Constitutional Criminal Procedure

James P. Fleissner
Mercer University School of Law, fleissner_jp@law.mercer.edu

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Constitutional Criminal Procedure

by James P. Fleissner*

I. INTRODUCTION

The Fourth, Fifth, and Sixth Amendments of the United States Constitution are the three pillars of the American system of criminal justice. The three amendments make procedural guarantees using enigmatic terms that are given meaning by those with the power of interpretation. The Fourth Amendment protects us from "unreasonable searches and seizures." The Fifth Amendment includes a guarantee of "due process of law." The Sixth Amendment guarantees a "speedy" trial. In the years since 1791, when these provisions were enshrined in the Bill of Rights, the courts have played the leading role in shaping the scope of these broad pronouncements. The evolution of these rights in the courts has been influenced by history, tradition, and precedent as well as changing societal attitudes about the requisites of fair process and the best way to maintain a safe, orderly society.

An important part of this constitutional evolution is played out in the United States Courts of Appeals, which decide a high volume of cases arising from federal criminal prosecutions and appeals in habeas corpus litigation concerning alleged federal constitutional violations in state prosecutions. This Article presents the annual survey of the constitutional criminal procedure decisions of the United States Court of Appeals for the Eleventh Circuit. The author surveyed decisions from calendar year 1996 that addressed Fourth, Fifth, and Sixth Amendment issues. In selecting cases for inclusion in the Article, the author attempted to

* Associate Professor of Law, Walter F. George School of Law, Mercer University. Marquette University (B.A., 1979); University of Chicago Law School (J.D., 1986). Former Chief of the General Crimes Section, Office of the United States Attorney, Northern District of Illinois. The author is a member of the Bar of the Eleventh Circuit Court of Appeals. The author wishes to acknowledge the research assistance of Jennifer D. Rose, a member of the Mercer Law School Class of 1997.

1485
choose cases based on their significance to practitioners, with an emphasis on important interpretive decisions on recurring questions. The discussion of the various cases includes a summary of the issues and the court's reasoning, as well as some commentary and analysis. Where appropriate, recent related developments in the United States Supreme Court are noted.

II. THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. ¹

A. Warrantless Searches/Exigent Circumstances

The general rule that warrantless searches are presumptively unreasonable is subject to several well-established exceptions.² One such exception is that an officer may, during an investigatory Terry stop grounded on reasonable suspicion, conduct a pat-down or frisk limited in scope to finding weapons.³ Contraband found during a protective pat-down search is admissible. Another exception is that an officer with probable cause to arrest a suspect may conduct a search before arresting the suspect where “the formal arrest followed quickly on the heels” of the search, as long as the search is “not necessary to support the probable cause to arrest.”⁴ Yet another exception is that searches may proceed without warrants if there are “exigent circumstances,” such as a serious risk that evidence will be destroyed.⁵ In United States v. Banshee,⁶ the court addressed the issue of whether one of these exceptions justified the challenged warrantless search.

In Banshee, Deputy Sheriff William Todd and another officer pulled over a northbound vehicle in Camden County, Georgia. The stated reason for the stop was that the vehicle was being operated with its

---

1. U.S. CONST. amend. IV.
high-beam lights despite the presence of on-coming traffic. The car was being driven by Kenneth Parker and contained two female passengers, Mary Lee Banshee and Lee Ann Johnson. Deputy Todd ordered Parker out of the car and asked for his driver's license. Parker could not produce a license, but claimed to have a District of Columbia license. Parker also stated that the three were returning from a vacation in Miami and that Banshee had rented the car. When the officer approached Banshee, who was in the passenger seat, she said that a friend had rented the car, that the three were returning from Orlando, and that they had not traveled farther south. Although a computer check failed to confirm that Parker had a valid license, Deputy Todd issued a warning, told Parker that he could no longer drive, and informed him that he was free to go. Before Parker left, Deputy Todd asked Parker for consent to search the vehicle, and Parker agreed.7

Deputy Todd frisked Parker and approached the passengers still seated in the car. When Johnson got out of the car, Deputy Todd did not frisk her, but asked her if she had a weapon, which she denied. Deputy Todd then ordered Banshee out of the car.8 When Banshee got out, Deputy Todd saw a bulge in Banshee's waist area. Rather than frisking Banshee, Deputy Todd asked her if she had any weapons or "anything." Banshee replied in the negative. When Deputy Todd asked about the bulge, Banshee said she was pregnant. At this point, Deputy Todd made remarks to his fellow officer expressing his belief that Banshee was carrying contraband. After an unsuccessful attempt to radio for the assistance of a female officer, Deputy Todd did a pat-down search of Banshee's midsection. He then handcuffed Banshee and asked her what she was hiding. After Banshee said it was something her boyfriend had given her, Deputy Todd released one of Banshee's hands from the cuffs and ordered her to remove the object from her clothes. The package contained 728.7 grams of cocaine.9

---

7. 91 F.3d at 100-01. Although the deputy told Parker he was free to leave before asking for consent to search, he was not required to do so. The Supreme Court recently rejected the contention that the Fourth Amendment requires an officer to inform a person stopped for a traffic violation that he is free to go as a prerequisite to seeking consent to search. The court thus refused to find a constitutional "first tell, then ask" rule. See Ohio v. Robinette, 117 S. Ct. 417 (1996).

8. 91 F.3d at 100-01. In Maryland v. Wilson, 117 S. Ct. 882 (1997), the Supreme Court held that an officer making a traffic stop may order passengers out of the car pending completion of the stop. The court based its conclusion on safety concerns. Id. Banshee, decided before Wilson, does not discuss the basis for ordering the passengers out of the car, but the officer's security during the consent search would seem to provide a basis.

9. 91 F.3d at 101.
Banshee moved to suppress the cocaine. The district court denied the motion, finding that the consent to search was valid and that the detention and pat-down search of Banshee was permissible under *Terry.* The court of appeals focused on the *Terry* issues, which it termed “problematic.” The district court’s conclusion that the pat-down was permissible under *Terry* is difficult to defend. A valid protective pat-down search must “be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” It is obvious that Deputy Todd was not searching for a weapon when he patted down Banshee. Both his words and his actions establish this. He made remarks indicating that he thought Banshee was carrying contraband: “She, She got it on her . . . I can see it, she got it on her.” Deputy Todd then put off a frisk and allowed Banshee to stand nearby without handcuffs while he tried to get assistance from a female officer. Although Deputy Todd was worried about accusations of improper conduct in frisking a female, he clearly was not concerned about being harmed. He believed, quite correctly, that he had found drugs. Thus, it is hard to defend the pat-down under *Terry.*

The court of appeals upheld the denial of the suppression motion, but chose not to adopt the district court’s *Terry* rationale. Instead, the court upheld the search by making two findings: First, Deputy Todd had probable cause to conduct a search. Second, “There were exigent circumstances excusing the need for a warrant.” In reaching these conclusions, the court noted that it was reviewing the issues de novo, as required by a recent Supreme Court decision setting forth the standard of review for warrantless searches and seizures. As for the finding

---

10. *Id.* The district court also found that the traffic stop was not pretextual. *Id.* Fourth Amendment challenges to stops for traffic violations on the grounds that they are pretext for investigating other criminal conduct are no longer viable. *Whren v. United States,* 116 S. Ct. 1769 (1996).
11. 91 F.3d at 101.
13. 91 F.3d at 101.
14. *Id.*
15. *Id.* at 101-02.
16. *Id.* at 102.
17. *Id.*
18. *Id.* at 101. See *Ornelas v. United States,* 116 S. Ct. 1657 (1996). Although the court held that ultimate questions of reasonable suspicion and probable cause to make warrantless searches should be reviewed de novo, the court preserved the deferential clear error standard for the district court’s findings of historical fact. *Id.* at 1659. Thus, the new standard of review does not eliminate the often difficult problem of sorting factual from legal findings concerning the fluid concepts of reasonable suspicion and probable cause.
that Deputy Todd had probable cause to believe that the search would uncover evidence of crime, one can consider that Parker and Banshee had made conflicting statements about their trip and that there was a visible bulge in Banshee's midsection. But can the arguably improper pat-down be considered? And what of Banshee's post pat-down statement about receiving the package from a friend? The court simply said it was basing its finding on the inconsistent statements and the bulge in Banshee's midsection.\textsuperscript{19}

It is the court's finding of exigent circumstances, however, that is open to serious question. There was no reason to believe that evidence would be lost or destroyed. The court explained its finding: "Specifically, Deputy Todd had the option of either letting Banshee go or detaining her for a prolonged period of time while he secured a warrant. Accordingly, under the circumstances, the frisk was much less an intrusion than a prolonged detention."\textsuperscript{20} First of all, if Deputy Todd had probable cause to believe Banshee was carrying contraband, did he not also have the option of arresting Banshee? Furthermore, the court's analysis seems to allow the exigent circumstances exception to drain the vitality out of the presumption favoring warrants. In a traffic stop, it always will be the case that doing a warrantless search will be less intrusive and time consuming than obtaining a warrant. If those facts alone give rise to a finding of exigent circumstances, then exigent comes to mean "commonplace."

The court of appeals advanced an alternative ground for approving the search, finding that the search was incident to a lawful arrest.\textsuperscript{21} Having raised the possibility that Deputy Todd might have had to let Banshee go, the court found probable cause to arrest.\textsuperscript{22} The court stated that "because there was probable cause for the arrest before the search and the arrest immediately followed the challenged search, the fact that Banshee was not under arrest at the time of the search does not render the search incident to the arrest doctrine inapplicable."\textsuperscript{23} However, the doctrine invoked by the court requires that the fruits of the search are "not necessary to support probable cause to arrest."\textsuperscript{24} Did Deputy Todd really have probable cause to arrest before he patted down Banshee? It does not appear that Deputy Todd or the district court

\textsuperscript{19} 91 F.3d at 102.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. (citing Rawlings v. Kentucky, 448 U.S. 98, 111 (1980); United States v. Thornton, 733 F.2d 121, 127-28 (D.C. Cir. 1984)).
\textsuperscript{24} Rawlings, 448 U.S. at 111 n.6.
thought so. It is true that the presence of a bulge has contributed to probable cause findings in other cases, but the court of appeals conclusion is surprising, especially in a case the district court analyzed as a Terry stop.

