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## Criminal Law and Procedure

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# CRIMINAL LAW AND PROCEDURE

by David A. Schlueter\*

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## I. INTRODUCTION

Each year the Fifth Circuit Court of Appeals decides, or in some other way disposes of, several hundred cases which might be considered to fall within the topic of criminal law and procedure. This article focuses only on selected cases tried in the federal courts. Cases before the Fifth Circuit on review of habeas corpus applications are not discussed here because for the most part those decisions focus on state procedural or substantive criminal law. The decisions selected here generally provide an overview of significant developments in a wide range of topics, ranging from fourth and fifth amendment issues, which seem to comprise the bulk of the issues addressed in the decisions, to pretrial and trial procedures. In some instances, particular decisions were selected for discussion because they presented the court with interesting or unique fact situations or because they reflect important issues which are still to be resolved. In most instances the cases simply demonstrate an application of earlier decisions and in that sense provide helpful guidance for the reader in understanding what the court is likely to do when faced with a particular issue.

## II. CONSTITUTIONAL ISSUES

### A. *Search and Seizure*

During the survey period the Fifth Circuit faced a number of rather typical search and seizure issues such as application of the good faith exception to the exclusionary rule, determination whether a seizure of a person amounted to a stop or an arrest, and permissible extent of border searches. But perhaps its most significant search and seizure ruling arose from the controversial topic of compulsory

urinalysis and whether such procedures constitute a search.

### 1. Defining What Constitutes a Search or Seizure

The court must first determine whether a government official has in some way intruded into an area reasonably expected to be private.<sup>1</sup> If both components are present, a search has occurred. A seizure of the person, on the other hand, occurs if the government meaningfully interferes with that person's liberty interests,<sup>2</sup> and seizure of property occurs when the government meaningfully interferes with a person's possessory interest in the property.<sup>3</sup> During the survey period, the Fifth Circuit had the opportunity to address some of these definitional issues in a variety of cases. The focus here will be on what constitutes a search. The topic of seizures of the person, as either a stop or arrest, is discussed separately.

In *United States v. Ramirez*,<sup>4</sup> federal agents determined that suspects arrested in various drug transactions had occupied a hotel room and that the room was registered through the next day.<sup>5</sup> The agents told the manager that if the room was determined to be abandoned that they would like to view any personal belongings found in the room.<sup>6</sup> In accordance with his normal practice when the rental period ended, the hotel manager entered the room, recovered the personal property and asked the agents to assume custody.<sup>7</sup> They did so and found incriminating evidence in an address book and luggage which was later admitted at trial.<sup>8</sup> The court concluded that the search of the room and the search of the personal belongings were separate issues.<sup>9</sup> The defendants, said the court, lost whatever reasonable expectation of privacy they might have had in their hotel room when the rental period expired.<sup>10</sup> The court noted that it would make no difference that their abandonment of the room was invol-

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1. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

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

3. *Maryland v. Macon*, 472 U.S. 463, 469 (1985).

4. 810 F.2d 1338 (5th Cir. Feb.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 136, 98 L. Ed. 2d 93 (1987).

5. *Id.* at 1340.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1341.

untary because they had been arrested.<sup>11</sup> The court also rejected the argument that the agents acted improperly in waiting until the rental period expired instead of obtaining a search warrant.<sup>12</sup> Citing *United States v. Mitchell*,<sup>13</sup> the court said that that argument was "fully refuted" because criminal investigations are not a game and the fact that the "constable" may not have chosen the best course does not disqualify him.<sup>14</sup> Moreover, the hotel manager was not acting as a government agent when he entered the room to prepare it for the new occupants.<sup>15</sup> Because the fourth amendment applies only to governmental actions, the manager's private action did not implicate the fourth amendment.<sup>16</sup> There was no evidence that the government had contrived the circumstances of the case to avoid constitutional limits.<sup>17</sup>

With regard to the seizure and search of the personal belongings, the court held that the defendants had not asserted any ownership or possessory interests in the belongings which might have given them standing to object.<sup>18</sup>

Standing to raise fourth amendment issues was present in *United States v. Martinez*,<sup>19</sup> where the owner of a car which was stopped by agents testified that he had loaned the car to his girlfriend who was a passenger at the time the car was stopped and the occupants arrested on drug charges.<sup>20</sup> In both of these cases, the Fifth Circuit simply applied existing law in a fashion consistent with not only its own precedent but also with the weight of authority from the other circuits. However, as noted in the following section, the court also recently addressed the issue of whether urinalysis testing constitutes a search.

## 2. Urinalysis Testing and the Fourth Amendment

With the increased emphasis on combatting drug abuse and detecting the presence of the AIDS virus, public and private em-

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11. *Id.* at n.3.

12. *Id.* at 1341.

13. 538 F.2d 1230, 1233-34 (5th Cir. 1976) (en banc), cert. denied, 430 U.S. 945 (1977).

14. 810 F.2d at 1341.

15. *Id.*

16. *Id.* at 1342.

17. *Id.*

18. *Id.*

19. 808 F.2d 1050 (5th Cir. Jan.), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 1962, 95 L. Ed. 2d 533 (1987).

20. *Id.* at 1056.

ployers are beginning to use various forms of drug testing.<sup>21</sup> The most common means of doing so is through laboratory analysis of a urine specimen provided by the employee.<sup>22</sup> In a case of first impression, the Fifth Circuit joined a slowly growing number of circuit courts which have addressed the issue of whether such testing implicates the fourth amendment.

In *National Treasury Employees Union v. Von Raab*,<sup>23</sup> the United States Customs Service drug testing program was challenged by a union representing customs agents on grounds that it violated the fourth amendment.<sup>24</sup> The testing program in question focused only on those individuals requesting transfer to sensitive positions.<sup>25</sup> The program was instituted not because the Customs Service suspected a significant level of drug abuse<sup>26</sup> but instead because illegal drug use "undermines . . . the integrity of the Service."<sup>27</sup> Those employees tentatively selected for transfer were notified that their appointment was contingent on successful completion of the drug testing program and were offered the opportunity to opt out with no adverse consequences.<sup>28</sup> Those agreeing to proceed with the testing were permitted to complete a form listing the medications or drugs to which the employee had been exposed in the preceding thirty

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21. See generally Curran, *Compulsory Drug Testing: The Legal Barriers*, 316 NEW ENG. J. MED. 318 (1987) (noting public acceptance of drug testing and use of drug testing in public agencies); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201 (1986) (discussing the implications of urinalysis to the employee, employer, and public, reconciled within constitutional mandates).

22. For the most part, urinalysis testing to date has been limited to "employees." That would include members of the Armed Forces which have been subjected to some form of urinalysis testing for a number of years. See, e.g., *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983) (Court of Military Appeals upheld compulsory urinalysis program in Navy). But it would not be unreasonable to expect that should the courts continue to rule that such testing is not in itself violative of the fourth amendment, other targets of investigation might be subjected to similar testing. A potential area of conflict—and no doubt fourth amendment analysis—is AIDS testing.

23. 816 F.2d 170 (5th Cir. Apr.), cert. granted, \_\_\_\_ U.S.\_\_\_\_, 108 S. Ct. 1072, \_\_\_\_ L. Ed. 2d \_\_\_\_ (1988).

24. *Id.* at 172-73.

25. *Id.* at 173. The positions included top administrative posts, criminal investigators, intelligence officers, or positions that involved carrying a firearm, dealing with confiscated drugs, or accessing to classified information. *Id.*

26. In five months of testing only one applicant tested positive. No current employee tested positive. *Id.* at 173.

27. *Id.*

28. *Id.*

days.<sup>29</sup> That form was sealed and opened only if the tests proved positive.<sup>30</sup> Observers were charged with collecting the urine samples but they were not permitted to actually observe the employee urinate into the specimen jar.<sup>31</sup> Strict chain of custody procedures were instituted and a positive test resulted in further laboratory testing to reduce the possibility of false results.<sup>32</sup> The court held that the testing program constituted a search within the fourth amendment but that it was not unreasonable in light of the compelling governmental interests at stake and the limited intrusiveness.<sup>33</sup> The court's decision to consider this a search was grounded on the conclusion that it infringed upon an employee's reasonable expectation of privacy. "[F]ew activities in our society," said the court, are "more personal or private than the passing of urine."<sup>34</sup> Perhaps more telling is the court's statement that absent a finding that this sort of program constitutes a search, the government would not be restrained in any way:

As we observed in *Horton v. Goose Creek Independent School District*, "[i]f an activity is not a search or seizure . . . the government enjoys a virtual carte blanche to do as it pleases." Hence, a finding that urine testing for drugs is not a search necessarily presumes that the ordinary individual's reasonable expectation of privacy would not be offended if the government, even without an articulable basis for suspicion, notified a person who had otherwise been properly stopped (seized in the legal sense) that he must submit a urine sample for analysis. That presumption simply does not comport with contemporary mores.<sup>35</sup>

In concluding that urine testing constitutes a search, the court joined the other circuit courts which have addressed the issue.<sup>36</sup>

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29. *Id.* at 173-74.

30. *Id.* at 174.

31. *Id.*

32. *Id.*

33. *Id.* at 173.

34. *Id.* at 175.

35. *Id.* at 176 (footnote omitted) (citing *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982) (per curiam), *cert. denied*, 463 U.S. 1207 (1983)).

36. See *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 577, 93 L. Ed. 2d 580 (1986); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

The court also concluded that this particular testing program was reasonable in its execution.<sup>37</sup> The applicable template of reasonable is whether considering the totality of the circumstances, those factors suggesting constitutional validity outweigh those indicating a violation of the Constitution.<sup>38</sup> In summary, the court's reasoning was centered around nine areas. First, the testing program was limited in both scope and manner.<sup>39</sup> Second, there was ample justification for the program even if there was no predicate suspicion that employees were using drugs.<sup>40</sup> Although this conclusion is in harmony with opinions from the Eighth and Third Circuits,<sup>41</sup> it is at odds with an older Seventh Circuit opinion and a number of recent district court opinions which have concluded that individualized suspicion is required.<sup>42</sup> Third, the testing was conducted in the most private facility available—a restroom.<sup>43</sup> Fourth, the testing program was to some extent voluntary because employees could forego testing by withdrawing their application.<sup>44</sup> Fifth, the unique position of the government as employer may justify intrusions not otherwise permissible in the work place.<sup>45</sup> Sixth, the testing program had been adopted solely as an administrative measure.<sup>46</sup> Seventh, like highly regulated industries, the Customs Service should be permitted to

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37. 816 F.2d at 179.

38. *Id.* at 177.

39. *Id.*

40. *Id.* at 177-78. The court stated that “[I]t is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens.” *Id.* at 179.

41. *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (testing, other than uniformly or by random selection of employees who have regular contact with prisoners, must be based on individualized suspicion); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 577, 93 L. Ed. 2d 580 (1986) (because of interest in safeguarding public confidence in horseracing industry, random selection for testing of jockeys permitted).

42. *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (rules required testing of mass transit operator “in any serious accident” or “suspected of being under the influence” of intoxicants); *American Fed’n of Gov’t Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986); *Lovvorn v. Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986), *rev’d on other grounds*, 833 F.2d 335 (D.C. Cir. 1987) (individualized suspicion holding of the district court was not an issue on appeal); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (reasonable suspicion required to support search of student’s belongings).

43. 816 F.2d at 178.

44. *Id.*

45. *Id.*

46. *Id.* at 179.



conduct "inspections" without the need for individualized suspicion.<sup>47</sup> Eighth, the availability of alternative means of determining drug abuse by Customs agents does not eliminate the need for urine testing.<sup>48</sup> And finally, the program seems to be effective, at least as a deterrent for drug-using employees who might seek transfers to the more sensitive positions within the Customs Service.<sup>49</sup>

Interestingly, the program was not challenged on the grounds that it violated the penumbral privacy rights of the employees.<sup>50</sup> But the court hinted that it might reach the same conclusion by noting that "even the areas sheltered by such rights are limited by counter-vailing state interests."<sup>51</sup>

In one of the few dissents during the survey period in the area of criminal law, Judge Hill disagreed with the majority conclusion that the program was reasonable.<sup>52</sup> In his view, the program was an ineffective means of meeting the Customs Service's goals and was, therefore, unconstitutional on grounds of unreasonableness.<sup>53</sup>

The significance of the lengthy and thoughtful decision in *Von Raab* is that it is currently one of the few opinions on the topic of urinalysis testing and that it is a departure from those circuit court opinions which have sustained such testing only where there has been a showing of reasonable suspicion.

### 3. Seizures of the Person: Stops and Arrests

The leading Fifth Circuit case on police-citizen fourth amendment contacts is *United States v. Berry*.<sup>54</sup> The court in that case set out the three levels of contact which may result and the appropriate measure of constitutionality with regard to each level.<sup>55</sup> The first level is "mere communication" which involves no coercion or deten-

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47. *Id.* at 179-80.

48. *Id.* at 180.

49. *Id.*

50. *Id.* at 181; *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

51. 816 F.2d at 181.

52. *Id.* at 182 (Hill, J., dissenting).

53. Judge Hill set out three reasons for concluding that the program was ineffective. First, those agents currently in the sensitive positions were not tested. Second, agents applying for a transfer were not tested again. Finally, an employee using drugs could temporarily abstain from using them until after he passed the test. *Id.* at 184 (Hill, J., dissenting).

54. 670 F.2d 583 (5th Cir. 1982) (en banc).

55. *Id.* at 591.

tion.<sup>56</sup> It implicates no fourth amendment analysis.<sup>57</sup> The second level consists of brief detentions which must be supported by reasonable suspicion based upon specific and articulable facts.<sup>58</sup> The final level is comprised of arrests which must be supported by probable cause.<sup>59</sup> The last two levels represent fourth amendment "seizures" which in the Fifth Circuit are measured by whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>60</sup>

During the survey period, the Fifth Circuit used the foregoing templates in several cases in straightforward fashion. In *United States v. Hanson*,<sup>61</sup> the defendants were stopped in the Dallas-Fort Worth International Airport by plain-clothes officers who identified themselves and asked to see identification and airline tickets.<sup>62</sup> When a comparison revealed that the tickets and driver's licenses contained conflicting names, the officers asked one of the defendants to step aside several feet.<sup>63</sup> He was informed that he was suspected of carrying narcotics and consented to a search of his luggage.<sup>64</sup> The defendants were arrested when that search revealed weapons and drugs.<sup>65</sup>

In applying the *Berry* three-level template, the court noted that it was presented with two questions: "[W]hen were the defendants 'seized,'" and on which level should the seizure be placed?<sup>66</sup> The court concluded that the seizure occurred when Hanson was asked to step aside and was informed that he was a suspect.<sup>67</sup> At that point, said the court, a reasonable person would have concluded that he was not free to leave.<sup>68</sup> As to the second question, the court placed the seizure in the second level.<sup>69</sup> This detention was more of an investigatory stop and did not blossom into a full arrest until the

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56. *Id.*; *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

57. 670 F.2d at 591.

58. *Id.*

59. *Id.*

60. *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

61. 801 F.2d 757 (5th Cir. Oct. 1986).

62. *Id.* at 759-60.

