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Kenneth N. Flaxman

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CRIMINAL LAW AND PROCEDURE: RECENT TRENDS IN THE SEVENTH CIRCUIT

KENNETH N. FLAXMAN*

Criminal cases comprise approximately twenty percent of the docket of the United States Court of Appeals for the Seventh Circuit.¹ Each year that court decides more than 750 cases,² of which about 160 are criminal appeals.³ As in most circuits,⁴ criminal appeals result in reversals less frequently than do civil appeals. The Administrative Office of the United States Courts reports that the Seventh Circuit reverses 20.5% of all private civil appeals and 10.8% of all criminal appeals.⁵

In its 1979-80 term, the Seventh Circuit employed circuit rule 35⁶ to dispose of nearly seventy percent of all criminal appeals and fifty percent of all civil appeals in "unpublished opinions."⁷ In those decisions which it chose to publish in its 1979-80 term, the Seventh Circuit continued its broad reading of federal criminal statutes,⁸ and moved in the direction of relying on a police officer's "good faith" as the control-

* B.E.E., City University of New York; J.D., IIT/Chicago Kent College of Law.

1. In calendar year 1979, 310 of the 1,598 appeals docketed in the Seventh Circuit, or 19.3%, were criminal appeals. *The Judicial Business of the United States Courts of the Seventh Circuit* 14 (1979).

2. In the twelve-month period ending June 30, 1979, the Seventh Circuit disposed of 757 appeals after hearing or submission. 1979 *Annual Report of the Director, Administrative Office of the United States Courts* A-3.

3. *Id.* Collateral attacks on criminal convictions totalled 31 for federal prisoners and 42 for state prisoners. *Id.* at A-10.

4. The average reversal rate for all circuits in private civil appeals is 18.9%, almost twice the 10.4% reversal rate in criminal appeals. The First Circuit, which reverses in 21.7% of all criminal appeals (and only 15.9% of all private civil appeals), is the only circuit which reverses more than twelve percent of its criminal appeals. *Id.* at A-2.

5. *Id.* at A-3.

6. 7TH CIR. R. 35 (formerly rule 28) purports to authorize the Seventh Circuit to dispose of appeals by "unpublished orders," which may not be cited as precedent in any other cases. See generally Meites & Flaxman, *Civil Liberties: Employment Discrimination, Due Process, Immunities and Exhaustion of Remedies*, 56 CHI-KENT L. REV. 73, 73-4 (1980).

7. Although the Seventh Circuit's Annual Report does not differentiate between cases decided by published opinions and unpublished orders, statistics collected by the Clerk of the Seventh Circuit show that from January, 1980 through the end of September, 1980, 417 of the 729 decisions (or 57%) were by unpublished order. This is consistent with a count of the decisions of the Seventh Circuit which reveals that of the 440 decisions of the Seventh Circuit, 236 (or 53.6%) were rule 35 unpublished orders. One hundred and seven (or 24.3%) were decisions in criminal appeals, 72 (or 67.2%) of which were decided by unpublished order. In the same period, 164 of 333 civil appeals (or 49.3%) were decided by unpublished order.

8. See notes 44-158 *infra* and accompanying text.

ling factor in assessing fourth amendment claims.⁹ Other highlights¹⁰ of the court's 1979-80 term include the creation of a new standard for review of a district court's post-verdict grant of a judgment of acquittal¹¹ and a refusal to fashion standards for compensation of appointed counsel under the Criminal Justice Act.¹²

REISSUANCE OF "UNPUBLISHED ORDERS" AS PUBLISHED OPINIONS

A virtually invisible highlight of the 1979-80 term is the use of Seventh Circuit rule 35(d)(3)¹³ by institutional litigants—namely, the United States Attorney and the Illinois Attorney General¹⁴—to obtain reissuance of unpublished orders as published opinions.¹⁵ The invisibility of this phenomenon is the result of the Seventh Circuit's practice of refusing to disclose the basis upon which an unpublished order was reissued as a published order. With few exceptions,¹⁶ the granting of a motion to publish is shown in the published opinion by a footnote which states: "This appeal originally was decided by unreported order on [date of unpublished opinion]. See Circuit Rule 35. The panel has decided to issue the decision as an opinion."

Cases decided in unpublished orders do not always involve well-settled principles of law. For example, in *United States v. Klein*,¹⁷ the court was confronted with the question of whether the rationale of *Terry v. Ohio*¹⁸ was applicable to investigatory detentions of prop-

9. See notes 159-92 *infra* and accompanying text.

10. This article does not attempt to analyze each of the criminal law-related cases decided by the Seventh Circuit in its 1979-80 term.

