Mercer Law Review

Volume 44
Number 4 *Annual Eleventh Circuit Survey*

Article 6

7-1993

Constitutional Criminal Law

Peggy Natale

Constitutional Criminal Law

by Peggy Natale*

I. Introduction

This year, the Eleventh Circuit issued opinions on a variety of criminal constitutional law cases, including decisions granting writs of habeas corpus on several death row inmates, and in three cases addressing ineffective assistance of counsel. What follows is a summary of some of the most important criminal constitutional cases for 1992. No effort has been made to make an exhaustive review of all of the court's criminal cases for the year.

II. Fourth Amendment—Search and Seizure

The Eleventh Circuit reversed on the grounds of a violation of the Fourth Amendment's provisions regarding unreasonable search and seizure in *United States v. Ellis*.[1] In this case a residential search warrant incorrectly described the place to be searched as " 'the third mobile home on the north side of Christian Acres Road.' "[2] Although Officer LaManna, who prepared the affidavit for the search warrant, had knowledge of defendant Billy Ellis and Ellis' home, he incorrectly described the location of the home, did not name defendant in the warrant, or give any other description of the house.[3]

Officer LaManna was not present when the officer executed the search warrant.[4] When the executing officers went to the third mobile home, the

---

* Assistant Public Defender, Capital Crimes Division, Palm Beach County Public Defender's Office; Former Assistant Federal Public Defender for the Southern District of Texas. Southwestern University (B.A., 1975); South Texas College of Law (J.D., 1978). Member, State Bars of Florida and Texas; Member, United States District Courts for the Southern District of Texas and Southern District of Florida.

1. 971 F.2d 701 (11th Cir. 1992).
2. *Id.* at 702 (quoting the warrant).
3. *Id.*
4. *Id.* at 703.

owner of that home told them Billy Ellis lived in the fifth mobile home.[5] The officers then went to that home, which belonged to Ellis, and searched.[6]

In reaching the decision in this case, the Eleventh Circuit relied on *Steele v. United States*,[7] which held that a description of the area to be searched is valid "if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended."[8] But the court noted that in this case "the name 'Billy Ellis' did not appear anywhere on the warrant or the affidavit. As a result, the officers could not use their personal knowledge that Ellis was the target of the search to cure the warrant's deficiency."[9]

Turning to the good faith exception to the exclusionary rule described in *United States v. Leon*,[10] the Eleventh Circuit determined that the good faith exception was not applicable to this case.[11] In this case, Deputy LaManna's mistake in the address was based on his observations, and the error was not on the part of the issuing magistrate, as was the case in *Leon*.[12] As a result, the officers did not reasonably rely on the warrant in searching Billy Ellis' home.[13] In fact, the officers did not rely on the warrant at all.[14] As the court pointed out, "the procedure employed in this case risked a general search."[15]

While in *Ellis* the court determined that incorrect observations of a police officer did not meet the good faith exception of *Leon*,[16] the Eleventh Circuit in *United States v. Gonzalez*[17] determined that as long as it was reasonable, a police officer's mistaken observation did not negate probable cause to arrest, even if the mistaken observation was the primary basis of the arrest.[18] Here, informants told federal agents that three people were driving to meet a yacht and pick up cocaine. The informants accurately described the cars, and named the three people and the yacht. While the trip to meet the boat was not inherently suspicious, the officers also observed one of the three suspects engage in counter surveillance

5. *Id.* at 702-03.
6. *Id.*
7. 267 U.S. 498 (1925).
8. *Id.* at 503.
9. 971 F.2d at 704.
10. 468 U.S. 897 (1984).
11. *Id.* at 897.
12. 971 F.2d at 705.
13. *Id.*
14. *Id.* at 703.
15. *Id.* at 705.
16. *Id.*
17. 969 F.2d 999 (11th Cir. 1992).
18. *Id.* at 1006.

techniques, exceed the speed limit on the way to meet the yacht, keep watch on the yacht from another vessel, and drive carefully on the return trip while drugs were in the car.[19]

However, the person on the other vessel, whom the police believed to be engaged in this counter-surveillance, turned out to have no connection with any of these suspects.[20] The Eleventh Circuit nevertheless held that although the police officer was mistaken about the person in the unconnected vessel, the police officer still had probable cause to arrest.[21] The Eleventh Circuit reasoned that "although 'innocent behavior frequently will provide the basis for showing of probable cause . . . in making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent," or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.' "[22]

The Eleventh Circuit said "the determination that probable cause exists for a warrantless arrest is fundamentally a factual analysis that must be performed by the officers on the scene."[23]

III. Fifth Amendment—Right to Silence

A. *Right to Silence*

The court addressed the issue of whether the collective entity doctrine applies to custodians of corporate records who are no longer employed by a corporation in *In re Grand Jury Subpoena dated November 12, 1991 ("Paul")*.[24] A custodian of corporate documents cannot assert a Fifth Amendment claim to production of those documents that remain in his or her custody even after leaving the employ of the corporation.[25] In reaching its decision, the Eleventh Circuit broadened the already existing collective entity doctrine,[26] which holds that a custodian of corporate records does not have the Fifth Amendment right to refuse production of those documents as determined by the United States Supreme Court in *Bellis v. United States*.[27] Because production of corporate records necessarily must be accomplished through human representatives, an individual can-

