Constitutional Civil Law

Albert Sidney Johnson
Constitutional Civil Law

by Albert Sidney Johnson*

The 1996 survey period was a reasonably quiet year for the United States Court of Appeals for the Eleventh Circuit in terms of dramatic developments in civil constitutional law. The most significant labor of the court of appeals was directed toward accommodation of developing law in the United States Supreme Court surrounding the application of evidentiary sufficiency standards to qualified immunity inquiries.¹ The Eleventh Circuit continued its resolve against exercising pendent appellate jurisdiction in the aftermath of the Supreme Court's directive in Swint v. Chamber County Commission.² The court of appeals had occasion to consider, in three separate contexts,³ the municipal final policymaker issue in advance of the Supreme Court's pending opinion.⁴ Although the Eleventh Circuit continues to hold fast against any proposed erosions of its holding on the availability of substantive due process relief,⁵ it continues to be given opportunities to recede from that position.⁶ As the court of appeals finds its way toward stronger

* Partner in the firm of Johnson & Montgomery, Atlanta, Georgia. Mercer University (B.A., 1956); Walter F. George School of Law (J.D., 1959).

² 514 U.S. 35 (1995). Historically, the Eleventh Circuit has liberally exercised the concept of pendent appellate jurisdiction to consider appeals of government entities and official capacity defendants along with appeals from denials of qualified immunity. The Supreme Court found this practice to be beyond the appellate authority of a court of appeals.
⁶ Bell v. City of Demopolis, 86 F.3d 191 (11th Cir. 1996); C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996).
consensus in the civil constitutional arena, the Supreme Court's activity on the subject prevents the court of appeals from becoming clearly focused.

I. PRELIMINARY ISSUES

A. Immunity

1. Qualified Immunity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.\(^7\) The Eleventh Circuit uses a two-step analysis to determine whether qualified immunity is available. First, the defendant must show that he acted within the scope of his discretionary authority.\(^8\) Once the defendant has made such a showing, the plaintiff must show that the defendant violated the plaintiff's clearly established statutory or constitutional rights.\(^9\) A government official acts within his discretionary authority if the actions were "[1] undertaken pursuant to the performance of his duties and [2] within the scope of his authority."\(^10\)

The majority of cases decided by the Eleventh Circuit under the qualified immunity doctrine continue to focus on a determination of whether the plaintiff has shown that a defendant's conduct violated clearly established law. In \textit{Anderson v. Creighton},\(^11\) the Supreme Court determined that the constitutional right alleged to be violated must be sufficiently established to inform the official that his conduct violated the law when viewed in light of the information available to a reasonable official.\(^12\) The Court in \textit{Anderson} established that the viability of an "objectively reasonable" standard in preserving immunity depended on the "level of generality at which the relevant 'legal rule' is to be identified."\(^13\) The \textit{Anderson} rule has been expressed by the Eleventh Circuit as follows: "[F]or qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel (not just suggest or allow

---


\(^8\) Jordan v. Doe, 38 F.3d 1559, 1565 (11th Cir. 1994); Ziegler v. Jackson, 716 F.2d 847, 849 (11th Cir. 1983).

\(^9\) Doe, 38 F.3d at 1565; Ziegler, 716 F.2d at 849.

\(^10\) Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988) (quoting Barker v. Norman, 651 F.2d 1107, 1121 (5th Cir. 1981)).


\(^12\) Id. at 641-42.

\(^13\) Id. at 639.
or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.\textsuperscript{14}

2. Qualified Immunity Sustained. In \textit{Heggs v. Grant,}\textsuperscript{15} the Eleventh Circuit sustained qualified immunity for a police chief when it was not clearly established that the policies, procedures, and precautions instituted to prevent inmate suicide were insufficient to protect the inmate from any known suicidal tendencies.\textsuperscript{16} Similarly, a shift supervisor was entitled to qualified immunity when he knew the inmate; had prior dealings with her; placed her in a cell from which blankets, sheets, and mattress had been removed; and checked on her every fifteen minutes.\textsuperscript{17}

The Eleventh Circuit, in \textit{Suissa v. Fulton County,}\textsuperscript{18} sustained a grant of qualified immunity on a finding that the law has not clearly established that an unsuccessful attempt to influence speech violates the First Amendment.\textsuperscript{19}

In \textit{Johnson v. Clifton,}\textsuperscript{20} police officers who testified against the chief of police before a grand jury were disciplined following an internal investigation of their own conduct.\textsuperscript{21} Because the officers claimed that the discipline was in retaliation for exercising their free speech rights by testifying before the grand jury, the court of appeals pointed out that a balancing test must be conducted to determine whether the officer was justified in disciplining the employees.\textsuperscript{22} The Eleventh Circuit upheld qualified immunity because the law was not clearly established that the police chief could not have taken the disciplinary action indicated by the internal affairs investigation before he knew about the allegedly protected speech.\textsuperscript{23}

\begin{thebibliography}{99}
\bibitem{14} Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc).
\bibitem{15} 73 F.3d 317 (11th Cir. 1996).
\bibitem{16} Id. at 320-21.
\bibitem{17} Id. at 320.
\bibitem{18} 74 F.3d 266 (11th Cir. 1996).
\bibitem{19} Id. at 270 (stating that the facts of speech retaliation cases involved retaliation after speech occurred, and thus were not "materially similar' to unsuccessful attempts to prevent or influence protected speech").
\bibitem{20} 74 F.3d 1087 (11th Cir.), cert. denied, 117 S. Ct. 51 (1996).
\bibitem{21} 74 F.3d at 1092.
\bibitem{23} 74 F.3d at 1093.
\end{thebibliography}
Qualified immunity was also sustained in Tinney v. Shores, because neither plaintiffs' substantive due process claim nor procedural due process claim supported violations of clearly established law. Plaintiffs' claims were based on the sheriff's seizure of their mobile home on behalf of their landlord.

In a case in which deputized employees were discharged from employment by an elected county tax collector for supporting the collector's opponent, the Eleventh Circuit granted qualified immunity to the tax collector because there was no clearly established law which warned the collector that terminating the employees for political reasons violated any rights under the First Amendment.

In Cofield v. Randolph County Commission, which arose from repossession of an automobile, qualified immunity was granted to a deputy sheriff because it was not clearly established that repossession under the existing facts was wrongful.

Foy v. Holston presented a convoluted state of facts involving placement of children in foster care. The Eleventh Circuit upheld qualified immunity against claims of government employees' hostility toward plaintiffs' religious community and contentions of discriminatory intent, because "the Supreme Court has not instructed us to drop qualified immunity (with its test of objective reasonableness) from cases in which discriminatory intent is an element of the underlying tort."

3. Qualified Immunity Denied. Notwithstanding the Eleventh Circuit's substantial findings in support of the qualified immunity defense, the following cases illustrate the circumstances in which
qualified immunity may be denied. In *Dolihite v. Maughon*, the Eleventh Circuit denied qualified immunity to a social worker who was aware of an adolescent's suicidal threats and past behavior but had failed to notify psychiatrists at the hospital to continue protective measures. In *Cooper v. Smith*, the Eleventh Circuit denied a sheriff qualified immunity and held it was clearly established that a sheriff violated a public employee's free speech rights by taking adverse action against the employee because of the employee's cooperation with a law enforcement investigation involving the sheriff.

