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Constitutional Criminal Procedure: A Two Year Survey

James P. Fleissner
Mercer University School of Law

Jeffrey R. Harris

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by James P. Fleissner*
and
Jeffrey R. Harris**

I. INTRODUCTION

This Article surveys significant constitutional criminal procedure decisions of the United States Court of Appeals for the Eleventh Circuit issued during 1997 and 1998. The "constitutional" branch of criminal procedure focuses on the interpretation of the Fourth, Fifth, and Sixth Amendments to the United States Constitution. In selecting "significant" decisions, we emphasized questions of first impression, other noteworthy cases, and issues likely to interest attorneys practicing in the courts of the Eleventh Circuit. We have endeavored to summarize the selected decisions and provide commentary that, hopefully, will illuminate the issues and assist the reader in understanding the importance and implications of the cases.

Although it is difficult to characterize two years of decisions, one useful methodology stems from a classic article authored by Professor Herbert L. Packer.[1] Professor Packer suggested that the criminal

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* Associate Professor of Law, Walter F. George School of Law, Mercer University, Macon, Georgia. Marquette University (B.A., 1979); University of Chicago Law School (J.D., 1986). Before joining the Mercer faculty, the co-author was a federal prosecutor in Chicago from 1986-1994, last serving as Chief of the General Crimes Section of the U.S. Attorney's Office. The co-author currently is serving as Senior Associate Independent Counsel in *United States v. Henry G. Cisneros, et al.* Views expressed in this Article are solely those of the authors, and do not represent the views of the Office of Independent Counsel.

** University of Georgia (B.A., 1995); Mercer University (M.B.A., 1996); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 1999). Member, Mercer Law Review, 1997-1999; Editor in Chief, 1998-1999.

1. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

justice system may be viewed from the perspective of two models: the Crime Control Model and the Due Process Model.[2] The Crime Control Model emphasizes the efficient apprehension and punishment of criminals and the protection of citizens from crime.[3] The image of the Crime Control Model is that of an assembly line on which crimes are systematically investigated and prosecuted. The Due Process Model focuses on the process used to determine guilt or innocence. It is more concerned with the integrity of the process and the sanctity of constitutional safeguards. The image of the Due Process Model is an obstacle course that presents impediments to wrongful convictions and law enforcement practices that infringe on the rights of citizens.[4]

Obviously, the American system of criminal justice does not embody either of these two models exclusively, nor could it. Rather, the system reflects the ongoing tension between the two models. The American system is a compromise between the models that is constantly being struck and restruck in individual decisions, including those by the courts. Viewed from the perspective of the two models, the decisions of the Eleventh Circuit tend to favor the Crime Control Model. That generalization has more force if one considers the totality of the decisions of the court, including the entire docket of the court and not just cases involving a published opinion. But as this survey illustrates, the court often vindicates the values of the Due Process Model, and in other cases the voices of dissent advocate those values. Of course, opinions advancing the Due Process Model are over-represented here precisely because the result (or the dissent) favoring Due Process values over Crime Control values makes the cases noteworthy. That said, the general leaning of the Eleventh Circuit towards the Crime Control Model should not obscure the significant strain of Due Process values running through the body of the court's decisions.

II. THE FOURTH AMENDMENT

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[5]

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2. *Id.* at 6.
3. *Id.* at 9-13.
4. *Id.* at 13.
5. U.S. CONST. amend. IV.

A. *Standing/Reasonable Expectation of Privacy*

The Crime Control Model and the Due Process Model differ greatly concerning the interpretation of the Fourth Amendment and the scope of the exclusionary rule. The Crime Control Model favors a more narrow view of the scope of Fourth Amendment protections and abhors the suppression of evidence as a sanction for illegal searches and seizures. The Due Process Model favors an expansive view of Fourth Amendment rights and endorses the exclusion of evidence as the only viable means of deterring over-reaching by law enforcement officials. This tension between the values of the two models is illustrated by several notable decisions of the Eleventh Circuit.

In a case of first impression, the Eleventh Circuit decided whether the driver of an overdue rental car has the legitimate expectation of privacy necessary to provide standing to challenge a search of the car. In *United States v. Cooper*,[6] Cooper rented a car from Budget. The car was due back at the rental office on January 20. On January 24, four days after the car became overdue, the Florida Highway Patrol ("FHP") stopped Cooper for making an illegal lane change. When the trooper discovered the rental car was overdue, he contacted Budget and the company asked him to tow the car. Cooper asked to speak to a Budget representative, but the trooper refused to let him speak on the phone. Cooper maintained he had rented cars from Budget several other times and believed he could extend the rental contract if the necessary credit was available on his credit card to cover the additional days. There was some evidence that Budget had an unwritten policy of extending the deadline. However, the extension required the renter to make either a written or oral request to extend the time. There was no evidence that Cooper had done either.[7]

The trooper conducted a sweep search of the passenger compartment of the car and discovered a loaded firearm in the glove compartment. He arrested Cooper on a firearms charge and conducted an inventory search of the vehicle pursuant to FHP policy. The search revealed two safes in the trunk of the car. A drug dog "hit" on the safes. When the trooper pried them open, he discovered cocaine, cocaine base, scales, and other drug-related paraphernalia.[8] Cooper was charged with and convicted of several federal drug offenses and sentenced to life in prison.[9]

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6. 133 F.3d 1394, 1398-99 (11th Cir. 1998).
7. *Id.* at 1395-96.
8. *Id.* at 1396-97.
9. *Id.* at 1397.

Cooper moved to suppress the evidence discovered in the search, but the district court concluded Cooper lacked standing to challenge the search of the rental car.[10] The Eleventh Circuit reversed and remanded the case to the district court to determine whether the search was constitutionally permissible.[11] The court noted that standing to challenge a search requires a two-part analysis.[12] First, a party must have a subjective expectation of privacy. Second, this subjective expectation of privacy must be one that "society is prepared to recognize as reasonable."[13] There was no dispute that Cooper subjectively maintained an expectation of privacy in the rental car. This was so, the court noted, because Cooper's previous dealings with Budget led him to believe he could extend the rental contract if he had enough credit available on his credit card.[14]

The court began its legal analysis by discussing several "indicia of reasonableness" of the expectation of privacy. First, the court explained that dicta from a prior Eleventh Circuit decision indicated a defendant maintains a reasonable expectation of privacy in a rental car three weeks overdue.[15] However, while recognizing this dicta as one indicia of reasonableness, the court refused to endorse the statement made in the prior decision.[16] The court also pointed to a district court opinion finding a reasonable expectation of privacy in a rental car one month overdue, but again explicitly declined to embrace that result.[17]

The court then analyzed the Fourth Circuit decision in *United States v. Wellons*.[18] In *Wellons* the driver of a rental car challenged a search of the car that revealed drugs. The Fourth Circuit concluded the driver did not have standing to contest the search because he was not listed as

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10. *Id.*

11. *Id.* at 1402.

12. *Id.* at 1398.

13. *Id.* (quoting Rakas v. Illinois, 439 U.S. 128, 143 & n.12 (1978)); *see also* Smith v. Maryland, 442 U.S. 735, 740-41 (1979) (explaining that the subjective expectation must be objectively reasonable under the circumstances).

14. *Cooper*, 133 F.3d at 1398.

15. *Id.* at 1398-99 (citing United States v. Miller, 821 F.2d 546, 548 (11th Cir. 1987) (relying on United States v. Smith, 799 F.2d 704 (11th Cir. 1986)). The court, however, noted that it was not holding that a driver who keeps a rental car three weeks after its due date maintains a reasonable expectation of privacy. "We stress that our reference to the facts of *Smith* and the attendant *dicta* in *Miller* are merely for indicia purposes . . . ." 133 F.3d at 1399 n.10.

16. *Id.* at 1399 & n.10.

17. *Id.* at 1399-1400 & n.12. The court also pointed to two other indicia of reasonableness: the failure of the prosecution to contest the driver's privacy in *Smith*, and the fact that the Florida Highway Patrol asked Cooper for permission to search. *Id.* at 1399. The inferences drawn from both of these indicia seem tenuous at best.

18. 32 F.3d 117 (4th Cir. 1994).

an authorized driver on the rental contract.[19] The Eleventh Circuit distinguished *Wellons*.[20] Unlike Wellons, Cooper was listed on the rental contract and was contractually obligated to pay for the rental car's use. Therefore, "Cooper's expectation of privacy was materially different from that of Wellons."[21]

The court also rejected any comparison to rental contracts involving hotel rooms.[22] A decision by the Sixth Circuit, finding that a motel patron did not have a reasonable expectation of privacy when the motel clerk repossessed the room after the patron failed to check out at the allotted time, was distinguishable according to the Eleventh Circuit.[23] In *Cooper*, the court concluded, "Budget . . . had not repossessed the rented property prior to the challenged search."[24]

Ultimately, the court determined that Cooper's privacy expectation was reasonable based on the aggregation of several factors: (1) the car was only four days overdue,[25] (2) Cooper was in actual possession of the vehicle and the rental agency had not taken any affirmative steps to repossess the vehicle,[26] (3) Cooper actually paid for the rental use during the four days the car was overdue,[27] and (4) even though he did not avail himself of the option, "a simple phone call could have extended the rental contract past the date of the warrantless search."[28] Accordingly, the court concluded Cooper retained sufficient control over the vehicle "for it to fall within the zone of constitutional sanctity."[29] After holding Cooper had standing, the court remanded the case to the district court to determine whether the search was permissible under the Fourth Amendment.[30]

Ultimately, it is very difficult to predict, based on the court's holding in *Cooper*, when a defendant will maintain an expectation of privacy in an overdue rental car. The court was careful to avoid endorsing any specific length of time when a defendant's possession of an overdue car

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19. *Id.* at 119.
20. *Cooper*, 133 F.3d at 1400.
21. *Id.*
22. *Id.*
23. *Id.* (citing United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997)).
24. *Id.* at 1401.
25. *Id.* at 1400.
26. *Id.*
27. *Id.*
28. *Id.* at 1402.
29. *Id.*
30. *Id.* The district court did not resolve the issue of whether the search was permissible as a consent search. The court focused exclusively on the standing issue. *Id.* at 1396 n.4.

might be deemed unreasonable. Therefore, this case is likely confined largely to its facts and to the aggregation of factors that persuaded the court that Cooper's expectation was a reasonable one. Thus, although *Cooper* promotes the values of the Due Process Model, it is hardly a major advance for privacy rights.

B. Probable Cause

In an en banc decision, the Eleventh Circuit addressed the issue of whether the confession of one defendant can provide sufficient probable cause to arrest a co-defendant. In *Craig v. Singletary*,[31] Miami Police detectives arrested Craig and charged him with murder. His arrest stemmed from a rather convoluted series of events. On October 25, 1988, Junior Richards was shot to death after two men attempted to rob him. An anonymous tip implicated Donald Craig. Miami Police detectives went to Craig's house to interview him. After initially providing the officers with a false name, Craig identified himself and agreed to talk with the police. Craig told the officers that he had once worked as a confidential informant and he would tell them what he knew about the crime. Craig voluntarily accompanied the detectives to the police station. During the ride, the detectives informed him several times that he was not under arrest and was free to leave.

After twice reading him his *Miranda* rights, the detectives interviewed Craig and informed him (falsely) that his fingerprints had been discovered in the victim's car. Craig told the detectives he had been in the victim's car just prior to the killing because the two were friends. He said he knew more about the crime and would tell them the rest after they arrived at the police station. At the station, Craig signed a written waiver of his *Miranda* rights, and the detectives interviewed him. Craig admitted being in the victim's car, but again claimed he left the scene before the crime took place. However, he did remember seeing two people running from the scene later that same night; he identified them as Henry Lee Newsome and Rodney Newsome. According to Craig, Rodney Newsome was carrying a gun. The detectives informed Craig that his story was not very believable, but they reiterated that he was not under arrest. Craig replied that he wanted to take a polygraph to prove he was telling the truth.

