

Constitutional Criminal Procedure

by Charles E. Cox, Jr.*

I. INTRODUCTION

Each year the United States Court of Appeals for the Eleventh Circuit issues numerous decisions concerning the protections provided to criminal defendants by the Fourth, Fifth, and Sixth Amendments to the United States Constitution. This Article surveys decisions issued in 2002 that are likely to be of interest to criminal law practitioners.

II. THE FOURTH AMENDMENT

A. *Investigatory Stops and Frisk*

In *United States v. Hunter*,¹ three law enforcement officers were in a marked patrol car. The officers, who were part of a unit responsible for patrolling high crime areas, observed several men engaged in illegal gambling in the parking lot of a convenience store.² Defendant was standing next to the gamblers. When the three officers got out of their marked patrol car, defendant turned away from the gamblers and began to walk away “very quickly.” As defendant turned to walk away, one of the officers observed a bulge in defendant’s waistband. The officer walked up behind defendant, frisked him, and found a pistol with an obliterated serial number in defendant’s waistband. The district court granted defendant’s motion to suppress, and the government appealed.³

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1. 291 F.3d 1302 (11th Cir. 2002).
2. The men were rolling dice and exchanging money. *Id.* at 1304.
3. *Id.* at 1304-05.

The Eleventh Circuit identified four factors that can be “considered in determining whether the totality of the circumstances demonstrates a reasonable suspicion that criminal activity was afoot.”⁴ The court noted that “reasonable suspicion may exist even if each fact alone is susceptible to an innocent explanation.”⁵ First, an officer may consider the “reputation of an area for criminal activity . . . when determining whether circumstances are ‘sufficiently suspicious’ to warrant further investigation.”⁶ In this case, the area in which the officers found defendant was considered a high-crime area.⁷ Second, an individual’s proximity to illegal activity is a relevant consideration.⁸ In this case, defendant “was standing next to and observing illegal gambling moments before [the officer] stopped him.”⁹ Third, flight from the scene of illegal activity is a relevant consideration.¹⁰ The court in *Hunter* construed as flight the fact that defendant “walked quickly away” when the police arrived.¹¹ Last, “the presence of a visible, suspicious bulge on an individual may be considered in the totality of the circumstances.”¹² The officer in this case saw a bulge in defendant’s waistband when defendant turned to walk away.¹³ The court in *Hunter* therefore concluded that the officer had “reasonable, articulable suspicion that criminal activity was afoot when he stopped and frisked [defendant].”¹⁴

In *United States v. Baker*,¹⁵ a case of first impression, the Eleventh Circuit addressed whether “the interaction between the police and the individuals in [a] car that was neither parked nor moving was a consensual encounter under the Fourth Amendment.”¹⁶ The police officers in *Baker* were working drug interaction at a bus station. Prompted by information received from a bus company employee, the police officer approached a car that was stuck in traffic. The officer displayed his badge and asked the driver to lower his window. The

4. *Id.* at 1306.

5. *Id.* (citing *United States v. Arvizu*, 534 U.S. 266, 277 (2002)).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1306-07.

14. *Id.* at 1307.

15. 290 F.3d 1276 (11th Cir. 2002).

16. *Id.* at 1278.

officer then asked permission to speak with the man in the backseat.¹⁷ On his own initiative, the man in the backseat got out and walked to the back of the car, “leaving a jacket and bag on the backseat.”¹⁸ The officer asked the three men if any of them owned the jacket and bag in the backseat. All three men denied ownership and agreed for the officer to examine the jacket and bag. All three men were arrested after the officer found drugs in the jacket. After the district court denied defendant’s motion to suppress the drugs, the case went to trial, and the jury returned a verdict of guilty.¹⁹

In reviewing the district court’s denial of the motion to suppress, the Eleventh Circuit noted that “not all personal intercourse between policemen and citizens involves ‘seizures’ for Fourth Amendment purposes.”²⁰ A seizure does not occur simply because an officer approaches an individual and identifies himself; there must be something more, such as a show of force or show of authority that communicates to a reasonable person that he is “not at liberty to ignore the police presence and go about his business.”²¹ The requisite show of force can be in the form of “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”²²

The court in *Baker* concluded that there were no facts that would have transformed this encounter into a seizure for Fourth Amendment purposes.²³ “Just because [defendant] was in a car that was momentarily stopped waiting for traffic to clear does not elevate this interaction to that of a seizure [T]his was a consensual encounter not protected by the Fourth Amendment.”²⁴

17. *Id.* at 1277-78.

18. *Id.*

19. *Id.*

20. *Id.* at 1278.

21. *Id.* at 1278-79 (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)).

22. *Id.* at 1278 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). In *United States v. Ramirez-Chilel*, 289 F.3d 744, 751 (11th Cir. 2002), the Eleventh Circuit examined whether defendant’s consent to the officers’ entry into his home was the result of a show of force. Although the court in *Ramirez-Chilel* determined that the consent was voluntary, the court did express concern “about the officers’ decision in this instance to approach the defendant’s home and seek his consent at midnight.” *Id.* at 751 n.8. The court expressed concern that facing law enforcement officers in the middle of the night “has a tendency to be more coercive than during the day,” but the fact that the search occurred at midnight was not sufficient within the totality of the circumstances to negate the voluntariness of the defendant’s consent. *Id.*

23. 290 F.3d at 1279.

24. *Id.*

B. Reasonable Expectation of Privacy

The Eleventh Circuit addressed another issue of first impression in *United States v. Miravalles*²⁵ and concluded that “tenants in a large, high-rise apartment building, the front door of which ha[d] an undependable lock that was inoperable on the day in question, [do not] have a reasonable expectation of privacy in the common areas of their building.”²⁶ Defendant in *Miravalles* was convicted of trafficking cigars bearing counterfeit marks, and he appealed the denial of his motion to suppress evidence of counterfeit cigar labels obtained when officers were present in the common area of his apartment building. The officers in *Miravalles* received a tip that cigars with counterfeit labels were located in defendant’s apartment, but they did not have sufficient probable cause to obtain a search warrant. Defendant lived on the fourteenth floor of a large apartment building. The officers were able to enter defendant’s apartment building through the glass front door because the electronic locking mechanism that was designed to secure the front door was not working.²⁷

When the officers arrived at defendant’s apartment, defendant’s father answered the door and refused the officers’ request that he consent to a search of the apartment. While the officers were talking with the father, defendant’s wife walked up to the apartment, and she too refused to consent to the officers’ request to search. At one point during the conversation among the officers, defendant’s father, and defendant’s wife, one of the officers looked into the open door of the apartment and told defendant’s wife that he could see what appeared to be boxes of Cuban cigars and that they could be counterfeit. In response to an officer’s request, defendant’s wife gave an officer one of the cigars, which had no label on it.²⁸

After obtaining the cigar, most of the officers went downstairs. At least one officer stayed behind and hid in the hallway near the apartment. The officer soon observed defendant’s wife leave the apartment with a garbage bag and dispose of it down a chute that sends trash to the ground floor. The officer observed the wife come out of the apartment and dispose of a second bag, through which the officer claimed he could see what appeared to be counterfeit cigar labels.²⁹

25. 280 F.3d 1328 (11th Cir. 2002).

26. *Id.* at 1333.

27. *Id.* at 1329-30.

28. *Id.* at 1330.

29. *Id.* The opinion does not explain how the officer was able to see the labels through the garbage bag, and it does not explain how the officer could determine that the cigar

The officers retrieved the garbage bags containing the counterfeit labels and returned to defendant's apartment. The officers knocked on the door and yelled for the occupants, but no one responded. After a few minutes, the property manager responded to the commotion and opened the door for the officers. The officers observed boxes of cigars and counterfeit labels throughout the apartment and seized them. The district court held that defendant did not have a reasonable expectation of privacy in the common area of the apartment building and denied his motion to suppress.³⁰

The Eleventh Circuit noted that five of the six circuits that have addressed this issue have concluded that tenants do not have a reasonable expectation of privacy in their apartment buildings.³¹ Whether the front door was locked did not appear to be a relevant consideration in four of the five decisions because in each of those decisions, the door was locked.³² Rejecting a reasonable expectation of privacy in common areas, the five circuits reasoned that "tenants have little control over those areas, which are available for the use of other tenants, friends and visitors of other tenants, the landlord, delivery people, repair workers, sales people, postal carriers and the like."³³ The Sixth Circuit, which has recognized a reasonable expectation of privacy in the common areas of a locked apartment building, reasoned that "while tenants living in a locked building may expect that other tenants or their guests will be in the common areas, it is also reasonable for them to expect that the general public or trespassers (including law enforcement officers) will be excluded."³⁴

labels he observed through the garbage bag were counterfeit.

