Steele, 147 F.3d 1316, 1320 (11th Cir. 1998) (en banc)).
127. Id. at 1234 n.1.
128. Id.
129. Id. at 1232. Count One of the indictment stated, "That from on or about July 1, 1993, and continuously thereafter, up to and including on or about November 2, 1993, in the Northern District of Florida, . . . Steele, did knowingly and intentionally dispense hydromorphone hydrochloride, a schedule II controlled substance, commonly known as Dilaudid, in violation of Title 21, United States Code, Section 841(a)(1)." In the remaining three counts, other drugs were substituted for Dilaudid as appropriate. Id. at 1232-33.
130. Id. at 1234.
131. Id.
132. Id.
133. Id. at 1234-35.
counts contained in this indictment, [but] the failure to do so did not preclude Steele from adequately preparing his defense."^134 Also, the court held the indictment did not expose Steele to double jeopardy because "the court may refer to the entire record of the prior proceeding and [will] not be bound by the indictment alone."^135 Accordingly, the court concluded the indictment complied with the Fifth and Sixth Amendments.^136

The court's opinion addressed the issues of double jeopardy and notice, but it does not reflect whether the defense raised, or the record suggested, the presence of the other problem that lurks in cases in which substantive offenses are charged as they were in Steele. The substantive counts of the indictment charged that defendant repeatedly distributed illegal drugs over a four-month period. In essence, each substantive count charged more than one violation of the drug distribution statute. This practice is commonly known as "duplicitous" pleading, or charging separate offenses in a single count. It is sometimes said that duplicity inures to the benefit of the defendant because individual substantive counts could have been brought for each violation. But there is a great danger in duplicity—the defendant may be deprived of his right to a unanimous verdict. For example, if Steele distributed Dilaudid every day from July 1 to November 2, the jury should be instructed that it could convict Steele of the substantive count only if all twelve jurors unanimously agree that it was proved beyond a reasonable doubt that all the elements were proved on at least one specific occasion. In the absence of such an instruction, or a special verdict, there is no assurance that the jury unanimously agreed to one of the substantive violations encompassed by the duplicitous count. The court's opinion contains no indication that duplicity concerns were raised in Steele.

In United States v. Diaz,^139 the Eleventh Circuit held that a jury instruction and the judgment that referred to conspiracy to possess with intent to distribute cocaine, rather than conspiracy to distribute cocaine,
was only a clerical error and not a constructive amendment of the indictment. A constructive amendment occurs when an instruction provides greater basis for conviction than what was charged in the indictment. This situation results in a violation of the defendant's Fifth Amendment right to a grand jury indictment. Mere clerical errors are not constructive amendments so long as they do not prejudice the defendant in any significant way.

In *Diaz* defendant was charged in the indictment with conspiracy to distribute cocaine. However, the jury was charged on conspiracy to possess with intent to distribute. The verdict form correctly listed the offense. The trial court did not specifically give any instructions on the possession element, and defense counsel made no objection to the instructions. The error appeared in the record at the sentencing, in the presentencing report, and in the final judgment. The sentencing guidelines are the same for both offenses regardless of the possession element, so the sentence was not affected.

The court of appeals vacated the judgment and remanded the case to the district court to enter judgment in accordance with the indictment. First, the court noted that all the other allegations of error made by defendant were meritless and that the conviction would stand but for this error. Second, the court did not find that the jury was confused by the discrepancy. The jury had the correct verdict form and were told to follow the indictment. The instruction on conspiracy to possess was only one of several instructions that largely focused on the conspiracy element and the credibility of witnesses. Also, the transcript revealed that neither lawyer misstated the charge to the jury in their closing statements. Third, the court reasoned the thrust of the defense was lack of credibility of the witnesses and not failure of the Government to prove an element of the crime. Fourth, the court noted the fact that defense counsel failed to object to the charge. Fifth, the court reasoned that given the jury's credibility determinations, the record indicated defendant was guilty of the offense with which he

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140. *Id.* at 1251, 1253.
141. *Id.* at 1251.
142. *Id.*
143. *Id.* at 1252.
144. *Id.* at 1251-53.
145. *Id.* at 1253.
146. *Id.* at 1252.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 1252-53.
was charged. Six, the court noted that the sentencing guidelines were the same for both crimes.

The court's last reason for affirming the verdict was perhaps the most pertinent. This was a conspiracy case. Therefore, the court reasoned, the element of "possession" is neither here nor there. To commit the charged offense, defendant merely needed to agree to distribute; he did not actually have to distribute the cocaine himself. The same would be true for possession with intent to distribute—all that would be needed is the agreement and not the actual possession. Therefore, "the attempt to differentiate between these two crimes from a practical standpoint is a distinction without a difference." Accordingly, the court held the instruction was not reversible error.