Before taking the polygraph, Craig signed another *Miranda* waiver and a polygraph release form. While the polygraph was being administered, Henry Lee Newsome was brought to the station for questioning. He confessed to involvement in the robbery. His confession was

31. 127 F.3d 1030 (11th Cir. 1997) (en banc).

corroborated by a witness who identified Newsome as one of the robbers by picking him out of a photo lineup. The witness was not able to identify Craig. Newsome told the police that Craig had committed the murder.[32]

Craig was informed that the polygraph results indicated he was being deceptive. He told the detectives he wanted to speak with another detective with whom he had worked as an informant. The police did not believe they had enough evidence to arrest Craig, so they continued to treat him as if he was not under arrest. Eventually, Craig spoke with the detective he had requested. He did not specifically confess; however, he did state, "I really messed up. I really messed up. All I wanted to do was rip the guy."[33] He then told the detective that he had remarked to another detective during a previous interview, "if you have that against me you might as well get me a lawyer."[34] None of the detectives remembered Craig ever asking for a lawyer or commenting about a lawyer up until that point.[35]

Craig eventually confessed to involvement in the robbery. He blamed the shooting on Newsome, although he contended he held the gun while Newsome pulled the trigger. He signed a written statement to that effect. While the officers prepared the paperwork on the case against Newsome and Craig, Craig waited in the interview room. An hour and a half after his original confession, Craig requested to speak again with the officers. This time, he stated he had heard Newsome's voice in the building and realized Newsome would blame him for the murder, so he wanted to confess. He then confessed to shooting the victim.[36]

Craig was convicted of murder in Florida, and his conviction was upheld by the Florida appellate courts. He sought habeas corpus relief in the federal courts. His habeas petition was denied by the district court, and he appealed to the Eleventh Circuit. The district court was reversed by a panel decision, and that decision was later vacated when the Eleventh Circuit decided to hear Craig's appeal en banc.[37]

Craig attacked his conviction on two grounds. First, he argued that his confession should have been suppressed because it occurred after he indicated he wanted to speak with a lawyer.[38] Second, in his Fourth

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32. *Id.* at 1032-35.
33. *Id.* at 1035.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1036-38.
38. *See* Edwards v. Arizona, 451 U.S. 477 (1981). The Court in *Edwards* held that a confession that results from police questioning after a suspect requests counsel is unlawful. *Id.* at 487.

Amendment claim, Craig argued he was arrested without probable cause because, if his original confession was unlawful and could not be considered, the only evidence that the police had to establish probable cause was the confession by Newsome. Craig contended a codefendant's uncorroborated confession could not establish probable cause to arrest. Accordingly, he argued his second confession was also unlawful because it was the product of an illegal arrest.[39]

Turning to Craig's first argument, the court concluded that, even assuming that the first confession occurred after he had requested a lawyer, it was irrelevant. His second confession "was more harmful to Craig than the first, because the second one incorporated all that was incriminating from the first and added something worse."[40] Further, his second confession was not prompted by police interrogation. Craig asked to speak with the officers after he confessed the first time. Because Craig prompted the second confession, it was not invalidated by a prior request for counsel.[41]

In its ruling on the Fourth Amendment issue, the court also determined probable cause to arrest Craig existed after Newsome implicated him in the crime.[42] Therefore, the court concluded, the second confession was not barred, as Craig contended, because it took place after an illegal arrest.[43] Interestingly, there was evidence in the record that both the detectives who interviewed Craig and the prosecutor in his state trial did not believe there was sufficient probable cause to arrest Craig after Newsome implicated him. However, the Eleventh Circuit determined the subjective beliefs of police officers and prosecutors were irrelevant.[44] What matters, the court explained, is whether under an objective approach, there was enough "reasonably trustworthy information which would cause a prudent person to believe that Craig had committed a felony."[45]

The Eleventh Circuit expressly held in *Craig* that as long as a codefendant's confession is not incredible,[46] "a co-defendant's confession

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39. 127 F.3d at 1037.

40. *Id.* at 1040.

41. The court held that a confession was not an *Edwards* violation if the accused requests counsel but then later initiates contact with the police. *Id.* at 1039 (citing Minnick v. Mississippi, 498 U.S. 146, 155 (1990)).

42. *Id.* at 1041.

43. *Id.*

44. *Id.*

45. *Id.* at 1046.

46. *Id.* For an example of an incredible confession the court offered: "For example, the confession of a mental patient that he and the suspect, aided by an army of little green men, committed the crime clearly would not past muster." *Id.*

that he and the suspect committed the crime can supply probable cause to arrest the suspect."[47] The indicia of credibility in this case was the fact that a witness to the crime corroborated Newsome's confession, and this witness identified Craig as a participant. Further, Craig's use of an alias when the police initially approached him and the fact that he had been implicated by an anonymous tip constituted additional evidence.[48] Finally, the court explained that "[i]ndications of deception on a polygraph examination may be taken into account in determining whether probable cause exists."[49]

Three judges concurred in part and dissented in part because the court's suggestion that a codefendant's confession, standing alone, can supply probable cause troubled them.[50] The dissenters pointed out such a conclusion was clearly unnecessary in this case because there was additional evidence beyond Newsome's confession implicating Craig in the crime.[51] The dissenters concurred with the court's conclusion that under a totality approach, there was enough evidence to arrest Craig.[52] However, they disagreed with the majority's decision, which they considered to be dicta, that "Newsome's statement alone was enough."[53] This conclusion, the dissenters believed, was "a new principle of law . . . unnecessary to [the] disposition of the case, [that] conflicts with the established caselaw."[54]

The decision in *Craig* seems correct in light of the Supreme Court's decision in *Illinois v. Gates*.[55] In *Gates* the Court concluded that probable cause determinations should be based on the "totality of circumstances."[56] The Court rejected the rigid formulaic determinations of probable cause that characterized several previous decisions.[57] In light of that approach, it seems that the abundant evidence implicating Craig, when coupled with Newsome's confession, provided the police with sufficient probable cause to arrest. The interesting question about

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47. *Id.* at 1045-46.
48. *Id.* at 1046.
49. *Id.*
50. *Id.* at 1046-47 (Godbold, J., concurring in part and dissenting in part).
51. *Id.* at 1047.
52. *Id.*
53. *Id.*
54. *Id.* at 1049.
55. 462 U.S. 213 (1983).
56. *Id.* at 238.
57. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). The Court in *Gates* rejected the *Aguilar-Spinelli* test for making determinations of probable cause. 462 U.S. at 238. This test was a two-part inquiry into an informant's (1) basis of knowledge and (2) veracity. *Id.* at 233.

the implications of the court's decision is the one raised by the dissenters: Does the majority opinion countenance a finding of probable cause based on codefendant Newsome's confession alone? In several contexts, the Supreme Court has expressed skepticism about the reliability of a suspect's postarrest statements admitting a degree of guilt but pointing the finger at another person.[58] It must be remembered, however, that those expressions of skepticism did not occur in the context of a determination of probable cause under the *Gates* test. Under that generous test, which is definitely an example of the values of the Crime Control Model, the majority's conclusion appears sound.

In *United States v. Talley*,[59] the Eleventh Circuit confronted the issue of whether a tip supplied by a confidential informant provides the probable cause necessary to justify a warrantless search of the suspect's vehicle. In *Talley* a confidential informant with a history of providing reliable information contacted the police about a drug transaction. The informant told the police he had observed two suspects entering a residence and had also witnessed one of the suspects "remove . . . cocaine from his pants."[60] The informant described the suspect's car and the location where he claimed the suspects were in the process of "'cook[ing]' the powder cocaine into . . . 'crack' cocaine."[61] Several police officers went to the location and began surveillance. The officers confirmed the description of the car and the residence. While the surveillance was underway, the suspects left the residence, returned to their car, and drove away. One of the suspects "had a bulge in his pants."[62] The police followed and stopped the vehicle. A "pat-down" search revealed that the suspicious bulge was 24.7 grams of cocaine hydrochloride. A subsequent search of the entire vehicle revealed an additional 105.4 grams of cocaine base.[63]

Both defendants moved to suppress the evidence seized in the search.[64] The Government argued that the initial stop of the vehicle was justified as an investigatory *Terry* stop.[65] The discovery of the cocaine during the pat-down search provided probable cause to arrest. Therefore, the Government concluded, the search of the vehicle was valid

58. *See* Williamson v. United States, 512 U.S. 594 (1994) (construing 804(b)(3) penal interest exception); Bruton v. United States, 391 U.S. 123 (1968) (confrontation clause case).

59. 108 F.3d 277 (11th Cir. 1997) (per curiam).

60. *Id.* at 279.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 281.

65. Terry v. Ohio, 392 U.S. 1 (1968).

as a search incident to the arrest. At the suppression hearing, the district court rejected that analysis but upheld the search on another ground.[66] The court concluded the officers had probable cause to search the vehicle based on the confidential informant's tip and the independent verification of that information by police. The Eleventh Circuit adopted "the district court's reasoned approach" in upholding the decision.[67]

The court determined "the information provided by the confidential informant . . . when combined with independent corroboration by the police, rose to the level of probable cause."[68] The court concluded the officer's verification that the car and the house were as they were described by the confidential informant, coupled with the mysterious "bulge," provided probable cause.[69] This conclusion is somewhat remarkable considering the Government did not contend there was sufficient probable cause to search the car and there was little discussion of the informant's past record of providing reliable information.[70] Further, what the court deemed "independent corroboration"[71] pertained to the minor details of the type of car the suspects were driving and the address of the house the suspects entered. Obviously, when a court goes beyond the arguments advanced by the Government to uphold a search, the decision becomes fodder for those who criticize that court for having too strong a bias for the values of the Crime Control Model.

In *United States v. Wai-Keung*,[72] the Eleventh Circuit analyzed whether police had the particularized probable cause necessary to arrest a suspect associated with a multi-person credit card fraud operation. In *Wai-Keung* Agent Cachinero of the Secret Service was investigating an Asian-American credit card fraud ring. The group operated in the West Palm Beach area and, posing as wealthy Asian businessmen, purchased expensive items from exclusive stores by using fake credit cards. On January 12, 1993, Agent Cachinero went to a local mall to investigate complaints by merchants that the ring was operating out of the mall. He interviewed several store clerks who told him the group operated in pairs, with one member making purchases and the other serving as a lookout. The agent verified this information with a representative of a credit card company.[73]

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66. *Talley*, 108 F.3d at 281.
67. *Id.*
68. *Id.*
69. *Id.* at 281-82.
70. *Id.* at 280. The court succinctly noted that the informant "had provided reliable information in the past." *Id.*
71. *Id.* at 282.
72. 115 F.3d 874 (11th Cir. 1997) (per curiam).
73. *Id.* at 875-76.

Several weeks later, Agent Cachinero was summoned to the mall by mall employees who told him that a group of Asian-American men were in the mall making large purchases with credit cards, and the cards were being rejected. The men fit the descriptions given by other mall employees, and they used the same modus operandi with which the agent was familiar.[74]

After arriving at the mall, Agent Cachinero obtained a video showing two Asian-American men at one counter and two other men making credit card purchases at another counter. One of the men furtively handed something to his cohort during one of the transactions, and all of the men appeared nervous. An off duty police officer informed Agent Cachinero that a group of Asian-Americans was making credit card purchases at another store in the mall. Cachinero went to the store and observed the group. One of the men in this group was also in the group that was captured on the video tape. The other three were not on the videotape. Agent Cachinero observed two of the men "browsing among the merchandise."[75] These two men were later identified as Tam and Li. Another man sat in a chair "facing the mall . . . acting as a lookout."[76] The fourth man was purchasing items with a false credit card. He was identified as Sun. The group left this store and proceeded to another store where Sun made another credit card purchase while Tam and Li stood next to him. After the group left the second store, Agent Cachinero approached them, identified himself, and requested identification. Sun produced a driver's license and credit cards that Cachinero believed were fake. Li produced a Florida license in his own name. Agent Cachinero arrested all three men.[77]

Li argued his arrest was not based on probable cause because there was no evidence he was involved with the theft ring. He argued "he was just waiting while others purchased merchandise or just watching them make purchases."[78] Therefore, because there was no particularized probable cause to believe he personally had committed some crime, his arrest was illegal.[79]

The Eleventh Circuit rejected his argument. The court agreed with the district court and concluded there was sufficient evidence to implicate Li in a "multi-person operation" engaged in a criminal

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74. *Id.*
75. *Id.* at 876.
76. *Id.*
77. *Id.*
78. *Id.*
79. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (holding that probable cause to arrest must be particularized with respect to a specific person and not based on association with a group who may be engaged in wrongdoing).

enterprise.[80] The court determined Li was personally implicated because the group was a multi-person operation and Li was a member of the group.[81] Further, he stood next to one of the members while that member used phony credit cards. The group itself used the same modus operandi, purchasing expensive items in exclusive stores, and was comprised of Asian-Americans. Therefore, the court concluded there was "no basis on which it can be concluded, as Li suggests, that he was just waiting while others purchased merchandise or just watching them make purchases."[82] This conclusion is a bit overstated given the evidence and is unnecessary to reaching the conclusion that there was probable cause to arrest Li. The court's sweeping conclusion that there was "no basis" to credit Li's theory of innocence looks all the more inappropriate in light of the reference in a footnote to the conclusion stating that "subsequent events verify Li's culpability."[83] The footnote begins by conceding the irrelevance of subsequent events to the analysis of whether there was probable cause to arrest Li.[84] One is left to wonder why the court chose to engage in overstatement and to highlight a concededly irrelevant point. If one views the court as too friendly to the perspective of law enforcement, the conclusion that will be drawn is obvious.