63. *Id.* at 760.

64. *Id.*

65. *Id.*

66. *Id.* at 761.

67. *Id.*

68. *Id.*

69. *Id.* at 763.

officers found contraband.<sup>70</sup> The stop in turn was based upon articulable facts. Noting that use of the so-called drug courier profile is not sufficient justification in itself,<sup>71</sup> the court pointed to the following: the defendants paid cash for their tickets; the tickets were one-way; the defendants had travelled to a known "source" city—Miami; they were travelling under assumed names; and finally, they appeared nervous and watchful.<sup>72</sup>

Paying particular attention to the fine line which separates investigatory stops from arrests. The court was satisfied that under the circumstances the detention had been brief,<sup>73</sup> the defendants were expeditiously questioned, and they were detained in a public area.<sup>74</sup>

In a second case, the court addressed the issue of whether the arrest of an illegal alien was supported by probable cause. In *United States v. Tarango-Hinojos*,<sup>75</sup> a United States Border Patrol agent apprehended a number of illegal aliens in El Paso and placed them in her van.<sup>76</sup> As she resumed driving she saw the defendant standing in the street and called out to him.<sup>77</sup> Several of the already apprehended aliens told the officer that the defendant was an illegal alien who sometimes attempted to rob other aliens.<sup>78</sup> The defendant was evasive in his answers, could not produce any resident-alien identification, and eventually refused to answer any questions.<sup>79</sup> Using some force, the officer was able to place the defendant in her van.<sup>80</sup>

The officer's initial stop of the defendant, said the court, was a lawful stop based upon reasonable suspicion.<sup>81</sup> The officer had just arrested a few of the approximately seventy-five aliens that had scattered and the defendant had been identified as another illegal alien. The stop ripened into an arrest when the officer forced the

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70. *Id.*

71. *Id.* at 762.

72. *Id.* at 761.

73. The stop was for a maximum of twenty minutes. *Id.* at 764.

74. *Id.* Cf. *United States v. Morin*, 665 F.2d 765 (5th Cir. 1982) (defendant had been stopped at two different airports, his luggage had been subjected to drug-sniffing dogs, he had been questioned, and he was finally confronted in an empty public restroom, literally with his pants down).

75. 791 F.2d 1174 (5th Cir. June 1986).

76. *Id.* at 1175.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1176.

defendant into her van.<sup>82</sup> Reviewing the facts, the court concluded that the issue was close but that the arrest was supported by probable cause: the officer was a seven-year veteran of the force, she had just seen seventy-five aliens scatter, the defendant was seen close to an alley often used by illegal aliens, other aliens identified him, he was uncooperative and refused to acknowledge her presence, and he gave a commonly used excuse for not having his identification.<sup>83</sup>

These two cases are remarkable to the extent that they demonstrate the sort of analysis the court will use in determining whether a seizure actually occurred and whether the necessary predicate was established. In both cases, the court reiterated that determining whether reasonable suspicion or probable cause is present is not a technical process. Instead, it requires consideration of practical and factual factors of everyday life.<sup>84</sup>

Assuming that officers have probable cause to make an arrest, they may also need an arrest warrant if they intend to make the arrest in a suspect's home<sup>85</sup> or some other place where the suspect has a reasonable expectation of privacy.<sup>86</sup> In *United States v. Carrion*,<sup>87</sup> officers arrested one of the defendants when he opened his hotel room door.<sup>88</sup> Finding that the defendant had no protectible expectation of privacy in his open doorway<sup>89</sup> and noting a disagreement among the circuits over the importance attached to a suspect's exact location in the doorway, the court concluded that an open front door is a public place even if the suspect's feet are actually planted behind the doorframe.<sup>90</sup>

#### 4. Border Stops and Searches

The Fifth Circuit addressed the issue of border searches in *United States v. Delgado*<sup>91</sup> and *United States v. Salinas-Garza*.<sup>92</sup> In *Delgado*,

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82. *Id.*

83. *Id.* at 1176-77.

84. *Id.* at 1176.

85. *Payton v. New York*, 445 U.S. 573, 590 (1980).

86. See, e.g., *United States v. Baldacchino*, 762 F.2d 170 (1st Cir. 1981) (hotel room); *United States v. Mason*, 661 F.2d 45 (5th Cir. 1981) (threshold of house).

87. 809 F.2d 1120 (5th Cir. Feb. 1987).

88. *Id.* at 1123.

89. *Id.* at 1128.

90. *Id.* n.9.

91. 810 F.2d 480 (5th Cir. Feb. 1987).

92. 803 F.2d 834 (5th Cir. Oct. 1986).

the court addressed the lawfulness of a "warrantless extended border search." In response to a reliable tip that drugs would be smuggled into the United States from Mexico at a specific location, a customs agent followed and then stopped a truck being driven from the area.<sup>93</sup> When he approached the truck and smelled the "overpowering" odor of marijuana he arrested the driver.<sup>94</sup>

The court noted that there are two types of border searches. The first is a search at the border itself which need not be based upon either reasonable suspicion or probable cause.<sup>95</sup> These types of warrantless intrusions are justified on the historical premise that the United States has a compelling interest in protecting itself by examining persons and goods entering the country.<sup>96</sup> Similar justifications extend to searches conducted at the "functional equivalent" of a border.<sup>97</sup> The second type of border searches are those labelled as "extended border searches." However, these types of intrusions must be based upon reasonable suspicion of criminal activity.<sup>98</sup>

In both types of searches, there must have been a border crossing which must be shown beyond a "reasonable certainty."<sup>99</sup> The court noted that although its earlier decisions on the requirement of a border crossing had not been consistent, more recent cases have made it clear that an actual border crossing is required.<sup>100</sup> In this case, the

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93. 810 F.2d at 481-82.

94. *Id.* at 482.

95. *Id.* at 483; see *United States v. Ortiz*, 422 U.S. 891, 896 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-74 (1973).

96. See *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

97. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

98. *United States v. Barbin*, 743 F.2d 256, 261 (5th Cir. 1984).

99. 810 F.2d at 483; see *United States v. Niver*, 689 F.2d 520, 526 (5th Cir. 1982). Although, the court also used the term "high degree of probability" in *United States v. Brennan*, 538 F.2d 711, 715 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977), the prevailing standard is the reasonable certainty test. That test has been described by the Ninth Circuit as something more than probable cause but less than reasonable doubt. *United States v. Driscoll*, 632 F.2d 737, 739 (9th Cir. 1980).

100. 810 F.2d at 484 n.2. Apparently some of the inconsistencies focused on language in *United States v. Steinkoenig*, 487 F.2d 225, 227-28 (5th Cir. 1973), to the effect that a border crossing is not the *sine qua non* of a valid border search. 810 F.2d at 484 n.2. Although the court cited that language in *United States v. Fogelman*, 586 F.2d 337, 343 (5th Cir. 1978), it later stated that the language was dicta in light of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). 810 F.2d at 484 n.2 (citing *United States v. Johnson*, 588 F.2d 147, 154 n.13 (5th Cir. 1979)). In *Johnson*, the court said, the panel interpreted the statement in *Fogelman* to mean that officers need not actually see the border crossing take place. 810 F.2d at 484 n.2.

facts indicated that although the vehicle involved had probably not crossed the border, the contraband found inside the truck had.<sup>101</sup> The warrantless stop and search of the defendant's vehicle was a proper "extended border search."<sup>102</sup>

In *United States v. Salinas-Garza*,<sup>103</sup> customs agents received information from DEA agents that the defendant was attempting to cross the border into Mexico with large amounts of cash to be used to purchase drugs.<sup>104</sup> The defendant's truck was later stopped at the toll booth and searches of the truck, the defendant and his wife resulted in finding approximately \$28,000.00 in cash.<sup>105</sup> The court declined to decide whether border searches of persons exiting the United States could be conducted without probable cause or reasonable suspicion.<sup>106</sup> This particular search, said the court, was governed by section 5317(b) of title 31 of the United States Code, which acts as a limitation on customs agents by requiring that searches for monetary instruments be based upon reasonable cause.<sup>107</sup> The court

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The court stated that its more recent decision in *United States v. Niver*, 689 F.2d 520 (5th Cir. 1982), which clearly requires a showing beyond a reasonable certainty that a border crossing occurred, is the better-reasoned view. 810 F.2d at 484 n.2.

101. 810 F.2d at 484.

102. *Id.* at 485.

103. 803 F.2d 834 (5th Cir. Oct. 1986).

104. *Id.* at 835.

105. *Id.* at 835-36.

106. *Id.* at 836-37. The court recognized that several circuit courts have extended the rationale supporting border searches of persons entering the country to those exiting. *Id.*; see, e.g., *United States v. Duncan*, 693 F.2d 971, 977 (9th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *United States v. Swarovski*, 592 F.2d 131, 133 (2nd Cir. 1979). The court noted that these courts had apparently relied upon language in *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 63 (1974) ("those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment . . ."). The Ninth Circuit has declined to extend the border search rationale to exit searches. *United States v. Des Jardins*, 747 F.2d 499, 504 (9th Cir. 1984).

107. 803 F.2d at 837 (relying on 31 U.S.C. § 5317(b) (Supp. III 1985)). Section 5317(b) provides:

A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of section 5316 of this title.

31 U.S.C. § 5317(b) (Supp. III 1985).

translated that requirement into one of "reasonable suspicion"<sup>108</sup> and after reviewing the circumstances of this case, concluded that the defendant's truck had been lawfully stopped and searched.<sup>109</sup>

### 5. Automobile Stops and Searches

Investigative stops and searches of automobiles pose special problems not always associated with stops and arrests of the citizen on the street. Over the years some special rules have evolved for determining whether, and under what conditions, police may stop a car, question the occupants, and search them, their vehicle, and its contents. Many automobile stops and searches demonstrate just that sort of fourth amendment progression, with a myriad of combinations of intrusions and issues.

Police may conduct a *Terry* stop of a vehicle upon reasonable suspicion that criminal activity is afoot.<sup>110</sup> Once a vehicle is stopped, the officers may briefly detain and question the occupants to try to obtain information confirming or dispelling the officer's suspicion.<sup>111</sup> As a safety measure, an officer may "frisk" the interior portions of the vehicle if he suspects that an occupant is armed or poses a threat to the officer.<sup>112</sup> If during the stop the officer learns of facts which provide probable cause, he may arrest the occupants.<sup>113</sup> After the occupants are arrested, the officer may conduct a search of the vehicle and any containers found inside it as a search incident to an arrest<sup>114</sup> or he may conduct a consent search of the vehicle.<sup>115</sup> Without regard to whether the occupants have been detained or arrested, an officer may search a vehicle and its contents under the "automobile exception" to the warrant requirement if he has probable cause to believe that contraband is located somewhere in the vehicle.<sup>116</sup> During

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108. 803 F.2d at 837. In making the transposition in terms, the court cited only *United States v. Arends*, 776 F.2d 262, 264 n.1 (11th Cir. 1985), which had made the same change.

109. 803 F.2d at 838.

110. *United States v. Cortez*, 449 U.S. 411 (1981); *Terry v. Ohio*, 392 U.S. 1 (1968).

111. *United States v. Sharpe*, 470 U.S. 675 (1985); *Berkemer v. McCarty*, 468 U.S. 420 (1984).

112. *See Michigan v. Long*, 463 U.S. 1032, 1048 (1983).

113. *Id.* at 1050.

114. *New York v. Belton*, 453 U.S. 454, 460 (1981).

115. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Koehler*, 790 F.2d 1256, 1259 (5th Cir. June 1986).

116. *United States v. Ross*, 456 U.S. 798, 800 (1982).

the period of the survey, the Fifth Circuit had the opportunity in several cases to sort through and analyze these foregoing rules.

For example, in *United States v. Basey*,<sup>117</sup> officers stopped the defendant's car on a little-traveled rural road after they received information that a burglary had occurred and that a strange vehicle had been seen in the vicinity.<sup>118</sup> He was briefly questioned and when he could not produce evidence that his car was adequately insured, as required under Texas law, he was arrested.<sup>119</sup> He consented to a search of his trunk which revealed nothing unusual.<sup>120</sup> Inside the car, the officers found and seized two walkie-talkies and attempted to use one of them to make contact with whomever might be listening.<sup>121</sup> An unknown person responded with the inquiry as to whether the officer was "Spiderman."<sup>122</sup>

Applying an "objective assessment" of the facts,<sup>123</sup> the court concluded that the officers had sufficient justification to stop the car, that the defendant's arrest was based upon probable cause, and that the resulting search of the interior of the vehicle was justified under *New York v. Belton*.<sup>124</sup> The court rejected the proposition that the officer's use of the walkie-talkie was an impermissible seizure under *Arizona v. Hicks*<sup>125</sup> on grounds that such use amounted to an additional fourth amendment intrusion unsupported by probable cause.<sup>126</sup> Under *Belton*, said the court, the officers were free to seize

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117. 816 F.2d 980 (5th Cir. Apr. 1987).

118. *Id.* at 982.

119. *Id.* at 984.

120. *Id.*

121. *See id.*

122. *Id.*

123. *Id.* at 991. The defendant had argued that the officer's use of the Texas insurance requirement to arrest him was merely pretextual. *Id.* at 990. The court said that that argument misperceived the proper issue which is whether, given an objective assessment of all of the circumstances, the officers were justified in their actions. *Id.* at 990-91.

124. *Id.* at 988-91 (relying in part on *New York v. Belton*, 453 U.S. 454 (1981)).

125. \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). In *Arizona v. Hicks*, officers had lawfully entered an apartment under exigent circumstances to investigate a shooting. *Id.* at \_\_\_\_, 107 S. Ct. at 1152, 94 L. Ed. 2d at 353. Amidst the "squalid and otherwise ill-appointed" apartment, they discovered expensive audio equipment and, in an attempt to read serial numbers, moved some of the equipment. *Id.* at \_\_\_\_, 107 S. Ct. at 1152, 94 L. Ed. 2d at 353. The Court ruled that handling the equipment was a search which required either probable cause or some other independent basis because it amounted to invasion of an additional privacy interest. *Id.* at \_\_\_\_, 107 S. Ct. at 1152-53, 94 L. Ed. 2d at 353-55.

126. 816 F.2d at 992.



and examine the walkie-talkies.<sup>127</sup> Even assuming that the "use" of a walkie-talkie amounted to a separate and additional intrusion, it invaded no reasonable privacy interest of the defendant.<sup>128</sup>

In *United States v. Martinez*,<sup>129</sup> officers followed a car driven by persons suspected of being involved in the manufacture of illicit drugs.<sup>130</sup> They stopped the car, ordered the driver and his passenger, Martinez, to get out, patted them down for weapons, and questioned the driver about his purchase of chemicals—the odor of which was plain and usually associated with clandestine methamphetamine laboratories.<sup>131</sup> The entire stop lasted from fifteen to thirty minutes and the occupants were not handcuffed or placed into the squad car.<sup>132</sup> When the driver mentioned that the buyer of the chemicals would kill him, the officers read both occupants their constitutional rights, conducted a search of the vehicle, and then formally arrested and charged both occupants.<sup>133</sup>

The court concluded that under the circumstances, the vehicle had been lawfully stopped.<sup>134</sup> The officers had previously learned that the driver had purchased seven chemicals and although each of them had a legitimate use, the officers knew of no legitimate use of the combination of seven chemicals which had been purchased.<sup>135</sup> Once the vehicle was stopped, the officers expeditiously made attempts to confirm or dispel their suspicions. During that detention the officers gained additional information—the strong odor of chemicals on her clothes—to have probable cause to believe that the defendant, as the passenger, was also involved in illegal activity.<sup>136</sup> Her removal to the police station amounted to a lawful "de facto" arrest.<sup>137</sup> The search

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127. *Id.*

128. *Id.* In a lengthy footnote the court discussed whether the officer's use of the walkie-talkie constituted impermissible interception of transmissions over the airwaves. *Id.* at n.21. In another footnote, the court distinguished this case from *United States v. Turk*, 526 F.2d 654, 666 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976), where the court ruled it improper for officers to listen to a tape recording seized during an inventory. *Id.* at 993 n.22.