One judge dissented from these conclusions, despite the concession that the lack of objection meant the plain error standard applied. Under all the circumstances of the case, the majority position that defendant's right to grand jury indictment was not abridged appears sound. That said, the dissenting judge's displeasure with the error committed is understandable—the entire issue was the product of sloppiness and could easily have been avoided.

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.

A. The Right to Confrontation

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

151. Id. at 1253.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id. at 1259-60 (Cook, J., dissenting).
159. U.S. CONST. amend. VI.
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.\textsuperscript{160} 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. The Eleventh Circuit addressed several of these issues during the survey period. In \textit{United States v. Hunerlach},\textsuperscript{161} defendant argued that his Sixth Amendment right to confront witnesses was violated when the district court judge admitted hearsay statements made by two out-of-court declarants. Defendant was on trial for tax evasion, and the hearsay testimony was to prove that two corporations, on which defendant served as chairman of the board, were dummy corporations set up to hide money from the Government. An IRS agent testified that two directors of defendant's corporations admitted having little involvement with the corporations. The Government argued that the statements were not offered for the truth of the matter asserted and were, therefore, not hearsay.\textsuperscript{162} The Eleventh Circuit, however, held the statements were in fact offered for the truth of the matter asserted and, therefore, were hearsay under Rule 801(c) of the Federal Rules of Evidence.\textsuperscript{163} The court held the testimony had no relevant meaning other than to establish that the corporations were in fact wholly controlled by defendant rather than by the directors.\textsuperscript{164} This conclusion was sound because there does not seem to have been any legitimate nonhearsay purpose.

The out-of-court statements do not appear to meet any of the many rules and exceptions that allow out-of-court statements to be admitted for the truth of the matter asserted. Because the statements were erroneously admitted in a criminal prosecution, the rules of evidence and the Confrontation Clause were violated. Erroneously admitted evidence is subject to harmless error standards, but because such an error is of constitutional dimensions under the Confrontation Clause, the prosecu-

\textsuperscript{160} See \textsc{Christopher B. Mueller & Laird C. Kirkpatrick}, \textsc{Evidence} § 8.89 (2d ed. 1999). While most exceptions found in evidence rules such as the Federal Rules of Evidence have been held to be "firmly rooted" for Confrontation Clause purposes, several have not. See, e.g., \textit{Idaho v. Wright}, 497 U.S. 805, 817-18 (1990) (holding that a residual "catchall exception" is not firmly rooted); \textit{Lilly v. Virginia}, 527 U.S. 116, 125-34 (1999) (holding that an exception for statements against penal interest is not firmly rooted).

\textsuperscript{161} 197 F.3d 1059 (11th Cir. 1999).

\textsuperscript{162} \textit{Id.} at 1066-67.

\textsuperscript{163} \textit{Id.} at 1067.

\textsuperscript{164} \textit{Id.}
tion must demonstrate on appeal that the error was harmless beyond a reasonable doubt, rather than the lesser standard applied to nonconstitutional errors. Here, the court of appeals concluded the error was in fact harmless in light of substantial evidence in the record that defendant's corporations were not bona fide corporations. Although defendant's conviction for tax evasion was affirmed, the decision in Hunerlach is a reminder of the continuing, if limited, role of the Confrontation Clause in applying the heightened harmless error standard to erroneously admitted hearsay.

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 on 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.

The Eleventh Circuit recently addressed several Bruton issues. United States v. Gonzalez provides a virtual primer in the Bruton doctrine. Gonzalez involved a drug prosecution of five defendants: Buitrago, Diaz, Santiago, Claudio, and Gonzalez. At trial the Government offered confessions of two of the defendants, Gonzalez and Buitrago. In its

165. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (holding no reversal of conviction if Confrontation Clause violation was harmless beyond a reasonable doubt).
166. 197 F.3d at 1067.
167. Id. at 1069.
168. The heightened constitutional error standard was also applied in the cases involving the Bruton doctrine. See infra text accompanying notes 169-208.
170. See Williamson v. United States, 512 U.S. 594, 600-02 (1994) (rejecting the theory that a confession implicating another person fits the federal exception for statements against penal interest); Lilly, 527 U.S. at 125-34 (declaring a confession implicating another person to be a violation of the Confrontation Clause despite being admissible under Virginia's exception for statements against penal interest).
172. 183 F.3d 1315 (11th Cir. 1999).
original form, Gonzalez's confession implicated his codefendants, but the prosecution avoided separate trials by attempting to follow the procedure of redacting the confession to eliminate references to the codefendants. The Supreme Court has held that if a defendant's confession does not on its face implicate a codefendant, there is no confrontation violation. However, the courts have wrestled with the issue of when a redacted statement improperly points to the guilt of a codefendant when the name of the codefendant is deleted. The most recent Supreme Court pronouncement on the issue was the 1998 decision in Gray v. Maryland. In Gray the Court held that replacing the codefendants' names with a blank, a symbol, or the word "deleted" (as in "Me, deleted, deleted, and deleted") was insufficient to protect the confrontation rights of the other defendants.

The confession of Gonzalez involved an application of the principles of Gray. Gonzalez's confession did not refer to his three codefendants by name, but the prosecutor elicited testimony that the total number of co-conspirators was four. In addition, the confession of Gonzalez admitted at trial included references to a Colombian, including a description that made it obvious the Colombian was Buitrago. The court held that admission of the confession in this form was erroneous. The court found the form of the deletion "dangerously close" to the type of redaction found impermissible in Gray: "The rationale underlying the Supreme Court's decision in Gray requires finding a Bruton violation on facts such as these, where a redacted confession implicates a precise number of the confessor's codefendants." Thus, Buitrago, Santiago, and Claudio had their confrontation rights violated.

However, the court went on to analyze the question of whether the error was harmless. As stated above, the harmless error standard for errors of constitutional magnitude is whether the error was harmless beyond a reasonable doubt. Because Buitrago also confessed, the court held the Bruton violation against Buitrago was harmless. As for Santiago and Claudio, the court found the other evidence against them was so thin that the admission of Gonzalez's confession merited

173. Id. at 1322.
174. See Marsh, 481 U.S. at 211.
176. Id. at 197.
177. 183 F.3d at 1322.
178. Id.
179. Id.
180. Id. at 1323.
182. 183 F.3d at 1323.
Thus, the court affirmed the convictions of Gonzalez and Buitrago and reversed the convictions of Santiago and Claudio.\(^\text{184}\)

In \textit{United States v. Taylor},\(^\text{185}\) the Eleventh Circuit held that a codefendant’s redacted statements did not compel the jury to conclude defendant was a part of a drug conspiracy and, thus, that there was no \textit{Bruton} violation.\(^\text{186}\) In \textit{Taylor} defendants Taylor and Scott were tried jointly for conspiracy to import cocaine, knowingly importing cocaine, and possessing cocaine with intent to distribute. Prior to trial, the Government indicated it was going to offer a secretly taped conversation between Taylor and an undercover informant. Scott moved to sever the trial on Sixth Amendment grounds, arguing the taped testimony would violate his confrontation rights. The district court denied the motion to sever, but ordered that the tape be redacted to exclude any reference to Scott. The redacted statement was read into the record at trial. The judge instructed the jury before the tape was played that it was only to consider the statement as it related to Taylor’s role in charged crimes.\(^\text{187}\)

On appeal Scott contended his Sixth Amendment Confrontation rights were violated when the motion to sever was denied and when the nontestifying codefendant’s statement was published to the jury. Scott argued the redacted statement inculpated him in violation of \textit{Bruton}. He claimed the statement, combined with other evidence in the record, compelled the jury to find that he was involved in the conspiracy.\(^\text{188}\)

The Eleventh Circuit considered a prior opinion, \textit{United States v. Vasquez},\(^\text{189}\) involving whether the use of neutral pronouns in a confession violates \textit{Bruton}.\(^\text{190}\) The court of appeals held that “the admission of a co-defendant’s statement that contains neutral pronouns does not violate the Confrontation Clause so long as the statement does not compel a direct implication of the defendant’s guilt.”\(^\text{191}\) Thus, the central inquiry in the Eleventh Circuit is whether the statement compelled the jury to conclude the defendant was a part of the crime. In \textit{Taylor} the court held Taylor’s statement did not compel the jury to conclude that Scott was part of the conspiracy.\(^\text{192}\) The court noted that

