Constitutional Criminal Procedure

Edward D. Lukemire

John Lynch

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol46/iss4/6

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Constitutional Criminal Procedure

by Edward D. Lukemire* and John Lynch**

I. INTRODUCTION

This year's survey of Eleventh Circuit criminal cases is primarily a review of those decisions which involve significant constitutional issues. As in recent years, a substantial number of the court's decisions resulted from drug prosecutions. This is due to the increase in federal resources devoted to drug prosecutions and the substantially longer sentences which often result from a federal drug conviction as compared to a state conviction for the same offense. The court also decided a great many cases involving issues interpreting the Federal Sentencing Guidelines. Even though these cases do not usually involve constitutional issues, the authors decided to include a Sentencing Guidelines section because this area of law has such a significant affect on the federal criminal law practitioner.

Even though both authors are career prosecutors, this article is not intended to present a "prosecution view" of the cases and issues discussed. Rather, our purpose is to provide all federal criminal law practitioners with a review of those decisions in the Eleventh Circuit which involve significant issues or developments.

* District Attorney, Houston Judicial Circuit; Former Assistant United States Attorney, United States District Court, Middle District of Georgia. Mercer University (B.A., 1976); Walter F. George School of Law, Mercer University (J.D., 1980).

** Assistant United States Attorney, Criminal Division, United States District Court, Middle District of Georgia. U.S. Military Academy (B.S., 1972); Walter F. George School of Law, Mercer University (J.D., 1980).
II. FOURTH AMENDMENT

In *United States v. Ford*, the Eleventh Circuit decided for the first time whether surveillance of a home by law enforcement officers using a thermal imager constitutes a search under the Fourth Amendment. In that case, the defendant owned a mobile home which was located on land leased by Ford and his co-defendant in Venus, Florida. Law enforcement officers received information that the defendants were growing marijuana inside the mobile home. The officers entered the defendants' property over a locked gate and traveled a quarter of a mile onto the leased property where they established surveillance in thick foliage approximately thirty-five yards from the mobile home.

An agent viewed the mobile home through a thermal imager, which is a passive, non-intrusive device which measures infrared heat. The agent determined that the mobile home was emitting an inordinate amount of heat through its floor and walls which was consistent with the generation of excess heat from artificial lights used in indoor marijuana growing operations. Based on information gained from the thermal imager and from other sources, the agents obtained a search warrant for the mobile home. When the agents executed the search warrant, they discovered a sophisticated hydroponic laboratory and over four hundred marijuana plants.

On appeal, Ford challenged the district court's denial of his suppression motion in which he contended that the use of the thermal imager to detect heat emitted from his mobile home was an unconstitutional, warrantless search. The Eleventh Circuit held that thermal imagery, as used by the agents in this case, was not an unreasonable search under the Fourth Amendment. The court determined that Ford made no attempt to conceal the heat generated by his marijuana operation. Thus, he did not exhibit a subjective expectation of privacy in the heat emitted by his mobile home. Even if Ford had a subjective expectation of privacy in his vented heat, the court stated that it is not one that

1. 34 F.3d 992 (11th Cir. 1994).
2. Id. at 993.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id. at 994.
9. Id. at 997.
10. Id. at 995.
A significant issue which was not addressed by the court was whether the agents conducted a warrantless search by invading the curtilage of the mobile home. The Eleventh Circuit ruled that the defendant waived the curtilage issue by not raising it in his pretrial suppression motion.

In United States v. McGregor, the Eleventh Circuit addressed the issue of whether law enforcement officers created exigent circumstances when they made a warrantless entry into the defendant's house. United States Customs inspectors at a mail examining facility in Miami discovered cocaine in a package that had been sent from Peru. The inspectors decided to make a controlled delivery and obtained a warrant to place a beeper inside the package of cocaine; the beeper would alert the inspectors when the package was opened. The package was delivered to McGregor's home and the agents set up surveillance outside the home. Almost six hours after the delivery, the beeper sounded indicating that the package had been opened. The inspectors then entered the defendant's house without a warrant and arrested him.

In a motion to suppress, the defendant argued that the agents created the exigency by planting the beeper in the package, and that this made their warrantless search unreasonable. The majority of the Eleventh Circuit panel disagreed stating that the planting of the beeper did not create the exigency. The exigency resulted from the package being
opened and the tracing device being discovered. The court determined that the agents reasonably believed that, once the package was opened, the cocaine could be destroyed if they did not immediately take action. The court placed particular emphasis on the agents' uncertainty regarding when, where, or by whom the package would be opened, although McGregor was suspected.

The court concluded that, under the circumstances of this case, including the disposability of the cocaine, the inspectors did not act unreasonably when they decided that obtaining a warrant would be impractical.

There were some troubling facts in this case which lent credence to the dissenting judge's position that the agents created the exigency and a warrant could have been obtained. Prior to the delivery of the package, the inspectors initially attempted to get a warrant from a Florida state magistrate to enter McGregor's home if the beeper sounded. These efforts were abandoned when they were informed that, under Florida law, they were required to wait fifteen minutes after the beeper sounded before entering the house. The dissenting judge also noted that the agents had over five hours before the beeper indicated that the package had been opened to obtain a federal warrant, which would not have contained the waiting period required under Florida law. This case is an illustration of the reluctance by judges to second-guess judgment calls of law enforcement officers made during rapidly developing undercover investigations, unless they appear to be inherently unreasonable or made in bad faith.