129. 808 F.2d 1050 (5th Cir. Jan.), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 1962, 95 L. Ed. 2d 533 (1987).

130. *Id.* at 1052.

131. *Id.*

132. *Id.* at 1054.

133. *Id.* at 1052.

134. *Id.* at 1053.

135. *Id.* at 1054.

136. *Id.* at 1055.

137. *See id.* at 1055-56.

of the car was more problematic because it had preceded the arrest of both occupants.<sup>138</sup> But the court upheld that search as a lawful probable cause "automobile exception" search under *United States v. Ross*.<sup>139</sup>

Finally, in *United States v. Reyes*,<sup>140</sup> the court applied the automobile exception to the search of a vehicle for drugs. Officers had received a tip from an informant that the defendant had drugs in both his motel room and his car.<sup>141</sup> They corroborated some of the information and observed the defendant loading items into his car as he was checking out of his motel room.<sup>142</sup> After following him for a short period of time, they stopped the car, removed the defendant from the car, handcuffed him, and searched the interior including suitcases and gun cases.<sup>143</sup> They found large amounts of cash, weapons, and cocaine.<sup>144</sup>

This search, according to the court, fell squarely with the automobile exception as set out in *United States v. Ross*.<sup>145</sup> That is, the officers had ample probable cause under *Illinois v. Gates*,<sup>146</sup> to believe that contraband was located within the defendant's car.<sup>147</sup>

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138. *Id.* at 1056.

139. *Id.* (relying on *United States v. Ross*, 456 U.S. 798 (1982)).

140. 792 F.2d 536 (5th Cir. June), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 191, 93 L. Ed. 2d 124 (1986).

141. *Id.* at 537.

142. *Id.* at 538.

143. *Id.*

144. *Id.* The court was apparently not confronted with the argument that if the officers had time to follow the defendant's car, they had time to obtain a warrant. That argument was made and rejected, however, in *United States v. De Los Santos*, 810 F.2d 1326 (5th Cir. Feb.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 490, \_\_\_\_ L. Ed. 2d \_\_\_\_ (1987). In that case, officers had received a tip that the defendant would be storing drugs in a particular area and then picking them up. *Id.* at 1328. After observing him entering a house and exiting several minutes later, they permitted him to drive off and then searched the house with the consent of the occupants. *Id.* at 1329. Only when they did not find drugs in the house did they stop the defendant's car and retrieve the drugs. *Id.* The court summarily rejected the argument that the officers had manufactured the exigency. *Id.* at 1337. *See also* *United States v. Mitchell*, 538 F.2d 1230, 1233 (5th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 945 (1977) (fact that federal agent did not obtain warrant after probable cause arose, even though he had ample time, did not invalidate the search).

Assuming that the officers did not intentionally create the exigency in *De Los Santos*, there certainly is a strong appearance of such. The tip specifically indicated that the defendant would be picking up the drugs at a location. It would seem more logical to expect that the officers might have first stopped the automobile and then searched the house.

145. *Id.* at 541 (citing *United States v. Ross*, 456 U.S. 798 (1982)).

146. 462 U.S. 213 (1983).

147. 792 F.2d at 539.

They were justified in searching the entire interior of the car, including any containers inside, for that contraband.<sup>148</sup> These facts were distinguishable, said the court, from *United States v. Chadwick*<sup>149</sup> and *Arkansas v. Sanders*,<sup>150</sup> where the focus of the probable cause had been on the containers themselves—before they were placed into the vehicle.<sup>151</sup> In those cases officers were only permitted to seize those containers.

What the court did not address in *Reyes* is the fact that the search of the passenger portion of the defendant's car might have been justified on the basis that it was a lawful search incident to the defendant's arrest under *New York v. Belton*.<sup>152</sup>

## 6. Consent Searches

The issue of consent searches was addressed in *United States v. Koehler*.<sup>153</sup> Following an argument with the defendant, his wife informed the police that he had drugs hidden in the house.<sup>154</sup> The police arrested the defendant and after they had handcuffed him and placed him in the squad car, his wife indicated that she wanted the car keys which were in the defendant's pocket.<sup>155</sup> An officer retrieved the keys, without protest from the defendant, and handed them to her.<sup>156</sup> When she opened the door to the car, an officer saw a gun case containing a shotgun which he seized.<sup>157</sup>

Although there was no dispute that the defendant's wife had voluntarily consented to the search of the car, it was not so clear that she had the requisite authority over the car to grant permission to search it.<sup>158</sup> The defendant's wife held title to the car but she testified at the suppression hearing that she considered the car to be the defendant's because he drove it and would not let her do so.<sup>159</sup>

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148. *See id.*

149. 433 U.S. 1 (1977).

150. 442 U.S. 753 (1979).

151. 792 F.2d at 540-41.

152. 453 U.S. 454 (1981).

153. 790 F.2d 1256 (5th Cir. June 1986).

154. *Id.* at 1257.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See id.* at 1259.

159. *Id.*

Citing *United States v. Matlock*,<sup>160</sup> which briefly addressed third-party consent, the court concluded that under the circumstances at the time of the search, the defendant's wife had access to and control of the car.<sup>161</sup> The court rejected the argument that the defendant's earlier action in denying access prevented her from giving her consent once she gained access to her car.<sup>162</sup>

As an independent ground for affirmance, the government had argued that the search was not subject to fourth amendment requirements because the defendant's wife had conducted the intrusion as a private citizen.<sup>163</sup> But the court declined to address this issue and instead simply noted that the search was valid as a properly authorized consent search.<sup>164</sup>

### 7. Emergency Searches

The law seems generally well-settled that the fourth amendment does not bar warrantless intrusions where government officials reasonably believe that they are presented with a lifethreatening emergency.<sup>165</sup> Such a problem was presented for the court in *United States v. Borchardt*.<sup>166</sup> The defendant, a federal prisoner, was found lying unconscious on his cell floor and was carried to the infirmary.<sup>167</sup> On the way, another prisoner, who happened to be a medical doctor,<sup>168</sup> revived the defendant with mouth-to-mouth resuscitation and CPR.<sup>169</sup> Suspecting a drug overdose, the prison medical personnel administered Narcan, a drug used to reverse narcotic effects.<sup>170</sup> Later, at a community hospital, the defendant admitted that he had ingested heroin but refused any attempts to treat him.<sup>171</sup> When it became

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160. 415 U.S. 164 (1974).

161. 790 F.2d at 1260.

162. *Id.* The court cited its earlier opinion in *United States v. Hughes*, 441 F.2d 12, 18 (5th Cir.), *cert. denied*, 404 U.S. 849 (1971).

163. 790 F.2d at 1260 n.5; *see supra* notes 4-18 and accompanying text (hotel manager's actions were private, making his entrance of a hotel room a non-governmental intrusion).

164. 790 F.2d at 1260 n.5.

165. *See, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *United States v. Brand*, 556 F.2d 1312, 1317 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

166. 809 F.2d 1115 (5th Cir. Feb. 1987).

167. *Id.* at 1116.

168. The medical doctor was apparently Doctor Jeffrey McDonald, the celebrated Army Green Beret officer who had been convicted of murdering his family. *See id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1116-17.

apparent that the Narcan was wearing off and that respiratory arrest was possible, a nurse administered another dose of Narcan over the defendant's objection.<sup>172</sup> Although Narcan is not designed to induce vomiting, in this instance the accused vomited—nine full bags and two broken bags of heroin.<sup>173</sup>

The Fifth Circuit rejected the defendant's arguments that discovery of the drugs resulted from an unreasonable search and seizure.<sup>174</sup> Without deciding whether injection of the drug Narcan, which unexpectedly caused regurgitation, was a search, the court concluded that the procedure was reasonable in light of the lifethreatening situation.<sup>175</sup> The court also declined to decide whether this was a "private" search and thus outside the requirements of the fourth amendment.<sup>176</sup> But the court did note that the Supreme Court has rejected the distinction between searches conducted by law enforcement personnel and other government employees.<sup>177</sup>

#### 8. Exclusionary Rule: The Good Faith Exception

In *United States v. Leon*,<sup>178</sup> the Supreme Court adopted a good faith exception to the exclusionary rule—an exception recognized by the Fifth Circuit four years earlier in *United States v. Williams*.<sup>179</sup> The exception recognizes that the purpose of the exclusionary rule—deterrence of police misconduct—is not furthered by excluding evidence obtained by the police relying in good faith upon a search warrant.<sup>180</sup> During the survey period the Fifth Circuit applied the good faith exception to both a warranted search and administrative inspections. In the process, it relied upon language in *Leon* which suggested that a court is not required to resolve the fourth amendment questions before applying the good faith exception.<sup>181</sup>

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172. *Id.* at 1117.

173. *Id.*

174. *See id.* at 1118.

175. *Id.* at 1117-18.

176. *Id.* at 1117 n.4.

177. *Id.* The nurse who administered the final dose of Narcan was a municipal employee.  
*Id.*

178. 468 U.S. 897 (1984).

179. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

180. 468 U.S. at 921-22.

181. *Id.* at 924-25.

In *United States v. Harper*,<sup>182</sup> the defendant argued that in issuing the warrant used to search his room, the magistrate abandoned his neutral and detached role by relying upon a "bare bones" affidavit.<sup>183</sup> Thus, the defendant argued, the prosecution was not entitled to rely upon the good faith exception.<sup>184</sup> The court's conclusion that there were facts supporting the warrant and that the magistrate had not abandoned his role are unremarkable.<sup>185</sup> What is interesting is that the district court did not even address the defendant's fourth amendment arguments. Instead it proceeded first to the issue of whether the officers had relied in good faith upon a warrant.<sup>186</sup>

This procedure of proceeding directly to the good faith issue is based upon language in *Leon* which indicates that if no important fourth amendment question is presented a court may turn immediately to the issue of good faith without resolving the fourth amendment issue.<sup>187</sup> In *Harper*, the court indicated that the only issue is whether relevant facts constituted probable cause; "no question of broad import is raised."<sup>188</sup>

During the survey period, the court also addressed and clarified the applicability of the good faith exception to improper administrative inspections. In *Smith Steel Casting Co. v. Brock*,<sup>189</sup> the court indicated that the exclusionary rule does not extend to OSHA enforcement actions which are designed to correct violations of occupational safety and health standards.<sup>190</sup> The exclusionary rule does apply where the OSHA proceedings are instituted to assess monetary penalties against the employer for violations, unless the good faith exception applies to the Secretary's actions in obtaining the evidence.<sup>191</sup>

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182. 802 F.2d 115 (5th Cir. Oct. 1986).

183. *Id.* at 120.

184. *See id.*

185. *Id.* at 119-20.

186. *Id.* at 119.

187. 468 U.S. at 924-25; *see United States v. Maggitt*, 778 F.2d 1029, 1033-34 (5th Cir. 1985), *cert. denied*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 2920, 91 L. Ed. 2d 548 (1986).

188. 802 F.2d at 119. The court did not indicate what it would consider an "important" fourth amendment issue or one of "broad import." The safer procedure for trial courts addressing challenges to fourth amendment intrusions will usually involve focusing first on whether there was any violation of the fourth amendment and if so, whether the good faith exception applies.

189. 800 F.2d 1329 (5th Cir. Sept. 1986).

190. *Id.* at 1331.

191. *Id.* at 1330-31.

In *Davis Metal Stamping, Inc. v. Occupational Safety & Health Review Commission*,<sup>192</sup> decided on the same day as *Smith Steel*, an OSHA compliance officer obtained an *ex parte* inspection warrant.<sup>193</sup> As a result of the inspection, sanctions were assessed against the employer.<sup>194</sup> On appeal of the decision by the Occupational Safety and Health Review Commission, the employer argued that there was no probable cause to support the *ex parte* warrant which had authorized the inspection of his worksite.<sup>195</sup> Citing *Smith*, the court ruled that *ex parte* warrants were not authorized under the applicable regulation,<sup>196</sup> and it was unnecessary to address the issue of probable cause, except as it related to the good faith exception.<sup>197</sup> With regard to the applicability of the good faith exception, the court rejected the employer's arguments that the Secretary of Labor should have known that *ex parte* warrants were not permitted<sup>198</sup> and that the affidavit used to obtain the warrant contained false statements.<sup>199</sup>

### B. Fifth Amendment Issues

#### 1. The Right Against Self-Incrimination: The "Act of Production" Privilege

In *Hale v. Henkel*,<sup>200</sup> the Supreme Court ruled that the privilege against self-incrimination was personal in nature and that it was not

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192. 800 F.2d 1351 (5th Cir. Sept. 1986).

193. *Id.* at 1351.

194. *Id.*

195. *Id.*

196. *Id.* at 1355. Although the original regulation in effect at the time did not permit *ex parte* warrants, a later amendment now permits such warrants. 29 C.F.R. § 1903.4 (1986); 800 F.2d at 1356.

197. 800 F.2d at 1355. The court did, however, analyze the probable cause issue in the context of determining whether the OSHA compliance officer acted in manifest good faith. *Id.* As the Supreme Court noted in *Leon*, the good faith exception will not apply where the affidavit used to obtain the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." 468 U.S. at 923.

198. 800 F.2d at 1356. The court noted that at the time this warrant was executed no federal court had ruled that section 1903.4 of title 29 of the Code of Federal Regulations did not permit *ex parte* warrants. Therefore, the Secretary had operated in good faith. *Id.*

199. *Id.* at 1356-57. The court concluded that under the facts, the OSHA compliance officer reasonably believed that he had specific evidence of violations, including some incriminating statements from the employer that he was not in compliance with some of the OSHA requirements. *Id.* at 1358.

