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Constitutional Criminal Procedure

by Thomas E. Baker*

I. INTRODUCTION

This Article discusses decisions of the Eleventh Circuit and also some decisions of the former Fifth Circuit that have the effect of precedent for the Eleventh Circuit.¹ Following the approach taken in the last survey,² the scope of *Constitutional Criminal Procedure* will be narrowed. This Article will not discuss nonconstitutional survey decisions on related criminal law topics including: entrapment;³ the substantive law of federal crimes;⁴ nonconstitutional aspects of the Federal Rules of Evidence;⁵

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1. The matter of which former Fifth Circuit precedents bind the new Eleventh Circuit is summarized in Baker, *A Primer on Precedent in the Eleventh Circuit, 1982 Eleventh Circuit Survey*, 34 MERCER L. REV. 1175 (1983). See generally Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 SW. L.J. 725 (1982); Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L.J. 687 (1981) [hereinafter cited as Baker, *Precedent Times Three*].

2. Baker, *Constitutional Criminal Procedure, 1981 Eleventh Circuit Survey*, 33 MERCER L. REV. 1083 (1982) [hereinafter cited as Baker, *Criminal Procedure*].

3. This omission is a good example of the application of the constitutional and procedural criteria. The defense of entrapment itself fails both criteria. It is substantive rather than procedural, and the defense has no constitutional basis, but instead arises out of common law and statute. C. WHITEBREAD, *CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* 564 (1980). But see *United States v. Gianni*, 678 F.2d 956, 959-60 (11th Cir. 1982). During the survey period, the court approved an entrapment jury charge. *United States v. Sonntag*, 684 F.2d 781, 787 (11th Cir. 1982); *United States v. Vadino*, 680 F.2d 1329, 1337 (11th Cir. 1982). Furthermore, application of the principle proved troublesome. E.g., *United States v. Bagnell*, 679 F.2d 826, 834-35 (11th Cir. 1982); *Baucom v. Martin*, 677 F.2d 1346, 1350-51 (11th Cir. 1982); *United States v. Nicoll*, 664 F.2d 1308, 1314 (5th Cir. 1982) (Unit B). Nevertheless, adhering to the artificial limits of this article, these cases are only 'footnoteworthy.'

4. E.g., *United States v. Cuni*, 689 F.2d 1353 (11th Cir. 1982); *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982).

5. E.g., *United States v. Terebecki*, 692 F.2d 1345 (11th Cir. 1982); *United States v.*

nonconstitutional aspects of the Federal Rules of Criminal Procedure;⁶ procedural aspects of relief in the nature of habeas corpus;⁷ sentencing;⁸ probation;⁹ parole;¹⁰ prisoners' rights;¹¹ and civil rights suits that alleged constitutional deprivations.¹² The procedural emphasis omits substantive constitutional protections.¹³

This Article does not claim completeness even within the confines of constitutional criminal procedure. During the survey period,¹⁴ the court¹⁵ decided hundreds of appeals in the general area. A gross grouping of these decisions yields the following subtopics for this Article: Arrests; Searches and Seizures; Self-Incrimination; Grand and Petit Jury Rights; and the Right to Counsel. These emphases mirror the court's 1982 docket. If only in a 'footnoteworthy' way, the court did deal with other traditional constitutional criminal procedure topics such as the following: double jeopardy;¹⁶ pretrial and trial identifications;¹⁷ speedy trials;¹⁸

Clemons, 676 F.2d 122, 123 (5th Cir. 1982) (Unit B).

6. *E.g.*, *United States v. Bagnell*, 679 F.2d 826, 830-33 (11th Cir. 1982); *United States v. Rice*, 671 F.2d 455, 459-60 (11th Cir. 1982).

7. *E.g.*, *Grizzell v. Wainwright*, 692 F.2d 722 (11th Cir. 1982); *Duvallon v. Florida*, 691 F.2d 483 (11th Cir. 1982) (per curiam).

8. *E.g.*, *United States v. Duran*, 687 F.2d 348, 351-54 (11th Cir. 1982); *United States v. Hartley*, 678 F.2d 961, 991-92 (11th Cir. 1982).

9. *E.g.*, *United States v. O'Quinn*, 689 F.2d 1359 (11th Cir. 1982); *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982).

10. *E.g.*, *Carlton v. Keohane*, 691 F.2d 992 (11th Cir. 1982) (per curiam); *United States v. Pierre*, 688 F.2d 724, 725-26 (11th Cir. 1982).

11. *E.g.*, *Neman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982); *Hunter v. Florida Parole & Probation Comm'n*, 674 F.2d 847 (11th Cir. 1982) (per curiam).

12. *E.g.*, *Spears v. Chandler*, 672 F.2d 834 (11th Cir. 1982) (per curiam); *Staton v. Wainwright*, 665 F.2d 686 (5th Cir.) (Unit B), *cert. denied*, 456 U.S. 909 (1982).

13. *E.g.*, *United States v. Middleton*, 690 F.2d 820, 822-26 (11th Cir. 1982).

14. Jan. 1, 1982, to Dec. 31, 1982.

15. The generic reference 'the court' will be used throughout the remainder of this Article. 'The court' is the appropriate reference to both the entire court of appeals and a particular panel. *See Western Pac. R.R. Corp. v. Western Pac. R.R.*, 345 U.S. 247 (1953). When relevant, consideration by the en banc court will be distinguished from a three judge panel.

16. *E.g.*, *United States v. Guilbert*, 692 F.2d 1340, 1344-45 (11th Cir. 1982); *Andiarena v. Keohane*, 691 F.2d 993 (11th Cir. 1982); *United States v. Sturman*, 679 F.2d 840 (11th Cir. 1982); *United States v. Hayes*, 676 F.2d 1359, 1362-66 (11th Cir. 1982); *United States v. Bizzard*, 674 F.2d 1382, 1385-86 (11th Cir. 1982). For a discussion of a typical year's double jeopardy decisions, see generally *Baker, Criminal Procedure, supra* note 2, at 1106-10.

17. *E.g.*, *Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. 1982) (Unit B); *United States v. Thevis*, 665 F.2d 616, 641-44 (5th Cir.) (Unit B), *cert. denied*, 102 S. Ct. 2300 (1982).

18. *E.g.*, *United States v. Varella*, 692 F.2d 1352, 1356-60 (11th Cir. 1982); *United States v. Solomon*, 686 F.2d 863, 871-72 (11th Cir. 1982); *United States v. Bagnell*, 679 F.2d 826, 837 n.12 (11th Cir. 1982); *United States v. Bizzard*, 674 F.2d 1382, 1386 (11th Cir. 1982); *United States v. Pirolli*, 673 F.2d 1200, 1204 (11th Cir. 1982); *United States v. Gonzalez*, 671 F.2d 441 (11th Cir.), *cert. denied*, 102 S. Ct. 2279 (1982).

discovery;¹⁹ the right to confrontation;²⁰ guilty pleas;²¹ and bail.²² The subtopics selected, however, dominated the court's docket, and they will dominate this discussion.

II. ARREST

Challenges to arrests, which constitutionally are nothing more than seizures of persons, cluster around three problems.²³ First, the court must determine whether the fourth amendment to the United States Constitution applies at all, that is, whether the particular police-citizen contact was a seizure. Second, if a seizure occurred, the court must evaluate the adequacy of the factual basis for the contact. Third, the court must consider the appropriateness of the actions taken by the government actors.

As was predicted in last year's survey,²⁴ the en banc court in *United States v. Berry*²⁵ rethought the analysis for determining when a police-citizen contact rises to the level of a constitutional encroachment. The court's analysis tracked the prior discussion in last year's Eleventh Circuit Constitutional Criminal Procedure Survey²⁶ and may be summarized

19. *E.g.*, *United States v. Kopituk*, 690 F.2d 1289, 1337-41 (11th Cir. 1982); *United States v. Freedman*, 688 F.2d 1364 (11th Cir. 1982).

20. This omission is a good example of the effect of time and space restraints on the comprehensiveness of surveys such as this one. That there were more significant developments in other areas does not mean that there were no significant developments in the areas not discussed in the text. As the number of decisions and their parentheticals demonstrate, the failure to consider the right to confrontation is the result of poetic license and editorial judgment and nothing more. *See, e.g.*, *United States v. Varella*, 692 F.2d 1352, 1355-56 (11th Cir. 1982) (disclosure of confidential informant); *Foster v. Wainwright*, 686 F.2d 1382 (11th Cir. 1982) (exclusion of defendant); *Proffitt v. Wainwright*, 685 F.2d 1227, 1251-61 (11th Cir. 1982) (confrontation at capital sentencing hearing); *United States v. Sonntag*, 684 F.2d 781, 788 (11th Cir. 1982) (scope of cross-examination); *James v. Wainwright*, 680 F.2d 102 (11th Cir. 1982) (use of prior testimony of deceased witness); *United States v. Vadino*, 680 F.2d 1329, 1333-34 (11th Cir. 1982) (use of codefendant's statements); *United States v. Hartley*, 678 F.2d 961, 972-74 (11th Cir. 1982) (hearsay); *DeBenedictis v. Wainwright*, 674 F.2d 841, 843 (11th Cir. 1982) (wired informants recordings); *Dickerson v. Alabama*, 667 F.2d 1364, 1369-71 (11th Cir. 1982) (compulsory process); *United States v. Thevis*, 665 F.2d 616, 631-33 (5th Cir.) (Unit B), *cert. denied*, 102 S. Ct. 2300 (1982) (waiver of confrontation right by murdering witness).

21. *E.g.*, *Scarborough v. United States*, 683 F.2d 1323 (11th Cir. 1982); *United States v. Ammirato*, 670 F.2d 552, 554-56 (5th Cir. 1982) (Unit B).

22. *E.g.*, *United States v. Velez*, 693 F.2d 1081 (11th Cir. 1982); *United States v. James*, 674 F.2d 886 (11th Cir. 1982).

23. *Baker, Criminal Procedure, supra* note 2, at 1085.

24. *Id.* at 1086-87 n.25.

25. 670 F.2d 583 (5th Cir. 1982) (Unit B en banc), *aff'g on rehearing* 649 F.2d 385 (5th Cir. 1982) (Unit B).