The decision in Banshee must be understood in light of one other aspect of the case: Deputy Todd’s stop of the car in which Banshee was riding was recorded on videotape. The court commended the use of the tape, which obviously serves to give the court an accurate picture of the traffic stop. Ordinarily, frisking passengers who have bulges in their clothing would be upheld as a protective Terry pat-down. In fact, the district court upheld the search of Banshee on that basis. However, the videotape made it clear to the court of appeals that the actions of Deputy Todd were not based on security concerns. The court heard the deputy’s own words and saw his actions. The videotape made it impossible for the officers to interpret the search as a protective pat-down. Whatever the merits of the decision in Banshee, it is clear that the videotaping of traffic stops and other searches adds a new dimension to the litigation of Fourth Amendment issues: the court is not at risk of relying on testimony affected by poor memory, selective recall, or self-serving recreation of events.

Another case involving the exigent circumstances exception to the warrant requirement is United States v. Mikell. That case involved a narcotics investigation that began in typical fashion: law enforcement officers in Florida received an anonymous tip that Mikell, Young, and several others were dealing crack in Sarasota. That tip was followed by a second anonymous tip that Mikell, Young, and Jackson would be buying five thousand dollars worth of powder cocaine and converting it into crack that evening. The second tip said the five thousand dollars was in the bedroom of Young’s mother and that the three men, using

---

25. The district court found that after Banshee placed the package on the hood of the car, there was probable cause to arrest, and that this justified the opening of the package. 91 F.3d at 101. As summarized by the court of appeals, the district court’s findings treated the encounter as an investigatory Terry stop up to that point. Id.

26. The court in Banshee cited two such cases. Id. at 102. See United States v. Tomaszewski, 833 F.2d 1532, 1535 (11th Cir. 1987); United States v. Elsoffer, 671 F.2d 1294, 1299 (11th Cir. 1982). Of course, both cases involved a unique set of facts. For example, the court in Elsoffer emphasized the odd size and shape of the bulge, which was the size of “a good sized soft bound book.” 671 F.2d at 1295, 1299. The court stated, “We do not hold that any bulge would give probable cause for an arrest.” Id. at 1299 n.10.

27. 91 F.3d at 100 n.1.

28. Id.

29. 102 F.3d 470 (11th Cir. 1996), cert. denied, 117 S. Ct. 1459 (1997).
Young's car, would be taking the cocaine to an apartment where it would be converted into crack.  

The police staked out the apartment on the evening of the day they received the second tip. A Thunderbird pulled up and two persons, one of whom had a duffle bag, got out. A third person met the two who arrived in the car, and all three entered the apartment identified in the tip. After twenty minutes, a person left the apartment and walked away; a few moments later, a person later identified as Langston left the apartment in the Thunderbird and drove to a grocery store where he purchased a large box of baking soda, a substance used in making crack. Langston returned to the apartment, and about an hour later, three men, one carrying the duffle bag, were seen leaving the apartment. The three men drove away in the Thunderbird. Officers said they believed that a fourth person remained in the apartment.  

The police pursued the Thunderbird and attempted to pull it over. A chase ensued, during which the police saw plastic bags being thrown from the Thunderbird and one of the passengers talking on a cellular phone. The bags were recovered—they contained powder cocaine; chunks of crack also were found on the road. The Thunderbird, containing Young, Mikell, Langston, and Jackson, was stopped after it rammed a patrol car. Young was still talking on the phone. The car contained drug residue and other evidence.  

Two of the officers returned to the apartment. They said a superior told them to conduct a “security sweep” to assure that evidence in the apartment was not destroyed. The superior, however, recalled it differently: he said he told the officers to “secure” the apartment while a search warrant was obtained. After arriving at the apartment, the officers heard “a clanging noise within the apartment and forced the door open.” In the search, during which the officers claimed they searched only areas that could conceal a person, they discovered that the noise they heard was coming from an air conditioner. The officers also found a wealth of evidence, including drugs and drug paraphernalia. The police later obtained a search warrant based on the information at their disposal, including the observations of the officers during the protective sweep.

---

30. 102 F.3d at 472.
31. Id. at 472-73.
32. Id. at 473.
33. Id.
34. Id.
35. Id.
36. Id. at 473-74.
The stop of the Thunderbird clearly was justified under Terry.\(^{37}\) The court of appeals had no difficulty reaching that result. The court then addressed the warrantless entry of the apartment.\(^{38}\) Although the warrantless search of a home is presumptively unreasonable, such a search is allowed if both probable cause and exigent circumstances exist.\(^{39}\) The court concluded that based on the totality of circumstances, there was a fair probability that evidence of crime would be found in the apartment.\(^{40}\) Given all the evidence obtained before and after the stop of the Thunderbird, the court's conclusion is sound.

With respect to the issue of exigent circumstances, the court noted that whether the authorities have reason to believe that evidence might be destroyed is judged under an objective test: "[t]he appropriate inquiry is whether the facts would lead a reasonable and experienced police officer to believe that evidence might be destroyed or removed before a warrant could be secured."\(^{41}\) The court of appeals did not mention the Supreme Court decision months earlier that announced that the validity of warrantless searches should be reviewed de novo.\(^{42}\) However, the test set forth by the court, which defers on fact finding and reviews the application of law to facts de novo, is not significantly different.\(^{43}\)

In ruling on the presence of exigent circumstances, there were some troubling facts. The discrepancy between the stories of the officers who entered the apartment and their superior gives one pause. The officers remembered being told to do a "security sweep"; the superior said he told them to secure the apartment. Officers doing surveillance at the apartment as the men got into the Thunderbird said three men got into the car and one man was believed to be in the apartment. However, four men were in the car when it was stopped. The clanging sound that led the officers to break into the apartment turned out to be an air conditioner. It also turned out that no one was in the apartment. Despite these aspects of the record, the court examined the officers' determination of exigent circumstances based on the information they had at the time. The officers believed that someone remained in the apartment. They also knew that Young was using a cellular phone; he could have been calling a confederate at the apartment. The court stated that the discovery of powder cocaine during the traffic stop may

\(^{37}\) Id. at 475.

\(^{38}\) Id.

\(^{39}\) Id. (citing United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991)).

\(^{40}\) Id.

\(^{41}\) Id. (citing United States v. Young, 909 F.2d 442, 446 (11th Cir. 1990)).

\(^{42}\) Id. at 474 (setting forth standard of review). See Ornelas v. United States, 116 S. Ct. 1657 (1996), discussed at supra note 18.

\(^{43}\) 102 F.3d at 474 (citing United States v. Hromada, 49 F.3d 685 (11th Cir. 1995)).
have led to the inference that the crack was left at the apartment.\textsuperscript{44} The court concluded that the facts confronting the officers at the time could have led a reasonable, experienced officer to believe that evidence might be lost.\textsuperscript{45} The key fact was Young's use of the phone. In the absence of that fact, there would be little reason to believe that a person remaining in the apartment would know about the stop of the vehicle and begin destroying evidence.

B. Warrantless Arrest/Search Incident to Arrest

In \textit{United States v. Gonzalez},\textsuperscript{46} defendant appealed from his convictions for two counts of making false statements to a firearms dealer and two counts of being a felon in possession of a firearm. The charges were based on defendant's purchase and possession of two guns: a .38 Smith & Wesson seized from defendant's car at the time of his arrest and a 9mm Beretta seized from a residence where the defendant had lived.\textsuperscript{47} The defendant unsuccessfully challenged the seizure of both guns. This section will discuss the seizure of the .38 Smith & Wesson in the search incident to defendant's arrest. The following section will discuss the seizure of the 9mm Beretta, which was found during a consent search.

Augustin Gonzalez was convicted of violating the federal drug laws in 1984 and sentenced to thirteen years imprisonment. In 1989 he was paroled.\textsuperscript{48} In 1991 the United States Parole Commission found that Gonzalez had violated the terms of his parole and issued a warrant for the "retaking" of Gonzalez. The authorities were unable to locate Gonzalez until 1992, when they received information that Gonzalez was living in Miami Lakes, Florida, had been seen driving a black Buick Grand National, and had been seen with a firearm. Deputy Marshal Tom Figmik and Special Agent George Mastin of the Bureau of Alcohol, Tobacco, and Firearms went looking for Gonzalez.\textsuperscript{49}

When the two officers arrived in Miami Lakes, they spotted a black Buick Grand National near the place Gonzalez reportedly lived. After

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 476.
\item \textit{Id.}
\item 71 F.3d 819 (11th Cir. 1996).
\item \textit{Id.} at 824.
\item \textit{Id.} at 821. The rules and apparatus for administering the federal parole system exist to administer convictions obtained under the law as it existed before the adoption of the United States Sentencing Guidelines in 1987. The Sentencing Guidelines do not include a parole system.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
following the car a short time, the officers turned on the siren and blue light and attempted to stop the car. When Gonzalez refused to stop, the officers pulled up next to the driver's side of the Grand National and one of the officers displayed his badge and ordered Gonzalez to stop. Gonzalez put his car into reverse and attempted to evade the officers. The officers gave chase. Eventually the two cars collided and Gonzalez was arrested. The officers then searched the Grand National and found a black leather case containing the .38 Smith & Wesson revolver in the glove compartment.

On appeal, Gonzalez raised several issues. First, he challenged the validity of the warrant issued by the United States Parole Commission, arguing that the Commission, a creature of the executive branch, is not a neutral and detached magistrate under the Fourth Amendment. Despite some authority contrary to defendant's position, the court of appeals found it unnecessary to address defendant's attack on the warrant. Rather, the court analyzed the arrest of Gonzalez as a warrantless arrest based on his commission of crimes when he attempted to evade the officers. The court stated that even if the officers lacked probable cause to arrest, "the resulting arrest of appellant was nevertheless rendered lawful by appellant's subsequent conduct." Specifically, the court found that the actions of Gonzalez gave the officers authority to arrest him for assaulting a federal officer or otherwise disobeying a lawful order, resisting arrest, and impeding the officers in their attempt to serve legal process. For these crimes, committed in the presence of the officers, Gonzalez was subject to a warrantless arrest.

Because these crimes "served as an independent and valid basis" for

50. Id. Gonzalez was initially charged with assault on the officers based on the theory that he rammed the officers. See 18 U.S.C. § 111 (1994). At the suppression hearing, the officers testified that Gonzalez rammed their car. The defense contended that the officers rammed the Grand National. 71 F.3d at 822 n.4. There apparently was testimony from an expert transportation consulting engineer that called the officer's version of the crash into question. The government later moved to dismiss the assault charge. Id. at 830 n.23.

51. 71 F.3d at 833.
52. Id. at 826.
53. See id. at 827 n.16.
54. Id. at 826.
55. Id.
56. Id.