30. *Id.* at 1330-31. The Eleventh Circuit explained in a footnote that exigent circumstances justified the officers' warrantless entry of defendant's apartment. *Id.* at 1331 n.4. A United States Magistrate Judge had issued a report and recommendation that defendant did have a reasonable expectation of privacy in the common area of his apartment building that had been violated by the officers. The district court adopted the magistrate judge's findings of fact, but it disagreed with the legal conclusion that defendant had a reasonable expectation of privacy in the common area. *Id.* at 1330-31.

31. *Id.* at 1331.

32. *Id.* at 1331-32 (citing *United States v. Nohara*, 3 F.3d 1239, 1241-42 (9th Cir. 1993) (apartment hallway); *United States v. Concepcion*, 942 F.2d 1170, 1171-72 (7th Cir. 1991) (apartment common areas); *United States v. Barrios-Moriera*, 872 F.2d 12, 14-15 (2d Cir. 1989) (apartment hallway), *overruled on other grounds by Horton v. California*, 496 U.S. 128 (1990); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) (apartment hallway); *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976) (no expectation of privacy in unlocked apartment parking garage)).

33. *Id.* at 1332.

34. *Id.* (citing *United States v. Carriger*, 541 F.2d 545, 551 (6th Cir. 1976)).

The Eleventh Circuit reasoned that “[t]he reasonableness of a tenant’s privacy expectation in the common areas of a multi-unit apartment building stands in contrast to that of a homeowner regarding the home and its surrounding area, over which the homeowner exercises greater control.”³⁵ The court then identified the number of units in an apartment building, the number of tenants and other people who will have regular access to the common areas of an apartment building, and whether the door to the apartment building is locked as relevant considerations in determining whether a tenant of the apartment building would have a reasonable expectation of privacy in the common areas of the building.³⁶ The Eleventh Circuit recognized that in the case before it, “[t]here was nothing to prevent anyone and everyone who wanted to do so from walking in the unlocked door and wandering freely about the premises.”³⁷ Based on those facts, the Eleventh Circuit in *Miravalles* concluded that “any expectation of privacy in the common areas of the building was not only unreasonable, but foolhardy.”³⁸

C. Probable Cause and Arrest

While a man’s home may be his castle,³⁹ he can still be arrested for public drunkenness if he is in a friend’s backyard in an intoxicated state. In *United States v. Floyd*,⁴⁰ defendant Floyd was arrested for violating Georgia’s public drunkenness law.⁴¹ The arresting officer searched defendant incident to his arrest and found ammunition in his shirt pocket. Defendant was subsequently indicted and convicted for possession of ammunition by a convicted felon.⁴²

Defendant contended that the arresting officer did not have probable cause to arrest him for public drunkenness because he was an invited guest in a friend’s backyard at the time of his arrest.⁴³ The Eleventh Circuit upheld the district court’s denial of defendant’s motion to

35. *Id.* The Eleventh Circuit noted that in *Fixel v. Wainwright*, 492 F.2d 480, 488 (5th Cir. 1974), the Fifth Circuit held that tenants in a four-unit apartment building had a reasonable expectation of privacy in their fenced backyard. In that case, however, the backyard was not a common passageway used by tenants for ingress and egress. *Id.*

36. *Id.*

37. *Id.* at 1333.

38. *Id.*

39. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).

40. 281 F.3d 1346 (11th Cir. 2002).

41. O.C.G.A. § 16-11-41(a) (1999).

42. 281 F.3d at 1347. Section 922(g)(1) makes it unlawful for a convicted felon to possess ammunition. 18 U.S.C. § 922(g)(1) (2000).

43. 281 F.3d at 1349.

suppress the ammunition.⁴⁴ The court cited the testimony of the arresting officer that defendant was intoxicated, that he was visible from the street, and that he was so loud and boisterous that he could have been heard by people leaving a nearby church.⁴⁵ The court reasoned that the Georgia Public Drunkenness Statute “is broadly interpreted to include any place where the defendant’s conduct may reasonably be viewed by people other than members of the defendant’s family or household.”⁴⁶ Applying the facts to the Georgia Public Drunkenness Statute, the court concluded that defendant was in a “public place” and that the arresting officer had probable cause to arrest.⁴⁷

D. Strip Searches

This year the Eleventh Circuit again addressed the constitutionality of strip searches in the school context.⁴⁸ In *Cuesta v. School Board of Miami-Dade County*,⁴⁹ plaintiff, a high school student, was arrested for distributing a pamphlet that contained an essay in which the author “‘wondered what would happen’ if he shot the principal, the school’s teachers, or other students.”⁵⁰ The pamphlet also contained a graphic of the school principal with a dart through his head. After plaintiff’s arrest, she was taken to jail where she was strip searched pursuant to a Metro-Dade County policy requiring the strip search of all newly arrested felons. The State declined to prosecute plaintiff.⁵¹ In an unrelated case, the Florida Fourth District Court of Appeals subsequently declared unconstitutional the statute under which plaintiff was arrested.⁵² Plaintiff filed a claim under 42 U.S.C. § 1983,⁵³ contend-

44. *Id.* at 1348.

45. *Id.*

46. *Id.* at 1349.

47. *Id.*

48. See Charles E. Cox, Jr., *Constitutional Criminal Procedure*, 53 MERCER L. REV. 1339, 1343-45 (2002).

49. 285 F.3d 962 (11th Cir. 2002).

50. *Id.* at 965. The essay stated in part:

I have often wondered what would happen if I shot Dawson in the head and other teachers who have pissed me off or shot the fucking bastard who thought I looked at him wrong or the airheaded cheerleader who is more concerned about what added layer of Revlon she’s putting on instead of the fact that she’s blocking my path or, I would shoot (twice) the fucking freshmen who think they’re cool cuz they’re in high school.

Id. at 965 n.1.

51. *Id.* at 965-66.

52. *Id.* (citing *Florida v. Shank*, 795 So. 2d 1067 (Fla. Dist. Ct. App. 2001)).

53. 42 U.S.C. § 1983 (2000).

ing, in part, that she was subjected to an unconstitutional strip search.⁵⁴

The Eleventh Circuit noted that due to the “serious security dangers” in pretrial detention facilities, strip and visual body cavity searches of arrestees do not require probable cause.⁵⁵ The Eleventh Circuit started its analysis with the balancing test established by the Supreme Court in *Bell v. Wolfish*⁵⁶ for assessing the constitutionality of strip searches.

“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it was conducted.”⁵⁷

The Eleventh Circuit concluded that “[i]n this case, . . . [plaintiff’s] constitutional rights were not violated because [jail] officers had reasonable suspicion to search based upon the violent and threatening language and imagery contained in the pamphlet [that was the basis for plaintiff’s arrest].”⁵⁸ The Eleventh Circuit made clear that the officers who conducted the strip search were aware of the contents and violent nature of the pamphlet.⁵⁹

Although the court in *Cuesta* upheld the strip search in that case, the decision did not address the underlying jail policy that required the strip search of all newly arrested felons.⁶⁰ During last year’s survey period, the Eleventh Circuit held unconstitutional a jail policy that required officials to strip search all arrestees even absent any reasonable suspicion that the arrestee was concealing weapons or other contraband.⁶¹ It does not appear that plaintiff’s suit in *Cuesta* challenged the jail policy itself.⁶²

54. 285 F.3d at 966.

55. *Id.* at 968 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

56. 441 U.S. 520 (1979).

57. 285 F.3d at 968-69 (quoting *Wolfish*, 441 U.S. at 559).

58. *Id.* at 969.

59. *Id.* at 970. “In this case, it is implausible to believe that [jail] personnel did not know about the violent and hateful language contained in the pamphlet, given the contents of the arrest affidavit and their lengthy discussion with [the arresting officer].” *Id.*

60. *See id.* at 965-66, 969.

61. *Wilson v. Jones*, 251 F.3d 1340, 1343 (11th Cir. 2001).

62. *See* 285 F.3d at 956-66.