Of an entirely different nature is the case of *Anderson v. District Board of Trustees*, which illustrates the difficulties that occur when counsel become too embroiled in their own fight to remember that an independent decision-making body is also involved. Plaintiff filed a typical shotgun pleading, asserting six claims arising out of his termination by the college. Rather than filing a motion for more definite statement, the defendant answered in kind. Unable to sort out the pleadings and massive discovery, the court of appeals affirmed the district court's denial of qualified immunity without prejudice to the defendant's right to resubmit the issue once the parties appropriately joined issue on their claims and defenses.

4. Genuine Issues of Material Fact. The place and function of the fact-finding process continues to evolve in the Eleventh Circuit as the court of appeals finds opportunity to apply *Johnson v. Jones* and *Behrens v. Pelletier*. In *Johnson*, the Supreme Court returned to *Mitchell v. Forsyth* to reconsider the proposition that a claim of immunity by a governmental defendant is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. Thus, a defendant who is entitled to invoke the qualified immunity defense may not appeal a district court's denial of immunity insofar as

---

33. 74 F.3d 1027 (11th Cir. 1996).
34. Id. at 1042-43 (citing Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990), as the clearly established law governing the claim).
35. 89 F.3d 761 (11th Cir. 1996) (growing out of the same investigation that gave rise to Mastroianni v. Bowen, 74 F.3d 236 (11th Cir. 1996)).
36. Id. at 765.
37. 77 F.3d 364 (11th Cir. 1996).
38. Id. at 366.
39. Id. at 367.
40. Id. at 368.
42. 116 S. Ct. 834 (1996).
44. *Johnson*, 115 S. Ct. at 2157.
the order determines whether the pretrial record sets forth a "genuine" issue of fact.\textsuperscript{45}

Following its established construction of \textit{Johnson}, the Eleventh Circuit dismissed the appeal in \textit{Mastroianni v. Bowers},\textsuperscript{46} in which the district court found that arresting the plaintiff without probable cause violated clearly established law and that genuine issues of material fact existed as to whether the defendants were guilty of the conduct alleged to constitute the violation.\textsuperscript{47} The court of appeals adhered to its earlier applications of \textit{Johnson} and explained that when the district court finds that genuine issues of material fact exist regarding the conduct alleged to have violated clearly established law, the court of appeals is without appellate jurisdiction.\textsuperscript{48}

Closely following the Eleventh Circuit’s opinion in \textit{Mastroianni v. Bowers}, the United States Supreme Court decided \textit{Behrens v. Pellegrino},\textsuperscript{49} in which the Supreme Court clarified its intent in the decision in \textit{Johnson}. Pointing out that denial of summary judgment often includes a determination that there are controverted issues of material fact, the Supreme Court said that \textit{Johnson} does not mean that every such denial is nonappealable.\textsuperscript{50} If the issue in the trial court’s determination of the sufficiency of evidence is whether the evidence could support a finding that particular conduct occurred, the question decided is not truly separable from the plaintiff’s claim and, hence, there is no appealable final decision.\textsuperscript{51} Summary judgment determinations are appealable when they resolve a dispute concerning an abstract issue of law relating to qualified immunity.\textsuperscript{52}

The Eleventh Circuit anticipated \textit{Behrens} in \textit{Dolihte v. Maughon}\textsuperscript{53} and \textit{Johnson v. Clifton}.\textsuperscript{54} \textit{Dolihte} involved an extremely complex factual situation in which several mental health professionals and administrators worked for or under contract with a state department of

\textsuperscript{45} Id. at 2158. The \textit{Johnson} rationale was applied in the following cases during the 1995 survey period: Haney v. City of Cumming, 69 F.3d 1098 (11th Cir. 1995), cert. denied, 116 S. Ct. 1826 (1996); Babb v. Lake City Community College, 66 F.3d 270 (11th Cir. 1995); and Ratliff v. DeKalb County, 62 F.3d 338 (11th Cir. 1995).

\textsuperscript{46} 74 F.3d 236 (11th Cir. 1996) (growing out of the same investigation giving rise to Cooper v. Smith, 89 F.3d 761 (11th Cir. 1996)).

\textsuperscript{47} Id. at 238.

\textsuperscript{48} Id.

\textsuperscript{49} 116 S. Ct. 834 (1996).

\textsuperscript{50} Id. at 842.

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} 74 F.3d 1027 (11th Cir.), cert. denied, 117 S. Ct. 185 (1996).

\textsuperscript{54} 74 F.3d 1087 (11th Cir.), cert. denied, 117 S. Ct. 51 (1996).
mental health and mental retardation.\textsuperscript{55} Relying on Youngberg \textit{v.} Romeo\textsuperscript{56} and Greason \textit{v.} Kemp,\textsuperscript{57} the district court denied qualified immunity to all individual defendants.\textsuperscript{58} In reviewing the district court's judgment, the court of appeals noted that although genuine issues of material fact were raised as to the defendants' liability, their appeals raised core qualified immunity issues within the issues of fact.\textsuperscript{59}

In \textit{Johnson v. Clifton},\textsuperscript{60} plaintiffs were terminated by a chief of police under factual circumstances that were strongly disputed by the parties.\textsuperscript{61} The court of appeals began its analysis of the jurisdictional issues by observing that in \textit{Johnson} the Supreme Court did not change the well-established law of qualified immunity in the context of summary judgment; it just elaborated on it.\textsuperscript{62} The Eleventh Circuit concluded that when faced with a motion for summary judgment based on qualified immunity, the district court must determine whether there is a genuine issue of material fact as to whether the defendant committed conduct that violated clearly established law.\textsuperscript{63} The court stated that the inquiry can be broken down into two parts. "First, what was the official's conduct, based on the pleadings, depositions, and affidavits, when viewed in the light most favorable to the non-moving party? Second, could a reasonable public official have believed that such conduct was lawful based on clearly established law?"\textsuperscript{64} The resolution of the second issue constitutes a final, collateral, and therefore appealable order.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{55} \textit{Dolihiite}, 74 F.3d at 1033.
\item \textsuperscript{56} 457 U.S. 307 (1982) (holding that persons subjected to involuntary civil commitment are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish and liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment).
\item \textsuperscript{57} 891 F.2d 829 (11th Cir. 1990) (holding that officials responsible for the care of prison inmates are liable if they are put on notice of an inmate's suicidal tendencies and fail to take reasonable precautions to prevent that suicide). The court cited Waldrop \textit{v.} Evans, 871 F.2d 1030 (11th Cir. 1989), for the same proposition. 891 F.2d at 835-36.
\item \textsuperscript{58} \textit{Dolihiite}, 74 F.3d at 1040.
\item \textsuperscript{59} Id. at 1033-55 n.3.
\item \textsuperscript{60} 74 F.3d 1087 (11th Cir.), cert. denied, 117 S. Ct. 51 (1996).
\item \textsuperscript{61} 74 F.3d at 1089-90.
\item \textsuperscript{62} Id. at 1091.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id. (citing Mitchell \textit{v. Forsyth}, 472 U.S. 511, 528 (1985)).
\end{itemize}
In Cottrell v. Caldwell, the Eleventh Circuit first applied the Supreme Court's ruling in Behrens. Cottrell involved positional asphyxiation of an arrestee in a police vehicle. Finding that its earlier decisions were in alignment with Behrens, the court held that "interlocutory appellate jurisdiction over legal issues involved in a qualified immunity question exists even when the district court denied the summary judgment motion with the unadorned statement that "[m]aterial issues of fact remain as to [the defendant] on the [federal question] claim." The court also noted its contrary holdings in Mastroianni v. Bowers and Babb v. Lake City Community College, stating that those cases preceded Behrens and cannot be reconciled with it.

