TULANE MARITIME LAW JOURNAL ONLINE

VOLUME 42 MAY 2018

Drugs Overboard: How Coast Guard Officers Should Approach Arrests for Off-Shore Drug Trafficking—*United States v. Williams*

I. INTRODUCTION

When patrolling for drug trafficking off the coast of Columbia and Panama, United States Coast Guard agents on the *United States Coast Guard Cutter Bear* picked up a vessel on their radar.[1] Using a forward-looking infrared system (FLIR), one of the agents detected that the vessel was a fishing boat, which contained five individuals on board.[2] After they hailed the vessel over the radio, the agents witnessed four of the individuals place bale-like objects into a fishing net and throw the net overboard.[3] While this was happening, the vessel was moving erratically from left to right.[4] After dumping the first net overboard, the individuals threw two more fishing nets filled with bales overboard.[5] The agents then activated the *CGC Bear*'s law enforcement lights and ordered the vessel to stop by speaking over a loudhailer and through channel 16 over the radio.[6] Even after these instructions, the vessel did not stop until the *CGC*

1. United States v. Williams, 865 F.3d 1328, 1333 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1282 (2018).
2. *Id.* at 1334.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

Bear was within a few feet.[7] Once on board, the agents were able to identify the vessel as the *Rasputin*, a 34-foot American fishing boat.[8] However, there was no indication of fish or fishing gear on board.[9] Vanston Williams identified himself as the ship's master, and told the agents that the crew members were all Columbian nationals that were headed to Panama.[10] When the Coast Guard agents first saw the vessel, however, it was headed away from Panama.[11] In addition, an officer noticed that the radio on the *Rasputin* was turned to channel 16 with the volume turned up, indicating that the crew members heard the Coast Guard's instructions to heave-to.[12] The agents also noticed several empty gasoline containers, a strong smell of gasoline, and that the fish hold floor was covered with gasoline.[13] Because the *Rasputin* ran on diesel, the presence of gasoline suggested to the agents that it might have been used to mask a controlled substance.[14] The agents also seized the *Rasputin*'s "zarpe," a Columbian document which identifies a vessel's ports of call, which listed Panama as its next port of call.[15] After searching the *Rasputin,* the Coast Guard agents did not find any contraband on board and were unable to recover any of the jettisoned objects.[16] The agents used an IonScan machine to detect trace amounts of contraband on board the vessel.[17] In order to determine if there were trace amounts of a substance on board, the agents took samples off of objects and surfaces thought to have had contact with contraband and ran them through the IonScan machine.[18] Before boarding the vessel, the Coast Guard officers had their gear swiped to ensure that they were not introducing contraband onto the *Rasputin*.[19] Of the thirty-four samples taken on board the *Rasputin*, thirteen tested positive for cocaine.[20] This included samples taken from the fish hold, toilet and sink, seat cushions, knife, and on four of the five of the crewmembers' bodies.[21] However, the area on the vessel where the

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1335.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

agents saw the objects jettisoned from tested negative for illicit substances.[22]

All of the crew members were charged with conspiracy to distribute at least five kilograms of cocaine.[23] In addition, Williams was charged with failure to heave-to and the remaining four crew members were charged with aiding and abetting Williams' failure to heave-to.[24] At trial, Officer Tirado testified as an expert witness for the IonScan technology.[25] His qualifications included numerous trainings, including an initial training by the manufacturer in 1999 and annual courses from 2006 until 2015, and his job as an IonScan instructor.[26] The trial court allowed him to testify as an expert, over the defendants' objection.[27] In addition, several officers testified that the objects they saw through the FLIR resembled cocaine bales that they had previously seen in other drug interactions.[28] The defendants challenged this testimony because it was admitted as lay testimony, and they argued that it should have been considered expert testimony.[29] The jury returned guilty verdicts as to all charges for all five defendants.[30] The defendants challenged the district court's decision to admit several pieces of evidence, the sufficiency of the evidence for the drug convictions, and the sufficiency of the evidence for the failure to heave-to convictions.[31] The United States Court of Appeals for the Eleventh Circuit *held* that the district court did not abuse its discretion in admitting various expert and lay testimonies, the evidence presented at trial was sufficient to support the drug convictions for each defendant and the failure to heave-to conviction for Williams, however, there was not sufficient evidence to support the aiding and abetting failure to heave-to convictions for the other four crew members. *United States v. Williams*, 865 F.3d 1328, 1341-42, 1348 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1282 (2018).