57. Id. See 18 U.S.C. § 111(a)(1). Gonzalez denied assaulting the officers by ramming them with his car, but the court noted that he clearly violated the other proscriptions of section 111 (a)(1). See id. at 827 n.17.


59. Id. at 826-27 (citing United States v. Watson, 423 U.S. 411 (1976); United States v. Costa, 691 F.2d 1358, 1361 (11th Cir. 1982)).
probable cause supporting the warrantless arrest, the officers' subsequent search of the car's glove compartment was a valid search incident to arrest.\textsuperscript{60} The court of appeals applied the rule established by the Supreme Court in \textit{New York v. Belton},\textsuperscript{61} which states that when an occupant of a vehicle is arrested, the search incident to arrest may include the search of closed containers found in the passenger area of the vehicle.\textsuperscript{62}

C. Consent Searches

The court of appeals faced another issue in the Gonzalez case: Was the officers' subsequent warrantless search of Gonzalez's residence a valid consent search?\textsuperscript{63} The facts are troubling. After arresting Gonzalez, Deputy Marshal Figmik, accompanied by Deputy Marshal Tom McDermott and several other marshals, went to the Miami Lakes residence used by Gonzalez. They saw Raquel Fernandez, whom they believed was Gonzalez's girlfriend, exit the residence and drive away. Figmik followed her, pulled her over, ordered her out of the car, and detained her. At the time of the stop and detention, Figmik had no basis to suspect Raquel Fernandez had committed a crime. Figmik tried to get Raquel Fernandez to consent to a search of the residence, but she refused, saying that the residence was owned by Maria Fernandez, her mother. Raquel Fernandez asked to be allowed to return to her car, but Figmik refused, telling her to walk back to the residence.\textsuperscript{64}

Back at the residence, Figmik asked Raquel Fernandez about her relationship with Gonzalez. She admitted knowing him, denied that he lived at the residence, and said she had not seen him for months. Figmik then took out an automatic garage door opener he had seized from Gonzalez's car and used it to open the garage door of the residence. Raquel Fernandez used her own garage door opener to close the door, and Figmik responded by opening it again. Figmik continued to seek Raquel Fernandez's consent to search, but she was steadfast in her refusal. She did, however, agree to call her mother, Maria.\textsuperscript{65}

When Maria Fernandez arrived at the residence, the marshals asked for her consent to search. She refused. At the suppression hearing,

\begin{itemize}
\item \textsuperscript{60} \textit{Id.} at 825-27.
\item \textsuperscript{61} 453 U.S. 454 (1981).
\item \textsuperscript{62} \textit{Id.} at 460.
\item \textsuperscript{63} 71 F.3d at 827.
\item \textsuperscript{64} \textit{Id.} at 823.
\item \textsuperscript{65} \textit{Id.}
\end{itemize}
Maria Fernandez testified that the marshals told her that her daughter would go to jail for five years if she continued to refuse. Maria Fernandez eventually said she was going to go inside for a drink of water. When she did, Deputy Marshal McDermott, without her permission, followed her into the house, stating that she could not go in alone. McDermott continued to ask for consent to search Gonzalez's room. Maria Fernandez finally relented and later signed a consent-to-search form. In the warrantless search, the officers found the 9mm Beretta and the fraudulent forms completed during the purchase of the two weapons involved in the case.

The consent of Maria Fernandez was the only legal justification for the warrantless search. The court began its analysis by noting that there was no question that Maria Fernandez had the authority to consent to the search of the residence. The issue was whether the consent of Maria Fernandez was voluntarily given. The court focused its attention on events following the arrival of Maria Fernandez, because she gave the consent to search. The court expressed its concern over the improper and unlawful conduct of the marshals in seeking consent from Raquel Fernandez, but found that those acts did not affect Maria Fernandez's eventual consent. With its attention thus focused on Maria Fernandez, the court noted that “the absence of official coercion is a sine qua non of effective consent.” Viewing the record in the light most favorable to the government, the court concluded that the district court's factual finding that Maria Fernandez voluntarily consented to the search was not clearly erroneous.

In reaching its holding, the court of appeals relied heavily on the credibility determinations of the district court. For example, the district court found that the testimony of the officers was credible while the testimony of Maria Fernandez was not. The district court obviously discounted the claim of Maria Fernandez that the officers threatened to send her daughter to jail. Confronted with two “wildly differing accounts” of what happened, the district court credited the testimony of the law enforcement officers. The district court's reconstruction of

66. Id. at 823-24.
67. Id. at 827.
68. Id. at 828. The court of appeals deemed the issue of standing waived and proceeded to reach the merits. Id. at 828 nn. 18, 19.
69. Id. at 828.
70. Id. at 828 n.20.
71. Id. at 828.
72. Id. at 829.
73. Id. at 831.
74. Id. at 830-31.
events put special emphasis on the fact that Maria Fernandez agreed to the search after receiving an assurance that the search would be limited to Gonzalez's possessions. The district court found that this assurance was the turning point that led to a voluntary consent to search.

The difficult issue for the court of appeals was how the conduct of Deputy Marshal McDermott, who followed Maria Fernandez into the house uninvited, should affect the analysis of consent. The court clearly was displeased with the officer's conduct. It characterized McDermott's warrantless entry as a "Fourth Amendment violation." The court pointedly rejected the government's claim that the failure of Maria Fernandez to bar the officer constituted implied consent to his entry.

Despite these statements, the court of appeals concluded that McDermott's warrantless entry did not vitiate the voluntariness of Maria Fernandez's consent, noting that her testimony at the suppression hearing did not claim that the illegal entry caused her consent.

III. THE FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
A. The Right Against Self-Incrimination

Once an arrestee has been informed of his Miranda rights, police must stop the interrogation if the arrestee states that he wishes to remain silent or requests an attorney. In United States v. Mikell, the court of appeals confronted the issue of whether a vague or equivocal invocation of Miranda rights requires that the police cease interrogating an arrestee. In Mikell, after defendant was arrested and informed of his rights, he indicated a willingness to talk with investigators. The advice of rights given Mikell included telling him that he could end the interview at any time and that he could choose not to answer particular questions. After some preliminary questioning, the investigators confronted Mikell with evidence they had discovered. Several times during the interview, Mikell declined to answer particular questions by simply remaining mute or shaking his head, but never asked for the questioning to stop and never requested an attorney. Mikell did, however, answer other questions, and in doing so made a number of damaging admissions.

In a prior decision, the court of appeals held that when an arrestee makes an equivocal request for an attorney or an equivocal request to end the questioning, investigators must limit the scope of the interrogation to clarifying the equivocal request. However, that was before the Supreme Court decision in Davis v. United States, in which the Court held that the arrestee must clearly articulate a request for an attorney. The Court stated that the request must be sufficiently clear that a reasonable law enforcement officer would understand the nature of the request: “If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning

---

85. Id. at 473-74.
87. 102 F.3d 470 (11th Cir. 1996). This case also is discussed earlier in this Article under the heading Warrantless Searches/Exigent Circumstances.
88. Id. at 473.
89. Id. at 476.
90. Id. at 473.
91. Id. at 473-74.
92. Id.
93. Id. at 476. See Coleman v. Singletary, 30 F.3d 1420, 1423-24 (11th Cir. 1994).
95. Id.
The court of appeals subsequently applied the *Davis* holding to cases involving equivocal requests to terminate questioning. Applying the post-*Davis* rule to the facts of the case, the court of appeals had no difficulty concluding that Mikell had not clearly invoked his right to remain silent. The court held that "a suspect's refusal to answer certain questions is not tantamount to the invocation, either equivocal or unequivocal, of the constitutional right to remain silent and that questioning may continue until the suspect articulates in some manner that he wishes questioning to cease." The *Davis* approach has an analytical flaw when applied to the invocation of the right to remain silent: certainly the refusal to respond to a particular question, indicated by silence, gesture, or words, is a plain and unequivocal invocation of the right to remain silent as to that question. However, the approach is defensible insofar as it allows questioning to continue as long as the arrestee indicates a willingness to continue the interview and, perhaps, answer other questions. The investigators who interrogated Mikell made the analysis easier by explicitly telling Mikell that he could choose to refuse to answer individual questions.

Another recurring Fifth Amendment issue arose in *United States v. Holloway*. It is common for the possibly illegal conduct of persons to be the subject of parallel civil and criminal proceedings by the federal government. Because of the requirements of grand jury secrecy, the civil and criminal proceedings are usually handled by separate government attorneys. *Holloway* illustrates one of the pitfalls of parallel proceedings. Investigators executed a search warrant and found evidence of drug and firearm violations by the Holloways. No arrests were made, but a grand jury investigation was initiated into possible drug, firearm, and tax violations. A civil forfeiture complaint also was filed against the Holloways, alleging they had used their property to facilitate drug transactions. Before criminal charges were filed, discovery in the civil case proceeded. The Holloways, with their attorney, appeared for a deposition as required. When the Holloways' attorney saw that a criminal investigator was present, he threatened to leave with his clients. The Assistant United States Attorney and the Holloways' attorney stepped into the hallway and had a private conversation.

96. *Id.* at 462.
97. 102 F.3d at 476. *See Coleman*, 30 F.2d at 1424.
98. 102 F.3d at 477.
99. *Id.*
100. *Id.* at 476.
101. 74 F.3d 249 (11th Cir. 1996).
When the Holloways were indicted for criminal violations, they moved to dismiss the charges, claiming that the attorney representing the government in the civil forfeiture proceeding had assured them they would not be prosecuted. In essence, the Holloways claimed that the assurance had the effect of a grant of immunity and that the subsequent use of the civil discovery materials under the assurance was a violation of their Fifth Amendment rights. The hearing in the district court was a swearing contest. The government attorney said she made no such assurance while the Holloways’ attorney said she did. The government pointed out that interrogatories served on the Holloways after the deposition indicated that the Holloways’ attorney expected an indictment, that the Holloways’ attorney made no effort to document the alleged promise, and that the motion to dismiss the charges was not made for over fifteen months after indictment. Notwithstanding these points, the district court credited the testimony of the Holloways’ attorney and dismissed the criminal prosecution. The court of appeals reviewed the district court’s factual findings for clear error and affirmed. Obviously, the government failed to protect itself from this claim. The government pointed out that the Holloways’ attorney had failed to document the promise, but it is equally true that the government attorney did nothing to document a critical one-on-one conversation with the defense lawyer. The presence of a witness, a discussion of the understanding in the presence of others or on the record in the deposition, or perhaps even a confirming letter after the fact, would have helped the government convince the court. But those steps were omitted, and the court doubted the credibility of the government’s civil attorney, who may have been suspected of covering up a major goof.