The court of appeals expanded its Johnson-Behrens application in McMillian v. Johnson. Plaintiff's murder conviction was reversed on appeal, after which he brought a civil rights action against the sheriff, district attorney's investigator, and state bureau of investigation agent most responsible for his conviction. Following denial of qualified immunity defenses by the district court, the court of appeals considered three issues about which there existed genuine issues of material fact. The first issue focused on whether the pretrial detention of the plaintiff on death row violated clearly established law. The second issue considered whether the defendants suppressed exculpatory and impeachment evidence. The third issue concerned coercion of false testimony. The court of appeals treated differently the district court's fact-finding and the analysis of each issue.

First, the Eleventh Circuit concluded that pretrial detention on death row for purposes of punishment constituted a violation of clearly

66. 85 F.3d 1480 (11th Cir. 1996).
68. 85 F.3d at 1483.
69. Id. at 1485 (citing Dolihite v. Maughon, 74 F.3d 1027 (11th Cir.), cert. denied, 117 S. Ct. 185 (1996); Johnson v. Clifton, 74 F.3d 1087 (11th Cir.), cert. denied, 117 S. Ct. 61 (1996); Haney v. Cumming, 69 F.3d 1098 (11th Cir. 1995), cert. denied, 116 S. Ct. 1826 (1996)).
70. Id. at 1484-85 (alterations in original) (citations omitted) (quoting Behrens, 116 S. Ct. at 838).
71. 74 F.3d 236 (11th Cir. 1996).
72. 66 F.3d 170 (11th Cir. 1995).
73. 85 F.3d 1480, 1485 (11th Cir. 1996).
74. 88 F.3d 236 (11th Cir. 1995).
75. Id. at 1558-59.
76. Id. at 1559.
77. Id. at 1560.
78. Id. at 1561.
established law on due process grounds. Whether the purpose of such detention was for punishment and intimidation, as contended by plaintiff, or for purposes of security and safekeeping of plaintiff, as contended by defendants, were issues of material fact from which a jury could determine that punishment was the purpose of death row detention. Accordingly, qualified immunity was denied.

The second issue considered was whether the alleged suppression of exculpatory evidence violated clearly established law. Under the principles of Brady v. Maryland, the court found that plaintiff stated a claim of constitutional violation. The case was remanded to the district court for a determination of materiality of the suppressed evidence as to defendant's knowledge of how the totality of the evidence would play out at trial.

In its consideration of the issue involving coercion of false testimony, the court resorted to its own fact-finding prerogative, concluding that the coerced individual was not a potential defense witness and that defendants did not violate plaintiff's clearly established rights in allegedly threatening the witness. Accordingly, defendants were entitled to qualified immunity.

---

79. *Id.* at 1564 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), and *Hamm v. DeKalb County*, 774 F.2d 1567, 1572 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986)).
80. *Id.* at 1559.
81. *Id.* at 1559-60.
82. *Id.* at 1566.
83. *Id.*
84. *Id.*
85. 373 U.S. 83 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution).
86. *McMillian*, 88 F.3d at 1567-70.
87. *Id.* at 1570.
88. *Id.* at 1571. Even when the core qualified immunity issue is raised, the court of appeals is not required to make its own determination of facts and may decline to review the district court’s determination of the facts for purposes of summary judgment. It has discretion to accept the district court’s findings if they are adequate. That approach is normally followed by the Eleventh Circuit, but as to this issue an exception was made because the court determined that the district court’s finding as to the content of a statement by the witness appeared to be based entirely on a misreading of the record. *Id.* See *Cottrell v. Caldwell*, 86 F.3d 1480 (11th Cir. 1996); *Johnson v. Clifton*, 74 F.3d 1087 (11th Cir.), *cert. denied*, 117 S. Ct. 51 (1996).
89. *McMillian*, 88 F.3d at 1571.
90. *Id.*
5. Deliberate Indifference. Lack of attention to medical needs, prisoner suicides, and inmate-on-inmate violence constitute a large portion of cases involving qualified immunity and claims of deliberate indifference. Cases involving these issues are most likely to be analyzed under Farmer v. Brennan, in which a subjective element is present along with an objective element. On the other hand, cases involving failure to train or failure to supervise are more appropriately analyzed under the objective standard of City of Canton v. Harris.

In Williams v. Lee County, plaintiff's decedent committed himself to a medical center for detoxification and treatment for drug abuse. After he left the facility without authority, he was taken into custody and ordered to be held at the county jail pending transfer to a treatment facility. While in the jail, he was kept under constant observation for two days and later moved to a single cell where he was monitored every fifteen to twenty minutes. The decedent made self-threatening statements to an officer, subsequent to which the officer concluded that the statements were threats of self-harm. Upon returning to the cell, the officer found that the decedent had hanged himself. Resuscitation efforts failed. Against claims of deliberate indifference based on insufficient training and supervision, the Eleventh Circuit followed its earlier rule that to establish deliberate indifference to a suicide risk, the official must have notice of a strong likelihood, rather than a mere possibility, of the particular decedent's suicidal tendencies.

Riley v. Newton was a suit against a sheriff's investigator who permitted a military police officer to accompany him in a drug investigation. In the course of an arrest, the military police officer accidentally

91. 114 S. Ct. 1970, 1979 (1994) (holding that the appropriate test for "deliberate indifference" is the same as that of "subjective recklessness" as used in the criminal law—whether the official has consciously disregarded a substantial risk of serious harm. Thus, the official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference).
93. 78 F.3d 491 (11th Cir. 1996).
94. Id. at 492.
95. Id.
96. Id. at 493.
97. Id. (citing Tittle v. Jefferson County Comm'n, 10 F.3d 1535 (11th Cir. 1994), and observing that the court of appeals had found less formal means of suicide prevention than those appearing in this case to pass constitutional muster). See Belcher v. City of Foley, 30 F.3d 1390 (11th Cir. 1994); Schmelz v. Monroe County, 954 F.2d 1540 (11th Cir. 1992).
98. 94 F.3d 632 (11th Cir. 1996), cert. denied, 117 S. Ct. 955 (1997).
99. 94 F.3d at 634.
shot and killed an arrestee.\textsuperscript{100} The ensuing claim contended that the sheriff had failed to properly train his personnel regarding the use of military personnel to enforce civil law.\textsuperscript{101} In granting motion for summary judgment, the court of appeals held that a claim for inadequate training exists only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.\textsuperscript{102} The failure to train must reflect a deliberate or conscious choice and the deficiency must be closely related to the ultimate injury.\textsuperscript{103}