In United States v. Smith, the Eleventh Circuit considered the issue of standing to object to the warrantless search of a letter which contained LSD. In that case, United States Postal inspectors had obtained information that Smith was receiving LSD through the mail. In the course of the investigation, the inspector learned that Smith had asked a mail carrier about mail going to another person's address. The inspector subsequently intercepted an envelope addressed to this other person which bore a crossed-out address to Smith. The inspec-

24. Id.
25. Id.
26. Id.
27. Id.
28. Id. at 1068.
29. Id.
30. Id. at 1071, 1073 (Kravitch, J., dissenting).
31. 39 F.3d 1143 (11th Cir. 1994).
32. Id. at 1144.
33. Id.
34. Id.
tor confronted the recipient of the letter and informed her that they believed she was being used to receive drugs in the mail. The addressee of the letter said that the letter belonged to Smith, but she gave the inspector permission to open the letter in her presence. The envelope contained LSD impregnated on blotter paper. Prior to trial, Smith filed a motion to suppress the evidence seized from the envelope.

The Eleventh Circuit held that Smith did not have a legitimate expectation of privacy in the envelope and thus had no standing to object to the search of its contents. The court based this decision on equivocal testimony which Smith gave at the suppression hearing regarding his ownership interest in the letter, and the fact that he was neither the sender nor the addressee of the letter.

The court declined to establish a bright line rule that a person who is neither the sender nor addressee of the letter could never have standing to object to the search of the letter. The implication of the court's ruling is that, had the defendant not equivocated concerning his ownership interest in the letter, he could have had standing to challenge the search even though his name did not appear on the envelope.

In United States v. Harris, the Eleventh Circuit upheld the validity of a search warrant in a complex drug and money laundering conspiracy, notwithstanding the fact that most of the information contained in the search warrant affidavit recited events which took place over two years prior to the application for the warrant. The court noted that the affidavit was sufficiently updated with contemporaneous information which overcame the defendant's claim that the search warrant was based on stale information. The updated information consisted of the defendant's failure to report earnings or file income tax returns and alleged that as of one week prior to the search, records indicated that no state tax was being withheld for the defendant. Of greater significance to the court were the facts in the affidavit which indicated that the defendant was maintaining an ongoing relationship with his co-

35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 1144-45.
40. Id.
41. 20 F.3d 445 (11th Cir. 1994).
42. Id. at 451.
43. Id.
44. Id.
conspirators as reflected by the observation of the co-conspirators at his house. In rejecting the defendant's staleness claim, the court stated that the updated information supported the reasonable inference that criminal activity was continuing because it showed that Harris had no visible source of income, yet owned a large house, and that he continued to associate with members of the drug conspiracy. This updated information made it probable that drug-related activities took place or that drug-related documents were stored at his house.

This case demonstrates that the Eleventh Circuit court of appeals will apply a more lenient standard when reviewing staleness challenges to search warrants if the affidavit alleges a long standing and protracted criminal conspiracy which is inherent in large-scale drug trafficking operations. In reaching this conclusion, the court cited United States v. Bascaro, for the proposition that "information supporting probable cause receives liberal treatment when [a] large drug conspiracy is involved."

III. FIFTH AMENDMENT

A. The Right to Counsel and Self-Incrimination

The fifteen-year-old defendant in Coleman v. Singletary was convicted for the murder of his ten-year-old sister. After strangling her, wrapping her body in a blanket and hiding it in a closet, the defendant rode his bicycle to a store where he bought some candy and a soft drink. When arrested by a police officer, the defendant was advised of his Miranda rights and subsequently interviewed. At some point during the interview, a public defender was notified of Coleman's arrest; the public defender then sent word to the interviewing officers to "cease any further interview at this time." When this request was relayed...
to the defendant, he gave an equivocal response concerning his desire to end the interview. After asking a few clarifying questions, the officers continued with the interview. On appeal of the denial of his habeas corpus petition, the defendant contended that the officers ignored his invocation of his *Miranda* rights, arguing that his response to the officer's statement about what the public defender had said was a clear invocation of his right to remain silent.

The court of appeals affirmed the denial of the habeas petition, noting that the rule in the Eleventh Circuit with regard to equivocal requests for counsel is no longer viable in light of the Supreme Court's recent decision in *Davis v. United States*. Prior to *Davis*, the rule in this circuit required that "[w]hen a defendant makes an equivocal request for an attorney during a custodial interrogation, 'the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified.'" This same rule was applied to equivocal invocations of the right to terminate questioning. In changing this requirement, the court acknowledged that "our prior decisions must yield to supervening decisions of the Supreme Court." Thus, "decisions creating a duty to clarify a suspect's intent upon an equivocal invocation of counsel are no longer good law." Adopting the *Davis* rule, the court of appeals held as follows:

A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation.

