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Constitutional Criminal Procedure

by Thomas E. Baker*

I. INTRODUCTION

This article discusses decisions of the new Eleventh Circuit and also decisions of the former Fifth Circuit, some of which are binding precedents for the new court.1 By way of introduction, the title Constitutional Criminal Procedure deserves amplification. Related criminal law topics not within the scope of this article include the following: the substantive law of crimes;2 nonconstitutional aspects of the Federal Rules of Evidence;3 nonconstitutional aspects of the Federal Rules of Criminal Procedure;4 procedural aspects of habeas corpus;5 sentencing;6 prisoners’

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1. In the first case heard by the United States Court of Appeals for the Eleventh Circuit, the en banc court held that decisions of the former Fifth Circuit on or before September 30, 1981, would be binding precedent in the new court. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc). The new court reserved decision on the precedential impact of other categories of former Fifth Circuit precedent; for example, decisions handed down after September 30, 1981, in cases submitted prior to the date of division and also of postdivision en banc decisions. Thus, counsel are cautioned to pay close attention to the date of the decision of former Fifth Circuit precedents. See generally Baker, Precedent Times Three: Stare Decisis in the Divided Fifth Circuit, 35 S.W.L.J. 687 (1981).


5. See, e.g., Cerrella v. Hanberry, 650 F.2d 606 (5th Cir. 1981) (appeal pending); Torna v. Wainwright, 649 F.2d 290 (5th Cir. 1981) (appeal pending). While habeas corpus is nominally classifiable as a civil proceeding, these cases normally arise in a postconviction context. Therefore, while procedural aspects of the Great Writ are beyond the scope of this article, relevant decisions will be discussed on the merits.

rights;\textsuperscript{7} and civil rights suits alleging constitutional deprivations.\textsuperscript{8} Thus eliminated are the substantive constitutional protections.\textsuperscript{9} Nor is the entire area of constitutional criminal procedure detailed here. Of the twenty-three individual rights guaranteed in the first eight amendments to the Constitution, twelve relate to criminal procedure. As a consequence of the founding fathers’ emphasis, which has been carried forward by the judicial activism of the last two decades, constitutional criminal procedure predominates the workload of the courts of appeal. During the survey period,\textsuperscript{10} the court\textsuperscript{11} decided more than three hundred appeals in this area. A gross grouping of these decisions furnishes the following subtopics for this article: Arrests; Searches and Seizures; Self-Incriminations; Double Jeopardy; and Right to Counsel. This article mirrors the court’s 1981 docket. If only in a “footnoteworthy” way, the court did deal with other traditional constitutional criminal procedure topics such as entrapment,\textsuperscript{12} pretrial and trial identifications,\textsuperscript{13} grand jury procedures,\textsuperscript{14} the right to a speedy trial,\textsuperscript{15} discovery,\textsuperscript{16} guilty pleas,\textsuperscript{17} the right to jury trial,\textsuperscript{18}

\begin{itemize}
  \item See, e.g., Miller v. Stanmore, 636 F.2d 986 (5th Cir. 1981); Pace v. Oliver, 634 F.2d 305 (5th Cir. 1981).
  \item See, e.g., Simon v. United States, 644 F.2d 490 (5th Cir. 1981); Brown v. Vance, 637 F.2d 272 (5th Cir. 1981).
  \item The omission of substantive guarantees is not to be taken as denigration. One category of cases demonstrates the significance of this omission. Of the 813 persons on death row, 478 are imprisoned in the six states that comprised the former Fifth Circuit. 1 DEATH PENALTY RPRTR. 18 (August 1981). As a result, the new Fifth and Eleventh Circuits will play a critical role in interpreting the substantive protections of the cruel and unusual punishment clause. However significant, survey decisions in this area are not within the purview of this article. See, e.g., Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Smith v. Balkcom, 666 F.2d 573 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981); Francioni v. Wainwright, 650 F.2d 590 (5th Cir. 1981); Woodall v. Poti, 648 F.2d 268 (5th Cir. 1981); Terrbonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) (en banc); Jones v. Diamond, 636 F.2d 1364 (5th Cir.), cert. denied, 102 S. Ct. 27 (1981).
  \item January 1, 1981, to December 31, 1981.
  \item 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 division or panel. See Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 241 (1953). When relevant, consideration by the en banc court will be distinguished from a three-judge panel.
  \item See, e.g., United States v. Crossman, 663 F.2d 607 (5th Cir. 1981); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981).
  \item See, e.g., Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc); In re Grand Jury Proceedings, 647 F.2d 511 (5th Cir. 1981); In re Grand Jury Proceedings, 643 F.2d 226 (5th Cir. 1981); United States v. Scrimgeour, 636 F.2d 1019 (5th Cir. 1981) (appeal pending).
\end{itemize}
and the right to confrontation. The subtopics selected were, however, the principal areas of concern during the survey period for the litigants, the attorneys, and the court. Faced with so many decisions in a divergent and complex area of law, what follows is a survey that, perhaps inevitably, cannot claim the comprehensiveness of these introductory disclaimers.

II. ARRESTS

Appeals challenging arrests—fourth amendment seizures of persons—raise three essential issues. First, the court must determine when a police-citizen contact rises to the level of a constitutional encroachment. Second, the court must evaluate the sufficiency of the factual basis for a contact of constitutional proportion. Third, the court must analyze the appropriateness of the procedures that the government actors followed. During the survey period, the court considered each of these issues, which here are discussed in turn.

The Fifth Circuit consistently has noted the absence of a definitive standard from the Supreme Court for determining when a police-citizen contact rises to the level of a constitutional encroachment. In two re-


17. See, e.g., United States v. Block, 660 F.2d 1086 (5th Cir. 1981); United States v. Jackson, 659 F.2d 73 (5th Cir. 1981); Eh I v. Estelle, 656 F.2d 166 (5th Cir. 1981); Hill v. Estelle, 653 F.2d 202 (5th Cir. 1981); Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1981) (en banc); United States v. Broussard, 645 F.2d 504 (5th Cir. 1981); In re Bryan, 645 F.2d 331 (5th Cir. 1981); United States v. Law, 633 F.2d 1156 (5th Cir.), cert. denied, 101 S. Ct. 2332 (1981). See also note 251 infra.


cent cases concerning drug courier profiles, the Supreme Court explored
the limits of the fourth amendment only to stop short of drawing its
boundaries. In *United States v. Mendenhall*, a Supreme Court majority
held there was no fourth amendment violation when drug agents
approached defendant in an airport after defendant had satisfied a number
of characteristics in the agents' drug courier profile. The majority
could not agree on a rationale. Justices Stewart and Rehnquist concluded that
the federal agents' initial approach was not a fourth amendment seizure.
Justice Powell, joined by Chief Justice Burger and Justice Blackmun,
cconcurred in the result but declined to reach the issue, assuming instead
that a seizure had occurred which was justified on the facts. Justices
White, Brennan, Marshall, and Stevens dissented from the decision, as-
suming also that defendant had been seized, but concluding that there
was insufficient suspicion for the seizure. The second recent Supreme
Court case, *Reid v. Georgia*, is noteworthy for its similarity to *Menden-
hall* both on its facts and in its lack of certainty. The Supreme Court
held that the fourth amendment was violated because the profile charac-
teristics that the agents relied upon were insufficient constitutionally.
The issue of whether the initial police-citizen contact was of a constitu-
tional dimension had not been addressed by the state court and simply
was not reached by the Supreme Court. Noting this inability of the Su-
preme Court to provide a framework for analysis, the Fifth Circuit ap-
plied its own precedent during the survey period.

The case that has emerged as the leading Fifth Circuit precedent for
determining when a police-citizen contact rises to the level of a constitu-
tional encroachment is *United States v. Elmore*. Elmore established

21. 446 U.S. 544 (1980). The Supreme Court opinions are analyzed carefully in *United
States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980).

22. A "drug courier profile" has been defined as "a somewhat informal compilation of
characteristics believed to be typical of persons unlawfully carrying narcotics." *Reid v. Geor-
gia*, 448 U.S. 438, 440 (1980). Since many of the characteristics are consistent with com-
pletely innocent behavior, the utility of these profiles as a basis for a constitutional contact
has been questioned. *Id.* at 441; *United States v. Berd*, 634 F.2d 979, 984 n.5 (5th Cir. 1981);

23. 448 U.S. at 438.