\textit{Steele} v. \textit{Shah}\textsuperscript{104} presented circumstances in which a prison inmate and his psychiatrist disagreed as to the prisoner’s proper course of treatment and the consequences likely to result therefrom.\textsuperscript{105} Establishing \textit{Waldrop} v. \textit{Evans}\textsuperscript{106} and \textit{Greason} v. \textit{Kemp}\textsuperscript{107} as standards of comparison, the court held that on record facts, a jury would have been entitled to find that the care afforded plaintiff was grossly inadequate and that any reasonable person in the doctor’s position would have known that such care constituted deliberate indifference to plaintiff’s needs.\textsuperscript{108}

\section*{B. Subject Matter Jurisdiction}

1. \textbf{Stating a Claim.} The Eleventh Circuit found an absence of federal subject matter jurisdiction in \textit{Boatman} v. \textit{Town of Oakland},\textsuperscript{109} where the issue was whether property owners should be issued a certificate of occupancy for their manufactured home.\textsuperscript{110} After the property owners obtained a building permit and constructed the home, the town’s building inspector refused to perform a final inspection and issue a certificate of occupancy on the grounds that the property owners had constructed a mobile home in violation of the town’s zoning

\begin{flushright}
\textsuperscript{100} \textit{Id.} at 635. \\
\textsuperscript{101} \textit{Id.} at 638. \\
\textsuperscript{102} \textit{Id.} \\
\textsuperscript{103} \textit{Id.} (citing City of Canton v. Harris, 489 U.S. 378, 388-89 (1989)). \\
\textsuperscript{104} 87 F.3d 1266 (11th Cir. 1996). \\
\textsuperscript{105} \textit{Id.} at 1267. \\
\textsuperscript{106} 871 F.2d 1030 (11th Cir. 1989) (discontinuance of psychotropic medication resulting in self-mutilation). \\
\textsuperscript{107} 891 F.2d 829 (11th Cir. 1990) (discontinuance of psychotropic medication resulting in suicide). \\
\textsuperscript{108} \textit{Steele}, 87 F.3d at 1270. \\
\textsuperscript{109} 76 F.3d 341 (11th Cir. 1996). \\
\textsuperscript{110} \textit{Id.} at 342-43.
\end{flushright}
ordinance. Upon the property owners' concession that any relief they sought in federal court could have been granted by the state circuit court, the court found no federal constitutional claim in the case.

In McKusick v. City of Melbourne, plaintiff brought an action against a city seeking declaratory judgment to invalidate a state court injunction. The injunction required named parties and persons acting in concert with them to maintain a buffer zone of thirty-six feet around an abortion clinic. Plaintiff entered the buffer zone and began to read her Bible and pray. As a result, she was approached by a city police officer who warned her that she was in violation of the injunction. Thereafter, she refrained from violating the injunction because she feared being arrested. Her complaint was based on allegations that the city unconstitutionally enforced the injunction against her and other third parties who were neither named parties in the state court action, nor acting in concert with named parties. In response, the city contended that its interests were not adverse to plaintiff's, and therefore, the action sought an impermissible advisory opinion. The district court agreed and granted the city's motion to dismiss. The court of appeals reversed, holding that under the terms of the injunction, the development and implementation of an administrative enforcement procedure, going beyond the terms of the injunction itself, leading to the arrest of all anti-abortion protesters found within the buffer zone, including persons not named in the injunction nor shown by probable cause to be acting in concert with named parties, would amount to a cognizable policy choice.

111. Id.
112. Id. at 346.
113. 96 F.3d 478 (11th Cir. 1996).
114. Id. at 481. The Supreme Court had previously upheld the injunction as a permissible content-neutral restriction on speech in Madsen v. Women's Health Ctr., 512 U.S. 753 (1994). The Eleventh Circuit had previously held the injunction to be a viewpoint-based restriction on speech in Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993), vacated, 41 F.3d 1421 (11th Cir. 1994).
115. 96 F.3d at 481.
116. Id.
117. Id. at 482.
118. Id.
119. Id. The injunction stated that "law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction." Id. (emphasis added).
120. Id. at 484.
Accordingly, the plaintiff had stated a claim against the city.121

2. Ripeness. The ripeness doctrine addresses constitutional and prudential concerns that a claim does not constitute a "case" or "controversy" within the meaning of Article III.122 In the land use context, because the Fifth and Fourteenth Amendments prohibit the taking of property without just compensation, a plaintiff asserting regulatory takings must obtain a final decision that he has been denied state court remedies for inverse condemnation before the takings claim is ripe.123 The finality prong of the ripeness inquiry is required for the court to determine "the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit [development]."124

The ripeness doctrine was applied in Strickland v. Alderman,125 where plaintiff advanced the futility exception in the denial of a building permit.126 Plaintiff sought to bring himself within the futility exception by relying on casual conversations in which city officials had stated that no building permits would be issued on the property in question.127 Until the plaintiff makes application for or otherwise formally requests permits and is rejected, the action of the city is not final.128 Informal inquiries are insufficient to invoke the futility exception.129

---

121. Id. at 483 (citing Monell v. Department of Social Servs., 436 U.S. 658 (1978) (holding that a private party may obtain relief against a municipality under Section 1983 when the allegedly unconstitutional municipal action implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or when the alleged constitutional violation results from municipal custom) and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (finding that the presence of a municipal policy or custom is essential, because municipal liability under section 1983 can attach only when a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question)).
124. 505 U.S. at 1011 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986)).
125. 74 F.3d 269 (11th Cir. 1996).
126. Id. at 263.
127. Id. at 265.
128. Id.
129. Id.
In *Bickerstaff Clay Products, Inc. v. Harris County*, a brick manufacturer owned property as mineral reserves for future mining. Incident to an attempt to rezone the property to a mining classification, the county's governing authority rezoned the property to residential use. The property owner's Fifth Amendment taking claim was not ripe because state law provided a compensatory remedy under the eminent domain and due process provisions of the state constitution. Nevertheless, the court of appeals remanded the case to the district court for a determination of compensation on the temporary taking claim because the residential zoning was determined to be a completed but unconstitutional act, and therefore, ripe for consideration.

In *New Port Largo, Inc. v. Monroe County*, a property owner's taking claim centered around its contention that the county had physically occupied the property and deprived the owner of its right to exclude others. The contention was predicated on the county's rezoning of property from a residential classification to private airport use. Although "a permanent physical occupation of private property by the state constitutes a taking for which a landowner must be compensated," the leasing of the property by the county to a tenant for the purpose of operating an airport does not constitute the physical occupation which would authorize compensation without first seeking compensation in the state courts.