26. *Baker, Criminal Procedure, supra* note 2, at 1088.

here this year. The appeal concerned the 'Markonni modus operandi,' named for the Atlanta-based drug enforcement agent who has figured in a host of the leading cases,²⁷ and whose actions were involved in the airport confrontation in *Berry*.²⁸ The court distilled from the precedents three categories of police-citizen encounters.²⁹ What is reminiscent of a 'Steven Spielberg theory' of the fourth amendment distinguishes among the following: (1) police-citizen encounters of the first kind that involve no coercion or detention; (2) police-citizens encounters of the second kind, sometimes called 'stops,' which are seizures of the person limited in duration and scope; and (3) police-citizen encounters of the third kind, which are full scale arrests.³⁰ These theoretical levels have fourth amendment significance. The fourth amendment has no application to encounters of the first kind. Encounters of the second kind—stops—must be supported by an articulable reasonable suspicion. Encounters of the third kind—arrests—must be supported by probable cause.³¹ The en banc court first rejected the argument that all airport encounters were at least stops, since neither the governmental nor the individual interest predominated the constitutional balance.³² The court made every effort to narrow the definition of the police-citizen encounter of the first kind. These airport encounters do not invoke the fourth amendment "if of extremely restricted scope and conducted in a completely non-coercive manner."³³ The court attempted to draw a line between "voluntary, unintrusive communications between police and citizens"³⁴ versus "forced interrogation by police that is so intrusive as to be a seizure."³⁵ The degree

27. "Indeed, the exploits of Special Agent Markonni are nearly legendary in this circuit." *United States v. Ehlebracht*, 693 F.2d 333, 335-36 n.3 (5th Cir. 1982) (Unit B) (citations omitted).

28. 670 F.2d at 588-89. While the airport encounter has generated this line of precedent, the court's analysis applies beyond airports. See *United States v. Hernandez*, 668 F.2d 824, 826-28 (5th Cir. 1982) (Unit B) (holding boats anchored in bay).

29. 670 F.2d at 591.

30. *Id.*

31. *Id.*

32. *Id.* at 593. Recent Supreme Court precedent has been inconclusive. See generally *Reid v. Georgia*, 448 U.S. 438 (1980); *United States v. Mendenhall*, 446 U.S. 544 (1980). Two lines of Fifth Circuit precedent had developed. Compare *Elmore v. United States*, 595 F.2d 1036 (5th Cir. 1970) (police-citizen airport encounter was not a stop) with *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978) (suggesting that all police-citizen airport encounters were stops). In general, the court followed *Elmore*, which was described in last year's survey as the leading precedent. *Baker, Criminal Procedure*, *supra* note 2, at 1086-87.

33. 670 F.2d at 594. Accord *United States v. West*, 651 F.2d 71 (1st Cir. 1981); *United States v. Patino*, 649 F.2d 724 (9th Cir. 1981); *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978). *Contra United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980).

34. 670 F.2d at 595.

35. *Id.*

of coercion is determined from all the circumstances and from the perspective of a reasonable person. The intent of the law enforcement officials is relevant only insofar as the citizen perceives their intent.³⁶

The en banc court acknowledged the inadequacy of any general guidelines, exhorted the district courts to be zealous in protecting the individual, and identified benchmarks of coercion: (1) Blocking the path or preventing the progress of the individual; (2) retaining a traveler's airline ticket; (3) statements by the officials that the traveler is suspected of smuggling drugs; (4) exhortations by the officials that an innocent person, who had nothing to hide, would cooperate; and (5) failure to inform the individual of the right to refuse to cooperate.³⁷

The court in *Berry* went on to discuss the second fourth amendment question whether there was an adequate factual basis for the contact once the encounter became a stop. The Constitution requires that the officials have an articulable, reasonable suspicion.³⁸ Again, tracking the analysis in last year's survey, the en banc court considered the fourth amendment significance of the so-called drug courier profile.³⁹ The profile is a list of primary and secondary characteristics that law enforcement officials use to identify drug couriers at airports.⁴⁰ Last year's survey concluded that "the profile is a legitimate tool of law enforcement . . . [and] [t]hat the characteristic is on a list of things to watch for is of no additional consequence."⁴¹ The majority in *Berry* agreed.⁴²

Taking advantage of the 'bully pulpit' of en banc opinion writing, the majority went on to consider the recurring issue in these cases of whether requiring nonconsenting individuals to accompany officials to an airport office was an encounter of the second or third kind, namely, a stop or an

36. *United States v. Jensen*, 689 F.2d 1361, 1363 n.3 (11th Cir. 1982). The characteristics of the individual, such as age, intelligence, and education also are relevant. 670 F.2d at 597 n.12.

37. 670 F.2d at 597.

38. *Id.* at 598-99. On the fourth amendment continuum of cause to seize, reasonable suspicion that would justify a stop is less cause than probable cause that would justify an arrest. *United States v. McCulley*, 673 F.2d 346, 351-52 (11th Cir. 1982).

39. Compare 670 F.2d at 598-601 with *Baker, Criminal Procedure*, *supra* note 2, at 1091-92.

40. See generally *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980). The details of the profile change from airport to airport. *United States v. Rico*, 594 F.2d 320, 325 (2d Cir. 1979) (New York); *United States v. Ballard*, 573 F.2d 913, 914-15 (5th Cir. 1978) (New Orleans); *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977) (Cleveland); *United States v. McCaleb*, 552 F.2d 717, 719-20 (6th Cir. 1977) (Detroit).

41. *Baker, Criminal Procedure*, *supra* note 2, at 1091-92.

42. 670 F.2d at 600-01. The court agreed with last year's survey suggestion that, although the actual facts controlled, the officials' training and experience colored the significance of particular details.

arrest. The court reasoned, first, that the balance of interests, individual versus government, weighed on the side of individual privacy and, second, that the rationale for a stop could not justify the additional intrusion of an office interrogation. Thus, forced office interviews were deemed encounters of the third kind—arrests—which require a probable cause factual basis under the fourth amendment.⁴³

All that was left of the majority's analysis in *Berry* was its application to the facts.⁴⁴ The facts in *Berry* and those cases following the en banc analysis highlight a difficulty in application.⁴⁵ The real world problem of policing drug dealing exemplifies one of Professor Dershowitz's 'rules of the justice game': "It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution."⁴⁶ The en banc majority's theory has a certain appeal. Indeed, much the same theory appeared in these pages last year. Reality, however, has a certain way of overtaking theory. The majority in *Berry* revealed a refreshing skepticism of official claims of individuals' consent.⁴⁷ Yet, the court either has overlooked or ignored the simple reality of how the three-tired 'Spielberg analysis' works. The government camel's nose is in the fourth amendment tent when the officials initially contact the citizen, and the rest of the beast is not far behind. The encounter, for which the Constitution holds out no protection, provides information to articulate a reasonable suspicion for a stop, which, in turn, provides information to establish probable cause for an arrest or even some type of consent for a search. Drug couriers and law enforcement officials are not programmed by law review commentary or judicial opinions. Is all that is accomplished by such commentary and opinions the post hoc justification of what took place? Perhaps, here theory follows reality. Yet, the hierarchy of the Constitution is that reality should conform to the fourth amendment theory.⁴⁸

43. *Id.* at 601-02. *Accord* Florida v. Royer, 51 U.S.L.W. 4285 (U.S. Mar. 23, 1983).

44. Factual issues of consent divided the court. Judge Hill concurred but not without reservation. *Id.* at 606 (Hill, J., dubitante). Judge Anderson, joined by Judge Fay, specially concurred. *Id.* Judge Clark dissented. *Id.* at 607.

45. *E.g.*, United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982); United States v. Jensen, 689 F.2d 1361 (11th Cir. 1982); United States v. Elsoffer, 671 F.2d 1294, 1297-98 (11th Cir. 1982); United States v. Rojas, 671 F.2d 159, 164-65 (5th Cir. 1982) (Unit B).

46. A. DERSHOWITZ, THE BEST DEFENSE xxi (1982). Several other of Dershowitz' rules also are implicated.

47. "We think it strikingly unusual that so many individuals stopped at airports consent to search while carrying drugs and even show where they have hidden drugs." 670 F.2d at 598 n.16. See A. DERSHOWITZ, *supra* note 46, at xxii. Cf. United States v. Ehlebracht, 693 F.2d 333 (5th Cir. 1982) (Unit B) (consent was clearly voluntary).

48. The third mentioned fourth amendment question—the appropriateness of the ac-

III. SEARCH AND SEIZURE

The fourth amendment protection "against unreasonable searches and seizures"⁴⁹ only shields an individual's reasonable expectation of privacy from a government actor's intrusion. Several survey decisions involved this most basic tenet of fourth amendment jurisprudence.

To state the obvious, the fourth amendment concerns only governmental searches and seizures. This truism was dispositive in one survey decision. When government agents investigating a stolen automobile ring interviewed a daughter at her father's residence, her father produced documents on the vehicles and stated he wished to assist the investigation and to dissuade the agents from arresting his daughter.⁵⁰ In a later prosecution, father and daughter claimed the incident was a warrantless search and the government rejoined with a consent argument. The court did not reach those issues and held there was no search and seizure.⁵¹ The father was only a private actor and was not the instrument or agent of the government. The fourth amendment does not protect against the adverse consequences of a private person's spontaneous, good faith effort to clear another.⁵²

When the fourth amendment inquiry shifts from the searcher and seizer to the place or thing searched and seized, the aggrieved individual must show that the government has encroached on a reasonable expectation of privacy. The inquiry is divided further into whether protected privacy has been intruded upon and whether the person claiming the intrusion should be heard to complain. Inevitably, the two inquiries become blurred in application.⁵³ This blurring has resulted from relatively recent

tions taken by the government actors—once again did not merit much of the court's attention during the survey period. *E.g.*, *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1982) (search incident to arrest); *United States v. Roper*, 681 F.2d 1354, 1357-58 (11th Cir. 1982) (warrantless exigent arrest); *United States v. Marszalkowski*, 669 F.2d 655, 662-63 (11th Cir. 1982) (warrantless arrest in home); *United States v. Bulman*, 667 F.2d 1374, 1382-84 (11th Cir. 1982) (warrantless arrest in motel room); *United States v. Tolliver*, 665 F.2d 1005, 1008 (11th Cir.), *cert. denied*, 456 U.S. 935 (1982) (unannounced entry to arrest). *See generally* Baker, *Criminal Procedure*, *supra* note 2, at 1092.

49. U.S. CONST. amend. IV.

50. *United States v. Burns*, 662 F.2d 1378, 1384-85 (11th Cir. 1981).

51. *Id.* at 1385. The case was reversed on a venue issue. *Id.* at 1380-83. This may have been the right result, but for the wrong reason. *See United States v. Burns*, 597 F.2d 939, 944 (5th Cir. 1979) (held evidence sufficient).

52. *See Coolidge v. New Hampshire*, 403 U.S. 443, 489-90 (1971). The court's state action analysis reached the right result, but should have recognized that the father simply was not 'the state in sheep's clothing.' *See Baker & Wood, "Taking" a Constitutional Look at the State Bar of Texas Proposal to Collect Interest on Attorney-Client Trust Accounts*, 14 TEX. TECH. L. REV. 327, 339 (1983).

53. *See generally* C. WHITEHEAD, *supra* note 3, § 4.02, at 91 (1980).