24. A Supreme Court answer may be forthcoming. See *Royer v. Florida*, 389 So. 2d 1007

Bowles*, 625 F.2d 526, 532 n.5 (5th Cir. 1980), the court suggested that the *Elmore* analysis
had been eroded by *United States v. Santora*, 619 F.2d 1052 (5th Cir.), *cert. denied*, 449
U.S. 954 (1980). Subsequent opinions seem to have shored up the precedent. See *United
States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Robinson*, 625 F.2d 1211
(5th Cir. 1980). Certainly, decisions during the survey period testify to the preeminence of
the *Elmore* analysis. See text accompanying notes 25-42 infra. The court's decision to re-
hear en banc *United States v. Berry*, 649 F.2d 385 (5th Cir. 1981), may suggest that the
three categories of police-citizen contacts: encounters, stops, and arrests. During the survey period, the court struggled with this threshold classification, which may be understood only within the factual context of the cases.

Police-citizen contacts of the third kind—arrests—are at one end of the fourth amendment spectrum. If a traditional arrest occurs, the seizure is constitutionally infirm unless the arresting officer has probable cause to believe that the suspect is guilty of a specific violation of the law. The arrest paradigm, in which a person is taken physically into custody, leaves little room for doubt with regard to timing. The fourth amendment issue then becomes whether the arresting officer had the requisite probable cause. Police-citizen contacts of the first kind—mere encounters—are at the opposite end of the fourth amendment spectrum. An encounter is an incident of "personal intercourse between police and citizens which may be for investigative purposes but which [is] not [a restraint] on the citizen's liberty and which thus [is] not encompassed by the fourth amendment." Since there is no constitutional encroachment, encounters of this type need not be based on any particular level of suspicion. The difficult constitutional line-drawing entails distinguishing police-citizen contacts of the second kind—stops—from mere encounters. A stop is a "[restraint] of [a citizen] which [is] less than [an arrest] but which nevertheless trigger[s] fourth amendment scrutiny. . . ." In other words, arrests and stops are "seizures" for fourth amendment purposes and encounters are not. The Fifth Circuit has noted that "the determination of whether [a seizure has occurred] often requires a 'refined judgment,' especially when no force, physical restraint, or blatant show of authority is involved." In Mendenhall, Justice Stewart proposed the following objective test for distinguishing between seizures and mere encounters: "[A]
person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

The Fifth Circuit already had embraced implicitly the reasonable person test in Elmore and has applied it in several survey period decisions. In the course of these decisions, the Fifth Circuit has placed its imprimatur on what might be called the “Markonni modus operandi,” named for the Atlanta-based drug enforcement agent who has figured in a host of the leading cases. It appears from all of these decisions that the police may approach a citizen in an airport, identify themselves, request identification or an airline ticket, and briefly question the individual with his permission about travel plans, ownership of luggage, and traveling companions. As long as the district court in the first instance and the court of appeals on review of the record determine that a reasonable person would have believed he was free to go, the police-citizen contact is to be deemed a mere encounter and beneath the fourth amendment threshold.

In a decision remanding the case to the district court for the initial totality-of-the-circumstances determination, the court identified several “matters which would be relevant”:

1. whether the area of the contact was so private that the citizen felt isolated;
2. whether the officers were uniformed and how many there were;
3. whether the physical location of the officers and their body language indicated that the citizen was not free to go if he did not wish to answer the officers’ questions; and
4. whether the questions or the manner in which they were asked was intimidating, accu-

33. 446 U.S. at 554. This approach may be the one all of the Justices have taken. Justice Powell, in his concurring opinion, noted that he did “not necessarily disagree.” Id. at 560 n.1 (Powell, J., concurring). Justice White, writing for the dissenters, observed that whether a seizure has occurred is a “fact-bound question with a totality-of-circumstances assessment that is best left in the first instance to the trial court. . . .” Id. at 569. See also note 24 supra.

34. 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); see United States v. Sanford, 658 F.2d 342, 345 (5th Cir. 1981); United States v. Berd, 634 F.2d 979, 984-85 n.7 (5th Cir. 1981).

35. See, e.g., United States v. Smith, 649 F.2d 305 (5th Cir. 1981); United States v. Williams, 647 F.2d 588 (5th Cir. 1981); United States v. Moeller, 644 F.2d 518 (5th Cir. 1981) (appeal pending); United States v. Lara, 638 F.2d 892 (5th Cir. 1981).


satory, or persistent. These factors must be considered to decide if the citizen is “restrained in any way or . . . his or her cooperation is . . . obtained by coercion, force or other use of authority.” Still, the emphasis is on the impact of verbal exchange. One of Agent Markonni’s ploys was to suggest that a person who was not engaged in criminal activity should be willing to consent to a search. While not alone dispositive, such “offensive statements” as unsupported accusations of criminal activity or suggestions that an innocent person would be willing to waive constitutional rights are relevant to the analysis.

Distinguishing between stops, which are fourth amendment seizures, and encounters, which are not, may seem solely a matter of semantics, but examples of each category exist even though fine lines are difficult to draw. United States v. Pena-Cantu concerned a police-citizen contact that exceeded the de minimis intrusiveness of an encounter and became a seizure of constitutional proportion. In Pena-Cantu, agents of the Immigration and Naturalization Service spotted two automobiles suspected of carrying illegal aliens. Four agents in two unmarked vehicles followed the suspicious automobiles until they stopped. The agents parked directly behind the vehicles, identified themselves, and stood on both sides of the vehicle while they questioned the driver and the passengers concerning their citizenship. The court, applying the Elmore objective standard, had no trouble concluding that a reasonable person would not feel free to leave.

The second essential issue in an arrest is whether there is a sufficient factual basis to support a police-citizen contact of constitutional proportion. The requisite factual basis must increase in certainty as the contact becomes more invasive. An arrest must be supported by probable cause; an investigative stop need only be supported by a reasonable suspicion; a mere encounter requires no significant basis whatsoever.

During the survey period, the court repeated a working definition of probable cause:

[P]robable cause exists whenever the facts and circumstances known to the officer, and of which he has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. The currency of probable cause is probability, not legal certainty; it may exist even though the evidence

39. Id.
41. See, e.g., United States v. Setzer, 654 F.2d 354 (5th Cir. 1981); United States v. Hill, 626 F.2d 429 (5th Cir. 1980); United States v. Robinson, 625 F.2d 1211 (5th Cir. 1980).
43. 639 F.2d 1228 (5th Cir. 1981).
Even though the controlling principles may be so broadly stated, their application is narrowly fact-bound. Indeed, "the decision in one case seldom furnishes a pat answer in another." Two generalizations may be distilled from the surveyed cases. First, the case is rare in which the court is unable to conclude that probable cause supported the arrest. Second, the court continues to place an almost excessive emphasis on the expertise of the arresting officer in order to find probable cause for warrantless arrests. These generalizations may be explained by the realization that the probable cause standard of the fourth amendment is applied to data in arrests of suspects in a way that is markedly different from searches for evidence or contraband.

For less intrusive seizures—investigative stops—the Supreme Court explicitly has recognized an exception to the fourth amendment requirement of probable cause. The articulable facts known to the stopping officer must establish only a reasonable suspicion that the stopped citizen is involved in criminal activity. Whereas the probable cause cases supported two generalizations, the reasonable suspicion cases admit but one: "Given the degree that this determination is dependent upon the peculiar facts of the situation presented, the appearance of inconsistency


at least to advocates [and surveyors], is somewhat unavoidable."51

The most important survey development in the reasonable suspension area concerns the significance of the drug courier profile52 in justifying a stop. A review of presurvey cases in which the court examined airport stops by agents demonstrated that the reasonable suspicion standard was not automatically satisfied merely when the characteristics of a person under surveillance satisfied some or all of the profile characteristics.53 In United States v. Sanford,54 the majority suggested in dictum that some of the profile characteristics can be "considered significant when properly evaluated" toward a finding of reasonable suspicion.55 The dissent rejected the majority's notion that there were any additional facts in Sanford to be considered along with the profile characteristics to support a finding of reasonable suspicion.56 Since the issue was not necessary to the holding in Sanford and the issue likewise was discussed without definitive resolution in other survey opinions,57 it remains open. The issue may be something of a straw person. It seems beyond doubt that the profile is a legitimate tool of law enforcement. Many of the characteristics included in the profile are, however, consistent with innocence. The court has expressed a concern that the profiles not be abused to support totally arbitrary and random stops.58 It is almost too obvious that whether law en-

52. The drug courier profile is a list of primary and secondary characteristics that drug agents use to identify drug couriers in airports. A typical profile follows:

The seven primary characteristics are: (1) arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as a rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers.