200. 201 U.S. 43 (1906).

available to a corporation.<sup>201</sup> In *Bellis v. United States*,<sup>202</sup> the Supreme Court ruled that an individual possesses no fifth amendment privilege from producing records of a collective identity.<sup>203</sup> A collective identity was defined by the Court as “an organization which is recognized as an independent entity apart from its individual members.”<sup>204</sup> However, in *United States v. Doe*,<sup>205</sup> the Court retreated slightly from its narrow application of the privilege and recognized that a sole proprietor might claim the privilege, if the act of producing the requested documents or information would be incriminating.<sup>206</sup> An issue currently dividing the circuits is whether *Bellis* should be read narrowly to mean that the privilege is not available with regard to the “contents” of collective entity documents. Several circuits have read *Bellis* to bar invocation of the privilege only with regard to the contents of a collective entity’s documents and thus allow the custodian to claim an “act of production” privilege.<sup>207</sup> Still others, including the Fifth Circuit, have refused to so apply *Bellis*.<sup>208</sup>

In *In re Grand Jury Proceedings (Doe)*,<sup>209</sup> the Fifth Circuit relied upon its earlier decision in *In re Grand Jury Proceedings (Lincoln)*<sup>210</sup> in holding that the act of production exception does not apply to a collective entity.<sup>211</sup> The collective entity in this case consisted of two

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201. *Id.* at 69-70.

202. 417 U.S. 85 (1974).

203. *Id.* at 100-01.

204. *Id.* at 92. The “entity” in *Bellis* was a small law firm. *Id.* at 86.

205. 465 U.S. 605 (1984).

206. *Id.* at 616-17. While the custodian cannot argue that the contents of the demanded documents are incriminating, he may under *Doe* claim that simply turning the documents over to the government may amount to testimonial incrimination—that the records exist, that the custodian has them, and that they are authentic. *Id.* at 612.

207. See, e.g., *United States v. Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986); *United States v. Lang*, 792 F.2d 1235, 1240 (4th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 574, 93 L. Ed. 2d 578 (1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc).

208. See, e.g., *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861 (8th Cir.), *cert. dismissed sub nom.* See v. United States, \_\_\_ U.S. \_\_\_, 107 S. Ct. 918, 93 L. Ed. 2d 865 (1986); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.) (en banc), *cert. denied sub nom.* *Morganstern v. United States*, 474 U.S. 1033 (1985); *United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir.), *cert. denied sub nom.* *Vargas v. United States*, 469 U.S. 819 (1984); *In re Grand Jury Proceedings United States*, 626 F.2d 1051, 1053 (1st Cir. 1980).

209. 814 F.2d 190 (5th Cir. Mar.), *cert. granted sub nom.* *Braswell v. United States*, \_\_\_ U.S. \_\_\_, 108 S. Ct. 64, 98 L. Ed. 2d 28 (1987).

210. 767 F.2d 1130 (5th Cir. 1985).

211. 814 F.2d at 193.



closely-held corporations which were, according to the district court, being managed "as close to the manner in which a sole proprietorship would be handled as almost as could be conceived."<sup>212</sup> The court observed that under the applicable state laws, a corporation is a creature of law with a separate identity<sup>213</sup> and that the Supreme Court in *Bellis* had noted that corporations are collective entities, regardless of how small, and not entitled to the privilege.<sup>214</sup> It rejected the argument that the one-man corporations in this case were not collective entities.<sup>215</sup>

The court seems to have read *Bellis* too closely. The Supreme Court's denial of the privilege to corporations in *Hale* rested heavily on the proposition that the privilege against self-incrimination is designed to protect the individual.<sup>216</sup> Where the entity is a sole proprietorship, as in *United States v. Doe*,<sup>217</sup> or as here where the entity is essentially a single individual, the privilege should apply.<sup>218</sup> In both cases, notwithstanding the legal nature or label of the entity, it is the individual's risk of incrimination which is at stake and only application of the privilege will protect against the incrimination.

## 2. The Right Against Self-Incrimination: Compulsory Urinalysis

The issue of the applicability of the right against self-incrimination in the context of drug urinalysis testing was addressed by the Fifth Circuit in *National Treasury Employees Union v. Von Raab*.<sup>219</sup> Although the majority of the court's opinion, as discussed above, addressed the issue of whether the drug urinalysis testing program initiated by the Customs Service constituted a search, it did address

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212. *Id.* at 192. The appellant Doe (Mr. Braswell) testified that the corporate structure of his two corporations existed only for appearance and that it did nothing to change the way he did business. *Id.*

213. *Id.* The corporations had been formed in accordance with Mississippi law. *Id.*

214. *Id.*

215. *Id.*

216. *Hale v. Henkel*, 201 U.S. 43, 69 (1906).

217. 465 U.S. 605 (1984).

218. *Bellis* can be distinguished from this situation on the grounds that the entity in *Bellis* was a partnership consisting of more than one individual. 417 U.S. at 86.

219. 816 F.2d 170 (5th Cir. Apr. 1987). This case is also discussed under the section on searches and seizures. *See supra* notes 23-53 and accompanying text. Remarkably, the union which was challenging the program did not raise the issue of self-incrimination. 816 F.2d at 174. But the district court did address this issue and concluded that the program would withstand such a challenge. *Id.*

briefly the possibility that the program implicated self-incrimination issues.<sup>220</sup> The court also noted that testing urine for the presence of drugs does not violate the right against self-incrimination.<sup>221</sup> The court noted that urine samples are like voice exemplars,<sup>222</sup> blood samples,<sup>223</sup> and line-up identifications,<sup>224</sup> which do not implicate testimonial evidence.<sup>225</sup>

Despite the court's rejection of the self-incrimination argument, one feature of the testing program does present self-incrimination problems. Before providing the test samples, the employees are required to list any medications taken and the circumstances involving legitimate contact with illegal drugs.<sup>226</sup> The purpose of this is to "discover information that will explain why a particular positive test does not reflect drug use."<sup>227</sup> The court recognized that completing these pre-test forms involved testimonial evidence but observed that questions about medications and contact with illicit drugs do not in themselves elicit incriminating information,<sup>228</sup> and even if they did provide incriminating information, the effect would be negligible.<sup>229</sup> Although the court specifically declined to comment on whether a particular employee might legitimately invoke the privilege,<sup>230</sup> it would seem that on at least a case-by-case basis the requirement to provide potentially incriminating information would raise serious self-incrimination issues.

### 3. Grants of Immunity

Several immunity issues were addressed in *United States v. Williams*.<sup>231</sup> Pursuant to an agreement of immunity, one of the defendants in *Williams*, Jan Grossman, offered evidence to the United

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220. 816 F.2d at 181.

221. *Id.*

222. *Id.* (citing *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973)).

223. *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 760-65 (1966)).

224. *Id.* (citing *United States v. Wade*, 388 U.S. 218, 221-23 (1967)).

225. *Id.*

226. *Id.* at 173-74.

227. *Id.* at 181.

228. *Id.*

229. *Id.*

230. *Id.*

231. 809 F.2d 1072 (5th Cir. Jan.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 228, 98 L. Ed. 2d 187 (1987).

States Attorney in the Western District of Texas.<sup>232</sup> But when it became apparent that the defendant had not cooperated fully, he was indicted in the Southern District.<sup>233</sup> The defendant's argument was that the government had impermissibly used his immunized testimony against him.<sup>234</sup> The court first addressed the issue, one of first impression for the Fifth Circuit,<sup>235</sup> of whether he had even been granted immunity.<sup>236</sup> Although the Justice Department had authorized a grant of use immunity under section 6002 of title 18 of the United States Code, a court order was never issued.<sup>237</sup> Noting that other circuits had recognized this sort of "informal immunity,"<sup>238</sup> the court concluded that under the facts, the defendant had indeed been granted informal immunity which was binding on the federal prosecutors.<sup>239</sup> They were thus required to show under *Kastigar v. United States*,<sup>240</sup> that they had not used any of the defendant's protected testimony in seeking the indictment.<sup>241</sup> The court concluded that under the facts, the government had met its *Kastigar* burden.<sup>242</sup>

#### 4. *Miranda* Warnings: Use and Consequences

In several cases during the survey period, the Fifth Circuit addressed the issues of when *Miranda* warnings must be given, who must give them, the content of the warnings, and the consequences of failing to follow the *Miranda* mandate on other pieces of evidence.

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232. *Id.* at 1081.

233. *Id.*

234. *Id.*

235. *Id.* at 1082. The court observed that it had addressed the issue of whether a refusal to testify pursuant to an informal grant of immunity was a valid exercise of the privilege against self-incrimination. *Id.*

236. *Id.* at 1081.

237. *Id.*

238. *Id.* at 1082. The principle of giving effect to less than perfect grants of immunity recognizes that if the "immunized" individual responds with incriminating information, he has waived his privilege against self-incrimination involuntarily and it would violate due process to use those coerced statements against him.

239. *Id.* at 1082; see also *United States v. Weiss*, 599 F.2d 730, 735 n.9 (5th Cir. 1979) (discussing review of grants of immunity and the role of the judiciary therein).

240. 406 U.S. 441, 460-62 (1972).

241. 809 F.2d at 1082.

242. *Id.* at 1082. In *Kastigar*, the Supreme Court indicated that the prosecution bears a "heavy" burden of showing that its prosecution is based upon independent evidence. 406 U.S. at 461. However, the Fifth Circuit held that this means a "preponderance of the evidence." 809 F.2d at 1082 (citing *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974)).

In none of these cases did the court make any remarkable departures from precedent.

In *United States v. Bengivenga*,<sup>243</sup> the court addressed the issue of whether the defendant was "in custody" at the time she was questioned by border agents.<sup>244</sup> The defendant was on a commercial bus stopped by agents who were conducting a routine check of the passengers' citizenship.<sup>245</sup> When a check of the luggage, linked with the defendant, revealed the strong odor of marijuana, the agents led her to a trailer for questioning which lasted about one and one-half minutes.<sup>246</sup> She was then arrested and advised of her rights.<sup>247</sup> The court applied its four-prong test for determining custody:<sup>248</sup> (1) whether there was probable cause to arrest; (2) whether the law enforcement officer had a subjective intent to hold the defendant; (3) whether the defendant had a subjective belief that her freedom was significantly restricted; and (4) whether the focus of the investigation was on the defendant at the time of the questioning.<sup>249</sup> In finding that the questioning was custodial and reversing the conviction, the court focused closely on the fact that at the time the defendant was questioned the officers had probable cause to arrest her and that the officers, by their own admission, had focused their investigation on the defendant.<sup>250</sup>

In *United States v. Borchardt*,<sup>251</sup> the court held that a hospital nurse was not required to advise the defendant of his *Miranda* rights when her questions about possible drug overdose were designed for diagnosis and treatment.<sup>252</sup> In seeking medical information the nurse

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243. 811 F.2d 853 (5th Cir. Feb.), *reh'g granted*, 825 F.2d 62 (5th Cir. Aug. 1987).

244. *Id.* at 854-55.

245. *Id.* at 854.

246. *Id.*

247. *Id.*

248. *Id.* at 855.

249. *Id.*; *see also* *United States v. Alvarado Garcia*, 781 F.2d 422, 425-26 (5th Cir. 1986) (The court applied the four-pronged test to a dump truck driver who was stopped by two border patrol agents, based on reasonable suspicion that he was transporting marijuana, and found that the defendant was not in custody).

250. 811 F.2d at 855. In dissent, Judge Clark opined that the record did not show that the agents had probable cause. *Id.* at 855-56.

251. 809 F.2d 1115 (5th Cir. Feb. 1987).

252. *Id.* at 1118-19. The defendant was a federal prisoner transferred to an area community hospital as an emergency measure to resuscitate him from what appeared to be a drug overdose. *Id.* at 1116. In response to the nurse's questions, he admitted that he may have ingested heroin. *Id.* Shortly thereafter, the nurse administered a dose of Narcan which unexpectedly

was acting not as an agent for the police but rather on behalf of the patient.<sup>253</sup> The court noted that *Miranda* is inapplicable even where the medical professional asking the questions is a government employee.<sup>254</sup> The fact that an officer eavesdropped on the conversation did not convert the questioning into a law enforcement interrogation.<sup>255</sup>

The actual content of the *Miranda* warning was at issue in *United States v. Tapp*.<sup>256</sup> On advice of counsel, who had been told that the defendant was not a target of an investigation, the defendant cooperated with FBI agents who conducted three separate interrogations.<sup>257</sup> However, between the first and second interview, the investigation shifted from a third party to the defendant.<sup>258</sup> The agents not only failed to so inform the defendant, but it also appears that on at least one occasion, the agents told the defendant's counsel that his client was not their target.<sup>259</sup> However, before each of the last two interviews, the defendant received *Miranda* warnings and executed a written waiver of his rights.<sup>260</sup>

The court rejected the defendant's argument that his statements were not free and voluntary because he did not know that he was a target of the investigation.<sup>261</sup> The court found that the questions in the second and third interview entailed matters directly involving the defendant's activities and should have alerted him to the fact that he was the target.<sup>262</sup> According to the court, the agent's failure to

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caused the defendant to regurgitate eleven bags of heroin. *Id.* at 1117. This case is also discussed under the topic of emergency searches. See *supra* notes 166-77 and accompanying text.

253. 809 F.2d at 1118.

254. *Id.* The court cited its decision in *United States v. Webb*, 755 F.2d 382, 391-92 (5th Cir. 1985), where it had held that an Army psychiatrist was not a law enforcement officer required to give *Miranda* warnings. *Id.* Interestingly, the court declined to hold in another portion of its opinion whether the nurse's injection of Narcan—which caused the defendant to regurgitate the ingested heroin packets—amounted to a *private* search. 809 F.2d at 1117 n.4. But the court noted that for fourth amendment purposes, the Supreme Court has rejected any distinction among government employees. *Id.*

255. 809 F.2d at 1119.

256. 812 F.2d 177 (5th Cir. Feb. 1987).

257. *Id.* at 178.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 179.

262. *Id.*

advise the defendant that the agenda had changed was objectionable as a matter of ethics—but not a ground for holding the statements involuntary.<sup>263</sup> In reaching this conclusion, the court did not cite its opinion in *United States v. McCrary*,<sup>264</sup> where it recognized that failure to advise a suspect of the offense being investigated might result in an invalid waiver.<sup>265</sup>

This opinion is troubling in several respects. First, by reducing the characterization of the agent's actions to only ethically objectionable, the court may have implicitly blessed future procedural shortcuts by law enforcement personnel. In this case, it appears that the agent affirmatively informed the defendant's counsel that his client was not a target.<sup>266</sup> *Miranda* was designed to prevent overreaching by the police.<sup>267</sup> Affirmatively misleading the defendant in this case appears to be an excellent example of the sort of police conduct which should not be tolerated.<sup>268</sup>

Secondly, the court appears to have placed much stock in the fact that the defendant must have known that he was a target by the fact that he had received warnings and was asked questions concerning his conduct.<sup>269</sup> Although the Supreme Court has apparently shunned a verbatim incantation of *Miranda*,<sup>270</sup> failure to clearly tell the suspect that he is a suspect in itself may render the statements invalid because it potentially lulls the defendant into a false sense of security.<sup>271</sup>

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263. *Id.* The court cited *Moran v. Burbine*, 475 U.S. 412 (1986), but that case is arguably inapposite. In *Moran*, the unethical actions occurred when the officer falsely told the suspect's attorney that the suspect was not being interrogated and would not let the attorney consult with his client who had received valid warnings and waived them. *Id.* at 416-17. The Supreme Court noted that the purpose of *Miranda* had been met because the suspect's waiver was voluntary and rejected the argument that a suspect must be given a running account of factors which might change his mind about waiving his rights. *Id.* at 421-22. In *Tapp*, however, the unethical actions of the agents affirmatively misled both the counsel and the suspect and cast serious doubt on the suspect's waiver itself. See 812 F.2d at 178.