---

55. *Id.* at 1423. The defendant's specific response was "I don't know. But if [the public defender] said to stop it I don't want to do what he said not to do." *Id.*
56. *Id.*
57. 114 S. Ct. 2350, 2355 (1994).
58. 30 F.3d at 1423-24 (citing *Owen v. Alabama*, 849 F.2d 536, 539 (11th Cir. 1988) (quoting *Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979) (emphasis in original)).
59. *Id.* at 1424. *See also* *United States v. Pena*, 897 F.2d 1075, 1081 (11th Cir. 1990).
60. 30 F.3d at 1424 (citing *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521 (11th Cir. 1994)).
61. *Id.*
62. *Id.*
B. Double Jeopardy

In *United States v. Quiala*,
conduct of the defendant's attorney resulted in an unexpected windfall for the defendant. Quiala and nine co-defendants were being tried in Key West, Florida on cocaine charges. Quiala had requested a severance; that request was denied, but the trial court did allow Quiala to proffer certain evidence after the jury had returned its verdicts against the co-defendants and before they deliberated as to his charges. This bifurcated trial could not be completed in a day, so the trial judge scheduled closing arguments for the following morning. Quiala's attorney, Ms. Diane Ward, did not appear in court the next morning. Ms. Ward had taken a flight the night before from Key West to Miami and was unable to get back to Key West in time for trial. After waiting approximately an hour for Ms. Ward, the district court declared a mistrial based upon defense counsel's failure to appear. Prior to his second trial on the same charges, Quiala filed a motion to dismiss the indictment based on double jeopardy grounds. This motion was denied, and Quiala was tried, convicted and sentenced to 235 months incarceration.

On appeal, Quiala contended that the trial court had erred in *sua sponte* declaring a mistrial; the government asserted that the mistrial was declared at the request, or at least at the inducement, of the defendant. The court of appeals first noted that it is possible for a trial court to grant a mistrial after it has denied a defendant's motion which states a particular ground, if later events at the trial support that ground. However, it was clear to the court that such was not the case at Quiala's first trial. Although Quiala had been seeking a severance and a mistrial, the reasons he gave in his motions were not at all related to why the trial court declared a mistrial, *i.e.*, the unexcused absence of defense counsel. Under these circumstances, the declaration of a mistrial was clearly without consent of the defendant.

The government also suggested that Ms. Ward's absence be considered a strategic decision by defense counsel to obtain a mistrial; if so characterized, retrial would not be barred. *Id.* (citing *United States v. Miller*, 742 F.2d 1279, 1285 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)). The court of appeals found no evidence to support the contention that Ward's absence was deliberate and rejected that argument as well. *Id.*
if this were the case, then the retrial would be legitimate. Clearly, the mistrial was the district court's response to the delay and inconvenience caused by Ms. Ward's conduct, but the court of appeals determined that such conduct "does not constitute a manifest necessity to justify granting a mistrial." As the Double Jeopardy Clause does not contain a judicial economy exception. As a result, the court reversed the district court's order denying Quiala's motion to dismiss the indictment and ordered the district court to vacate the judgment and sentence rendered in the retrial.

IV. SIXTH AMENDMENT

A. Confrontation Clause

In United States v. Ross, the Eleventh Circuit considered for the first time whether the admission of foreign business records pursuant to 18 U.S.C. § 3505 violated the Sixth Amendment's Confrontation Clause. This case concerned a prosecution related to an international marijuana and cocaine conspiracy involving two major drug organizations. During the trial, the government introduced into evidence certain foreign business records pursuant to 18 U.S.C. § 3505. This section 3505 allows the admission of foreign records of regularly conducted activity if supported by an affidavit meeting specifically delineated standards. The central issue was whether the use of an affidavit to authenticate foreign business records offends the Confrontation Clause.

The court noted that, unlike Rule 803(6) of the Federal Rules of Evidence, Section 3505 does not require the custodian of the business records to appear in court and, thus, does not qualify as a "firmly-rooted"

67. Id. at 571 (citations omitted).
68. Id. at 572.
69. Id. (citing United States v. Chica, 14 F.3d 1527, 1532 (11th Cir. 1994)).
70. Id. In a concurring opinion, Judge Black stressed that the trial court's frustration was the result of Ms. Ward's conduct and that such conduct was inconsiderate and a result of poor judgement. Recognizing that her client should not be penalized for her conduct, it was nevertheless suggested that she "might well have deserved sanctions." Id. at 572-73 (Black, J., concurring).
71. 33 F.3d 1507 (11th Cir. 1994).
72. Id. at 1515-16.
73. Id. at 1510.
74. Id. at 1515.
75. Id.
76. Id.
Therefore, the court's inquiry was whether section 3505 bore sufficient guarantees of trustworthiness to overcome the Sixth Amendment's constitutional hurdle to the admissibility of hearsay. The court concluded that the bank records were sufficiently reliable because the affidavit indicated that the record keeper, under criminal penalty in his own country, asserted that the records were kept in the ordinary course of business.

In that case the court also considered the trial judge's imposition of an absolute ban on recross-examination of witnesses. The court noted that, as opposed to cross-examination, a defendant has no constitutional right to recross-examination. However, a defendant does have a limited right to recross-examination when a new matter is brought out on redirect examination. The court concluded that the Confrontation Clause had been violated when the defendant was denied an opportunity to recross-examine a government witness regarding new material elicited on redirect examination. However, the court found the error to be harmless.