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{183}.] \textit{Id}.
\item[	extsuperscript{184}.] \textit{Id} at 1328.
\item[	extsuperscript{185}.] 186 F.3d 1332 (11th Cir. 1999).
\item[	extsuperscript{186}.] \textit{Id} at 1335.
\item[	extsuperscript{187}.] \textit{Id} at 1334.
\item[	extsuperscript{188}.] \textit{Id} at 1335.
\item[	extsuperscript{189}.] 874 F.2d 1515 (11th Cir. 1989) (per curiam).
\item[	extsuperscript{190}.] 186 F.3d at 1336.
\item[	extsuperscript{191}.] \textit{Id} (citing \textit{Vasquez}, 874 F.2d at 1518).
\item[	extsuperscript{192}.] \textit{Id}.
\end{enumerate}
\end{footnotesize}
the redacted statement referred to the existence of other participants in the crime. It further noted, however, that several other people were involved with the conspiracy and that the statement did not directly incriminate Scott. The court held the statement "does nothing more than corroborate other evidence that showed that other people were involved in the drug importation scheme besides Taylor." This reasoning, combined with the facts that the Government did not link the neutral pronouns in the statement to Scott during closing argument and that the judge gave appropriate limiting instructions to the jury, led the court to affirm the conviction of Scott.

In contrast to Taylor, the Eleventh Circuit held in United States v. Ramirez-Perez that a codefendant's postarrest statement did violate defendant's Confrontation Clause rights. In Ramirez-Perez three defendants were tried and convicted of various methamphetamine charges. The charges were made as a result of a drug sale to an undercover Georgia Bureau of Investigation ("GBI") agent. One of the defendants, Maclavio, challenged his conviction and sought a new trial on the ground that the court erred in admitting testimony of the GBI agent relating to inculpatory postarrest statements of a codefendant, Homero.

The evidence showed that on the night of the incident Maclavio waited in the car with a nine-millimeter gun in a box by his feet. Whether he actually participated in the larger drug conspiracy turned on whether Maclavio brought the weapon to protect himself or whether he brought it in furtherance of the conspiracy in case the deal went bad. At trial the district court allowed the GBI agent to relate a postarrest statement by Homero that Maclavio brought the nine-millimeter pistol at Homero's instruction. The agent testified that Homero told him the pistol was for protection in case Homero was "ripped off." Maclavio contended this statement was inculpatory and violated Bruton. The Eleventh Circuit agreed.

On appeal the Government conceded that the introduction of the statement by the agent violated Bruton. However, it argued that the statement was harmless error because all it proved was that Homero

193. Id.
194. Id.
195. Id. at 1337.
196. Id.
197. 166 F.3d 1106 (11th Cir. 1999).
198. Id. at 1107-08.
199. Id. at 1108-09.
200. Id.
201. Id. at 1109.
told Maclavio to bring the gun. Because other evidence established that
Maclavio in fact brought the gun to the scene, the Government argued
the statement did not further inculpate Maclavio. The Eleventh
Circuit was unpersuaded and held the statement was inculpatory and
was not harmless, although the court did not explicitly discuss applica-
tion of the beyond-a-reasonable-doubt standard applicable to constitu-
tional errors.

The crux of the court’s decision was that without Homero’s statement
that he told Maclavio to bring the gun, the jury would have no reason to
infer that Maclavio brought the gun in furtherance of the conspira-
cy. Rather, it would be an equally logical inference that Maclavio
brought the gun for his own protection, a lawful reason. The court
concluded, without Homero’s statement the evidence would have
been in equipoise. The court went so far as to say that without the
unconstitutional statement, the evidence against Maclavio probably
would have been insufficient to warrant a conviction on either of the
narcotics charges. The court of appeals vacated Maclavio’s convic-
tions on the narcotics charges and remanded the case for a new
trial.

Each of the three Bruton cases discussed above, Gonzalez, Taylor, and
Ramirez-Perez, help to illustrate the many difficulties attendant to
protecting the confrontation rights of codefendants in joint trials when
another defendant has confessed. To avoid the significant costs of
separate trials, the Supreme Court has, within hard-to-discern limits,
allowed editing and redacting of statements to alleviate the confronta-
tion problem. Setting aside concerns one may have about the process of
altering evidence for presentation to the finder of fact, it is obvious the
modern Bruton doctrine is a delicate compromise largely dependent on
the very belief about which the Supreme Court was so skeptical in
Bruton—that juries are able to follow an instruction asking that they not
consider one defendant’s confession against another defendant.