22. *Id.*
23. *Id.* at 1333.
24. *Id.*
25. *Id.* at 1335.
26. *Id.* at 1336.
27. *Id.* at 1336, 1339-40.
28. *Id.* at 1336.
29. *Id.*
30. *Id.* at 1337.
31. *Id.*

II. HISTORICAL BACKGROUND

A witness' testimony can be qualified as either expert or lay testimony. If a witness's testimony is based on specialized knowledge, such as scientific or technical expertise, it is considered expert testimony, and must comply with the Federal Rule of Evidence 702.[32] However, if the testimony is based on the witness' perception, it is considered lay testimony, and must comply with Federal Rule of Evidence 701.[33] Additionally, in a sufficiency of the evidence challenge, a convicted person has the burden to prove that the evidence, along with any reasonable inference there from, viewed most favorably to the government, would not permit a jury to find them guilty beyond a reasonable doubt.[34]

A. Evidentiary Issues

Expert testimony is governed by Federal Rule of Evidence 702, which states that an expert witness may be qualified to give an opinion about their "knowledge, skill, experience, training, or education" and may testify if their "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[35] Courts have held that though education may qualify someone as an expert in a specific field, experience in a particular field is another way to qualify a person for expert status.[36] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the court explains that "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."[37] This "'helpfulness' standard [in Rule 702] requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[38] Testimony must also be relevant, meaning that it must have "any tendency to make a fact more or less probable than it would be without the evidence."[39] Expert testimony is also restricted by Federal Rule of Evidence 403 which states that all testimony should be excluded if the "probative value is substantially outweighed by a danger of . . .

32. *See* FED. R. EVID. 702.
33. *See* FED. R. EVID. 701.
34. *See* United States v. Harrell, 737 F.2d 971, 979 (11th Cir. 1984).
35. FED. R. EVID. 702.
36. United States v. Frazier, 387 F.3d 1244, 1260-61 (11th Cir. 2004) (en banc).
37. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 591 (1993).
38. *Id.* at 591-92.
39. FED. R. EVID. 401.

unfair prejudice confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[40]

In addition, in order for IonScan results to be admitted as evidence, there are specific procedures that Coast Guard officers need to follow to ensure that there is no contamination. First, all officers and their gear must be swiped and test negative for illicit substances prior to boarding the vessel.[41] The officer conducting the test must wear gloves at all times, which must come from a sealed package.[42] Next, officers swipe suspected areas of contamination with swipes from a sealed package and put the swipes through the IonScan machine.[43] Another officer will follow along and log each swipe, assigning a number and description to each one.[44] After each swipe, the officer operating the IonScan must remove their gloves and put them in a sealed bag which was labeled with the number corresponding with the number logged for each swipe.[45] If the IonScan tests a sample positive for contraband, two blank swipes must be run through the machine to clear it, and the results of the blank scans must be recorded.[46] In addition, the machine must undergo routine maintenance and calibrated prior to testing to ensure that it is operating correctly.[47]

Lay opinion testimony is governed by Federal Rule of Evidence 701, which limits non-expert testimony to an opinion that is "rationally based on the witness's perception; helpful to clearly understanding the witness's testimony or determining a fact in issue; and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[48] The Eleventh Circuit has held that "Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences."[49]

Documents are required to be authenticated or identified to be admitted into evidence.[50] Under Federal Rule of Evidence 901, this requirement is satisfied if enough evidence is produced "to support the