Supreme Court pronouncements that dismantled the law of standing and erected in its place an analytical framework of privacy. For a time, a criminal charge of possession against a defendant automatically qualified him to challenge the search for and seizure of the contraband.⁵⁴ The automatic qualification has been abolished;⁵⁵ ownership alone will not suffice.⁵⁶ A spate of recent Supreme Court decisions has replaced the 'standing' slogan with a privacy analysis bottomed on the policy that underlies the fourth amendment.⁵⁷ The new constitutional litmus is whether the search and seizure violated the defendant's legitimate expectation of privacy.⁵⁸ Thus, there is no longer a separate 'standing' analysis, although the slogan persists, and the privacy inquiry is informed by standing lore.⁵⁹

Applications of this privacy test are as varied as the factual situations from which they arise. It is, perhaps, inevitable then that these decisions have a certain ad hoc character. A few examples are illustrative. A defendant convicted of threatening the life of the president-elect could not claim any privacy intrusion when correctional officials opened the threatening letter written while he was incarcerated, since he should have expected that it would be opened by someone before it reached the addressee.⁶⁰ Crewmen had no legitimate claim of privacy in their ship's common areas where Coast Guard officials found contraband while conducting a safety, documentation, and customs check.⁶¹ In another case a defendant disclaimed any knowledge or ownership of a suitcase, at the time of the seizure, and thereby disclaimed any legitimate expectation of privacy in its contents.⁶² Defendant, who was prosecuted along with sev-

54. See *Jones v. United States*, 362 U.S. 257, 259-67 (1960).

55. See *United States v. Salvucci*, 448 U.S. 83 (1980).

56. See *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980).

57. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 133-35 (1978). See generally Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 635-43 (1981); Tucker & Wolinski, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1 (1981).

58. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

59. The Supreme Court has attempted to rid the reports of the slogan in fourth amendment cases. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Salvucci*, 448 U.S. 89, 90-93 (1980); *Rakas v. Illinois*, 439 U.S. 128, 138-40 (1978). The Eleventh Circuit seems to be reluctant to give up the familiar. E.g., *United States v. Vadino*, 680 F.2d 1329, 1335 (11th Cir. 1982); *United States v. Glen-Archila*, 677 F.2d 809, 813 n.6 (11th Cir. 1982); *United States v. McCulley*, 673 F.2d 346, 352 (11th Cir. 1982).

60. *United States v. Wilson*, 671 F.2d 1291, 1293-94 (11th Cir. 1982).

61. *United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir. 1982); *United States v. Glen-Archila*, 677 F.2d 809, 813 n.5 (11th Cir. 1982). The Supreme Court has agreed to consider the issue. See *United States v. Villamonte-Marquez*, 652 F.2d 481 (5th Cir. 1981) (Unit A), cert. granted, 50 U.S.L.W. 3963 (U.S. June 7, 1982) (No. 81-1350).

62. *United States v. Hawkins*, 681 F.2d 1343, 1345-46 (11th Cir. 1982); *United States v. Pirolli*, 673 F.2d 1200, 1203-04 (11th Cir. 1982). A mere passive failure to claim incriminating evidence, on the other hand, may not extinguish a preexisting privacy interest. See Wal-

eral others for conspiracy to possess narcotics, did not show sufficient ownership or control of the house he was in to claim a protected privacy interest when the government agent answered a phone call from a defendant's wife, which led to incriminating evidence.⁶³ Two codefendants would not be heard to complain about a warrantless search of an automobile rented by a third codefendant even though they had agreed to share the rental expense.⁶⁴

The most interesting survey decision that concerned the legitimacy of expectations of privacy came in *Owens v. Kelley*.⁶⁵ The question on first impression was whether the fourth amendment's proscription of unreasonable searches and seizures was violated by a condition of probation that allowed warrantless searches by probation supervisors and law enforcement officers.⁶⁶ A probation condition must be reasonable to be constitutional. Reasonableness is determined by three factors: (1) The purposes of probation; (2) the extent to which a probationer's status compromises the probationer's constitutional rights; and (3) legitimate needs of law enforcement.⁶⁷ By enhancing law enforcement surveillance ability, the condition thereby discouraged unlawful possession and provided a practical mechanism for monitoring rehabilitation. The search condition thus satisfied the first and third factor. Basic privacy policy controlled the second factor. A criminal conviction provides a compelling state interest to incarcerate and also diminishes the individual's expectation of privacy. Unlike a law abiding citizen's legitimate expectation of privacy, a probationer's lesser legitimate expectation is not violated by a condition of probation that permits warrantless searches of his person and property by probation supervisors and law enforcement officers.⁶⁸ Al-

ter v. United States, 447 U.S. 649, 658 n.11 (1980).

63. United States v. Vandino, 680 F.2d 1329, 1335 (11th Cir. 1982).

64. United States v. McCulley, 673 F.2d 346, 352 (11th Cir. 1982). The court concluded that the third codefendant could make the challenge but upheld the search. *Id.* at 352.

65. 681 F.2d 1362 (11th Cir. 1982).

66. The condition stated:

Probationer shall submit to a search of his person, houses, papers, and/or effects as these terms of the Fourth Amendment to the United States Constitution are defined by the courts, any time of the day or night with or without a search warrant whenever requested to do so by a Probation Supervisor or any law enforcement officer and specifically consents to the use of anything seized as evidence in a proceeding to revoke this order of probation.

Id. at 1366. Thus, the decision is relevant to the consent to search cases. See *infra* text accompanying notes 100-109.

67. 681 F.2d at 1366. Although *Owens v. Kelley* concerned a state conviction and state probation, the court applied the test developed for constitutional challenges on federal probation conditions. See *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979).

68. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

though the court declined to impose a requirement of reasonable suspicion precedent to a search, it was careful to hold that any search under the condition must be conducted in a reasonable manner and for a probationary purpose. Searches designed for law enforcement purposes or meant to harass or intimidate are not permitted. Thus, such a condition is constitutional on its face but may be challenged as applied when there are abuses. This result is consistent with the denouement of the notion that probation and parole are merely privileges. Probationers and parolees are provided some measure of fourth amendment protection. The reasonableness clause of the fourth amendment protects them against governmental action that, in context, is arbitrary and abusive.⁶⁹

As was true during the last survey, the court was more concerned with whether warrantless searches were justified than with searches under warrant.⁷⁰ Concerning the warrant itself, a few survey decisions applied well-worn precedents.⁷¹ The court's treatment of administrative warrants, however, was noteworthy. Administrative inspection searches generally require a warrant, although for purposes of the fourth amendment they are sufficiently unique to be treated separately.⁷² The first survey decision on administrative searches concerned a bank's refusal to cooperate with a compliance review under an executive order that prohibited discrimination by government contractors. This refusal resulted in the termination of the contracts.⁷³ The bank admitted that it contracted voluntarily and that it expressly agreed to be bound by the executive order, including the responsibility to furnish information and reports on compliance with the affirmative action requirement. The bank urged, however, that the consent did not include unreasonable or otherwise unconstitutional searches

69. S. KRANTZ, *THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS* 660 (2d ed. 1980).

70. Baker, *Criminal Procedure*, *supra* note 2, at 1096. Last year's troubling general observation holds true again. The court seems more concerned with whether the official conduct in the particular search was reasonable, with or without a warrant, than it is concerned with the competing orientation—whether the officials were reasonable in acting without a warrant. *See, e.g.*, *United States v. Wilson*, 671 F.2d 1291, 1293-94 (11th Cir. 1982).

71. *See, e.g.*, *United States v. Wuagneux*, 683 F.2d 1343, 1348-50 (11th Cir. 1982) (particularity of description of things to be seized); *United States v. Strauss*, 678 F.2d 886, 892-93 (11th Cir. 1982) (particularity of description of things to be seized and probable cause for warrant); *United States v. Lockett*, 674 F.2d 843 (11th Cir. 1982) (sufficiency of affidavit supporting warrant); *United States v. Flynn*, 664 F.2d 1296, 1301-06 (5th Cir. 1982) (Former 5th) (sufficiency of affidavit supporting warrant).

72. *See generally* C. WHITEBREAD, *supra* note 3, § 5.06, at 125-33 (unique nature of administrative searches has led to a distinct body of law).

73. *First Ala. Bank v. Donovan*, 692 F.2d 714 (11th Cir. 1982). Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in 42 U.S.C. § 2000e at 1232-36 (1976), and accompanying regulations forbade discrimination on the basis of race, sex, color, religion, or national origin by government contractors and required annual reporting on affirmative action efforts. 692 F.2d 714, 716 n.1 (11th Cir. 1982).

designed to harass and to oppress. The government agreed, but issue was joined when the government urged that the particular administrative searches were legitimate. The bank lost. The court balanced the bank's privacy interest, diminished by the small reporting burden and the bank's own agreement, with a heightened national policy in favor of equal employment opportunity. Three factors controlled.⁷⁴ First, the particular compliance review was authorized by statute. Second, the review was properly limited in scope. Third, the review was pursuant to an administrative plan that contained specific neutral criteria: the Department of Labor's plan to focus on the banking industry and review compliance by banks with more than fifty employees and \$50,000 in government contracts.⁷⁵

Two survey decisions considered administrative procedures for Occupational Safety and Health Administration (OSHA) inspection warrants. In the first, *West Point-Pepperell, Inc. v. Donovan*,⁷⁶ the district court granted a preliminary injunction that stayed the execution of an OSHA inspection warrant. The court vacated the injunction and held for the agency.⁷⁷ Administrative warrants must be supported by administrative probable cause, a lesser showing of probable cause than is required for criminal search warrants.⁷⁸ The issuing magistrate must balance the governmental need for the search against the individual invasion the search requires. The court concluded that there was sufficient specific evidence of a violation when the sworn application was based on an employee petition, employees' letters, and summaries of employee interviews that described specific violations of the applicable safety regulations.⁷⁹ Having found the requisite administrative probable cause,⁸⁰ the court upheld the scope of the administrative warrant. The Constitution was satisfied since the scope of the administrative search warrant bore a reasonable relationship to the underlying employee complaints.⁸¹

74. 692 F.2d 714, 721 (11th Cir. 1982) (citing *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. Mar. 6, 1981) (Unit A), *cert. denied*, 454 U.S. 892 (1981)).

75. 692 F.2d 714, 721 (11th Cir. 1982). Reasonableness may be based either on particular evidence of an actual violation, on reasonable administrative or legislative standards, or on a neutral administrative plan. 638 F.2d 899, 907-08. *See generally* *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978); Note, *Rationalizing Administrative Searches*, 77 MICH. L. REV. 1291 (1979).

76. 689 F.2d 950 (11th Cir. 1982).

77. *Id.* at 963.

78. *See generally* *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978).

79. 689 F.2d at 957.

80. The decision also analyzed the procedures for a district court review of the magistrate's warrant issuance and the role of the appellate court in such situations. *See id.* at 956-62; *see also id.* at 963-64 (Roney, J., concurring).