Another noteworthy case concerning the right against self-incrimination is United States v. Moya. In prior cases, the court of appeals had held that “aliens at the border are entitled to Miranda warnings before custodial interrogation.” The question in Moya was whether the definition of custody is different at a border crossing than other places. When Moya arrived at Miami International Airport, he presented a resident-alien card to an INS inspector. After a preliminary

102. Id. at 249.
103. Id. at 250-51.
104. Id. at 251-52.
105. Id. at 253.
106. Id.
107. 74 F.3d 1117 (11th Cir. 1996).
108. Id. at 1119. See, e.g., United States v. Henry, 604 F.2d 908, 914 (5th Cir. 1979).
computer check indicated that Moya may have been deported previously, a United States Immigration officer took Moya to an office and interviewed him. The government offered statements made by Moya at his trial for illegal re-entry into the United States following deportation. Moya claimed that he was in custody and was not given *Miranda* warnings. The district court denied Moya's motion to suppress the statements on Fifth Amendment grounds. The court of appeals reviewed the issue of custodial status as a mixed question of fact and law. The objective test applied by the court asked whether, under the totality of circumstances, a reasonable person in Moya's position would feel that he was not free to leave. The court noted that Moya was not handcuffed, accompanied by armed officers, or told he was not free to leave. The record also reflected that Moya never asked to leave or see an attorney. Based on these facts, the court held that Moya was not in custody and that no *Miranda* warnings were necessary. The court reasoned that the determination of whether Moya was in custody “should be interpreted in light of the strong governmental interest in controlling the borders.” At the border, some degree of questioning is expected, the court stated, and it must rise to “a distinctly accusatory level” before creating the feeling of restraint that comes with arrest. The court concluded: “We stress that events which might be enough often to signal ‘custody’ away from the border will not be enough to establish ‘custody’ in the context of entry into the country.”

**B. Double Jeopardy**

During the survey period, the court of appeals decided several interesting cases involving the Double Jeopardy Clause of the Fifth Amendment. *United States v. Stinson* concerned a case where a bank robbery defendant was resentenced after successfully challenging the calculation of his guideline sentence on appeal. At defendant's first

---

109. 74 F.3d at 1118.
110. Id. at 1119.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id. at 1120.
117. Id.
sentencing, the district court found that he was a "career offender." With the career offender enhancement, defendant's guideline range was 292-365 months imprisonment. The prosecution asked the district court to depart upward by two offense levels, which would have yielded a range of imprisonment of 360 months to life. The district court denied the government motion to depart, stating that a sentence at the top of the applicable range (365 months) would be adequate to protect society; however, the court noted that had the applicable range been lower, a departure might have been appropriate.

Stinson successfully challenged the career offender enhancement on appeal. His case was remanded for resentencing. Without the career offender enhancement, Stinson's guideline range was 210-262 months imprisonment. However, this time the district court granted the government's motion to depart upward. The court departed upward by three levels, yielding a range of 292-365 months. After his successful appeal, Stinson received the very same sentence. In the immortal words of Yogi Berra, for Stinson it was "deja vu all over again." One question faced by the court in Stinson's appeal following his second sentencing was whether this deja vu was double jeopardy.

Stinson argued that the district court's upward departure at his resentencing was improper. He invoked the Double Jeopardy Clause, as well as the "law of the case doctrine," the Due Process Clause, and a claim that the government had waived the right to move for departure by failing to appeal the denial of its original motion to depart. The court of appeals rejected each of these contentions. The court declared that it had adopted a holistic approach to sentencing:

A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines . . . . Under this holistic approach, when a criminal sentence is vacated, it becomes void in its entirety; the sentence—including "any enhancements—has been wholly nullified and the slate wiped clean." Consequently, when a sentence is vacated and the case is remanded for resentencing, the district court is free to reconstruct the sentence utilizing any of the sentence components.

119. 97 F.3d at 467.
120. Id. at 468. Defendant was also subject to a mandatory consecutive term of 60 months for his conviction on one count of using a firearm during a crime of violence. Id.
121. Id.
122. Id.
123. Id. at 466-69.
124. Id. at 469, 470.
125. Id. at 469 (citations omitted).
With respect to the double jeopardy argument, the court found that Stinson voluntarily asked that the sentence be vacated and thereby waived his right to raise a double jeopardy claim. The court also gave short shrift to Stinson's other arguments.

There is a tension between the decision in *Stinson* and another decision from the survey period, decided months earlier by another panel of the Eleventh Circuit, *United States v. Tamayo*. Tamayo is not cited or discussed in *Stinson*. In contrast to Stinson, a case in which the government benefited from being able to revisit issues previously litigated, in Tamayo it was the defendant who was arguing for reconsideration of issues on remand for resentencing. Tamayo's case was remanded for resentencing because recent case law called into question the validity of the calculation of Tamayo's criminal history score. On remand, the district court decided that the recent case law did not require a lower sentence. Tamayo asked the court to revisit other issues that had been raised at the original sentencing, but the district court declined to do so, noting that the mandate of the court of appeals on remand was narrowly tailored to the criminal history issue. Indeed, Tamayo was not formally given the right of allocution at his resentencing. The court of appeals affirmed. The key to the court's analysis was the wording of the mandate on remand. The court held that where the mandate is limited, the law of the case doctrine prevents relitigation of issues.

*Stinson* and *Tamayo* can be reconciled: Stinson involved a mandate that allowed all issues to be revisited while Tamayo involved an explicit, limited mandate. The two cases, however, present the court and attorneys with important systemic and strategic issues. Since the advent of the Sentencing Guidelines, the courts of appeals have been inundated with sentencing appeals. Errors often require a remand, if only to decide where a defendant should be sentenced within the new guideline range. From the standpoint of minimizing litigation, the use

---

126. *Id.*
127. *Id.* at 469-70.
128. 80 F.3d 1514 (11th Cir. 1996).
129. *Id.* at 1515.
130. *Id.* at 1516-17.
131. *Id.* at 1518. The court noted that Tamayo conversed with the court at the time of his resentencing, and stated that he had an opportunity to discuss concerns with the court. *Id.* at 1518 n.4. However, the court stopped short of finding this amounted to allocution and proceeded to decide the case assuming that the right of allocution was denied. *Id.* at 1519.
132. *Id.* at 1518-21.
133. *Id.* at 1520.
of limited mandates make sense. From the standpoint of the prosecution and defense, limited mandates sometimes will benefit the prosecution (as in Tamayo) and sometimes will benefit the defense (as a limited mandate would have in Stinson). Practitioners will need to decide which kind of mandate would advance their cause, develop arguments in favor of the type of mandate they prefer, and explicitly seek that type of mandate as part of the relief requested. The court of appeals will be faced with weighing the efficiencies of limited mandates against the values promoted by open mandates, such as the government’s interest in keeping Stinson off the street, or Tamayo’s interest in presenting himself as a changed person after part of his term. If the option of open mandates is preserved despite the costs of revisiting issues, the challenge will be to ensure that the benefits and risks of open mandates are granted and imposed in a principled manner. What criteria should determine whether the mandate is open or limited? This is the ultimate issue raised in Stinson and Tamayo.

United States v. Isom\textsuperscript{134} presents an intriguing double jeopardy problem that the district court might have avoided. In jury selection for a multi-defendant case expected to last several weeks, the court seated twelve jurors and two alternates.\textsuperscript{135} In selecting the jury and alternates, the court exhausted the venire.\textsuperscript{136} The court administered the oath to the jurors, and jeopardy attached.\textsuperscript{137} The court then sent the jurors home for the weekend.\textsuperscript{138} Unfortunately, two of the regular jurors had to be excused on Monday morning, which left the court without any alternate jurors. The court ordered another venire for the purpose of selecting alternate jurors and three were selected.\textsuperscript{139} During the trial, one of the members of the jury had to be excused, so one of the three alternates was included on the jury that decided the case. On appeal, the defense argued that they were entitled to be tried by the jury that had been sworn before the weekend break and that the subsequent addition of the alternate impermissibly altered the jury’s composition after the attachment of jeopardy.\textsuperscript{140} The court of appeals pointed out that the defense did not move for a mistrial at the time the court selected the alternates; instead, the defense contended that the trial should proceed without the alternates.\textsuperscript{141} The court also pointed

\textsuperscript{134} 88 F.3d 920 (11th Cir. 1996) (per curiam), cert. denied, 117 S. Ct. 1325 (1997).
\textsuperscript{135} 88 F.3d at 922.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 922, 924 n.8.
\textsuperscript{138} Id. at 922.
\textsuperscript{139} Id. at 922-23.
\textsuperscript{140} Id. at 923 n.7.
\textsuperscript{141} Id. at 923.
out that at the time the regular juror was excused, the defense opted to seat the alternate juror from the second venire rather than agree to a jury of less than twelve as allowed by the federal procedure rules. Under these circumstances, the court held that no double jeopardy violation occurred.

This result is open to question. The court pointed to the defense's failure to seek a mistrial when the court selected new alternates, but the defense had no obligation to do so. The defense asked to go forward with the twelve sworn jurors. The court also focused on the defense's failure to agree to go forward with a jury of less than twelve, but the defense was not obligated to agree under the federal rules. The defense refusal to stipulate to a jury of fewer than twelve forced the district court to seat one of the alternates, but surely the defense did not waive the objection to using one of the alternates from the second venire. In short, the defense claim seems to have merit: By adding the alternate from the second venire, the court changed the composition of the jury after the attachment of jeopardy. The court might have avoided the problem. One approach would have been not to swear the jury until the morning of trial. If the court believed three alternates were a good idea, it could have delayed swearing the jury, ordered another venire, and selected one or more additional alternates. Another tack would have been to ask the defense to agree to a jury of less than twelve in the event that one or more of the remaining twelve had to be excused. If the defense refused to so agree, then the court could have declared a mistrial, citing the need for alternate jurors as providing manifest necessity. The defense would be hard pressed to argue that a court in that situation must go forward without alternates and wait until the high likelihood of losing a juror is realized. Of course, declaring a mistrial would require starting jury selection from scratch, which is not an appealing alternative. But even though Isom appears to countenance

---

142. *Id.* at 924. Federal Rule Criminal Procedure 23(b) states: Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors. [*FED. R. CRIM. P.* 23(b)].