Judge Barkett, in dissent, disagreed with the court's conclusion that there was sufficient probable cause to arrest Li.[85] "[T]he worst that can be said of [Li] at the time of arrest is that he was associating with people who were breaking the law."[86] The dissent pointed out that there was no evidence that Li passed a stolen credit card because he was not on the video the agent observed, there was no evidence that Li was aware of the scheme or that he possessed any fake credit cards, and when asked for identification, Li produced his driver's license.[87] Therefore, Judge Barkett concluded, there simply was not enough particularized evidence to arrest Li.[88] The dissent took the majority to task (albeit gently) for its reference to subsequently obtained evidence of Li's guilt.[89]

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80. *Wai-Keung*, 115 F.3d at 876.
81. *Id.*
82. *Id.*
83. *Id.* at 876 n.1.
84. *Id.*
85. *Id.* at 878 (Barkett, J., dissenting).
86. *Id.* at 879.
87. *Id.* at 876.
88. *Id.* at 879.
89. *Id.* at 879 n.1.

Although this was a close case, and notwithstanding the majority's aggressive opinion, the result reached by the majority is defensible. Li's conduct was more than mere association with persons committing a crime; the nature, timing, and proximity of Li's association with persons engaging in suspicious conduct created probable cause that Li was a knowing participant. The totality of the circumstances reasonably led to the conclusion that there was particularized probable cause as to Li. While it might be too much to say there was "no basis" to conclude Li's conduct was innocent, it can be said that there is enough basis to conclude Li was a participant and that the probable cause standard was met.

C. *Consent to Search*

In two cases the Eleventh Circuit overturned convictions obtained from the consent searches of passengers on board buses. These two cases are good examples of the Eleventh Circuit reining in crime-fighting efforts and vindicating the values of Professor Packer's Due Process Model. In *United States v. Guapi*,[90] a Greyhound bus made a scheduled stop in Mobile, Alabama, en route to its destination of Miami, Florida. Two officers from the Mobile drug unit boarded the bus. One officer, Marvin Whitfield, was in uniform. His partner was wearing street clothes. Officer Whitfield stood in the front of the bus near the exit and announced:

> I'm Officer Marvin Whitfield with the Mobile Police Department Drug Interdiction Unit. With your cooperation, I'd like to check on-board cargo for illegal contraband such as alcohol, narcotics, weapons, or explosives. With your consent and cooperation, I'd like to ask you to bring down your on-board luggage if you have any overhead and have it open so I can do a quick on-board inspection.[91]

Officer Whitfield never informed the passengers they could refuse to consent to the search. As the passengers pulled their luggage from the overhead compartments, Officer Whitfield worked his way down the aisle, from front to back, inspecting the contents of the passengers' luggage. He discovered a brick shaped object in Guapi's bag, and after a drug dog indicated that the object contained narcotics, Officer Whitfield arrested Guapi.[92]

Guapi argued the consent search was invalid because it was not voluntary and moved to suppress the evidence. The district court

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90. 144 F.3d 1393 (11th Cir. 1998).
91. *Id.* at 1394.
92. *Id.*

concluded the search was valid and determined it was "irrelevant that [the] encounter took place on a bus."[93] The Eleventh Circuit disagreed.[94] The court began its analysis with the United States Supreme Court's decision in *Florida v. Bostick*.[95] In *Bostick* the Court refused to require that police inform passengers during a bus search they were free to leave and instead held the appropriate inquiry is whether a reasonable person would believe consent to search was optional under the circumstances.[96] The Court found two factors particularly relevant. First, informing passengers they could refuse consent strengthens the argument that consent is freely given.[97] Second, officers should not threaten passengers with the use of force in order to obtain consent.[98]

The Eleventh Circuit seized upon the fact that Officer Whitfield had not informed passengers they could refuse the search. The court conceded the Supreme Court rejected such a per se requirement;[99] however, the court concluded, "we feel that a reasonable person in the defendant's position would not have felt free to disregard Officer Whitfield's requests without some positive indication that consent could have been refused."[100] Several factors seemed particularly important to the court in drawing this conclusion. First was the fact this search took place in the cramped confines of a bus[101] while Officer Whitfield stood at the front of the bus blocking the exit. He also conducted the search from front to back, preventing passengers from leaving without passing him. Further, Officer Whitfield's search procedure seemed "carefully designed to convince passengers that they had no choice but to accede to [his] demands."[102] The court also noted that Officer Whitfield apparently made his announcement very rapidly,[103] so the passengers may not have understood the search was based on their

93. *Id.* at 1395.
94. *Id.*
95. 501 U.S. 429 (1991).
96. *Id.* at 439.
97. *Id.*
98. *Id.* at 432.
99. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (holding that officers are not required to inform suspects that they may refuse to consent to a search).
100. *Guapi*, 144 F.3d at 1395.
101. The Court in *Bostick* recognized that the fact that a search takes place on a bus is an important factor in evaluating the voluntainess of consent to search. *See Bostick*, 501 U.S. at 435.
102. *Guapi*, 144 F.3d at 1395.
103. *Id.* at 1396. Part of this conclusion derived from the fact that at the suppression hearing Officer Whitfield repeated his speech so rapidly that the court reporter had to interrupt him three times to accurately transcribe it. *Id.*

"consent and cooperation."[104] Finally, it was also important to the court that Whitfield operated a veritable "consent search" machine. He testified he conducted approximately twenty-eight bus searches per week, and he could only recall several occasions when passengers refused consent.[105] Based on the totality of these factors, the court concluded, "a reasonable person traveling in this bus would not have felt free to ignore the search request . . . [therefore] this search was unconstitutional."[106]

The Eleventh Circuit examined another bus search in *United States v. Washington*.[107] In *Washington* two federal agents boarded a bus in Jacksonville, Florida. Both agents were in plain clothes and their weapons were concealed. One agent went to the front of the bus and the other to the back. Holding his badge over his head, Agent Perkins, who was at the rear of the bus, announced:

> Good morning, ladies and gentlemen. My partner and I are both federal agents with the United States Department of Justice. No one is under arrest or anything like that, we're just conducting a routine bus check. When we get to you, if we could please see your bus ticket, some photo identification if you have some with you, please, and if you would please identify which bag[] is yours on the bus we'd appreciate it and we'll be out of your way just as quick as we can.[108]

The agents moved down the aisle, starting from the back of the bus, asking each passenger if they were carrying "drugs, weapons, large sums of money, or firearms."[109] The agents did not try to block the aisle and stood behind each passenger as they conducted their sweep of the bus. Eventually, they arrived at Washington's seat and asked him if he was carrying any contraband. He replied he was not, and the agents requested his identification and bus ticket. After he identified his luggage, the agents asked Washington if they could search his bags. He consented. During the encounter Agent Perkins believed Washington was acting suspicious. Washington was crouched over in his seat and appeared to be covering something in his lap. After Perkins noticed a tubular bulge in Washington's pants pocket, he asked Washington if he could search him. Washington consented, and a subsequent search

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104. *Id.* at 1394.
105. *Id.* at 1396.
106. *Id.* at 1393.
107. 151 F.3d 1354 (11th Cir. 1998).
108. *Id.* at 1355.
109. *Id.*

revealed several packages of cocaine in a homemade apron concealed under his pants.[110]

Relying on *Guapi*, the court in *Washington* focused on the fact the agents had not notified passengers they could refuse to consent to the search.[111] The court noted the search took place on a cramped bus and was "consciously designed to take full advantage of a coercive environment."[112] Accordingly, "the typical bus passenger would not feel free to refuse the request[] . . . [t]herefore we hold that the search violated the Fourth Amendment's prohibition against unreasonable searches and seizures."[113]

Judge Black dissented, observing that the court's reliance on *Guapi* was misplaced.[114] In *Guapi* the searching officer was in uniform, but in *Washington* both agents were in plain clothes. Further, the agents in *Washington* made no attempt to block the aisles and conducted the search from the back of the bus moving forward. In *Washington* consent to search was asked individually, whereas in *Guapi* the officer made a mass announcement.[115] Judge Black concluded that given these differences, the court was concerned with the only factor both cases had in common.[116] "[T]he majority opinion makes notification of the right to refuse consent a requirement of a valid bus search."[117]

A synthesis of *Guapi* and *Washington* suggests that Judge Black's conclusion has force. In the Eleventh Circuit, a bus search predicated on consent seems to require police inform suspects they have a right to refuse the search. Otherwise, as the dissent pointed out, "it is not clear that there will ever be any set of circumstances under which [the] Court [will] uphold a bus search."[118] Whether Judge Black is right that the Eleventh Circuit has created, de facto, a per se rule despite the Supreme Court's reluctance to create such a rule, *Guapi* and *Washington* should have a salutary effect. After those decisions, law enforcement officers should clearly inform bus passengers of their right to refuse consent. Those decisions should deter tactics designed to lull passengers into a

110. *Id.* at 1356.
111. *Id.* at 1355.
112. *Id.* at 1357.
113. *Id.*
114. *Id.* at 1357-58 (Black, J., dissenting).
115. *Id.* at 1358. There were several other differences as well. There was no evidence in *Washington* that the agents engaged in numerous bus searches while almost always receiving consent. Further, there was no evidence that the agents hurried through their consent requests or that passengers might not understand them.
116. *Id.*
117. *Id.*
118. *Id.*

false sense of their right to refuse consent. That certainly seems a good result.

III. THE FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[119]

A. *The Right Against Self-Incrimination*

In *United States v. Grimes*,[120] the Eleventh Circuit concluded a suspect may invoke *Miranda*[121] rights only during custodial interrogation or when interrogation is imminent.[122] In *Grimes*, defendant worked as a maintenance supervisor at an apartment complex. After he was fired, he became disgruntled at his coworkers and former boss. He decided to express his dissatisfaction by blowing up the apartment complex. He constructed a bomb and delivered it to the apartment where the maintenance shop had been located when he was an employee. Unbeknownst to Grimes, the shop had moved and a tenant received the bomb. The bomb detonated, killing the tenant and partially destroying the building. Grimes later bragged about the bombing to his new employer, Kenneth Pender. Pender contacted police and began working as an informant, agreeing to tape incriminating conversations with Grimes.[123]

After Pender began working as an informant, Grimes was arrested on bad check charges. He obtained appointed counsel and signed a form invoking his right to remain silent and his right to counsel. The form was filed with the police and with the state attorney's office. While Grimes was in jail awaiting disposition of the bad check charges, he continued to brag to fellow inmates and others about the bombing. He

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119. U.S. CONST. amend. V.

120. 142 F.3d 1342 (11th Cir. 1998).

121. Miranda v. Arizona, 384 U.S. 436 (1966) (holding that a suspect must be warned prior to custodial interrogation that he has a right to remain silent and to have an attorney present during questioning).

122. *Grimes*, 142 F.3d at 1348.