E. Exigent Circumstances and Anticipatory Search Warrants

In *United States v. Holloway*,⁶³ the Eleventh Circuit directly addressed for the first time “whether law enforcement officials may conduct a warrantless search of a private residence in response to an emergency situation reported by an anonymous 911 caller.”⁶⁴ The officer in *Holloway* received a dispatch at around 10:22 p.m. from a 911 operator regarding gunshots at a particular residence. The officer received a second dispatch from the 911 operator at 10:29 p.m., less than a minute before arriving at the residence, informing him of arguing and continuing gunshots. The officer was joined at the residence by another law enforcement officer, who provided backup.⁶⁵

Upon arriving at the residence, the officer observed defendant and his wife sitting on the porch of their trailer. Concerned about his safety, the officer drew his weapon, and he directed defendant and his wife to raise their hands into view while the officer remained behind his car door. Defendant complied with the officer’s request, but defendant’s wife did not comply. While defendant was complying with the officer’s direction to step off the porch and walk towards the officers, another individual stepped out from behind a trailer parked in the yard. Defendant and the third individual then complied with the officer’s direction to lie down on the ground, facing away from the officers with their palms up.⁶⁶

Throughout this time, the wife refused to comply with the officer’s verbal commands. At one point a child appeared in the doorway of the trailer and was ordered back into the house. After being threatened with the use of pepper spray and after being encouraged by defendant, the wife stepped off the porch of the house, but she refused to raise her hands. A third officer, who had arrived for additional backup, was able to secure the wife.⁶⁷

After the officers patted down the three individuals to check for weapons, one of the officers began to search the residence for victims and weapons.⁶⁸

As he stepped onto the porch, [the officer] saw a shotgun shell on top of the picnic table. Glancing around for a corresponding weapon, the officer located a model 870 Remington shotgun leaning against the side of the mobile home, approximately three feet from where [defendant]

63. 290 F.3d 1331 (11th Cir. 2002).

64. *Id.* at 1334.

65. *Id.* at 1332.

66. *Id.*

67. *Id.* at 1332-33.

68. *Id.* at 1333.

had been standing when the officers first arrived. The safety was disengaged. Additional shotgun shells, two expended and one live, were found lying in the grass by the side of the residence.⁶⁹

The officer secured the shotgun and continued his search of the residence. He did not find any victims.⁷⁰

After completing his search, the officer returned to defendant to explain the officer's actions. As he was talking, defendant interrupted him and said that three males had been throwing rocks at his residence and he had fired his shotgun in the air to scare them off.⁷¹ The officer confirmed defendant's story with the wife, and then he arrested defendant for reckless endangerment and disorderly conduct.⁷²

Subsequently, a federal grand jury indicted defendant for possession of a firearm by a convicted felon.⁷³ After the district court denied defendant's motion to suppress the firearm and any other evidence seized by the officers, defendant entered a conditional guilty plea that preserved his right to appeal the denial of his motion to suppress.⁷⁴

The court in *Holloway* noted that "the United States Supreme Court has crafted a few carefully drawn exceptions to the warrant requirement to cover situations where 'the public interest require[s] some flexibility in the application of the general rule that a valid warrant is a prerequisite for such a search.'" ⁷⁵ The "exigent circumstances" exception to the warrant requirement allows for a warrantless entry into a home when there is a compelling need for law enforcement to take immediate action and there is not sufficient time to secure a warrant.⁷⁶ "The [exigent circumstances] exception encompasses several common situations where resort to a magistrate for a search warrant is not feasible or advisable, including: danger of flight or escape, loss or destruction of evidence, risk of harm to the public or the police, mobility of a vehicle, and hot pursuit."⁷⁷ The Eleventh Circuit reasoned that emergency situations

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1333 n.1.

73. 18 U.S.C. § 922(g).

74. 290 F.3d at 1333.

75. *Id.* at 1334 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979)).

76. *Id.*

77. *Id.* at 1334-35 (citing *Johnson v. United States*, 333 U.S. 10, 14-15 (1948) (listing situations falling within exigent circumstances exception); *United States v. Reid*, 69 F.3d 1109, 1113-14 (11th Cir. 1995) (finding exigent circumstances based on risk of loss of evidence); *United States v. Forker*, 928 F.2d 365, 368-69 (11th Cir. 1991) (finding that mobility of vehicle constitutes exigent circumstances); *United States v. Tobin*, 923 F.2d 1506, 1510-11 (11th Cir. 1991) (en banc) (finding exigent circumstances based on risk of

are the most compelling support for the finding of exigent circumstances and that “[t]he most urgent emergency situation excusing police compliance with the warrant requirement is, of course, the need to protect or preserve life.”⁷⁸ After reviewing Supreme Court precedent, as well as decisions from other federal and state courts,⁷⁹ the court concluded that “emergency situations involving endangerment to life fall squarely within the exigent circumstances exception.”⁸⁰

The Eleventh Circuit explained that in attempting to validate a warrantless search based on the existence of an emergency, the government has the burden of proving both the exigency and the probable cause.⁸¹ “In a typical case, probable cause exists where the circumstances would lead a reasonable person to believe a search will disclose evidence of a crime. . . . [I]n an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger.”⁸² The Eleventh Circuit concluded that “under the circumstances known to them at that time, the officers reasonably believed an emergency situation justified a warrantless search of [defendant’s] home for victims of gunfire.”⁸³

The court in *Holloway* recognized that much of the information that supported probable cause to believe an emergency existed was based on information from an anonymous caller to 911.⁸⁴ The court reasoned, however, that “[i]f law enforcement could not rely on information conveyed by anonymous 911 callers, their ability to respond effectively to emergency situations would be significantly curtailed.”⁸⁵

loss of evidence); *United States v. Burgos*, 720 F.2d 1520, 1525-26 (11th Cir. 1983) (finding exigent circumstances based on threat to public safety from defendants stash of weapons in his residence); *United States v. Blasco*, 702 F.2d 1315, 1326 (11th Cir. 1983) (finding exigent circumstances based on danger of flight or escape); *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. Unit B Jul. 1981) (finding exigent circumstances based on hot pursuit and dangerousness of armed fugitive)).

78. *Id.* at 1335 (citing *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)).

79. *Id.* at 1336-37.

80. *Id.* at 1337.

81. *Id.*

82. *Id.* at 1337-38 (citations omitted).

83. *Id.* at 1338.

84. *Id.* at 1339.

85. *Id.* Although not discussed by the Eleventh Circuit in *Holloway*, at least one district court in the Eleventh Circuit in *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703, 707 (S.D. Ga. 1993), concluded that anonymous 911 calls can be admitted into evidence under the present sense impression exception to the hearsay rule. In *Miller* the district court admitted into evidence the recording of an anonymous 911 call that described an automobile accident. *Id.* at 704-05. The court concluded that the 911 recording met the requirements of Rule 803(1) of the Federal Rules of Evidence. *Id.* at 705-07. If anonymous 911 calls can be admitted under the present sense impression exception to the hearsay

In contrast to the decision in *Holloway*, the Eleventh Circuit in *United States v. Davis*⁸⁶ concluded that an anonymous call to the Department of Children and Family Services (“DCFS”) was not sufficient to support a finding of probable cause to believe that an emergency existed.⁸⁷ Defendant in *Davis* entered a conditional guilty plea to unlawful possession of a machine gun and possession of a firearm by a convicted felon after the district court denied his motion to suppress. On appeal, defendant argued that the results of the initial search of his trailer should have been suppressed because it was not supported by probable cause and exigent circumstances.⁸⁸

The law enforcement officers in *Davis* were informed that DCFS had received a call on its hotline that defendant was holding a fifteen-year-old girl captive in his trailer, that he was providing her with drugs, and that he was having sexual intercourse with her. One set of officers went to defendant’s trailer to investigate, but they would not enter without a warrant. A second set of officers went to defendant’s trailer about three hours after law enforcement first learned of the call to the hotline. Fearing for the girl’s safety, the officers entered the residence without a warrant.⁸⁹ Based on observations during the initial search, “[they] obtained and executed two search warrants and recovered ammunition from [defendant’s] residence.”⁹⁰ As fate would have it, the day after the officers executed the second warrant, law enforcement was informed of a robbery in progress at defendant’s residence.⁹¹ “Upon questioning the perpetrators and receiving information that the trailer home contained a concealed firearm, [law enforcement] officials obtained a third search warrant and recovered a fully automatic weapon.”⁹²

In reviewing defendant’s challenges to the searches of his home, the Eleventh Circuit stated that the exigent circumstances exception to the warrant requirement exists “only when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action” and that the most urgent emergency situations are those involving danger to human life.⁹³ Quoting its prior decision in *Holloway*, the

rule, it certainly seems appropriate that anonymous 911 calls can form the basis for probable cause to believe that an emergency exists.

86. 313 F.3d 1300 (11th Cir. 2002).

87. *Id.* at 1303.

88. *Id.* at 1301.

89. *Id.*

90. *Id.* at 1301-02.

91. *Id.* at 1302.