143. *88 F.3d* at 924.

144. *See FED. R. CRIM. P.* 23(b), *supra* note 142.

145. *Id.*
the course of adding a new alternate to an already sworn jury, it is hard
to see how that course comports with the well-established double
jeopardy principle that the composition of the jury cannot be altered
after the attachment of jeopardy. And the stakes are high: if the court
of appeals finds a double jeopardy violation, reprosecution of the
defendant would be barred.

The court of appeals confronted another interesting double jeopardy
issue in *United States v. Shenberg*, a case arising out of the Dade
County, Florida, court corruption investigation known as "Operation
Court Broom." The charges included Racketeer Influenced and Corrupt
Organization Act ("RICO") conspiracy, substantive RICO violations, and
charges based on the crimes charged as the predicate acts constituting
the pattern of racketeering activity. Defendants were charged with
conspiring to operate, and operating, the Dade County Circuit Court
system through a pattern of racketeering activity, namely assorted acts
of extortion, money laundering, and mail fraud. The verdicts were
mixed. As to each defendant, the jury acquitted on some of the counts
charging individual acts of extortion, money laundering, and mail fraud.
As to several defendants, the jury was unable to reach a verdict on the
RICO conspiracy charge, or the substantive RICO charge, or both.
Ultimately, the government elected to seek a retrial against defendant
Sepe, who had not been convicted on any counts. Sepe was acquitted on
a number of extortion, money laundering, and mail fraud charges, but
the jury was unable to reach a verdict on the RICO conspiracy,
substantive RICO, and a handful of extortion charges.

In anticipation of the retrial, the district court issued two rulings
grounded in the Double Jeopardy Clause. The government objected to
both rulings and cross-appealed on each. The first ruling was that
collateral estoppel barred the government from using crimes alleged in
counts of acquittal as predicate acts in the substantive RICO counts. It
is standard for the government to allege the particular crimes constitut-
ing the pattern of racketeering activity in the substantive RICO count
and also to have separate counts alleging the separate criminal
violations. The government argued that the acquittal on the individual
violations should not bar the government from alleging those same
violations as predicate acts for the substantive RICO count. The

---

147. 89 F.3d at 1468-69. See 18 U.S.C. § 1962(d) (RICO conspiracy); 18 U.S.C.
racketeering acts constituting pattern of racketeering activity).
148. 89 F.3d at 1469.
149. Id. at 1468-69, 1478.
government reasoned that estoppel is a creature of the Double Jeopardy Clause, and, therefore, the protections of collateral estoppel should be coextensive with the double jeopardy protections. The Double Jeopardy Clause does not forbid a retrial after a mistrial; the retrial is said to be "continuing jeopardy." Therefore, the acquittal on the individual counts alleging extortion, money laundering, and mail fraud should not preclude the use of those violations as predicate acts in the retrial of the RICO count, which was a continuation of the original jeopardy. In essence, the government argued that if double jeopardy is not implicated, then collateral estoppel cannot be implicated. 150

The court of appeals rejected the government's argument, holding that "the Double Jeopardy Clause does not limit the application of collateral estoppel to only cases in which double jeopardy applies." 151 The court noted that "[t]he doctrine of collateral estoppel applies 'when an issue of ultimate fact has once been determined by a valid and final judgment.'" 152 In the case of Sepe's retrial, the jury had rendered acquittals on the very charges that the government wanted to use as predicate acts in the retrial. 153 Indeed, the court stated that it would be appropriate to bar use of those predicate acts on a theory of direct estoppel, because the government was seeking to relitigate an issue after a judgment in the very same case. 154 The court drew support for its holding from a Seventh Circuit decision in an almost identical case involving a mistrial on RICO charges in which the government sought to use acquitted charges as predicate acts. 155 The court of appeals seems to have reached the right result. 156

The second double jeopardy ruling of the district court was that collateral estoppel also barred the use of the evidence concerning the acquitted counts as proof of the RICO conspiracy. 157 The government appealed this ruling as well, arguing that even if it were precluded from

150. Id. at 1478-79.
151. Id. at 1479.
152. Id. (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)).
153. It should be noted that there often are no special verdicts rendered on the various predicate acts alleged in the substantive RICO count. The Shenberg opinion does not indicate that any special verdicts were part of the record, and there was no separate jury verdict explicitly rejecting the predicate acts listed in the substantive RICO count.
154. 89 F.3d at 1478.
155. Id. at 1479. See United States v. Bailin, 977 F.2d 270 (7th Cir. 1992).
156. In reaching this conclusion, the author feels obligated to note that he was one of the government attorneys who, in Bailin, supra note 155, unsuccessfully advanced the very argument made by the government in Shenberg. Perhaps my current view can be attributed to several years' opportunity for reflection.
157. 89 F.3d at 1478.
utilizing the acquitted counts as predicate acts, it should be allowed to use the evidence of those acts as proof of the conspiracy. The government based its argument on the principle that collateral estoppel does not bar the government from offering evidence of a crime for which the defendant was acquitted. The government cited Dowling v. United States, in which the Supreme Court allowed the admission as "other act" evidence proof of a bank robbery for which defendant had been acquitted. The court of appeals agreed with the government's position on this score and held that "the doctrine of collateral estoppel does not bar the government from using predicate acts that mirror acquitted substantive offenses to prove RICO conspiracy." The court also declared that one of its prior opinions, which held the opposite, was no longer good law in light of Dowling. Once again, this seems the right result.

Much double jeopardy litigation arises in the context of drug prosecutions involving criminal activity touching several federal jurisdictions. The arsenal of the federal prosecutor includes venue rules that allow prosecution in one federal district of a far-flung criminal enterprise as long as part of the conspiracy touched the district of the prosecution. When more than one federal prosecutor goes after the same multi-district criminal enterprise, prosecutions can overlap and double jeopardy issues can arise. One such case was United States v. Harvey. In 1990, Harvey pleaded guilty to drug charges in federal court in the Eastern District of Michigan. Harvey pleaded guilty to violating the federal narcotics conspiracy statute by conspiring to possess and distribute cocaine. The charges alleged that one of the overt acts committed was a 1986 importation of 487 kilograms of cocaine through Sebastian Inlet, Florida. Harvey was subsequently charged

158. Id. at 1480.
160. Id. at 348-49.
161. 89 F.3d at 1481.
162. Id. at 1480 n.23. See United States v. Gornto, 792 F.2d 1028 (11th Cir. 1986).
163. See, e.g., United States v. Felix, 503 U.S. 378, 380 (1992) (holding that a subsequent prosecution for conspiracy to manufacture, possess, and distribute methamphetamine was not barred by a previous conviction in another district for attempt to manufacture the same substance on the ground that a prosecution for conspiracy is not precluded by a prior prosecution for the substantive offense).
164. 78 F.3d 501 (11th Cir. 1996).
166. 78 F.3d at 502. The importation through Sebastian Inlet was described in the Michigan charge as an "overt act." Id. Some conspiracy statutes contain an element of an overt act, that is, some act in furtherance of the criminal agreement. See, e.g., 18 U.S.C. § 371 (1994). However, 21 U.S.C. § 846 contains no express overt act requirement. In
in the Middle District of Florida with conspiracy to distribute cocaine and with engaging in a continuing criminal enterprise. The conspiracy charge alleged the Sebastian Inlet importation as the overt act. The government apparently saw the double jeopardy problem, but not all of it. The government moved to dismiss the conspiracy charge, but pursued the continuing criminal enterprise ("CCE") charge, which alleged the Sebastian Inlet incident as one of the drug felonies committed by the enterprise. The CCE crime is engaging in a series of drug felonies for profit in concert with five or more other persons with respect to whom the defendant is a manager or supervisor. The double jeopardy issue before the court of appeals was whether a CCE prosecution "may incorporate the same agreement and the same conduct" for which Harvey had been convicted of conspiracy. The court had little difficulty concluding that the Double Jeopardy Clause barred the government from using the Sebastian Inlet importation conspiracy to prove the "in concert" element of the subsequent CCE charge. Noting that conspiracy has been held to be a lesser included offense of the CCE crime, the court sought to determine whether the Michigan conspiracy and Florida CCE merely overlapped or whether the two were the same. The court found that the two were the same, relying heavily on the fact that the two charging instruments clearly allege the Sebastian Inlet importation as the essence of the offense. The court's conclusion is sound.

The Double Jeopardy Clause allows retrial following a mistrial if there is "manifest necessity" for declaring the mistrial. Before declaring a mistrial it is incumbent on the trial judge to consider alternatives, but the findings do not have to be explicit. In Venson v. Georgia, the court of appeals affirmed the district court's grant of habeas corpus relief on the ground that defendant's retrial following a mistrial violated the Double Jeopardy Clause. Defendant was charged with three counts of sexual battery, with each count based on the testimony of a different complaining witness. During defendant's first trial, the judge ruled that

---

1994, the Supreme Court held that section 846 does not require an allegation or proof of an overt act. United States v. Shabani, 513 U.S. 10 (1994).
169. Harvey, 78 F.3d at 503.
170. Id. at 504-06.
171. Id.
172. Id. at 506.
175. 74 F.3d 1140 (11th Cir. 1996).
the defense attorney had engaged in an improper attack on the
credibility of the complaining witness for Count Three. The State moved
for a mistrial, arguing that a curative instruction would be inade-
quate.\textsuperscript{176} The court agreed there were grounds for a mistrial and
granted a mistrial as to all three counts. The defense argued that there
had been no manifest necessity for mistrial on Counts One and Two and
that retrial of those counts should be barred. The trial court rejected the
argument. At defendant's second trial, he was convicted of Count One
and acquitted of the other two charges. The Georgia courts rejected
defendant's double jeopardy claim, but the United States District Court
granted defendant's petition for a writ of habeas corpus. The State of
Georgia appealed.\textsuperscript{177} The court of appeals held that the trial court's
declaration of a mistrial as to Count One was an abuse of discretion.\textsuperscript{178}
Although the record of the trial court's reasoning was somewhat sketchy,
the court chose not to remand the case.\textsuperscript{179} The key factor supporting
the abuse of discretion finding was that the conduct provoking the
mistrial resulted in minimal prejudice to the State as to Count One.\textsuperscript{180}
The Venson decision provides an important lesson for evaluating the
propriety of a mistrial in cases involving charges based on a series of
separate incidents. The manifest necessity finding must justify the
mistrial of each count.