123. *Id.* at 1345.

made many of these incriminating statements to Pender. After pleading guilty to the bad check charges, Grimes was released from jail, and Pender agreed to pick him up. Pender took Grimes to a meeting with an undercover officer who posed as someone who was seeking to hire an expert in bombs and arson. Grimes once again bragged about his bombing prowess.[124]

Ultimately, Grimes was arrested and charged with the bombing. He moved to suppress his incriminating statements, arguing that the form he executed in the bad check case, invoking his right to remain silent and to counsel, prevented the introduction of his subsequent statements.[125] The district court denied his motion, and he appealed.[126]

On appeal the Eleventh Circuit recognized Fifth Amendment rights are not "offense specific."[127] Thus, the Fifth Amendment could, in theory, protect Grimes. However, the court noted that other circuits had rejected the notion *Miranda* rights may be anticipatorily invoked.[128] Adopting the reasoning of those circuits, the Eleventh Circuit concluded "that *Miranda* rights may be invoked only during custodial interrogation or when interrogation is imminent."[129] Because no interrogation was imminent when Grimes executed his rights form, he did not properly invoke his *Miranda* rights. His incriminating statements, therefore, could be used against him.[130] Of course, Grimes's outrageous conduct might qualify him to be the poster-boy for the Crime Control Model of criminal procedure. If one views the result as not sufficiently friendly to Grimes's rights, the quarrel is with the basic tenets set forth in the Supreme Court's Fifth Amendment cases, not with the Eleventh Circuit's application of those precedents.

In *United States v. Veal*,[131] the court confronted the issue of whether statements suppressed in a civil rights trial could be used in a later trial

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124. *Id.* at 1345-46.

125. *Id.* at 1346. Grimes also argued that his statements to Pender while he was incarcerated should have been suppressed because he was never given a *Miranda* warning. The court rejected this contention, holding that the Supreme Court's decision in *Illinois v. Perkins* foreclosed that argument. *Id.* (citing Illinois v. Perkins, 496 U.S. 292, 299 (1990)). In *Perkins* the Court concluded that there was no reason to believe that a suspect's confession was coerced if it was freely given to another person who was secretly working for the government. *Perkins*, 496 U.S. at 296-97.

126. *Grimes*, 142 F.3d at 1346.

127. *Id.* at 1348 (citing McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)).

128. *Id.* (citing United States v. LaGrone, 43 F.3d 332, 335-40 (7th Cir. 1994); United States v. Thompson, 35 F.3d 100, 103-04 (2d Cir. 1994); Alston v. Redman, 34 F.3d 1237, 1242-51 (3d Cir. 1994); United States v. Wright, 962 F.2d 953, 954-56 (9th Cir. 1992)).

129. *Id.*

130. *Id.*

131. 153 F.3d 1233 (11th Cir. 1998).

for perjury and obstruction of justice. In *Veal* Officer Camacho, a member of a Miami police drug unit, received a death threat from a local drug dealer named Mercado. After receiving the threat, Camacho, along with several other members of the drug squad, went to Mercado's house. The officers escorted Mercado inside, closed the door, and lowered the curtains. Shortly thereafter another officer arrived at the scene and discovered that Mercado had been beaten to death. Police investigators interviewed the officers. They gave statements denying any knowledge of how Mercado died and denying having any physical contact with him prior to his death. Despite this denial, physical evidence and eyewitness testimony implicated the officers, who were then charged with federal civil rights violations.[132]

At the civil rights trial, the officers moved to suppress the statements they gave to police.[133] The district court granted the motion[134] pursuant to the Supreme Court's decision in *Garrity v. New Jersey*.[135] In *Garrity* the Court held that when a public employee gives a statement during an internal investigation under a belief that failure to co-operate with investigators will result in termination, that statement may not be used against the employee in a later criminal proceeding.[136] The district court concluded the officers reasonably believed they had to co-operate, or risk termination. Therefore, their statements to police investigators were suppressed.[137] The civil rights trial resulted in no convictions.[138]

Several years later the officers were charged with obstruction of justice and perjury because the Government contended they conspired to hide the true circumstances of Mercado's death. The officers moved to suppress the same statements the district court had previously suppressed under *Garrity*. This time the court declined to suppress the statements, and the officers appealed.[139] The Eleventh Circuit concluded that "*Garrity* provide[s] no insulation against a subsequent perjury or obstruction of justice charge."[140] The court explained, "neither *Garrity* nor the Fifth Amendment prohibits prosecution and punishment for false statements or other crimes while *making Garrity*-protected statements. Giving a false statement is an *independent*

132. *Id.* at 1236-38.
133. *Id.* at 1238.
134. *Id.*
135. 385 U.S. 493 (1967).
136. *Id.* at 500.
137. *Veal*, 153 F.3d at 1238.
138. *Id.*
139. *Id.*
140. *Id.* at 1241-42.

criminal act that . . . is *separate* from the events to which the statement relates . . . ."[141] To be protected under *Garrity*, the statements must be true.[142] The immunity is not, the court explained, "a license to lie or commit perjury."[143] This seems the right result. The law of immunity in the federal system, including the use-immunity statutes,[144] generally carves out an exception allowing immunized statements to be used in a prosecution for crimes committed during the immunized testimony, such as perjury. This is sound policy that prevents a grant of immunity from becoming a license to lie.

Another interesting self-incrimination issue was *Hill v. Turpin*,[145] another case illustrating the limits of the court's tolerance for aggressive crime fighting tactics that may infringe on the rights of defendants. In *Hill* defendant was convicted of murder in Georgia. Hill was accused of murdering a police officer during a domestic violence incident involving Hill, his neighbors, his daughter, and a variety of bystanders. During the melee surrounding a police attempt to arrest a neighbor on domestic violence charges, a police officer was shot and killed. Police discovered Hill near the crime scene, lying on the ground suffering from multiple gun shot wounds.[146] He was arrested and refused to speak to police officers without the presence of his lawyer.[147] Hill was convicted of the murder and appealed his conviction through the Georgia appellate courts, ultimately without success.[148] He subsequently filed a habeas corpus petition in the United States District Court for the Northern District of Georgia. The district court granted him partial relief based on sentencing irregularities, but denied him relief on his Fifth Amendment claims.[149] On appeal to the Eleventh Circuit, the court granted Hill a new trial based on Fifth Amendment violations.[150]

The Fifth Amendment violation at issue in *Hill* arose from remarks made by a witness and the state prosecutor that impermissibly commented on Hill's invocation of his right to remain silent. In *Doyle v. Ohio*,[151] the Supreme Court held that it is improper for a prosecutor to comment on a defendant's invocation of the right to be free from self-

141. *Id.* at 1243.
142. *Id.*
143. *Id.*
144. 18 U.S.C. §§ 6001-6005 (1994 & Supp. III 1997).
145. 135 F.3d 1411 (11th Cir. 1998).
146. *Id.* at 1412-13.
147. *Id.* at 1415.
148. *Id.* at 1413.
149. *Id.*
150. *Id.*
151. 426 U.S. 610 (1976).

incrimination.[152] The Court noted it is unfair to apprise a defendant that he has the right to remain silent and that his silence will not be used against him, and then to do precisely that at trial.[153] It is also improper to impeach a defendant based on his post arrest silence.[154]

In *Hill* the court concluded the state prosecutor impermissibly violated *Doyle* four times, despite repeated objections from defense counsel and several admonitions from the judge.[155] Defense counsel even filed a motion in limine prior to trial to insure the state would not comment on Hill's post arrest silence. The judge explicitly warned the prosecutor to avoid any such references and entered an order to that effect. The first violation occurred during the prosecutor's direct examination of the state's chief investigator. When the testimony began to center around the time of Hill's arrest, defense counsel approached the bench and asked the judge again to remind the prosecutor not to stray into matters concerning Hill's post-arrest silence. The court agreed and reminded the prosecutor of the prior order. Undeterred, the prosecutor asked the investigator to relay what Hill had said immediately after being apprised of his *Miranda* rights.[156] The investigator replied, "His response was nil. He did not give a response."[157] The court, prompted by a defense objection, instructed the jury that a criminal defendant has no obligation to say anything and warned them about inferring anything from Hill's response.[158] With the very next question, the prosecutor again placed Hill's post-arrest silence before the jury. He asked the investigator if they shared any further conversation and he replied, "I asked him if he was in great pain, and he said yes . . . and I told him that the ambulance would be there in a little bit . . . and he asked me for a cigarette, which I found him and gave it to him and at that time he stated he wanted his lawyer."[159] Defense counsel objected and moved for a mistrial and a contempt hearing. The court denied the mistrial motion and instead offered to give another curative instruction. After court resumed from a recess, the judge once again reminded the jury not to infer anything from Hill's invocation of his right to counsel. The prosecutor made a third reference to Hill's silence when Hill took the stand to testify in his own defense. After Hill testified to his account of the shooting, the prosecutor cross-examined him by asking, "[d]id you

152. *Id.* at 619.
153. *Id.*
154. *See* Wainwright v. Greenfield, 474 U.S. 284, 291 (1986).
155. 135 F.3d at 1418.
156. *Id.*
157. *Id.* at 1414.
158. *Id.*
159. *Id.* at 1415.

ever try to explain all of this to anybody before today?"[160] However, before Hill could respond, defense counsel objected. The court sustained the motion and once again instructed the jury. The final reference took place during the state's closing argument. The prosecutor emphasized Hill's failure to tell his version of the story to police at the time he was arrested.[161]

The court of appeals began its analysis by examining the appropriate standard of review.[162] The court determined that collateral review of *Doyle* violations requires a reviewing court to analyze whether references to a defendant's post-arrest silence have a "'substantial and injurious effect or influence in determining the jury's verdict.'"[163] The Eleventh Circuit concluded that the repeated references to Hill's post arrest silence did substantially influence the jury's verdict.[164]

Three factors were important to the court in this case. First, the court noted the frequency of the violations and their apparent deliberate nature.[165] In fact, the court noted that the prosecutor had been held in contempt for failing to better control the witness.[166] Second, the court was concerned by the number of times the judge was forced to instruct the jury to ignore the improper references.[167] Indeed, one of the curative instructions occurred after a recess, so the court reminded the jury of the violation and then instructed them to ignore it. This instruction, the court concluded, "may have served not to cure but to magnify the impact of the prosecutor's improper comment."[168] The third factor was the overall weakness of the state's case. Several other witnesses provided conflicting accounts of the murder scene, so Hill's testimony was particularly significant. Improper attacks against his credibility could therefore be expected to have highly damaging results.[169] The result in this case seems as appropriate as the conduct of the prosecutor and witness was inappropriate. Although there was no finding that the prosecutor encouraged the improper testimony, the

160. *Id.* The court recognized that this statement standing alone would not have constituted a *Doyle* violation under the Supreme Court's decision in Greer v. Miller, 483 U.S. 756, 764-65 (1987). *Hill*, 135 F.3d at 1416 n.5. However, because the statement was coupled with three other improper references, the court found *Greer* inapplicable. *Id.*

161. *Hill*, 135 F.3d at 1415.

162. *Id.* at 1416.

163. *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)).

164. *Id.* at 1416-17.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1419.

169. *Id.* at 1418.

prosecutor was at least guilty of failing to take steps to control the witness, especially after the initial incident. Even that conduct falls below the standard of behavior the system expects of prosecutors.