19. *Id.* at 1000-01.
20. *Id.* at 1002.
21. *Id.*
22. *Id.* at 1003 (quoting Illinois v. Gates, 462 U.S. 213, 243-44 n.13 (1983)).
23. *Id.*
24. 957 F.2d 807 (11th Cir. 1992).
25. *Id.* at 812.
26. *Id.* at 813.
27. 417 U.S. 85, 88 (1974).

not assert his or her Fifth Amendment rights to avoid production of corporate documents.[28]

The issue before the Eleventh Circuit in *Paul* was whether a former employee of the corporation also loses his or her Fifth Amendment rights to production of corporate documents. The employee left the corporation's employ before a grand jury investigation began. Mr. Paul took corporate documents with him to use in his personal defense, if needed.[29] The Eleventh Circuit expanded the decision in *Braswell* to include past employees as well as current employees of the corporation.[30] This decision conflicts with the Second Circuit's decision in *In re Grand Jury Subpoenas Duces Tecum dated June 13, 1983 & June 22, 1983 ("Saxon").*[31] The Second Circuit had previously determined that "[o]nce the officer leaves the company's employ . . . he no longer acts as a corporate representative but functions in an individual capacity in his possession of corporate records."[32]

Noting that the decision in *Saxon* predated *Braswell*,[33] the Eleventh Circuit focused on the nature of the records themselves rather than in whose custody they fell. The key factor was not the relationship of the custodian to the entity, but the character of the records themselves as corporate records.[34]

In *United States v. Moody*,[35] defendant was charged with bombings that caused the death of a federal judge and an attorney.[36] He contended that the taping of his conversations at home with his wife, as well as the taping of soliloquies of defendant talking to himself in his jail cell did violate the Fifth Amendment because there was coercive police activity in connection with defendant's statements.[37]

The Government taped certain "soliloquies" in which the defendant talked to himself about having committed two killings and made vitriolic statements about the court system.[38] The court held these were not the result of inadequate minimization in violation of 18 U.S.C. § 2518(5) and that the trial court had not erred in crediting the monitoring agents' as-

---

28. Braswell v. United States, 487 U.S. 99, 111-12 (1988).
29. 957 F.2d at 809.
30. *Id.* at 812.
31. 722 F.2d 981 (2d Cir. 1983).
32. *Id.* at 986-87.
33. 957 F.2d at 811.
34. *Id.* at 812.
35. 977 F.2d 1425 (11th Cir. 1992).
36. *Id.* at 1428.
37. *Id.* at 1433-35.
38. *Id.* at 1433-34.

sertions that they could always determine whether defendant was conversing with anyone or was instead talking to himself.[39]

Defendant had challenged the in prison surveillance under doctrines relevant to custodial interrogation, specifically *Miranda v. Arizona*[40] and the Due Process Clause, but the Eleventh Circuit found that these arguments failed due to the absence of any coercive police activity in connection with defendant's statements.[41]

B. Due Process

In *United States v. Gayle*,[42] defendant was charged with fraudulently impersonating a federal officer or employee in violation of 18 U.S.C § 912.[43] Congress had amended the statute and eliminated the words " 'with intent to defraud.' "[44] The appellant argued that the words "intent to defraud" were a necessary element of the crime charged and were not included in his indictment.[45] In reaching its decision, the court departed from its predecessor, the Fifth Circuit, which previously had held that an intent to defraud or to wrongfully deprive another of property was an essential element of this crime.[46] In rejecting the Fifth Circuit's decision, the Eleventh Circuit aligned itself with decisions of the Third, Eighth, and D.C. Circuits, which held that the intent to defraud continues to be an element of the crime, but need not be specifically alleged in the indictment;[47] that the intent to defraud "is automatically present anytime the other elements of the offense (i.e. [1] acting as such or [2] obtaining something of value) are proven."[48] The decision in *Gayle* specifically rejected opinions of the Second, Fourth, Seventh, and Ninth Circuits, which have held that by amending the statute, Congress eliminated that element entirely from the offense.[49]

---

39. *Id.*
40. 384 U.S. 436 (1966).
41. 977 F.2d at 1434.
42. 967 F.2d 483 (11th Cir. 1992).
43. *Id.* at 485.
44. *Id.* at 486 (quoting the prior statute).
45. *Id.* at 484.
46. *Id.* at 486.
47. *Id.* at 486-87.
48. *Id. See generally* United States v. Wilkes, 732 F.2d 1154 (3d Cir. 1984), *cert. denied*, 469 U.S. 964 (1984); United States v. Robbins, 613 F.2d 688 (8th Cir. 1979); United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976).
49. 967 F.2d at 486. *See generally* United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967); United States v. Rose, 500 F.2d 12 (2d Cir. 1974), *cert. denied*, 424 U.S. 956 (1976); United States v. Mitman, 459 F.2d 451 (9th Cir. 1972), *cert. denied*, 409 U.S. 863 (1972).