11. See notes 194-210 *infra* and accompanying text.

12. See notes 211-37 *infra* and accompanying text.

13. 7TH CIR. R. 35(d)(3) authorizes "any person" to request reissuance of an unpublished order as a published opinion.

14. A Lexis search of Seventh Circuit opinions which had originally been announced as unpublished orders and then reissued as published opinions reveals that of the total of 17 of such cases from August, 1979 through August, 1980, the United States Attorney had been counsel in 10 of those cases, and the Illinois Attorney General in four. With the exception of *United States v. Hubbard*, 618 F.2d 422 (7th Cir. 1980), where the motion to publish was made by the non-party Prison Law Monitor, the motion to publish in each case involving an institutional litigant appears to have been made by that party.

15. It is difficult, if not impossible, to determine the number of cases in which a motion to publish is denied. Such an inquiry would require the mammoth undertaking of checking the docket sheet of each appeal decided in an unpublished order, because the Seventh Circuit does not keep separate statistics of this phenomenon.

16. On rare occasions, the Seventh Circuit discloses that the unpublished order has been reissued as a published opinion on a motion. See, e.g., *United States v. Price*, 617 F.2d 455 n.* (7th Cir. 1979). In even fewer instances will the court disclose the identity of the party who had requested reissuance of the order as a published opinion. See, e.g., *Encyclopedia Britannica, Inc. v. F.T.C.*, 517 F.2d 1013 (7th Cir. 1975).

17. 626 F.2d 22 (7th Cir. 1980).

18. 392 U.S. 1 (1968).

erty.¹⁹ The court admitted that its “research ha[d] uncovered no case in which a court has confronted a detention situation precisely like the one before us now.”²⁰ The court, nonetheless, initially announced its decision upholding the investigatory seizure in an unpublished order. In its motion to publish,²¹ the United States Attorney pointed out that this decision “establishing a new . . . rule of law”²² should be published, and for the first time²³ advised the court that three trial courts, none of which had issued an opinion, had considered the same question. Two of the trial courts had upheld the investigatory seizure,²⁴ while one had found the seizure to have been unlawful.²⁵

A review of the criminal cases reissued as published opinions shows that, in general, the decisions involved questions of law which were usually resolved favorably to the government. For example, in *United States v. Price*,²⁶ the Seventh Circuit had agreed with the government’s arguments that “a public official can be guilty of extortion even if the victim pays for something to which he was not legally entitled.”²⁷ In its brief, the government had asserted that this principle was well settled.²⁸ But in its motion to publish, the government represented that by accepting this argument, the court had resolved “several conflicts in the law.”²⁹

The absence of any independent agency to monitor each unpublished order and advise the court if the opinion has precedential value³⁰ means that, in general,³¹ the bar must rely on institutional litigants to

19. In *Klein*, two suitcases were seized while a search warrant was obtained; the subsequent search of the suitcases revealed cocaine. 626 F.2d at 24. *Cf.* *United States v. Garza-Hernandez*, 623 F.2d 496 (7th Cir. 1980) (if warrantless seizure of automobile is lawful, warrantless search of vehicle is also lawful).

20. 626 F.2d at 25.

21. Government’s Motion for Publication of the Decision of the Court, *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980).

22. *Id.* at 1. 7TH CIR. R. 35(c)(1)(i) sets out, as one criterion for issuance of a decision as a published opinion, that the decision has “establish[ed] a new . . . rule of law.”

23. Initially, on appeal the government did not advise the court that similar investigatory seizures had been at issue in other cases, but presented in its brief the analogy to *United States v. Van Leeuwen*, 397 U.S. 249 (1970) which was adopted by the Seventh Circuit, 626 F.2d at 25.

24. *United States v. Cunningham*, No. 78-80070 E.D. Mich. (1978); *United States v. Casey*, No. H-78-74 D. Conn. (1978).

25. *People v. Valle*, Cir. Ct. Cook County, Illinois, No. MC-80-1-756854 (1980).

26. 617 F.2d 455 (7th Cir. 1980).

27. Brief of the United States at 19, *United States v. Price*, 617 F.2d 455 (7th Cir. 1980).

28. *Id.* at 19-22.

29. Government’s Motion for Publication of the Decision of the Court at 2, *United States v. Price*, 617 F.2d 455 (7th Cir. 1980).

30. This was the solution to “library overgrowth” proposed forty years ago by Dean Pound. *See R. POUND, APPELLATE REVIEW IN CIVIL CASES* 391 (1941).