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40. FED. R. EVID. 403.
41. *See* United States v. Williams, 865 F.3d 1328, 1335 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1282 (2018).
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.* at 1335-36.
47. *See id.* at 1335.
48. FED. R. EVID. 701.
49. United States v. Toll, 804 F.3d 1344, 1355 (11th Cir. 2015).
50. *See* FED. R. EVID. 901.

finding that the item is what the proponent claims it is."[51] This is achieved through "circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them."[52] In addition, a document may be authenticated by evidence "including the document's own distinctive characteristics and the circumstances surrounding its discovery."[53] In addition, documents may not be admitted into evidence if they are considered hearsay. Under the definition described in Federal Rule of Evidence 801, hearsay is an out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement."[54] However, evidence is not considered hearsay when it is used to show that it contains false information.[55]

B. Sufficiency of the Evidence—Drug Convictions

In determining whether there was sufficient evidence to uphold a conviction, "the relevant question is whether, after viewing the evidence in light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[56] Courts have noted that "evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt."[57] In *United States v. Cruickshank*, the court explained that in order to convict a defendant for conspiracy, there must be proof beyond a reasonable doubt that "two or more persons entered into an unlawful agreement to commit an offense, that the defendant knew of the agreement, and that he voluntarily became a part of the conspiracy."[58] In addition, the court stated that "[i]n order to convict a defendant of possession with intent to distribute, the government must prove knowing possession and an intent to distribute."[59] In order for the government to convict a defendant for conspiracy to possess a controlled

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51. *Id.*

52. *In re* Int'l Mgmt. Assocs., LLC, 781 F.3d 1262, 1267 (11th Cir. 2015).

53. United States v. Smith, 918 F.2d 1501, 1510 (11th Cir. 1990) (citing FED. R. EVID. 901(b)(4)).

54. FED. R. EVID. 801(c)(2).

55. *See* United States v. Costa, 31 F.3d 1073, 1080 (11th Cir. 1994).

56. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (citing Johnson v. Louisiana, 406 U.S. 356, 362 (1972)).

57. United States v. Harrell, 737 F.2d 971, 979 (11th Cir. 1984) (citing United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982), *aff'd*, 462 U.S. 356 (1983)).

58. United States v. Cruickshank, 837 F.3d 1182, 1188 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (mem.) (citing United States v. Tinoco, 304 F.3d 1088, 1122, 2002 AMC 2998 (11th Cir. 2002) (AMC reporter summarizing case)).

59. *Id.* at 1189 (quoting United States v. Camacho, 233 F.3d 1308, 1317 (11th Cir. 2000)).

substance with intent to distribute the controlled substance, the government must prove beyond a reasonable doubt the specific identity of the drug.[60] To identify the controlled substance, the government may use circumstantial evidence including "lay experience based on familiarity through prior use, trading, or law enforcement; a high sales price; on the scene remarks by a conspirator identifying the substance as a drug; and behavior characteristic of sales and use, such as testing, weighing, cutting and peculiar ingestion."[61] The Eleventh Circuit has held that "uncorroborated testimony of a person who observed [the] defendant in possession of a controlled substance is sufficient if the person is familiar with the substance at issue."[62]

C. Sufficiency of the Evidence—Failure to Heave-To

To "heave-to" is "to cause a vessel to slow, come to a stop, or adjust its course or speed to account for the weather conditions and sea state to facilitate a law enforcement boarding."[63] Under the failure to heave-to statute originally codified in 2010, "[i]t shall be unlawful for the master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel."[64] In order to uphold a conviction for failure to heave-to, the government, in addition to proving that the vessel was within the United States' jurisdiction, must prove that: "(1) the defendant was the master, operator, or person in charge of a vessel; (2) an authorized federal law enforcement officer ordered the defendant to heave-to; (3) the defendant failed to obey that order; and (4) the defendant's failure to obey the order was knowing and intentional."[65]

Additionally, to establish aiding and abetting, the government must prove beyond a reasonable doubt that: "(1) the substantive offense was committed by someone; (2) the defendant committed an act which

60. *See* United States v. Sanchez, 722 F.2d 1501, 1506 (11th Cir. 1984).