Due process was again addressed by the court in *United States v. Yesil*,[50] which held a trial court's failure to hear evidence of defendant's cooperation, as required by the previously accepted plea agreement, violated defendant's due process rights.[51] In this case, the written plea agreements required each defendant to cooperate with the Government and specified that upon completion of each defendant's cooperation, the Government would notify the court of the nature and extent of the cooperation.[52] In an unusual scenario, both defendants and the Government appealed the trial court's denial of an evidentiary hearing on a Rule 35 motion for reduction of sentence.[53]

The Eleventh Circuit's decision did not disagree with the trial court's denial of the Rule 35 motion, but rather with the trial court's failure to grant an evidentiary hearing on defendants' cooperation.[54] At the original sentencing hearing, the court heard testimony from an agent regarding defendants' ongoing cooperation, and the court sentenced all defendants to a six year term, with three years special parole and a $150,000 fine.[55] The court also ordered defendants to surrender voluntarily in six months and serve the sentence.[56]

Both defendants and the Government urged the trial court to reduce the sentence pursuant to Rule 35.[57] Attached to the Rule 35 motion were letters from detectives setting forth defendants' cooperation since the plea, resulting in indictments in at least eleven drug trafficking cases.[58] The letters also apprised the court of defendants' ongoing cooperation and requested a hearing.[59] The court denied the reduction of sentence for two defendants and granted one defendant a reduction of his sentence.[60] In all three cases, however, the trial court denied an evidentiary hearing regarding the extent of defendants' cooperation.[61]

Although a defendant generally cannot appeal a court's refusal to grant a downward departure in sentencing, this case involved an appeal of the court's refusal to grant an evidentiary hearing on the Rule 35 motion.[62] The Eleventh Circuit held that a trial court's discretion in granting an

50. 968 F.2d 1122 (11th Cir. 1992).
51. *Id.* at 1124.
52. *Id.*
53. *Id.* at 1125.
54. *Id.* at 1128.
55. *Id.* at 1123-25.
56. *Id.* at 1125.
57. *Id.*
58. *Id.* at 1124-25.
59. *Id.*
60. *Id.* at 1125-27.
61. *Id.* at 1124.
62. *Id.* at 1127.

evidentiary hearing is " 'severely' curtailed once that court accepts a plea bargain" as in this case.[63] In reaching its decision to remand the case for an evidentiary hearing on the Rule 35 motion for reduction of sentence, the Eleventh Circuit noted that Rule 11(e), governing plea agreements, requires the trial court to comply with the terms of the plea agreement once the court accepts the plea.[64] "[I]t is a denial of due process to assure a defendant that he will receive a certain process and then to renege on that promise or merely pay it lip service."[65]

Judge Hatchett dissented from the majority ruling and focused on the fact that this was a Government appeal without commenting on the fact that it was a defense appeal as well.[66] Nevertheless, the dissent's rationale was that the Government could not appeal the denial of an evidentiary hearing, and that the decision to grant an evidentiary hearing was totally discretionary within the trial court.[67] His fear that this decision might result in granting the Government more control than the courts have on sentencing issues is summed up as follows: "With this opinion, district court judges are prohibited from even deciding when to set sentencing hearings and what kind of hearings to conduct. The Government, through this opinion, has become more than a litigant in the courts of this circuit."[68]

A defendant's reliance on a plea agreement again was addressed by the Eleventh Circuit in *United States v. Rewis*.[69] Here, the Government breached the plea agreement with defendant by informing the court of defendant's failure to cooperate.[70] Rewis, a commercial fisherman, pleaded guilty to possession of more than 1,000 kilograms of marijuana and conspiracy to distribute.[71]

The plea agreement provided that "the government reserves its right of allocution, that is, to make known to the United States Probation Office and to the Court all relevant facts regarding the offenses. However, the government agrees not to recommend what sentence should be imposed."[72] The plea agreement also specifically provided that Mr. Rewis was under no obligation to cooperate, but if he did cooperate, the Govern-

---

63. *Id.* (citing United States v. Runck, 601 F.2d 968, 970 (8th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980)).

64. *Id.*

65. *Id.* at 1128 (citing United States v. Thomas, 580 F.2d 1036 (10th Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979)).

66. *Id.* at 1129.

67. *Id.* at 1130.

68. *Id.* at 1131.

69. 969 F.2d 985 (11th Cir. 1992).

70. *Id.* at 987.

71. *Id.* at 986.

72. *Id.* at 987.

ment would ask the court for a downward departure from the sentencing guidelines.[73]

Defendant did not cooperate. At sentencing the government, through its memorandum, advised the court of defendant's failure to cooperate and stated that defendant persuaded others not to cooperate.[74] The Government went on to say:

> This man would rather remain an "outlaw smuggler" with a code of silence and intimidation, part of the problem, than become part of the solution . . . . [H]e will say nothing about past or current activities involving smuggling despite all government efforts to gain his cooperation. If he were truly sorry . . . he would have cooperated.[75]

The district court sentenced defendant to forty years without parole on all four counts, plus five years special parole on the two substantive counts.[76]

The Eleventh Circuit recognized that the plea agreement rested in a significant degree on the promise of the government, and that a defendant is entitled to specific performance on that agreement.[77] Following the method of interpreting plea agreements previously set forth by the Eleventh Circuit in *United States v. Jefferies*,[78] the court reiterated that a plea agreement constitutes a waiver of "substantial constitutional rights" and if Mr. Rewis' reasonable understanding of the plea agreement was not enforced, the trial court could not find that defendant was actually aware of the consequences of his plea.[79] In its opinion, the Eleventh Circuit noted that in this case, even though the Government may not have specifically recommended a harsher sentence, the Government's comments in its sentencing memorandum suggested a harsher sentence, which violated the plea agreement.[80] Furthermore, the case was remanded for resentencing before a different district court.[81]

In *United States v. Rodriguez*,[82] the Eleventh Circuit held that a trial judge could not weigh a defendant's exercise of his or her constitutional rights in deciding whether to grant a reduction in offense for "acceptance of responsibility" under the sentencing guidelines.[83] The court held that

---

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 986.
77. *Id.* at 988.
78. 908 F.2d 1520 (11th Cir. 1990).
79. 969 F.2d at 988.
80. *Id.* at 986.
81. *Id.* at 989.
82. 959 F.2d 193 (11th Cir. 1992).
83. *Id.* at 197.

the trial judge erred in denying defendant the sentencing guidelines' "acceptance of responsibility" reduction in points[84] by considering defendant's failure to forego his Fifth Amendment privilege.[85]

Defendants had expressed their remorse to the probation officer who prepared the pre-sentence investigation report and recommended to the court that it grant a two level reduction for acceptance of responsibility.[86] The sentencing judge, however, conditioned the reduction on defendants' admission of guilt in open court,[87] obviously jeopardizing the defendants' appellate rights and right against self incrimination.