92. *Id.*

93. *Id.* (quoting *United States v. Satterfield*, 734 F.2d 827, 844 (11th Cir. 1984)). Exigent circumstances also justify a warrantless entry into a residence when law

court further explained that “[i]n emergencies, probable cause exists where law enforcement officials ‘reasonably believe’ that someone is in danger.”⁹⁴

The court in *Davis* identified a number of facts that weakened the government’s argument that any exigency existed.⁹⁵ The fact that the call that prompted the visit to defendant’s trailer came in on a DCFS hotline, as opposed to 911, indicated to the court that the situation was not as urgent as other cases in which the court had found exigent circumstances.⁹⁶ The caller to the DCFS hotline did not report any immediate danger.⁹⁷ The court also considered the fact that the officers had conflicting information about whether the young girl was even in the trailer when they arrived.⁹⁸ The officers observed an open window but heard no sounds indicating anyone was inside the trailer, and the officers knew that two other officers “previously had investigated the situation, finding that it was not urgent enough to enter [defendant’s] residence without a warrant.”⁹⁹ In addition, the court noted that the three hours that elapsed from the time the initial report was made to the police until the time when law enforcement officials entered the trailer “seems to be a sufficient amount of time in which to have obtained a search warrant based on the information gleaned from [defendant’s] neighbor and the caller.”¹⁰⁰

Although the court questioned whether the exigent circumstances exception should apply, the court concluded that the determination was unnecessary because “even if we assume that the initial search was invalid and that anything related to that search was the fruit of the poisonous tree, the gun’s seizure was valid because it had been purged of the ‘taint’ of the allegedly illegal search.”¹⁰¹ The firearm that was the basis of defendant’s conviction was found pursuant to the third search warrant, which “was based on the information given by the

enforcement officers have probable cause to believe that evidence of a crime is “in danger of imminent destruction.” *United States v. Miravalles*, 280 F.3d 1328, 1331 n.4 (11th Cir. 2002).

94. 313 F.3d at 1302 (quoting *Holloway*, 290 F.3d at 1338).

95. *Id.* at 1303-04.

96. *Id.* at 1303.

97. *Id.*

98. *Id.*

99. *Id.* at 1304.

100. *Id.*

101. *Id.*

perpetrators of the robbery at [defendant's] trailer home, rather than on the allegedly illegal observations from the earlier searches."¹⁰²

F. Warrants: Sufficiency and Good Faith

The Eleventh Circuit examined the good-faith exception to the exclusionary rule in *United States v. Martin*.¹⁰³ The law enforcement officer in *Martin* was contacted by an inmate who wanted to confess to some of his criminal past. Among other things, the inmate told the officer that he had stolen some firearms from a home in North Carolina and that he had sold the weapons to the occupants of a crack house/apartment in Atlanta. The officer actually had defendant point out the apartment where he sold the stolen firearms.¹⁰⁴

The officer obtained a search warrant from an Atlanta municipal court judge.¹⁰⁵ The officers executed the warrant, found cocaine and a thirty-eight caliber pistol, and arrested defendant for possession of a firearm by a convicted felon. Defendant filed a motion to suppress the drugs and the gun.¹⁰⁶ The district court concluded that the search warrant was not based upon probable cause but held that the *Leon*¹⁰⁷ good-faith exception to the exclusionary rule applied and that the results of the search should not be suppressed.¹⁰⁸

The Eleventh Circuit explained that the United States Supreme Court's decision in "*United States v. Leon* . . . stands for the proposition that courts generally should not render inadmissible evidence obtained

102. *Id.* The court in *Davis* explained that although evidence seized in an illegal search would be suppressed as the "fruit of the poisonous tree, . . . [t]he government may 'purge the taint' by proving that there was a break in the causal link between the initial illegal search and the eventual seizure, such as by establishing that the evidence in question was seized pursuant to an independent source." *Id.* at 1303 (citing *United States v. Bailey*, 691 F.2d 1009, 1013 (11th Cir. 1982)).

103. 297 F.3d 1308 (11th Cir. 2002).

104. *Id.* at 1310.

105. *Id.* at 1311. The affidavit for the warrant stated the following:

On 05/15/00 Troy Terry initiated contact with the Atlanta Police Department and confessed to several crimes that took place outside the City of Atlanta. While taking a taped statement, the suspect admits to taking several weapons from a home in North Carolina and subsequently selling the weapons to the occupants of the listed apartment. Troy Terry directed the Atlanta Police to the specific apartment and personally pointed out the apartment in the presence of the Atlanta Police. It is believed that the weapons that have been verified as stolen out of North Carolina were in fact sold and presently are in the listed apartment.

Id.

106. *Id.*

107. *United States v. Leon*, 468 U.S. 897 (1984).

108. 297 F.3d at 1312.

by police officers acting in reasonable reliance upon a search warrant that it ultimately found to be unsupported by probable cause.¹⁰⁹ The court explained that the exclusionary rule's purpose is to deter unlawful police conduct and that the *Leon* good-faith exception applies when an officer has engaged in "objectively reasonable law enforcement activity" by obtaining and relying upon a search warrant issued by a judge.¹¹⁰ The *Leon* good-faith exception does not apply in the following four circumstances:

- (1) where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;" (2) "where the issuing magistrate wholly abandoned his judicial role . . .;" (3) where the affidavit supporting the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and (4) where, depending upon the circumstances of the particular case, a warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."¹¹¹

In *Martin* defendant contended that two of the exceptions to the *Leon* good-faith exception applied to his case.¹¹² First, defendant contended that the warrant was so lacking in any indicia of probable cause that it was unreasonable for the officer to have believed that probable cause existed.¹¹³ The first step in determining if a warrant falls within this exception is to examine the face of the affidavit to evaluate "what facts are included and what critical information has been left out."¹¹⁴ "[T]he affidavit should establish a connection between the defendant and the residence to be searched and a link between the residence and any criminal activity."¹¹⁵ The information on which the affidavit is based must not be stale, and if the affidavit relies upon information provided by an informant, the affidavit must demonstrate the informant's reliability and "basis of knowledge."¹¹⁶

The Eleventh Circuit was not entirely uncritical of the affidavit at issue; however, the court stated that the issue was not whether it found sufficient probable cause to support the warrant, but whether it was

109. *Id.* at 1313 (citing *Leon*, 468 U.S. 897).

110. *Id.* (quoting *Leon*, 468 U.S. at 919-20).

111. *Id.* (citations omitted).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1314.

116. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

“unreasonable for [the officer] to believe that what he wrote in the affidavit would be sufficient to support a finding of probable cause.”¹¹⁷ The court concluded that in this case, “[t]he affidavit contained sufficient indicia of probable cause to enable a reasonable officer to execute the warrant thinking it valid.”¹¹⁸

Defendant also contended that the judge wholly abandoned his judicial role and acted as a rubber stamp for the officer seeking the warrant.¹¹⁹ The Eleventh Circuit recognized that it was not entirely clear what conduct amounts to a judge’s abandonment of his role as a “neutral and detached magistrate.”¹²⁰ The Supreme Court has found that a judge did not act as a neutral and detached magistrate when he accompanied the officers while the search warrant was executed.¹²¹ The Eighth Circuit has found that a judge abandoned his role by signing a search warrant without reading the warrant and noticing that it did not list the items to be seized.¹²² The Tenth Circuit has cautioned that a judge who has a close working relationship with the officer “should not substitute the police officer’s assessment of the facts for the judge’s own independent analysis of the situation.”¹²³ The factual basis for defendant’s contention in *Martin* that the issuing magistrate had abandoned his judicial role was the magistrate’s testimony at the suppression hearing that he did not have any doubts about the freshness of the information set forth in the affidavit because “he had been signing warrants for [the officer] for years and he would not expect [the officer] to bring him a stale warrant.”¹²⁴ The court recognized that the magistrate’s testimony created the impression that the magistrate could have relied on his past experience with the officer rather than independently assessing the validity of the warrant.¹²⁵ The Eleventh Circuit ultimately rejected this challenge to the warrant because there was no evidence that the magistrate relied “solely” upon his relationship with the officer rather than reading the affidavit or that the magistrate’s opinion of the officer somehow interfered with his independent review of the facts in the affidavit.¹²⁶

117. *Id.* at 1315.

118. *Id.*

119. *Id.* at 1316.

120. *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971)).

121. *Id.* (discussing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979)).

122. *Id.* (discussing *United States v. Decker*, 956 F.2d 773, 777 (8th Cir. 1992)).

123. *Id.* at 1316-17 (discussing *United States v. McKneely*, 6 F.3d 1447, 1455 (10th Cir. 1993)).

124. *Id.* at 1317.

125. *Id.*

126. *Id.* at 1318.