264. 643 F.2d 323 (5th Cir. 1981).

265. *Id.* at 328.

266. 812 F.2d at 178.

267. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

268. See *id.* at 476 ("any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.").

269. 812 F.2d at 179.

270. See *California v. Prysock*, 453 U.S. 355, 355-56 (1981); see generally Comment, *Criminal Law: The Accused's Right to Miranda Warnings—or Their Functional Equivalent*, 21 WASHBURN L.J. 427 (1982) (argument that *Prysock* reinforces the return to the voluntariness test to determine the admissibility of an accused's confession).

271. Informing the suspect that he is not a target is akin to a negation of the warnings

### 5. Miranda Violations and Voluntariness

In a third review of *United States v. Cherry*,<sup>272</sup> the Fifth Circuit addressed the issue of the effect of a *Miranda* violation on the admissibility of the murder weapon.<sup>273</sup> The defendant in *Cherry*, a member of the armed services, was arrested for the murder of a taxi driver and after waiving his *Miranda* rights, initially denied committing the murder and consented to a search of his barracks room.<sup>274</sup> The victim's billfold was found in a nearby latrine.<sup>275</sup> He was again advised of his *Miranda* rights and made an "equivocal" request to speak with counsel.<sup>276</sup> The agents told him that counsel would probably tell him to remain quiet; they did not attempt to get one for him.<sup>277</sup> They continued their questioning regarding the defendant's possession of a pistol.<sup>278</sup> In response, the defendant told them where to find the murder weapon.<sup>279</sup>

On the first appeal of his murder conviction (*Cherry I*),<sup>280</sup> the court reversed because the defendant's confession had been taken in violation of *Miranda* and *Edwards v. Arizona*.<sup>281</sup> At his second trial, the court admitted the murder weapon on the theory of inevitable discovery under *Nix v. Williams*.<sup>282</sup> On the second appeal (*Cherry II*),<sup>283</sup> the Fifth Circuit rejected that holding and remanded for

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which typically occur where the officer gives the warnings and then informs the suspect that what he says will not be used against him. See, e.g., *United States v. Ramirez*, 404 F. Supp. 273, 276 (W.D. Tex. 1974), *aff'd*, 523 F.2d 1054 (5th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

272. 794 F.2d 201 (5th Cir. July 1986), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 932, 93 L. Ed. 2d 983 (1987).

273. *Id.* at 207-08.

274. *Id.* at 203.

275. *Id.*

276. *Id.* The defendant said that "maybe I should talk to an attorney before I make a further statement." *Id.* Safe practice indicates that agents should in such circumstances attempt carefully to determine whether such equivocal statements are indeed an attempt to ask for counsel.

277. *Id.*

278. *Id.*

279. *Id.* at 203-04.

280. *United States v. Cherry*, 733 F.2d 1124 (5th Cir. 1984).

281. *Id.* at 1132 (relying on *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981)).

282. *Cherry III*, 794 F.2d at 204 (relying on *Nix v. Williams*, 467 U.S. 431 (1984)).

283. *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985). See Ellis, *Criminal Procedure and Criminal Law, Fifth Circuit Survey, July 1, 1984 - June 30, 1985*, 17 TEX. TECH L. REV. 365, 490 (1986).

consideration of whether the murder weapon was admissible under *Oregon v. Elstad*<sup>284</sup> where the Supreme Court indicated that a *Miranda* violation might not automatically block otherwise voluntarily disclosed derivative evidence.<sup>285</sup> Subsequently, the trial court relied on *Elstad* and ruled that the discovery of the murder weapon was not tainted by the investigator's violation of the defendant's *Miranda* rights.<sup>286</sup>

On the third appeal, the Fifth Circuit agreed with the trial court and affirmed the conviction.<sup>287</sup> The thrust of the court's opinion rested on the proposition that a *Miranda* violation is not in itself a constitutional infringement.<sup>288</sup> Although the court found that such a violation does create a presumption that a suspect's right against self-incrimination has been violated, it was clear under *Elstad* that the test for deciding whether the right against self-incrimination was violated was the "due process voluntariness test."<sup>289</sup> Citing *Michigan v. Tucker*<sup>290</sup> and *Harris v. New York*,<sup>291</sup> the court concluded that discovery of the murder weapon—the fruit of the defendant's otherwise voluntary statements—was admissible.<sup>292</sup> Although the Supreme Court has yet to address the admissibility of an article of evidence discovered after a *Miranda* violation, the Fifth Circuit rested its decision on the Supreme Court's language in *Elstad* concerning *Tucker*: "[T]he introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights . . . [T]his reasoning applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an *article of evidence* but the accused's own voluntary testimony."<sup>293</sup>

## 6. Commenting on the Defendant's Silence: A Perennial Problem

A recurring problem in closing arguments is the temptation prosecutors face in commenting on the absence of testimony from

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284. 470 U.S. 298 (1985).

285. *Cherry II*, 759 F.2d at 1210.

286. *Cherry III*, 794 F.2d at 205.

287. *Id.* at 208.

288. *Id.* at 207-08.

289. *Id.* at 207.

290. 417 U.S. 433 (1974).

291. 401 U.S. 222 (1971).

292. 794 F.2d at 208.

293. *Id.* at 208 (citing *Elstad*, 470 U.S. at 308) (emphasis added by the Fifth Circuit).



the defendant. It is well-settled that the prosecution may not comment, either directly or indirectly, on the defendant's failure to testify.<sup>294</sup> However, comment upon the failure to produce evidence is permitted if there is favorable evidence which could have been produced by a source other than the defendant's testimony.<sup>295</sup> This distinction represents a fine line which is measured by whether the comment was the result of the prosecutor's manifest intent or whether the jury would naturally and necessarily take the prosecutor's argument as a comment on the failure of the defendant to testify.<sup>296</sup> The difficulty in drawing the line between a constitutional violation and a permissible comment is demonstrated in two cases decided by the Fifth Circuit this survey period.

In *United States v. Sardelli*,<sup>297</sup> the defense counsel emphasized in his closing argument that no defense witnesses had been called because he was willing to rely upon the weaknesses in the government's case.<sup>298</sup> In response, the prosecutor argued that the defense counsel had asked the jury to draw inferences from the fact that the defendant had not taken the stand and then added that defense counsel "likes to argue things but doesn't want the whole thing brought out to you."<sup>299</sup> Under the facts, said the court, the added comments by the prosecution were an impermissible comment on the defendant's right to remain silent.<sup>300</sup> The court relied on the fact that the prosecutor had twice referred to the defendant by name and the fact that the only other witnesses who had knowledge of the crime were government witnesses.<sup>301</sup> The court was "satisfied that the jury would 'naturally and necessarily' construe the prosecutor's remarks as a comment on defendant's silence."<sup>302</sup>

In the second case, the court concluded that the prosecutor's comments were not improper. In *United States v. Borchardt*,<sup>303</sup> the

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294. *Griffin v. California*, 380 U.S. 609, 612 (1965); *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980).

295. *United States v. Jennings*, 527 F.2d 862, 871 (5th Cir. 1976).

296. *United States v. Benevides*, 664 F.2d 1255, 1263 (5th Cir.), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Bright*, 630 F.2d 804, 805 (5th Cir. 1980); *United States v. Austin*, 585 F.2d 1271, 1279 (5th Cir. 1978).

297. 813 F.2d 654 (5th Cir. Mar. 1987).

298. *Id.* at 656.

299. *Id.* at 657.

300. *Id.*

301. *Id.*

302. *Id.* (citing *United States v. Chisem*, 667 F.2d 1192, 1195 (5th Cir. 1982) (per curiam)).

303. 809 F.2d 1115 (5th Cir. Feb. 1987).

defendant; a federal prisoner, was convicted of possessing heroin which he had ingested.<sup>304</sup> During closing arguments the prosecutor stated:

I suggest to you that it is incredulous to suggest that Mr. Borchardt did not know that he had ingested heroin. There has been no contrary explanation offered that in any way conflicts with that except a few things and I will talk about those the next time I get up.<sup>305</sup>

The court rejected the defendant's argument that this was an indirect comment on his failure to testify.<sup>306</sup> The comment, said the court, was directed at the defense counsel's failure to produce any evidence to support his opening statement that the defendant did not know that the packets he had swallowed contained heroin.<sup>307</sup> In the court's view, other alternate explanations might have come from a variety of sources other than the defendant, including fellow inmates.<sup>308</sup>

These two cases are difficult to reconcile. In *Sardelli*, it was apparently clear that other witnesses had knowledge of the crime but that they had been called as prosecution witnesses.<sup>309</sup> However, in *Borchardt*, the court unfortunately appeared content with the fact that other witnesses *might* have been able to offer favorable defense evidence.<sup>310</sup> Given the constitutional ramifications of these sorts of comments, the better rule would seem to be that in order to justify a permissible "lack of defense evidence argument," the prosecution should be required to show that favorable defense evidence, other than the testimony of the defendant, was reasonably available to the defense. The burden should not be on the defense to show that the argument was improper because there was no source other than the defendant.

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304. *Id.* at 1116-17. The defendant had ingested 11 bags of heroin which he later regurgitated at the hospital while undergoing emergency treatment. *Id.* at 1117. The case is also discussed under the topics of emergency searches, *see supra* notes 166-77 and accompanying text, and use and consequences of *Miranda* warnings, *see supra* notes 251-55 and accompanying text.

305. 809 F.2d at 1119.

306. *Id.*

307. *Id.*; *see also* United States v. Soudan, 812 F.2d 920, 930 (5th Cir. Dec. 1986), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 2187, 95 L. Ed. 2d 843 (1987) (prosecutor was simply pointing out holes in web of defense theory).

308. 809 F.2d at 1119.

309. 813 F.2d at 657.

310. 809 F.2d at 1119.

### III. PRETRIAL PROCEDURES

#### A. *Bail and Pretrial Detention*

The Bail Reform Act of 1984<sup>311</sup> permits pretrial detention without bail where it appears that the defendant poses a flight risk or a danger to an individual or the community.<sup>312</sup> Before imposing restraint without bond, the court must be satisfied that no condition or combination of conditions of bond will reasonably assure a defendant's appearance at trial.<sup>313</sup> The Act generally recognizes a delicate balance between the individual's important liberty interests and the public's interest that individuals charged with crimes be present at trial and, while awaiting trial, not pose a danger to the community.<sup>314</sup> In striking this balance, Congress included within the Act a number of fairly stringent criteria for, and timeliness constraints on, the imposition of this form of pretrial restraint.<sup>315</sup> During the survey period, the court addressed several significant issues that arise under the Act.

#### 1. Presumption of Flight or Danger to Community

In *United States v. Trosper*,<sup>316</sup> the court addressed a provision of the Bail Reform Act which sets out a presumption that no condition will assure the presence of defendants charged with certain drug offenses.<sup>317</sup> The Act provides in part:

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act.<sup>318</sup>

The defendant was charged with conspiracy to possess and attempting to possess with intent to distribute approximately 12,000

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311. 18 U.S.C. §§ 3141-50, 3154, 3156 (Supp. IV 1986).

312. *Id.* § 3142(e).

313. *Id.*

314. *United States v. Salerno*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 107 S. Ct. 2095, 2105, 95 L. Ed. 2d 697, 714 (1987).

315. 18 U.S.C. §§ 3141-56 (Supp. IV 1986).

316. 809 F.2d 1107 (5th Cir. Jan. 1987).

317. *Id.* at 1108-09.

318. 18 U.S.C. § 3142(e) (Supp. IV 1986).

tablets of methylenedioxy methempletamine.<sup>319</sup> These offenses were among those which are deemed sufficient to trigger the foregoing presumption.<sup>320</sup> He was denied bond following a hearing under the Bail Reform Act and on appeal he argued that the presumption set out in the Act is only triggered by independent evidence of probable cause, and not on the basis of the indictment alone.<sup>321</sup> Citing *United States v. Volkson*<sup>322</sup> and cases from the Eleventh, Second, and Sixth Circuits,<sup>323</sup> the court summarily concluded that the presumption is applicable on proof of the indictment alone.<sup>324</sup>

A larger question posed in *Trosper* was whether the trial court had impermissibly shifted the burden of persuasion to the defendant to show that he was not a flight risk and if not, whether the defendant had sufficiently rebutted the presumption.<sup>325</sup> The Supreme Court has held that in a criminal trial it is constitutionally impermissible to shift the burden of persuasion to the defendant through a mandatory presumption.<sup>326</sup> On the other hand, it is not impermissible to shift the burden of producing rebuttal evidence.<sup>327</sup> In *Trosper*, the defendant's burden shifting argument was apparently based upon the fact that his rebuttal evidence had been rejected by the district court; therefore, the court must have placed on him the burden of persuasion.<sup>328</sup> Without discussing the distinction, the court stated that the defendant's burden shifting argument was "reduced to nothing more than quibbling over semantics."<sup>329</sup>

In an attempt to rebut the statutory presumption, the defendant had offered evidence of family ties and of his financial condition.<sup>330</sup> The defendant's rebuttal evidence, said the court, was not supportive

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319. 809 F.2d at 1108.

320. *Id.*

321. *Id.* at 1110.

322. 766 F.2d 190 (5th Cir. 1985).

323. See *United States v. Hurtado*, 779 F.2d 1467, 1478-79 (11th Cir. 1985); *United States v. Contreras*, 776 F.2d 51, 54 (2d Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985).

324. 809 F.2d at 1110.

325. *Id.*

326. See, e.g., *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Ulster County Court v. Allen*, 442 U.S. 140, 156-60 (1979).

327. See *Sandstrom v. Montana*, 442 U.S. 510, 516 (1979).

328. 809 F.2d at 1110.

329. *Id.*

330. *Id.*

of the point for which he offered it.<sup>331</sup> After reviewing the evidence offered by the defendant, the court concluded that as to the family ties, the district court's conclusion that they offered no assurance of his appearance was supported by the proceedings.<sup>332</sup> As to the defendant's financial condition, the court likewise concluded that "this evidence did not overcome the statutory presumption."<sup>333</sup> The court added that in any event, the prosecution had met its burden of persuading the district court that denial of bond was appropriate because of the defendant's casual family ties, his murky financial condition, and because he apparently had access to false identification materials.<sup>334</sup>

In commenting on the evidentiary burdens posed by the statutory presumption the court stated:

Finally, we observe that when on review by an appellate court, the burdens imposed by the statute here are to be viewed somewhat like the evidentiary burdens in a case under Title VII of the Civil Rights Act. When a case has been fully tried, the shifting of and the descriptions of evidentiary burdens become largely irrelevant and the question becomes whether the evidence as a whole supports the conclusions of the proceedings below.<sup>335</sup>

There are several troubling aspects of the court's treatment of the statutory presumption. Although it rejected the defendant's argument that the burden of overcoming the presumption had been placed upon him, the court may have done exactly that. There is clear language in the opinion indicating that the defendant had not produced "evidence of the quality or competence required to overcome the statutory presumption that he was not reasonably likely to appear at trial."<sup>336</sup> The burden of "overcoming" the presumption should not rest on the defendant. Instead, the presumption should be rebutted on the showing of any evidence which raises a genuine issue of fact. And as the court noted in *United States v. Valenzuela-Verdigo*,<sup>337</sup> if the presumption is rebutted it nonetheless "remains in the case as a factor to be considered by the judicial officer."<sup>338</sup> As

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331. *Id.* at 1111.