Section 3E1.1 of the Federal Sentencing Guidelines provides that a defendant must be awarded a two level reduction in offense level if the defendant clearly displays acceptance of personal responsibility for his crime, whether or not he has gone to trial.[88] Although the Eleventh Circuit has in the past rejected Fifth and Sixth Amendment challenges to this sentencing provision,[89] the court held that a sentencing court cannot consider a defendant's constitutionally protected conduct against him, in this case his right to remain silent.[90] The Eleventh Circuit noted, however, that it is not a constitutional violation to provide incentives to forego a constitutional right and a defendant's capacity to receive acceptance of the responsibility reduction may well be diminished when a defendant exercises his or her full panoply of rights.[91]

IV. SIXTH AMENDMENT

A. Attorney Client Privilege

The Eleventh Circuit eroded the attorney-client privilege by holding that an attorney must testify before the grand jury regarding his source of counterfeit one-hundred dollar bills, even if his clients gave him the counterfeit bills.[92] The attorney sought to quash the grand jury subpoena on the grounds that the identity of his clients was protected under the attorney-client privilege.[93] The district court quashed the subpoena noting

84. FEDERAL SENTENCING GUIDELINES 3E1.1 (1987).
85. 959 F.2d at 195-97.
86. *Id.* at 195.
87. *Id.*
88. *Id.*
89. United States v. Henry, 883 F.2d 1010 (11th Cir. 1989); United States v. Crawford, 906 F.2d 1531 (11th Cir. 1990).
90. 959 F.2d at 197.
91. *Id.*
92. *In re* Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992).
93. *Id.* at 996.

that a client's identity and fee agreement generally are not privileged.[94] However, the case of *United States v. Hodge & Zweig*[95] determined that a client's identity and fee agreement may be privileged when the person invoking the privilege can show that a strong probability exists that disclosing the clients identity would implicate that client in the criminal activity for which legal advice was sought.[96]

On appeal, the Eleventh Circuit reversed the district court and held that the facts of this case did not fall within the exception in *Hodge & Zweig*.[97] The court reasoned that "[m]erely because the matter which will be disclosed may incriminate the client does not make the matter privileged."[98] The court examined the "last link" doctrine relied on in *Hodge & Zweig*.[99]

The "last link" doctrine recognizes the attorney-client privilege when the identity of the client might be the link that forms the chain of testimony necessary to convict the individual of a federal crime.[100] The Eleventh Circuit, however, relied on its previous decision in *In re Grand Jury Proceedings ("Rabin")*,[101] which held that the "last link" doctrine extends the attorney-client privilege to nonprivileged information only when "disclosure of that identity would disclose other, privileged communications (e.g., motive or strategy) and when the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential."[102] The court further reasoned that in the present case, disclosure of the nonprivileged client identity does not result in linking the clients with confidences that would be protected.[103]

B. *Ineffective Counsel*

The Eleventh Circuit reversed two capital murder cases on the basis of ineffective assistance at trial. A death row inmate's case was remanded for a new penalty phase in *Cave v. Singletary*[104] primarily due to ineffective assistance of trial counsel.[105] In *Cave* an employee of a convenience

94. *Id.* at 997.
95. 548 F.2d 1347 (9th Cir. 1977).
96. *Id.* at 1353.
97. *In re* Grand Jury Matter No. 91-01386, 969 F.2d at 998-99.
98. *Id.* at 998.
99. *Id.*
100. *Id.* at 997.
101. 896 F.2d 1267 (11th Cir. 1990).
102. *Id.* at 1273.
103. *Id.* at 1274.
104. 971 F.2d 1513 (11th Cir. 1992).
105. *Id.* at 1529.

store was robbed by four men, shot in the head, and stabbed in the abdomen. The bullet to the head was the cause of death. All defendants were tried separately. Cave was convicted of first degree murder and sentenced to death. The Supreme Court of Florida affirmed Cave's conviction and death sentence.[106] On petition for habeas corpus, the federal district court held an evidentiary hearing and concluded that Cave had received ineffective assistance of trial counsel, which had prejudiced Cave only at the sentencing phase.[107] The Eleventh Circuit agreed.[108]

In a prime example of why federal habeas corpus review is so critical to our system of justice, the Eleventh Circuit determined Cave's trial counsel, Ms. Steger, obviously had not understood the crime of felony murder and, therefore, did not adequately represent petitioner at this trial.[109] Apparently, Ms. Steger argued at the trial level that defendant admitted his guilt of the robbery, but should not be found guilty of first degree murder.[110] The court held that the attorney did not understand the elements of felony murder, that her statements regarding Cave's guilt of the robbery necessarily established his guilt for first degree murder under felony murder,[111] and that "her performance fell far below the acceptable standard for competent counsel."[112] At the federal evidentiary hearing, Ms. Steger contended that she had indeed understood the felony murder rule, but purposely misstated that law her in closing argument to confuse the jury.[113] One other attorney, however, testified that in his discussions with Ms. Steger the night before her closing arguments, he had concluded that she had not understood the felony murder rule. Cave's attorney had indicated that her defense to the first degree murder was that Cave was not the person who shot the gun that caused the murder.[114] Another attorney who met with Cave's attorney after the trial to discuss appealable issues concluded that she did not understand that her closing argument was legally incorrect.[115]