The secondary characteristics are (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.

54. 658 F.2d 342 (5th Cir. 1981).
55. Id. at 346.
56. Id. at 348. (Randall, J., concurring in part and dissenting in part).
58. United States v. Berry, 636 F.2d 1075, 1080 n.8 (5th Cir. 1981); United States v.
Enforcement agents include a factor in the profile should be largely irrelevant to the court's evaluation of reasonable suspicion based on the circumstances. The actual facts must control. The only conceivable relevance of inclusion on the list of a particular characteristic, which the facts of a case demonstrate supported a stop, is the additional weight attributable to the training and experience of the officers and the collective expertise of the agency.\\textsuperscript{68} The reasonable suspicion standard is objective. Nevertheless, "it is important to recall that a trained law enforcement agent may be 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.'"\\textsuperscript{69} One or more particular characteristics in the actual context may trigger a reasonable suspicion in a trained agent. That the characteristic is on a list of things to watch for is of no additional consequence.

The third essential issue that seizures of persons raise is whether the government actors followed the appropriate procedures. During the survey period, the court considered a few questions in this area, which call for little more than the application of recent Supreme Court precedent.\\footnote{69. See text accompanying notes 46-48 supra.}

### III. Search and Seizure

The protection of the fourth amendment comes into play if, and only if, the government, as searcher and seizer, has violated an individual's reasonable expectation of privacy. Several survey decisions dealt with the most basic fourth amendment tenets. The general rule is that the fourth amendment does not apply to searches made by foreign officials in their own country unless either the conduct of the foreign officials "shocks the conscience" or the search was really an American function due to participation or instigation by American officials.\\textsuperscript{69} In United States v. Hau

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Pulvano, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980).

59. See text accompanying notes 46-48 supra.


61. See, e.g., Holifield v. Davis, 662 F.2d 710 (11th Cir. 1981) (defendant's arrest pursuant to warrant issued under city code provision that was subsequently declared unconstitutional was not illegal); United States v. Mason, 661 F.2d 45 (5th Cir. 1981) (defendant had no protected expectation of privacy when he answered the door of his home, and his warrantless arrest was constitutional); United States v. Congote, 656 F.2d 971 (5th Cir. 1981) (the fourth amendment prohibits the police from entering a suspect's home to make a routine felony arrest in the absence of exigent circumstances); Carnejo-Molina v. Immigration & Naturalization Serv., 649 F.2d 1145 (5th Cir. 1981).

the court found no reason to depart from the general rule. The search was carried out pursuant to a Panamanian search warrant in an acceptable manner. American official involvement was limited to notifying the local officials that a plane suspected of carrying narcotics had crashed in Panama. The Panamanian officials did not act as agents for, or under pressure from, the American officials. The mere notification by American officials was an insufficient level of participation and involvement to render the search American.  

When the focus is shifted from the searcher and seizer to the place or thing searched and seized, the aggrieved party also must demonstrate the invasion of a reasonable expectation of privacy to establish a fourth amendment violation. The limits of the fourth amendment are two dimensional. Either there is no expectation of privacy due to the intrinsic nature of the thing itself, or the person does not have a sufficiently personal nexus with the thing. These two concepts sometimes are referred to as the public exposure doctrine and the requirement of standing. They represent closely related concepts used to demarcate the constitutionally cognizable privacy interest.  

The analysis under the public exposure doctrine distinguishes between the protected and the unprotected on the basis of the individual's outward manifestations. The Supreme Court made the distinction in the landmark decision Katz v. United States:  

"What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."  

A person has no justifiable expectation of privacy in the contents of the original checks, deposit slips, and financial statements that he voluntarily turns over to a third party bank. He cannot entertain a legitimate expectation that the bank will not disclose the documents to authorities. A father who produced documents for government agents and stated that he wished to aid their investigation had no fourth amend-

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63. 661 F.2d 436 (5th Cir. 1981).
64. The court did not discuss whether the search would have triggered the exclusionary rule or whether some warrant-excusing condition was present. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).
68. 389 U.S. at 351-52.
ment claim, even though agents were interviewing his daughter in his home. Neither the captain nor the crew could claim a legitimate expectation of privacy in an area subject to the common access of those legitimately aboard the vessel. Finally, Katz has been applied to the use of trained dogs. Whatever privacy interest there is in the contents of luggage, the use of dogs to sniff the exterior of luggage did not invade fourth amendment protection, even when the agents "prepped" the bag by squeezing the air out of them.

The arcane concept of standing to raise fourth amendment claims, although somewhat dated, focuses on the nexus between the aggrieved party and the place or thing subjected to search or seizure. Pragmatically there is little, if any, difference between considering the personal interest of the individual and measuring the reasonableness of an expectation of privacy in the evidence. The Supreme Court recently said as much. Nevertheless, the slogan survives. A new analytical framework has emerged from a spate of recent Supreme Court decisions. In order to contest the validity of a search and seizure, an accused must assert a property or possessory interest in the property searched or at least some legitimate expectation of privacy in it. Even an accused charged with criminal possession of the evidence seized may not claim the protection of the fourth amendment in the absence of a legitimate expectation of privacy. Bystanders, visitors, or absentees from the scene who have no ownership or possessory rights in the property searched cannot be heard.

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71. United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981); United States v. Willis, 63 F.2d 1335 (5th Cir. 1981); United States v. DeWeese, 632 F.2d 1267 (5th Cir. 1980) (appeal pending); accord, United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (en banc).
to complain.80

In response to this renaissance of privacy, the Fifth Circuit has fractured the legitimate expectation of privacy talisman into several nonconstitutional factors, with no single factor predominating: (1) whether the defendant has a property interest in the thing seized or the place searched; (2) whether the defendant has a possessory interest in the thing seized or the place searched; (3) whether the defendant has the right to exclude others from that place; (4) whether the defendant has exhibited a subjective expectation that it would remain inviolate against government encroachment; (5) whether the defendant manifested a concern for privacy by taking expected precautions against invasion; (6) whether the defendant was legitimately present or in possession.81 The court applied these factors in several survey decisions. In one decision, defendant was found to have a legitimate expectation of privacy in gambling records he secreted in his parents’ home under their bed.82 His parents had ensured his unencumbered access by giving him a key and permission to use their home. He kept clothes there and occasionally stayed overnight. He conducted his gambling activities at their home, owned the records, and exhibited an obvious subjective expectation that the hidden records would remain private. In contrast, a second decision held that although defendants were present as guests of the tenant when the apartment was searched, they could not challenge the search of a bathroom cabinet in which drugs were found even though they subjectively intended that their interrupted drug transaction remain private.83 A third case emphasized how fact-bound this analysis is. Defendants in this third case were not permitted to challenge the search of a house even though they had occupied the premises for several weeks,84 a factor the concurring judge felt controlled the issue.85 Searches of personalty resulted in similar distinctions. One defendant, charged with a possessory offense, could challenge the search of a package mailed to him even though he denied ownership since his claim that he was picking it up for someone else amounted to an assertion of a lawful possessory claim.86 In a second case, a defendant could not claim the protection of the fourth amendment against a search of a van he did not own even though he drove it on several errands after

82. Id.
85. Id. at 221-22 (Tate, J., concurring).
the search. Finally, any expectation of privacy in personal property will be deemed forfeited by its abandonment.

Although the framers of the fourth amendment apparently were more concerned with the elements of a valid warrant than with the criteria for lawful warrantless searches and seizures, their priority has been superseded to a great extent. Two polar approaches to the warrant requirement exist. On the one hand, some commentators interpret the fourth amendment to require search warrants in all but a few narrowly defined situations. Their orientation is to inquire whether it was reasonable for the officials to have failed to procure a warrant before conducting the search and seizure. On the other hand, other commentators interpret the fourth amendment warrant clause as merely stating the standards for the issuance of a warrant, should the officials seek one. Their orientation is to inquire whether the official conduct in the particular search and seizure was reasonable, with or without a warrant, since the protection is only against unreasonable searches.

If this survey year is any indicator the judges of the Fifth Circuit seem to have embraced this latter orientation. While decisions concerning the warrant itself are few and of little consequence, the reports are teeming with decisions involving warrantless searches, including searches incident to a lawful arrest, consent searches, plain view searches, border searches, exigent searches, and automobile searches. The remainder of this section is devoted to these warrant exceptions.