202. Id.
203. Id.
204. Id. at 1110.
205. Id.
206. Id. at 1111.
207. Id. The court’s conclusion that without the inadmissible statement the evidence
was insufficient to convict does not prevent a retrial. See Lockhart v. Nelson, 488 U.S. 33,
42 (1988).
208. 166 F.3d at 1114. The court upheld Maclavio’s conviction on the charge of
possession of a firearm by an alien because the Bruton error was harmless as to that count.
Id.
B. The Right to a Speedy Trial

As interpreted by the Supreme Court, the constitutional right to a speedy trial is a paper tiger. Although the right was applied to the states through the Fourteenth Amendment in the landmark case of Barker v. Wingo,\textsuperscript{209} the Supreme Court declared the right "vague," "amorphous," and "slippery" and proceeded to adopt an ad hoc test for judging the right that merits each of those adjectives.\textsuperscript{210} The court announced a nonexclusive list of four factors that courts should balance in determining whether the right has been denied and whether dismissal is the appropriate remedy: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.\textsuperscript{211} The court explicitly rejected drawing any bright lines, such as specific time limits or a hard and fast requirement that the right be asserted, declaring that specific rules "would require the court to engage in legislative or rulemaking activity."\textsuperscript{212} Because Barker provided such a limited protection of the right to a speedy trial, Congress and many state legislatures adopted comprehensive statutory schemes governing when a case must go to trial. At the federal level, the Speedy Trial Act of 1974\textsuperscript{213} established detailed rules that require cases to go to trial within seventy days, but allow the "speedy trial clock" to be stopped for a variety of permissible purposes. In federal court, most of the legal action concerning speedy trial claims is under the regime of the Speedy Trial Act. The constitutional right described in Barker is only occasionally litigated and rarely results in relief.

\textit{United States v. Register}\textsuperscript{214} is illustrative of the flaccid nature of the constitutional speedy trial right. Defendant Jubal Register argued that a thirty-eight month delay from his initial indictment to his trial on drug trafficking charges denied him a speedy trial under the Sixth Amendment.\textsuperscript{215} Although the court accepted that the delay was presumptively prejudicial under the one-year benchmark applied by many lower courts, analysis of the \textit{Barker} factors led to the conclusion that no constitutional violation occurred.\textsuperscript{216} The court noted that the reasons

\begin{itemize}
\item \textsuperscript{209} 407 U.S. 514 (1972).
\item \textsuperscript{210} Id. at 521-22, 530.
\item \textsuperscript{211} Id. at 530.
\item \textsuperscript{212} Id. at 523.
\item \textsuperscript{213} 18 U.S.C. §§ 3161-3174 (1994).
\item \textsuperscript{214} 182 F.3d 820 (11th Cir. 1999).
\item \textsuperscript{215} Id. at 826-27. Register also argued that the Speedy Trial Act was violated, but the strict waiver rules under the Act precluded his claim and left him to the vagaries of a Sixth Amendment claim. Id. at 828.
\item \textsuperscript{216} Id. at 827.
\end{itemize}
for the delay were often legitimate and that both the prosecution and the
defense had contributed to the delay.\textsuperscript{217} The court also pointed out
that Register's assertion of his speedy trial rights was sporadic.\textsuperscript{218}
Despite the presumption of prejudice, the court highlighted the absence
of even a single argument suggesting any prejudice to Jubal Register's
conduct of his defense.\textsuperscript{219}

Under these circumstances the court reached a predictable result. If
the speedy trial guarantee is to be more than a paper tiger, the Supreme
Court will have to be willing to give the right more vigor through the
announcement of prophylactic rules or guidelines that would give some
teeth to the constitutional provision. Such judicially created rules to
enforce and define constitutional rights are increasingly out of fashion
and, when they have been created (such as the \textit{Miranda} rules), under
attack. There seems little hope that the Speedy Trial Clause will be
invigorated in that way.

C. The Right to Counsel

Jubal Register's codefendant, Charles Register, raised a very
interesting right-to-counsel claim. When Charles Register was initially
indicted on drug trafficking charges, the prosecution raised the
possibility that Charles Register's attorney may have been laboring
under a conflict of interest because he had represented several potential
witnesses and continued to represent Jubal Register on several matters
relating to the case. The court held a hearing and explained to Charles
Register the potential conflict of interest. Charles Register waived the
potential conflict, and the court accepted the waiver.\textsuperscript{220}

Later, the prosecution obtained a superseding indictment. The
superseding indictment raised the ante regarding the conflict of interest.
The new indictment alleged that as part of defendants' scheme, various
unnamed attorneys assisted defendants in their illegal activity. In light
of these new charges, the Government again moved to disqualify Charles
Register's lawyer, contending that the lawyer (1) continued to represent
Jubal Register in a related state case, (2) was a subject (but not a target)
of the ongoing federal investigation, and (3) was involved in the charged
crimes. This time the court found a conflict of interest and refused to
accept Charles Register's waiver.\textsuperscript{221}