332. *Id.* at 1110.

333. *Id.* at 1111.

334. *Id.*

335. *Id.* (citations omitted).

336. *Id.*

337. 815 F.2d 1011 (5th Cir. Apr. 1987).

338. *Id.* at 1012 (citing *United States v. Fortna*, 769 F.2d 243, 251 (5th Cir. 1985)).

a practical matter, in the absence of jury instructions or judicial comments on the record, it will often be difficult to determine whether a court has actually shifted this evidentiary burden. In this case, it appears that on the whole, there was ample evidence to support the court's denial of bail. But in a closer case, the court's summary dismissal of semantic arguments which tend to indicate that the defendant has been saddled with "overcoming" the statutory presumption, may be problematic.

## 2. Timeliness of Proceedings

The issue of timeliness of the pretrial detention hearing under the Bail Reform Act was raised, as a matter of first impression, in *United States v. Valenzuela-Verdigo*.<sup>339</sup> The defendant was indicted on various drug charges by a grand jury in the Western District of Texas and arrested in the Western District of Kansas.<sup>340</sup> At the request of the defendant, the detention hearing was postponed until she was transferred back to the Western District of Texas (San Antonio).<sup>341</sup> The detention hearing was held in San Antonio approximately two weeks after the defendant initially appeared before the magistrate in Kansas and five days after the defendant appeared before the magistrate in San Antonio.<sup>342</sup> The prosecution was apparently ready to proceed with the hearing but the defendant's counsel was not available.<sup>343</sup> On appeal of the order of detention, the defendant argued that the order should be set aside because the detention hearing in San Antonio was untimely within the stringent time requirements of the Bail Reform Act.<sup>344</sup> The Fifth Circuit disagreed, relying on precedent in the Second and Seventh Circuits,<sup>345</sup> and noting the absence of any precedent to the contrary, the Fifth Circuit held that a defendant's "first appearance before the judicial officer" for purposes of the Bail Reform Act "means the defendant's first appearance in the district in which he is indicted."<sup>346</sup> Here, the defen-

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339. 815 F.2d 1011 (5th Cir. Apr. 1987).

340. *Id.* at 1012.

341. *Id.* at 1013.

342. *Id.* at 1014.

343. *Id.*

344. *Id.* at 1015.

345. *Id.* at 1015; see *United States v. Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986); *United States v. Dominguez*, 783 F.2d 702, 704-05 (7th Cir. 1986).

346. 815 F.2d at 1015.

dant's pretrial detention hearing was held five days after the initial appearance before the magistrate in San Antonio.<sup>347</sup> Although it was not clearly indicated on the record, the court inferred that the resulting delay in holding the hearing was the result of delays in obtaining the presence of defense counsel and, therefore, within the provisions of the Bail Reform Act which permit a continuance at the request of the defendant.<sup>348</sup>

In reviewing these two cases applying the Bail Reform Act it is clear that the Fifth Circuit is taking seriously its appellate rule that in reviewing detention orders, it will uphold the district court's order if it is supported by the proceedings below.<sup>349</sup> This rule would appear to apply not only to the substantive decision to detain the defendant but also to the application of the procedures for determining whether to do so. The attitude of the Fifth Circuit seems in harmony with the congressional intent to vest greater authority in the trial court's decision to detain certain defendants.<sup>350</sup>

### B. Discovery

In two cases during the survey period, the court addressed the issue of whether the defendant was denied his right to discover evidence which might assist him at trial. In both cases, the court consistently applied the general rules, both constitutional and statutory, governing discovery.

In *United States v. Whiteside*,<sup>351</sup> the court addressed the issue of whether the prosecution had violated Federal Rule of Criminal Procedure 16(a)(1)<sup>352</sup> by not producing certain prosecution exhibits

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347. *Id.* at 1014-15.

348. *See id.* at 1015.

349. *Id.* at 1013 (citing *United States v. Fortna*, 769 F.2d 243, 290 (5th Cir. 1985)).

350. *See* 18 U.S.C. § 3145 (Supp. IV 1986); *United States v. Golding*, 742 F.2d 840 (5th Cir. 1984).

351. 810 F.2d 1306 (5th Cir. Jan. 1987).

352. The rule provides:

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

FED. R. CRIM. P. 16(a)(1).

prior to the day before the defendant's trial started.<sup>353</sup> Citing its own precedent,<sup>354</sup> the court continued its rule of requiring the defendant to show that pretrial disclosure of the evidence would have "enabled him significantly to alter the quantum of proof in his favor."<sup>355</sup> In an attempt to meet this burden, the defendant argued that had he known about the exhibits earlier he would have called several witnesses to testify that he had not distributed one of the documents—a tax protest flier.<sup>356</sup> However, as the court noted, there was other evidence of guilt.<sup>357</sup> Thus, earlier production of the evidence would not have significantly altered the quantum of proof in his favor.<sup>358</sup>

In a second case, *United States v. McKellar*,<sup>359</sup> the court addressed the constitutional issues surrounding failure to disclose evidence to the defense.<sup>360</sup> In *McKellar*, after the defendant was convicted of filing false financial statements to a federally insured lending institution, the defense learned that an employee of an investment company which had worked with the defendant had admitted to FBI agents that he had changed some of the figures on one of several financial statements.<sup>361</sup> The defense unsuccessfully moved for a new trial on the ground that by not disclosing that evidence, the defendant had been denied his constitutional right against the prosecution's suppression of exculpatory evidence as set out in *Brady v. Maryland*.<sup>362</sup>

Citing the Supreme Court's decision in *United States v. Bagley*,<sup>363</sup> the court noted that the test for determining whether a *Brady* violation has occurred is whether the information was material to the defendant on the issue of guilt or punishment.<sup>364</sup> Materiality, in turn, is a question of whether there is a reasonable probability that

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353. 810 F.2d at 1307. The defendant was tried for federal income tax evasion and the prosecution exhibits consisted of two W-4 forms and a tax protest flier. *Id.*

354. See *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

355. 810 F.2d at 1308.

356. *Id.*

357. *Id.*

358. *Id.*

359. 798 F.2d 151 (5th Cir. Aug. 1986).

360. *Id.* at 153-55.

361. *Id.* at 152.

362. *Id.* at 153 (relying on *Brady v. Maryland*, 373 U.S. 83 (1963)).

363. 473 U.S. 667 (1985).

364. 798 F.2d at 153.



if the evidence had been disclosed, the result of the proceeding would have been different.<sup>365</sup> In this case, the court extensively reviewed the information available to the defendant before trial, the defendant's testimony, and the ability of the defense to prepare for trial by exploring the possibility of falsified documents.<sup>366</sup> Under the totality of the circumstances, the court concluded that the undisclosed evidence was not material.<sup>367</sup>

These cases demonstrate the great difficulty defendants face in showing, under *Bagley*, that previously undisclosed evidence harmed their case. Further, they continue the trend of expressing appellate confidence in the trial process and a general reluctance to disturb the lower court's decisions.

### C. *Speedy Trial: Counting the Days*

The Speedy Trial Act<sup>368</sup> provides that a defendant's trial must begin within seventy days of the date on which he was indicted or when he first appeared before a judicial officer, whichever date is later.<sup>369</sup> The Act also provides that the defendant is entitled to thirty days, from his first appearance with counsel, to prepare for trial.<sup>370</sup> In *United States v. Bigler*,<sup>371</sup> the court discussed the potential interplay of these two rules which may appear at times to collide.

In *Bigler*, the defendant, awaiting disposition of state robbery charges, entered a plea of guilty on September 6, 1985 to similar federal charges arising out of the same incident.<sup>372</sup> Before sentencing he moved *pro se* to withdraw his guilty plea on the grounds that his federal indictment charged him with use of a firearm and that because he had not used a firearm, he was not guilty of the charged offense.<sup>373</sup>

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365. *Id.*

366. *Id.* at 153-54.

367. *Id.* at 154.

368. 18 U.S.C. §§ 3161-74 (1982 and Supp. IV 1986).

369. *Id.* § 3161(c)(1).

370. *Id.* § 3161(c)(2). The provision states in part that "unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to appear *pro se.*" *Id.*

371. 810 F.2d 1317 (5th Cir. Feb.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 130, 98 L. Ed. 2d 88 (1987).

372. *Id.* at 1318.

373. *Id.* The counsel who had entered into negotiations with the federal authorities on a guilty plea later withdrew from the case because of unresolvable conflicts. *Id.* at 1324 n.1 (Jones, J., dissenting).

The district court granted his motion on September 20 and remanded him to the state authorities.<sup>374</sup> On November 27, he entered guilty pleas on the state charges and was sentenced to fifteen years confinement.<sup>375</sup>

Despite notice from state authorities that Bigler's state trial had been completed, it was not until January 7, 1986 that federal prosecutors began procedures to transfer him.<sup>376</sup> After an unsuccessful attempt to appoint a counsel who could proceed to trial on the scheduled trial date, March 3, counsel was appointed on February 3.<sup>377</sup> At the request of defense counsel, the court reset trial for March 5 in order to assure the full thirty-day preparation time stated in the Speedy Trial Act.<sup>378</sup> The result was that the defendant's trial began beyond the seventy-day limit. Bigler filed a motion to dismiss the charges because he was denied a speedy trial.<sup>379</sup> The district court denied the motion and sentenced him to twenty years.<sup>380</sup>

On appeal, the Fifth Circuit held that under the facts the defendant had been denied a speedy trial.<sup>381</sup> The speedy trial clock, said the court, began on September 20 when the district court granted the defendant's motion to withdraw his guilty plea.<sup>382</sup> Between that date and March 5, when trial began, 166 days elapsed.<sup>383</sup> The court deducted sixty-eight days for delays "resulting from trial" of the state charges.<sup>384</sup> But it declined to decide whether the government was entitled to deduct an additional nineteen-day delay during which the defendant's motion to dismiss for lack of a speedy trial was pending, noting that even if it were to do so, seventy-nine non-excludable days would remain.<sup>385</sup>

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374. *Id.* at 1318.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 1318-19.

379. *Id.* at 1319.

380. *Id.*

381. *Id.* at 1324.

382. *Id.* at 1319.

383. *Id.*

384. *Id.* at 1320-21. The court rejected the proposition that only the amount of time consumed in actually trying a defendant in state trial is excluded. *Id.* at 1320 (citing *United States v. Oliver*, 523 F.2d 253, 260 (2d Cir. 1975) (Lumbard, J., concurring)). In doing so the court joined at least four other circuits which have concluded that "delay resulting from trial" also includes the time used in preparing for trial. 810 F.2d at 1320 n.13 (citing cases).

385. 810 F.2d at 1321.

In an attempt to further reduce the number of days, the government cited *United States v. Eakes*,<sup>386</sup> for the proposition that a defendant cannot use the Speedy Trial Act as a two-edged sword by insisting on the thirty-day period for counsel's preparation and then arguing that the resulting delay denied him a speedy trial.<sup>387</sup> The court rejected this argument, pointing out that in *Eakes*, the defendant had led the trial court to believe that he was entitled to an additional thirty days for preparation after his co-defendant moved for consolidation of several indictments.<sup>388</sup> Shortly before trial and after seventy days had elapsed, Eakes moved to dismiss the indictment for lack of a speedy trial.<sup>389</sup> The Fifth Circuit refused to "turn the benefits [Eakes] accepted into an error that would undo his conviction . . . ."<sup>390</sup>

In this case, said the court, Bigler had not waived his right to counsel or received an appointed counsel until February 3, twenty-eight days before the scheduled trial date of March 3.<sup>391</sup> The court added that even if trial had proceeded on March 3, it would still have fallen beyond the seventy-day limit by seven days.<sup>392</sup>

The court observed that the real cause for the delay in this case was the federal government's failure to obtain the defendant's transfer from the state authorities and that this type of delay is not unavoidable.<sup>393</sup> If a reasonable delay cannot be avoided, the Speedy Trial Act permits the government, the defense, or the court to move for a continuance that serves "the ends of justice."<sup>394</sup>

In reversing the case and remanding it to the trial court, the court noted that the sanction for failing to comply with the Speedy

386. 783 F.2d 499 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 3277, 91 L. Ed. 2d 567 (1986).

387. 810 F.2d at 1321.

388. *Id.*

389. *Eakes*, 783 F.2d at 503.

390. *Id.*

391. 810 F.2d at 1321-22.

392. *Id.* at 1322-23.

393. *Id.* at 1323.

394. *Id.* (citing 18 U.S.C. § 3161(h)(8) (1982 & Supp. IV 1986)). On this point in her dissent, Judge Jones argued that in this case, the majority was being hypertechnical because the trial court on its own motion could have treated all or a portion of the thirty-day delay as a court-requested delay in the interest of justice and thus could have saved the case from falling outside the Speedy Trial Act. *Id.* at 1325 (Jones, J., dissenting). The majority noted that the burden of requesting such continuances falls on the party seeking to benefit from the delay and that in this case, no such request had been made. *Id.* at 1323.

Trial Act is dismissal of the indictment with or without prejudice.<sup>395</sup> In deciding whether to dismiss with or without prejudice, the trial court should consider the seriousness of the offense, the facts and circumstances which led to the dismissal and the impact of re prosecution on the administration of the Speedy Trial Act and the administration of justice.<sup>396</sup>

Judge Jones dissented because she believed that *Eakes* controlled this case or, in the alternative, that Bigler was tried within the seventy-day limit.<sup>397</sup> In her view, "Bigler was not harmed by the procedural situation in which he found himself,"<sup>398</sup> and that the trial court's grant of thirty days preparation time in this case was consonant with the delays granted in *Eakes* under sections 3161(h)(8)(A)-(C) of the Speedy Trial Act which permits the judge to grant delays to serve the "ends of justice."<sup>399</sup> Thus, she apparently concluded that Bigler's request for the statutory thirty-day preparation time estopped him, like the defendant in *Eakes*, from arguing that he was denied a speedy trial.<sup>400</sup> She also found support for her position by noting that there is no actual conflict between the seventy-day and thirty-day rules.<sup>401</sup> Where there is a delay in obtaining counsel and the resulting thirty-day preparation time extends the trial date beyond the seventy allotted days, the trial court, in her view, should simply treat the extra time as an excludable period of time under section 3161(h)(8)(B)(iv)—that is, a delay incurred to serve the ends of justice.<sup>402</sup>

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395. *Id.* at 1323 (citing 18 U.S.C. § 3162(a)(2) (1982)).

396. *Id.* at 1323-24 (citing 18 U.S.C. § 3162(a)(2) (1982)). The trial court's decision will be reversed only for abuse of discretion. *United States v. Peeples*, 811 F.2d 849, 850 (5th Cir. Feb. 1987); *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1267 (5th Cir. June), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

397. 810 F.2d at 1324 (Jones, J., dissenting).