31. One exception in the Seventh Circuit’s 1979-80 term was a case in which the motion to publish was filed by the non-party Prison Law Monitor, which represented that it was interested in

secure the publication of important decisions mistakenly announced as "unpublished orders." The Seventh Circuit's decision in *United States v. Rodriguez*³² makes plain that such reliance is misplaced.

United States v. Rodriguez involved a prosecutor's improper closing argument.³³ In *United States v. Spain*,³⁴ the Seventh Circuit had stated that improper closing arguments by the prosecution were apparent in many criminal cases,³⁵ and had intimated that continuation of this practice would result in the adoption of a *per se* rule of reversal.³⁶ In *United States v. Buege*,³⁷ the Seventh Circuit again cautioned prosecutors to refrain from improper final arguments, reiterating its warning that continued improper final arguments would result in the adoption of a *per se* rule of reversal.³⁸ The same threat of adoption of a *per se* rule of reversal was made by the Seventh Circuit in its unpublished order in *United States v. Pleas Moody*.³⁹

The decision in *Moody* falls within the guidelines for disposition by published opinion of Seventh Circuit rule 35(c)(1)(ii) in that it "involves an issue of continuing public interest."⁴⁰ However, the Seventh Circuit's docket sheet for *Moody* shows that no person sought publication of the unpublished order, even though, as the court later stated in *United States v. Rodriguez*,⁴¹ a copy of the unpublished order in *Moody* had been forwarded to each United States Attorney, "directing attention to the warning it contained, together with the court's suggestion that United States Attorneys disseminate copies of the order to all their assistants or circulate their own memoranda on the subject."⁴²

The teaching of *Rodriguez* and *Moody* is two-fold. First, the guidelines for disposition by unpublished order of rule 35(c)(1)(i) notwithstanding,⁴³ important decisions may be lurking in the unpublished orders of the Seventh Circuit. Second, institutional litigants,

disseminating to its readership the court's unpublished order in that case. See *United States v. Hubbard*, 613 F.2d 422 (7th Cir. 1980).

32. 627 F.2d 110 (7th Cir. 1980).

33. The improper comment referred to the defendant's failure to have testified in his own behalf. *Id.* at 111.

34. 536 F.2d 170 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976).

35. *Id.* at 176.

36. *Id.*

37. 578 F.2d 187 (7th Cir.), *cert. denied*, 439 U.S. 871 (1978).

38. *Id.* at 189-90.

39. No. 78-1981 (7th Cir. Feb. 27, 1979) (unpublished opinion).

40. 7TH CIR. R. 35(c)(1)(ii) provides "A published opinion will be filed when the decision . . . involves an issue of continuing public interest."

41. 627 F.2d 110 (7th Cir. 1980).

42. *Id.* at 112.

43. 7TH CIR. R. 35(c)(1)(i) provides: "A published opinion will be filed when the decision . . . establishes a new, or changes an existing rule of law."

like the United States Attorney, cannot be depended upon to insure that decisions which were mistakenly issued as unpublished orders are re-issued as published opinions. This is an area of the court's business which bears further scrutiny.

EXPANDING FEDERAL CRIMINAL JURISDICTION

In its 1979-80 term, the Seventh Circuit was generally unsympathetic to the claims of convicted defendants that their wrongful acts could not be punished as violations of federal criminal laws. The common theme in the Seventh Circuit's decisions involving jurisdictional challenges is that federal criminal statutes should be construed in favor of punishing wrongdoers. That this view is not always correct is illustrated by the Seventh Circuit's decision in *United States v. Peters*⁴⁴ and the Supreme Court's subsequent decision in *Bifulco v. United States*.⁴⁵

At issue in *Peters* was the question of whether the mandatory special parole term required by section 406 of the Comprehensive Drug Abuse Prevention and Control Act of 1970⁴⁶ for persons convicted of the substantive drug offenses under that Act⁴⁷ is also applicable to persons convicted of conspiracy to commit those substantive offenses.⁴⁸ In cursory fashion, the Seventh Circuit resolved this question of statutory construction adversely to the defendant.⁴⁹

The Seventh Circuit's rationale in *Peters* was that "the absence of any explicit reference to [a special parole term for conspiracy convictions] reflects the integral nature of the term to the sentence imposed."⁵⁰ This reasoning was squarely rejected by the Supreme Court in *Bifulco v. United States*,⁵¹ where the Court held that the absence of any explicit reference to a special parole term for convictions of conspiracy was intentional, and meant that Congress had not intended to extend this punishment to persons convicted only of conspiracy charges.⁵²

It might well be that the Seventh Circuit's other decisions rejecting jurisdictional challenges suffer from the same flaw as the Seventh Cir-

44. 617 F.2d 503 (7th Cir. 1980).