61. United States v. Baggett, 954 F.2d 674, 677 (11th Cir. 1992) (quoting United States v. Harrell, 737 F.2d 971, 978 (11th Cir. 1984)).

62. United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984), *abrogated on other grounds by* Bourjaily v. United States, 483 U.S. 171, 177-79 (1987).

63. 18 U.S.C. § 2237(e)(2) (2012).

64. *Id.* § 2237(a)(1).

65. United States v. Santana-Perez, 619 F.3d 117, 120 (1st Cir. 2010); *see also* United States v. Rodriguez, 596 F. App'x 753, 755 (11th Cir. 2014).

contributed to and furthered the offense; and (3) the defendant intended to aid in its commission."[66]

III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the Eleventh Circuit examined evidentiary issues presented by United States Coast Guard investigatory stops. First, the court addressed both expert and lay testimony to determine whether either was admissible. Second, the court examined whether a document was properly authenticated, and therefore admissible. Third, the court analyzed sufficiency of the evidence standards for the defendants' drug convictions. Finally, the court addressed sufficiency of the evidence standards for failure to heave-to convictions of the vessel's master and crew.

A. Evidentiary Issues

First, the defendants challenged the admissibility of the IonScan evidence based on Tirado's qualifications as an expert to interpret the results and that his testimony did not meet the *Daubert* "fit,"[67] a test used to determine admissibility of expert testimony requiring that all expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."[68] The court found that Tirado's training and additional courses on how to interpret test results, which he took in order to become a certified IonScan instructor, was enough for him to qualify as an expert.[69] The court reasoned that a witness does not need a formal scientific education or training to otherwise be qualified as an expert.[70] In addition, the court rejected the defendants' arguments because they only generally questioned Tirado's opinions, and did not specifically identify any opinions that were beyond the scope of his expertise.[71] Therefore, the court concluded that the district court did not abuse its discretion in finding that Tirado was qualified as an expert.[72]

After making this determination, the Second Circuit performed a balancing test under Rule 403, to ensure that the probative value of

66. United States v. Camacho, 233 F.3d 1308, 1317 (11th Cir. 2000) (citing United States v. DePace, 120 F.3d 233, 238 (11th Cir. 1997)).

67. United States v. Williams, 865 F.3d 1328, 1340 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1282 (2018).

68. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 580 (1993).

69. *Williams*, 865 F.3d at 1339.

70. *See id.* (citing United States v. Frazier, 387 F.3d 1244 (11th Cir. 2004) (en banc)).

71. *Id.* at 1339.

72. *Id.* at 1340.

Tirado's testimony outweighed the prejudicial effect. The court reasoned that Tirado's testimony aided the jury's understanding of the idea that traces of cocaine on the vessel made it more likely that the packages jettisoned by the crew contained cocaine.[73] Though the defendants argued that the testimony had insufficient probative value because it left several questions unanswered, the court reasoned that testimony does not need to answer every question to meet the *Daubert* fit.[74] In addition, the court stated that the testimony was relevant under Federal Rule of Evidence 401 because the fact that the IonScan results were positive for cocaine makes it more probable that the jettisoned objects contained cocaine.[75] Therefore, the court concluded that Tirado's testimony was admissible because it was relevant (FRE 401) and the probative value outweighed the prejudicial effect (FRE 403)[76]

Next, the court turned to the lay testimony of the Coast Guard agents. The defendants argued that the testimony from these witnesses should have been excluded because they are experts, not laypeople, and proper notice was not given as would be required for expert witnesses.[77] Federal Rule of Evidence 701 explains that lay witnesses are permitted to give opinions so long as they are rationally based on their perception, helpful to clearly understanding the witness's testimony, and not based on specialized knowledge within the scope of Rule 702.[78] The Eleventh Circuit held that "a witness is permitted to deliver lay testimony based on his professional experiences as long as testimony is 'rationally based on' those experiences, rather than on scientific or technical knowledge."[79] Here, the court reasoned that the Coast Guard witnesses merely compared the packages they saw on the scene to packages they had previously seen during interactions with cocaine.[80] Because comparing sizes and shapes of objects require no specialized knowledge, the court held that the Coast Guard's testimony was within the scope of the average layman.[81]