81. The court had never addressed the standard for determining the permissible scope of an administrative search based on specific employee complaints. 689 F.2d at 962. Of the

In the second decision, *Donovan v. Sarasota Concrete Co.*,⁸² the government petitioned for review of the decision of the Occupational Safety and Health Review Commission (Commission) that vacated a citation issued against an allegedly offending employer. The Commission had suppressed evidence obtained pursuant to an administrative search warrant that authorized a full scope inspection on the basis of a specific employee complaint. In a thoughtful discussion of the administrative search warrant and the fourth amendment, the court clarified the policy issues and described the framework for analysis. When deciding the appropriateness of a Commission decision to suppress evidence, the court of appeals is to be guided by four principles.⁸³ First, the Commission may independently evaluate the administrative probable cause determination of a federal magistrate in deciding the admissibility of evidence gathered under the warrant at an administrative hearing. Second, an administrative warrant based only on a particular employee complaint that concerns a specific existing violation must be subjected to an individualized judicial inquiry into whether the subsequent inspection went no further than was required to determine the validity of the complaint.⁸⁴ Third, the Commission may apply an exclusionary rule in OSHA proceedings to protect fourth amendment rights.⁸⁵ Fourth, the Commission could refuse to dilute the deterrent impact of the administrative exclusionary rule by rejecting the so-called 'good faith' exception.⁸⁶ Thus, in these three cases the court has reaffirmed the fourth amendment principle that a warrant is the rule and the warrantless search the exception.⁸⁷

courts which have considered the issue, some have held that the scope of the inspection must be limited to the alleged violations, while others have not imposed the relevancy limit. Compare *Marshall v. North Am. Car Co.*, 626 F.2d 320 (3d Cir. 1980) (scope of inspection had some relationship to alleged violations in employee complaint) with *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (scope not limited to specific complaints). Since the warrant sub judice met the narrower test, the court declined to choose between the two approaches. 689 F.2d at 963. A later survey panel decided the issue in favor of the narrower test. *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068-69 (11th Cir. 1982) (See *infra* text accompanying notes 82-87).

82. 693 F.2d 1061 (11th Cir. 1982).

83. *Id.* at 1063.

84. See *supra* note 81.

85. See generally *Trant, OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered*, 1981 DUKE L.J. 667. But cf. *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary rule not extended to civil case).

86. See *United States v. Williams*, 622 F.2d 830, 840-48 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981). See generally *Burkoff, Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982).

87. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). But see *supra* text accompanying notes 70-71.

Three types of constitutional warrantless searches predominated the survey docket: searches incident to a lawful arrest, consent searches, and border searches.⁸⁸ The remainder of this section is devoted to these warrant exceptions.

The rationale of the warrant exception for searches incident to arrest defines the permissible scope of the search. When making a valid arrest, a law enforcement official may search the person and the area within the immediate control of the arrestee for weapons, evidence that might be destroyed, or contraband.⁸⁹ The arrest-search sequence is not critical. The search incident may precede formal arrest as long as probable cause existed absent the result of the search, and a formal arrest immediately follows the search.⁹⁰ Under the circumstances of an airport stop,⁹¹ a bulge of unusual size and shape in a defendant's trousers provided probable cause to arrest, and the search of his person was incident to his arrest when the bulge proved to be cocaine.⁹² The subsequent search of a defendant's wallet that had been taken from him upon arrest was sufficiently incident to the arrest.⁹³ It mattered not that several hours elapsed or that the defendant had been booked between arrest and wallet search.⁹⁴ These decisions cloud the contemporaneous requirement of searches temporally and locally incident to arrest.⁹⁵ The basic requirement that the arrest be lawful to support the incident warrantless search can be problematical. Even when an initial arrest was unlawful, once a defendant struggled and tried to flee, his recapture supported an arrest for resisting the first arrest, and the warrantless search was incident to the second lawful arrest.⁹⁶ Following the Supreme Court's lead,⁹⁷ the court refused to allow an incident search for the arrestee to precede the arrest. Warrantless entry of a

88. A few of the other warrant exceptions were considered in routine analyses. *E.g.*, *United States v. Kent*, 691 F.2d 1376, 1381-84 (11th Cir. 1982) (plain view search); *United States v. Gianni*, 678 F.2d 956, 960 (11th Cir. 1982) (automobile search); *United States v. Bosby*, 675 F.2d 1174, 1179 (11th Cir. 1982) (inventory search); *United States v. Rojas*, 671 F.2d 159, 163-67 (5th Cir. 1982) (Unit B) (exigent search). *See also generally* Baker, *Criminal Procedure*, *supra* note 2, at 1096-1101.

89. *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

90. *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980).

91. *See supra* notes 25-48 and accompanying text.

92. *United States v. Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982).

93. *United States v. Watson*, 669 F.2d 1374, 1383-84 (11th Cir. 1982).

94. *United States v. Sonntag*, 684 F.2d 781, 785-86 (11th Cir. 1982).

95. *Compare* *Preston v. United States*, 376 U.S. 364 (1964) (search too remote to be incidental to arrest) *with* *United States v. Edwards*, 415 U.S. 800 (1974) (search found to be incident to arrest).

96. *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1982).

97. *Payton v. New York*, 445 U.S. 573 (1980).

home or a hotel room to effect an arrest defies the fourth amendment.⁹⁸ The Eleventh Circuit has expanded the searchable area to allow for a security check of the situs of arrest when there is reason to suspect that there are others present who pose a threat to the officials.⁹⁹

As an exception to the warrant requirement, consent to be searched is analyzed along three axes: (1) Whether the consent is valid; (2) whether the search exceeded the scope of the consent; and (3) whether the appropriate person gave the consent.¹⁰⁰ The validity of consent is considered in the totality of the circumstances. Although none alone is controlling, some of the relevant factors are the degree of voluntariness of defendant's custodial status, the presence of coercive police procedures, the extent and level of defendant's general cooperation with the police, defendant's awareness of the right to refuse consent, defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found.¹⁰¹ The decisions have something of an ad hoc character as a result.¹⁰² Even a defendant's consent to be searched may be unreasonable under the fourth amendment if the officials induced the consent by deceit, trickery, or misrepresentation. A subsequent allegation that a prior consent was attained wrongfully must show clearly and convincingly that the official materially misrepresented the nature of the inquiry.¹⁰³ The distinction in the decisions seems to be between officials who misrepresent their official status and officials who make no representation of their status; this curious distinction somehow amounts to a difference. One line of cases concerns everyone's favorite official, the tax collector. Although special agents provide explicit warnings concerning possible criminal lia-

98. *United States v. Roper*, 681 F.2d 1354, 1357-58 (11th Cir. 1982); *United States v. Bulman*, 667 F.2d 1374, 1382-84 (11th Cir. 1982).

99. *United States v. Roper*, 681 F.2d 1354, 1358-59 (11th Cir. 1982).

100. *Baker, Criminal Procedure*, *supra* note 2, at 1097.

101. *United States v. Robinson*, 690 F.2d 869, 874-77 (11th Cir. 1982); *United States v. Phillips*, 664 F.2d 971, 1023 (5th Cir. 1982) (Unit B).

102. Compare *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982) (Unit B en banc) (airport consent voluntary) with *United States v. Robinson*, 690 F.2d 869 (11th Cir. 1982) (airport consent involuntary). See also *United States v. Rojas*, 671 F.2d 159 (5th Cir. 1982) (Unit B). Last year's survey noted the low level of voluntariness required by quoting one of the court's asides: "He was not intoxicated, was not handcuffed, and was not threatened with a shotgun." *Baker, Criminal Procedure*, *supra* note 2, at 1097 n.100 (quoting *United States v. Webb*, 633 F.2d 1140, 1142 (5th Cir. Jan. 5, 1981)). This year the court went one better in saying "Sorry Charlie" to a member of the infamous 'Black Tuna' marijuana smuggling enterprise. The court concluded consent was voluntary, stressing "the circumstances in this case are unique and . . . it is most unusual that consent given at gunpoint can ever be found to be voluntary." *United States v. Phillips*, 664 F.2d 971, 1024 (5th Cir. 1981) (Unit B).

103. See generally *United States v. Tweel*, 550 F.2d 297, 299-300 (5th Cir. 1977); *United States v. Dawson*, 486 F.2d 1326 (5th Cir. 1973).

bility in taxpayer confrontations, in routine civil audits revenue agents do not. Thus, the taxpayer consents to cooperate with the revenue agent who turns over serious cases to the special agent for a criminal prosecution, and the taxpayer is not heard to complain about the original consent.¹⁰⁴ There was no material representation regarding the official's status. Compare another line of cases in which the suspect consented but was ignorant that the person given the permission to search had any official status. Undercover agents often go where neither warrant nor probable cause would take them, yet they do so with the unwitting permission of the defendant.¹⁰⁵ The court broadly construed the consent given an agent provocateur and found, by analogizing to wiretap cases, that it legitimated a search by the undercover agent and another government official.¹⁰⁶ Straining reason by the analogy, the court concluded that by giving the undercover agent permission to enter an apartment and acquire contraband, the suspect somehow assumed the risk that the undercover agent would reveal the information and pass on the consent to a regular agent who would aid the search.¹⁰⁷ The result is at odds with the precedent and logic of the situation. In the wiretap and wired informant cases, the Supreme Court has concluded that transmitting conversations to agents located elsewhere was similar to the undercover agent's later revelation of the conversation, at least for fourth amendment cases.¹⁰⁸ The consent to enter given the undercover agent was narrower than the search conducted by the regular agent.¹⁰⁹

Unlike the second consent search inquiry—the scope of the consent¹¹⁰—the third issue—whether the appropriate person consented—proved troublesome during the survey period. Third party consent, that is, consent by someone other than the person against whom the seized evidence is used, will suffice if the third party has a sufficient privacy interest in common with the defendant.¹¹¹ A partner in an illicit

104. *United States v. Wuagneux*, 683 F.2d 1343, 1347-48 (11th Cir. 1982).

105. See *Lewis v. United States*, 385 U.S. 206, 209-11 (1966); *United States v. Enstam*, 622 F.2d 857, 867-68 (5th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

106. *United States v. Schuster*, 684 F.2d 744 (11th Cir. 1982).

107. *Id.* at 747-49.

108. See *United States v. White*, 401 U.S. 745, 748-54 (1971); *United States v. Brand*, 556 F.2d 1312, 1318 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

109. Judge Johnson's dissent has the better of precedent and logic, but not the second vote. *United States v. Schuster*, 684 F.2d 744, 749 (Johnson, J., dissenting).

110. The court will interpret the scope of the consent broadly enough to cover the scope of most searches arguably within the range of consent. See, e.g., *United States v. Schuster*, 684 F.2d 744, 748 (11th Cir. 1982); *United States v. Wuagneux*, 683 F.2d 1343, 1352-53 (11th Cir. 1982).