45. 447 U.S. 381 (1980).

46. 21 U.S.C. §§ 801-966 (1976 & Supp. 1979).

47. 21 U.S.C. § 841(a) makes unlawful the manufacture, distribution, or possession with intent to distribute of various controlled substances.

48. 21 U.S.C. § 841(b)(1)(B) provides, *inter alia*, for a special parole term of at least 2 years in addition to any term of imprisonment.

49. 617 F.2d at 505-06.

50. *Id.* at 505.

51. 447 U.S. 381 (1980).

52. *Id.* at 2254-58.

cuit's reasoning in *Peters*—akin to what Chief Justice Burger characterized in his concurring opinion in *Bifulco v. United States* as yielding to “[t]he temptation to exceed our limited judicial role and do what we regard as the more sensible thing.”⁵³ Future decisions by the Supreme Court will determine the correctness of the Seventh Circuit's expansive view of the Hobbs Act⁵⁴ and the Racketeer Influenced and Corrupt Organizations (RICO) Act.⁵⁵

The Hobbs Act

Prior to 1970, the Hobbs Act⁵⁶ had been applied in prosecutions for extortion involving the “wrongful use of actual or threatened force, violence, or fear.”⁵⁷ The language of the act is much broader, though, and includes “the obtaining of property from another with his consent induced . . . under color of official right.”⁵⁸ Starting with *United States v. Kenny*,⁵⁹ the courts of appeals have upheld application of the Hobbs Act to local public officials who had misused their offices,⁶⁰ as long as the misuse of official position somehow affected interstate commerce.⁶¹

53. *Id.* at 401-02 (Burger, C.J., concurring).

54. 18 U.S.C. § 1951 (1976), discussed in the text accompanying notes 56-119 *infra*.

55. 18 U.S.C. §§ 1961-1968 (Supp. III 1979), discussed in the text accompanying notes 120-156 *infra*.

56. 18 U.S.C. § 1951. The Hobbs Act was intended to correct the result reached by the Supreme Court in *United States v. Local 807 Int'l Bhd. of Teamsters*, 315 U.S. 521 (1942), where it held that the Anti-Racketeering Act of 1934, 48 Stat. 979, did not apply to extortion which arguably involved a claim for wages. *See United States v. Emmons*, 410 U.S. 396, 401-08 (1973).

57. *See United States v. Staszczuk*, 502 F.2d 875, 877 n.4 (7th Cir. 1974), *aff'd in part, rev'd in part*, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975). *See Stern, Prosecutions of Local Political Corruption Under The Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SEATON HALL L. REV. 1 (1971).

58. 18 U.S.C. § 1951(b)(2). Extortion under color of official right had been proscribed in the predecessor of the Hobbs Act, the Anti-Racketeering Act of 1934, 48 Stat. 979. The legislative history of the 1934 act is devoid of any explanation of what was meant by “extortion under color of official right.” *See, e.g.*, *United States v. Mazzei*, 521 F.2d 639, 644-45 (3d Cir.) (en banc), *cert. denied*, 423 U.S. 1014 (1975). Debates in the House of Representatives, though, indicate that Congress intended to adopt the New York common law definition of extortion. *See United States v. French*, 628 F.2d 1069, 1073 (8th Cir. 1980).

59. 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).

60. *See, e.g.*, *United States v. Kuta*, 518 F.2d 947 (7th Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Irali*, 503 F.2d 1295 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973).

61. Impact upon interstate commerce has been shown in two ways. First, the extortion may have resulted in some depletion of resources which the victim would otherwise have used in transactions involving articles which had been in interstate commerce. Second, the money taken may have been used in such transactions. *See, e.g.*, *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) (possibility that money taken would have been used in interstate transactions); *United States v. Staszczuk*, 517 F.2d 53 (7th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 837 (1975) (same); *United States v. Irali*, 503 F.2d 1295 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (depletion of assets); *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (same); *United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974) (same).

The Supreme Court has yet to review the correctness of these decisions. The present view of the broad scope of the Hobbs Act is illustrated by three decisions of the Seventh Circuit in its 1979-80 term.