The admission of confessions by nontestifying co-defendants continues to cause significant problems for both trial and appellate courts. In United States v. Costa, the Eleventh Circuit reversed a conviction based on the improper admission of a co-defendant's confession. This case resulted from the prosecution of several defendants who were involved in a cocaine conspiracy in Alabama. One of the defendants, Mario DaCosta, made a custodial confession in which he implicated three co-defendants. DaCosta's custodial confession was the only direct evidence that the other defendants were knowing members of the conspiracy.

DaCosta was tried first after the district court granted a motion, to sever his trial from that of the co-defendants. After DaCosta's

77. Id. at 1516.
78. Id. at 1517.
79. Id.
80. Id. at 1518.
81. Id.
82. Id.
83. Id.
84. 31 F.3d 1073 (11th Cir. 1994).
85. Id. at 1079.
86. Id. at 1075.
87. Id. at 1076.
88. Id.
89. Id.
conviction, the government sought to call him as a government witness against the other defendants.\textsuperscript{90}

At the trial of the co-defendants, DaCosta was granted use immunity by the government but refused to testify.\textsuperscript{91} Given the self-imposed unavailability of DaCosta, the government proposed to introduce his custodial confession through the testimony of a DEA agent.\textsuperscript{92} The defendants objected on the grounds that DaCosta's confession was inadmissible hearsay and would violate their constitutional right of confrontation.\textsuperscript{93} The district court ruled that the confession was admissible as a statement against penal interest under Rule 804(b)(3) of the Federal Rules of Evidence.\textsuperscript{94}

The court of appeals reversed on the grounds that DaCosta's custodial confession was not genuinely against his penal interest to the extent that it directly implicated his co-defendants in the conspiracy.\textsuperscript{95} The court referred to the recent Supreme Court case of Williamson \textit{v. United States},\textsuperscript{96} which requires the trial court to make a fact-intensive inquiry of the surrounding circumstances of the statement in order to determine if it is truly against the declarant's penal interest.\textsuperscript{97} The Eleventh Circuit found that the district court had failed to conduct such an inquiry.\textsuperscript{98} The court noted that confessions by one defendant are presumptively unreliable as to the passages detailing other defendants' conduct or culpability because those passages may well be the product of the declarant's desire to shift or spread blame, curry favor, or divert attention to another.\textsuperscript{99}

\textit{In United States v. Deeb},\textsuperscript{100} the court reached a different result when it considered the admissibility of the testimony of a co-conspirator given at a prior trial at which the defendant was neither present nor represented.\textsuperscript{101} Deeb and his co-defendant, Biamby, were charged along with five others with importing approximately 490 kilograms of cocaine in violation of federal narcotics laws. Biamby pled guilty and

\begin{thebibliography}{99}
\bibitem{90} Id.
\bibitem{91} Id.
\bibitem{92} Id. at 1076-77.
\bibitem{93} Id. at 1077.
\bibitem{94} Id.
\bibitem{95} Id.
\bibitem{96} 114 S. Ct. 2431 (1994).
\bibitem{97} Id. at 2437.
\bibitem{98} 31 F.3d at 1077-78.
\bibitem{99} Id. at 1078.
\bibitem{100} 13 F.3d 1532 (11th Cir. 1994).
\bibitem{101} Id. at 1533.
\end{thebibliography}
agreed to testify as a government witness. Deeb failed to appear at the trial and the district court severed the charges against Deeb and proceeded with the trial against the remaining defendants. Biamby testified at that trial but neither Deeb nor his counsel were present for any part of the trial.

Deeb was subsequently arrested in the Dominica Republic and brought to Miami for trial. Biamby was unable to testify at Deeb's trial because he was terminally ill with AIDS and was suffering progressive memory deterioration. Biamby's testimony from the first trial was admitted by the district court, in part, pursuant to the residual hearsay provision of Rule 804(b)(5) of the Federal Rules of Evidence.

On appeal, Deeb argued that Biamby's testimony was not admissible under Rule 804(b)(5) and that its admission violated his rights under the Sixth Amendment's confrontation clause. The issue before the court was whether Biamby's former testimony exhibited the indicia of reliability necessary for admission under the residual hearsay exception of Rule 804(b)(5). After an extensive analysis of the requirements of the residual hearsay exception, the court concluded that the co-defendants' cross-examination of Biamby during the first trial afforded his former testimony the particularized guarantees of trustworthiness required for admission under the Confrontation Clause.

B. Right to Counsel

Can a trial, or a portion of a trial, not be a "critical stage" for purposes of a Sixth Amendment right to counsel? This issue was addressed by the court in Vines v. United States, with a result which many may find surprising. Miguel Vines and two co-defendants were indicted on drug charges; Vines and one of the co-defendants were tried together in a trial which lasted two days and resulted in Vines being acquitted of one count and convicted of the other. On the afternoon of the first day of trial, the court excused Vines's attorney for the remainder of the day, even though the government thereafter presented two witnesses. This excusal
was at the request of counsel and came after Vines had purportedly agreed to the absence.\footnote{113} On collateral review, Vines contended that his Sixth Amendment right to counsel had been violated in two respects: first, he did not voluntarily and knowingly waive his right to counsel, and second, he was denied effective assistance of counsel based on his attorney's absence during the taking of evidence.\footnote{114} In support of his contentions, Vines argued that the temporary absence of counsel results in an irrebuttable presumption of prejudice, citing United States v. Cronic.\footnote{115} The court of appeals disagreed:

Vines argues that under Cronic the taking of evidence is a critical stage of trial per se. Vines proffers no authority that compels this court to reach that conclusion; and, we decline to give birth to a rule that the taking of evidence is necessarily a critical stage of trial . . . . Where, as in this case, no evidence directly inculpating a defendant is presented while that defendant's counsel is absent, we decline to hold that counsel was absent during a critical stage of trial within the meaning of Cronic.\footnote{116}

The court then turned to what it considered the "appropriate analytical framework" for deciding the issue.\footnote{117} First, it determined that the temporary absence of Vines' counsel was a "trial error" and not a "structural defect", the importance of the distinction being that trial errors are subject to the harmless-error analysis.\footnote{118} The court phrased

\footnote{113} Id. at 1126 n.3. Although the court mentioned the colloquy between the trial court and Vine's attorney as to the requested absence, it specifically declined to address the issue of whether Vines had made a legitimate waiver of his right to counsel. Id.

\footnote{114} Id. at 1126-27.

\footnote{115} 466 U.S. 648 (1984). In Cronic, the Supreme Court stated that prejudice would be presumed if: (1) counsel is completely denied; (2) counsel is denied at a critical stage of trial; or (3) counsel fails to subject the prosecution's case to meaningful adversarial testing. Id. at 659.

\footnote{116} 28 F.3d at 1128. Two witnesses were presented by the government after Vines' attorney had been excused for the day: the Customs case agent and the owner of the warehouse where the drugs were to be sent. Each was cross-examined by counsel for Vines' co-defendant. Exhibits were also admitted into evidence during the testimony of these witnesses. Id. at 1133. The dissent was particularly forceful on this point, questioning the majority's attempt to extract portions of a trial and label them as non-critical for Sixth Amendment purposes. Id. at 1139, 1141.

\footnote{117} Id. at 1128.

\footnote{118} Id. at 1129. The most important distinction between trial errors and structural defects is that the former can be assessed in the context of other evidence to determine whether or not they are harmless, whereas the latter are of such severity that they affect the conduct of the entire trial. Id. (citing Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993, cert. denied, 114 S. Ct. 1107,
its task as determining "whether the temporary absence of Vines's counsel during the testimony of [the two witnesses] had a substantial influence on the jury's verdict in this case."\textsuperscript{119} The majority concluded that it did not, and thus, the absence of Vines's counsel was harmless.\textsuperscript{120}

In a lengthy dissent, Judge Birch took issue with every phase of the majority's analysis because, in his opinion, they had failed to identify what was the crucial issue in the case:

By taking a harmless error analytical approach, the majority has overlooked the principal constitutional violation and issue on appeal: waiver of the Sixth Amendment right to counsel. Counsel's \textit{absence from trial}, complete or temporary, is a fundamental constitutional deprivation that is not amenable to harmless error exception. While constitutional waiver of the right to counsel is recognized, it is doubtful that such waiver occurred in this case.\textsuperscript{121}

The dissent's concern over the legitimacy of the waiver was based on the fact that Vines did not speak or "comprehensively understand English,"\textsuperscript{122} and there was no indication that an interpreter was present when the trial court excused his attorney.\textsuperscript{123} Nor was there anything in the record to indicate that the trial court had made any attempt to determine if Vines's waiver was knowingly, intelligently and voluntarily made.\textsuperscript{124} Thus, it was the waiver issue which the dissent considered as crucial for determination on appeal. And it was this very issue which the majority chose not to address.\textsuperscript{125}

In \textit{Rogers v. Zant},\textsuperscript{126} the petitioner's request for relief was granted by the district court on the ground that petitioner had received ineffective assistance of counsel; the court of appeals reversed this decision.\textsuperscript{127} Rogers had been convicted and sentenced to death for the murder of his neighbor. An investigation of the case revealed that Rogers may have been intoxicated and under the influence of an hallucinogen at the time of the murder, but his trial counsel chose not

\textsuperscript{119} Id. at 1130.
\textsuperscript{120} Id. at 1131.
\textsuperscript{121} Id. at 1131-32 (Birch, J., dissenting).
\textsuperscript{122} Id. at 1132.
\textsuperscript{123} Id. at 1134.
\textsuperscript{124} Id. at 1136.
\textsuperscript{125} Id. at 1126 n.3.
\textsuperscript{126} 13 F.3d 384 (11th Cir. 1994).
\textsuperscript{127} Id. at 388.
to investigate what effects that may have had on him, nor did they rely on the intoxication issue at trial and sentencing. This decision was based on the attorneys' knowledge of the community and how a jury would likely react to such evidence presented in mitigation. The district court decided that the failure to investigate and present evidence of the effects of the drug rendered counsel ineffective. In reversing this decision, the court of appeals stressed that it is not necessary for trial counsel to do a thorough investigation prior to making all strategic decisions in a case; "[b]y its nature, 'strategy' can include a decision not to investigate." In addition, it is not necessary for defense lawyers to assert every nonfrivolous defense in order to avoid being labeled ineffective; such "stacking" of defenses may very well damage the credibility of the defense, as a "multiplicity of arguments or defenses hints at the lack of confidence in any one."

V. SENTENCING GUIDELINES

A substantial number of cases decided by the Eleventh Circuit during the survey period involved issues related to the application of the Federal Sentencing Guidelines. Although most of the cases discussed in this section do not involve constitutional issues, the decision was made to include them because of the significance of the cases to the court's application of the Sentencing Guidelines.