The first significant exception to the warrant requirement is the search incident to a lawful arrest. The rationale of this exception defines its scope. Contemporaneous with a valid arrest, officials may search the person and the area within his immediate control for weapons, evidence the might be subject to destruction, or contraband. The full search of the person permits the search of the contents of a wallet found in the person.

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89. C. Whitebread, CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 4.02, at 102-03 (1980).
son’s trousers pocket or a piece of paper in his shirt pocket. The area under the arrestee’s control includes boxes of stolen articles present with the arrestee in her car. The Fifth Circuit has expanded the searchable area to allow a quick and cursory security check of the arrestee’s lodging, even though the arrest is effected outside, when the arresting officials have reasonable grounds to believe that there are others present inside who pose a security risk.

Consent searches, a second exception to the warrant clause, raise three basic concerns: (1) whether the consent is valid; (2) whether the search was within the scope of the consent; and (3) whether the appropriate person gave the consent. Although the consent must be voluntary in light of all the circumstances, an unawareness of the ability to refuse does not destroy voluntariness, even if the person is in custody. The Fifth Circuit has immunized the district court’s determination of voluntariness, except when clearly erroneous, thereby making it a nearly futile appellate issue. While the scope of the consent given may expressly limit the search, the permission granted usually will be interpreted broadly to allow for an effective search. Finally, a third party may consent. A wife, for example, who enjoyed joint control of an automobile with her husband could consent to its search although her husband had previously refused consent.

A third well-worn exception to the warrant requirement is the so-called

100. Although defendant affirmatively helped the officers in the search, in United States v. Webb, 633 F.2d 1140 (5th Cir. 1981), the court added an aside that shows just how voluntary the consent must be: “He was not intoxicated, was not handcuffed, and was not threatened with the shotgun.” Id. at 1142. See also, e.g., United States v. Williams, 647 F.2d 588 (5th Cir. 1981); United States v. Moeller, 644 F.2d 518 (5th Cir. 1981) (appeal pending); United States v. Berry, 636 F.2d 1075 (5th Cir. 1981); United States v. Dorr, 636 F.2d 117 (5th Cir. 1981).
plain view doctrine which, simply stated, permits seizure of objects falling within the plain view of an officer who has a right to be in a position to have that view. One significant survey development concerned the search of carry-on luggage in airports. Sequentially, once the security screening x-ray machine discloses suspicious images, the luggage may be inspected for weapons or dangerous objects. Once opened, the contents are in plain view and any contraband is subject to a warrantless seizure.

Border searches, sometimes sanctioned as an exception to the warrant requirement, are more correctly justified on the theory that a person crossing an international boundary has no reasonable expectation of privacy. The most important border search decision during the survey period was United States v. Sandler, in which the en banc court considered the appropriateness of a personal pat-down search as part of a routine border inspection. Prior decisions had established that a routine search of luggage at the border requires no justification. In Sandler, the majority sought to measure the intrusiveness of personal searches in order to determine the level of justification required. The court distinguished between pat-down searches of a person and the more intrusive strip searches or body cavity searches that must rest on a reasonable suspicion even at the border. The court defined the routine pat-down to include a frisk, the removal of outer garments such as coats, hats, or shoes, and the emptying of pockets, wallets, or purses. The court then went on to hold that no justification was required for these pat-downs other than the person's decision to cross the national boundary.


106. 644 F.2d 1163 (5th Cir. 1981) (en banc). See also, e.g., United States v. MacPherson, 664 F.2d 69 (5th Cir. 1981); United States v. Bland, 653 F.2d 989 (5th Cir. 1981); United States v. Ramos, 645 F.2d 318 (5th Cir. 1981).


108. 644 F.2d at 1169. See also United States v. Ramos, 645 F.2d 318 (5th Cir. 1981).
Sometimes warrantless police searches and seizures are justified simply because "the exigencies of the situation made that course imperative." Whereas all the warrant exceptions, except consent searches, are based to some extent on exigency, in this category of warrantless searches the emergency is pronounced. In these situations, the court must measure the intensity of the exigency and the permissible scope of the search. The hot pursuit of apparent drug smugglers, the immediate need to discover fleeing coconspirators, and the danger posed by the possible presence of an armed fugitive at large late at night in a rural area, coalesced in sufficient exigency to justify the opening of a zippered suitcase found in the defendant's truck and a cursory search for some identification. Although acknowledging that it was a "close call," the court deemed the warrantless search reasonable as an effort to block the flight of armed fugitives who were a serious danger to the public. In a second exigency search case, the court approved the seizure of marijuana from an off-loading vessel and land transports which were searched during the excitement and confusion of a drug raid because of the danger that one of the suspects would flee in the vehicles or that the vehicles may have hidden coconspirators who presented a danger to the police. In a third case, the exigent search exception overcame the recent Supreme Court rulings which require that the police obtain a search warrant before opening any closed opaque container whose exterior or shape does not disclose its probable contents. The court also upheld the warrantless exigent search of a briefcase found in the trunk of a vehicle when the search was based on the suspicion that the briefcase contained a loaded spring-triggered pistol. By contrast, the contents of a brown paper bag found next to the briefcase were suppressed for lack of any indication of an exigency creating danger.

The final warrant clause exception to be considered is the so-called automobile exception. The term is something of a misnomer since the category is neither limited to automobiles nor does it cover all automobile


111. Id. at 1190-93.


114. 646 F.2d at 959. See also United States v. Rivera, 654 F.2d 1048 (5th Cir. 1981).

115. 646 F.2d at 959-62.
An automobile may be searched without a warrant when there are exigent circumstances and probable cause to believe that it contains articles subject to seizure.117 The automobile exception is not limited to situations in which the vehicle is seized after police stop it on a highway. Rather, exigency can be derived from the unrestricted public access to a parked, locked automobile in the immediate area of a bank robbery when the fleeing bank robber has not been apprehended and police have probable cause to believe that the automobile contains evidence necessary to his capture.118 An initial exigency of this type may allow a search even after impoundment as long as there is the slightest chance that the vehicle or its contents may be moved before a valid search warrant can be obtained.119

The electronic age has affected this facet of fourth amendment law. The issue of installing a beeper on a vehicle without a warrant has divided the courts of appeals. The First Circuit has held that no warrant is required for the attachment and monitoring of beepers but that probable cause must exist to justify the intrusion.120 The Sixth Circuit requires a warrant and probable cause for the installation of a beeper.121 Other circuits have avoided deciding the issue because judicial authorization, consent, or exigent circumstances justified the installation.122 The Fifth Circuit considered the issue en banc a few terms ago but divided evenly without conclusion.123 During the survey period, the Fifth Circuit finally did resolve the issue in United States v. Michael.124 Recognizing that the fourth amendment protects individuals from violations of their reasonable expectation of privacy, the court initially opined that this expectation is diminished with respect to automobiles. Nonetheless, whatever reason-

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119. Id. at 1306. See also United States v. Chadwick, 433 U.S. 1, 13 n.7 (1977); United States v. Mitchell, 538 F.2d 1230 (5th Cir. 1976) (en banc), cert. denied, 430 U.S. 945 (1977).
121. United States v. Bailey, 628 F.2d 938 (6th Cir. 1980).
123. United States v. Holmes, 537 F.2d 227 (5th Cir. 1976) (en banc).
124. 645 F.2d 252 (5th Cir. 1981) (en banc). The new rule for the Fifth Circuit seems secure for a time. Although three justices dissented, the Supreme Court declined to reconcile the conflicting approaches of the circuits. Michael v. United States, 102 S. Ct. 489 (1981).
able expectation of privacy of movement remained, that expectation was compromised by the installation of a beeper in defendant's vehicle while the vehicle was parked in a public place and when the vehicle was tracked on public roads during the daytime. The court balanced this diminution of privacy against the governmental interest in eliminating criminal conduct through effective surveillance. Since the privacy interest was slight and the governmental interest was significant, the court concluded that reasonable suspicion entitled government agents to install a beeper in a private automobile without a warrant. 125

IV. SELF-INCrimINATION

During the survey period, pretrial applications of the fifth amendment privilege against self-incrimination involved issues of voluntariness as well as certain nuances of the Miranda 128 doctrine. While an inquiry into the voluntariness of the confession itself theoretically is a separate and distinct issue from the voluntariness of a Miranda waiver, both are determined under a "totality of the circumstances" approach and, as a consequence, the theoretical distinction has become factually blurred. 127

The ultimate issue of voluntariness is an issue of law which requires that the appellate court make an independent assessment of the totality of the circumstances. 128 Thus viewed, the court "must conclude that [the defendant] made an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him." 129 The burden of demonstrating constitutional voluntariness is on the government. 129 The focus is on the impact of the circumstances on the defendant; the truth or falsity of the confession itself is not part of the "totality of the circumstances." 130 In the typical situation the government demonstrates volun-

125. At the border, neither warrant nor suspicion is necessary. See United States v. Sheikh, 654 F.2d 1057 (5th Cir. 1981). When installed pursuant to a warrant, the warrant will be scrutinized for reasonableness of the authority actually exercised. See United States v. Cady, 651 F.2d 290 (5th Cir. 1981) (appeal pending).