II. SUBSTANTIVE ISSUES

A. Municipal Liability

1. Policy or Custom. In *Riley v. Newton*, the court of appeals held that use of a military police officer to accompany a sheriff's

---

130. 89 F.3d 1481 (11th Cir. 1996).
131. Id. at 1483.
132. Id. at 1484.
133. Id. at 1490.
134. Id. at 1491 (citing GA. CONST. art. I, § 1, para. 1).
135. Id. (citing GA. CONST. art. I, § 3, para. 1).
136. Id.
137. 95 F.3d 1084 (11th Cir. 1996).
138. Id. at 1087.
139. Id.
140. Id. at 1088 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).
141. Id. at 1088-89.
142. 94 F.3d 632 (11th Cir. 1996), cert. denied, 117 S. Ct. 955 (1997).
investigator during a drug investigation, or lack of oversight of the military officer's choice of weapon, could not establish the existence of a policy or custom to use the military to enforce the law in violation of the Posse Comitatus Act, or any other policy or custom that caused the military officer to accidentally shoot an arrestee.

2. Final Policymaker. A municipality may be held liable for a single act or decision of a municipal official with final policymaking authority in the area of the act or decision. In Hill v. Clifton, a terminated police officer brought action under 42 U.S.C. § 1983 alleging gender discrimination, equal protection violations, and retaliation. The termination was recommended by the police chief and approved by the city manager. The police chief was not the final policymaker, and there was no evidence that the city manager approved the termination based on the same allegedly discriminatory reasons that supported the recommendation. Accordingly, the municipality had no liability under the "final policymaker" theory.

In McMillian v. Johnson, the issue was whether an Alabama sheriff had final policymaking authority for a county. The court of appeals noted that the Supreme Court has provided limited guidance for determining whether an official has final policymaking authority with respect to a particular action, but the majority opinion in Jett v. Dallas Independent School District provides several principles for guidance. First, state law determines whether a particular official has final policymaking authority. Second, "the authority to make..."
municipal policy is necessarily the authority to make final policy."\textsuperscript{156} Third, "the alleged policymaker must have final policymaking authority with respect to the specific action alleged to have caused the particular constitutional or statutory violation."\textsuperscript{157} The application of these guidelines led the Eleventh Circuit to conclude that, in Alabama, a sheriff was not a final policymaker for the county so as to make a county liable in the area of law enforcement.\textsuperscript{158}

B. First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.\textsuperscript{159}

1. Government Regulation Impacting Speech. The Constitution grants less protection to commercial speech than to other constitutionally safeguarded forms of expression.\textsuperscript{160} The Supreme Court has established a four-part test to determine the constitutionality of restrictions on commercial speech: (1) the speech must concern a lawful activity and not be misleading; (2) the government must prove that it has a substantial interest in its stated basis for the statute; (3) the restriction must directly advance the government's interest; and (4) the restriction must be narrowly drawn to avoid unduly burdening speech.\textsuperscript{161}

In \textit{Sciarrino v. City of Key West},\textsuperscript{162} the Eleventh Circuit applied the \textit{Central Hudson} four-part test to a city ordinance which was designed to control activities of barkers for retail establishments by limiting the location of off-premises solicitation, limiting the number of off-premises canvassers, and establishing a permitting system for persons who sought setting policy in any given area of a local government's business.'" \textit{Id.} (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 125 (1988)).

\textsuperscript{156} Id. (quoting \textit{Praprotnik}, 485 U.S. at 127).

\textsuperscript{157} Id. at 1577-78.

\textsuperscript{158} Id. at 1582. The court found that under Alabama law, Ala. Code § 36-22-3(4) (1991), law enforcement authority is assigned to sheriffs, but not to counties. Thus, \textit{McMillian} is distinguished from \textit{Parker v. Williams}, 862 F.2d 1471 (11th Cir. 1989), in which the court found that the sheriff was a final county policymaker in the area of hiring, firing, and jail administration.

\textsuperscript{159} U.S. CONST. amend. I.


\textsuperscript{162} 83 F.3d 364 (11th Cir. 1996), \textit{cert. denied}, 117 S. Ct. 768 (1997).
The city conceded that the activity was not misleading and concerned lawful activity. The court of appeals found that the city's asserted interest in controlling solicitation to prevent the harassment of pedestrians by barkers, reducing pedestrian traffic, and reducing litter, stated a substantial interest in the problems sought to be corrected. The ordinance directly advanced the city's interest in reducing pedestrian congestion and harassment and went no further than necessary to achieve the result sought.

In analyzing a facial attack on Florida's laws regulating lobbying activities, the court of appeals followed the guidelines of United States v. Harris, where the Supreme Court upheld the Federal Regulation of Lobbying Act against a First Amendment challenge. The court of appeals expressed concern about the level of constitutional scrutiny to be applied to the analysis and rejected the contention that the regulations must be reviewed on the basis of strict scrutiny. The challengers conceded that the state had articulated legitimate interests in advancing the regulations but failed to show that a substantial fraction of the applications of the law would fail to further those interests.

In Smith v. Avino, the court of appeals held that when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review of constitutional challenges to the curfew is limited to a determination of whether the action was taken in good faith and whether there is some factual basis for a decision that the restriction imposed was necessary to maintain order.

163. 83 F.3d at 366.
164. Id. at 367.
165. Id.
166. Id. at 369-70 (holding that the city is not required to employ the least restrictive means imaginable).
167. FLA. STATS. ANN. §§ 11.045, 112.3215 (West 1997). The specific issues in this case related to disclosure requirements and contingent fee engagements.
171. Florida League, 87 F.3d at 460.
172. Id. at 460-61.
173. 91 F.3d 105 (11th Cir. 1996).
174. Id. at 107 (Hurricane Andrew).
175. Id. at 109 (citing United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971) (civil unrest after a racial incident) and Moorhead v. Farrelly, 727 F. Supp. 193 (D.V.I. 1989) (ravages of Hurricane Hugo)).
Nationalist Movement v. City of Cumming\textsuperscript{176} made another appearance before the Eleventh Circuit on the question of restrictions in parade permits.\textsuperscript{177} A city ordinance banning Saturday morning parades was a reasonable time, manner, and place regulation and did not violate the First Amendment.\textsuperscript{178} The ordinance furthered a significant government interest in controlling traffic, was narrowly tailored because it prohibited parades only when traffic was heaviest and provided ample alternative channels of communication, such as leafleting, distributing pamphlets, and holding parades during other times.\textsuperscript{179}

In International Caucus of Labor Committees v. City of Montgomery,\textsuperscript{180} the Eleventh Circuit considered a policy of the City of Montgomery, Alabama that completely banned any tables on all sidewalks. The Caucus sought to use public sidewalks to set up folding card tables for the purpose of distributing political literature.\textsuperscript{181} The court of appeals rejected the First Amendment attack, holding that the prohibition against placing any table on a public sidewalk, for whatever purpose, does not implicate the First Amendment.\textsuperscript{182}

2. Public Employment. A governmental employer’s restrictions or actions violate the First Amendment if the employee was sanctioned for speaking out on a matter of public concern in his role as a citizen and if the employee’s interest in the speech is not outweighed by the employer’s interest in providing orderly and efficient government services.\textsuperscript{183} The “public concern” element is determined on a case-by-case basis by determining whether the content, form, and context of the speech indicate that the speech was a matter of general public concern.\textsuperscript{184}