In a case of first impression, the appellant in United States v. Byse challenged on equal protection grounds the harsher sentences imposed for offenses involving crack cocaine. Byse contended that 21 U.S.C. § 841(b)(1) and U.S.S.G. § 2D1.1(c) had a disparate impact on African Americans and Hispanics because the penalties for possession and distribution of crack cocaine were more severe than those for powder cocaine. It was the first case in the Eleventh Circuit in which an appellant contended that this disparate impact was the result of intentional discrimination by Congress against minorities. In denying Byse's claim, the court noted that he failed to produce any

128. Id. at 387.
129. Id. at 385.
130. Id. at 387.
131. Id. at 388 (citing Jones v. Barnes, 103 S. Ct. 3308, 3313 (1983)).
132. 28 F.3d 1165 (11th Cir. 1994).
133. Id. at 1167.
134. Id. at 1168. The Sentencing Guidelines treat one gram of cocaine base or "crack" cocaine as the equivalent of one hundred grams of powder cocaine for sentencing purposes. U.S.S.G. § 2D1.1(c) (Drug Equivalency Tables). Title 21 U.S.C. § 841(b)(1) provides certain mandatory minimum sentences using the same 100 to 1 ratio.
135. 28 F.3d at 1168.
evidence whatsoever of discriminatory purpose by Congress or the Sentencing Commission in establishing harsher sentencing penalties for crack cocaine. The court reviewed the legislative history of 21 U.S.C. § 841(b)(1) which revealed that Congress imposed harsher penalties for crack cocaine than for powder cocaine because "it (1) has a more rapid onset of action, (2) is more potent, (3) is more highly addictive, (4) is less expensive than cocaine powder, and (5) has widespread availability."

The court was called upon to determine the meaning of "cocaine base" in United States v. Munoz-Realpe. Munoz-Realpe was arrested at Miami International Airport with six liquor bottles containing a liquid that tested positive for cocaine base. The defendant contended that, since the cocaine base was in liquid form, it could not be used without further processing and should be treated for sentencing purposes as cocaine powder. The government contended that even though the cocaine base was in liquid form, it met the scientific, chemical definition of cocaine base which required the harsher sentence.

The Eleventh Circuit disagreed and held that unless cocaine base had been processed into "crack cocaine," it is treated as cocaine hydrochloride (powder) for sentencing purposes. The court based its decision on the amendment to U.S.S.G. § 2D1.1(c), effective November 1, 1993, which contains the following definition: "'Cocaine base,' for the purposes of this guideline means 'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form."

The court noted that the sentencing guideline amendment eroded the precedental value of United States v. Rodriguez, in which the court had held that the term "cocaine base" was not limited to crack cocaine, but included all forms of cocaine base according to the scientific meaning of the term. The court left open the issue of whether the

136. Id. at 1169.
137. Id. (quoting United States v. Thurmond, 7 F.3d 947, 950-53 (10th Cir. 1993), cert. denied, 114 S. Ct. 1311 (1994)).
138. 21 F.3d 375 (11th Cir. 1994).
139. Id. at 376.
140. Id.
141. Id. at 377.
142. Id.
143. U.S.S.G. § 2D1.1(c) Explanation of terms following Drug Quantity Table.
144. 980 F.2d 1375 (11th Cir. 1992), cert. denied, 113 S. Ct. 3003 (1993).
145. 980 F.2d at 1377.
amended guideline definition of cocaine base would be applied retroactively.146

The issue of retroactivity was decided in United States v. Camacho.147 The Eleventh Circuit held that the amendment to U.S.S.G. § 2D1.1(c) defining cocaine base as "crack" was not intended by the Sentencing Commission to have retroactive effect.148 Thus, the amendment does not apply to defendants sentenced prior to November 1, 1993, the effective date of the amendment.149

There were also some significant developments in cases involving the clarification under the Sentencing Guidelines of "career offenders" and "armed career criminals." United States v. Stinson,150 was remanded to the Eleventh Circuit from the United States Supreme Court.151 Stinson had been convicted for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g), and was sentenced in July 1990 as a "career offender."152 At the time Stinson was sentenced, the conviction for possession of a firearm by a convicted felon was used as the predicate "crime of violence" necessary for establishing career offender status.153 After Stinson was sentenced, the Sentencing Commission amended the commentary to U.S.S.G. § 4B1.2 to provide that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon.154 The Eleventh Circuit decided to follow the Second and Fifth Circuits and applied the amendment retroactively.155 The effect of this decision is to significantly reduce the prison sentences of those defendants who had been previously classified as career offenders based on a predicate offense of possession of a firearm by a convicted felon.