"Even if counsel's misstatements of the law were strategic in nature, we could not consider such a 'strategy' to be reasonable under the circumstances because defense counsel may not 'encourage [the] jurors to ignore

106. *Id.* at 1514.
107. *Id.* at 1515.
108. *Id.* at 1529-30.
109. *Id.* at 1518.
110. *Id.* at 1517.
111. *Id.*
112. *Id.* at 1518.
113. *Id.* at 1517.
114. *Id.*
115. *Id.* at 1518.

the court's instruction and apply the law at their caprice.' "[116] The Eleventh Circuit spoke of Cave's trial attorney as follows:

> We are troubled by the fact that a defendant facing the possibility of execution in Florida's electric chair was defended by counsel who, in the words of the district court, had a "grandiose, perhaps even delusional" belief in her abilities, especially so because she was trying her first capital case. We are convinced that Steger completely misunderstood the law of felony murder, which is a concept that often confuses laypeople, but should be within the grasp of lawyers, especially those defending a client charged with a capital offense.[117]

At the trial level sentencing hearing, the defense did not offer any witnesses for mitigation.[118] Yet, at the evidentiary hearing in the federal district court, Cave produced several family members who testified that, had they been asked, they would have testified regarding Cave's good character at the sentencing phase of the trial.[119] They also testified that Steger had told them they were not needed.[120] The Eleventh Circuit agreed with the district court finding that the absence of witnesses at the sentencing hearing was the result of Steger's lack of preparation.[121]

But the Eleventh Circuit was not disturbed enough by Steger's representation of Cave to grant him a new trial and held that "even a highly competent lawyer could not have won Cave an acquittal" because "[h]is confession to robbery sealed his conviction for felony murder" and Cave had offered no reason to suppress his confession.[122] The court held Steger's representation was constitutionally inadequate and that Cave was prejudiced at the penalty phase.[123] Therefore, the jury verdict of seven to five for death was reversed and remanded.[124]

In *Waters v. Zant*,[125] a divided Eleventh Circuit again held that a habeas corpus petitioner had received ineffective assistance of counsel at his 1981 capital murder trial.[126] The trial attorney, who had not tried a murder case since 1955, presented all his defense witnesses during the guilt phase, and none, except for defendant, during the sentencing

---

116. *Id.* (quoting United States v. Trujillo, 714 F.2d 102 (11th Cir. 1983)).
117. *Id.*
118. *Id.* at 1516.
119. *Id.* at 1519.
120. *Id.* at 1516.
121. *Id.* at 1519.
122. *Id.* at 1518.
123. *Id.* at 1519.
124. *Id.* at 1522.
125. 979 F.2d 1473 (11th Cir. 1992).
126. *Id.* at 1475.

phase.[127] In this case, evidence of mental illness existed.[128] Although the defense witnesses did not allege that it rose to the level of insanity, the mental illness could have been a mitigating factor at the sentencing phase had it been presented at the sentencing hearing to the jury.[129]

Waters, the petitioner, was convicted of murder in Georgia.[130] He had forced two women at gunpoint to leave their cars and go to a secluded location where one was sexually assaulted and both were shot and killed.[131] Although the evidence of guilt at trial was "overwhelming,"[132] the court held counsel's performance at sentencing was constitutionally inadequate.[133]

The evidence showed that Waters had previously been diagnosed as a paranoid schizophrenic and had ceased taking his anti-psychotic medication three weeks before the murders.[134] The defense at trial was insanity, but trial counsel conceded at a state habeas proceeding that he only expected the jury to return a life sentence rather than death.[135] At the guilt phase of the trial no mental health expert testified that Waters was insane and several gave testimony that was damaging to Waters' mercy plea.[136] Only Waters testified on his own behalf during the sentencing phase, and the defense did not call mental health experts.[137]

The court determined that counsel had tried Waters' case "just as a criminal defense lawyer would have prior to *Furman v. Georgia*[138] and its sequel[]" by pleading insanity, putting in the psychiatric evidence, and seeking the jury's sympathy.[139] The court noted that since *Furman*, statutes and systems for imposing the death penalty must focus on the nature of the crime and character of the accused and must provide some guidance for the jury in determining whether the death penalty should be imposed in each case.[140] This was not accomplished in Waters' trial.

The court noted that "[f]ederal courts generally will not second-guess a trial counsel's strategic decision, so long as the decision is reasonable."[141]

---

127. *Id.* at 1477-78.
128. *Id.* at 1478-79.
129. *Id.*
130. *Id.* at 1475.
131. *Id.*
132. *Id.* at 1490.
133. *Id.* at 1491.
134. *Id.* at 1478-79.
135. *Id.* at 1478.
136. *Id.* at 1478-79.
137. *Id.* at 1478, 1495.
138. 408 U.S. 238 (1972).
139. 979 F.2d at 1492.
140. *Id.*
141. *Id.* at 1494 (citing Stanley v. Zant, 697 F.2d 955, 966 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984)).