After concluding that none of the four exceptions to the *Leon* good-faith exception applied, the Eleventh Circuit addressed the final issue of whether the officer reasonably relied upon the search warrant.¹²⁷ The standard for making this determination is “whether a reasonably well-trained officer would know that the warrant was illegal despite the magistrate’s authorization.”¹²⁸ The Eleventh Circuit decided that in determining whether an officer reasonably relied upon a warrant, a reviewing court can look beyond the four corners of the affidavit to information known by the officer that was not presented in the initial warrant application or affidavit.¹²⁹

The record showed that the officer attempted to corroborate the information that had been provided to him by the inmate. In addition, the officer attempted to determine whether the information provided was stale.¹³⁰ “Under the totality of the circumstances, taking into account the facts known to [the officer] at the time he applied for the search warrant, [the court found] that [the officer] reasonably believed that probable cause existed to execute the search warrant.”¹³¹ In affirming the district court’s denial of defendant’s motion to suppress, the Eleventh Circuit emphasized that “[t]he exclusionary rule is meant to guard against police officers who purposely leave critical facts out of search warrant affidavits because these facts would not support a finding of probable cause.”¹³² In *Martin*, however, instead of omitting facts that would have defeated probable cause, the officer omitted facts that would have supported a finding of probable cause.¹³³

III. THE FIFTH AMENDMENT

A. *Privilege Against Self-Incrimination*

The facts giving rise to *United States v. Vangates*¹³⁴ began in 1995 when a citizen was arrested and taken into custody for failing to complete community service after a shoplifting conviction. After her release, the citizen reported to the Department of Corrections that she had been beaten by three correctional officers.¹³⁵ An internal affairs

127. *Id.*

128. *Id.* (citing *Leon*, 468 U.S. at 922 n.23).

129. *Id.*

130. *Id.* at 1319-20.

131. *Id.* at 1320.

132. *Id.*

133. *Id.*

134. 287 F.3d 1315 (11th Cir. 2002).

135. *Id.* at 1317.

investigation was initiated, and each of the three correctional officers was informed in writing that

she would be subject to discipline and possibly dismissal if she refused to answer the investigator's questions about her work performance and that her statements to Internal Affairs could not be used against her in a subsequent criminal proceeding, except one for perjury, but that they could be used against her in relation to departmental charges.¹³⁶

While the internal affairs investigation was still pending, the citizen filed suit against the officers in United States District Court pursuant to 42 U.S.C. § 1983.¹³⁷ At the trial of the citizen's § 1983 case, plaintiff subpoenaed each correctional officer to appear as a witness. They answered questions about the incident and the internal affairs investigation, and they each denied assaulting the citizen. None of the officers claimed a Fifth Amendment privilege or asserted any type of immunity. The officers testified in uniform and were compensated by their government employer for the time they spent in court.¹³⁸

The citizen's attorney filed a complaint with the Federal Bureau of Investigation while the civil suit was pending. This complaint ultimately resulted in the three officers being indicted in July of 2000 for depriving the citizen of her civil rights by assaulting her.¹³⁹

Prior to the criminal trial, the district court ruled that the government could utilize all portions of the civil trial transcript except for those portions referencing the internal affairs investigation. None of the officers testified at the criminal trial, and the government did not seek to introduce their testimony from the civil trial. The jury convicted one of the three correctional officers.¹⁴⁰ On appeal, defendant contended that the district court erred in ruling that her civil trial testimony was not protected by the Supreme Court's decision in *Garrity v. New Jersey*,¹⁴¹ and she maintained that this error "compelled her not to take the stand in her own defense."¹⁴²

136. *Id.*

137. 42 U.S.C. § 1983 (2000).

138. 287 F.3d at 1317-18. The civil suit was settled in 1997 while being presented to the jury. *Id.* at 1318.

139. *Id.*

140. *Id.* at 1319.

141. 385 U.S. 493 (1967). "*Garrity* protects police officers from having to choose between cooperating with an internal investigation and making potentially incriminating statements. Immunity under *Garrity* prevents any statements made in the course of the internal investigation from being used against the officers in subsequent criminal proceedings." *Vangates*, 287 F.3d at 1320 (quoting *In re Fed. Grand Jury Proceedings*, 975 F.2d 1488, 1490 (11th Cir. 1992)).

142. 287 F.3d at 1319.

The court in *Vantages* reviewed the interplay between the Fifth Amendment and public employees who are subject to employment-related investigations.¹⁴³ The court stated that “a public employee may not be coerced into surrendering his Fifth Amendment privilege by threat of being fired or subjected to other sanctions”¹⁴⁴ and the employee “cannot be forced to choose ‘between self-incrimination or job forfeiture.’”¹⁴⁵ Although a public employer cannot coerce an employee into surrendering his Fifth Amendment privilege, the public employer “can compel a public employee to answer questions in a formal or informal proceeding by granting that employee immunity from future criminal prosecution based on the answers given.”¹⁴⁶ This immunity is referred to as “use immunity.”¹⁴⁷ “Ultimately, . . . the state must decide whether to demand a statement from an employee on job-related matters, in which case it may not use the statement in a criminal prosecution.”¹⁴⁸

The district judge determined that the “use immunity” defendant received during the internal affairs investigation did not apply to testimony she gave during the civil trial.¹⁴⁹ The Eleventh Circuit held that in order for defendant’s testimony at the civil trial to be protected, first, she must have subjectively believed that she was compelled to testify on the threat of the loss of her job and, second, her belief must have been objectively reasonable.¹⁵⁰ Thus, the Eleventh Circuit established a two-part test that has a subjective and objective component.¹⁵¹

Defendant easily satisfied the subjective prong of the test.¹⁵² “She testified at a pretrial hearing before the district court that she believed she would have been subject to discipline if she had refused to cooperate with the County Attorney during the civil trial. . . .”¹⁵³ Moreover, her counsel informed her that her testimony could not be used against her.¹⁵⁴

143. *See id.* at 1315.

144. *Id.* at 1320 (citing *Erwin v. Price*, 778 F.2d 668, 669 (11th Cir. 1985)).

145. *Id.* (quoting *Garrity*, 385 U.S. at 496).

146. *Id.* at 1320-21.

147. *Id.* at 1321.

148. *Id.*

149. *Id.*

150. *Id.* at 1322.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

Defendant was unable to show that the belief that her testimony was compelled was objectively reasonable, however.¹⁵⁵ “[T]he relevant inquiry concerns *state* action which may have compelled [defendant] to testify.”¹⁵⁶ The fact that defendant was subpoenaed to testify at the civil trial was insufficient to amount to compulsion.¹⁵⁷ In this case, there was no evidence of any state action compelling her testimony.¹⁵⁸ The fact that counsel incorrectly advised her that her testimony in the civil trial could not be used against her did not support the claim that her testimony was coerced in the absence of some state action.¹⁵⁹ The court concluded that defendant’s testimony at the civil trial was not protected by *Garrity* and that the district court did not err in admitting the testimony in the criminal trial.¹⁶⁰

B. Double Jeopardy

In *United States v. Vallejo*,¹⁶¹ the district court granted defendants’ motion for mistrial after the detective made an improper statement about defendants’ post-arrest silence while being questioned by the prosecutor. The detective testified that he had not received any cooperation from defendants, and the prosecutor explained that he thought the detective was going to testify that he had not been able to corroborate defendants’ version of events.¹⁶² The district court accepted the prosecutor’s representation that he was surprised by the

155. *Id.*

156. *Id.* at 1323.

157. *Id.* (citing *Benjamin v. City of Montgomery*, 785 F.2d 959, 962 (11th Cir. 1986)).

158. *Id.* at 1324.

159. *Id.*

160. *Id.* at 1325.

161. 297 F.3d 1154 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 934 (2003).

162. *Id.* at 1161, 1162 n.1. The detective responded to the following questions about why he had not arrested a certain witness named Anthony Jackson:

[Prosecutor]: In any of the interviews which you have participated with Tony Jackson on, did he ever ask not to be prosecuted by the government?

[Frazier]: No, he never did.

. . . .

[Prosecutor]: Did he seem concerned about being prosecuted?

[Frazier]: Well, he was petrified.

[Prosecutor]: Can you tell the ladies and gentlemen of the jury why you elected not to arrest Tony Jackson up until this point in time right now?