Similarly, the Eleventh Circuit held in United States v. Oliver156 that possession of a firearm by a convicted felon does not constitute a "violent

---

146. 21 F.3d at 377 n.4.
147. 40 F.3d 349 (11th Cir. 1994).
148. Id. at 353-54.
149. Id. at 354.
150. 30 F.3d 121 (11th Cir. 1994).
151. Id. at 122.
152. Id. A defendant is a "career offender" if: (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1.
153. 30 F.3d at 122.
154. Id.
155. Id.
156. 20 F.3d 415 (11th Cir. 1994).
felony" within the meaning of U.S.S.G. § 4B1.4, which defines an armed career criminal.\textsuperscript{157}

In \textit{United States v. Lipsey},\textsuperscript{158} the court decided a case of first impression involving the classification of a career offender under U.S.S.G. § 4B1.1, based on two prior controlled substance convictions.\textsuperscript{159} Section 4B1.1 of the Sentencing Guidelines provides that a defendant convicted of a controlled substance felony offense should be treated as a career offender if he has two prior qualifying controlled substance convictions.\textsuperscript{160} In this case, Lipsey's career offender status was based in part on an underlying state conviction for possessing valium with intent to distribute.\textsuperscript{161} Lipsey urged the court to look beyond the elements of the crime to the facts underlying his conviction. He contended that, although he pleaded guilty to the state offense, at the time he entered his plea, he denied that he had any intent to distribute.\textsuperscript{162} The court held that a court should look at the elements of the convicted offense, not the conduct underlying the conviction, in determining if a prior conviction is a controlled substance offense to qualify the defendant as a career offender.\textsuperscript{163} This case is an illustration of the reluctance of trial and appellate courts to become involved with issues that require factual inquiries into the specific conduct underlying an earlier conviction, provided the conviction appears valid on its face.

VI. MISCELLANEOUS

A. Right to Appeal

In \textit{United States v. Ortega-Rodriguez},\textsuperscript{164} the court established a new test for determining whether a fugitive has lost his or her right to appeal. Ortega-Rodriguez and two co-defendants were convicted of several drug charges. Although his two co-defendants made it to

\textsuperscript{157} A defendant who is subject to an enhanced sentence under 18 U.S.C. § 924(e) is an armed career criminal. U.S.S.G. § 4B1.4. Under 18 U.S.C. § 924(e), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) (possession of firearm by convicted felon) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. U.S.S.G. § 4B1.4, comment n.1.

\textsuperscript{158} No. 93-9076, slip op. 755 (11th Cir. Dec. 27, 1994).
\textsuperscript{159} Id., slip op. at 756.
\textsuperscript{160} U.S.S.G. § 4B1.1.
\textsuperscript{161} No. 93-9076, slip op. at 756.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} 13 F.3d 1474 (11th Cir. 1994).
sentencing, Ortega-Rodriguez did not, and the trial court sentenced him in absentia. When finally apprehended, he was indicted for contempt of court and failure to appear but, at his counsel’s request, he was resentenced on the drug convictions. Subsequently, he filed a notice of appeal on the drug convictions; the government responded by filing a motion to dismiss based on the fugitive dismissal rule established in United States v. Holmes.¹⁶⁵ That motion was granted, Ortega-Rodriguez filed a petition for certiorari and the Supreme Court granted the petition. The Supreme Court then vacated the court of appeal’s order and remanded the case for further consideration.¹⁶⁶ In essence, the court of appeals was instructed to fashion a less stringent rule for determining when a fugitive would lose the right to appeal.¹⁶⁷ The concern was that there be more room for discretion when applying the automatic dismissal rule to a former fugitive’s appeal.¹⁶⁸

In response, the court of appeals established a two prong test to apply when determining whether a former fugitive has forfeited the right to appeal. The court held that such an appeal should be dismissed unless the defendant can show that “(1) granting the appeal is not likely to result in an undue burden on the government; and (2) the defendant’s flight has not resulted in nor [sic] will not result in significant interference with the operation of the judicial process in either the district court or the appellate court.”¹⁶⁹ The court enumerated several factors to be considered in determining whether a defendant has met this burden. For instance, as to the first prong, attention should be paid to the availability of evidence and witnesses in the event of remand for a new trial, the complexity of proof of the substantive crime, and any burden.

¹⁶⁵ 680 F.2d 1372 (11th Cir.1982). In Holmes, the Eleventh Circuit ruled that “a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control.” Id. at 1373.
¹⁶⁶ 13 F.3d at 1475.
¹⁶⁷ According to the Supreme Court, the Eleventh Circuit in Holmes had “overextended” what has been called the “disentitlement” theory:
No pervasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.
¹⁶⁸ 13 F.3d at 1476.
¹⁶⁹ Id.
the government undergoes as a result of the appellate process itself.\textsuperscript{170} Concerning the second prong, a factor to consider is what the court called "the duplication of appellate efforts."\textsuperscript{171} In essence, this means that if a fugitive defendant had co-defendants and their appeals were considered by the court, then the court is not going to be inclined to look at the case again for the fugitive.\textsuperscript{172} These factors were offered by the court as being illustrative and not definitive of the things to consider in applying the new test.\textsuperscript{173} Only time will tell if this new rule will have any noticeable effect on this type appeal; nevertheless, it does give the unsuccessful fugitive more grist to argue that the appellate court should consider the merits of his appeal, notwithstanding his conduct.