\textsuperscript{176} 92 F.3d 1135 (11th Cir. 1996), cert. denied, 117 S. Ct. 688 (1997).
\textsuperscript{177} See Nationalist Movement v. City of Cumming, 913 F.2d 885 (11th Cir.), vacated, 921 F.2d 1125 (11th Cir. 1990), original opinion reinstated, 934 F.2d 1482 (11th Cir. 1991), aff’d on different issue, 505 U.S. 123 (1992).
\textsuperscript{178} 92 F.3d at 1139.
\textsuperscript{179} Id. at 1139-40.
\textsuperscript{180} 87 F.3d 1275 (11th Cir. 1996).
\textsuperscript{181} Id. at 1276.
\textsuperscript{182} Id. The court of appeals noted the lack of authority on the precise question, the inappropriateness of the newsrack cases to the issue of folding tables, and the nondiscriminatory nature of the ban. Id. The dissent argued that the district court was correct in applying the time, place, and manner test under Ward v. Rock Against Racism, 491 U.S. 781 (1989), and would focus on the communication rather than the table. Id. at 1282 (Anderson, J., dissenting).
Three cases decided during the survey period illustrated the difficulty of establishing standards of analysis and review which would generally apply in such cases. In *Thornquest v. King*, college policy gave the president the authority to manage dissent and demonstrations, including the authority to delineate types of acceptable and unacceptable dissent. In furtherance of the policy, the college administration created a designated demonstration area which plaintiffs disregarded in the conduct of their protests and demonstrations about certain college issues. The demonstrations were conducted at a performance center which was the focus of protests. Against plaintiffs' claims that the policy was unconstitutional facially and as applied to them, the Eleventh Circuit found the record insufficient to permit a summary judgment determination as to such questions as (1) whether the performance center was a public forum, and if so, whether the college's policies were narrowly drawn to effectuate a compelling state interest, (2) whether the policies were reasonable, and (3) whether plaintiffs had standing to challenge the policies.

In *Beauregard v. Olson*, a tax collector discharged deputized employees for supporting the collector's opponent. Plaintiffs' job duties were ministerial and the tax collector fired them for political reasons. This action posed the question whether the employees had a general First Amendment right not to be fired for political patronage reasons. The court of appeals reviewed the application of *Elrod v. Burns* and *Branti v. Finkel*, noting that the First Amendment right not to be fired for patronage reasons is determined on a standard "framed in vague and sweeping language certain to create vast uncertainty.

In *Mize v. Jefferson City Board of Education*, the Eleventh Circuit reiterated the four-part *Bryson* test for deciding a claim of First

---

185. Cooper v. Smith, 89 F.3d 761 (11th Cir. 1996); Beauregard v. Olson, 84 F.3d 1402 (11th Cir. 1996); Thornquest v. King, 82 F.3d 1001 (11th Cir. 1996).
186. 82 F.3d 1001 (11th Cir. 1996).
187. Id. at 1004.
188. Id.
189. Id. at 1004-05.
190. 84 F.3d 1402 (11th Cir. 1996).
191. Id. at 1403.
192. Id.
195. Beauregard, 84 F.3d at 1405 (quoting Branti, 445 U.S. at 522 (Powell, J., dissenting)).
196. 93 F.3d 739 (11th Cir. 1996).
197. Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989).
Amendment retaliatory discharge. In those cases, the court looks to (1) whether the employee's speech involves a matter of public concern, (2) whether the employee's interest in speaking outweighs the government's legitimate interests in efficient public service, (3) whether the speech played a substantial part in the government's challenged employment decision, and (4) whether the government would have made the same employment decision in the absence of the protected conduct. When there is no causation between the employee's speech and the adverse employment action, the employee's claim of retaliatory discharge fails, and it is unnecessary to consider the other three elements. In Mize, the discharged employee failed to present sufficient evidence from which a jury could find causation between the speech and the discharge.

3. Free Exercise Clause. The Eleventh Circuit considered the impact of prison regulations on the Free Exercise Clause in two cases during the survey period. In Lawson v. Singletary, state prisoners brought a class action challenging refusal of prison officials to permit inmates of the Hebrew Israelite faith to receive religious literature. In upholding the restrictive regulations, the court of appeals held that prison inmates retain only such First Amendment rights as are not inconsistent with their status as prisoners, and there is no per se bar to censorship of prisoners' incoming mail. The same deference is accorded the judgment of prison officials with respect to security and other penological concerns, whether the challenge involves free speech or exercise of religion.

198. 93 F.3d at 742.
199. Id.
200. Id.
201. Id. at 745.
202. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" U.S. CONST. amend. I.
204. 85 F.3d 502 (11th Cir. 1996).
205. Id. at 504. Prison officials claimed that the Hebrew Israelite texts at issue contained "highly-charged, anti-white, racism and thus presented a serious threat to security and order within [the] prisons." Id.
206. Id. at 513.
207. Id. at 509.
208. Id. at 509-10.
Similarly, in *Harris v. Chapman*, a prison hair length rule met legitimate penological interests and did not violate a Rastafarian inmate’s free exercise rights.

4. Ballot Access. In *Chandler v. Miller*, plaintiffs challenged a state statute requiring drug testing for political candidates and nominees for state office. Under the statute, anyone who declined to take the test or who tested positive was basically barred from holding office. The statutory scheme was attacked on First Amendment grounds, alleging that the refusal of the plaintiffs to submit to drug testing was a form of protected expression. Relying on *United States v. O’Brien*, in upholding the statute, the court of appeals held that it is generally in the power of the state to prescribe qualifications for elected officials where the statute furthers a substantial governmental interest, the government’s underlying purpose is not suppression of free expression, and the statute is no more restrictive of expression than is necessary.

*Duke v. Massey* made a further appearance before the Eleventh Circuit in an on-going constitutional challenge to a state statute which designated that state and party officials make up the presidential primary ballot. Duke challenged the committee’s decision to delete...
him from the ballot.223 Employing a standard of strict scrutiny, the court of appeals announced a series of propositions upholding the statute: Duke has a First Amendment right to express his political beliefs free from state discrimination no matter how repugnant his beliefs may be to others; he does not have a First Amendment right to express his beliefs as a presidential candidate for the Republican Party; the Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs; Duke does not have the right to associate with an unwilling partner; Duke’s supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate, but are not foreclosed from supporting him as an independent candidate or as a third party candidate in the general election; and the state has a compelling interest in protecting political parties’ right to define their membership.224

C. Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.225

1. Search. In Chandler v. Miller,226 the petitioners challenged a state statute requiring drug testing for political candidates and nominees for state office227 on Fourth Amendment grounds.228 The court of appeals concluded that the tests were Fourth Amendment searches, but that special needs were at issue.229 The special needs issue was whether unlawful drug use was fundamentally incompatible with high state office.230 Balancing the state’s special needs interest against the plaintiffs’ privacy interests, the court of appeals held that the intrusion

---

223. Id.
224. Id. at 1234.
225. U.S. CONST. amend. IV.
226. 73 F.3d 1543 (11th Cir. 1996), rev’d, 117 S. Ct. 1295 (1997). See supra note 211.
228. 73 F.3d at 1545.
229. Id. (citing Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)).
230. Id. at 1546 (comparing the special needs of Von Raab that physical and ethical demands on customs agents were so great as to render drug use totally incompatible with the nature of the position).
of the search was insufficient to constitute a violation of the Fourth Amendment.\textsuperscript{231}