[Frazier]: Yeah, I can. I was looking for cooperation from the defendants’ side of the camp. That’s why I didn’t arrest him. Up until that time I met Mr. Jackson I hadn’t reached or – I hadn’t obtained any kind of cooperation from their side, excuse my language, of the camp

Id. at 1162.

detective's improper comment on defendants' post-arrest silence and did not intend to cause a mistrial. The district court denied defendants' motion to dismiss the indictment on double jeopardy grounds, and defendants were convicted when the case was retried.¹⁶³

On appeal, defendants contended that "the government's conduct left them with no choice but to request a mistrial."¹⁶⁴ Typically, the Double Jeopardy Clause does not bar a retrial after a defendant has been granted a mistrial "unless the prosecution intentionally goaded the defendant into moving for a mistrial."¹⁶⁵ The Eleventh Circuit reasoned that the district court's determination about the prosecutor's intent was a finding of fact that was reviewable for clear error.¹⁶⁶ The Eleventh Circuit stressed that "only deliberate prosecutorial misconduct implicates double jeopardy principles."¹⁶⁷ The court concluded that defendants "have not presented sufficient evidence to show clear error in the district court's determination that the prosecutor did not intentionally 'goad' [defendants] to move for mistrial. The Double Jeopardy Clause did not bar [defendants'] retrial."¹⁶⁸

C. Due Process

1. Agreements with the Government. Petitioners in *Valenzuela v. United States*¹⁶⁹ filed a petition for a writ of habeas corpus, seeking review of a magistrate judge's decision certifying their extradition to Italy for various drug offenses.¹⁷⁰ Prior to Italy seeking extradition, petitioners had entered into cooperation agreements with the Drug Enforcement Administration ("DEA"), and they had signed a DEA Cooperating Individual Agreement, which promised that the DEA would "use all lawful means to protect [their] confidentiality."¹⁷¹ At the extradition hearing, the United States introduced an affidavit setting forth certain statements made by petitioners, and the magistrate judge concluded that the evidence was sufficient to sustain extradition to Italy only because of petitioners' statements contained in the affidavit.¹⁷²

163. *Id.* at 1161-62.

164. *Id.* at 1162.

165. *Id.* (citing *United States v. Fern*, 155 F.3d 1318, 1324 (11th Cir. 1998)).

166. *Id.*

167. *Id.* at 1163 (citing *Oregon v. Kennedy*, 456 U.S. 667, 678 (1982)).

168. *Id.*

169. 286 F.3d 1223 (11th Cir. 2002).

170. *Id.* at 1225.

171. *Id.*

172. *Id.* at 1227, 1230.

Petitioners filed a habeas corpus action, seeking review of the extradition order. Petitioners contended that the government's use of their statements to the DEA breached the confidentiality agreement petitioners had entered into with the government.¹⁷³ The Eleventh Circuit agreed with petitioners.¹⁷⁴ The court reasoned that petitioners were aware they had committed crimes in Italy for which they could be prosecuted and their cooperation with the DEA was conditioned in part on the DEA's promise of confidentiality.¹⁷⁵ Citing its prior decision in *United States v. Harvey*,¹⁷⁶ the Eleventh Circuit stated that "[d]ue process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes."¹⁷⁷ The Eleventh Circuit concluded that "[i]n this case, the Government not only ignored the agents' promise—by revealing petitioners' identity and the information they provided to the Italian authorities—but it went one step further: it used the fruits of the breach by presenting the information to the magistrate judge, all to petitioners' detriment."¹⁷⁸ The Eleventh Circuit directed the district court to grant their petition for a writ of habeas corpus.¹⁷⁹

2. Apprendi Cases. In *United States v. Tinoco*,¹⁸⁰ two of the four defendants appealed their convictions under the Maritime Drug Law Enforcement Act ("MDLEA")¹⁸¹ for conspiracy and possession with intent to distribute five kilograms or more of cocaine while on board a

173. *Id.* at 1228. Petitioners also argued that they had received a grant of transactional and use immunity, thereby rendering inadmissible their statements that the government sought to use against them in the extradition proceedings and that the statements submitted by the United States in support of Italy's request for extradition were obtained in violation of the Fifth Amendment prohibition on self-incrimination. *Id.* at 1228-29. The Eleventh Circuit rejected petitioners' immunity arguments, concluding that the immunity provided "applied solely to prosecutions in the United States." *Id.* at 1228. The court also held that the Fifth Amendment did not bar use of petitioners' statements in an extradition proceeding. *Id.* The Self-Incrimination Clause of the Fifth Amendment does not have extraterritorial application. *Id.* at 1229 (citing *United States v. Balsys*, 524 U.S. 666, 672-73 (1998)). "Thus, even if the statements of petitioners contained in the . . . [a]ffidavit were compelled, the [Self-Incrimination] Clause would not bar their use in the extradition hearing." *Id.*

174. *Id.* at 1229-30.

175. *Id.* at 1230.

176. 869 F.2d 1439 (11th Cir. 1989) (en banc).

177. 286 F.3d at 1230 (quoting *Harvey*, 869 F.2d at 1443-44).

178. *Id.*

179. *Id.*

180. 304 F.3d 1088 (11th Cir. 2002).

181. 46 U.S.C. app. §§ 1901-1904 (2000).

vessel subject to the jurisdiction of the United States.¹⁸² A United States Coast Guard cutter intercepted defendants, who were in a “go-fast” boat in international waters approximately 475 nautical miles west of the Columbian/Ecuadoran border.¹⁸³ Once the Coast Guard crew members intercepted and boarded the go-fast boat, they were unable to find any identifying marks or registration papers that supported claims made by defendants that the boat was Columbian in origin. The Columbian Navy was unable to provide any information about the vessel’s country of origin, given the lack of any identifying marks or documentation, and it was unable to verify defendants’ verbal claims that the vessel was of Columbian registry. The Coast Guard recovered about 97.5 bales of cocaine that had been thrown into the ocean by defendants during the chase.¹⁸⁴

On appeal, defendants raised two arguments premised on the United States Constitution that will be addressed in this Article. First, they contended that the MDLEA was facially unconstitutional because its penalty provisions violated the United States Supreme Court’s decision in *Apprendi v. New Jersey*.¹⁸⁵ Second, defendants contended that the venue provisions of the MDLEA¹⁸⁶ violated the principles set forth by the United States Supreme Court in *United States v. Gaudin*.¹⁸⁷ The jurisdiction and venue provisions of the MDLEA require a judge rather than a jury to determine as a preliminary issue of law whether a vessel is subject to the jurisdiction of the United States.¹⁸⁸

Section 1093(a) of the MDLEA provides: “It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States . . . to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.”¹⁸⁹ The penalty provision of the MDLEA provides that “[a]ny person who commits an offense defined in

182. 304 F.3d at 1091 (citing 46 U.S.C. app. § 1903(a), (g), and (j) (2000)).

183. *Id.* at 1092. The go-fast boat was approximately forty feet in length with three outboard motors. *Id.* “Coast Guard officials refer to such vessels as ‘go-fast’ boats because they can travel at high rates of speed, which makes them a favored vehicle for drug and alien smuggling operations.” *Id.*

184. *Id.* at 1093-94. The total weight of the cocaine was 1,807 kilograms. *Id.* at 1093.

185. 530 U.S. 466 (2000).

186. 46 U.S.C. app. § 1903(f).

187. 304 F.3d at 1095 (citing *United States v. Gaudin*, 515 U.S. 506 (1995)). As explained later by the court in *Tinoco*, “*Gaudin* stands for the proposition that *elements* of an offense that involve factual determinations, or mixed determinations of law and fact, must go the jury.” *Id.* at 1110 (citing *Gaudin*, 515 U.S. at 511-15, 522-23).

188. *Id.* at 1095.

189. 46 U.S.C. app. § 1903(a).

this section shall be punished in accordance with the penalties set forth in [21 U.S.C. § 960(b)].¹⁹⁰ In analyzing the MDLEA, the Eleventh Circuit concluded that § 1903(a) states a “complete substantive drug offense, without reference to drug type or quantity, and that . . . the sentencing factors [set forth] in § 960(b) to come into play only upon a defendant’s conviction . . . under § 1903(a).”¹⁹¹

Defendants argued on appeal that because Eleventh Circuit precedent interpreted § 960(b) as setting forth sentencing factors to be determined by the judge, § 960 is facially unconstitutional under *Apprendi* because it permits increases in the maximum penalty to which a defendant can be subjected without requiring that those factors be charged in the indictment and proven to a jury beyond a reasonable doubt. Defendants further argued that the MDLEA was facially unconstitutional because it incorporates by reference the sentencing provisions of § 960.¹⁹²

The Eleventh Circuit compared the similarities between the MDLEA and 21 U.S.C. § 841.¹⁹³ The court concluded that 46 U.S.C. app. § 1903(a), like 21 U.S.C. § 841(a), “sets forth a complete substantive drug offense, without reference to drug type or quantity”¹⁹⁴ and that the sentencing provisions of 21 U.S.C. § 841(b), which set forth different terms of imprisonment based on the specific quantity and type of drug involved, are similar to the sentencing framework set forth in 21 U.S.C. § 960(b).¹⁹⁵ “Moreover, § 841(b)(1)(C), like § 960(b)(3), creates a catchall provision that sets a maximum term of [twenty] years imprisonment without reference to the drug type or quantity involved.”¹⁹⁶ “[B]ecause of the close similarity between the statutes involved, the *Apprendi* concerns raised in [*United States v.*] *Sanchez*¹⁹⁷ mirror the concerns raised in the present case.”¹⁹⁸

In *Sanchez* the Eleventh Circuit held that the Supreme Court’s decision in *Apprendi* was merely “an external constitutional restraint under the Sixth Amendment and the Due Process Clause[] that forbids the judge during sentencing from making findings that actually increase the defendant’s sentence above the prescribed statutory maximum.”¹⁹⁹

190. 46 U.S.C. app. § 1903(g)(1) (citing 21 U.S.C. § 960(b)).