\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id. at 828.}
\textsuperscript{219} \textit{Id. at 827.}
\textsuperscript{220} \textit{Id. at 824.}
\textsuperscript{221} \textit{Id. at 825.}
The Government obtained yet another superseding indictment. This new indictment, which displaced the first superseding indictment, omitted all reference to the unnamed attorneys and their role in the scheme. On appeal Charles Register argued the Government’s evidence was too tenuous to justify disqualification of his chosen counsel, especially because he waived the conflict. He also argued that the Government manufactured the conflict for the purpose of disqualifying his counsel.222 The Eleventh Circuit was faced with a case requiring application of the principles set down in Wheat v. United States.223

Wheat established the standards for reviewing a district court’s pretrial decision to disqualify counsel for a potential conflict of interest.224 That decision balanced two competing values. On one hand there must be concern about the defendant’s choice of counsel. The right to counsel of one’s choice, while not absolute, is entitled to respect. On the other hand, the district court has an obligation to avoid having an attorney try a case while under a conflict of interest. The Supreme Court recognized that even when a defendant waives the potential conflict, the defendant may well assert a claim of ineffective assistance of counsel, and that appellate courts have shown a tendency to allow such claims despite a waiver.225 In balancing these values and concerns, the Court in Wheat crafted a rule that is very deferential to the district court’s prospective determination of the issue:

The District Court must recognize a presumption in favor of petitioner’s counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.226

Applying these principles to the facts in Register, the Eleventh Circuit held that the district court’s disqualification of Charles Register’s lawyer was permissible.227 Despite the prosecution’s about-face regarding the mention of lawyers as part of the charged scheme, the district court had a solid basis for finding a potential conflict of interest.228 At a full-blown adversarial hearing, the district court heard evidence that the lawyer may well have been involved in defendant’s drug-related

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222. Id. at 825-26, 828.
224. 182 F.3d at 828.
225. 486 U.S. at 161.
226. Id. at 164.
227. 182 F.3d at 830-34.
228. Id.
activities, including evidence from an informant who said that Charles Register said he paid his lawyer with illegal drugs.\textsuperscript{229} The district court also rejected the claim of bad faith by the Government.\textsuperscript{230} Given the evidence of the conflict, the district court discounted the prosecution’s redrafting of the indictment.\textsuperscript{231} Although the prosecution’s actions might be cast as an attempt to deprive Charles Register of his chosen counsel, the prosecution also had a motive to protect the trial record against later claims of ineffective assistance that could have caused a reversal on appeal. In the end, the court of appeals held that under the principles of Wheat, Charles Register was not denied his right to counsel.\textsuperscript{232}

The Eleventh Circuit addressed another Sixth Amendment right-to-counsel issue in United States v. Gonzalez.\textsuperscript{233} Gonzalez was the defendant whose confession created Bruton issues for his three codefendants, as discussed above. Gonzalez launched an unsuccessful Sixth Amendment attack on the admissibility of his confession, which provided the prosecution with very powerful evidence of Gonzalez’s guilt. The day after Gonzalez was arrested, he appeared in state court and was appointed a defense lawyer. The lawyer filed a “Notice of Defendant’s Invocation of the Right to Counsel.”\textsuperscript{234} Under the Supreme Court’s bright-line approach, the Sixth Amendment right to counsel had attached because adversarial judicial proceedings had commenced. Furthermore, defendant clearly invoked his right, and an attorney-client relationship had ensued.

Afterward, Gonzalez’s wife contacted the investigating agent and told the agent that Gonzalez wished to speak to the agent immediately. Two agents subsequently interviewed Gonzalez at the county jail without his counsel being present or notified. The agents read Gonzalez his Miranda rights before the interview and obtained a waiver. That interview resulted in the confession used against Gonzalez at his trial. Gonzalez moved to suppress the confession, arguing the agents had violated his Sixth Amendment right to counsel by initiating contact with him and interviewing him about the charged crime without his counsel being present.\textsuperscript{235}