111. See *United States v. Matlock*, 415 U.S. 164, 169-72 (1974); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

drug business could consent to an entry into a partner's apartment for a drug transaction.¹¹² The government did not violate the fourth amendment by recording and transmitting private conversations with the consent of only one of the parties, because the Constitution does not protect a wrongdoer's misplaced confidentiality.¹¹³

Border searches sometimes are sanctioned as an exception to the warrant clause. Searches at the border or its functional equivalent are more accurately justified on the theory that an individual crossing our country's international boundary has no reasonable expectation of a searchless passage.¹¹⁴ The law of border searching has become rather routine.¹¹⁵ The antecedent question of the applicability of border search law attracted some court attention during the survey period. More particularly, the court considered the where and when of border crossings, namely the location of and the nexus with an international boundary which together justify the search and seizure.¹¹⁶

For example, a nonstop flight from outside the United States, in effect, brings the border with it, and passengers and cargo are subject to customs search at the point of destination.¹¹⁷ The court has waffled on the legal issue of the degree of proof required to establish a border crossing, sometimes referring to a 'high degree of probability' or 'preponderance of evidence' or 'reasonable suspicion.'¹¹⁸ The Eleventh Circuit resolved the confusion in a survey decision, *United States v. Garcia*.¹¹⁹ The Government must demonstrate a substantial likelihood that the trip terminating within the country originated in a foreign country.¹²⁰ Obviously, this inquiry is fact-bound. A private aircraft under a flight plan with a domestic point of origin cannot be searched without some showing that the plane

112. See *United States v. Sonntag*, 684 F.2d 781, 785-86 (11th Cir. 1982).

113. *United States v. Shields*, 675 F.2d 1152, 1157-58 (11th Cir. 1982). Compare *supra* text accompanying notes 104-109.

114. *Baker, Criminal Procedure, supra* note 2, at 1098.

115. See, e.g., *United States v. Bustos-Guzman*, 685 F.2d 1278 (11th Cir. 1982); *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982); *United States v. Alonso*, 673 F.2d 334 (11th Cir. 1982).

116. The textual discussion considers the where and when of the border crossing. Once the international boundary is crossed, more intrusive search techniques require higher degrees of suspicion to justify the warrantless search. The court has recognized three distinct kinds of border searches of persons: simple frisks and pat-downs, strip searches, and body-cavity searches. See *United States v. DeGutierrez*, 667 F.2d 16, 18-19 (11th Cir. 1982); see also *United States v. Sandler*, 644 F.2d 1163, 1166-67 (5th Cir. May 15, 1981) (en banc) (discussed in *Baker, Criminal Procedure, supra* note 2, at 1098-99).

117. *United States v. Messersmith*, 692 F.2d 1315, 1320 (11th Cir. 1982).

118. *United States v. Stone*, 659 F.2d 569, 573 (5th Cir. 1981) (Unit B).

119. 672 F.2d 1349 (11th Cir. 1982).

120. *Id.* at 1358; see also *United States v. Messersmith*, 692 F.2d 1315, 1318 (11th Cir. 1982).

had deviated from its stated course. In contrast, a plane, flying without a flight plan and without notification, that pierced the air defense identification zone travelling from southeast of the United States was searchable.¹²¹ Furthermore, the border search rationale has been extended functionally. In one decision, the plane's signals first registered over foreign airspace. Visual contact occurred over United States waters, and customs officials intercepted the plane and followed it in for a landing. Government officials could infer an earlier border crossing and an observed first landing.¹²² In a second decision, the court explored the limits of the border search rationale. A vehicle may be border searched for contraband or dutiable goods, though it has not crossed the border, if it has come in contact with someone or something that has crossed the border, and the object of the search has been observed continuously since that contact.¹²³

IV. SELF-INCRIMINATION

During the survey period, applications of the fifth amendment privilege against self-incrimination involved a few novel principles,¹²⁴ voluntariness,¹²⁵ some peculiar nuances of the *Miranda* doctrine,¹²⁶ and the perennial problem of prosecutorial comments.¹²⁷ Only the decisions on *Miranda* and prosecutorial comments deserve mention here.

In *Miranda v. Arizona*,¹²⁸ the Supreme Court held inadmissible all "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against

121. 672 F.2d at 1358.

122. *United States v. Flynn*, 664 F.2d 1296, 1306 (5th Cir.) (Former 5th), *cert. denied*, 456 U.S. 930 (1982).

123. *United States v. Lueck*, 678 F.2d 895 (11th Cir. 1982). The court held that the Government must show by a preponderance of the evidence that the object of the search crossed the border. *Id.* at 902. *But see supra* text accompanying notes 120-22.

124. *See, e.g.*, *United States v. Fortin*, 685 F.2d 1297 (11th Cir. 1982) (guilty plea waived privilege regarding crime pleaded but not extraneous perjury); *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982) (evidence of guilt induced by Government promise of immunity is coerced and inadmissible); *United States v. Pilcher*, 672 F.2d 875, 877 (11th Cir. 1982) (taxpayer may not assert privilege to justify failure to file tax return); *United States v. Watson*, 669 F.2d 1374, 1389 (11th Cir. 1982) (jury instruction on right not to testify).

125. *See, e.g.*, *United States v. Wright*, 685 F.2d 142 (5th Cir. 1982) (Unit B) (statement voluntary under all the circumstances); *Acosta v. Turner*, 666 F.2d 949, 959 (5th Cir. 1982) (Unit B) (procedures for determining voluntariness of confession); *Sullivan v. Alabama*, 666 F.2d 478, 482-83 (11th Cir. 1982) (voluntariness requires mental competency). *See generally* Baker, *Criminal Procedure*, *supra* note 2, at 1101-02.

126. *Miranda v. Arizona*, 384 U.S. 436 (1966).

127. *See* Baker, *Criminal Procedure*, *supra* note 2, at 1105-06.

128. 384 U.S. 436 (1966).

self-incrimination."¹²⁹ Defendant in *United States v. Contreras*¹³⁰ raised the issue of the adequacy of his warning compared to the famous litany composed by the Supreme Court.¹³¹ Contreras relied on a 1968 Fifth Circuit decision¹³² to claim that his warning was deficient in failing to apprise him of his right to have counsel appointed immediately and prior to any questioning. Following its first duty of obeisance to Supreme Court precedent,¹³³ the court considered *California v. Prysock*,¹³⁴ a 1981 decision that effectively overruled the former Fifth Circuit rule.¹³⁵ The panel went on to uphold the standard Customs and Drug Enforcement Administration (DEA) warnings that informed defendant of his right to consult with an attorney prior to questioning, to have an attorney present during questioning, and to have counsel appointed.¹³⁶ As long as the warning does not condition the right on some future event, the accused need not be told expressly that the right to appointed counsel is 'here and now'.¹³⁷

The remaining survey *Miranda* decisions involved determining whether

129. *Id.* at 444.

130. 667 F.2d 976 (11th Cir. 1982).

131. The accused must be informed that:

he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479.

132. *Lathers v. United States*, 396 F.2d 524 (5th Cir. 1968).

133. See *Gresham Park Community Org. v. Howell*, 652 F.2d 1227, 1234 (5th Cir. 1981) (Unit B); see also *Baker, Precedent Times Three*, *supra* note 1, at 723.

134. 453 U.S. 355 (1981).

135. 667 F.2d at 979.

136. Upon arrest, defendant was read his rights in Spanish. He answered each paragraph orally stating that he understood his rights and signed a written waiver. The translated Customs warnings stated:

You have the right to consult your attorney before making any statement or answering any question, and you can have your attorney present while we interrogate you.

If you want an attorney but cannot pay for one on your own, the United States Magistrate in this city or in the Federal Court will assign you an attorney free of charge.

Id. at 978. The translated Drug Enforcement Administration warnings stated:

You have the right to consult an attorney before making any statement or answering any question posed to you, and he can be present at the interrogation.

You have the right to be represented by an attorney who will be appointed by the United States federal magistrate or court in the event of insolvency on your part.

Id.

137. *Id.* at 979. For examples of conditional and, hence, deficient warnings see *United States v. Garcia*, 431 F.2d 134 (9th Cir. 1970); *Gilpin v. United States*, 415 F.2d 638, 640-41 (5th Cir. 1969).

a suspect has been subjected to custodial interrogation, which engages the duty to warn, waiver rules, and the harmless error doctrine. When a suspect is in custody and what constitutes interrogation are separate inquiries. Something less than a full blown arrest may satisfy the custody requirement if the investigation has focussed on the accused, and both the official and the suspect subjectively view their relationship as custodial.¹³⁸ An armed Coast Guard boarding of a vessel on the high seas obviously was custodial.¹³⁹ It was just as obvious, at least to the court, that an Internal Revenue Service interview during a criminal investigation did not trigger a duty to warn as long as the surroundings were familiar to the suspect, who freely accompanied agents for one hour of questioning without any evidence of restraint or coercion.¹⁴⁰

Once custody envelops a suspect, however, the warnings must be given only if an interrogation or its functional equivalent occurs. *Lebowitz v. Wainwright*¹⁴¹ is the lone survey decision on the issue worth noting.¹⁴² The issue in *Lebowitz* concerned whether a suspect's silence during a search could be used for impeachment purposes. The court had to interpolate two Supreme Court precedents. In *Doyle v. Ohio*,¹⁴³ the Supreme Court held that the use of postarrest and postwarning silence as impeachment was unfair. Later, in *Jenkins v. Anderson*,¹⁴⁴ the Supreme Court distinguished *Doyle* and held that the use of silence before any police contact as impeachment was permitted. The facts in *Lebowitz* fell in between those of *Doyle* and *Jenkins*.¹⁴⁵ While the court declined to describe just how much governmental action encouraging silence was necessary to make a comment on the silence impermissible, there was not enough in

138. See *United States v. Warren*, 578 F.2d 1058, 1071 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). See generally Baker, *Criminal Procedure*, supra note 2, at 1103 (three-prong test for custodial setting).

139. *United States v. Glen-Archila*, 677 F.2d 809, 814 n.12 (11th Cir. 1982); cf. *United States v. Gray*, 659 F.2d 1296, 1301 (5th Cir. 1981) (Unit B) (Coast Guard's routine stop, boarding, and inspection on the high seas did not create a custodial setting).

140. *United States v. Wright*, 685 F.2d 142 (5th Cir. 1982) (Unit B) (per curiam). See supra text accompanying notes 100-109.

141. 670 F.2d 974 (11th Cir. 1982).

142. See also, e.g., *United States v. Glen-Archila*, 677 F.2d 809, 814 (11th Cir. 1982); *Sullivan v. Alabama*, 666 F.2d 478, 483 (11th Cir. 1982). See generally Baker, *Criminal Procedure*, supra note 2, at 1103-04.

143. 426 U.S. 610, 616-18 (1976).

144. 447 U.S. 231, 238-40 (1980).