\textit{United States v. Rivera}\textsuperscript{181} involved double jeopardy and the related
doctrines concerning duplicitous and multiplicitous charging instru-
ments. An indictment is duplicitous when more than one crime is
charged in a single count. Duplicity can be cured by instructing the jury
to consider each sub-crime separately and that unanimity is required to
convict for each sub-crime. Duplicitous charging actually favors the
defendant in one sense: The government could have charged multiple
counts, subjecting defendant to additional potential punishment.
Duplicity can also be cured by making the government elect the offense
on which it will proceed. Multiplicity occurs when a single crime is
charged in more than one count, subjecting the defendant to possible
multiple punishments.\textsuperscript{182}

The defendant in Rivera was charged in a single count with being a
felon in possession of a firearm. The indictment charged that he

\begin{footnotes}
\item 176. \textit{Id.} at 1142-43.
\item 177. \textit{Id.} at 1144.
\item 178. \textit{Id.} at 1147.
\item 179. \textit{Id.}
\item 180. \textit{Id.}
\item 181. 77 F.3d 1348 (11th Cir.) (per curiam), \textit{cert. denied}, 116 S. Ct. 2511 (1996).
\item 182. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.3(c) (2d ed. 1992).
\end{footnotes}
possessed a certain firearm "[o]n or about August 12, 1994 and February 5, 1995." The government's proof suggested possession on August 12, 1994, February 5, 1995, and at various points in between. At trial, the judge treated the charge as if it were duplicitous, using a special verdict form dividing the count into two sub-crimes. The judge instructed the jury that it could not convict unless there was unanimous agreement that defendant possessed the gun on either or both August 12 and February 5. The jury was unable to reach a verdict on the August 12 possession and acquitted defendant of the February 5 possession. Defendant moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion and defendant appealed. 183

The analysis of the issue hinged on the nature of the crime of possession. That crime can be continuous in nature, where an item is possessed nonstop over a period of time. The crime can also be episodic, with separate possessions of an item on separate occasions. Determining whether possession is continuous or episodic is complicated because the law recognizes the concepts of joint and constructive possession, which require resort to notions like dominion and control to resolve issues of possession. The court of appeals in Rivera addressed defendant's contention that his possession was a continuing act and that the acquittal should exonerate him of the entire charge. In answering this claim, the court alluded to this rule: "Where there is no proof that possession of the same weapon is interrupted, the Government may not arbitrarily carve a possession into separate offenses." 184 The court acknowledged this rule, but concluded that the rule was not violated by what the district court had done: "Proof of possession of a firearm as a convicted felon on one day within an alleged continuous possession is sufficient to support a conviction." 185 On this same logic, the court concluded that collateral estoppel did not bar a retrial because the jury's verdict had not resolved an issue of ultimate fact against the government. 186 The court stated that the indictment was properly drawn to allege a continuing offense of possession and that charging the two dates of possession separately would have rendered the indictment multiplicious. 187

The analysis of the court is flawed. First of all, the indictment did not charge the crime of possession as a continuing offense. The indictment

183. 77 F.3d at 1350.
184. Id.
185. Id. at 1351.
186. Id.
187. Id. at 1352.
188. Id.
charged the offense as occurring on August 12 and February 5. The use of a conjunction does not create a charge of a continuing offense. Ordinarily, a continuing offense would be indicated by language like “from on or about August 12 to on or about September 5.” If the crime had been charged as a continuing offense, the jury would have been instructed that it could convict if there was proof that defendant possessed the gun at any point during that period. No special verdict would have been needed. Given the result of the first trial, the jury probably would have been unable to reach a general verdict on the charge and there would have been no impediment to a retrial.

Instead, the district court instructed the jury as if it were voting on two separate counts. It is not clear what possession instructions were given by the district court, but it is clear that the court told the jury to consider two charges on two discrete days. As the court of appeals acknowledged, separate charges would have been multiplicitous because the evidence established one continuous possession. Given the way the indictment was drawn and the jury was instructed at the trial, the verdict can be understood as an acquittal on one of two multiplicitous counts. Such a verdict should preclude a retrial on double jeopardy grounds. The issue is a tough one, but proper charging language reflecting a continuing offense and corresponding jury instructions will keep the issue from recurring.

C. Due Process

The courts have read a variety of procedural protections and rights into the Due Process Clause of the Fifth Amendment. The court of appeals decided several cases in 1996 arising under the clause. United States v. Foxman concerned a possible denial of due process because of pre-indictment delay by the prosecution. As the court of appeals acknowledged, separate charges would have been multiplicitous because the evidence established one continuous possession. Given the way the indictment was drawn and the jury was instructed at the trial, the verdict can be understood as an acquittal on one of two multiplicitous counts. Such a verdict should preclude a retrial on double jeopardy grounds. The issue is a tough one, but proper charging language reflecting a continuing offense and corresponding jury instructions will keep the issue from recurring.

189. Id. at 1350.
190. 87 F.3d 1220 (11th Cir. 1996).
191. Once an indictment or other charge is filed, pretrial delays are analyzed under the speedy trial guarantee of the Sixth Amendment. See Barker v. Wingo, 407 U.S. 514 (1972).
193. Foxman, 87 F.3d at 1221.
was charged with conspiracy involving the failure of a savings and loan. The conduct occurred in 1983, and the indictment was returned in 1993, within the statute of limitation for the charged offense. The district court dismissed the indictment and the government appealed. The court of appeals noted that the standard of review is abuse of discretion, but also noted that when the charge is brought within the statute of limitations, the defendant bears a “heavy burden in showing a dismissal is appropriate.” The court set forth the general test as follows: “[F]or this dismissal to have been proper, Foxman must have shown that pre-indictment delay caused him actual substantial prejudice and that the delay was the product of a deliberate act by the government designed to gain a tactical advantage.”

Addressing the first prong of this test, the court concluded that the district court was not clearly erroneous in finding that Foxman had suffered actual substantial prejudice from the delay: several witnesses critical to the defense had died, and because Foxman was not put on notice of the investigation until shortly before the indictment, he had no reason to preserve evidence.

The court of appeals then looked at the second prong of the test: the delay must also be the “product of a deliberate act by the government designed to gain a tactical advantage.” Because the district court had not addressed this prong, the court of appeals discussed the test and remanded to the district court. The court of appeals made several statements about how the district court might apply the test. Some of the delay in the case occurred because the government waited until the convictions of one defendant were affirmed before it immunized that defendant. The court stated that delay from the decision over the timing of the immunity grant is the sort of delay that might be viewed as designed to achieve a tactical advantage.

The court rejected the

---

195. 87 F.3d at 1221.
196. Id. at 1222.
198. 87 F.3d at 1222-23.
199. Id. at 1223.
200. Id. at 1223-24. The district court had not analyzed the reasons for the delay because it was under the impression that a recent Supreme Court case removed that step in the analysis. See Doggett v. United States, 505 U.S. 647 (1992). In Foxman, the Court of Appeals held that Doggett, a Sixth Amendment case, does not alter the law under the due process clause. Foxman, 87 F.3d at 1222.
201. 87 F.3d at 1222.
notion that the government must be motivated by the desire to prejudice the defense, such as where a prosecutor delays charges until a terminally ill defense witness dies.\textsuperscript{202} That sort of "bad faith" is not required. The court explained:

The critical element is that the government makes a judgment about how it can best proceed with litigation to gain an advantage over the defendant and, as a result of that judgment, an indictment is delayed . . . . The main point is showing acts done intentionally in pursuit of a particular tactical advantage: delay (and the prejudice directly caused by the delay) need not necessarily be the tactical advantage sought.\textsuperscript{203}

The court's opinion gives rise to two observations. First, although courts have rarely dismissed indictments for pre-indictment delay, the trend to longer statutes of limitations, such as the one at issue in Foxman, may cause courts to scrutinize such claims more closely.\textsuperscript{204} Second, the wisdom of the court's tactical advantage test is open to question. By eschewing a conventional bad faith test requiring that the government seek delay to cause prejudice, the court may be opening a Pandora's Box. The court will have to engage in complicated second guessing about the prosecutor's conduct of the investigation. This may involve a hearing in which the court will examine prosecutors under oath about their decisions and require the production of prosecution documents. The second-guessing process will be tricky. Take the example used by the court, the timing of a decision to immunize a witness. Many factors may have caused the decision, such as the fear that the witness would not be forthcoming until his convictions were affirmed, or a fear of tainting the witness's reprosecution in case his conviction was reversed, or a decision to wait in hopes that another witness would come forward, obviating the need to immunize. The list could go on. The court of appeals test will require after-the-fact policing of the executive branch's prosecutorial decisions, a practice that the Supreme Court has been reluctant to countenance.\textsuperscript{205}

\textsuperscript{202} Id. at 1223 n.2.
\textsuperscript{203} Id.
\textsuperscript{204} See id. at 1224 n.4 (noting that dismissals are rare but expressing concern that the long limitations period may not have protected the defendant).
\textsuperscript{205} See United States v. Armstrong, 116 S. Ct. 1480 (1996) (announcing rigorous standard for triggering discovery based on selective prosecution claims under the Due Process Clause, citing the presumption of regularity of the executive's exercise of prosecutorial discretion).
Criminal Procedure

Trial lawyers are familiar with the fact that some trial judges do not like the lawyers to instruct the jury about the law—these judges view the instructions on the law to be their province and they do not want the lawyers usurping the function. Within limits, this attitude makes sense. The lawyers should not be allowed to make misstatement of law or confuse the legal issues. But if taken to an extreme, refusing to let the lawyers discuss the law prevents them from effectively arguing their cases and may deny the parties due process. That is what happened in United States v. Hall. Hall was on trial on a charge of being a felon in possession of a firearm. When Hall’s attorney delivered his closing argument, he sought to address some of the legal matters that would later be set forth in the court’s jury instructions. Hall’s attorney was repeatedly blocked by the court when he attempted to make reference to the law. The court interrupted the attorney: “[W]hat I want you to do is get to the facts and the evidence. You are usurping so far the role of the court. I will instruct the jury.” When the attorney tried to apply the definition of reasonable doubt to his attack on the government’s two key witnesses, the following exchange occurred:

Counsel: This ladies and gentlemen, is the case. It’s the two people that the government relies upon to prove beyond a reasonable doubt that Mr. Hall participated in this offense. Now, proof beyond a reasonable doubt is proof of such a character—
Court: No, no, no.
Counsel: You will not allow that, Your Honor?
Court: No.
Counsel: I will pass. His Honor will instruct you on proof beyond a reasonable doubt . . .