In *United States v. Price*,⁶² the Seventh Circuit was concerned with a former inspector of the Chicago Bureau of Electrical Inspection who had accepted illegal payments from electrical contractors.⁶³ On appeal, the defendant argued that the illegal payments had been obtained as bribes and not as extortion payments, thereby not coming within the proscriptions of the Hobbs Act.⁶⁴ In rejecting this argument, the Seventh Circuit obliterated the distinction between bribery and extortion under color of official right which had been suggested in *United States v. Pranno*⁶⁵ and in Judge Campbell's concurring opinion in *United States v. Staszuk*.⁶⁶

United States v. Pranno involved the payment of money under the threat that a construction permit for a manufacturing plant would be withheld.⁶⁷ On appeal, the defendants argued that extortion and bribery were mutually exclusive, and that the payment was a bribe and not the product of extortion.⁶⁸ In rejecting this argument, the Seventh Circuit observed that the payment "might be solely a bribe and not extortion if the record showed that the issuance of the permit was illegal."⁶⁹ Issuance of the permit, though, had been legal, and the question of whether payments made to secure issuance of an illegal permit constituted extortion was not reached.⁷⁰

*United States v. Staszuk*⁷¹ was the Seventh Circuit's first case involving extortion under "color of official right."⁷² There, a Chicago alderman had accepted unlawful payments in exchange for his promise not to oppose three zoning amendments.⁷³ In rejecting the defendant's claims that the payment had not been obtained under color of official

62. 617 F.2d 455 (7th Cir. 1980).

63. *Id.* at 456. Price was one of 29 inspectors and supervisors employed by the City of Chicago Bureau of Electrical Inspection who were indicted in October and November of 1978 for extortion under color of official right. Twenty-five of those indicted were subsequently convicted. Government's Motion for Publication of the Decision of the Court at 2, *supra* note 29.

64. Brief of Defendant-Appellant at 18-21, *supra* note 27.

65. 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 (1968).

66. 502 F.2d 875, 882-83 (7th Cir. 1974) (Campbell, J., concurring).

67. 385 F.2d at 389.

68. *Id.* at 390.

69. *Id.*

70. *Id.*

71. 502 F.2d 875 (7th Cir. 1974), *aff'd in part, rev'd in part on other grounds*, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975).

72. *Id.* at 877.

73. *Id.* at 878.

right, the court held that “[t]o accept money in return for an agreement . . . to suspend independent judgment on the merits of such zoning changes—constitutes obtaining property from another, with his consent, induced under color of official right.”⁷⁴

In a brief concurring opinion joined in by all members of the panel,⁷⁵ Judge Campbell wrote that in order to show extortion under color of official right, the government “need only demonstrate that the public official has obtained from the ‘victim’ something of value to which the official is not entitled, in return for something that should have been provided without payment.”⁷⁶ In Judge Campbell’s view, payments made to obtain something to which the payee is not entitled would not be extortion under color of official right, but would rather be bribery of a public official.⁷⁷

The question of whether there can ever be a distinction between bribery of a public official and extortion under color of official right was squarely presented in *United States v. Price*.⁷⁸ There, the defendant claimed that he had been bribed by an unlicensed electrical contractor to permit that contractor to work as if he had been licensed.⁷⁹ This, the Seventh Circuit held, was extortion under color of official right because the defendant had been able to provide the unlawful permits “due to his official position.”⁸⁰

The sole authority cited by the Seventh Circuit for this holding was its prior decision in *United States v. Braasch*.⁸¹ The statements in *Staszczuk*⁸² and *Pranno*⁸³ which were “arguably contrary” were rejected as “dicta and not controlling.”⁸⁴ A closer examination of the *Braasch* decision, though, reveals that the language from *Braasch* relied upon in *Price* was also dictum.

Braasch involved Chicago police officers who had been receiving payments from tavern owners to buy “protection” from police harassment.⁸⁵ In the words of Justice Clark,⁸⁶ “a set of roving police officers

74. *Id.*

75. *Id.* at 882 (Campbell, J., concurring).

76. *Id.* at 882-83.

77. *Id.* at 883.

78. 617 F.2d 455 (7th Cir. 1980).

79. *Id.* at 457.

80. *Id.*

81. 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

82. *See* notes 71-77 *supra* and accompanying text.

83. *See* notes 67-69 *supra* and accompanying text.

84. 617 F.2d at 457.

85. The prosecution involved “the corruption of the entire vice squad of the 18th Police District of Chicago over a period of many years.” 505 F.2d at 141.