131. United States v. Kreczmer, 638 F.2d 108 (5th Cir. 1981); see also Lego v. Twomey,
tariness with a signed waiver form which, "though not conclusive, is 'usually strong proof of the voluntariness of the waiver."' 132 Issues concerning free will and rational intellect are more troublesome. 133 A confession is involuntary if obtained when "the defendant is so intoxicated by alcohol or other drugs that the confession is not rationally and freely given." 134 Educational and mental shortcomings also are relevant factors in the voluntariness analysis. 135 The fundamental concern is that a weak will or mind is vulnerable to overreaching. 136 Henry v. Dees 137 involved such a mental deficiency. Defendant was a twenty-year-old marginally retarded man charged with armed robbery. His intelligence quotient was between sixty-five and sixty-nine; he had completed the sixth grade, but he read on a second grade level. Defense counsel and the prosecutor agreed that defendant would take a polygraph test. If he passed, the prosecutor would nolle prosequi the case; if he failed, defendant would plead guilty. During the examination and without the presence of counsel, the polygraph examiner misrepresented to the defendant that he had failed and defendant subsequently made an inculpatory statement that was introduced at his trial. Expressing some doubt whether defendant had the capacity to waive his rights, 138 the court held that the subterfuge had negated any semblance of voluntariness. Signed waivers were not enough. In these situations, the court concluded, extra precautions were necessary to assure voluntariness and in this case none were taken.

In Miranda v. Arizona, 139 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 self-incrimination." 140 The most important aspect of the decision, the fa-

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137. 658 F.2d 406 (5th Cir. 1981).
138. Id. at 409 & n.6 (citing Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972)).
140. Id. at 444. The accused must be informed as follows:
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
mous litany of warnings, played no significant part in the survey decisions. Rather, the Miranda doctrine cases during the survey period concerned the questions of when a suspect is in custody and what constitutes an interrogation.

While a traditional arrest with all the trappings of police apprehension and transportation to the station house for processing satisfies the custody requirement, something less will suffice to mandate the Miranda warnings. Once probable cause to arrest exists, the Fifth Circuit considers three factors in deciding whether an interrogation occurred in a custodial setting: (1) whether the subjective intent of the officer doing the interrogating was to hold the defendant; (2) whether the defendant's subjective belief was that his freedom was significantly restricted; and (3) whether the investigation had focused on the defendant at the time of the interrogation. When postal officials removed a suspect from her car, escorted the suspect into her office, and detained her, the custody requirement was satisfied without formal words of arrest or the filing of a formal arrest record. Under the three-pronged test, other situations are just as obviously not custodial. A police-citizen encounter at an airport is not a custodial interrogation even when the citizen declines cooperation and the agent persists. Warnings need not be given during such noncustodial interrogations as "on the scene questioning as to the facts surrounding the crime and other general questioning of citizens in the fact-finding process." The Coast Guard's routine stop, boarding, and inspection of an American vessel on the high seas does not create a custodial setting.

Even though an accused is in custody, he will not be entitled to the

questioning if he so desires.

*Id.* at 479.

141. It should be noted that the erroneous admission of statements obtained in violation of the Miranda rules does not automatically require reversal. Such violations are subject to the constitutional harmless error rule. See generally Germany v. Estelle, 639 F.2d 1301, 1303 (5th Cir. 1981).


144. United States v. Roberson, 650 F.2d 84, 86 (5th Cir. 1981) (appeal pending); see also United States v. Darland, 659 F.2d 70, 72 (5th Cir. 1981).


Miranda warnings if neither an interrogation nor its functional equivalent occurs. At the extremes, the interrogation issue is easily resolved. Actual questioning and interrogation require a warning; in the total absence of any inquisitorial activity the warning requirement is not triggered. In between these two extremes, any interaction that is the functional equivalent of an interrogation must be accompanied by a warning. Interrogation is functionally defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Functional interrogation continued even after an interview in defendant's cell had formally ceased, for example, when the agent stated, "'You sure messed up by stealing a truck and bringing it from Alabama to Florida,'" which evoked the response, "'Well, I needed transportation.'" A police officer's statement that defendant had failed a polygraph test and the officer's challenge to defendant to "tell the truth about this thing" was a functional interrogation. Finally, volunteered and spontaneous statements made before or after actual interrogation do not satisfy the interrogation criterion.

One last decision that dealt with a Miranda issue was Battie v. Estelle. The court withheld decision of Battie pending the decision of the Supreme Court in Estelle v. Smith. In Smith, the Supreme Court held that the considerations compelling a warning prior to custodial interrogation apply equally to court-ordered psychiatric inquiries into competency for trial that the prosecution uses at the penalty stage of a capital trial. After carefully evaluating the Supreme Court's holding and the applicable constitutional principles, the Fifth Circuit concluded that Smith should be applied retroactively. Absent the Miranda warning and waiver, the testimony of the court-appointed psychiatrist relating his conversation with defendant was inadmissible.

151. United States v. Little, 647 F.2d 533, 533 (5th Cir. 1980).
The most significant remaining group of fifth amendment survey decisions concerns the perennial problem of trial comments about the failure of a criminal defendant to testify in his own defense. To reverse for improper comment, the Fifth Circuit must conclude either that the speaker’s manifest intention was to comment on the accused’s failure to testify or that the character of the remark was such that the jury naturally and necessarily would consider it as such. Thus, both direct and indirect comments that undermine the privilege are the basis for reversal. Since the privilege is personal, the court has distinguished carefully between comments concerning the failure of the defense to come forward with an explanation of the evidence, which are permissible, and comments concerning the defendant’s own silence in the face of damning evidence, which are not permissible. Furthermore, improper comments by persons other than the prosecutor, such as statements by a codefendant or a codefendant’s attorney, also can undermine the privilege.

While occasionally the court applies these standards summarily and does not mention the allegedly offending comment, the directness of the comment in context is controlling. Some survey examples illustrate this point. An exhortation to the jury by codefendant’s attorney that “things are not always as they seem” was a legitimate request that the jury look beyond the apparent. When, in closing argument, defense counsel referred to defendant’s life being in jeopardy of ruin, it was permissible for the prosecutor to rebut by arguing that defendant had charted his own fate and was blameworthy on the uncontroverted facts.

159. See, e.g., United States v. Pool, 660 F.2d 547 (5th Cir. 1981) (defendants waived fifth amendment claim by failing to assert it in a timely fashion); United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981) (search and seizure of gambling records was not compulsory self-incrimination); In re Grand Jury Subpoena, 646 F.2d 963 (5th Cir. 1981) (privilege against self-incrimination reaches compelled production of individual’s private books and papers in response to grand jury subpoena); United States v. Ylda, 643 F.2d 348 (5th Cir. 1981) (prosecutor’s comment on accused’s postarrest silence was harmless error); United States v. Meeks, 642 F.2d 733 (5th Cir. 1981) (appeal pending) (conviction of civil contempt could not be grounded upon an assertion of the privilege against self-incrimination by a defendant when the defendant was asked why he could not produce subpoenaed corporate records).


161. United States v. Garcia, 655 F.2d 59, 64 (5th Cir. 1981); United States v. Forrest, 620 F.2d 446, 455 (5th Cir. 1980).

162. United States v. Fogg, 652 F.2d 551, 557 (5th Cir. 1981); United States v. Bright, 630 F.2d 804, 825 (5th Cir. 1980).


A prosecutor's comment that, "if he wants to take the stand he may" was not a reversible error reference to defendant's election not to testify, when in context the prosecutor seemed to be referring to defense counsel. A prosecutor's argument that agents' live testimony should be given more weight than their written report could not be construed as an indirect comment on the accused's silence. When a defendant voluntarily takes the stand to testify in his own defense, he waives the privilege to an extent. On proper cross-examination the prosecutor may ask questions to which the defendant invokes the fifth amendment and this will not be reversible error.