B. Double Jeopardy

In *United States v. Gil*,[170] the Eleventh Circuit confronted an interesting double jeopardy issue. In *Gil* Lourdes and Julian Gil were charged with federal violations of possession with intent to distribute cocaine and conspiracy to possess cocaine with intent to distribute.[171] Federal agents conducted a controlled delivery of five kilograms of cocaine to Julian Gil and another man. The agents sprayed the cocaine packages with "clue spray," a substance that is visible only under ultraviolet light.[172] The cocaine was delivered to Gil's home. Shortly after the delivery, Lourdes Gil drove away from the scene. The police stopped her and discovered bundles of cash in her car. The agents arrested Julian and Lourdes and found additional incriminating evidence in their home. After their arrest, the Gils were inspected for the presence of clue spray. Julian Gil had clue spray on his hands and forearms; however, Lourdes had only small dots of the spray on her person. Further, Julian's fingerprints were on the packages, but police did not find Lourdes's prints on the cocaine.[173]

At trial Lourdes elicited testimony from a forensic chemist that several common household substances appear fluorescent under ultraviolet light. She also argued clue spray could be transferred by touching someone who had the spray on his or her skin.[174] Ultimately, the jury acquitted her on the possession count, but hung on the conspiracy count.[175] The Government sought to retry her on the conspiracy charge. Lourdes moved to exclude the clue spay evidence, arguing that because the jury acquitted her of possession, the the Double Jeopardy Clause barred the Government from relitigating certain aspects of the possession charge.[176] The district court concluded that estoppel under the Double Jeopardy Clause requires a two-step analysis. First, a court must examine which facts were necessarily determined by a jury's prior verdict. Second, a court must decide if those same facts are an essential

170. 142 F.3d 1398 (11th Cir. 1998).
171. *Id.* at 1400.
172. *Id.* at 1399.
173. *Id.* at 1399-1400.
174. *Id.* at 1400.
175. *Id.*
176. *Id.* As the court of appeals noted, the term "collateral estoppel" is often used in this context, although a better term might be "direct estoppel" because the estoppel is being applied in the same case. *Id.* at 1400 n.3.

element of the pending case.[177] The district court concluded the jury must have decided the clue spray evidence did not prove Lourdes had touched the cocaine packages. Therefore, the court precluded the Government from introducing the clue spray evidence at the retrial.[178]

The Eleventh Circuit agreed the district court's two-step inquiry was correct. The court, however, disagreed with the district court's conclusions and reversed the case.[179] The court of appeals determined the jury did not necessarily reject the clue spray evidence merely because it acquitted Lourdes on a possession with intent to distribute count.[180] The jury may have credited "Lourdes's assertions that she never intended to distribute the drugs."[181] The proper inquiry, the court explained, is whether the jury *must* have determined the efficacy of the clue spray evidence.[182] Otherwise, it is inappropriate to "'speculate' regarding the meaning of the jury's verdict."[183] The burden was on defendant to show estoppel applies, and she could not "demonstrate that the issue whose relitigation [s]he seeks to foreclose was actually decided in the first proceeding."[184]

Turning to the second part of the test, the court determined that the issue of whether Lourdes *touched* the cocaine was not an essential element of the conspiracy charge.[185] As long as the issue decided in the first case does not go to an essential element of the retried case, double jeopardy does not apply. The Government could establish a conspiracy regardless of whether Lourdes ever touched the cocaine.[186] Therefore, the court concluded, under the second prong of the analysis the clue spray evidence was not barred.[187] The court's conclusion is fully consistent with the approach to estoppel reflected in prior Eleventh Circuit cases[188] and Supreme Court cases.[189]

Another double jeopardy issue arose in *United States v. Fern*.[190] Fern was charged with mail fraud, witness tampering, and violations of

177. *Id.* (citing United States v. Garcia, 78 F.3d 1517 (11th Cir. 1996)).
178. *Id.*
179. *Id.* 1401-02.
180. *Id.* at 1402.
181. *Id.* at 1401.
182. *Id.*
183. *Id.* (quoting United States v. Bennett, 836 F.2d 1314, 1316 (11th Cir. 1988)).
184. *Id.* (quoting Dowling v. United States, 493 U.S. 342, 350 (1990)).
185. *Id.* at 1401-02.
186. *Id.* at 1401.
187. *Id.* at 1401-02.
188. *See, e.g.*, United States v. Shenberg, 89 F.3d 1461 (11th Cir. 1996).
189. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970); Dowling v. United States, 493 U.S. 342 (1990).
190. 117 F.3d 1298 (11th Cir. 1997).

the Clean Air Act, all of which derived from a complicated insurance scam. Fern owned an asbestos testing firm. He was hired to test for asbestos contamination in a local resort that had been damaged by a fire. The resort maintained insurance that covered the cost of asbestos removal only if the asbestos contamination resulted from fire. Fern fabricated test results to show the resort was extensively contaminated with asbestos. He contracted with the resort's project manager, who was aware of the scam, to remove the asbestos despite not having the appropriate federal license certifying Fern's company in asbestos removal. Undaunted, Fern fabricated the appropriate forms indicating he had hired a certified asbestos removal firm to assist him with the project. Fern completed the project and the resort's insurance carrier paid for the asbestos removal.[191]

Fern was eventually arrested, and at trial the Government called an Alcohol, Tobacco, and Firearms ("ATF") agent to testify against him. The agent testified, and two days later the prosecutor learned the agent was under investigation for theft of government property. The following day the prosecutor promptly disclosed this information to Fern's attorney. Fern attempted to recall the agent to the stand, but the agent invoked the privilege against self-incrimination. Fern moved for a mistrial, and the district court granted the motion.[192] Although the court's opinion is not explicit on this score, it probably is safe to assume that the district court found that the cross-examination on the misconduct allegations was appropriate under Federal Rule of Evidence 608(b) and that the inability to cross-examine on the issue created a manifest necessity for a mistrial.

The Government sought to retry Fern, and he argued retrial violated the Double Jeopardy Clause. He contended that another prosecutor, working in the public corruption section of the United States Attorney's office, had been aware of the accusation against the ATF agent and should have disclosed the incriminating information. The district court conducted extensive evidentiary hearings on the motion. The court concluded that at the time the prosecutor learned of the accusation, no ATF internal investigation had occurred, and the accusations were unsubstantiated. Further, the prosecutor had been unaware that the ATF agent was testifying in any pending cases.[193] The court denied Fern's motion and he appealed.[194]

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191. *Id.* at 1300-02.
192. *Id.* at 1302-03.
193. *Id.*
194. *Id.* at 1303.

The Eleventh Circuit began by explaining that ordinarily when a defendant successfully moves for a mistrial, the Double Jeopardy Clause does not bar retrial.[195] However, the court stated, double jeopardy may be implicated if the government "goads" the defendant into seeking a mistrial.[196] Determining whether a defendant has been goaded into seeking a mistrial depends on the objective facts and circumstances of the case.[197] In *Fern* the court concluded the objective facts did not support the contention the Government intentionally induced Fern to move for a mistrial or had behaved in a grossly negligent fashion.[198] The court determined the prosecutor who was trying the case against Fern promptly disclosed the information about the ATF agent immediately after he received it.[199] Further, the prosecutor who originally received the information reasonably believed it to be preliminary and had no obligation to reveal it to anyone at that time.[200] Accordingly, the court concluded, there was no "goading" on the Government's part and Fern's retrial was not barred by the Double Jeopardy Clause.[201] Given the fact-finding about the purposes of the prosecutors, the court of appeals reached the right result. Expanding double jeopardy protection following a mistrial to cases involving unintentional or merely negligent conduct by the prosecution would provide a windfall to the defendant who is granted a mistrial. Ironically, it might also create a powerful incentive for trial courts not to find manifest necessity for mistrials, thereby robbing defendants of even the advantage of a fresh start in an untainted proceeding.

In *United States v. Mendez*,[202] another case concerning double jeopardy, Mendez was charged with assaulting a mail carrier with intent to steal mail and with possessing stolen mail. Mendez and two other men robbed several postal employees at gunpoint and stole their mail trucks. The men sifted through the stolen mail looking for credit cards they could use to make purchases.[203] They were eventually apprehended, and Mendez was charged with a violation of 18 U.S.C. § 2114, a statute criminalizing the knowing and willful taking of mail from a

195. *Id.* at 1304.
196. *Id.*
197. *Id.* (citing Oregon v. Kennedy, 456 U.S. 667, 679-80 (1982) (Powell, J., concurring)).
198. *Id.*
199. *Id.* at 1304-05.
200. *Id.*
201. *Id.*
202. 117 F.3d 480 (11th Cir. 1997).
203. *Id.* at 481-82.

mail carrier by force.[204] Mendez was also charged with a violation of 18 U.S.C. § 1708, a criminal statute that prohibits the unlawful possession of stolen mail when a person knows it to be stolen and possesses the specific intent to possess it anyway.[205] A jury convicted him on both counts. Mendez moved to vacate his conviction, contending that section 1708 was a lesser included offense of section 2114 and that the Double Jeopardy Clause prohibited sentencing him on both charges.[206] The district court denied his motion, so he appealed to the Eleventh Circuit.[207]

The issue was whether the counts charging the violations of section 1708 and section 2114 are "separate offenses" under the Double Jeopardy Clause. Under the well-known *Blockburger*[208] test, crimes established by different statutes are separate offenses if each contains an element the other does not.[209] If one crime contains an element the other does not, but the other contains no unique element, then the defendant may not be punished for both crimes.[210] If the crime without a unique element carries a lower potential punishment, then that crime is the lesser included offense of the crime with the greater punishment. Consistent with this, the court explained the Double Jeopardy Clause prohibits sentencing a criminal defendant for two separate offenses unless the offenses contain at least one different element.[211] The court concluded that under the facts of this case, the robbery and the possession were contemporaneous.[212] The unlawful possession count was subsumed by the claim that Mendez assaulted a mail carrier with the intent of taking the mail. Therefore, the possession count was a lesser included offense of the assault count, and double jeopardy prevented separate sentences for each offense.[213] The court vacated Mendez's sentence for possession of stolen mail and remanded the case for sentencing on the assault claim.[214]

Two observations may be made. First, had the district court recognized section 1708 as a lesser included offense of section 2114,

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204. *Id.* at 486 (citing 42 U.S.C. § 2114 (1988)).
205. *Id.* (citing 42 U.S.C. § 1708 (1988)).
206. *Id.* at 484.
207. *Id.*
208. Blockburger v. United States, 284 U.S. 299 (1932).
209. 117 F.3d at 486.
210. *Blockburger*, 284 U.S. at 304.
211. *Mendez*, 117 F.3d at 486 (citing United States v. Dixon, 509 U.S. 688, 696 (1992)). This test is often called the "same elements" test or the "Blockburger" test after the Supreme Court's decision in *Blockburger*. *Id.*
212. 117 F.3d at 487.
213. *Id.*
214. *Id.*

defendant could have requested instructions allowing convictions on the lesser included offense (each count has a five year maximum penalty) instead of the more serious section 2114 charges, which carry twenty-five years on each count. Second, although the court remanded the case for resentencing because of defendant's successful argument, it appears to be a pyrrhic victory. Under the Sentencing Guidelines, the total sentence of imprisonment was 162 months.[215] Although the district court imposed forty-two months on one of the section 1708 counts to run consecutively, it is unlikely that the total sentence of imprisonment will be much different at resentencing because the guidelines focus on offense conduct rather than the number of counts of conviction.[216]

Although the specific guideline calculation was not part of the published opinion, it appears that the district court will be able to impose the guideline sentence of 162 months on either of the section 2114 counts. If the defense had successfully requested lesser included offense instructions, and if the jury had chosen to convict on the lesser section 1708 offenses, defendant's sentence would have been capped at ten years, which represents the total statutorily allowed sentence on the two section 1708 counts.

C. Due Process

The courts have construed the Due Process Clause of the Fifth Amendment to guarantee numerous procedural safeguards during a criminal trial. The Eleventh Circuit confronted several of these issues during the survey period.

1. Improper Jury Argument. In recent years the Eleventh Circuit has addressed many cases concerning improper remarks made by prosecutors during jury trials. That trend continued during the current survey period. In *United States v. McLean*,[217] the Government charged McLean with possession of cocaine and conspiracy to distribute cocaine, contending he was involved in a crack cocaine distribution network operating in Fort Lauderdale, Florida.[218] At trial the prosecutor stated during closing argument, "there is something unique and distinctive about crack cocaine. And we speak here today . . . on behalf of the people who have no voice. Those are the crack addicted babies languishing in hospitals around the country."[219] McLean objected to

215. *Id.* at 484.
216. *See* UNITED STATES SENTENCING GUIDELINES, Ch.1, Pt. A, subpts. 4(a), (e).
217. 138 F.3d 1398 (11th Cir. 1998).
218. *Id.* at 1400-02.
219. *Id.* at 1405.

this remark. On appeal the Eleventh Circuit concluded the statement "[was] a blatant appeal to the fears and prejudices of jurors and [was] obviously improper."[220] However, the court determined "the government is saved from constitutional error by the overwhelming evidence against McLean."[221] The court reminded trial courts to safeguard the rights of defendants by punishing lawyers who violate the "high standards we should all demand."[222] The court offered no suggestions, however, regarding what punishment might be appropriate.