\begin{itemize}
\item \textsuperscript{229} Id. at 830-31.
\item \textsuperscript{230} Id. at 832-33.
\item \textsuperscript{231} Id. at 833.
\item \textsuperscript{232} Id. at 834.
\item \textsuperscript{233} 183 F.3d 1315 (11th Cir. 1999).
\item \textsuperscript{234} Id. at 1323.
\item \textsuperscript{235} Id. at 1323-24.
\end{itemize}
The Eleventh Circuit began its discussion by citing to Edwards v. Arizona,236 a Fifth Amendment case in which the Supreme Court fashioned a prophylactic rule concerning police contact with a defendant who invokes his right to counsel after being advised of his Miranda rights.237 Edwards forbids further police questioning in the absence of counsel about the subject of the initial interrogation, unless the defendant initiates further interrogation.238 The Supreme Court grafted this prophylactic rule onto the Sixth Amendment in Michigan v. Jackson.239 Applying Edwards to the facts, the court had little difficulty in concluding that Gonzalez had initiated the meeting by having his wife ask the agents to visit him.240 The court's conclusion is sound. The Edwards “initiation exception,” however, has at least two potential difficulties. First, although the facts of Gonzalez are straightforward enough, it is easy to see that there will often be a question of whether a defendant initiates an interrogation. What if the defendant seeks to meet with law enforcement officials for some limited purpose and the agents take the opportunity to expand the interview to the charged crime? The question of whether a defendant initiates the asking of questions by the agents may involve some subtle distinctions.241 Second, there is a tension between the theory behind Edwards and the application of the defendant-initiation exception. If invocation of the right to counsel signals that the suspect or defendant wants his counsel to serve as a medium between him and the state, how can the suspect or defendant effectively waive the right to counsel without legal advice? Despite this tension, the exception recognizes that the suspect or defendant may voluntarily waive the right to counsel after invocation and that initiation of the interview by the defendant is strong evidence of the desire to waive.

237. 183 F.3d at 1324.
238. 451 U.S. at 487.
239. 475 U.S. 625, 636 (1986). The Eleventh Circuit cited to Edwards, but not to Jackson. Although not important to the resolution of the scenario in Gonzalez, it should be remembered that Edwards has less breadth in the Sixth Amendment context than in the Fifth Amendment context, particularly because the Sixth Amendment is offense-specific. See McNeil v. Wisconsin, 501 U.S. 171, 175-80 (1991). Thus, it would have been permissible to interview Gonzales about crimes other than the one for which he was charged without violating the Sixth Amendment. However, if Gonzalez had invoked his Fifth Amendment right to counsel, the police could not initiate interrogation about crimes other than the one for which the suspect has invoked his right to counsel, even if Gonzalez had an opportunity to talk with counsel before the interrogation. See Arizona v. Roberson, 486 U.S. 675, 682-85 (1988); Minnick v. Mississippi, 498 U.S. 146, 154 (1990).
240. 183 F.3d at 1324.
D. Ineffective Assistance of Counsel

The right to counsel must be a right to effective counsel. However, many practitioners would disagree as to tactics and strategy in the various situations confronting them. If the standard of effective representation is set too high, then any sense of finality to the litigation process would give way to endless cycles of second guessing lawyers' decisions and retrying cases. If the standard is set too low, then the right of effective representation is undermined. The Supreme Court has attempted to reconcile these competing concerns. In the landmark case of *Strickland v. Washington*, the Supreme Court announced the standards governing claims of ineffective assistance of counsel. The well-known test has two prongs, both of which must be satisfied. "First, the defendant must show that counsel's performance was deficient." This is judged on an objective standard of reasonableness. The question is whether counsel's performance fell "outside the wide range of professionally competent assistance." In answering this question, the courts are to be highly deferential to counsel's decisions and strongly presume that counsel has rendered adequate assistance. Second, the defendant must show prejudice. The court stated, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Given this standard, it is not surprising that few claims of ineffective assistance of counsel succeed. It is also not surprising that ineffective-assistance claims are more closely scrutinized in death penalty cases because the stakes are so high. Nor is it surprising that the few decisions reversing for ineffective assistance often have the tone of second guessing and speculation as to the effect of counsel's errors on the jury. Consider the Eleventh Circuit's opinion in *Collier v. Turpin*.

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243. Id. at 687.
244. Id.
245. Id. at 687-88.
246. Id. at 690.
247. Id. at 687.
248. Id. at 690.
249. Id. at 694. In context of the duty to disclose exculpatory evidence, when the court has applied the *Strickland* test, it has been suggested that the term "reasonable probability" is equivalent to the term "significant possibility." See Strickler v. Greene, 119 S. Ct. 1936, 1957 (1999) (Souter, J., dissenting in part).
250. 177 F.3d 1184 (11th Cir. 1999).
In that case defendant sought habeas corpus relief following his convictions for felony murder, aggravated assault, and armed robbery, for which he was sentenced to death. He appealed from a denial of the writ. On appeal defendant advanced two ineffective-assistance-of-counsel claims. First, defendant claimed his lawyers did not effectively investigate the case and failed to interview certain of his relatives and friends who could have provided mitigating information. Most of that information concerned defendant's economic and social environment, diabetic condition, and related physical and emotional problems. Second, defendant claimed counsel failed to elicit mitigating information from the witnesses that were called during the sentencing phase.\(^{251}\)