In this case, however, the court held that defense counsel "totally and completely failed to execute his strategy" by failing to elicit any mitigating evidence from medical experts at sentencing regarding Waters' mental state and that there was no reason for counsel's failure to elicit testimony that the defendant's mental illness affected Waters' conduct on the day of the murders.[142] The court also opined that defense counsel elicited much unfavorable testimony from his own mental health expert, Dr. Bosch, but failed to elicit Dr. Bosch's opinion that Waters had a serious mental disorder and no criminal personality.[143]

The Eleventh Circuit also held that the attorney's decision to put Waters on the stand during sentencing was unreasonable.[144] The court further remanded the case because the jury received absolutely no guidance from either the trial court or Waters' attorney regarding how they might consider Waters' mental illness as a mitigating factor for punishment.[145]

In argument, the trial attorney argued to spare Waters' life so that he could be studied and used for experiments.[146] The Eleventh Circuit held that counsel's delivery of a closing argument was more appropriate for a mad dog than a human being and bordered on barbarity.[147] Judge Tjoflat dissented.[148] Interestingly, one of the very reasons the court reversed this case (defense counsel's closing argument) forms the basis of the Chief Judge's dissent. He found that counsel's argument to spare defendant's life so that experiments could be conducted on him was persuasive and reasonable.[149]

C. *Right to Testify*

The court addressed two cases concerning a defendant's right to testify in his own behalf in *United States v. Teague*[150] and *Nichols v. Butler*.[151] Nichols was tried and convicted of armed robbery. The theory of defense was that the prosecutor's eyewitness was mistaken about the identity of defendant. In *Nichols* defendant's attorney denied him the right to testify. During trial, defendant and his attorney had an argument and the defense attorney threatened to withdraw if defendant testified in his own

142. *Id.*
143. *Id.* at 1495.
144. *Id.*
145. *Id.* at 1496.
146. *Id.* at 1497.
147. *Id.*
148. *Id.* at 1498 (Tjoflat, C.J., dissenting).
149. *Id.* at 1501-02 (Tjoflat, C.J., dissenting).
150. 953 F.2d 1525 (11th Cir. 1992).
151. 953 F.2d 1550 (11th Cir. 1992).

behalf.[152] The court held that if defendant had testified, the jury would have been able to weigh his credibility against that of the eyewitness for the prosecution and that the trial counsel's coercion prejudiced defendant in this case.[153] In *Teague* the court held that defendant's Sixth Amendment rights were not violated by trial counsel's advice to defendant that he should not testify, especially when the defense attorney's advice followed a careful assessment of the client as a potential witness.[154] But the court pointed out that the right to testify cannot be waived by trial counsel against defendant's will.[155]

D. Right to Confrontation

In *United States v. Lankford*,[156] the Eleventh Circuit reversed the trial court decision and held that a defendant's right to cross examination, as well as his right to produce evidence, had been violated by the trial court.[157] Defendant, a former sheriff of Fulton County, Georgia, was convicted of extorting money from the owner of a catering company that had contracted with the sheriff's jail, and for failing to report that income to the Internal Revenue Service. Defendant claimed he believed that the owner gave him the money to defray personal costs incurred during his campaign.[158] The United States Supreme Court previously held that a defendant's good faith belief that one does not have a legal duty to pay taxes can negate the willfulness of a tax offense.[159] At his trial, the court did not allow his attorney to cross examine a key prosecution witness regarding the witness' sons' state drug prosecution.[160] The trial court also failed to allow the defense to put on an expert witness who would have testified about defendant's misunderstanding regarding his failure to report the money taken as income.[161] Citing *Cheek*, the court reasoned that expert opinion concerning the reasonableness of the defendant's purported misunderstanding of tax laws governing campaign contributions would have aided the jury in its determination of willfulness.[162]

In reversing the conviction for the failure of the trial court to allow the tax expert witness for the defense, the court, relying on *Cheek*, opined

---

152. *Id.* at 1551.
153. *Id.* at 1553.
154. *Id.* at 1529, 1535.
155. *Id.* at 1532.
156. 955 F.2d 1545 (11th Cir. 1992).
157. *Id.* at 1549-52.
158. *Id.* at 1547.
159. *Id.* at 1550 (citing United States v. Cheek, 498 U.S. 192 (1991)).
160. *Id.* at 1549.
161. *Id.* at 1546.
162. *Id.* at 1550.

that the more unreasonable defendant's belief that he was not legally required to pay taxes seemed to be, the more an expert was probative to demonstrate to the jury that defendant's belief was, in fact, a reasonable one.[163]

In a decision sure to be cited often in future trials, the Eleventh Circuit recognized that the importance of cross examination of a witness who has a substantial incentive to cooperate with the prosecution does not depend upon whether or not a "deal" in fact exists between the witnesses and the government.[164] The court, in reaching its opinion, realistically viewed human nature and held that the existence of a deal between the witnesses and the prosecution is not the only basis for bias to exist.[165] " 'A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception.' "[166] In the present case, the witness was the primary witness against Lankford.[167] On cross examination, the defense sought to elicit testimony regarding the witness' sons' arrest for the sale of a large amount of marijuana. The trial court disallowed such cross examination on the basis that there was little likelihood that the witness had reason to fear a federal investigation of the state charges against his sons.[168] "Not-withstanding the fact that LeCroy '[the witness]' had made no deal with the government concerning a federal investigation into his sons' marijuana arrest, his desire to cooperate may have in fact been motivated by an effort to prevent such an investigation."[169]