191. 304 F.3d at 1097.

192. *Id.* at 1098-99 (citing 46 U.S.C. app. § 1903; *United States v. Coy*, 19 F.3d 629, 636-37 (11th Cir. 1994) (per curiam)).

193. *Id.* at 1099. 21 U.S.C. § 841 (2000).

194. 304 F.3d at 1099.

195. *Id.*

196. *Id.* at 1100.

197. 269 F.3d 1250 (11th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 942 (2002).

198. 304 F.3d at 1100.

199. *Id.* (quoting *Sanchez*, 269 F.3d at 1268).

[I]n the context of federal drug cases, drug type and quantity do not have to be charged in the indictment or submitted to the jury for proof beyond a reasonable doubt, except when the finding of drug type or quantity causes the sentence actually imposed upon the defendant to rise above the prescribed statutory maximum.²⁰⁰

The court in *Tinoco* concluded its explanation of its prior ruling in *Sanchez* by stating,

We went on to rule that there is constitutional error under *Apprendi* in a 21 U.S.C. § 841 case only when the sentencing judge's factual finding actually increased the defendant's sentence above the statutory maximum found in § 841(b)(1)(C), and only when the fact that led to the enhanced sentence was not charged in the federal indictment or submitted to the jury for proof beyond a reasonable doubt.²⁰¹

Applying the reasoning of *Sanchez* to the MDLEA, the court rejected defendants' facial attack on the MDLEA because they could not "demonstrate 'that no set of circumstances exist under which the Act would be valid.'"²⁰² In the context of an MDLEA conviction, there is *Apprendi* error only if the sentencing judge's factual finding actually increased defendant's sentence above the statutory maximum found in the MDLEA's catchall sentencing provision,²⁰³ "and only if the fact that led to the enhanced sentence was not charged in the federal indictment or submitted to the jury for proof beyond a reasonable doubt."²⁰⁴ The court concluded that *Apprendi* was irrelevant to one defendant because he was sentenced below the twenty-year maximum set forth in the MDLEA's catchall sentencing provision.²⁰⁵ There was no *Apprendi* error regarding the other defendant who received a sentence in excess of twenty years because the drug type and quantity was charged in the indictment and found by the jury.²⁰⁶

200. *Id.* (citing *Sanchez*, 269 F.3d at 1268-69).

201. *Id.* (citing *Sanchez*, 269 F.3d at 1270).

202. *Id.* at 1101 (quoting *United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir. 1989)).

203. 21 U.S.C. § 960(b)(3), *incorporated by* 46 U.S.C. app. § 1903(g).

204. 304 F.3d at 1101.

205. *Id.*

206. *Id.* at 1101-02. In *Tinoco* the court found that there was no *Apprendi* error. *Id.* at 1101. An *Apprendi* error does not require reversal, however, if that error is harmless beyond a reasonable doubt. *United States v. Anderson*, 289 F.3d 1321, 1326 (11th Cir. 2002). "Quite simply, *Apprendi* errors are neither jurisdictional nor structural and do not fall within the limited class of fundamental constitutional error that defy analysis by harmless error standards." *Id.* (internal citations omitted). In *Anderson* there was no *Apprendi* error because no reasonable jury could have found defendant guilty without also finding defendant possessed a sufficient amount of drugs to make him eligible for life

The Eleventh Circuit also rejected defendant's arguments that the jurisdiction and venue provisions in 46 U.S.C. app. § 1903(f) "unconstitutionally removes from the jury the determination of whether the government has prove[d] beyond a reasonable doubt that the vessel at issue in a given case is a vessel subject to the jurisdiction of the United States."²⁰⁷ In *United States v. Medina*,²⁰⁸ the Eleventh Circuit held in an MDLEA prosecution that whether a vessel is subject to the jurisdiction of the United States was a question of fact for the jury to decide.²⁰⁹ Subsequent to the Eleventh Circuit's decision in *Medina*, however, Congress amended the MDLEA, adding the jurisdiction and venue provision²¹⁰ that treats jurisdiction and venue as preliminary questions of law for the court to determine.²¹¹ Because Congress effectively overruled *Medina* by amending the MDLEA, the issue for the Eleventh Circuit was whether Congress could "constitutionally provide that the MDLEA jurisdictional requirement is a non-element of the offense, thereby authorizing the judge to decide the issue."²¹²

The court in *Tinoco* explained that legislatures have great flexibility in defining certain facts as sentencing factors rather than elements of an offense; however, a legislature cannot relieve the government of proving beyond a reasonable doubt an essential element of the offense.²¹³ The court further explained that certain facts are "traditional elements" of an offense subject to the Due Process Clause and the Sixth Amendment right to trial by jury, regardless of any label attached to those facts by the legislature.²¹⁴ "As used in the common law, the 'elements' of an offense include each part of the actus reus, causation, and the mens rea that the government must establish before an individual can be found guilty of a crime."²¹⁵ The court concluded that the requirement under the MDLEA that a vessel be subject to the jurisdiction of the United States did not go to the actus reus, causation, or mens rea.²¹⁶ Therefore, it did not constitute a traditional element of an offense and did not have to be submitted to the jury for proof beyond a reasonable

imprisonment. *Id.* at 1327.

207. 304 F.3d at 1103.

208. 90 F.3d 459 (11th Cir. 1996).

209. *Id.* at 463-64.

210. 46 U.S.C. app. § 1903(f).

211. 304 F.3d at 1105.

212. *Id.* at 1106.

213. *Id.* at 1107.

214. *Id.* (citing *Jones v. United States*, 526 U.S. 227, 241-42 (2002)).

215. *Id.* at 1108.

216. *Id.*

doubt.²¹⁷ Even though jurisdiction under the MDLEA could be a fact-bound inquiry, the Supreme Court's decision in *Gaudin* did not require submission of that issue to the jury because "*Gaudin* stands for the proposition that *elements* of an offense that involve factual determinations, or mixed determinations of law and fact, must go to the jury."²¹⁸

IV. THE SIXTH AMENDMENT

In this survey period, the Eleventh Circuit addressed for the first time the issue of whether the use of a stun belt violates any of a defendant's trial rights. In *United States v. Durham*,²¹⁹ defendant had a history of escape attempts while awaiting trial on bank robbery charges. Aware of defendant's history, courtroom security personnel decided to place defendant in leg shackles and a stun belt while on trial for armed bank robbery, possession of a firearm during a crime of violence, and possession of a firearm by a convicted felon.²²⁰ "A stun belt is a device placed around the defendant's midsection that uses an electric shock to temporarily disable the defendant if his actions pose a security threat."²²¹

Defendant filed a motion to prevent the use of the stun belt when he became aware of the security personnel's intention to use the device. The court held a hearing outside the presence of the jury on the first day of trial.²²² Defendant's attorney argued that use of the stun belt would interfere with defendant's ability to assist in his own defense because defendant would be "more concerned about receiving such a jolt than he is thinking about the testimony and giving me aid and assistance in the defense of this case."²²³ Without receiving any evidence, the trial court denied defendant's motion.²²⁴ "Other than the conclusion that [defendant] was a 'heightened security risk' and that there was 'no rational basis for him to be unduly apprehensive' about the belt's discharge, the court did not make any factual findings to justify its denial of [defendant's] motion."²²⁵ The district court also failed to

217. *Id.* at 1109-10.

218. *Id.* at 1110 (construing *Gaudin*, 515 U.S. at 511-15, 522-23).

219. 287 F.3d 1297 (11th Cir. 2002).

220. *Id.* at 1301.

221. *Id.*

222. *Id.* at 1301-02.

223. *Id.* at 1302. One might initially be dismissive of defense counsel's arguments; however, the literature published by the manufacturer of the stun belt in question touted its product as "necessary 'for total psychological supremacy . . . of potential troublesome prisoners.'" *Id.* at 1312 (Tjoflat, J., concurring).

224. *Id.* at 1302.