86. Justice Tom C. Clark, Associate Justice (Retired) of the United States Supreme Court, was sitting by designation. 505 F.2d at 141, n.*.

preyed upon the vulnerable position of the bars in the 18th district for their own profit."⁸⁷ Taverns were harassed in various ways,⁸⁸ and to put a "stop [to] this sort of harassment . . . the payment of 'protection' money appeared to be the only answer."⁸⁹

One of the issues before the Seventh Circuit in *Braasch* was whether the shakedown scheme constituted extortion under color of official right.⁹⁰ The defendants argued that extortion under color of official right does not include the acceptance of money by a public official to refrain from performing acts which he can only perform by virtue of his office, but is limited to "either the acceptance of money by a public official to perform an act that he was already under a legal duty to perform or, alternatively, the taking of money under a claim by the officer that he had an official right to the money by virtue of his office."⁹¹

In rejecting this argument, the Seventh Circuit relied upon the fact that the payments had been received through exploitation of the defendants' position as police officers and the exercise of the power of their office to harass taverns.⁹² Prior to reaching this conclusion, the Seventh Circuit used broad language to describe the reach of extortion under color of official right: "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute 'classic bribery' is not a relevant consideration."⁹³ It was this broad language which the Seventh Circuit relied upon in *Price* when it obliterated any distinction between bribery and extortion.⁹⁴

The Seventh Circuit's broad language in *Braasch* must be read in the context of the facts there at issue. *Braasch* did not involve any claim that police officers had been paid off to allow unlicensed tavern

87. *Id.* at 151.

88. The defendants "harassed bars, taverns and liquor establishments through their official position by making unusually frequent premise checks (four times a day) and identification examinations of patrons; they inspected bars catering to homosexuals with flashlights and harassed the patrons; they individually 'shook down' proprietors often; they set-up underage drinkers in bars in order to frame a violation of law; and they sent liquor licensing authorities false reports about bars resulting in cancellations." *Id.*

89. *Id.*

90. *Id.* at 150.

91. *Id.* at 150-51.

92. *Id.* at 151.

93. *Id.* The court here pointed out in a footnote that the modern trend in the federal courts is to hold that bribery and extortion are not mutually exclusive for the purposes of the Hobbs Act. *Id.* at n.7.

94. 617 F.2d at 457.

owners to operate taverns; on the contrary, *Braasch* involved payments made to buy protection from police harassment. Another relevant factor in construing the broad language of *Braasch* is the approving reference in that case to the discussion of extortion under color of official right in *United States v. Staszczuk*, where all members of the panel agreed with Judge Campbell's view of extortion under color of official right.⁹⁵ Thus, the Seventh Circuit's obliteration of any distinction between bribery and extortion under color of official right appears to be the result of choosing the dicta in *Braasch* over the dicta in *Staszczuk* and *Pranno*.

Another example of the broad reach of the Hobbs Act is *United States v. Blakey*,⁹⁶ where two Chicago police officers had shaken down a heroin dealer who was also in the business of selling automobile tires.⁹⁷ The retail tire business accounted for only a small fraction of the drug dealer's gross income,⁹⁸ but this was held sufficient to establish that the shakedown had had an impact upon interstate commerce.⁹⁹

The outer limits of the type of activity which affects interstate commerce under the Hobbs Act may well have been reached in *United States v. Glynn*,¹⁰⁰ another case involving payoffs to Chicago electrical inspectors. There, the money actually paid to the inspector had been provided by the FBI,¹⁰¹ and the payoffs neither depleted the contractor's assets¹⁰² nor made it unnecessary for the contractor to purchase interstate goods for a particular job.¹⁰³ A direct impact upon interstate commerce was deemed immaterial by the Seventh Circuit, which—over the dissent of Judge Swygert—held that an attempt to affect commerce is sufficient to satisfy the jurisdictional prerequisites of the

95. See notes 71-77 *supra* and accompanying text.

96. 607 F.2d 779 (7th Cir. 1979).

97. *Id.* at 781.

98. For the purposes of its decision, the court apparently accepted defendants' estimate that less than one percent of the drug dealer's income was derived from his legitimate tire business. *Id.* at 783 n.7.

99. *Id.* at 782-84.

100. 627 F.2d 39 (7th Cir. 1980).

101. *Id.* at 40. This was a change from the FBI's prior practice of actually creating an ongoing business to engage in interstate commerce. See *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

102. 627 F.2d at 43 (Swygert, J., dissenting). This "depletion of assets" theory was relied upon in *United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979), discussed in the text at notes 96-99 *supra*.

103. 627 F.2d at 43 (Swygert, J., dissenting). See, e.g., *United States v. Irali*, 503 F.2d 1295 (7th Cir. 1974), *cert. denied*, 420 U.S. 490 (1975) (interstate commerce affected by evidence that extorted payments impeded ability of victim to purchase supplies which had been in interstate commerce).