Third, the defendants challenged the authentication of the zarpe, arguing that it should not have been admitted into evidence. Rule of

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73. *Id.* (quoting *Daubert*, 509 U.S. at 591).
74. *Id.*
75. *Id.*
76. *Id.* at 1341.
77. *Id.*
78. FED. R. EVID. 701.
79. *Williams,* 865 F.3d at 1341 (quoting United States v. Toll, 804 F.3d 1344, 1355 (11th Cir. 2015)).
80. *Id.*
81. *Id.* at 1342.

Evidence 901 states that there only needs to be enough evidence for "a jury to reasonably conclude that a document was authentic."[82] The government may authenticate a document solely through circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery.[83] Here, the court reasoned that the testimony presented by the government sufficiently met this burden.[84]

In addition, the defendants argued that the zarpe should not be admitted because it is hearsay.[85] When a statement is entered into evidence to show its falsity, the statement is not hearsay.[86] Here, the government explained that it was using the zarpe to demonstrate that the master of the ship falsely told the officers that the *Rasputin* was on its way to Panama, when the Rasputin was headed away from Panama when the Coast Guard first saw the vessel.[87] Therefore, the court held that the zarpe was properly admitted because it was not hearsay evidence.[88]

B. Sufficiency of the Evidence—Drug Convictions

The court then analyzed the sufficiency of the evidence for the drug convictions. The court must determine "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[89] To convict for conspiracy to possess with intent to distribute, the identity of the drug must be established beyond a reasonable doubt.[90] Here, the court rejected the defendants' other theories for how the cocaine traces might have gotten on the *Rasputin*, finding that there was little to no evidence supporting these assertions.[91] The court used several factors in determining whether it was likely there was cocaine aboard the vessel. First, the Coast Guard witnesses had several prior drug interactions in the area where the *Rasputin* was stopped, and had only recovered cocaine, no

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82. *In re* Int'l Mgmt. Assocs., LLC, 781 F.3d 1262, 1267 (11th Cir. 2015); *see also* FED. R. EVID. 901.

83. United States v. Smith, 918 F.2d 1501, 1510 (11th Cir. 1990); *see also* FED. R. EVID. 901(b)(4).

84. *Williams*, 865 F.3d at 1343.

85. *Id.*

86. *Id.* (citing United States v. Costa, 31 F.3d 1073, 1080 (11th Cir. 1994)).

87. *Id.*

88. *Id.*

89. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (citing Johnson v. Louisiana, 406 U.S. 356, 362 (1972)).

90. United States v. Sanchez, 722 F.2d 1501, 1506 (11th Cir. 1984) (citing United States v. Crisp, 563 F.2d 1242 (5th Cir. 1977)).

91. *Williams*, 865 F.3d at 1345.

other drugs, from that area.[92] Second, the objects that the Coast Guard witnessed the crew jettisoning were the same size and shape as cocaine bales seized in previous drug interactions.[93] Finally, IonScan results showed traces of cocaine on board the *Rasputin* and on the person of several of the defendants.[94] The court reasoned that the effect of all of this evidence together was enough for a rational jury to find beyond a reasonable doubt that the objects jettisoned from the vessel contained cocaine.[95]

C. Sufficiency of the Evidence—Failure to Heave-To

Lastly, the court examined the sufficiency of the evidence in the failure to heave-to convictions for both the master and crew members. Under statutory law, "it shall be unlawful for the master, operator, or person in charge of a vessel of the United States, to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel."[96] Williams argued that the record contains no evidence that he heard or saw the Coast Guard's attempts to hail the *Rasputin*.[97] The court rejected this argument because when the officer gave the instructions to heave-to on the loudhailer and over the radio, the vessel started moving erratically, which was unsafe due to the weather conditions.[98] In addition, when the Coast Guard boarded the *Rasputin*, the radio was tuned to channel 16 and on max volume, indicating that Williams had heard their instructions to heave-to.[99]