In his dissent, Justice Hoffman argued that because the defense did not provide any evidence that the witness in fact had testified in hopes of helping his sons, it was improper to imply it on cross examination.[170] The dissent reasoned that because the court allowed the defense to elicit testimony of the same witness' bias due to his grant of immunity from the Government, no reason existed to believe the additional cross examination regarding the witness' sons would have affected the jury's impression of the witness' testimony.[171]

---

163. *Id.* (citing *Cheek*, 498 U.S. at 198-204).
164. *Id.* at 1548.
165. *Id.*
166. *Id.* (citing Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981)).
167. *Id.* at 1546.
168. *Id.* at 1549.
169. *Id.*
170. *Id.* at 1555 (Hoffman, J., dissenting).
171. *Id.* at 1557 (Hoffman, J., dissenting).

V. FOURTEENTH AMENDMENT—DUE PROCESS

The court carefully examined and explained the difference between a procedural incompetency claim and a substantive incompetency claim in *James v. Singletary*,[172] which held that James' Fourteenth Amendment due process rights were violated.[173]

Defendant was tried and convicted of the first degree murder of a Tampa, Florida couple and was sentenced to death.[174] Apparently, defendant's competency was not questioned prior to trial or on direct appeal.[175] On petition for writ of habeas corpus to the Florida Supreme Court, defendant raised the issue of his incompetency at the time of trial with supporting affidavits by Dr. Krop.[176] The Eleventh Circuit held that the Florida Supreme Court misinterpreted defendant's claim as a procedural incompetency issue rather than a substantive due process issue and denied the writ, apparently because the petitioner raised no trial court error.[177] But the Eleventh Circuit, in an opinion critical of the Florida Supreme Court, granted petitioner's writ.[178]

The court, in a realistic approach, noted that due process is violated if a person is tried while incompetent; whether any state actor committed an error in bringing the trial about while the defendant is incompetent is not required.[179] But the Eleventh Circuit found that a petitioner bringing a substantive incompetency claim, as opposed to a procedural incompetency issue, must first demonstrate his incompetency by a preponderance of the evidence.[180] Here, petitioner presented medical evidence in his habeas petition to meet this showing and the Eleventh Circuit accordingly remanded the case for a hearing on the issue of incompetency to stand trial.[181]

In correcting this mistake, the Eleventh Circuit found fault with the Florida Supreme Court in misinterpreting petitioner's allegations.[182] The Florida Supreme Court had stated that Dr. Krop's report " 'falls short of stating that he [petitioner] was incompetent to stand trial.' "[183] The Eleventh Circuit pointed out that Dr. Krop's report had concluded that the

---

172. 957 F.2d 1562 (11th Cir. 1992).
173. *Id.* at 1569.
174. *Id.* at 1565.
175. *Id.* at 1570.
176. *Id.* at 1574.
177. *Id.* at 1569.
178. *Id.* at 1575.
179. *Id.* at 1572-73.
180. *Id.* at 1571.
181. *Id.* at 1575.
182. *Id.* at 1569.
183. *Id.* at 1574 (quoting James v. State, 489 So. 2d 737, 739 (Fla. 1986)).

petitioner suffered from Organic Personality Syndrome, which contributed to James' lack of capacity to disclose pertinent facts, relate to his attorney, assist his attorney in his defense, realistically challenge the prosecution witnesses, and testify relevantly.[184] The Eleventh Circuit remanded the case for an evidentiary hearing.[185]

The Eleventh Circuit Court explained in great detail the distinction of a substantive incompetency issue versus a procedural incompetency issue as described in *Pate v. Robinson*.[186] A petitioner pursuing a procedural incompetency issue need only establish relevant trial error for the burden to shift to the state to prove that the petitioner actually was competent during trial.[187] In a substantive incompetency claim, however, the petitioner has a much greater initial burden to prove by a preponderance of the evidence that the petitioner was in fact competent at the time of the trial. Only then will the state be required to prove competency during trial.[188]

It may be a difficult hurdle for a petitioner to prove incompetency years after his trial. However, the decision in *James* does not require the petitioner to allege as error the trial judge's failure to appoint an expert to examine the petitioner or to conduct a hearing, nor does the decision in *James* require the petitioner to point a finger at defense counsel for failure to raise the competency issue.[189] The petitioner must only raise incompetency to compel a hearing.[190] "By contrast, a [p]etitioner raising a substantive claim of incompetency is [not] entitled to [a] presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence" to obtain a hearing.[191]

In *Presnell v. Zant*,[192] the court granted a writ of habeas corpus on a death penalty case and ordered a new penalty phase.[193] At the time of closing, the prosecutor quoted *Eberhart v. State*,[194] a nineteenth century Georgia Supreme Court case, which suggested that the jury must exclude any consideration of mercy from its decision.[195] The Eleventh Circuit held that this argument was "highly improper,"[196] particularly because defend-

184. *Id.*
185. *Id.* at 1575.
186. 383 U.S. 375 (1966).
187. 957 F.2d at 1571.
188. *Id.*
189. *Id.* at 1572.
190. *Id.*
191. *Id.*
192. 959 F.2d 1524 (11th Cir. 1992).
193. *Id.* at 1526.
194. 47 Ga. 598 (1873).
195. 959 F.2d at 1528.
196. *Id.* at 1529.

ant had relied solely on a mercy plea at sentencing, and, therefore, ordered a new sentencing hearing for defendant.[197]