A similar situation arose in *United States v. Wilson*.[223] Wilson was charged with possession with intent to distribute crack cocaine.[224] His arrest stemmed from a negotiation with an undercover agent for the sale of 4.5 ounces of cocaine. However, when the sale commenced, Wilson delivered only one-half ounce of cocaine. Wilson had been targeted by a multi-agency task force concentrating on major cocaine dealers.[225] He was arrested and charged. At trial the prosecutor elicited testimony that the investigation involving Wilson concentrated on "large scale dealers of drugs."[226] Despite numerous defense objections, the prosecutor continued to refer to Wilson as a "major drug dealer"[227] even though the charges stemmed from a relatively minor amount of cocaine. Wilson also contended prosecutorial misconduct arose when the prosecutor elicited testimony that Wilson held a gun to a federal agent's head during a prior drug transaction that resulted in a criminal conviction.[228] Although the prior conviction was admissible as 404(b)[229] evidence, the prosecutor twice emphasized the violent nature of the transaction.[230]

Wilson was convicted, and on appeal the Government conceded it was inappropriate to elicit the details of the conviction but argued that the evidence against Wilson was overwhelming.[231] The Eleventh Circuit agreed and noted that prosecutorial misconduct requires a two-part analysis. First, the remarks must be improper. Second, the defendant's substantial rights must be prejudiced.[232] The court concluded that

220. *Id.*
221. *Id.*
222. *Id.*
223. 149 F.3d 1298 (11th Cir. 1998).
224. *See* 21 U.S.C. § 841(a)(1) (1994).
225. *Wilson*, 149 F.3d at 1300-01.
226. *Id.* at 1300 n.3.
227. *Id.*
228. *Id.* at 1301 n.4.
229. *See* FED. R. EVID. 404(b).
230. *Wilson*, 149 F.3d at 1301 n.4.
231. *Id.* at 1302 n.6.
232. *Id.* at 1301.

although "some of the pertinent remarks . . . were improper . . . [the] Defendant has shown no prejudice."[233] The court was persuaded by the facts that the evidence against Wilson was overwhelming and that the district court attempted to cure the violations with instructions to the jury. Because the jury is presumed to have followed those instructions, Wilson was not granted a new trial.[234]

The court then remarked, "[w]e thus find ourselves in a situation with which we are all too familiar: a prosecutor has engaged in misconduct at trial, but no reversible error has been shown."[235] The court reminded trial courts to supervise the conduct of prosecutors and punish them for excessive transgressions. However, unlike the court in *McLean*,[236] the court offered a list of possible sanctions appropriate to address prosecutorial misconduct. The court suggested: "1) contempt citations; 2) fines; 3) reprimands; 4) suspension from the court's bar; 5) removal or disqualification from office; and 6) recommendations to bar associations to take disciplinary action."[237] However, the court of appeals also noted that reversal is rarely the appropriate remedy to deter prosecutorial misconduct because it provides a "windfall" to defendants.[238]

Another case concerning improper remarks made by a prosecutor was *Cargill v. Turpin*.[239] David Cargill was convicted in Georgia of murder and armed robbery and was sentenced to death.[240] He appealed his conviction through the Georgia appellate courts without success.[241] He sought federal habeas corpus review in the United States District Court for the Middle District of Georgia, and the district court denied him relief.[242] He appealed that decision to the Eleventh Circuit.[243]

The crux of Cargill's appeal concerned a series of statements the prosecutor made during the state trial. He contended that during the guilt phase of the trial, the prosecutor made three improper comments during his opening statement.[244] First, Cargill asserted that the prosecutor erred when he indicated one of the state's witnesses became acquainted with Cargill when the witness began searching for someone

233. *Id.* at 1301-02.
234. *Id.* at 1302.
235. *Id.* at 1303.
236. *See supra* note 164.
237. *Wilson*, 149 F.3d at 1304.
238. *Id.* at 1303 (quoting United States v. Isgro, 974 F.2d 1091, 1099 (9th Cir. 1992)).
239. 120 F.3d 1366 (11th Cir. 1997).
240. *Id.* at 1372.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 1376.

to kill his wife.[245] Second, the prosecutor improperly remarked that a co-defendant told police that Cargill was the murderer.[246] Third, Cargill contended the prosecutor improperly informed the jury that several witnesses had not told police what they knew about the murders because they were afraid of defendant.[247]

The Eleventh Circuit easily concluded that all three statements were improper.[248] However, the court explained the proper standard of review was whether the statements rendered Cargill's trial fundamentally unfair.[249] The court concluded that given the overwhelming evidence against him, Cargill had not been overly prejudiced by the prosecutor's remarks.[250] The court also noted Cargill's counsel had not contemporaneously objected to the remarks, thereby depriving the trial court of the opportunity to remedy the violation with a curative instruction.[251] Further, both the prosecutor and defense counsel repeatedly informed the jury that opening statements are not evidence. Therefore, the jury was probably not overly influenced by remarks given during the opening statement.[252]

A more difficult and closer question concerned another statement the prosecutor made during the closing argument portion of the sentencing phase of Cargill's trial. As the jury grappled with the decision whether to sentence Cargill to life imprisonment or death, the prosecutor remarked:

> Is the appropriate price life imprisonment, and 10 years or 15 years or ever how long it is, seven years or five years, when a bunch of little boys are sitting around the Christmas table thinking, "Is that all the jury thought of my mama and daddy because that man is sitting off somewhere eating Christmas turkey dinner?"[253]

Cargill contended this statement was improper because the clear import of the statement was that without a death sentence, the defendant could be released in as little as five years.[254] However, the majority in *Cargill* rejected that approach.[255] The court concluded that because

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245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 1379.
249. *Id.*
250. *Id.* at 1381.
251. *Id.* at 1380.
252. *Id.* at 1381.
253. *Id.*
254. *Id.*
255. *Id.*

Cargill had been charged with both murder and armed robbery, the statement was an accurate representation of Georgia law.[256] The court focused on the conjunctive nature of the comment. The prosecutor stated that the sentence could be life imprisonment *and* "10 years or 15 years or ever how long it is, seven years or five years."[257] Because under Georgia law a sentence for five years to fifteen years was permissible for armed robbery, the court construed the remark as proper.[258] Additionally, the court determined that taken in its entirety, the prosecutor's remarks were an appropriate attempt to convey the seriousness of the crime.[259] At most, the court concluded, the remark was ambiguous, and a reviewing court is required to view such remarks in the least damaging light reasonably permissible under the circumstances.[260] Finally, the court also pointed out the prosecutor had commented that life in a Georgia prison is not "any piece of cake."[261] Therefore, the jury was not overly prejudiced into concluding the only adequate sentence would be the imposition of the death penalty.[262]

Judge Kravitch agreed with the majority's conclusions concerning the statements made during the guilt phase of the trial. She dissented, however, from the court's holding that the remarks during the sentencing phase did not render Cargill's sentence fundamentally unfair.[263] Specifically, Judge Kravitch concluded that the majority's highly technical parsing of the prosecutor's statement, although plausible, was not the likely interpretation the jury would have made.[264] Because the jury would have been unfamiliar with the permissible sentence for armed robbery, the likely import of the statement was that without the imposition of the death penalty, Cargill could be released in as little as five years. Further, Judge Kravitch noted that the prosecutor remarked a "bunch of little boys" would wonder why the defendant had been released so quickly.[265] If Cargill served time for the murders, plus the five to fifteen years imposed for the armed robbery, "the victims' children would hardly be the 'bunch of little boys' the prosecutor described."[266] Finally, Judge Kravitch also noticed that the prosecutor indicated that

256. *Id.*
257. *Id.*
258. *Id.* (citing O.C.G.A. § 16-8-41(b)).
259. *Id.* at 1381-82.
260. *Id.* at 1382 n.25 (citing Donnelly v. De Christoforo, 416 U.S. 637, 647 (1974)).
261. *Id.* at 1382.
262. *Id.*
263. *Id.* at 1387 (Kravitch, J., concurring in part and dissenting in part).
264. *Id.*
265. *Id.* at 1388.
266. *Id.*

the life sentence would be a "judicial slap on the wrist," indicating Cargill would be released in a short period of time.[267] These remarks, the judge concluded, likely caused the jury to impose the death penalty because of a mistaken belief that Cargill would be released after serving five years for a life sentence.[268] For that reason, she concluded, Cargill's sentence should have been reversed.[269]

These closing argument cases illustrate a tension between the values of the Crime Control Model and those of the Due Process Model. The Crime Control Model disapproves of giving the defendant the windfall of a new trial for errors that do not affect the outcome. However, the question arises: How can prosecutorial over-reaching be deterred if errors are deemed harmless? The court obviously struggles with this issue. Besides formal sanctions of offending attorneys, perhaps the court could try to deter misconduct by identifying and chastising the attorneys in published opinions. The court has been reluctant to do so, as these opinions illustrate. While it is a serious step to take because of the consequences for the prosecutor, it is a step that may serve to deter and to punish.[270] Effective sanctions are needed to balance the values of the Crime Control and Due Process Models.

2. Sufficiency of Evidence. In *United States v. Hardin*,[271] the Eleventh Circuit addressed a due process issue concerning the sufficiency of the evidence needed to convict a criminal defendant. Hardin was charged with being a felon in possession of a firearm. Hardin conceded he was a convicted felon and entered into a stipulation with the Government to that effect.[272] The stipulation was never filed with the court, however, and more importantly it was never introduced into evidence during Hardin's trial. During the trial both the Government and Hardin's attorney referred to Hardin's status as a convicted felon; however, the Government never attempted to introduce the stipulation into evidence. Hardin never objected during the trial to the references to his felon status, nor did he move for a directed verdict at the close of the Government's case.[273]

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267. *Id.*

268. *Id.* at 1389.

269. *Id.* at 1390.

270. Emily Heller, *Court of Appeals Issues Rebuke for Prosecutor's Drug Trial Closing*, FULTON COUNTY DAILY RPTR., Jan. 28, 1998, at A4.

271. 139 F.3d 813 (11th Cir. 1998).

272. *Id.* at 815; *see also* Old Chief v. United States, 519 U.S. 172 (1997) (requiring the government to accept defendant's stipulation that he was a convicted felon during a prosecution for being a convicted felon in possession of a firearm).

273. *Id.* at 814.

On appeal Hardin argued the evidence was insufficient to convict him because the Government never proved an essential element of the case: that he was a convicted felon.[274] The court of appeals noted that the circuits were split on the issue of whether a stipulation removes the Government's obligation to prove the stipulated element.[275] The court decided, however, that Hardin's stipulation he was a felon "eliminated the government's burden to produce evidence of his felon status."[276] The court seemed persuaded that Hardin's own assertions at trial that he was a convicted felon, as well as his failure to object to the prosecution's references to his felon status, constituted a waiver of the traditional requirement that the Government prove all the essential elements of the charge.[277] Despite finding a waiver, the court pointed out that failing to offer the stipulation was not wise trial practice. Indeed, the jury may well have acquitted Hardin based on that omission. The court suggested that obviously the better practice is to introduce stipulations into evidence.[278] However, in this case "Hardin . . . ha[d] no legal or equitable basis to contest the government's mistake."[279]

Another due process case concerning the sufficiency of evidence was *United States v. Toler*.[280] In *Toler* numerous defendants were charged with conspiracy to distribute crack cocaine. One of the defendants was Traci Mathis. Mathis was charged with being a part of the cocaine distribution conspiracy based on her association with a drug dealer named Rod Savage. The evidence at Mathis's trial showed that Mathis allowed Savage to stay in her apartment for several weeks. She became angry at Savage because he did not pay his portion of the utility bills and because he allowed another drug dealer to enter the apartment. Eventually, Mathis changed the locks and locked Savage out. Savage informed Mathis he left some cocaine in the apartment, and she demanded that he pay her five hundred dollars for its return. Mathis

274. *Id.* at 815.

275. *Id.* at 816-17 (citing United States v. Muse, 83 F.3d 672, 678-79 (4th Cir. 1996) (holding conviction is invalid unless jury is presented with the stipulation); United States v. Branch, 46 F.3d 440, 441 (5th Cir. 1995) (holding stipulation removes government's obligation to prove stipulated element); United States v. James, 987 F.2d 648, 650 (9th Cir. 1993) (holding failure to offer stipulation into evidence leaves jury with no proof of the stipulated element)).

276. *Id.* at 817.