In \textit{Jenkins v. Talladega City Board of Education},\textsuperscript{232} elementary teachers twice strip searched two eight year old female students based on accusations by a classmate that they had stolen money.\textsuperscript{233} Plaintiffs' stated a cause of action for a Fourth Amendment violation.\textsuperscript{234} The application of the Fourth Amendment to searches of public school students is governed by \textit{New Jersey v. T.L.O.},\textsuperscript{235} and requires an examination of such factors as the reasonable relationship between the scope and the objectives of the search,\textsuperscript{236} the intrusiveness of the search in light of the age and sex of the students,\textsuperscript{237} and the intrusiveness of the search in light of the nature of the alleged infraction.\textsuperscript{238}

2. Seizure. \textit{Tinney v. Shores}\textsuperscript{239} arose from the seizure by a deputy sheriff of a mobile home for failure to pay rent.\textsuperscript{240} Action was instituted on due process grounds, both substantive and procedural.\textsuperscript{241} In affirming the district court's dismissal of the case,\textsuperscript{242} the court of appeals underscored the requirement of \textit{Graham v. Connor}\textsuperscript{243} that the specific prohibition of the Fourth Amendment be applied.\textsuperscript{244}

In \textit{Whiting v. Traylor},\textsuperscript{245} overzealous state marine patrol officers engaged in a series of harassing acts against a boat owner, including

\begin{itemize}
\item \textbf{231.} \textit{Id.} at 1547. \textit{But see id.} at 1549-53 (Barkett, J., dissenting). ("I do not believe that the suspicionless search in these circumstances serves any special governmental need beyond the normal need for law enforcement, and, if it did, I believe that the candidates' privacy interests outweigh the governmental interests when the factors of \textit{Von Raab} are properly considered"). \textit{Id.} at 1549.
\item \textbf{232.} 95 F.3d 1036 (11th Cir.), \textit{vacated}, No. 95-6243, 1996 WL 606638 (11th Cir. Oct. 16, 1996).
\item \textbf{233.} 95 F.3d at 1038.
\item \textbf{234.} \textit{Id.} at 1039.
\item \textbf{235.} 469 U.S. 325 (1985).
\item \textbf{236.} 95 F.3d at 1044.
\item \textbf{237.} \textit{Id.} at 1047.
\item \textbf{238.} \textit{Id.} at 1043.
\item \textbf{239.} 77 F.3d 378 (11th Cir. 1996).
\item \textbf{240.} \textit{Id.} at 380.
\item \textbf{241.} \textit{Id.} at 381.
\item \textbf{242.} \textit{Id.} at 383.
\item \textbf{243.} 490 U.S. 386, 395 (1989) (holding that where a particular Amendment provides an "explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing the claim").
\item \textbf{244.} \textit{Tinney}, 77 F.3d at 381.
\item \textbf{245.} 85 F.3d 581 (11th Cir. 1996).
\end{itemize}
arrests and citations. Some charges were nol-prossed. Others were pursued until dismissed by a state court judge. In dismissing, the state court found that defendants and the prosecuting attorney had harassed plaintiff, either through gross incompetence or by intention. Upon conclusion of all proceedings, plaintiff brought an action under 42 U.S.C. § 1983 based upon the maintenance of a prosecution without probable cause in violation of the Fourth Amendment. In dismissing the complaint under Rule 12(b)(6), the district court concluded that any Fourth Amendment claim based on plaintiff's surrender or arrest was time barred. Relying on Albright v. Oliver, and citing Justice Ginsberg's concurring opinion in particular, the court of appeals recognized plaintiff's "continuing seizure" theory and permitted him to wait to sue until the prosecution terminated in his favor.

In Ortega v. Christian, the court of appeals reviewed the essential elements for establishing probable cause for an arrest based on a tip from a confidential informant. A warrantless arrest without probable cause violates the Fourth Amendment and forms a basis for a section 1983 claim. In determining whether an informant's tip rises to the level of probable cause, a court must assess the totality of the circumstances, including the relevance of factors such as the informant's veracity, reliability, and basis of knowledge; the corroboration of the details of the informant's tip through independent police work; and whether a reasonable officer in the same circumstances and possessing the same knowledge could have believed that probable cause existed to make the arrest for the suspected crime. An assessment of the totality of circumstances in this arrest indicated a failure to corroborate the details of available information to the extent that the arresting officer lacked probable cause to make the arrest. The arrest in this case led to a detention of the suspect for a period of five months, and thus, engendered an analysis of the constitutional implications of false
imprisonment.\textsuperscript{269} A detention on the basis of a false arrest presents a viable section 1983 action.\textsuperscript{260} A false imprisonment claim under section 1983 is based on the Fourteenth Amendment's protection against deprivations of liberty without due process of law and is grounded in the Fourth Amendment guarantee against unreasonable seizures.\textsuperscript{261}

D. \textit{Fifth Amendment}

No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.\textsuperscript{282}

1. \textbf{Self-Incrimination.} A custodian of corporate records may not be compelled to testify as to the location of documents not in her possession when such testimony would be self-incriminating.\textsuperscript{263} However, there is no Fifth Amendment privilege in favor of collective entities, such as corporations\textsuperscript{264} or labor unions.\textsuperscript{265} Accordingly, an agent of such an entity may not refuse to produce documents of the entity even when those documents will incriminate the entity or the agent producing the documents.\textsuperscript{266}

2. \textbf{Taking.} Takings cases continue in a regular flow through the Eleventh Circuit, mostly under the Fourteenth Amendment incorpora-

\begin{thebibliography}{99}

\bibitem{} Id. at 1528.
\bibitem{} Id. (citing Reeves v. City of Jackson, 608 F.2d 644, 654 (5th Cir. 1979)).
\bibitem{} Id. (citing Baker v. McCollan, 443 U.S. 137 (1979)). The holding is somewhat confusing in that the language suggests that there is a separate Fourteenth Amendment claim based on substantive due process, as well as a Fourth Amendment claim based on the continuation of an unreasonable seizure which is made applicable to the state through the Fourteenth Amendment. The authorities cited in support of the Fourteenth Amendment claim predate Graham v. Conner, 490 U.S. 386, 395 (1989), holding where a particular Amendment provides an "explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing the claim." Id. It would appear that the particularized Fourth Amendment basis for a false imprisonment claim would be more appropriate than the generalized substantive due process claim under the Fourteenth Amendment.
\bibitem{} U.S. CONST. amend. V.
\bibitem{} In re Grand Jury Subpoena, 87 F.3d 1198, 1200 (11th Cir. 1996).
\bibitem{} Id. (citing Hale v. Henkel, 201 U.S. 43 (1906)).
\bibitem{} Id. (citing United States v. White, 322 U.S. 694 (1944)).
\bibitem{} Id.
\end{thebibliography}
tion doctrine. Four takings cases\textsuperscript{267} claimed the court of appeals attention during the survey period. However, \textit{Strickland v. Alderman,}\textsuperscript{268} \textit{Bickerstaff Clay Products, Inc. v. Harris County,}\textsuperscript{269} and \textit{New Port Largo, Inc. v. Monroe County,}\textsuperscript{270} were disposed of for lack of subject matter jurisdiction on ripeness grounds under the rubric of \textit{Williamson County Regional Planning Commission v. Hamilton Bank.}\textsuperscript{271}