145. On a time line, in sequence: Alleged Crime . . . *Jenkins* (Comment on silence proper) . . . Contact with Police . . . *Lebowitz* . . . Arrest . . . *Miranda* Warning . . . *Doyle* (Comment on silence improper). 670 F.2d at 979. Some courts had used arrest as the bright line, permitting comment on silence before arrest and prohibiting comment on silence after. See *United States ex rel. Smith v. Frazen*, 660 F.2d 237, 239 (7th Cir. 1981); *Bradley v. Jago*, 594 F.2d 1100, 1103 (6th Cir.), cert. denied, 444 U.S. 847 (1979).

the case sub judice. The police arrived at defendant's home, told him and his family to stay in one room, and proceeded to execute a search warrant. Under these circumstances, the prosecutor could argue to the jury that defendant's silence during the search was a guilty silence that impeached his trial explanation concerning his possession of stolen goods eventually found during the search.¹⁴⁶

Even if the custody and interrogation requirements engage the *Miranda* protection, the properly warned suspect may either expressly or implicitly waive the right to remain silent, and any inculpatory or falsely exculpatory statement will be admissible.¹⁴⁷ When the suspect asserts either the right to have counsel present or the right to remain silent, all questioning must cease. Although invoking the former right absolutely bars resumption of questioning, invoking the latter only interrupts the questioning.¹⁴⁸ Finally, even if custodial interrogation takes place without following the dictates of the *Miranda* doctrine, the error may be deemed harmless.¹⁴⁹

Once again, the court considered what in last year's survey was called "the perennial problem of trial comments about the failure of a criminal defendant to testify in his own defense."¹⁵⁰ To reach the harmful error threshold, it must appear either that the speaker's manifest intention was to comment on the accused's failure to take the stand or that the character of the remark naturally and inevitably would be taken as such an improper comment.¹⁵¹ Although direct and indirect comments are forbidden, in context it is the directness of the remark that is controlling. On the first level, the court is loathe to posit bad faith on the part of a prosecutor. On the second level, prosecutors read advance sheets, and they know which remarks will pass appellate review. When the effective test becomes, "How indirect was it?," the court almost always seems to answer "It was so indirect, we affirm." Viewing the decided cases en masse, the Eleventh Circuit tolerates indirect remarks that just as easily could be held reversible error under the announced test.¹⁵² As it has developed,

146. 670 F.2d at 979-81.

147. *United States v. Glen-Archila*, 677 F.2d 809, 814-16 (11th Cir. 1982); *United States v. McCulley*, 673 F.2d 346, 351 (11th Cir. 1982); *Sullivan v. Alabama*, 666 F.2d 478, 482-83 (11th Cir. 1982).

148. *United States v. Bosby*, 675 F.2d 1174, 1182 (11th Cir. 1982) (discussing *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Michigan v. Mosely*, 423 U.S. 96 (1975)).

149. *United States v. Roper*, 681 F.2d 1354, 1359 (11th Cir. 1982); *Sullivan v. Alabama*, 666 F.2d 478, 484-85 (11th Cir. 1982).

150. *Baker, Criminal Procedure*, *supra* note 2, at 1105.

151. See *United States v. Hartley*, 678 F.2d 961, 983 (11th Cir. 1982); *Williams v. Wainwright*, 673 F.2d 1182, 1184-85 (11th Cir. 1982).

152. See, e.g., *United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir. 1982) (Opening: "The defendants may or may not have a different version [of the case]. This is

such remarks have become a low percentage appellate issue.¹⁵³

V. GRAND AND PETIT JURY RIGHTS

Besides a few decisions that contained general jury issues,¹⁵⁴ the most noteworthy survey decisions concerned selection procedures for grand and petit juries.¹⁵⁵ There is a reason to consider the two together.¹⁵⁶ Of course, the Constitution does not require that a state criminal system provide for a grand jury.¹⁵⁷ If a state does provide for a grand jury, however, constitutional standards must be satisfied.¹⁵⁸ The constitutional requirements concerning the selection procedures for grand juries are largely identical to those applicable to petit juries.¹⁵⁹ Thus, the two will be considered together here.

The constitutional maxim long has been that the jury must represent a fair cross section of the community. Just how fair and just how represen-

the Government's version." Closing: "They didn't answer that question to your satisfaction, ladies and gentlemen. They didn't answer it at all."); *United States v. Hartley*, 678 F.2d 961, 983 (11th Cir. 1982) ("I don't recall any testimony about that."); *Williams v. Wainwright*, 673 F.2d 1182, 1184 (11th Cir. 1982) ("I think the evidence is clear, the evidence is uncontradicted . . .").

153. See, e.g., *Baker, Criminal Procedure*, *supra* note 2, at 1105-06.

154. See, e.g., *United States v. Hayes*, 676 F.2d 1359, 1366-67 (11th Cir. 1982) (approved bifurcated trial with two juries, one for each of two codefendants jointly tried); *Rogers v. McMullen*, 673 F.2d 1185, 1190 (11th Cir. 1982) (while state law may, the Constitution does not prohibit 17 year olds from serving on state jury).

155. Following the introductory disclaimers of this Article, several significant grand and petit jury decisions are not considered in the text because they dealt with substantive rights or nonconstitutional procedures. See, e.g., *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982); *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982); *United States v. Strauss*, 678 F.2d 886 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 218 (1982); *Morgan v. Wainwright*, 676 F.2d 476 (11th Cir. 1982); *United States v. Kabbaby*, 672 F.2d 857 (11th Cir. 1982); *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982); *United States v. Ramos*, 666 F.2d 469 (11th Cir. 1982).

156. See generally C. WHITEBREAD, *supra* note 3, § 19.07, at 391-94 (standards for selection are essentially the same).

157. *Hurtado v. California*, 110 U.S. 516, 538 (1884). Of the provisions of the Bill of Rights that relate to criminal procedure, the grand jury clause of the fifth amendment is singularly not applicable to the states through fourteenth amendment due process. The sixth amendment right to impartial jury trial has been incorporated. *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968). Equal protection concerns also apply at the state and federal levels.

158. See *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970). Indeed, a person may challenge a conviction because of a constitutional flaw in the grand jury process even if the conviction itself was rendered by a constitutionally constituted petit jury. See *Cassel v. Texas*, 339 U.S. 282, 287-90 (1950).

159. C. WHITEBREAD, *supra* note 3, at 391. The discussion here narrows to consider only selection procedures. For a general discussion of other constitutional requirements, such as scope, size, unanimity, and waiver, see generally *id.*, §§ 22.01-.08 at 430-73.

tative the jury must be still is the subject of many cases and controversies. There are three analytical elements in a case of discrimination in venire selection: (1) the alleged discrimination is against a distinct class; (2) the class is substantially underrepresented in venires; and (3) the Government cannot show that the selection procedure is racially neutral or not susceptible to abuse as a tool of discrimination.¹⁶⁰ The first element is satisfied easily when the discrimination is along classic equal protection lines such as race and gender.¹⁶¹ The second element, sometimes referred to as the 'rule of exclusion,'¹⁶² has quantitative and temporal aspects, since the greater the disparity and the longer it exists, the less likely it results from chance or inadvertance. The typical approach to the statistical evaluation¹⁶³ includes three measures. The percentage of the relevant general population composed of the particular group allegedly discriminated against must be computed and compared with the percentage of the venire composed of members from the particular group. A significantly large disparity between the two measures engages a rebuttable presumption of discrimination. The Eleventh Circuit has declined to establish any specific percentage as a benchmark for discrimination. Instead, following the Supreme Court lead,¹⁶⁴ the court looks beyond the statistics to evaluate how long the disparity has existed, the size of the sample, and the demographic profile of the general population.¹⁶⁵ The third factor, the capacity for abuse of the selection process, also can affect the significance of the disparity. The more manipulatable the selection process is, the more likely the disparity is the result of manipulation.¹⁶⁶

The court applied this analysis to grand jury selection procedures in two noteworthy survey decisions. In the first decision,¹⁶⁷ the court held there was no prima facie violation of the fourteenth amendment equal protection or the incorporated sixth amendment fair cross section right in evidence of an average variance of 7.4% between the percentage of blacks in the general population and the percentage of blacks serving on the

160. See generally *Rose v. Mitchell*, 443 U.S. 545 (1979); *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977).

161. E.g., *Bryant v. Wainwright*, 686 F.2d 1373 (11th Cir. 1982); *Machetti v. Linahan*, 679 F.2d 236, 238 (11th Cir. 1982).

162. *Bryant v. Wainwright*, 686 F.2d 1373, 1376 (11th Cir. 1982).

163. See generally Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776 (1977).

164. See, *Turner v. Fouche*, 396 U.S. 346, 359 (1970) (23% disparity sufficient); *Whitus v. Georgia*, 385 U.S. 545 (1967) (30% disparity sufficient); *Swain v. Alabama*, 380 U.S. 202, 208 (1965) (10% insufficient).

165. See *Bryant v. Wainwright*, 686 F.2d 1373, 1376-77 (11th Cir. 1982).

166. See *Alexander v. Louisiana*, 405 U.S. 625, 631-32 (1972).

167. *Bryant v. Wainwright*, 686 F.2d 1373 (11th Cir. 1982).

county's grand juries.¹⁶⁸ The disparity was not as great, as long-lived, or as well-documented as a statistical showing necessary to establish a constitutional violation. In the second decision, the court found a prima facie claim of gender discrimination.¹⁶⁹ Women comprised 54% of the general population, yet only 18% of the petit venire and 12% of the grand jury venire. The statistics were emphasized by state procedures that allowed women to opt-out of jury service, resulting in the unconstitutional imbalance.¹⁷⁰ Not all jury selection procedures that appear disparate are unconstitutional, however. For example, in a third survey decision the court upheld a peculiar state statute that limited criminal defendants in one populous county to one peremptory juror challenge for each one allowed the prosecution even though the ratio was two-to-one everywhere else in the state.¹⁷¹

The most significant new survey development in these principles was the court's extension of the analysis to selection procedures for grand jury forepersons.¹⁷² While the Supreme Court has assumed, without deciding,¹⁷³ that these general principles applied to foreperson selection procedures, the Eleventh Circuit in *United States v. Perez-Hernandez*¹⁷⁴ has extended the traditional analysis to foreperson selection. Of course, a single individual cannot represent a fair cross section of the community under the incorporated sixth amendment. The equal protection guarantee applies, however, to the position of foreperson and may be violated by improper exclusions of particular groups. The court held that the very same analysis already described for venire discriminations applied to discrimination against potential forepersons.¹⁷⁵ Such challenges to foreperson selection procedures already have become an Eleventh Circuit

168. *Id.* at 1378-79.

169. *Machetti v. Linahan*, 679 F.2d 236, 241-42 (11th Cir. 1982).

170. *Id.* at 238.

171. *Tarter v. James*, 667 F.2d 964, 965 (11th Cir. 1982). The court adopted the district court's memorandum opinion that relied on nineteenth century precedents and rather unconvincingly sought to distinguish recent decisions. The decision may be noteworthy for another reason. The court dismissed several state constitutional claims that apparently reached the merits. *Id.* at 970-71. This willingness to review the state constitutional issues may portend a dramatic future turn in equal protection jurisprudence. At least in theory, a state's recognition of a fundamental interest should trigger a closer judicial scrutiny than mere rationality. See Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77 (1983). But see *Tarter v. James*, 667 F.2d 964, 969 (11th Cir. 1982) (refusing federal strict scrutiny).