VI. Article I, Section Six—Speech or Debate Clause

In *United States v. Swindall*,[198] the Eleventh Circuit held that the Speech or Debate Clause[199] privilege extends to the status of membership of committees in either the United States House of Representatives or the Senate.[200] The Speech or Debate Clause of the United States Constitution provides that members of the United States Senate and House of Representatives shall not be questioned in any other place regarding speech or debate.[201] This privilege exists to reinforce the separation of powers doctrine[202] and "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."[203]

The court in *Swindall* reasoned that because members specialized in a limited amount of legislation,

> [i]f legislators thought that their personal knowledge of such bills could one day be used against them, they would have an incentive (1) to avoid direct knowledge of a bill and perhaps even memorialize their lack of knowledge by avoiding committee meetings or votes, or (2) to cease specializing and attempt to become familiar with as many bills as possible, at the expense of expertise in any one area. Either way, the intimidation caused by the possibility of liability would impede the legislative process. Prohibiting inquiry into committee membership thus advances the Speech or Debate Clause's "fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."[204]

The facts in *Swindall* are quite unusual. The Internal Revenue Service ("IRS") was investigating Swindall for his involvement with LeChasney, who was later indicted for money laundering.[205] Swindall never actually consummated a deal with the undercover IRS agent or LeChasney and gave LeChasney back a check, refusing to receive a loan from the agent.[206] The IRS later closed its investigation against Swindall.[207] However, a

197. *Id.* at 1530.
198. 971 F.2d 1531 (11th Cir. 1992).
199. U.S. Const. art. 1, § 6.
200. 971 F.2d at 1544.
201. *Id.*
202. *Id.* at 1543 (citing United States v. Johnson, 383 U.S. 169, 178 (1966)).
203. *Id.* (quoting Gravel v. United States, 408 U.S. 606, 617 (1972)).
204. *Id.* at 1545 (quoting *Gravel*, 408 U.S. at 618).
205. *Id.* at 1535.
206. *Id.* at 1538.
207. *Id.* at 1536.

grand jury called Swindall to testify regarding his knowledge of LeChasney's actions.[208] During that grand jury inquiry, the grand jury questioned Swindall regarding his own knowledge of money laundering statutes and Swindall's membership in the House Banking Committee.[209] He testified that he had no knowledge of LeChasney's money laundering activities, but the Government alleged that Swindall perjured himself before the grand jury to conceal his discussions about illegal money laundering with LeChasney and the IRS agent.[210]

Although when testifying before the grand jury Swindall did not invoke the Speech or Debate Clause privilege, the court held that the indictments, nevertheless, were invalid.[211] The court dismissed those counts of the indictment against Swindall that rested on the Banking Committee and prohibited a new trial.[212] The court stated: "[T]he improper Speech or Debate evidence likewise was fatal to the indictment . . . because evidence of Swindall's legislative acts was an essential element of proof with respect to the affected counts."[213]

"The Government itself argued that it could not have proved Swindall's knowledge of criminality without showing the grand jury that he was on the committees that considered money-laundering statutes."[214] The court dismissed the indictment and precluded reindictment to deter prosecutors from asking improper questions of a member of Congress.[215]

VII. Separation of Powers, Article II, Section I

As decided by the Eleventh Circuit in *United States v. Ucciferri*,[216] cases may be prosecuted in federal court even if it was investigated entirely by state officials and brought in federal court merely to deprive the defendant of the state's constitutional protection.[217]

Defendant contended that his case had no federal ties at all and that the prosecution brought it in federal court to avoid the more restrictive standards of Florida state law regarding search warrants, surveillance, and informants.[218] Although the United States District Court granted de-

208. *Id.* at 1538.
209. *Id.* at 1539.
210. *Id.* at 1537-38.
211. *Id.* at 1534, 1546.
212. *Id.* at 1550.
213. *Id.* at 1549.
214. *Id.*
215. *Id.*
216. 960 F.2d 953 (11th Cir. 1992).
217. *Id.* at 953.
218. *Id.*

fendant's motion to dismiss on that basis, the Government appealed.[219] The Eleventh Circuit ruled against defendant and held that the separation of powers doctrine allowed bringing the case in either state or federal court.[220]

In reaching its decision, the Eleventh Circuit relied upon its predecessor court's opinion in *United States v. Mann*.[221] In *Mann* "the Fifth Circuit held that it is the prerogative of the executive to initiate criminal proceedings and that courts should not interfere with the executive's discretionary power to control criminal prosecutions."[222] Because defendant did not allege that the indictment was insufficient or that his constitutional rights were violated, the Eleventh Circuit held that no basis supported a motion to dismiss.[223] In reaching its decision, however, the Eleventh Circuit at least pointed out its concern of systematic transfer of state cases to the federal system.[224]

VIII. CONCLUSION

The Eleventh Circuit covered a wide range of constitutional issues in criminal litigation in 1992. Perhaps the most significant decisions, however, were the court's opinions regarding petition for Writ of Habeas Corpus filed by several death row inmates. By granting the writs in part and requiring new sentencing hearings for these petitioners, the court acted as a safety net in the criminal justice system. In a time when the United States Supreme Court apparently is seeking to limit petitions for Writs of Habeas Corpus, these particular Eleventh Circuit opinions are all the more noteworthy.

---

219. *Id.* at 954.
220. *Id.*
221. 517 F.2d 259 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).
222. 960 F.2d at 954.
223. *Id.* at 954-55.
224. *Id.* at 954.