With respect to the claim of ineffective investigation, the court affirmed the district court's finding that the defense team had not been ineffective in seeking out additional witnesses.\(^{252}\) Among other factors the district court found that the newly identified witnesses would have provided mostly cumulative evidence.\(^{253}\) The court of appeals endorsed the district court's view that the failure to investigate was in part tactical and that deference to counsel's choice was appropriate.\(^{254}\) The court of appeals rejected the claim of ineffective investigation.\(^{255}\)

However, the court of appeals reversed the district court and ordered the writ granted as to defendant's death sentence on the ground that defense counsel were ineffective in presenting the mitigating evidence they had at hand.\(^{256}\) The court of appeals scrutinized the record of the sentencing and found defense counsel's examination of the witnesses terse and incomplete.\(^{257}\) The court found that counsel presented almost none of the readily available evidence of Collier's background and character that would have led the jury to eschew the death penalty. Instead of developing an image of Collier... as a good family man and a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives, counsel's presentation tended to give the impression that the witnesses knew little or nothing about Collier. In failing to present any of the available evidence of Collier's upbringing, his gentle disposition, his record of helping family in times of need, specific instances of his heroism and compassion, and evidence of his circumstances at the time of the crimes—including his recent loss of his

\(^{251}\) Id. at 1186, 1199.

\(^{252}\) Id. at 1200.

\(^{253}\) Id. at 1199-1200.

\(^{254}\) Id.

\(^{255}\) Id. at 1200.

\(^{256}\) Id. at 1203-04.

\(^{257}\) Id. at 1201-02.
job, his poverty, and his diabetic condition—counsels' performance brought into question the reliability of the jury's determination that death was the appropriate sentence.\textsuperscript{258}

Collier presents a very unusual case because defense counsel apparently conceded their presentation of the case was deficient. Defense counsel claimed the judge had issued an off-the-record order restricting their presentation; however, the court of appeals would have none of it: "We find that the trial judge was not to blame for counsels' ineffectiveness; rather [counsel] were."\textsuperscript{259} Having found the first prong of the \textit{Strickland} test satisfied, the court went on to find that Collier suffered the required prejudice: "[W]e believe that it is at least reasonably probable that the jury would have returned a sentence other than death."\textsuperscript{260}

\textit{Collier} is noteworthy at several levels. As a reversal for ineffective assistance, it is a rarity. Accepting the court's conclusion that the trial judge was not responsible, a reversal based on shoddy courtroom presentation of evidence is very unusual given the high measure of deference usually accorded to lawyers practicing the art of trying cases. The court's treatment of the claim based on ineffective investigation is also worthy of comment. Why did the court feel the need to reach the issue at all? Given the holding regarding the ineffective presentation of evidence, resolution of the investigation issue was unnecessary. Indeed, the court declined to resolve one aspect of the inadequate investigation claim, namely an argument that defense counsel could have obtained useful expert testimony regarding Collier's mental condition.\textsuperscript{261} Perhaps the court decided to take the opportunity to reject the investigation claim to make a statement discouraging these sorts of claims. Obviously, claims of inadequate investigation can almost always be made, and when new counsel unearths useful evidence, these claims can be compelling because the new evidence may seem important enough to have made a difference.\textsuperscript{262} In finding the investigation to be objectively reasonable, the court did draw a distinction between what is prudent and appropriate and what is constitutionally compelled.\textsuperscript{263}

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\item \textsuperscript{258} \textit{Id.} at 1202.
\item \textsuperscript{259} \textit{Id.}
\item \textsuperscript{260} \textit{Id.} at 1204.
\item \textsuperscript{261} \textit{Id.} at 1199 n.19.
\item \textsuperscript{262} See, e.g., Holsomback v. White, 133 F.3d 1382, 1387-89 (11th Cir. 1998) (reversing the conviction because of inadequate investigation by counsel). Probably more representative of the court's typical response to claims of inadequate investigation are two recent opinions of the court. See Williams v. Head, 185 F.3d 1223, 1233-44 (11th Cir. 1999) (rejecting a claim of ineffective assistance based on inadequate investigation); Glock v. Moore, 195 F.3d 625, 634-40 (11th Cir. 1999) (same).
\item \textsuperscript{263} 177 F.3d at 1200.
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