Hobbs Act.¹⁰⁴ This is a substantial development in the law.

In its en banc decision in *United States v. Staszuk*,¹⁰⁵ a majority of the Seventh Circuit held that some connection with interstate commerce must be proved in each Hobbs Act prosecution,¹⁰⁶ and that "jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce."¹⁰⁷ Under the facts presented in *Staszuk*, the "realistic probability" of an impact upon interstate commerce was established by evidence that the extortion was likely to have resulted in the construction of a building using out-of-state components.¹⁰⁸ The defendant's claim that, after the money had been extorted, plans were changed, and the building was not constructed,¹⁰⁹ was deemed to be a "fortuitous circumstance[s]" which would not defeat federal jurisdiction.¹¹⁰

Under the *Staszuk* test, it is far from clear how the government would be able to prove that the extortion of money supplied by the FBI, as in *Glynn*,¹¹¹ had a "realistic probability" of affecting interstate commerce. The panel majority in *Glynn*, though, viewed this problem as insubstantial, noting that "[e]very court which has considered the issue has held that an indictment charging an attempt to affect commerce by extortion is proper."¹¹² An examination of the cases cited in support of this proposition, though, reveals only one district court decision involving an attempt to affect commerce.¹¹³ The other cases cited by the Seventh Circuit in *Glynn* each involve "attempted extortion which would, if the act were completed, have [had] the effect of obstructing commerce."¹¹⁴ This is simply not true for the extortion of

104. The Hobbs Act only punishes "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so . . ." 18 U.S.C. § 1951(a).

105. 517 F.2d 53 (7th Cir. 1975) (en banc), *modifying* 502 F.2d 875 (7th Cir. 1974).

106. *Id.* at 59 n.16.

107. *Id.* at 60.

108. *Id.* The extortion involved the payment of \$3,000 to a Chicago alderman, in exchange for his cooperation in obtaining a zoning variance. The rezoning was sought to construct an animal hospital, which would have required the use of components manufactured outside of Illinois. After the zoning change had been obtained, however, plans to build the animal hospital were abandoned. *Id.* at 56.

109. *Id.*

110. *Id.* at 60.

111. 627 F.2d 39 (7th Cir. 1980).

112. *Id.* at 42 n.2.

113. *United States v. Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978).

114. *United States v. Rosa*, 560 F.2d 149 (3d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 862 (1977). There, a contractor had refused to make extortion payments. There was no dispute that the extortion, if completed, would have affected interstate commerce. The defendants argued that the Hobbs Act "does not by its terms reach merely an attempted extortion." The Third Circuit

money supplied by the FBI.

The Seventh Circuit's decisions in *United States v. Price*,¹¹⁵ *United States v. Blakey*,¹¹⁶ and *United States v. Glynn*¹¹⁷ continue the court's broad reading of the statutory language of the Hobbs Act. The question of whether the court has yielded to "[t]he temptation to exceed [its] limited judicial role and do what [it] regard[s] as the more sensible thing"¹¹⁸ must await future decisions of the Supreme Court.¹¹⁹

RICO

Another powerful weapon for federal prosecutors is the Racketeer Influenced and Corrupt Organizations Act.¹²⁰ The act provides civil¹²¹ and criminal¹²² penalties for persons who engage in a "pattern of racketeering activity or collection of unlawful debt."¹²³ A "pattern of racketeering activity" can consist of two robberies punishable under state law by imprisonment for more than one year.¹²⁴

The RICO Act is the result of congressional concern with infiltra-

rejected this argument, holding that the Hobbs Act extends to "an attempt to commit extortion in order to obstruct commerce." *Id.* at 153.

The other case cited by the Seventh Circuit in *Glynn* similarly involved an attempt to commit extortion, rather than attempt to affect interstate commerce. For example, in *United States v. Green*, 246 F.2d 155 (7th Cir.), *cert. denied*, 355 U.S. 871 (1957), the defendants had attempted to obtain from two employers money in the form of wages to be paid for imposed, unwanted, superfluous and fictitious services of laborers. This money would have been paid from a contract for the construction of a flood control project which related to "certain navigational difficulties in the Mississippi River." *Id.* at 158. There, as the court held, "it is obvious" that the attempted extortion, if completed, would have affected interstate commerce. *Id.* at 161.

115. 617 F.2d 455 (7th Cir. 1979). See text accompanying notes 62-95 *supra*.