V. DOUBLE JEOPARDY

In civil proceedings, the doctrine of res judicata prevents parties from relitigating claims and factual issues previously determined in a final judgment on the merits. This doctrine protects two societal values: prospective litigants are protected from the expense and harassment of unwanted participation in litigation, and scarce judicial resources are conserved. Double jeopardy, the criminal counterpart to res judicata, emphasizes the first goal. Although modern double jeopardy principles have their origin in abstract and ancient concepts of law, the basic policy underlying the constitutional guarantee has remained constant. Once an individual has been exposed to the substantial danger and risk of criminal punishment, he should not, without his consent, be exposed a second time to the same danger for the same offense. The courts have not formulated an all-encompassing theory to implement the fifth amendment policy. Rather, double jeopardy case law has developed several rules, each being applied to a different factual situation, each engendering disparate policy considerations, and each yielding to a myriad of exceptions. Survey decisions may be grouped into three categories of issues: (1) determining when jeopardy attaches; (2) applying exceptions to the bar against multiple prosecutions; and (3) deciding when the same offense is involved in a subsequent proceeding.

In determining if a person is "twice in jeopardy," the initial question is

whether a prior exposure was a first jeopardy. A former jeopardy becomes fixed, if at all, when a jury is empanelled and sworn or, in bench trials, when the first witness is sworn.\textsuperscript{175} Obviously, jeopardy has attached by the time a defendant begins serving his sentence.\textsuperscript{174} Whether evidence touching the particular charges actually is introduced at trial is of no relevance to the attachment issue.\textsuperscript{176} When charges against a defendant are dismissed before a jury is empanelled, no jeopardy attaches to be antecedent to a subsequent indictment.\textsuperscript{176} If an accused pleads guilty, jeopardy attaches when the plea is taken, apparently because the accused is deemed the first witness.\textsuperscript{177}

In recent years, the Supreme Court has expanded the focus of the double jeopardy provision beyond the individual's protection from a second run through the gauntlet\textsuperscript{178} to include the public's interest. The basic duality is expressed in two lines of cases. The first line considers when trial error insulates a defendant from reprosecution and the second line considers retrials after mistrials.\textsuperscript{179}

As a general rule, the government is not barred from reprosecuting a defendant who has won an appellate reversal, either because he waives a later double jeopardy claim or because the original jeopardy is somehow continued.\textsuperscript{180} The double jeopardy clause does, however, preclude "a second trial once a reviewing court has determined that the evidence introduced at trial was insufficient to sustain the verdict."\textsuperscript{181} One Fifth Circuit consequence of this exception is that on appeal the court will evaluate a claim of inadequate evidence despite a reversal on other grounds in order to prejudge a former jeopardy claim upon retrial.\textsuperscript{182} Still left unresolved


\textsuperscript{174} Williams v. Wainwright, 650 F.2d 58, 61 (5th Cir. 1981).

\textsuperscript{175} United States v. Fine, 644 F.2d 1018, 1022 n.12 (5th Cir.), cert. denied, 102 S. Ct. 669 (1981).

\textsuperscript{176} United States v. Futch, 637 F.2d 386, 389 (5th Cir. 1981).

\textsuperscript{177} United States v. Broussard, 645 F.2d 504 (5th Cir. 1981). This plea, when made knowingly and voluntarily, waives only nonjurisdictional defects and not a claim of former jeopardy. Id. at 505.


\textsuperscript{182} United States v. Goss, 650 F.2d 1336, 1340-44 (5th Cir. 1981).
is whether a second trial is prohibited when the legally competent evidence, as distinguished from all the evidence admitted, is insufficient to sustain a conviction. This exception raises procedural issues as well as constitutional issues. While appellate courts have jurisdiction to entertain interlocutory appeals from collateral pretrial orders denying dismissal on double jeopardy grounds, the substance of the motion determines jurisdiction. It is not enough to justify an interlocutory appeal by a simple claim that the evidence is insufficient and that the denial of the motion to acquit is wrong. Instead, the appellate court must be asked to decide whether a prior determination of insufficiency bars retrial either in the form of a jury finding of not guilty, a trial judge's grant of an acquittal motion, or an earlier appellate court reversal on insufficiency grounds.

The basic duality of double jeopardy is demonstrated vividly in the circumstance of a mistrial. The Supreme Court has held that the plea in bar does not apply when "the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice."

When the trial judge sua sponte declares a mistrial, the decision is so discretionary that it will not bar a reprosecution unless the trial judge failed to consider carefully the alternatives and acted in an abrupt, erratic, or precipitate manner. Thus, a mistrial hastily entered because a juror forgot to bring his high blood pressure pills from home barred further prosecution. On the other hand, a mistrial based on the death of a juror's mother and entered after the judge deliberated was an exercise of the judge's sound discretion and did not bar reprosecution.

When the defense makes the motion for mistrial, the double jeopardy clause will bar reprosecution only in narrow circumstances. Supreme Court and Fifth Circuit precedent establish the criteria. A mistrial entered merely to avoid the consequences of judicial or prosecutorial error

188. Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1980).
189. Cherry v. Director of State Bd. of Corrections, 635 F.2d 414 (5th Cir. 1981) (en banc).
does not bar reprosecution in and of itself. The misconduct of the judge or prosecutor must be in bad faith, intentional or grossly negligent, and seriously prejudicial to the defendant. Three survey period decisions called for application of these criteria. A prosecutor’s failure to disclose a witness’ new address to the defense, even after the trial judge directed him to do so, did not demonstrate sufficient bad faith or prejudice to the defense to bar reprosecution. A prosecutor’s intransigent misinterpretation of precedent did not “descend to the [requisite] level of intentional misconduct, gross negligence, or prosecutorial overreaching.” A mistrial granted on a defense motion did not bar reprosecution when an allegedly duplicitous count was included in an indictment. The indictment had been designed to meet defense objections to an earlier indictment and had survived pretrial defense challenges even though the duplicity was discovered only after trial.

Because the double jeopardy clause only proscribes multiple punishments for the “same offense,” a critical inquiry is whether two prosecutions involve distinct and independent offenses. The so-called same evidence test may be simply stated: if there is any factual difference between the elements to be proven under two provisions, the two instances are not the same offense. Two separate substantive offenses also will satisfy this test. Additionally, a conspiracy charge is not the


192. United States v. Luttrell, 609 F.2d 1190, 1191 (5th Cir. 1980); United States v. Kessler, 530 F.2d 1124, 1126 (5th Cir. 1976).


same offense as an attempt, and a conspiracy is a separate offense from the underlying substantive offense. Two alleged conspiracies may be either separate offenses or the same offense. The Fifth Circuit has identified five factors to determine whether a unified conspiracy exists: (1) time; (2) the existence of coconspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government and any other description of the offense that indicates the nature and scope of the illicit activity; and (5) the locations where the events took place.

The collateral estoppel doctrine is a final dimension of the double jeopardy provision. The doctrine applies when an issue of fact, ultimate or merely evidentiary, has been determined by a valid and final judgment. Collateral estoppel may operate to bar completely a subsequent prosecution or to bar introduction or argument of certain facts necessarily established in the prior proceedings. The doctrine has no currency within a single proceeding. An attempt to pass a counterfeit bill, for example, was not the same offense as a completed pass of a different bill that had been charged in a prior indictment. Nevertheless, collateral estoppel barred prosecution of the attempt charge because the prior prosecution had established that defendant had no knowledge that any bill passed to the same recipient on the same night was counterfeit. In another case, defendant was acquitted of charges stemming from the use of a telephone to facilitate the possession of heroin with intent to distribute. He was acquitted because the conversation concerned only sham heroin. The acquittal did not, however, bar a later charge of telephone facilitation unrelated to the first and concerning real heroin.

199. United States v. Anderson, 651 F.2d 375 (5th Cir. 1981) (conspiracy to import controlled substance separate from attempt to import controlled substance).

200. United States v. Counter, 661 F.2d 374 (5th Cir. 1981) (substantive crime of using a communication facility to commit a federal drug offense is separate from conspiracy to do the same); United States v. Pearson, 655 F.2d 569 (5th Cir. 1981) (importing heroin separate from conspiracy to do the same); United States v. Martino, 648 F.2d 367 (5th Cir. 1981) (appeal pending) (violating the Racketeer Influenced and Corrupt Organizations Act separate from conspiracy to do the same); United States v. Broussard, 645 F.2d 504 (5th Cir. 1981) (possessing marijuana separate from conspiracy to do the same).