In examining the sufficiency of the evidence for the failure-to-heave-to conviction of the crew members through accomplice liability, the court must find that "(1) the substantive offense was committed by someone; (2) the defendant committed an act which contributed to and furthered the offense; and (3) the defendant intended to aid in its commission."[100] The court held that there was no evidence of the third element because the government's only evidence of intent was that the crew members jettisoned the packages.[101] It concluded that without more evidence, a

92. *Id.* at 1346.
93. *Id.*
94. *Id.*
95. *Id.*
96. 18 U.S.C. § 2237(a)(1) (2012).
97. *Williams*, 865 F.3d at 1347.
98. *Id.*
99. *Id.*
100. *Id.* (quoting United States v. Camacho, 233 F.3d 1308, 1317 (11th Cir. 2000)).
101. *Id.*

reasonable jury could not find that the crew members had the requisite intent to aid the *Rasputin*'s master in evading the Coast Guard.[102]

IV. ANALYSIS

In the noted case, the Eleventh Circuit made a distinction between the officers' testimony by labeling Officer Tirado as an expert witness and the other officers as lay witnesses. It was undisputed that Tirado's testimony should be classified as "expert testimony" because he explained how the IonScan technology works and interpreted the results of the IonScan tests conducted aboard the *Rasputin*.[103] Conversely, the court decided that the other officers' testimony was considered "lay testimony," despite the defendants' objection that they should be classified as "expert testimony."[104] Although all of these witnesses were Coast Guard officers, there were key differences in their testimonies which warranted the court's distinction between them. In order to qualify to testify as an expert in the IonScan technology, Tirado had to have advanced training on how to operate and interpret the results of a specific technology.[105] No formal scientific training is required to be considered an expert, merely the requisite training and experience is required to give the witness specialized knowledge in the subject matter in which they are testifying.[106] The other officers, however, were classified as "lay witnesses" because they merely testified as to what they observed.[107] Even though the officers testified that the barrels they saw on the *Rasputin* were similar in size and shape to the ones they have seen in previous cocaine interactions, the court held that a witness can testify based on their professional experience and still be considered "lay testimony."[108] These officers were permitted to testify as lay witnesses because they did not need any specified knowledge to compare sizes and shapes of objects.[109] Therefore, the nature of the testimony given, not formal training or position, is what differentiated the officers' testimonies as either lay or expert.

The IonScan technology was crucial for the government's in order to convict the *Rasputin*'s crew members of conspiracy to distribute and

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102. *Id.*
103. *See id.* at 1338.
104. *See id.* at 1342.
105. *See id.* at 1339.
106. *See id.*; *see also* United States v. Frazier, 387 F.3d 1244, 1260-61 (11th Cir. 2004) (en banc).
107. *Williams*, 865 F.3d at 1342.
108. *Id.* at 1341 (citing United States v. Toll, 804 F.3d 1344, 1355 (11th Cir. 2015)).
109. *See id.* at 1341-42.

possession with intent to distribute five or more kilograms of a substance containing cocaine. While there are established protocols for IonScan testing, the officers here clearly deviated from them because there was no record of blanks being run through the machine after each positive test result and the operator only wore one glove on one of his hands, rather than two gloves on both hands as required.[110] By allowing the IonScan results into evidence, the court has indicated that a degree of deviation from standard protocol is permitted. Because this is the first case in which this court analyzed the standard protocol for operating the IonScan, the degree of permissible deviance from protocol is unclear.