\section*{E. Eighth Amendment}

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.\textsuperscript{272}

\subsection*{1. Cruel and Unusual Punishment.} To establish an Eighth Amendment violation a prisoner must prove that an injury was caused by an unnecessary and wanton infliction of pain.\textsuperscript{273} In \textit{Harris v. Chapman,}\textsuperscript{274} a Rastafarian prisoner refused on religious grounds to comply with a hair length regulation. Following orders to enforce the hair length rule, several corrections officers forcibly removed plaintiff from his cell and restrained him while his hair was cut.\textsuperscript{275} The prisoner's Section 1983 complaint alleged that while his hair was being cut, the corrections officers beat him and used racial slurs at him.\textsuperscript{276} In response to a jury award of five hundred dollars in punitive damages against one officer, the district court granted judgment as a matter of law.\textsuperscript{277} The court of appeals reversed, holding that the core judicial inquiry is whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.\textsuperscript{278}

\begin{thebibliography}{999}
\bibitem{266} New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996); Corn v. City of Lauderdale Lakes, 95 F.3d 1066 (11th Cir. 1996); Bickerstaff Clay Prods. v. Harris County, 89 F.3d 1481 (11th Cir. 1996); Strickland v. Alderman, 74 F.3d 260 (11th Cir. 1996).
\bibitem{267} 74 F.3d 260, 266 (11th Cir. 1996).
\bibitem{268} 89 F.3d 1481, 1490 (11th Cir. 1996).
\bibitem{269} 95 F.3d 1084, 1089 (11th Cir. 1996).
\bibitem{270} 473 U.S. 172 (1985).
\bibitem{271} U.S. CONST. amend. VIII.
\bibitem{273} 97 F.3d 499 (11th Cir. 1996).
\bibitem{274} \textit{Id.} at 502.
\bibitem{275} \textit{Id.} at 501.
\bibitem{276} \textit{Id.} at 505.
\bibitem{277} \textit{Id.} (citing Hudson v. McMillian, 503 U.S. 1 (1992)).
\end{thebibliography}
The absence of serious injury alone is insufficient to dismiss an Eighth Amendment claim.\(^{279}\)

F. Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^{280}\)

1. Due Process. A public housing tenant was evicted from her apartment and complained that she was not afforded a pre-eviction hearing.\(^{281}\) The record showed that her eviction was procured through a state court eviction process.\(^{283}\) However, the complaint focused on the tenant’s contention that she was not provided a hearing by the housing authority pursuant to the housing statute.\(^{283}\) Because the tenant was entitled to present a defense in state court, and because there was no reason to believe that the housing authority could better determine whether she had paid her rent, the court of appeals held that the state court proceeding provided her with all the process that she was due.\(^{284}\)

In Williams v. Fountain,\(^{285}\) an inmate of a state prison was subjected to discipline for fighting with another inmate.\(^{286}\) Although no witnesses were offered by either side at a hearing, the imposition of the discipline was substantially based on facts furnished by a confidential informant.\(^{287}\) The inmate raised two procedural due process issues: (1) whether he was entitled to have the credibility of the informant evaluated, and (2) whether there should have been any record evidence of his violation of rules.\(^{288}\) The court of appeals held that there was no

---

\(^{279}\) Id.
\(^{280}\) U.S. CONST. amend. XIV, § 1.
\(^{281}\) Colvin v. Housing Auth. of Sarasota, 71 F.3d 864 (11th Cir. 1996).
\(^{282}\) Id. at 866.
\(^{283}\) Id. at 866.
\(^{284}\) Id.
\(^{286}\) 77 F.3d at 373.
\(^{287}\) Id. at 374.
\(^{288}\) Id.
due process deprivation on either the credibility evaluation claim or the corroboration of evidence claim.

C. B. v. Driscoll involved school discipline issues raised by two students complaining of two separate incidents. One student was suspended for nine days for fighting, screaming obscenities, and assaulting faculty members. The other was suspended for nine days for possessing a look-alike illegal substance. Both alleged denial of both substantive and procedural due process. The substantive due process claims contended that the suspension caused injury of a shocking and abusive nature and that the disciplinarian was biased in the matter. Relying on McKinney v. Pate, the court of appeals held that the right to attend a public school is a state-created, rather than a fundamental, right for the purposes of substantive due process. Accordingly, the right to avoid school suspension may be abridged as long as proper procedural protections are afforded.

The Fourteenth Amendment is implicated in school suspension decisions when a state provides an entitlement to a public education. However, when a student is suspended for fewer than ten days, the process provided need consist only of oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. Thus, when students are removed from school for creating a disturbance, a tentative decision to continue to suspend the students for some days may be made before a hearing, as long as the disciplinarian holds a sufficient evidentiary basis independent of any unreliable information obtained from confidential informants, the procedural due process concerns would be allayed. Id. (citing Kyle v. Hanberry, 677 F.2d 1386, 1391 (11th Cir. 1982) ("The inquiry into the reliability of informers may be diminished (or even satisfied) where there is corroborating physical evidence of the information provided")).

A minimum requirement of due process is that conclusions of prison disciplinary bodies be "supported by some evidence in the record." Id. (quoting Superintendent, Mass. Correctional Inst., v. Hill, 472 U.S. 445 (1985)). In Williams, the corroborating evidence was the inmate's admission that he engaged in a fight. 77 F.3d at 375.

82 F.3d 383 (11th Cir. 1996).

Id. at 386.

Id.

Id. at 386.

Id.


C.B., 82 F.3d at 387.

Id.

Id. at 386 (citing Goss v. Lopez, 419 U.S. 565, 577 (1975)).
prompt hearing at which the preliminary decision to suspend can be reversed. 301

The procedural due process claim under review in Bell v. City of Demopolis, 302 an employment discrimination action, involved discipline and reprimand, indefinite suspension, termination, review by a police committee, and finally, review by the city council. 303 The court of appeals held that when there is available a satisfactory state means by which the plaintiff can seek redress for any procedural due process deprivation, then there is no cognizable procedural due process claim. 304

III. CONCLUSION

During 1996, the Eleventh Circuit continued to make adjustments in its docket management process. These efforts arise from two sources: the Supreme Court's substantial bar to the use of pendent appellate jurisdiction and the Supreme Court's continued refinement of the standard and application of evidentiary sufficiency in qualified immunity consideration. The Supreme Court's ripple effect on the Eleventh Circuit is likely to continue when the final policymaker decision comes down, probably in the 1997 survey period. More substantive constitutional issues appear to have achieved a measure of stability without any pending Supreme Court cases threatening to disrupt or redirect the Eleventh Circuit's work in the near future.

301. Id. at 387 (citing Sweet v. Childs, 518 F.2d 320, 321 (5th Cir. 1975)).
302. 86 F.3d 191 (11th Cir. 1996).
303. Id. at 191.
304. Id. at 192. The court of appeals declined to reconsider the substantive due process disposition of McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 898 (1995).