172. See generally Note, *Constitutional Challenges to Grand Jury Foreperson—Selection Procedures*, 17 GA. L. REV. 153 (1982).

173. *Rose v. Mitchell*, 443 U.S. 545, 551-52 n.4 (1979).

174. 672 F.2d 1380 (11th Cir. 1982).

175. *Id.* at 1385-88. See *supra* text accompanying notes 154-171.

fixture,¹⁷⁶ but how far the general principles will be extended remains to be seen.¹⁷⁷

VI. RIGHT TO COUNSEL

The right to counsel has become recognized as being central to our adversarial system of justice.¹⁷⁸ This centrality is functional, not merely aspirational. Judicial interpretation, rather than textual emphasis, has emphasized the importance of an advocate in an adversarial system. This judicial interpretation has composed three variations on the right to counsel theme. They are considered here, and are: entitlement, surrender, and sufficiency.¹⁷⁹

The entitlement theme describes when an accused must be afforded counsel and other state subsidized support in defending against criminal charges.¹⁸⁰ The court considered the entitlement theme in few decisions beyond the ordinary.¹⁸¹ In one extraordinary decision, the defendant was faced with a 'Hobson's choice,'¹⁸² and the court was faced with a knotty sixth amendment issue. Aptly styled *United States v. Hobson*,¹⁸³ the appeal was from an order of the district court that disqualified one of defendant's attorneys from representing him in a drug trafficking prosecution.¹⁸⁴ The appeal concerned two policies in tension. A defendant's right to counsel is so fundamental that only some overriding social or ethical

176. See, e.g., *Bryant v. Wainwright*, 686 F.2d 1373 (11th Cir. 1982); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982); *United States v. Holmon*, 680 F.2d 1340 (11th Cir. 1982).

177. See *United States v. Perez-Hernandez*, 672 F.2d 1380, 1388 (11th Cir. 1982) (Morgan, J., concurring).

178. See *Gandy v. Alabama*, 569 F.2d 1318, 1320 (5th Cir. 1978) ("[T]he right to counsel is a vital component in the scheme of due process and the keystone of our adversary system of criminal justice."

179. See generally *Baker, Criminal Procedure*, *supra* note 2, at 1111-18.

180. *Id.* at 1111-12.

181. Two decisions considered the attorney-client relationship within the right to counsel context. In *Spivey v. Zant*, 683 F.2d 881 (5th Cir. 1982) (Unit B), the court held that neither the work-product doctrine nor personal property law entitled an attorney to refuse to disclose files subpoenaed by a former client seeking habeas corpus relief. In the second, the court reversed the denial of the Government's motion to compel an attorney to testify before a grand jury about the identity of the person who hired him to represent three clients in a drug conspiracy investigation. *In re Grand Jury Proceedings*, 680 F.2d 1026 (5th Cir. 1982) (Unit A, en banc), *rev'd on rehearing*, 663 F.2d 1057 (5th Cir. Dec. 11, 1981) (Former 5th).

182. An English liveryman named Tobias Hobson allowed each of his customers in turn only the horse then nearest the door, thereby presenting them with no real alternative. *Bartlett Familiar Quotations* 312(b) (14th ed. 1968).

183. 672 F.2d 825 (11th Cir. 1982).

184. *Id.* at 826.

interest could justify any deprivation. On the other hand, the right is not absolute and must give way to vindicate public confidence in the integrity of the legal system.¹⁸⁵ Defendant's interest in being represented by a particular attorney was outweighed by pretrial expectations that witnesses would portray the attorney as having acted improperly and unethically due to his knowledge of the smuggling operation for which the defendant was being tried. Public suspicion and obloquy and jury mistrust were so likely and so serious that defendant could not waive the disqualification.¹⁸⁶ How far the trial court may go under the Constitution in disqualifying a defendant's chosen counsel because of the mere appearance of impropriety under the professional canons is unclear. Certainly, the last salvo has not been fired.¹⁸⁷

Recently, the surrender theme of the right to counsel has been discordant with the right of self-representation.¹⁸⁸ Just as the right to counsel is 'yin' to the right to self-representation 'yang,' the surrender of the latter may be harmonized with the exercise of the former. In *Brown v. Wainwright*,¹⁸⁹ the en banc court examined the conditions under which a defendant may be considered to have surrendered the right of self-representation. The majority in *Brown*¹⁹⁰ viewed the two rights as mutually exclusive guarantees that have different entitlement and surrender principles. The right to counsel attaches unless affirmatively waived; the right to self-representation does not attach until asserted. Thus, the right to counsel must be waived expressly, knowingly, and voluntarily. In contrast, the right to self-representation may be surrendered by a mere failure to assert the guarantee, which is deemed consistent with the exercise of the former.¹⁹¹ Further, unlike the right to counsel, an accused may at first assert and later surrender the right to self-representation through subsequent inconsistent, or even equivocal, conduct. The court invoked

185. *Id.* at 827.

186. *Id.* at 829.

187. *See id.* at 829-31 (Kravitch, J., dissenting).

188. *See generally* Faretta v. California, 422 U.S. 806 (1975) (established constitutional right to self-representation); Rosenberg, *Self-Representation and the Criminally Accused—Evolution and Scope in the Federal Courts*, 13 CAL. W.L. REV. 46 (1976) (examination of scope of self-representation in light of Faretta). *See also* Baker, *Criminal Procedure*, *supra* note 2, at 1112-13.

189. 665 F.2d 607 (5th Cir. 1982) (Former 5th en banc). *See also* United States v. Zajac, 677 F.2d 61 (11th Cir. 1982) (waiver of conflict-free representation); United States v. Hobson, 672 F.2d 825, 829 (11th Cir. 1982) (defendant could not waive attorney's apparent impropriety).

190. Judge Garwood wrote a separate concurring opinion. 665 F.2d at 616. Judge Hill, joined by Judges Rubin, Kravitch, Randall, Tate, Thomas A. Clark, and Williams, dissented with opinion. *Id.* at 612. Judge Hatchett wrote a dissent joined by Judges Rubin, Kravitch, Randall, Tate, and Thomas A. Clark. *Id.* at 614.

191. *Id.* at 609-12.

an objective test for waiver of the right to self-representation.¹⁹² In the instant case, the court concluded that, despite defendant's pretrial request to represent himself, he reasonably appeared to abandon his request by permitting court-appointed counsel to represent him and by not reasserting his request until late in the trial. One cannot read the "careful ambiguities and silences"¹⁹³ of the majority opinion without wondering if standby counsel and a hybrid representation have been assumed away in the synthetic syllogism that the right to counsel and the right to self-representation are mutually exclusive. The standby counsel is appointed to assist a pro se defendant, when called upon by the defendant, and to assist the trial judge in presiding.¹⁹⁴ A hybrid representation would allow a defendant to exercise each half of the incorporated sixth amendment by demanding the active assistance of an attorney while also participating as pro se cocounsel.¹⁹⁵ The court is guilty of a familiar lawyer's error: confusing inclusive and exclusive definitions. Because there are alternative, distinct constitutional policies in the right to counsel and the right to self-representation, the court seems to assume they are exclusive concepts, and the exercise of one pretermits the exercise of the other. The two principles are cumulative, however, and should overlap. Indeed, one infamous pro se defendant has explained, "Rigorously speaking, neither is a *right* if one must be renounced in order to exercise the other."¹⁹⁶

The sufficiency theme, the third theme of the sixth amendment, considers the allocation of the burden of persuasion, the establishment of the standard of adequacy, and the application of the burden and standard to particular situations.¹⁹⁷ During the survey period, the court issued a very significant decision concerning the standard of adequacy that merits close attention.¹⁹⁸

192. *Id.* at 611-12. The Court declined to require a waiver hearing at trial on the constitutional issue.

193. *Bridges v. California*, 314 U.S. 252, 279 (1941) (Frankfurter, J., dissenting).

194. See STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 6.7 (Tent. Draft 1972). Standby counsel can raise other constitutional issues. See generally *Wiggins v. Estelle*, 681 F.2d 266 (5th Cir. 1982) (unwanted interference by standby counsel may deny constitutional right of self-representation).

195. See generally Note, *Assistance of Counsel: A Right to Hybrid Representation*, 57 B.U.L. REV. 570 (1977).

196. A. DAVIS, *IF THEY COME IN THE MORNING* 253 (1971). See also Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1480 (1971) (right to cocounsel status); Comment, *Jury Nullification and the Pro Se Defense: The Impact of Dougherty v. United States*, 21 U. KAN. L. REV. 47, 52, 66 (1972).

197. *Baker, Criminal Procedure*, *supra* note 2, at 1113.

198. Claims of ineffectiveness often are founded on allegations of inadequate preparation or performance. *E.g.*, *Proffitt v. Wainwright*, 685 F.2d 1227, 1240 (11th Cir. 1982) (attorney's misperception of the law); *Jones v. Kemp*, 678 F.2d 929 (11th Cir. 1982) (defense counsel's

In *Washington v. Strickland*,¹⁹⁹ a majority²⁰⁰ of the Unit B court sitting en banc retooled the standard for measuring the adequacy of defense representation. Analytically, the court approached the issue on three levels. First, defense counsel must be effective, namely "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances."²⁰¹ Whether described as a burden to persuade that counsel was ineffective or as a burden to rebut a presumption of competence, the 'by a preponderance' burden falls on the petitioner.²⁰² If the court finds defense counsel's performance less than effective, the court second and separately must determine whether the ineffectiveness created not only a possibility of prejudice but that it worked to the actual and substantial disadvantage of the defense.²⁰³ If a petitioner should meet these two burdens, then relief must be granted, unless, third, the government proves the ineffectiveness was harmless, that is, "in the context of *all* the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel."²⁰⁴

failure to object to instruction); *Mylar v. Alabama*, 671 F.2d 1299 (11th Cir. 1982) (failure to file brief with appeal). See *Baker, Criminal Procedure*, *supra* note 2, at 1114-15. This survey year, the effectiveness of counsel at guilty pleas was not litigated very much. See *Roberts v. Wainwright*, 666 F.2d 517 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 174 (1982). Compare *Baker, Criminal Procedure*, *supra* note 2, at 1115-16. The duty of defense attorneys to be familiar with the applicable law also was not litigated much. See *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982); *cf. Baker, Criminal Procedure*, *supra* note 2, at 1116. Claims of conflict of interest, however, continue to trouble the court, although the decided cases simply applied well-developed principles. See, e.g., *United States v. Panasuk*, 693 F.2d 1078 (11th Cir. 1982); *Dasher v. Stripling*, 685 F.2d 385 (11th Cir. 1982); *United States v. McDonald*, 672 F.2d 864 (11th Cir. 1982). *cf. Baker, Criminal Procedure*, *supra* note 2, at 1117-18. Finally, the court continues to resist efforts to second guess trial strategy. See, e.g., *Ford v. Strickland*, 676 F.2d 434, 451-56 (11th Cir. 1982).