203. United States v. Mock, 604 F.2d 336, 338 (5th Cir. 1979).

204. United States v. Caucci, 635 F.2d 441, 448 (5th Cir. 1981).


VI. Right to Counsel

In a leading case, the Fifth Circuit observed that, "the right to counsel is a vital component in the scheme of due process and the keystone of our adversary system of criminal justice."\(^{207}\) The centrality of the right to counsel is a result of judicial interpretation rather than textual emphasis. Judicial interpretation has created three variations on the right to counsel theme. They are entitlement, surrender, and sufficiency.

The modern status of the entitlement to counsel at trial is well-defined. As it has evolved, the right to counsel is engaged by any length of actual imprisonment. No indigent person may be sentenced to a term of imprisonment unless the government has afforded the defendant with an opportunity to be assisted at trial by appointed counsel.\(^{208}\) This guarantee has significant rippling effects beyond the primary flawed conviction. A prior conviction that is unconstitutional because defendant had no counsel may not later be "used against a person either to support guilt or enhance punishment for another offense" and to do so would be "inherently prejudicial."\(^{209}\) The Fifth Circuit had held that a prior conviction entered without counsel for which no imprisonment was imposed may be introduced at the punishment phase of a trial.\(^{210}\) During the survey year, the court concluded that the admission at the punishment phase of a trial of a prior counselless conviction for which a three day imprisonment was imposed was harmless constitutional error.\(^{211}\) Generally, when the guilt or innocence of a defendant rests on his credibility, the use of a constitutionally void prior conviction for impeachment is forbidden.\(^{212}\) Within this category, the Fifth Circuit has permitted the introduction at a subsequent trial of a prior conviction then pending on appeal, subject to explanation by counsel that the prior conviction may be set aside.\(^{213}\) This survey year the court held that, in a state trial in which defendant’s credibility determined guilt or innocence, the introduction of a prior conviction was reversible error even though the prior conviction was pending on appeal when introduced and only subsequently was overturned in part on the

\(^{207}\) Gandy v. Alabama, 569 F.2d 1318, 1320 (5th Cir. 1978).


\(^{210}\) Thompson v. Estelle, 642 F.2d 996, 999 (5th Cir. 1981).


\(^{213}\) See, e.g., United States v. Klein, 560 F.2d 1236 (5th Cir. 1977), cert. denied, 434 U.S. 1073 (1978); United States v. Franicevich, 471 F.2d 427 (5th Cir. 1973).
ground that defendant was denied effective assistance of counsel.214
It should be noted that the sixth amendment entitlement goes beyond
the courtroom and counsel.215 A defendant is entitled to counsel upon initia-
tion of adversary proceedings.216 As a practical matter, this occurs
"when ‘the government ha[d] committed itself to prosecute’" and the in-
dividual finds "himself faced with the prosecutorial forces of organized
society, and immersed in the intricacies of substantive and procedural
criminal law."217 According to the Fifth Circuit, this immersion does not
occur when a show-up identification is made during the investigation on
the night of the crime prior to any government commitment to prose-
cute.218 Although the sixth amendment sometimes requires defense sup-
port beyond the appointment of counsel, when there was no evidence that
the physician appointed to conduct a psychiatric examination was un-
qualified and the physician’s report stated that defendant was not insane,
the failure to appoint a qualified psychiatrist did not offend the
constitution.219

The surrender of the right to counsel and its concomitant benefits in
favor of exercising the right to self representation is a relatively recent
variation of the sixth amendment theme.220 In this situation, it is incum-
bent on a trial judge to conduct a waiver hearing. A defendant “should be
made aware of the dangers and disadvantages of self-representation, so
that the record will establish that ‘he knows what he is doing and his
choice is made with eyes open.’”221 The waiver hearing should be con-
ducted outside the presence of the jury to avoid prejudice.222 Once prop-

215. The sixth amendment right applies to the states via the due process clause of the
dal v. Estelle, 505 F. 2d 1334 (5th Cir.) (en banc), cert. denied, 422 U.S. 1011 (1975). Beyond
entitlement analysis, the right to be represented by a retained attorney applies not only to
those situations in which an appointed attorney is mandated but also may extend to other
689 (1972)).
218. Passman v. Blackburn, 652 F. 2d 559, 565-66 (5th Cir. 1981). The court also held,
inter alia, that there was no entitlement to counsel when the government presented pho-
tographs to eyewitnesses for identification. Id. at 566 (citing Moore v. Illinois, 434 U.S. 220,
227 n.3 (1978) and United States v. Ash, 413 U.S. 300 (1973)).
220. See generally Faretta v. California, 422 U.S. 806 (1975); Rosenberg, Self-Represen-
tation and the Criminally Accused—Evolution and Scope In the Federal Courts, 13 Cal.
W.L. Rev. 46 (1976).
221. 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279
(1942)). See also Scott v. Wainwright, 617 F. 2d 99, 102 (5th Cir.), cert. denied, 449 U.S. 885
(1980); Chapman v. United States, 553 F. 2d 886, 889 (5th Cir. 1977).
erly surrendered, legal representation cannot be foisted on the accused by the trial court.\textsuperscript{223} One who surrenders the right to counsel is exercising the right to self representation and acquires no rights other than those also possessed by a represented defendant.\textsuperscript{224} For example, absent some showing of excusable neglect, a pro se defendant's untimely notice of appeal results in dismissal.\textsuperscript{225}

The third theme of the sixth amendment—sufficiency—encompasses a three-step process. The three stages of the process are allocating the burden of persuasion, establishing the standard of adequacy, and applying the burden and standard to particular circumstances.

The burden of proving the ineffectiveness of counsel lies with the convicted defendant.\textsuperscript{226} The Fifth Circuit normally will decline to review a claim of ineffective counsel on direct review when an evidentiary hearing is necessary, unless the contentions made involve only matters of record.\textsuperscript{227} The court has rejected the so-called farce or mockery standard.\textsuperscript{228} Instead, the court considers the actual performance of defense counsel, whether that counsel is appointed or retained.\textsuperscript{229} The standard may be briefly stated as follows:

The Sixth Amendment entitles a criminal defendant to counsel reasonably likely to render and rendering reasonably effective assistance. Effective assistance is not tantamount to errorless assistance or counsel judged ineffective by hindsight. The methodology for applying the standard involves an inquiry into the actual performance of counsel and a determi-

\textsuperscript{223} Lyles v. Estelle, 658 F.2d 1015 (5th Cir. 1981).
\textsuperscript{224} Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981) (citing United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977)). A pro se litigant's properly filed pleadings, however, are construed liberally. See Haines v. Kerner, 404 U.S. 519, 520 (1972).
\textsuperscript{225} Birl v. United States, 660 F.2d 592, 593 (5th Cir. 1981).
\textsuperscript{227} United States v. Curry, 663 F.2d 572, 573 (5th Cir. 1981) (citing United States v. Fuentes-Lozano, 600 F.2d 552, 553 n.1 (5th Cir. 1979) and United States v. Coronado, 554 F.2d 166, 170 (5th Cir.), cert. denied, 434 U.S. 870 (1977)).
\textsuperscript{228} Beavers v. Balkcom, 636 F.2d 114, 115-16 (5th Cir. 1981); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).
\textsuperscript{229} Cuyler v. Sullivan, 446 U.S. 335, 345 n.9 (1980); United States v. Hughes, 635 F.2d 449, 451 (5th Cir. 1981); Kemp v. Leggett, 635 F.2d 453, 455 (5th Cir. 1981); Perez v. Wainwright, 627 F.2d 782 (5th Cir. 1980) (mem.). The Fifth Circuit for a long time has considered the performance of retained and appointed counsel against the same standard. The court has maintained another distinction, however. A challenge to counsel's performance can be based on either due process concerns of fundamental fairness or incorporated concerns of effective assistance of counsel. See Ogle v. Estelle, 641 F.2d 1122 (5th Cir. 1981); Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974) (en banc), cert. denied, 422 U.S. 1011 (1975).
On appeal, the court makes fine distinctions between district court findings of primary facts, such as what counsel did to prepare, and findings that combine legal and factual issues, such as whether counsel's preparation was so minimal as to be ineffective. The former category is reviewed under the traditional clearly erroneous standard; the latter category calls for an independent appellate evaluation.