The court of appeals held that the closing argument of Hall’s attorney had been “impermissibly restricted.” Hall’s conviction was reversed. Although the Equal Protection Clause of the Fourteenth Amendment, by its terms, applies only to the states, the Supreme Court has applied equal protection guarantees to the federal government by finding a “due

207. 77 F.3d at 400.
208. Id. at 400 n.1.
209. Id. at 400.
210. Id.
211. Id. at 401.
process component" in the Fifth Amendment.\textsuperscript{212} Equal protection analysis now plays an important role in the law of jury selection. Under \textit{Batson v. Kentucky},\textsuperscript{213} and its progeny, both parties in a criminal case\textsuperscript{214} may object to the other side's use of peremptory challenges on the ground that the challenges are being used to strike jurors on an impermissible basis, such as race, gender, or ethnicity.\textsuperscript{215} Under \textit{Batson}, if a party can make out a prima facie case that peremptory challenges are being used for an impermissible purpose (usually based on a pattern of strikes), then the burden shifts to the side making the strike to provide a race or gender-neutral reason for the strike.\textsuperscript{216} If the court finds a \textit{Batson} violation, the usual penalty is that one or more jurors against whom the challenges were exercised will be seated on the jury.

In \textit{Wallace v. Morrison},\textsuperscript{217} the court of appeals announced a potentially important new rule to be applied during litigation over \textit{Batson} issues. In that decision, the court adopted the so-called "dual motivation analysis."\textsuperscript{218} Under this analysis, the finding that race or gender was a substantial part of the party's motivation for the strike would not end the inquiry. Instead, the party found to have had an improper motive may raise an "affirmative defense" by "showing by a preponderance of the evidence that the strike would have been exercised in the absence of any discriminatory motivation."\textsuperscript{219} The court approved the district court's formulation of "the dispositive question in dual-motivation analysis: would the prosecutor have exercised each challenged peremptory strike solely for his proffered race-neutral reasons?"\textsuperscript{220} This analysis creates a new category of mixed motive cases that will pass muster under \textit{Batson}. The court of appeals has since stated that "resort to dual motivation analysis will rarely be necessary."\textsuperscript{221} Despite this prediction, dual motivation analysis may well play a role, at least as an alternative basis for decision. Thus, the court might find that the race or gender-neutral reasons for the strike are sufficient, but

\begin{itemize}
\item\textsuperscript{212} See, e.g., Schlesinger v. Ballard, 419 U.S. 498 (1975).
\item\textsuperscript{213} 476 U.S. 79 (1986).
\item\textsuperscript{214} See Georgia v. McCullom, 505 U.S. 42 (1992) (prosecution may challenge strikes of defendant).
\item\textsuperscript{216} \textit{Batson}, 476 U.S. at 97.
\item\textsuperscript{217} 87 F.3d 1271 (11th Cir.), cert. denied, 117 S. Ct. 616 (1996).
\item\textsuperscript{218} 87 F.3d at 1274-75.
\item\textsuperscript{219} Id.
\item\textsuperscript{220} Id. at 1274.
\item\textsuperscript{221} United States v. Tokars, 95 F.3d 1520, 1523 (11th Cir. 1996), cert. denied, 117 S. Ct. 1328 (1997).
\end{itemize}
that even if race or gender were a partial motive, the party would have made the strike for the permissible purpose. Combined with recent case law concerning what constitutes a valid race or gender-neutral reason, the dual motivation analysis may provide a device for defending against Batson challenges at trial and on appeal.222

IV. THE SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.223

A. The Right to Counsel

The Sixth Amendment right to counsel includes the right to effective assistance of counsel. If the right did not require competent representation, it would become a paper tiger. The Supreme Court's test for determining when counsel's performance falls below the requirements of the Sixth Amendment is often criticized as failing to adequately ensure the quality of representation. The current test requires a showing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's unprofessional conduct, the result of the case would have been different.224 A "reasonable probability" of a different outcome means that the chances are such that confidence in the outcome is undermined.225

In Huynh v. King,226 the court of appeals found that a defense attorney in a murder case had failed to meet the first part of the Strickland test when he failed to file a motion to suppress evidence in a timely manner; when the motion was filed, the court dismissed it as untimely.227 Crucial evidence linking defendant to the murder had

---

222. See Purkett v. Elem, 115 S. Ct 1769, 1771 (1995) (per curiam) (a legitimate reason need not make sense—it must be a reason that does not deny equal protection).
223. U.S. CONST. amend. VI.
225. Id. at 694.
226. 95 F.3d 1052 (11th Cir. 1996).
227. Id. at 1055.
been found during a pat-down search. However, there seemed to be a strong argument that the scope of the pat-down search exceeded allowable limits. Indeed, the evidence was discovered during a second pat-down search, which followed another search that was limited to the permissible purpose of searching for weapons. At a post-trial hearing, Huynh's attorney explained his failure to file the motion in a timely fashion. In essence, the attorney said he did so on purpose, hoping that the refusal of the trial judge to hear the motion would become an issue on appeal. Furthermore, the attorney stated his belief that the suppression motion was meritorious. The court of appeals concluded that the attorney's decision to file a possibly meritorious suppression motion in an untimely manner was unacceptable. The court quoted from the Supreme Court's decision in *Kimmelman v. Morrison:* "No reasonable lawyer would forgo competent litigation of meritorious, possibly decisive issues on the remote chance that his deliberate dereliction might ultimately result in federal habeas review." Having found counsel's performance inadequate under the first part of the *Strickland* test, the court decided to remand to the district court for a thorough analysis of the merit of the motion to suppress. However, the court concluded that based on the critical nature of the evidence recovered in the pat-down search, that had the evidence been excluded, there would be a reasonable probability that the outcome would have been different. Thus, the district court on remand was to decide whether the motion, if timely filed, would have been granted.

There is an irony to the outcome in *Huynh.* The trial attorney said that he failed to file the motion to create an appellate issue; he specifically mentioned the possibility that the federal courts would be concerned that the motion had not been heard. He also said he feared that the state court would simply believe the police and his motion to suppress would fail. The court stated that "no competent lawyers would choose deliberately to 'set up' an ineffective assistance of counsel claim whereby that lawyer's own incompetence would serve as the cause

---

228. *Id.* See *Terry v. Ohio,* 392 U.S. 1 (1968).
229. 95 F.3d at 1056.
231. 95 F.3d at 1057 (quoting *Kimmelman v. Morrison,* 477 U.S. 365 (1986)).
232. 477 U.S. at 383 n.7.
233. 95 F.3d at 1058.
234. *Id.* at 1058 n.6.
235. *Id.* at 1058.
236. *Id.* at 1056-57.
for defaulting a claim. But it is apparent that defendant Huynh may well be better off because of the strategic decision of his trial counsel, a decision deemed to be incompetent. The decision also had the effect of having the ultimate merit of the suppression motion decided by a federal court.

The right to counsel is also fortified by the requirement that counsel be given the opportunity to be present at every "critical stage" of criminal proceedings. One such critical stage is a pretrial psychological examination. The court of appeals was confronted with an unusual problem concerning the right to counsel in this setting in Delguidice v. Singletary. Defendant was the subject of two separate state prosecutions. He was represented by different lawyers in the two cases. In one case, he was convicted and set for sentencing. His family arranged for a clinical psychiatrist, Dr. Ceros-Livingston, to determine defendant's competency to be sentenced. In the second case, which was pending at the time defendant was preparing for sentencing in the first case, defendant was charged with attempted manslaughter and battery. When Dr. Ceros-Livingston went to evaluate defendant before his sentencing in the first case, she "was under the misapprehension that she was to evaluate Delguidice with respect to both pending cases." The lawyer handling the sentencing did not know the scope of the doctor's examination and the lawyer handling the manslaughter and battery case did not receive notice of the examination.

At the trial on the manslaughter and battery charges, defendant used an insanity defense. An expert testified on defendant's behalf, and opined that defendant was insane at the time of the alleged offenses. The State responded by calling Dr. Ceros-Livingston, who testified that defendant knew right from wrong and understood the consequences of his actions. Dr. Ceros-Livingston was the only witness who testified contrary to defendant's expert on the issue of insanity. Defendant was convicted. The Florida courts affirmed. The United States District Court denied defendant's request for habeas relief.

The court of appeals reversed and granted the writ of habeas corpus. The court stated: "In sum, the Sixth Amendment right to

237. Id. at 1057.
239. 84 F.3d 1359 (11th Cir. 1996).
240. Id. at 1360-61.
241. Id. at 1361.
242. Id.
243. Id.
244. Id. at 1364.
counsel requires that counsel be given advance notice of the scope and
time of a psychological examination so that counsel can discuss with
the client the advisability of undergoing the examination and give other
appropriate advice.\textsuperscript{245} The purpose of the notice requirement is to
give counsel a chance to act before and during the examination.\textsuperscript{246} The
court addressed the State's contention that the lawyer representing
defendant in the sentencing received notice and was present at the
examination to protect defendant's rights. The court rejected this
argument because the lawyer representing defendant in the sentencing
was unaware that the scope of the examination included the other
criminal case.\textsuperscript{247} The court concluded that defendant's Sixth Amend-
ment rights were violated and that the error was not harmless.\textsuperscript{248}

Another principle that augments the Sixth Amendment right to
counsel is the notion that one has a right to counsel of one's own
choosing.\textsuperscript{249} United States v. McCutcheon\textsuperscript{250} concerned the limits on
this Sixth Amendment "right to choose." McCutcheon and a co-
defendant, Samuels, were set for trial on drug charges. McCutcheon's
lawyer indicated that McCutcheon would be using an entrapment
defense that would incriminate Samuels. In response, Samuels stated
that he would testify and contradict McCutcheon's defense. That
decision further complicated matters because McCutcheon's chosen
counsel had represented Samuels in a prior case and had learned
personal information about Samuels in their privileged discussions.
Because Samuels would not waive the privilege, McCutcheon's attorney
was in a conflict of interest between representing his current client and
loyalty to his former client. One solution, requested by Samuels, was to
sever the trials of the two defendants. The district court, however,
refused to do that. Instead, the court disqualified McCutcheon's lawyer
because of the conflict of interest. McCutcheon retained a new lawyer,
but as it turned out, defendants' trials were severed for scheduling
reasons. McCutcheon was convicted and appealed, arguing that the
court had needlessly denied his choice of counsel.\textsuperscript{251}