This is a case of first impression in this court in that there were no witnesses who identified the substance inside the jettisoned packages as cocaine, nor was any cocaine actually recovered.[111] Here, the evidence identifying the jettisoned packages as containing cocaine was entirely circumstantial. It has been widely accepted that circumstantial evidence is sufficient to prove the identity of a substance as long as it is proven beyond a reasonable doubt.[112] The Eleventh Circuit has specified circumstantial evidence that can establish the identity of a drug beyond a reasonable doubt to include "lay experience based on familiarity through prior use, trading, or law enforcement; a high sales price, on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior characteristic of sales and use such as testing, weighing, cutting, and peculiar ingestion."[113] In addition, other circuit courts have also recognized evidence that the substance has the same effects when sampled by someone familiar with the drug, evidence that the substance was used in the same manner as the drug, and the secrecy of the transactions relating to the substance as sufficient to prove identity of a substance.[114] Here, the court held that all of the evidence taken together, even without any witness testimony or the recovery of the narcotics, was enough to permit a reasonable jury to determine that the substance jettisoned from the *Rasputin* was cocaine.[115] Nonetheless, there is a question of whether the evidence presented was enough to establish conspiracy to distribute at

110. *See id.* at 1336.

111. *See id.* at 1346.

112. *See* United States v. Quesada, 512 F.2d 1043, 1045 (5th Cir. 1975); *see also* United States v. Baggett, 954 F.2d 674, 677 (11th Cir. 1992).

113. United States v. Harrell, 737 F.2d 971, 978 (11th Cir. 1984) (citing United States v. Sanchez, 722 F.2d 1501, 1506 (11th Cir. 1984)).

114. United States v. Eakes, 783 F.2d 499, 505 (5th Cir. 1986) (quoting United States v. Scott, 725 F.2d 43, 45-46 (4th Cir. 1984)).

115. *See Williams*, 865 F.3d at 1346.

least five kilograms of cocaine beyond a reasonable doubt when no visible amount of drugs were found, and there were no witnesses to identify that the jettisoned objects contained cocaine. While it is easier to convict someone of possession of cocaine when only a trace amount of the drug is found, it is entirely different to convict someone of intent to distribute a large amount of the substance when only a trace amount is found.

The Eleventh Circuit's decision to affirm Williams' conviction for failure to heave-to is consistent with prior jurisprudence. However, the court's decision to reverse the other crew members' convictions for aiding and abetting Williams' failure to heave-to offense is questionable. The court's decision turned on its want for evidence as to the crew members' affirmative intention to aid Williams in his failure to heave-to.[116] Though the prosecution's only evidence of the crew members' intent was the fact that they jettisoned packages from the boat, this could be sufficient to establish the requisite intent element for accomplice liability. Other circuit courts have held that a defendant can engage in aiding or abetting through their words or actions if they promote the successful commission of the offense.[117] In addition, "[t]he government need only show some affirmative participation which, at least, encourages the principal offender to commit the offense."[118] Here, the crew members jettisoned three nets full of packages off of the *Rasputin* while Williams was evading officers.[119] If this does not qualify as intent, the court leaves the question as to whether any prosecutor would be able to successfully convict a defendant of aiding and abetting a failure to heave-to offense. This gap leaves the door open for crew members to actively assists a vessel's master in failing to heave-to without fear of the law.

V. CONCLUSION

Here, the Eleventh Circuit has left many questions unanswered. The court was unclear as to what Coast Guard officers have to do to ensure admissibility of IonScan test results because of its flexibility with regards to IonScan protocols, without specifying it reasoning behind the decision to allow the results. In addition, the noted case does not give clear answers with regards to several evidentiary issues. On one hand, the court allows circumstantial evidence to uphold a drug conviction where there were no witnesses and no visible drugs were recovered. On the other hand, the

116. *Id.* at 1347.
117. *See* United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010).
118. *Id.* (citing United States v. Frorup, 963 F.2d 41, 43 (3d Cir. 1992)).
119. *Williams,* 865 F.3d at 1334.

court's limited interpretation of intent has made it very difficult, if not impossible, for prosecutors to successfully convict defendants for aiding and abetting a master in failing to heave-to.

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