277. *Id.*

278. *Id.*

279. *Id.*

280. 144 F.3d 1423 (11th Cir. 1998).

testified that she demanded the money because Savage had earlier promised to buy her a VCR.[281]

Based on the evidence that Mathis knew Savage was storing cocaine in her apartment, the Government charged her with being part of the cocaine distribution conspiracy.[282] She was convicted of conspiracy at trial.[283] The Eleventh Circuit reversed her conviction, holding "[we] cannot conclude that the government's inferential leap suffices to cross the chasm of proof beyond a reasonable doubt that Mathis agreed to join the conspiracy."[284]

The court noted the appropriate standard of review for any criminal case is whether there is substantial evidence supporting a conviction.[285] Further, due process demands proof of every element beyond a reasonable doubt.[286] The court explained that prior Eleventh Circuit decisions suggested that only slight evidence was needed to connect a particular person to a conspiracy once the underlying conspiracy was proved.[287] That formulation, the court concluded, was contrary to the due process requirement of proof beyond a reasonable doubt.[288] "'The "slight evidence" rule as used and applied on appeal in conspiracy cases . . . should not have been allowed to worm its way into the jurisprudence of [this circuit].'"[289] Applying the appropriate standard, the court concluded there was not substantial evidence to suggest that Mathis knew about and agreed to join the conspiracy.[290] Mathis might well have been charged with criminal blackmail or possession of cocaine, the court conceded, but her actions "could hardly be termed to be an act in furtherance of [the] conspiracy."[291]

Judge Henderson concurred in the result, emphasizing that in order to sustain a conspiracy conviction, the Government must prove beyond a reasonable doubt a conspiracy existed, the defendant knew the essential objectives of the conspiracy, and the defendant knowingly and voluntarily participated.[292] The evidence suggested Mathis knew about

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281. *Id.* at 1430-32.
282. *Id.* at 1433.
283. *Id.* at 1425.
284. *Id.* at 1433.
285. *Id.* at 1426.
286. *Id.* at 1427 (citing Jackson v. Virginia, 443 U.S. 307, 316 (1979)).
287. *Id.* (citing United States v. Calderon, 127 F.3d 1314, 1324 (11th Cir. 1997); United States v. Gates, 967 F.2d 497, 499 (11th Cir. 1994)).
288. *Id.*
289. *Id.* (quoting United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir. 1979) (en banc)).
290. *Id.* at 1433.
291. *Id.*
292. *Id.* at 1433-34 (Henderson, J., concurring).

the conspiracy, but by changing the locks and locking Savage out she clearly was not acting in furtherance of its objectives. Indeed, as the judge explained, her actions "seem[ed] to constitute only interference with the business of the conspiracy."[293] Judge Henderson concluded, "this is a very close case,"[294] but ultimately the Government could not meet its burden.[295]

In dissent Judge Black argued there was sufficient evidence to connect Mathis to the conspiracy.[296] However, he was sympathetic to the majority's conclusion because Mathis's sentence, imposed pursuant to the sentencing guidelines, was "unduly harsh."[297] Judge Black lamented that the district court did not have the discretion to reduce her sentence.[298] Interestingly, Mathis's sentence never appeared in the court's opinion despite the fact that it may well have been the driving force behind the court's conclusion.

Mathis's case raises several interesting points. First, the court of appeals was quite right to put to rest the "slight evidence" test, which is an unfortunate misformulation that has confused the traditional test for sufficiency of the evidence and has appeared to lower the standard in favor of the Government. Second, this case is an example of a familiar scenario: The court is wrestling with what to do with the least culpable defendant in a multi-defendant drug case in which the penalties are quite high for all defendants because of the Sentencing Guidelines. Judge Black's dissent on the sufficiency of the evidence has a lot of force. The evidence seems sufficient to conclude that a reasonable jury could have found Mathis guilty beyond a reasonable doubt. Perhaps Judge Black is also correct that the real solution might be in significantly reducing the penalties for the least culpable defendant under the guidelines.

In *Taylor v. Singletary*,[299] the Eleventh Circuit decided whether defendant's due process rights were violated when he was impeached during his state drug conspiracy trial with testimony he had given in a previous federal trial under an informal immunity agreement. Taylor made a living supplying aircraft to drug smugglers. He entered into an informal immunity agreement with the United States Attorney for the Southern District of Florida in which he agreed to testify against certain

293. *Id.* at 1435.
294. *Id.* at 1434.
295. *Id.* at 1435.
296. *Id.* (Black, J., concurring in part and dissenting in part).
297. *Id.*
298. *Id.*
299. 148 F.3d 1276 (11th Cir. 1998).

drug dealers in exchange for a promise that he would not be prosecuted. The immunity agreement only applied to the Southern District of Florida and by its terms did not preclude state or federal prosecution in another district.[300] Taylor testified before a federal grand jury and in a subsequent criminal trial that arose from the grand jury's investigation. At no point during either proceeding did Taylor invoke his right against self-incrimination.[301]

Florida prosecutors subsequently indicted Taylor for conspiracy to traffic drugs. He sought to have the indictment dismissed, arguing the federal immunity agreement precluded state prosecution.[302] The Florida trial court denied his motion, and Taylor's case proceeded to trial.[303] During his trial Taylor elected to testify in his own defense. The Florida prosecutor sought to impeach Taylor's credibility using testimony from the federal trial in which he had testified under the immunity agreement. Taylor objected, arguing that his prior immunized testimony could not be used against him in any way, including impeachment. The trial court allowed the impeachment testimony, and Taylor was convicted.[304] After exhausting his state remedies, Taylor sought habeas corpus review in the federal courts.[305] The district court denied him relief, and Taylor appealed to the Eleventh Circuit.[306]

Taylor's primary argument on appeal was that his original testimony was per se involuntary because he was forced to testify under an immunity agreement. Therefore, his testimony could not be used against him in the ensuing state trial, even for impeachment purposes.[307] The court rejected Taylor's per se argument, holding "[a] voluntarily-entered informal immunity agreement does not, by virtue of its existence, override a witness' free will such that the witness' testimony is involuntary under the Due Process Clause."[308] The court compared

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300. *Id.* at 1277-78. Taylor contended an Assistant United States Attorney orally promised him the immunized testimony could not be used against him during a state trial, but the promise was not contained in the immunity agreement. *Id.* at 1279.

301. *Id.* at 1279.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 1280.

306. *Id.*

307. *Id.* Taylor also argued the immunity agreement precluded state prosecution; however the court determined that the agreement by its express terms did not apply to state authorities. *Id.* at 1284-85. There was also no evidence that the agreement had been orally modified to bar state prosecution as Taylor contended. *Id.* at 1285.

308. *Id.* at 1280. Because Taylor was challenging the actions of Florida authorities, the Fourteenth Amendment's Due Process Clause was implicated, not the comparable provisions of the Fifth Amendment. However, in this instance the distinction is irrelevant.

Taylor's argument to a similar argument previously rejected by the Supreme Court in *Bordenkircher v. Hayes*.[309]

In *Bordenkircher* petitioner claimed his plea of guilty violated due process because state authorities threatened to indict him under a repeat offender statute if he did not plead guilty to the indictment. The Court rejected the contention that the prosecutor's conduct constituted a per se violation of due process.[310] The Court explained the prosecutor did "no more than openly present[] the defendant with the unpleasant alternatives of forgoing trial [by pleading guilty] or facing charges on which he was clearly subject to prosecution."[311]

Similarly, Taylor was faced with the choice of testifying under an informal grant of immunity or being prosecuted. The court construed this arrangement as "give and take" bargaining that did not deprive Taylor of his option to exercise his free will.[312] He was merely forgoing his right to invoke the privilege against self-incrimination in exchange for an immunity grant. After rejecting Taylor's per se argument, the court determined whether, under the facts of his case, Taylor's testimony was involuntary.[313] The court noted that Taylor testified during the trial that he voluntarily consented to the agreement to avoid prosecution and "get it all behind me."[314] Accordingly, the court refused to conclude that Taylor's decision to testify was involuntary.[315]

The court's approach seems entirely appropriate. The analogy to the plea bargaining situation is apt. Declaring Taylor's testimony involuntary under these facts would be a victory for due process values but would constitute a serious obstacle that would disrupt the bargaining process that is necessary to the efficient operation of the criminal justice system. In this context the court's favoring of the Crime Control Model strikes the proper balance.

The final significant due process case the court confronted during the survey period was also entitled *Taylor v. Singletary*.[316] Taylor and Ortiz were charged with murder by Florida authorities. The cases were severed, and Taylor sought to have his case tried after Ortiz was tried. Taylor provided the trial judge with an affidavit from Ortiz indicating Ortiz would provide exculpatory information during Taylor's trial. Ortiz

309. 434 U.S. 357 (1978).
310. *Id.* at 363.
311. *Id.* at 365.
312. *Taylor*, 148 F.3d at 1281.
313. *Id.* at 1282.
314. *Id.* at 1284.
315. *Id.*
316. 122 F.3d 1390 (11th Cir. 1997).

maintained, however, he would assert the privilege against self-incrimination unless he was tried before Taylor and was convicted or acquitted before Taylor's trial began. Taylor offered to proffer Ortiz's testimony in camera, but the trial court refused the offer. The court denied Taylor's motion, and Taylor was tried before Ortiz. True to his word, Ortiz invoked the Fifth Amendment when Taylor called him as a defense witness. Taylor's counsel informed the court that had Ortiz not invoked the privilege, he would have testified that Taylor was not present at the murder scene. Taylor was ultimately convicted.[317]

At his trial Ortiz testified he had been at the murder scene with another man named Mark, not with Taylor. Ortiz implicated Mark by testifying the victim was still alive when Ortiz left the murder scene, but Mark remained behind with the victim. Ortiz was eventually acquitted.[318] The fact that Ortiz testified made this an unusual case. Usually, the co-defendant who is to offer the exculpatory testimony decides he does not want to testify in his trial and, therefore, refuses to testify at a joint trial or a trial preceding his own. Here, Ortiz refused to testify at the earlier trial but then testified at his trial. Taylor appealed his conviction, arguing the trial court's decision to try Taylor first deprived him of his rights to due process and to present a defense.[319] His state appeals were unsuccessful, and Taylor sought habeas corpus review in federal district court. The district court concluded that Taylor's constitutional right to present an exculpatory witness had been violated but that the error was harmless. The court denied him habeas relief, and Taylor appealed to the Eleventh Circuit.[320]

The Eleventh Circuit reversed the district court's decision that the error was harmless.[321] The court noted the state trial court gave no reason why Taylor's trial had to go first. Further, the court refused to hear Taylor's in camera proffer and did not consider the "substance, nature, or effect of Ortiz's testimony."[322] The proper standard of review, the court explained, was not whether the state trial court's decision was harmless, but whether Taylor was deprived of his right to present a witness that was material and favorable to his defense.[323] Taylor needed only to show that Ortiz's testimony could reasonably "'put the whole case in such a different light as to undermine confidence in

317. *Id.* at 1391-92.
318. *Id.* at 1392.
319. *Id.*
320. *Id.*
321. *Id.* at 1394.
322. *Id.*
323. *Id.*

the verdict.'"[324] The court concluded Taylor's "inability to call Ortiz essentially precluded him from putting on a defense."[325] Therefore, the Eleventh Circuit reversed Taylor's conviction and remanded the case for a new trial.[326]

This decision is a sound one. Promoting a fairer process for Taylor (and vindicating the values of the Due Process Model) could have been achieved at a low cost. All that was necessary was to alter the order of the trials.

IV. THE SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[327]

A. *The Right of Confrontation*

The court examined a relatively straightforward Confrontation Clause issue in *United States v. Mills*.[328] Jack and Margie Mills were majority shareholders and owners of a Medicare services provider, First American, Inc. They were indicted, along with First American and several other corporate officers, for Medicare fraud and other related federal offenses.[329] During trial the district court judge became impatient when lawyers for First American and Jack Mills employed what the judge described as "tag team" cross-examinations.[330] Ultimately, he forbade Mills from cross-examining a government witness named Terris who detailed many of the financial techniques used to perpetrate the fraud. The court required Mills to forgo cross-examination and to use First American's lawyers to examine Terris.[331]

The court of appeals easily concluded that this conduct deprived Mills of his Sixth Amendment confrontation right.[332] The court explained

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324. *Id.* at 1395 (quoting Kyles v. Whitley, 514 U.S. 419, 434-35 (1995)).
325. *Id.* at 1396.
326. *Id.*
327. U.S. CONST. amend. VI.
328. 138 F.3d 928 (11th Cir. 1998).
329. *Id.* at 930.
330. *Id.* at 937.
331. *Id.*
332. *Id.*

the Confrontation Clause is designed to ensure the adequacy of evidence against a criminal defendant by subjecting that evidence to the rigorous testing of the adversarial process.[333] Although a court has discretion to limit cross-examination, a defendant must be allowed some opportunity to conduct a meaningful cross. Because Mills "did not get to cross-examine the witness *at all* . . . the [district court] was not operating within any discretion to control the progress of the trial."[334]

The court then turned to the appropriate standard of review to determine whether the error required reversal. Mills argued that denial of confrontation rights was a structural defect that mandated reversal.[335] The Government contended that the error should be analyzed under the "harmless beyond a reasonable doubt" standard utilized to examine many trial errors.[336] The court of appeals sided with the Government, concluding that errors predicated on confrontation rights fall squarely within the trial error category.[337] Employing harmless error analysis, the court concluded that because Terris was not a vital witness, because she had been effectively cross-examined by First American, and bevcause the rest of the Government's case was strong, Mills had not suffered reversible error.[338] Although the conviction was not reversed, this case sends a message that forbidding cross-examination completely is reversible error. The case leaves uncertain how much the scope of cross-examination can be limited.