The court of appeals began its analysis by stating that "while the right
to counsel is absolute, there is no absolute right to counsel of one's own
choice."\textsuperscript{252} The court pointed out that precedent holds "that the right

\begin{itemize}
\item \textsuperscript{245} Id. at 1362 (citations omitted).
\item \textsuperscript{246} Id. at 1362 n.7.
\item \textsuperscript{247} Id. at 1362.
\item \textsuperscript{248} Id. at 1364.
\item \textsuperscript{249} See, e.g., Glasser v. United States, 315 U.S. 60, 70 (1942).
\item \textsuperscript{250} 86 F.3d 187 (11th Cir. 1996).
\item \textsuperscript{251} Id. at 188-89.
\item \textsuperscript{252} Id. at 189.
\end{itemize}
to a choice of counsel is subordinate to the requirements of the efficient and orderly administration of justice.\textsuperscript{253} With that foundation, the court went on to approve the district court's finding that McCutcheon's lawyer had a conflict of interest.\textsuperscript{254} Although McCutcheon offered to waive the conflict, the court found that Samuels' refusal to waive the conflict left Samuels' interests open to damage.\textsuperscript{255} The court went on to consider McCutcheon's claim that the judge should have eliminated the conflict by severing the trials, especially in light of the fact that the cases were eventually severed for other reasons.\textsuperscript{256} The court conceded that "subsequent events might indicate it would have been the better part of discretion to grant a severance."\textsuperscript{257} However, in deciding whether the district court abused its discretion in denying the motion for severance, the court of appeals looked at the situation as it existed at the time of district court's ruling.\textsuperscript{258} From that perspective, the court viewed the district court's ruling as a reasonable exercise of its "broad discretion" to "manage its own docket."\textsuperscript{259} In any event, McCutcheon did receive a separate trial, and there was no showing that the court's exercise of discretion caused him compelling prejudice.\textsuperscript{260}

\section*{B. The Right to Speedy Trial}

In the federal system, most litigation over the right to a speedy trial focuses on the Speedy Trial Act,\textsuperscript{261} the statutory scheme enacted by Congress. In most cases, the statutory scheme has supplanted the Sixth Amendment's speedy trial guarantee as the primary legal basis for challenging delay. Indeed, the Speedy Trial Act was designed to fill a void left by the Supreme Court's reluctance to read any strict time limits into the Sixth Amendment.\textsuperscript{262} However, some defendants do invoke the Sixth Amendment's right of speedy trial in certain situations. The court of appeals decided two noteworthy Sixth Amendment speedy trial cases in 1996. The first was \textit{United States v. Derose}.\textsuperscript{263} Defendants

\begin{itemize}
\item \textsuperscript{253} \textit{Id.}
\item \textsuperscript{254} \textit{Id.}
\item \textsuperscript{255} \textit{Id.}
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} \textit{Id. at} 190.
\item \textsuperscript{258} \textit{Id.}
\item \textsuperscript{259} \textit{Id.}
\item \textsuperscript{260} \textit{Id.}
\item \textsuperscript{261} 18 U.S.C. § 3161-3174 (1994).
\item \textsuperscript{262} \textit{See, e.g.,} Barker v. Wingo, 407 U.S. 514 (1972).
\item \textsuperscript{263} 74 F.3d 1177 (11th Cir. 1996).
\end{itemize}
Derose and Ould were arrested in July 1991 and charged in a criminal complaint with conspiring to purchase marijuana. A preliminary hearing was held and the court found probable cause. Although the Speedy Trial Act requires that an indictment be returned within thirty days of an arrest, the government did not obtain an indictment in a timely manner and did not even move to dismiss the pending criminal complaint until July 1993, a year after the arrest. In May 1993, the government finally obtained an indictment charging the defendants with conspiracy (as in the complaint) and possession of marijuana with intent to distribute.

Defendants argued that the indictment should be dismissed because the dismissal of the complaint should have been with prejudice. Under the Speedy Trial Act, the court is allowed to dismiss a complaint with prejudice in certain cases. The district court found that this was an appropriate case to dismiss with prejudice: the one year delay between arrest and the dismissal of the complaint was due to “gross negligence” by the prosecutor. However, the dismissal of the complaint with prejudice did not end the prosecution because the complaint had only contained the conspiracy charge. The dismissal of the complaint with prejudice precluded the prosecution on the conspiracy charge, but not the possession count of the indictment. Defendants advanced two arguments contending that the possession charge should also be precluded. One argument was statutory, the other constitutional.

The statutory argument was that the possession charge was supported by the same facts as the dismissed conspiracy charge; the possession

---

264. *Id.* at 1180-81.
265. *Id.* at 1180.
266. See 18 U.S.C. § 3161(b) (1994). Extensions can be obtained with leave of court, but there is no indication that occurred in the case in question. *Id.*
267. 74 F.3d at 1180.
268. *Id.*
269. *Id.*
271. 74 F.3d at 1180. It is important to put the negligence of the prosecutor in perspective. Had the prosecutor moved to dismiss the complaint within the 30 day period for returning an indictment, the complaint almost certainly would have been dismissed without prejudice. Once the complaint is dismissed, the defendants are not formally charged with a crime, and the limitations of the Speedy Trial Act do not apply. In the author's experience, it not uncommon for complaints to be dismissed and for lengthy periods of time to pass before indictment. Thus the negligence of the prosecutor in *Derose* was the failure to dismiss the complaint in a timely fashion, which is a routine act that removes the case from the strictures of the Speedy Trial Act.
272. *Id.* at 1180-81.
charge merely “gilded” the conspiracy charge.\textsuperscript{273} Under these circumstances, defendants argued, the possession charge should be precluded where the conspiracy charge was dismissed with prejudice.\textsuperscript{274} The court rejected this argument. The principal basis for the court’s holding was that the possession charge is not merely a gilding of the conspiracy charge.\textsuperscript{275} The court noted that conspiracies and substantive offenses are distinct crimes and even questioned whether a “substantive offense can ever gild a conspiracy charge.”\textsuperscript{276} Although the court did not decide the issue, it also called into question the viability of the so-called “gilding exception” to the Speedy Trial Act in the Eleventh Circuit, pointing to some conflicting language in the cases.\textsuperscript{277}

Defendants’ constitutional argument was that once accused in the complaint in July 1991, their Sixth Amendment speedy trial rights attached and their trial on the possession charge in January 1994 was not a speedy trial.\textsuperscript{278} Given its view that conspiracy and possession are distinct offenses, the court had little difficulty in disposing of defendants’ claim. Because the July 1991 complaint charged only conspiracy, it was irrelevant. Because possession charge was not lodged until May 1993, the delay from charging to trial was only eight months, an insufficient time to merit a speedy trial inquiry.\textsuperscript{279}

\textit{United States v. Clark}\textsuperscript{280} addressed another constitutional speedy trial claim generated by a government foul-up. In July 1993, Clark was arrested by police in Alabama on drug charges. The state case was dismissed and the matter was presented to the United States Attorney for prosecution. An indictment was returned against Clark in September 1993, but Clark was not arrested for seventeen months. Clark did not know about the charges until his arrest and did nothing to avoid arrest. It was undisputed that Clark would have been easy to find—the failure to arrest him was simply the result of negligence. Clark’s case had “fallen through the cracks.”\textsuperscript{281} On these facts the district court found that Clark’s Sixth Amendment speedy trial rights were violated. The indictment was dismissed with prejudice.\textsuperscript{282}

\textsuperscript{273} Id. at 1183-84. \\
\textsuperscript{274} Id. \\
\textsuperscript{275} Id. \\
\textsuperscript{276} Id. at 1184. \\
\textsuperscript{277} Id. \\
\textsuperscript{278} Id. at 1184-85. \\
\textsuperscript{279} Id. See Doggett v. United States, 505 U.S. 647 (1992) (delay of approximately one year is needed to trigger inquiry). \\
\textsuperscript{280} 83 F.3d 1350 (11th Cir. 1996). \\
\textsuperscript{281} Id. at 1352-53. \\
\textsuperscript{282} Id. at 1351.
The court of appeals applied the factors set forth in the Supreme Court's decision in Barker v. Wingo: 283 (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to speedy trial; and (4) the prejudice to defendant. 284 The court also noted the Supreme Court opinion in Doggett v. United States, 285 which stated that a speedy trial inquiry is triggered in the pre-indictment setting only when the defendant shows that the length of delay was "presumptively prejudicial." 286 Applying these standards, the court of appeals first found that the seventeen-month delay was sufficient to trigger an inquiry under Doggett. 287 Thus the threshold requirement was met and the first Barker factor was noted for purposes of applying the test. As for the second factor, the court of appeals affirmed the district court's finding that the delay was caused by the government's negligence. 288 The third factor, which concerns the defendant's assertion of the right, did not weigh against defendant's claim because he did not know about the indictment. 289

The difficult portion of the court's analysis concerned the prejudice to the defendant, the fourth Barker factor. In cases of government bad faith or negligence, the presumption of prejudice may compel relief even when the defendant fails to show particularized prejudice. 290 And the concern over prejudice increases in proportion to the delay. 291 The court of appeals compared Clark's case to the facts of Doggett, a case in which the court found prejudice from an eight and one-half year delay. 292 The court also noted appellate decisions finding insufficient prejudice based on delays similar to the delay in Clark's case. 293 With these precedents suggesting that the presumption of prejudice would carry the day for Clark, the court went on to find that Clark's showing of actual prejudice was too weak to require relief. 294 Clark was not subject to incarceration during the delay, nor did he suffer added

---

284. 83 F.3d at 1352.
286. 83 F.3d at 1352.
287. Id.
288. Id. at 1352-53.
289. Id. at 1353.
290. Doggett, 505 U.S. at 657-58.
291. Id. at 657.
292. 83 F.3d at 1353-54. See Doggett, 505 U.S. at 655, 657-58; Robinson v. Whitley, 2 F.3d 562 (5th Cir. 1993), cert. denied, 510 U.S. 1167 (1994); United States v. Beamon, 992 F.2d 1009, 1015 (9th Cir. 1993).
293. 83 F.3d at 1353-54.
294. Id. at 1354.
anxiety, as he did not know about the charges. Furthermore, Clark was unable to demonstrate that his defense had been impaired by the passage of time. Weighing all of the Barker factors, the court of appeals concluded that Clark was not denied his Sixth Amendment right to a speedy trial. The outcome in Clark is representative of the reluctance of courts to derail criminal prosecutions delayed by government blunders, unless the showing of prejudice is strong or the length of the delay is so outrageous that prejudice is assumed.

295. Id.
296. Id.
297. Id.