B. Guilty Plea

In an issue of first impression in this circuit, and apparently in any circuit, the court in \textit{United States v. Morse}\textsuperscript{174} considered whether or not it is required to inform a defendant pleading guilty that in doing so, he may become ineligible for receipt of federal benefits. Donald Morse pled guilty in district court to various drug charges and was sentenced to 105 months in prison; additionally, the court ordered that Morse be ineligible for federal benefits for a period of five years.\textsuperscript{175} On appeal, Morse contended that his plea was invalid because the district court did not tell him that he could lose federal benefits if he pled, and this was required by Rule 11.\textsuperscript{176} The court found this contention to be without merit: "Rule 11 does not require a sentencing court to inform a defendant of every possible consequence of his plea."\textsuperscript{177} In addition, the pre-sentence report prepared by the probation officer specifically set out the statutory and guideline provisions which allow a sentencing judge to deny federal benefits; because the defense indicated that the report had been read and there was no objection to it, there was no ground for complaint on appeal. Accordingly, the guilty plea was not vacated and Mr. Morse was left with only one source of federal support for the next 105 months.

\begin{flushleft}
\textsuperscript{170} \textit{Id.} at 1477.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.} at 1477 n.6. Query: would the additional burden the government must endure in writing a second brief and arguing a second time—assuming a co-defendant's appeal had been completed—be considered sufficient to find that a former fugitive was not entitled to an appeal?
\textsuperscript{174} 36 F.3d 1070 (11th Cir. 1994).
\textsuperscript{175} \textit{Id.} at 1071.
\textsuperscript{176} \textit{Id.} at 1072.
\textsuperscript{177} \textit{Id.} (quoting \textit{Holmes v. United States}, 876 F.2d 1545, 1548 (11th Cir. 1989)).
\end{flushleft}
C. In-Custody Statements and Miranda

As a rule, Miranda warnings must be given prior to any “custodial interrogation.” However, general “on-the-scene questioning” by law enforcement to determine the facts and circumstances of a crime or other general questioning of citizens does not require that the warnings be given. What if the general “on-the-scene questioning” occurs in a prison where all of the potential witnesses are without question in custody; does a person’s status as an inmate automatically constitute “in-custody” for Miranda purposes? This was the issue of first impression for the court in Garcia v. Singletary. While extinguishing a fire set by Garcia, a deputy asked Garcia why he had started the fire. Garcia’s reply was “I no get my canteen . . . . I got my rights.” After his conviction for arson and exhaustion of his state remedies, Garcia proceeded to federal court, filing his petition for writ of habeas corpus. His claim was that it was error to admit the above incriminating statement because the deputy had failed to inform him of his Miranda rights. Neither the district court nor the court of appeals accepted Garcia’s argument that because he was in prison he was necessarily “in-custody” for Miranda purposes. After considering how the Fourth and Ninth Circuits had handled the issue, the court determined that to trigger Miranda in a prison setting, there must be some change in the surroundings of the prisoner which result in an “added imposition on his freedom of movement.” Because the totality of the circumstances did not evidence such an additional restraint of freedom in Garcia’s case, and because the deputy’s question was basically a “spontaneous reaction to a startling event,” the court found that Miranda warnings were not a prerequisite and that Garcia’s incriminating statement was properly admitted against him.

D. Batson

In dealing with Batson challenges, there are a number of different ways the courts can analyze an attorney’s exercise of peremptory strikes to determine whether or not there is a discriminatory intent operating. In Hollingsworth v. Burton, the prosecution and lower courts focused...
on comparing stricken white jurors with stricken black jurors and determining whether or not there was some parity as to disqualifying factors which would justify the strikes, regardless of race. The court of appeals issued a reminder that although such an analysis is appropriate, it is likewise appropriate in a Batson challenge to compare stricken blacks to seated whites; the court then applied this analysis. It is important to note that even if a seated juror and one who was struck had a common disqualifying factor, the court did not find that dispositive of discriminatory intent; the totality of factors was considered to decide if any racial animus existed. The court determined that there were “significant non-race-based differences between seated white jurors and stricken black potential jurors” to find that the prosecution’s exercise of peremptory strikes was legitimate.

E. Prosecutorial Misconduct

The court of appeals instructed the district court to grant a writ of habeas corpus in Davis v. Zant based on the overzealous objection and argument of the prosecution. Davis and a co-defendant were charged with murder. Some six months before Davis’ trial, his co-defendant confessed that she had committed the murder and not Davis. She consistently maintained this story throughout Davis’ trial, although she would not testify at his trial; the State was aware of the co-defendant’s admission. When attempts were made by Davis’ counsel to inform the jury of the co-defendant’s confession, the State objected on hearsay grounds, and in the course of the objection stated that it was not true that the co-defendant had confessed. The court agreed that the hearsay objection was entirely appropriate, but the surplusage claiming that the confession had not been made was improper because the State knew that the confession had been made. Even so, the court stated that this “miscue” alone would not have amounted to a constitutional violation warranting a new trial. However, in addition to this indiscretion, the prosecutor made numerous references in his closing
argument that the claim of his co-defendant's confession was a last minute fabrication by Davis that it was "thought up" during trial, after the prosecution had rested. \textsuperscript{193} These arguments were made by the State's counsel even though he knew that the co-defendant had in fact confessed. The court found that "the prosecutor intentionally painted for the jury a distorted picture of the realities of this case in order to secure a conviction" \textsuperscript{194} and that, considered in the context of the entire trial, these improper remarks rendered the trial fundamentally unfair. \textsuperscript{195}

\textsuperscript{193} \textit{Id.} at 1547.
\textsuperscript{194} \textit{Id.} at 1549.
\textsuperscript{195} \textit{Id.} at 1551.