Claims of ineffective assistance of counsel may be founded upon a fundamentally flawed preparation or performance by defense counsel. Such fundamental flaws include the following: The failure to interview or call a witness who would establish an alibi defense; the failure to interview eye witnesses; inadequate preparatory consultation with defendant; the failure to conduct any pretrial investigation, including neglecting to read the transcript of the preliminary hearing; the failure to pursue a possible incompetency defense; the failure to proffer a written charge on a lesser included offense; the failure to probe venire members' relevant racial attitudes during voir dire; the failure to make an opening statement; inadequate cross-examination; errors in assertions made during closing argument; particular lines of questions asked or not asked; the failure to make appropriate and timely objections; and the failure to move for a new trial based on newly discovered


231. This rule emerged from the court's careful chronicling of case law in Washington v. Watkins, 655 F.2d 1346, 1351-54 (5th Cir. 1981). See also Baty v. Balkcom, 661 F.2d 391, 394-95 n.7 (5th Cir. 1981).


233. See, e.g., Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981); Kemp v. Leggett, 635 F.2d 43 (5th Cir. 1981).


237. See, e.g., Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981).


239. See, e.g., United States v. Curry, 663 F.2d 572 (5th Cir. 1981).

240. Id.

241. Id.


Some state intrusions into the attorney-client relationship may render the assistance of counsel ineffective. Even when the government’s action directly intrudes on the attorney-client relationship, as when the government relies on a codefendant turned informant, some remedy short of dismissal may be appropriate to vindicate the sixth amendment interest and to protect the public interest in seeing the guilty brought to justice. A defendant is not deprived of a constitutional right, for example, when a private attorney is retained and paid by the family and friends of the victim to prosecute the case. Still, in such a prosecution, the potential for prejudice is increased and merits a closer examination. The prosecution did violate the Constitution by making a material eyewitness unavailable to testify after the witness had been subpoenaed to testify at defendant’s first trial. From the bench, the participation of two judges who had not heard oral argument of defense counsel on the final state appeal did not so intrude on counsel’s effectiveness as to violate the Constitution. A trial judge’s order to defendant not to discuss the case with defense counsel during the break between his direct and cross-examination did, however, deny effective assistance.

The effectiveness of counsel often is the subject of a challenge to a guilty plea. When a defendant pleads guilty upon the advice of counsel, the attorney’s obligation is to advise him of the available options and possible consequences based on the attorney’s meaningful investigation of the facts and the law. If the advice of counsel falls short of the constitutional minimum, the plea itself is vulnerable for lack of the requisite

244. See, e.g., Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981).
250. United States v. Conway, 632 F.2d 641 (5th Cir. 1980).
251. Many other issues, beyond the scope of this article, are raised in challenges to guilty pleas. See, e.g., United States v. Block, 660 F.2d 1086 (5th Cir. 1981); United States v. Jackson, 659 F.2d 73 (5th Cir. 1981); Ehl v. Estelle, 656 F.2d 166 (5th Cir. 1981); In re Bryan, 645 F.2d 331 (5th Cir. 1981); United States v. Law, 633 F.2d 1156 (5th Cir.), cert. denied, 101 S. Ct. 2332 (1981). Exclusion here does not suggest that these issues are any less significant. See note 17 supra. Indeed, the court met en banc during the survey period to consider the role of a state trial judge in guilty plea negotiations. Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1981) (en banc).
knowing, voluntary, and informed waiver of constitutional rights.\textsuperscript{253} To demonstrate a counsel deprivation, a defendant must show that the advice "was not 'within the range of competence demanded of attorneys in criminal cases.'\textsuperscript{254} As in other areas of claimed ineffectiveness, the totality of the circumstances evaluation means a case-by-case consideration.\textsuperscript{255}

Claims of ineffective counsel may also be based upon the duty of defense attorneys to know the applicable substantive and procedural law. When evaluating an attorney's total performance against a fundamental fairness measure, it is rare that "a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard."\textsuperscript{256} Often such claims are based on counsel misinforming the defendant concerning potential sentencing options during plea negotiations,\textsuperscript{257} although other legal issues also may be the basis.\textsuperscript{258} The court made clear that clairvoyance is not necessary: "[A] failure of counsel to be aware of prior controlling precedents in even a single prejudicial instance might render counsel's assistance ineffective under the Sixth Amendment. However, counsel is normally not expected to foresee future new developments in the law or for that matter to research parallel jurisdictions. . . .\textsuperscript{259}

The final category of ineffective assistance of counsel claims to be discussed involves defense attorney conflicts of interests. Joint representation of codefendants is not per se unconstitutional, although there seems to be no good reason, beyond defense attorney economics and judicial facility, to permit one attorney to represent two defendants.\textsuperscript{260} In the Fifth

\textsuperscript{253} Grantling v. Balkcom, 632 F.2d 1261, 1263-64 (5th Cir. 1980); Jones v. Henderson 549 F.2d 995, 996-97 (5th Cir.), cert. denied, 434 U.S. 840 (1977); Mason v. Balcom, 531 F.2d 717, 725 (5th Cir. 1976).


\textsuperscript{255} See, e.g., Bradbury v. Wainwright, 658 F.2d 1083 (5th Cir. 1981); United States v. Aguilera, 654 F.2d 352 (5th Cir. 1981); Hill v. Estelle, 653 F.2d 202 (5th Cir. 1981); Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981).

\textsuperscript{256} Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979).

\textsuperscript{257} Dozier v. United States Dist. Court, 656 F.2d 990 (5th Cir. 1981); Hill v. Estelle, 65 F.2d 202 (5th Cir. 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981).


\textsuperscript{259} Nelson v. Estelle, 642 F.2d 903, 908 (5th Cir. 1981) (emphasis in original); see also Cooks v. United States, 461 F.2d 530, 532 (5th Cir. 1972).

Circuit only a conflict that is actual and not speculative fails the sixth amendment standard. "An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing." In *Baty v. Balkcom*, the Fifth Circuit considered the viability of a corollary rule. Fifth Circuit precedent had established that generally once an actual conflict of interest is demonstrated, prejudice must be presumed without further inquiry. In *Cuyler v. Sullivan*, the Supreme Court seemed to suggest that a sixth amendment claimant must establish both actual conflict of interest and the adverse effect of that conflict on counsel's performance. The *Baty* majority resolved any suggestion of ambiguity in the Supreme Court opinion by reaffirming the Fifth Circuit presumption of prejudice corollary.

Application of these principles during the survey period involved recurring problems of joint representation. A conflict existed when the defense attorney was presented with an uncalled prospective witness who would have been willing to testify that he robbed the store while defendant, co-defendant, and a third party remained in the getaway car. This account conflicted with the codefendant's alibi defense, but would have aided defendant's attack on the eyewitness identification. The sixth amendment was violated when one attorney represented two defendants who each would testify exonerating himself and implicating the other and when the joint representation prevented both from plea bargaining.

Not all invocations of the sixth amendment conflict doctrine are successful. When the defendant and the defense attorney deny a conflict of interest or insist on

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262. 661 F.2d 391 (5th Cir. 1981).

263. *Id.* at 395 (citing *Turnquest v. Wainwright*, 651 F.2d 331, 334 (5th Cir. 1981) and *Johnson v. Hopper*, 639 F.2d 236, 239 (5th Cir. 1981) (appeal pending)).

264. 446 U.S. 335 (1980).

265. See 446 U.S. at 348.

266. Judge Fay concurred specially and abstained from the Cuyler interpretation. 661 F.2d at 396 (Fay, J., concurring).

267. See 446 U.S. at 358 (Marshall, J., concurring and dissenting).

268. 661 F.2d at 396-97. See also *Turnquest v. Wainwright*, 651 F.2d 331, 333-34 (5th Cir. 1981).


continuing despite this possibility, appellate allegations of conflict of interest are probably simple allegations and of no consequence.271

VII. CONCLUSION

In retrospect, this was a typical year for the Fifth Circuit. While the Constitution limits the role of the federal judiciary by its historic notions of the judicial role, separation of powers, and federalism,272 the Fifth Circuit's caseload in constitutional criminal procedure is anything but limited. The variety and quantity of decisions and issues defies even a Bohemian survey.273

273. "Points more than all the lawyers in Bohemia can learning handle." W. Shakespeare, Winter's Tale Act IV, Scene IV, line 205.