225. *Id.* at 1303 (internal citations omitted).

explain why less severe security methods would be inadequate to restrain defendant. The trial commenced, and defendant was convicted on all counts and sentenced to 1,265 months imprisonment.²²⁶

The Eleventh Circuit in *Durham* began its review by setting forth the body of law that addresses how other security measures may affect a defendant's trial rights.²²⁷ The starting premise is that "a district court retains 'reasonable discretion' to determine whether or not to physically restrain a criminal defendant."²²⁸ The court then set forth some of the principles that guide a court's discretion in whether to use physical restraint, such as leg shackles.²²⁹ The first principle is that the use of physical restraints should be rare.²³⁰ "The Supreme Court has held that the presumption of innocence is an integral part of a criminal defendant's right to a fair trial The presence of shackles and other physical restraints on the defendant tend to erode this presumption of innocence."²³¹ Even if physical restraints are not visible to the jury, they may burden several aspects of a defendant's right to a fair trial by eroding the "dignity and decorum of judicial proceedings that the judge is seeking to uphold"²³² by impairing a defendant's ability to confer with trial counsel and by affecting the trial strategy he may choose.²³³

A trial judge's decision about what security measures to use in the courtroom are reviewed for an abuse of discretion.²³⁴ However, a judge's decision to apply physical restraints such as leg shackles is "subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed."²³⁵

The Eleventh Circuit resolved whether the use of stun belts raised the same concerns about a defendant's trial rights as do other types of physical restraints.²³⁶ The Eleventh Circuit noted that because the district court did not receive any evidence or make any factual findings,

226. *Id.*

227. *Id.*

228. *Id.* (citing *United States v. Mayes*, 158 F.3d 1215, 1225 (11th Cir. 1998)).

229. *Id.* at 1304.

230. *Id.*

231. *Id.* (citations omitted).

232. *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)).

233. *Id.* (citing *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983)).

234. *Id.*

235. *Id.* (quoting *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987) (per curiam), *withdrawn in part*, 833 F.2d 250 (11th Cir. 1987)).

236. *Id.* at 1304-05.

its discussion about the relationship between the principles that guide the use of other physical restraints and the use of stun belts would have to rely on defendant's uncontested assertions about the stun belt.²³⁷

Durham's primary factual claims about the belt are the following: (1) when activated, it administers a 50,000 - 70,000 volt shock for approximately eight seconds, (2) the power of such a shock causes the wearer to lose control of his limbs, and often to urinate or defecate on himself, and (3) the belt protrudes some three inches from the wearer's back, causing some degree of discomfort to the wearer. Durham also contends that the belts have been known to malfunction, and that there have been several instances where the device has accidentally been triggered during trials.²³⁸

One of the primary considerations given to the use of physical restraints is the impact the visibility of the restraint will have on the jury.²³⁹ The court reasoned that this was less of a concern with stun belts than other types of physical restraints because stun belts are worn beneath a defendant's clothing and are not readily visible.²⁴⁰ The greater concern to the court was that use of a stun belt could disrupt a defendant's constitutionally guaranteed trial rights.²⁴¹ The court reasoned that "[t]he fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements . . . necessary for effective communication with counsel."²⁴² The court also concluded that the focus and attention of a defendant who was wearing a stun belt would be occupied by the possible triggering of the device "and is thus less likely to participate fully in his defense at trial."²⁴³ The court concluded that the use of a stun belt is much more likely to interfere with a defendant's Sixth Amendment and due process rights to be present at trial and participate in his own defense than the use of physical restraints such as leg shackles.²⁴⁴ The court also concluded that the use of stun belts had significant potential to be "highly detrimental to the dignified administration of criminal justice."²⁴⁵ "Shackles are a minor threat to the dignity of the courtroom when

237. *Id.* at 1305.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 1306.

244. *Id.*

245. *Id.*

compared with the discharge of a stun belt, which could cause the defendant to lose control of his limbs, collapse to the floor, and defecate on himself.”²⁴⁶

The court held that “stun belts plainly pose many of the same constitutional concerns as do other physical restraints . . . [and that] a decision to use a stun belt must be subjected to at least the same ‘close judicial scrutiny’ required for the imposition of other physical restraints.”²⁴⁷ The Eleventh Circuit held that a court contemplating the use of stun belts will

need to assess whether an essential state interest is served by compelling a particular defendant to wear such a device, and must consider less restrictive methods of restraint. Furthermore, the court’s rationale must be placed on the record to enable us to determine if the use of the stun belt was an abuse of the court’s discretion.²⁴⁸

The standard for the use of stun belts established by the court in *Durham* presaged the result in the case before it. The district court’s conclusion that use of the stun belt was a “‘minimal intrusion’ on the defendant’s ‘normal liberties,’ and that the defendant had no basis for any apprehension about the belt’s interference with his rights”²⁴⁹ lacked any support in the record, and the court failed to consider any less restrictive alternatives.²⁵⁰ After concluding that the district court “acted outside the scope of its discretion,”²⁵¹ the court considered whether the error was harmless.²⁵²

In the instant case, the defendant’s ability to participate meaningfully throughout his trial was hampered by the use of the stun belt. The government has not demonstrated that Durham’s defense was not harmed by such an impediment to Durham’s ability to participate in the proceedings. Therefore, Durham’s conviction must be vacated and his case remanded for a new trial.²⁵³

246. *Id.*

247. *Id.* (quoting *Elledge*, 823 F.2d at 1451).

248. *Id.* at 1306-07 (citations omitted).

249. *Id.* at 1308 (internal citations omitted).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1309. On remand the district court conducted a lengthy evidentiary hearing and in a published opinion made detailed factual findings and conclusions supporting the decision to use the stun belt in the defendant’s retrial. *United States v. Durham*, 219 F. Supp. 2d 1234 (N.D. Fla. 2002). The district court detailed the defendant’s craftiness, dangerousness, and numerous escape attempts, including an escape attempt from the maximum security prison to which the defendant was sent after sentencing in the case before the district court. *Id.* at 1236-38. In addition, the district court added its own

V. TREATIES OF THE UNITED STATES

The Vienna Convention on Consular Relations (“Vienna Convention”)²⁵⁴ is a multilateral treaty that has been ratified by the United States.²⁵⁵ Article 36 provides that

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.²⁵⁶

In *United States v. Duarte-Acero*,²⁵⁷ defendant, a Columbian citizen, was arrested in Ecuador. The Ecuadorian authorities ignored defendant’s requests to speak to the Columbian Consulate. Defendant was excluded from Ecuador and placed on a Drug Enforcement Administration (“DEA”) plane to the United States, without a hearing, to face fifteen-year-old charges of conspiring to kill a DEA agent. Defendant’s motion to dismiss his indictment for a violation of the Vienna Convention was denied, and defendant was convicted at trial.²⁵⁸

There was no dispute that defendant’s requests to speak with his consulate officer were ignored.²⁵⁹ In *United States v. Cordoba-Mosquera*,²⁶⁰ the Eleventh Circuit followed the lead of other circuits by stating that neither the suppression of evidence nor the dismissal of an indictment is an appropriate remedy for a violation of Article 36 of the Vienna Convention.²⁶¹ The Eleventh Circuit in *Duarte-Acero*, however, recognized that the *Cordoba-Mosquera* decision indicated that defendant’s failure to show prejudice in that case influenced the decision.²⁶² In *Duarte-Acero* the Eleventh Circuit concluded that defendant had shown prejudice because he alleged that if his rights under the Vienna Convention had been protected, he would have been returned to

observations that this defendant, as well as other defendants who have worn a stun belt in trials before the district court, participated meaningfully and intelligently in his own defense and with counsel. *Id.* at 1241.

254. Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

255. *Id.*

256. *Id.* art. 36, at 101.

257. 296 F.3d 1277 (11th Cir. 2002).

258. *Id.* at 1279-80.

259. *Id.* at 1281.

260. 212 F.3d 1194 (11th Cir. 2000).

261. *Id.* at 1196.

262. 296 F.3d at 1281 (citing *Cordoba-Mosquera*, 212 F.3d at 1196).

Columbia, not sent to the United States.²⁶³ The Eleventh Circuit concluded that the presence or absence of prejudice was irrelevant, however, because a violation of Article 36 of the Vienna Convention “does not warrant the dismissal of an indictment.”²⁶⁴ The State Department’s interpretation of the Vienna Convention persuaded the Eleventh Circuit that “the only remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.”²⁶⁵

263. *Id.*

264. *Id.* at 1282.

265. *Id.* In addition, as the Eleventh Circuit noted, the preamble to the Vienna Convention explicitly “disclaims any intent to create individual rights.” *Id.* at 1281. The defendant also claimed that his rights under the International Covenant on Civil and Political Rights (“ICCPR”), December 9, 1966, S. TREATY DOC. NO. 95-2 (1992), 999 U.N.T.S. 171, which prohibits the expulsion of a person from a country without a hearing, were violated. *Id.* at 1282-83. The Eleventh Circuit concluded that “the ICCPR does not create judicially-enforceable individual rights,” and the violation of his rights under the ICCPR did not require dismissal of the indictment. *Id.* at 1283.