398. *Id.* at 1325 (Jones, J., dissenting).

399. *Id.* (Jones, J., dissenting).

400. *Id.* (Jones, J., dissenting). Judge Jones pointed out that had Bigler not attempted to plead guilty to the federal charges and had the government not attempted to accommodate him by entering into negotiations, the Speedy Trial clock would not have started running until after the state charges were disposed of. *Id.* at 1324-25. This reasoning is difficult to follow. The point is, as the majority points out, that the government should not be entering into plea negotiations for the purpose of merely accommodating a defendant. *Id.* at 1323. It does not appear that the defendant deliberately manipulated the proceedings to create a violation of the Speedy Trial Act. *Id.* at 1322.

401. *Id.* at 1326 (Jones, J., dissenting).

402. *Id.* at 1325-26 (Jones, J., dissenting). Judge Jones drew support for this position

Finally, Judge Jones would have further reduced the number of days by deducting ten days for "travel time."<sup>403</sup> Under section 3161(h)(1)(H), the court may exclude "delay resulting from transportation of any defendant from another district, . . . except that any time consumed in excess of ten days . . . shall be presumed to be unreasonable."<sup>404</sup> Noting that few cases have addressed this point, Judge Jones observed that other courts have deducted ten days for inter-district transfers of defendants.<sup>405</sup> That deduction would reduce the total number of days to sixty-nine, one day shy of the seventy-day limit.<sup>406</sup>

The government apparently realized its mistake in not arguing at trial or on Judge Jones' point on the ten-day transfer rule because it raised that issue in an application for rehearing.<sup>407</sup> The court denied the application noting that it had repeatedly ruled that it generally will not consider issues not raised before the trial court, and that in this case no exceptions to that general rule existed.<sup>408</sup> Moreover, the court again declined to address the issue of whether those periods during which pretrial motions are pending are excludable.<sup>409</sup> Once again, Judge Jones dissented because new issues had been raised in the application.<sup>410</sup>

This case is a prime example of the sort of day counting that trial and appellate courts must necessarily endure to determine whether the defendant has been deprived of a speedy trial. And this case is particularly difficult because of the possible interpretations which might legitimately be given to provisions within the Act. Despite the arguments of the dissent in this case, the legislative mandate seems clear and was properly followed here. The bulk of the delay in this

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from the Guidelines for Administration of the Speedy Trial Act which were prepared by the Committee on Administration of the Criminal Law under the auspices of the Judicial Conference of the United States. *Id.* (Jones, J., dissenting).

403. *Id.* at 1326 (Jones, J., dissenting).

404. *Id.* (Jones, J., dissenting) (citing 18 U.S.C. § 3161(h)(1)(H)(1982)).

405. *Id.* (citing *United States v. Robertson*, 810 F.2d 254 (D.C. Cir. 1987); *United States v. Greene*, 783 F.2d 1364 (9th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 2923, 91 L. Ed. 2d 551 (1986)).

406. 810 F.2d at 1326 (Jones, J., dissenting).

407. *United States v. Bigler*, 817 F.2d 1139, 1140 (5th Cir. May), *cert. denied*, \_\_\_ U.S. \_\_\_, 108 S. Ct. 130, 98 L. Ed. 2d 88 (1987).

408. *Id.* at 1140.

409. *Id.* at 1141.

410. *Id.* (Jones, J., dissenting).

case resulted from the unexplained government tardiness in obtaining the release of the defendant from state custody and providing him counsel. Although in some limited and compelling circumstances a court might properly exclude all or a portion of the mandatory thirty-day preparation period in computing the timetable, where the case is not complicated and the government has not acted with reasonable diligence, it should be held to the seventy-day limit.

#### IV. TRIAL PROCEDURES

##### A. *Guilty Pleas*

Under Federal Rule of Criminal Procedure 11, there are three types of plea agreements. The prosecution may agree to (1) a dismissal of some of the charges; (2) a nonbinding recommendation, or agreement not to oppose a defense request for a particular sentence; or (3) a specific sentence.<sup>411</sup> The rule also provides that if the court rejects either the first or third type of plea agreement, it must advise the defendant of his opportunity to withdraw his guilty plea.<sup>412</sup> In two cases, the court addressed several issues regarding the second type of plea bargain—where the prosecution has recommended a particular sentence.

In *United States v. Babineau*,<sup>413</sup> the prosecution and the defendant entered into an agreement whereby, in return for a guilty plea, the prosecution would recommend a particular sentence to the court.<sup>414</sup> However, the court sentenced the defendant to a sentence greater than the agreed amount.<sup>415</sup> The defendant argued that by imposing a sentence greater than the recommended amount, the court necessarily rejected the plea agreement and, therefore, it should have advised him of his ability to withdraw his plea.<sup>416</sup> The court rejected that argument, noting that rule 11 specifically treats separately those plea agreements which result in a recommended sentence.<sup>417</sup> In those types of agreements, there is no "disposition provided for" which would trigger either the acceptance or rejection provisions of rule

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411. FED. R. CRIM. P. 11(e)(1)(A)-(C).

412. *Id.* at 11(e)(4).

413. 795 F.2d 518 (5th Cir. July 1986).

414. *Id.* at 519.

415. *Id.*

416. *Id.* at 519-20.

417. *Id.* at 520.

11.<sup>418</sup> A court's rejection of a recommended sentence is not a rejection for purposes of permitting the defendant to withdraw his plea. As the court noted, this conclusion is consistent with the other circuits.<sup>419</sup>

Apparently part of the confusion about the ability to withdraw from this plea agreement arose when the trial court failed to advise the defendant, as required by rule 11(e)(2), that the defendant did not have a right to withdraw his guilty plea if the court declined to accept the prosecution's recommended sentence.<sup>420</sup> But because the court had treated this appeal as a collateral attack on the trial,<sup>421</sup> the defendant had the burden of establishing more than a failure of literal compliance with rule 11.<sup>422</sup> This he could not do.

The defendant in *United States v. Thibodeaux*<sup>423</sup> made a similar argument. Although the prosecution had agreed to recommend a sentence which included a five-year period of confinement, the trial court sentenced him to ten years confinement.<sup>424</sup> The defendant argued that his sentence should be reversed because the trial court had failed to apprise him in accordance with rule 11 that if it declined to follow the prosecution's recommendation, the defendant could not withdraw his plea.<sup>425</sup> Noting that it is "always best for a trial judge to adhere to the strict letter of Rule 11," the court nonetheless declined to "exalt form over substance."<sup>426</sup>

It is important to note that the defendant in *Thibodeaux* did not contend that he thought he could withdraw from his plea nor did he argue that had the judge given the rule 11 advice that he would have withdrawn his plea.<sup>427</sup> The court noted its agreement with

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418. *Id.* (citing FED. R. CRIM. P. 11(e)(2) advisory committee note).

419. *See, e.g.,* *Good Bird v. United States*, 752 F.2d 349 (8th Cir. 1985); *United States v. Schmader*, 650 F.2d 533 (4th Cir.), *cert. denied*, 454 U.S. 898 (1981); *United States v. Incrovato*, 611 F.2d 5 (1st Cir. 1979); *United States v. Gaertner*, 593 F.2d 775 (7th Cir. 1979).

420. 795 F.2d at 521.

421. *Id.* at 519. The defendant failed to file his notice of appeal within ten days of the trial court's ruling on his motion to reduce his sentence. However, the court elected to treat the appeal as a petition under section 2255 of title 28 of the United States Code. *Id.*

422. *Id.* at 521. Although the court in this case applied the standard of review for collateral attacks, *United States v. Timmreck*, 441 U.S. 780 (1979), it also denied relief in a similar case before it on a direct appeal. *See United States v. Thibodeaux*, 811 F.2d 847 (5th Cir. Feb.), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987).

423. 811 F.2d 847 (5th Cir. Feb.), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987).

424. *Id.*

425. *Id.* at 847-48.

426. *Id.* at 848.

427. *Id.*

the Third Circuit that a different result might occur where a defendant has labored under the misapprehension that his plea could be withdrawn if the court declined to follow the prosecution's recommendation.<sup>428</sup>

*B. Jencks Act Issues: Production of "Statements"*

The Jencks Act<sup>429</sup> provides in pertinent part that after a government witness has testified on direct examination the defendant may move for the production of any "statement" of the witness which relates to the witness' testimony.<sup>430</sup> The term "statement" with relation to the witness is

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement . . . .<sup>431</sup>

In two cases, the Fifth Circuit addressed the issue of whether the defense-requested statements by a witness were indeed "statements" within the meaning of the Jencks Act and the question of what procedures should be used to determine whether a particular statement should be produced.

In *United States v. Welch*,<sup>432</sup> the defense moved for production of two investigation reports prepared by a DEA agent after the agent had testified at the defendant's trial.<sup>433</sup> The prosecutor simply argued that the two reports were not statements within the meaning of the Jencks Act.<sup>434</sup> Without conducting an in camera review of the reports, the trial court denied the defense motion for production.<sup>435</sup>

The Fifth Circuit remanded, noting that the trial court was apparently convinced that "an agent's investigation report never can

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428. *Id.* (citing *United States v. de la Puente*, 755 F.2d 313, 315 (3d Cir.), *cert. denied*, 474 U.S. 1005 (1985)).

429. 18 U.S.C. § 3500 (1982).

430. *Id.*

431. *Id.* § 3500(e).

432. 810 F.2d 485 (5th Cir. Feb.), *cert. denied*, \_\_\_ U.S. \_\_\_, 108 S. Ct. 350, \_\_\_ L. Ed. 2d \_\_\_ (1987).

433. *Id.* at 489.

434. *Id.*

435. *Id.*



be a Jencks Act statement when the agent himself is the witness."<sup>436</sup> What the trial court failed to realize in this case was that a distinction exists between whether notes taken by an agent during a witness interview constitute a statement of that witness or whether, as in this case, a report compiled by the agent constitutes a statement of the agent.<sup>437</sup> That error, said the court, was an error of law and not subject to the "clearly erroneous" rule.<sup>438</sup>

What is perhaps more significant about this case is its footnote reference to the issue of whether the government is required to produce a witness' Jencks Act statements *before* the witness actually testifies at trial.<sup>439</sup> Citing earlier precedent, the court reiterated that although a pretrial discovery order would be invalid to the extent that it required the government to produce such statements, the Jencks Act does not prohibit the government from doing so.<sup>440</sup> "Indeed," said the court, "we encourage the practice . . . and applaud the district court's use of such a hortatory discovery order."<sup>441</sup>

In a second case addressing application of the Jencks Act, the court focused on the issue of whether the trial court must hold a hearing to consider extrinsic evidence in deciding whether to order production of a Jencks statement. In *United States v. Osgood*,<sup>442</sup> the trial court held an *in camera* hearing to examine various DEA investigative reports and summaries which included statements made by the government witness to DEA agents.<sup>443</sup> The court concluded that only some of the information constituted statements by the witness.<sup>444</sup>

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436. *Id.* at 490.

437. *Id.* As the court noted, the agent's interview notes of a witness are not statements of that witness unless the witness in some way adopts them as his own or the notes were substantially verbatim reports of the witness' interview. *Id.* (citing *United States v. Cole*, 617 F.2d 151, 153 (5th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981)).

438. 810 F.2d at 490 (citing *United States v. Judon*, 581 F.2d 553, 554 (5th Cir. 1978)). The court noted that a trial court's finding will constitute clear error where the finding is grounded upon an incorrect rule of law or is inconsistent with the facts. 810 F.2d at 490.

439. 810 F.2d at 489 n.2.

440. *Id.* (citing *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979)).

441. 810 F.2d at 489 (citing *United States v. McKenzie*, 768 F.2d 602, 609 (5th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986)).

442. 794 F.2d 1087 (5th Cir. July), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 596, 93 L. Ed. 2d 596 (1986).

443. *Id.* at 1091.

444. *Id.*

The defendant argued that the trial court erred in not considering extrinsic evidence regarding the preparation of the reports.<sup>445</sup> The court rejected that argument.<sup>446</sup> Although the Supreme Court has indicated that in some cases the trial court should consider extrinsic evidence,<sup>447</sup> the court did not read any Supreme Court or Fifth Circuit opinion to require a trial court to do so in every case.<sup>448</sup> Instead, it is a "function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."<sup>449</sup> In this case, the court concluded that materials in question, which had been forwarded to the court under seal, revealed no error in the trial court's decision.<sup>450</sup>

These two cases demonstrate several things. First, the court maintains a somewhat generous posture with regard to encouraging pre-trial disclosure of Jencks materials. Although that point is made in a footnote in *Welch*, its potential impact on future practice is probably more significant than it first seems. Second, although the court supports generous pre-trial disclosure, it will generally support the trial court's discretion in deciding which materials should be released under the Jencks Act—assuming the trial court has correctly applied the law.

### C. *The Right to Counsel: Self-Representation*

A criminal defendant has a constitutional right to waive his right to counsel and conduct his own defense—but only if his decision to do so is voluntary and knowing and "he is able and willing to abide by rules of procedure and courtroom protocol."<sup>451</sup> Since, in deciding to represent himself, the defendant is waiving another important constitutional right to the assistance of counsel, a trial court should accept the waiver only where the defendant's request to proceed *pro*

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445. *Id.*

446. *Id.* at 1091-92.

447. *Campbell v. United States*, 365 U.S. 85, 92-93 (1961).

448. 794 F.2d at 1091-92.

449. *Id.* at 1091 (quoting *Palermo v. United States*, 360 U.S. 343, 354-55 (1959)).

450. *Id.* at 1092.

451. *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (citing *Faretta v. California*, 422 U.S. 806 (1975)).

se is "clear and unequivocal."<sup>452</sup> In deciding whether the right to counsel has been properly waived, the Fifth Circuit has indicated that the circumstances of the case and background of the particular defendant must be measured and weighed.<sup>453</sup> In this process, the trial court must (1) consider the defendant's age, education<sup>454</sup> and his background and conduct;<sup>455</sup> (2) ensure that the decision is not due to coercion;<sup>456</sup> and (3) be satisfied that the defendant understands the impact of his waiver in a practical sense, the nature and extent of the charges against him, and the consequences of the trial.<sup>457</sup>

The Fifth Circuit addressed the applicability of the foregoing criteria in *United States v. Martin*<sup>458</sup> and concluded that the defendant had knowingly and voluntarily waived his rights.<sup>459</sup> The defendant, an avid tax protestor, had organized the South Texas Tax Protest Movement and Taxpayers United.<sup>460</sup> He was indicted on charges of conspiracy to aid in preparing false tax returns, 104 counts of aiding in the preparation of false tax returns, and fifteen counts of submitting false tax returns to secure refunds.<sup>461</sup>

Although the defendant had retained counsel to represent him during all of the pretrial proceedings, several weeks before trial he requested representation by a non-lawyer.<sup>462</sup> The trial court held a hearing on the matter and specifically apprised the defendant of the pitfalls of self-representation.<sup>463</sup> When he indicated that he would proceed *pro se* despite the difficulties of doing so, the trial court denied the motion for appointment of a non-lawyer, but permitted

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452. See *Brown v. Wainwright*, 665 F.2d 607, 610 (5th Cir. 1982) (en banc) (defendant waived his right of self-representation in not asserting a desire to represent himself until late in the trial).