199. 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc).

200. The majority in favor of remanding to the district court was not the same majority on the substantive holdings. See *id.* at 1246.

201. *Id.* at 1250.

202. *Id.* The court expressly refused to apply a different analysis in death penalty cases, although the degree of punishment is deemed part of the totality of the circumstances. *Id.* at 1250-51 n.12.

203. *Cf.* 693 F.2d at 1270, 1273 (Tjoflat, J., concurring) (substantially or materially affect the decisionmaking process of a rational sentence). The majority thus rejected a *per se* rule that a showing of counsel's ineffectiveness made out a constitutional violation. *Id.* at 1258-59. In the process, the majority rejected both the panel majority's approach ('altered in a helpful way') and the panel dissent's approach ('affecting the outcome'). See *Washington v. Strickland*, 673 F.2d 879, 901-02 (5th Cir.) (Unit B), *rev'd on rehearing* 693 F.2d at 1243 (1982).

204. 693 F.2d at 1262 (emphasis in original). The court went on, at great length and in several directions, in its opinionial deliberation of the actual facts and whether a remand was necessary. See generally *id.* at 1243.

Washington is more than old wine in a new bottle. True, the three-level analysis is vintage Eleventh-Fifth Circuit case law.²⁰⁵ The court changed the varietal, however, on the prejudice level. The law of the circuit was unclear on the precise degree of prejudice that a defendant must demonstrate until the en banc court's decision.²⁰⁶ The court rejected a rule of automatic prejudice.²⁰⁷ The court rejected an outcome-determinative test applied by other courts.²⁰⁸ The en banc prejudice test of actual and substantial disadvantage is something new in the law of the right to counsel but is something borrowed, too, from the law of habeas corpus.²⁰⁹ The statutory writ, of course, exists to remedy fundamentally unfair state criminal proceedings.²¹⁰ Most right to counsel issues are litigated on habeas corpus.²¹¹ Most alleged errors that go unnoticed at trial may be asserted within the right to counsel framework.²¹² This raises a symmetry problem. In a recent line of decisions, the Supreme Court has developed the 'adequate state ground' bar to federal habeas review.²¹³ In each case, trial counsel failed to make the proper objection concerning a constitutional ruling at a state trial, thus failing to preserve the error for state appellate review. Each decision held that a state prisoner barred by a procedural default from raising a constitutional claim on state direct appeal could not litigate the issue in a section 2254²¹⁴ proceeding without showing cause for and actual prejudice from the default. Having the federal court door closed on the merits of their claims, habeas petitioners began to sneak through the right to counsel window by alleging that the failure to object constituted ineffective assistance of counsel.²¹⁵ The court

205. See generally Comment, *Standards of Attorney Competency in the Fifth Circuit*, 54 TEX. L. REV. 1081 (1976); Annot., 26 A.L.R. FED. 218 (1976).

206. See *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982); *Washington v. Watkins*, 655 F.2d 1346, 1362 (5th Cir. Sept. 14, 1981) (Former 5th), *cert. denied*, 102 S. Ct. 2021 (1982).

207. 693 F.2d at 1258-60.

208. *Id.* at 1261. See *United States v. Deooster*, 624 F.2d 196, 208 (D.C. Cir. 1976) (en banc); see also *supra* note 203.

209. See *supra* text accompanying note 7.

210. 28 U.S.C. § 2254 (1976). See *Lehman v. Lycoming County Children's Servs.*, 102 S. Ct. 3231, 3239-40 (1982); *Rose v. Lundy*, 102 S. Ct. 1198, 1216 (1982) (Stevens, J., dissenting).

211. See *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982).

212. Accord *id.* at 819-20 (failure to raise constitutional challenge to jury composition alleged as ineffective assistance).

213. See *Engle v. Isaac*, 102 S. Ct. 1558, 1570-75 (1982); *United States v. Frady*, 456 U.S. 152 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976).

214. 28 U.S.C. § 2254 (1976).

215. See Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 128-30 (1977).

in *Washington* now has closed the window. By requiring a petitioner to show actual and substantive prejudice, the court has brought into symmetry the prejudice prong of an incorporated sixth amendment claim with the cause and prejudice requirement of federal habeas relief. Indeed, the court borrowed the exact formulation from the habeas decisions.²¹⁶ Substance has been synchronized with procedure.

By way of a postscript to this section, there is one further problem in the Eleventh Circuit's approach to claims of ineffectiveness. In long standing precedent, the court has divided ineffectiveness claims at state trials into two categories: those related to the due process clause alone and those related to the sixth amendment right to counsel incorporated in fourteenth amendment due process.²¹⁷ A denial of due process results when the state trial is fundamentally unfair, whatever the source of unfairness, including, but not limited to, gross misfeasance by appointed or retained defense counsel.²¹⁸ While due process stands on its own bottom, there is a second distinct constitutional category: the incorporated sixth amendment guarantee. The incorporated sixth amendment right to effective assistance of counsel always has been considered to cover "a greater range of counsel errors than does the fundamental fairness standard of the due process concept solely embodied within the Fourteenth Amendment."²¹⁹ This is to say that due process alone is more basic and a minimum protection and counsel's ineffectiveness must be egregious to violate the Constitution. The incorporated sixth amendment, on the other hand, requires a higher standard of counsel performance and is more easily violated. The constitutional protections are distinct; the two analyses are different.

For a time, the Fifth and Eleventh Circuits further divided ineffectiveness claims based on the incorporated sixth amendment on whether counsel was retained or appointed.²²⁰ Out of concern for federalism and based

216. 693 F.2d at 1250, 1258 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

217. *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336-37 (5th Cir.) (en banc), cert. denied, 422 U.S. 1011 (1975).

218. *Id.* at 1336.

219. *Id.* This remains the law today. See *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. 1982) (Unit B); *Clark v. Blackburn*, 619 F.2d 431, 433 (5th Cir. 1980). This is not so startling a revelation. The Supreme Court, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), only overruled the prior refusal to incorporate the sixth amendment in the *Betts v. Brady*, 316 U.S. 455 (1942), 'special circumstances' due process rule. Due process was not overruled. It is not phenomenal that a specific incorporated guarantee can exist alongside a general due process/fundamental fairness level of protection. Numerous due process/fundamental fairness holdings have survived the later incorporation of a specific criminal procedure in the bill of rights. See generally G. GUNTHER, *CONSTITUTIONAL LAW* 459-502 (10th ed. 1980); W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 480-98 (5th ed. 1980).

220. *Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir.) (en banc), cert. denied, 422 U.S. 1011 (1975).

on a preoccupation with state action, the court applied a standard for retained counsel that tolerated more ineffectiveness than when counsel was appointed.²²¹ Following the Supreme Court's decision in *Cuyler v. Sullivan*,²²² the court eliminated this second analytical division between appointed and retained counsel of incorporated sixth amendment claims.²²³ The basic and important analytical distinction between the due process alone and the incorporated sixth amendment remains, however. The due process fundamental fairness test is not the same as the incorporated sixth amendment test of rendering reasonably effective assistance.

Despite their distinctness, the court consistently blurs the two lines of analysis. It relies on decisions that have been eroded by later Supreme Court and court of appeals developments and frequently applies a fundamental fairness test, ignoring the correct analysis.²²⁴ The court seems to be following headnotes and not holdings. Such unsophisticated analysis and inadequate research seems to coexist in the *Federal Reporter* along with clear and accurate statements of the law.²²⁵ What to make of this is hard to say. The principled distinction between the fourteenth amendment due process alone and the incorporated sixth amendment may be more theoretical than real. What the court does in these appeals speaks louder than what the opinions say.²²⁶ The undifferentiated incorporated sixth amendment standard appears to be suspiciously close to the highly subjective and extreme 'force and mockery' standard long ago rejected in

221. *Id.* at 1336-37.

222. 446 U.S. 335 (1980). *Cuyler* concerned a conflict of interest claim. The Supreme Court held there must be a uniform standard for retained and appointed counsel in incorporated sixth amendment cases. *Id.* at 343-44.

223. See *Hardin v. Wainwright*, 678 F.2d 589, 592 (5th Cir. 1982) (Unit B).

224. See *Adams v. Balkcom*, 688 F.2d 734, 739 (11th Cir. 1982); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). Even the en banc court in *Washington v. Strickland* blurred the distinction by discussing prejudice in terms of fundamental fairness. 693 F.2d at 1260.

225. Prior to *Cuyler* this circuit applied different standards of effectiveness to retained versus appointed counsel. *Cuyler* holds that there must be a uniform standard. Since *Cuyler* the Fifth Circuit has adopted the standard that had been applied to appointed counsel and has rejected the standard formerly applied to retained counsel and used here by the district court. The proper standard is thus whether counsel is likely to render and in fact renders reasonably effective assistance, which is a more stringent standard than whether the trial was rendered fundamentally unfair or whether the state was put on notice of counsel's ineffectiveness (citations omitted).

Hardin v. Wainwright, 678 F.2d 589, 592-93 (5th Cir. 1982) (Unit B) (citations omitted). See also *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir.) (Unit A), *cert. denied*, 102 S. Ct. 2021 (1982).

226. See *Wilson v. First Houston Inv. Corp.*, 566 F.2d 1235, 1244-45 n.1 (5th Cir. 1978) (Hill, J., dissenting).

name and theory.²²⁷ At the very least, one cannot read and research in this area without concluding that the Eleventh Circuit judges have a poor opinion of trial lawyers. Reversals under a reasonableness standard describe the court's perception of the average defense attorney. The general run of ineffectiveness decisions sets that average quite low.²²⁸

VII. CONCLUSION

Once again, this was a typical year for the Eleventh Circuit.²²⁹ Changes in constitutional criminal procedure were 'molecular' rather than 'molar'.²³⁰ There were many more refinements of existing formulae than developments of new ones, which reflects the nature of an intermediate court. As the new court goes on deciding appeals, various first impressions of the prevailing judicial philosophy emerge—some good, some bad, but all interesting and important to understand. Should this survey generate some of that interest and help in that understanding, enough is done, and being done is enough.²³¹

227. See *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974); *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965). See generally Comment, *supra* note 205, at 1101-08.

228. There are few reversals, although the court often is called upon to evaluate defense counsel's performance. Compare *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982) with *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982); Compare *Mylar v. Alabama*, 671 F.2d 1299 (11th Cir. 1982) with all the cases cited *supra* notes 176-227.

229. Accord *Baker, Criminal Procedure*, *supra* note 2, at 1118.

230. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

231. "Enough is abundance to the wise." Euripides: *The Phoenissae*, quoted in *Hayes v. Solomon*, 597 F.2d 958, 960 n.2 (5th Cir. 1979)).