B. Assistance of Counsel

Claims of ineffective assistance of counsel are common, but getting a reversal on that basis is unusual. This makes any decision reversing a conviction because of ineffective assistance a noteworthy case, and there were several such decisions during the survey period. The criminal justice system's handling of ineffective assistance of counsel claims, on the whole, is a clear example of the dominance of the values of the Crime Control Model of criminal procedure. To relitigate a case, the errors by counsel must have a profound prejudicial effect. It is interesting that the balance between Crime Control Model values and Due Process Model values is somewhat different in cases involving ineffective assistance of counsel claims in death penalty cases. Because of the high stakes in death penalty cases, the courts are a bit more

333. *Id.*
334. *Id.*
335. *Id.* at 938 (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).
336. *Id.* (citing Chapman v. California, 386 U.S. 18, 24 (1967)).
337. *Id.* at 939.
338. *Id.*

searching in scrutinizing ineffective assistance of counsel claims in such cases. Not surprisingly, two of the three cases featured here were death penalty cases.

The test for determining whether counsel's performance has been ineffective is (1) whether the performance falls below an objective standard of reasonableness, and (2) whether a reasonable probability exists that without counsel's unprofessional conduct, the outcome would have been different.[339] Applying that standard the Eleventh Circuit decided three interesting ineffective assistance of counsel cases during the survey period.

In *Dobbs v. Turpin*,[340] a case with a lengthy procedural past in the Eleventh Circuit, the court concluded trial counsel's representation during the sentencing phase of a death penalty case was ineffective.[341] Dobbs was charged with murder and armed robbery of a convenience store. He was convicted by a jury in Georgia and sentenced to death. His numerous state and federal direct and habeas corpus appeals were unsuccessful.[342] One of his numerous enumerations of error focused on the deficient performance of his lawyer during the sentencing phase of his trial. When he originally sought habeas corpus review, he did not have a transcript of the sentencing phase of his trial. The federal district court decided this claim based on the testimony of his trial counsel concerning his actions during the state trial. Based on this testimony, the district court denied Dobbs habeas corpus relief.[343]

Almost ten years later, Dobbs's attorneys discovered stenographic notes of the sentencing phase of his trial in a court storage building. Dobbs sought to reopen and amend his appeal, but the district court denied his request.[344] After the Supreme Court heard the case and ordered this newly discovered evidence to be considered,[345] Dobbs successfully maintained he had been provided ineffective assistance of counsel during the sentencing phase of his state court trial. The district court granted his habeas corpus petition and ordered a new sentencing hearing based on ineffective assistance of counsel. The State appealed to the Eleventh Circuit.[346]

339. Strickland v. Washington, 466 U.S. 668, 687 (1984).
340. 142 F.3d 1383 (11th Cir. 1998).
341. *Id.* at 1391.
342. *Id.* at 1385 n.1.
343. *Id.* at 1385.
344. *Id.* at 1385-86.
345. Dobbs v. Zant, 506 U.S. 357, 359 (1993).
346. 142 F.3d at 1386.

The trial transcript revealed that during the closing argument of the sentencing phase of the trial, Dobbs's attorney never introduced any mitigating evidence that might have convinced the jury not to impose the death sentence.[347] Further, Dobbs's lawyer apparently never investigated his background to determine if there was any mitigating evidence to present.[348] There was some evidence that Dobbs had undergone an unfortunate childhood which might have persuaded a jury not to impose the death penalty.[349] Apparently, Dobbs's attorney based the decision not to present any evidence on the mistaken notion that mitigating evidence would have been inadmissible during the sentencing phase of the trial. He also believed that introducing mitigating evidence might "open the door" to more damaging impeachment evidence.[350] The Eleventh Circuit noted that in ineffective assistance of counsel claims, "'a heavy measure of deference [is given] to counsel's judgements,'" but those decisions must flow from an accurate understanding of the law.[351] Because the assumption that mitigating evidence was inadmissible during the sentencing phase of the trial was legally erroneous, the court concluded it was not objectively reasonable.[352] Therefore, under the first prong of the *Strickland* test, Dobbs's attorney's performance was inadequate.

The court also noticed that Dobbs's closing argument consisted in large part of reading to the jury Justice Brennan's concurrence in *Furman v. Georgia*.[353] The court of appeals was troubled by this strategy for two reasons. First, it was not particularly effective advocacy. Second, and more importantly, the crux of the argument was that the Supreme Court was likely to strike down Georgia's death penalty statute. The court concluded a jury might have imposed the death penalty on Dobbs under the assumption it might never be implemented.[354] This argument, the court concluded, also failed to pass muster under the first prong of *Strickland*.[355]

Turning to the second prong in *Strickland*, the court examined whether the deficient performance of Dobbs's lawyer prejudiced his sentence. The test, the court explained, is whether there is a reasonable

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347. *Id.* at 1388.
348. *Id.* at 1387-88.
349. *Id.* at 1388.
350. *Id.*
351. *Id.* (quoting *Strickland*, 466 U.S. at 691).
352. *Id.* at 1388-89.
353. *Id.* (citing Furman v. Georgia, 408 U.S. 238, 286-90 (1972) (Brennan, J., concuring)).
354. *Id.* at 1389.
355. *Id.*

probability that without counsel's deficient performance, the outcome would have been different.[356] The court of appeals concluded that because Dobbs's crime was not as egregious as many death penalty cases, a jury may well have decided not to impose the death penalty if it had been made aware of mitigating evidence.[357] The second prong of *Stickland* thus satisfied, the court remanded the case for a new sentencing.[358]

In *Collier v. Turpin*,[359] another ineffective assistance of counsel case, the Eleventh Circuit determined the attorneys in a death penalty case were ineffective for failing to consult an expert witness who might have established that defendant's diabetes contributed to his violent acts.[360] Collier was charged with murdering a police officer who was trying to apprehend him. He was convicted after a four-day trial and sentenced to death. The sentencing hearing took two hours and began on a Friday evening after the trial ended.[361] Collier filed numerous state and federal appeals seeking to have his conviction and sentence reversed, all without success.[362] He eventually appealed to the Eleventh Circuit, arguing his counsel was ineffective during the sentencing phase of his trial.[363]

Specifically, Collier presented evidence he was a gentle man without a violent past.[364] He suffered, however, from diabetes and he argued his attorneys should have determined whether his diabetes could have influenced his violent acts on the evening he committed the murder. He contended such evidence should have been presented during the sentencing phase of his trial to reduce the possibility the jury might impose the death penalty.[365] The court of appeals agreed. The court noted Collier's lawyers were aware of his diabetes, knew he was not taking the correct dosage of insulin, and knew that this act was out of character for a "gentle, respectful and hardworking [man]."[366] Therefore, the court concluded, Collier's attorney's were ineffective for "failing

356. *Id.* at 1389-90 (citing *Strickland*, 466 U.S. at 694).
357. *Id.* at 1390-91.
358. *Id.* at 1391.
359. 155 F.3d 1277 (11th Cir. 1998).
360. *Id.* at 1297. Interestingly, one of Collier's attorneys appears to be the same attorney deemed ineffective in *Dobbs*. *See supra* note 340 and accompanying text.
361. *Collier*, 155 F.3d at 1279-81.
362. *Id.* at 1281-82.
363. *Id.* at 1282.
364. *Id.* at 1291 n.19.
365. *Id.* at 1292.
366. *Id.*

to pursue an expert on diabetes to examine Collier and testify at the sentencing phase."[367]

Further, the court concluded Collier's attorneys should have presented additional mitigating evidence at the sentencing hearing. Collier's trial lasted four days and the sentencing hearing two hours. The majority of the evidence presented by Collier's counsel centered on his reputation as truthful in the community.[368] For instance, Collier's wife testified during the sentencing phase and was asked by his attorney if Collier was a hard worker. When she replied that he was, Collier's attorney responded, "I believe that's all I need to ask her."[369] Nine other witnesses were asked similarly succinct questions. Not surprisingly, the court concluded Collier's attorneys were ineffective for failing to present much of the "readily available evidence of Collier's background and character that would have led the jury to eschew the death penalty."[370]

These shortcomings, the Eleventh Circuit decided, failed to meet the objective reasonableness prong articulated in *Strickland* and rendered Collier's lawyers ineffective. His lawyer's actions also created a "reasonable probability that, but for their errors, [Collier] would not have received the death penalty."[371] Based on that determination, the court reversed Collier's sentence and remanded the case for imposition of a new sentence.[372]

Holsomback v. White[373] was an interesting Eleventh Circuit case because the court reversed a noncapital case based on ineffective assistance of counsel grounds.[374] Holsomback was charged with repeatedly sodomizing his ten-year-old son over five years. His son was the only witness who testified against Holsomback, and there was no medical evidence to support the allegations. This was so despite the fact the child had been examined by a doctor twelve days after reporting the incident to his mother.[375]

At trial Holsomback's attorney never presented any evidence or elicited any testimony regarding the lack of medical corroboration. He only mentioned the lack of medical evidence once during the trial when,

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367. *Id.*

368. Collier's attorneys contended they were limited by the trial court to presenting only this type of "character" evidence, but the court of appeals, after reviewing the record, rejected that contention. *Id.* at 1287-88.

369. *Id.* at 1293.

370. *Id.* at 1294.

371. *Id.* at 1295.

372. *Id.* at 1297.

373. Holsomback v. White, 133 F.3d 1382 (11th Cir. 1998).

374. *Id.* at 1386.

375. *Id.* at 1385.

during closing argument, he remarked that "the reason the doctor wasn't here was because there was no evidence [the child] had ever been touched or molested or abused."[376] Holsomback's counsel also never spoke with the family doctor who had examined the child or obtained any medical opinion regarding the significance of the dearth of medical evidence.[377]

The court of appeals concluded this lack of investigation constituted ineffective assistance of counsel.[378] The court determined that under the *Strickland* test, a reasonable lawyer would have sought medical opinions and presented the jury with some evidence that the lack of medical evidence was significant. The omission was particularly troubling, according to the court, because the only evidence against Holsomback was the testimony of his son. Further, there were several inconsistencies in that testimony that rendered it subject to attack. Therefore, the court held the omission undermined "our confidence in the trial outcome" and it reversed Holsomback's conviction.[379]

Judge Cox, in dissent, concluded the omission of medical evidence and medical investigation was premised on trial strategy.[380] He also did not believe Holsomback was prejudiced by his attorney's decision not to explore the lack of medical evidence with the jury.[381] Judge Cox's dissent is rather persuasive, particularly because the record did not contain evidence of the likely result of the investigation. Further, the defense attorney explained his lack of investigation by saying that the prosecution conceded a lack of medical evidence and that calling the doctor created a risk that the prosecution would gain some small concession during cross-examination.[382] The majority simply did not buy this explanation, but Judge Cox found it sufficient. Although Judge Cox did not raise the point, the decision in *Holsomback*, if followed strictly as precedent, opens the door for other claims based on the failure of counsel to investigate, even where a strategic reason for the decision is proffered.

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376. *Id.*
377. *Id.*
378. *Id.* at 1387.
379. *Id.* at 1389.
380. *Id.* at 1389 (Cox, J., dissenting).
381. *Id.* at 1390.
382. *Id.* at 1387.