453. See *McQueen v. Blackburn*, 755 F.2d 1174, 1177 (5th Cir.), *cert. denied*, 474 U.S. 852 (1985) (request for standby counsel refused on third day of trial held not a denial of sixth amendment right); *Wiggins v. Procnier*, 753 F.2d 1318, 1320 (5th Cir. 1985) (defendant's waiver of right to counsel made knowingly and intelligently).

454. See *Mixon v. United States*, 608 F.2d 588, 590 (5th Cir. 1979).

455. *Middlebrooks v. United States*, 457 F.2d 657 (5th Cir.), *cert. denied*, 409 U.S. 848 (1972).

456. *Blasingame v. Estelle*, 604 F.2d 893 (5th Cir. 1979).

457. *Raulerson v. Wainwright*, 732 F.2d 803 (11th Cir.), *cert. denied*, 469 U.S. 966 (1984).

458. 790 F.2d 1215 (5th Cir. June 1986).

459. *Id.* at 1218.

460. *Id.* at 1217.

461. *Id.*

462. *Id.*

463. *Id.* at 1218.

him to proceed *pro se*, and appointed the previously retained counsel as "standby counsel."<sup>464</sup>

On appeal, the defendant argued that the trial court failed to adequately assess his waiver of counsel and that the court erred in not granting him lay representation at trial.<sup>465</sup> The court rejected both arguments. First, it was clear from the record that the defendant knew exactly what he was doing when he decided to proceed *pro se*.<sup>466</sup> The court indicated that that issue "is the apparent product of intense effort and the keen legal mind of appellate counsel."<sup>467</sup> As to the second argument, the court reiterated that a defendant does not have a right to either standby counsel or representation by a non-lawyer of his choice.<sup>468</sup>

Without stating it, the court seems to have relied on the fact that this defendant was particularly adept at understanding the federal criminal legal system. Although the trial and appellate courts are properly reluctant to grant requests for self-representation, in this case the waiver was clearly an intelligent and voluntary choice of the defendant.

#### D. Judicial Misconduct and Fair Trials

Apart from the procedural or substantive rules which govern the trial of a criminal case in any court, there is a well-settled rule that the trial judge must remain a neutral participant in the proceedings.<sup>469</sup> In walking the thin line of exercising tight control over sometimes complicated and drawn-out proceedings, trial judges often risk abandonment of that impartiality and give the impression that the defendant has been denied a fair trial. At a minimum they risk the appearance of lacking impartiality.

The court addressed this highly sensitive topic in *United States v. Williams*.<sup>470</sup> Nine defendants were charged in a twenty-four count

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464. *Id.*

465. *Id.* at 1217.

466. *Id.* at 1218.

467. *Id.* At another point in its opinion the court expressed admiration for the fine job which the assigned appellate counsel had done in representing the defendant. *Id.* at 1217.

468. *Id.* at 1218 (citing *United States v. Magee*, 741 F.2d 93 (5th Cir. 1984); *United States v. Bertolini*, 576 F.2d 1133 (5th Cir. 1978)).

469. See, e.g., *Moore v. United States*, 598 F.2d 439, 442 (5th Cir. 1979).

470. 809 F.2d 1072 (5th Cir. Jan.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 228, 98 L. Ed. 2d 187 (1987).

indictment with various violations under RICO and a number of substantive offenses.<sup>471</sup> Following an eight-week trial during which 176 government witnesses were called, nine defendants were convicted. On appeal, they argued that the trial judge's conduct and comments deprived them of a fair trial, due process, and the effective assistance of counsel.<sup>472</sup> In a particularly thoughtful and careful analysis of the record, the court noted that it views such assertions seriously.<sup>473</sup> But in the final analysis the court concluded that the defendants had failed to establish that the errors committed by the trial judge were substantial and prejudicial.<sup>474</sup>

The trial was marked with a number of incidents where the trial judge had belittled counsel, interrupted defense counsel (over 900 times), and on several occasions was abrupt with counsel for both the defense and the government.<sup>475</sup> The court observed that most of this conduct fell within the broad discretion of the trial court in managing a long and complicated trial.<sup>476</sup> For example, the judge did not permit counsel to argue with the witnesses but did provide counsel with the opportunity to perfect the record.<sup>477</sup> The Fifth Circuit was particularly concerned about three incidents which arose during the trial.

First, during cross-examination of a witness, the judge interjected a comment concerning whether the witness would be willing to hire one of the defendants, Drake Williams, to do his books.<sup>478</sup> The interjection was apparently the result of a misunderstanding of the question put to the witness.<sup>479</sup> The court noted that although the comment reflected badly on the defendant, the judge had immediately acknowledged his mistake and instructed the jury to disregard his comment.<sup>480</sup>

Second, the trial judge summarily punished the defense counsel for contempt in front of the jury for "disobeying the judge's orders"

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471. *Id.* at 1077.

472. *Id.* at 1086.

473. *Id.* The court observed that a trial judge has "enormous influence on the jury and must therefore act with a corresponding responsibility." *Id.*

474. *Id.* at 1090-91.

475. *Id.* at 1086-87.

476. *Id.* at 1087.

477. *Id.*

478. *Id.* at 1089.

479. *Id.*

480. *Id.*

instructing counsel not to apologize or argue with the court.<sup>481</sup> The judge later gave the jury an explanation of his gruff manner.<sup>482</sup> The court noted that a trial judge should not fine a counsel for contempt in front of a jury but that there is no automatic reversal for such conduct.<sup>483</sup> This “unfortunate lapse,” said the court, caused no actual prejudice.<sup>484</sup>

The third incident arose when the judge interjected a comment while a witness, a DEA agent, was being cross-examined. The witness was asked whether work as a DEA informant required being adept at telling lies—in an effort to challenge the credibility of another government witness.<sup>485</sup> The judge interjected with the words which were then repeated by the witness.<sup>486</sup> The jury laughed out loud at the judge’s comment.<sup>487</sup> Again, the judge explained to counsel the next day, outside the presence of the jury, that he was merely cutting off repetitious questioning.<sup>488</sup> Although the court agreed that the trial judge should not have made such a “belittling comment,” there was “no prejudice from this isolated remark.”<sup>489</sup>

One is left with the distinct impression that but for the judge’s ready ability to constantly caution the jury and counsel not to misread his actions and comments, this case might have been reversed. It

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481. *Id.* at 1089-90 n.16. The judge imposed a fine of \$250.00. *Id.*

482. *Id.* at 1090 n.17. The judge said in part:

I don’t take it to intend any impression, leave any impression with you about how I feel about a witness’ testimony or a witness’s [sic] credibility, or the witness’ case or the witness’ side.

I think I smile during both sides, but that’s not my purpose.

And so, don’t—I do not, in any way, want to infringe upon your duties and your responsibilities; so, please, do not take any mannerism of mine—I’ve even been criticized for throwing a pencil down once and I throw pencils down about half a dozen times a day, but don’t take that as any impression that I’m for or against anybody.

Sometimes I get angry with lawyers, but never with clients, never in my whole life have I ever gotten angry with a client, with a party or with a juror.

I save my anger for the lawyers, just as they do with me sometimes.

So, do not take that as any reflection on anyone here, all right?

*Id.* at 1090 n.17.

483. *Id.* at 1090.

484. *Id.*

485. *Id.*

486. *Id.* The judge made references to “little white lies.” *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

also seems apparent that at times this trial was frustrating for both the counsel and the trial judge. But that does not relieve the trial judge from maintaining a dignified and responsible posture toward counsel for both sides; anything less gives the appearance of a rough and ready sort of jurisprudence which in turn calls into serious question whether a defendant received a fair trial. Although the court declined to reverse the convictions because of the trial judge's actions, this case nonetheless serves as an excellent model for what not to do—no matter how much sympathy one might have for the great responsibilities which rest on a trial judge's shoulders.

#### V. SUBSTANTIVE CRIMINAL LAW

##### *The Sanctuary Movement: Looking for Help in the First Amendment*

The free exercise clause of the first amendment to the Constitution serves as a haven for those who wish to believe in and practice a particular religion. While the freedom to believe is absolute, the freedom to act on those beliefs is nonetheless subject to reasonable regulations designed to protect society.<sup>490</sup> The potential conflict between an individual's freedom to the free exercise of religion and government regulations was addressed by the court in the highly publicized *United States v. Merkt*.<sup>491</sup>

The defendants in *Merkt* were convicted of violating various immigration laws by bringing into the country and transporting illegal aliens from El Salvador as a result of religiously motivated "sanctuary" activities for Salvadorans.<sup>492</sup> As the court put it, the defendants at trial and on appeal sought "sanctuary" in the free exercise clause.<sup>493</sup> The thrust of their argument was that they were immune from prosecution because they were religiously motivated to offer shelter and comfort to persecuted aliens.<sup>494</sup>

In measuring the worth of their arguments, the court applied the three-pronged analysis set out by the Supreme Court in *Wisconsin*

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490. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

491. 794 F.2d 950 (5th Cir. July 1986), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 1603, 94 L. Ed. 2d 789 (1987).

492. *Id.* at 953-54.

493. *Id.* at 954.

494. *Id.*

*v. Yoder*,<sup>495</sup> and *United States v. Lee*,<sup>496</sup> which requires a court to determine (1) the extent of the burden placed upon the religious practices, (2) the interest of the government in uniform law enforcement, and (3) the likelihood that the government could enforce its policy through other, less intrusive means.<sup>497</sup>

The court observed that it was not clear how the immigration laws placed an undue burden on the defendants. Those laws, said the court, relate only to conduct that aids illegal aliens and does not contain any explicit ban on religious beliefs or practices.<sup>498</sup> Further, there was no suggestion in the testimony of clergy who testified at the pretrial and trial proceedings that devout Christian beliefs require participation in the sanctuary movement.<sup>499</sup> Rather than choosing other legal means of assisting aliens, the court found that the defendants chose "confrontational, illegal means to practice their religious views—the 'burden' was voluntarily assumed and not imposed on them by the government."<sup>500</sup>

As to the second prong of *Yoder*, the court concluded that there was a compelling governmental interest in protecting national borders through uniform and facially neutral enforcement of border control provisions.<sup>501</sup> The court also rejected the argument that because enforcement of those laws has not been successful that there is no compelling interest in prosecuting those who do violate the laws.<sup>502</sup> The court said in part:

The argument is so broadly couched that it could be used to deny a compelling state interest in enforcement of the criminal drug laws. In any event, to the extent that appellants' conduct, amplified by the nationwide publicity given to the "sanctuary movement," has contributed to undermining compliance with the border control laws and encouraging illegal entries, appellants are trying to excuse their violation of law on the basis of other violations. This will not do. The compelling state interest becomes more

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495. 406 U.S. 205 (1972).

496. 455 U.S. 252 (1982).

497. 794 F.2d at 955.

498. *Id.* at 956.

499. *Id.* Representatives of both the Catholic and Methodist Clergy testified at trial on this issue. *Id.*

500. *Id.*

501. *Id.*

502. *Id.*



compelling in proportion to the increasing magnitude of the violations.<sup>503</sup>

In addressing the third prong of *Yoder*, the court rejected the defendants' argument that criminalizing their efforts is "almost never" the least restrictive means of advancing governmental interests.<sup>504</sup> Further, it characterized as trivial the defendants' proposed alternatives of simply deporting captured aliens or confiscating vehicles used to transport them.<sup>505</sup> But even more important, said the court, the defendants' proposal to impose a less restrictive alternative is open-ended.<sup>506</sup> Citing the trial court's opinion, the court observed that the defendants' "'do-it-yourself' immigration policy . . . is irreconcilably, voluntarily, and knowingly at war with duly legislated border control policy."<sup>507</sup>

Although it is not entirely clear, as the court recognized, just what test the Supreme Court is using to measure free exercise claims,<sup>508</sup> it is clear that in this case the Fifth Circuit correctly applied a number of well-settled principles in a sensitive and controversial setting. At points, the court's opinion leaves no mistake where it stands on challenges to the nation's immigration laws which have in recent years been subject to severe criticism. In deciding this case against the defendants, the court signaled its reluctance to legislate a solution to the immigration problem through a broad reading of the first amendment.

## VI. CONCLUSION

Several conclusions can be drawn from the cases decided by the Fifth Circuit Court of Appeals during this survey period. First, the court continues to adhere to a posture which reflects trust in the trial and pretrial process. That is, like most appellate courts, it views its role not as simply another forum for correcting all of the mistakes that have occurred in either the pretrial or trial process. That philosophy was demonstrated, for example, in the Jencks Act cases

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503. *Id.*

504. *Id.*

505. *Id.* at 956-57.

506. *Id.* at 957.

507. *Id.*

508. *Id.* at 955. The court noted that in *Bowen v. Roy*, 476 U.S. 693 (1986), the Supreme Court indicated in fragmented opinions that it might possibly apply a less stringent standard than that used in *Yoder*. 794 F.2d at 955.

where the court on the one hand applauded the trial courts for encouraging generous and early disclosure of Jencks Act materials, but on the other hand was careful not to read the Act so broadly as to reverse where it was not clear that the defendant had not been seriously prejudiced.<sup>509</sup>

The same sort of thinking was vividly demonstrated in its disposition of the arguments of judicial misconduct in *United States v. Williams*.<sup>510</sup> Although the court was clearly troubled by the trial court's manner of dealing with the parties and the witnesses, it just as clearly felt compelled to conclude that under the facts, the case could not be reversed on that ground alone.<sup>511</sup>

Second, the court continues to present a united front in disposing of criminal law issues. Very few cases were marked with dissenting opinions. And in those few cases, the issues seemed close.<sup>512</sup>

Third, although several of the cases raised questions of first impression, such as the decision addressing the issue of compulsory urinalysis,<sup>513</sup> most of the foregoing cases demonstrate the time-worn adage that "old" law is still good law. In reading the cases, one is left with the distinct impression that most of the issues have been addressed before and that the court views the newer cases as an extension of its precedent.

Finally, the Fifth Circuit has for the most part remained within the mainstream of the other circuits. In doing so, it has demonstrated a properly cautious attitude of permitting some issues to percolate and develop rather than rushing into breach and aggressively legislating a result.

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509. *United States v. Welch*, 810 F.2d 485 (5th Cir. Feb. 1987). See *supra* notes 429-50 and accompanying text (outlining Jencks Act cases decided by the Fifth Circuit during the survey period).

510. 809 F.2d 1072 (5th Cir. Jan.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 228, 98 L. Ed. 2d 187 (1987).

511. See *id.* at 1086-91.

512. See, e.g., *United States v. Bigler*, 810 F.2d 1317 (5th Cir. Feb.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 130, 98 L. Ed. 2d 88 (1987). See *supra* notes 368-85 and accompanying text (discussing *Bigler* and the Speedy Trial Act).

513. *National Treasury Employees Union v. Von Raab*, 816 F.2d (5th Cir. Apr.), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 1072, \_\_\_\_ L. Ed. 2d \_\_\_\_ (1988); see *supra* notes 219-30 and accompanying text.