116. 607 F.2d 779 (7th Cir. 1979). See text accompanying notes 96-99 *supra*.

117. 627 F.2d 39 (7th Cir. 1980). See text accompanying notes 100-14 *supra*.

118. *Bifulco v. United States*, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring).

119. The Supreme Court's most recent decision construing the Hobbs Act, *United States v. Culbert*, 435 U.S. 371 (1978), held that proof of "racketeering" is not required by the Act, and observed that the Act is to be construed as "mak[ing] criminal all conduct within the reach of the statutory language." *Id.* at 380.

120. 18 U.S.C. §§ 1961-1968 (1976 & Supp. III 1979) [hereinafter referred to in text and footnotes as the RICO Act].

121. 18 U.S.C. § 1964 vests district courts with jurisdiction to enter divestiture orders and prohibitory injunctions, and to order dissolution or reorganization of enterprises, at the behest of the Attorney General. The statute also creates a private right of action for treble damages and attorney's fees in favor of "[a]ny person injured in his business or property" by any of the activities prohibited by the Act. *Id.* § 1964(c).

122. In addition to fine of not more than \$25,000 or imprisonment of not more than twenty years, 18 U.S.C. § 1963 authorizes forfeiture of property acquired through a violation of the act.

123. 18 U.S.C. § 1962(a).

124. 18 U.S.C. § 1961(5) defines a "pattern of racketeering activity" as "at least two acts of racketeering activity within ten years." "Racketeering activity" is defined in section 1961(1), and can consist of "any act or threat involving . . . robbery . . . which is chargeable under State law and punishable by imprisonment for more than one year."

tion of commercial entities by organized crime.¹²⁵ The language chosen by Congress, however, is significantly broader, as shown by the Seventh Circuit's decisions in *United States v. Grzywacz*,¹²⁶ *United States v. Aleman*,¹²⁷ and *United States v. McNary*.¹²⁸

Section 1962(c) of the RICO Act¹²⁹ makes it unlawful for a person employed by any "enterprise" which affects interstate commerce to be involved "in the conduct of such enterprise's affairs through a pattern of racketeering activity."¹³⁰ On a first reading, this statute would appear to focus upon persons who infiltrate or manage "enterprises" through "racketeering activity." However, in *United States v. Grzywacz*,¹³¹ a divided panel of the Seventh Circuit applied section 1962(b) to members of the Madison, Illinois, police department who had accepted bribes and sexual favors from businesses.¹³²

The principal issue in *Grzywacz*¹³³ was whether the "enterprises" covered by RICO¹³⁴ included public entities, such as the Madison, Illinois, police department.¹³⁵ Over the dissent of Judge Swygert,¹³⁶ the panel held that a police department is an "enterprise" within the meaning of section 1961(4).¹³⁷ Similar reasoning was applied in *United States v. Aleman*,¹³⁸ again over the dissent of Judge Swygert.¹³⁹ In

125. See Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 840 (1980).

126. 603 F.2d 682 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980).

127. 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

128. 620 F.2d 621 (7th Cir. 1980).

129. 18 U.S.C. § 1962(c).

130. *Id.*

131. 603 F.2d 682 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980).

132. At trial, the government established that the defendants had "engaged in a pattern of securing monetary payments and sexual favors from city tavern and tow company operators and employees in return for 'protection' of certain illegal activities by the businesses." *Id.* at 684-85.

133. Also at issue in *Grzywacz* was the correctness of the trial court's decision to allow the prosecution to use evidence of prior misconduct by one of the defendants. *Id.* at 687. The panel majority upheld the decision of the trial judge, finding that the evidence was highly probative as to one defendant, and that limiting instructions had been sufficient to prevent "undue prejudice" to the two other defendants. *Id.* at 688. Judge Swygert disagreed with this reasoning. *Id.* at 692-94 (dissenting opinion).

134. The RICO Act defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Furthermore, the RICO Act makes it unlawful for any person "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* § 1962(c).

135. 603 F.2d at 685.

136. *Id.* at 690-92.

137. The panel majority concluded that public entities were included within the RICO Act because "Congress intended to frame a widely encompassing enactment to protect both the public and private sectors from the pervasive influence of racketeering." *Id.* at 687. Judge Swygert disagreed, finding "nothing in the legislative history [that] indicates that Congress intended governmental units to be included [within RICO]." *Id.* at 692.

138. 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

Aleman, the "enterprise" was the "home robbery business."¹⁴⁰ The defendants had conducted their "enterprise" through a pattern of racketeering activities—home robberies—and this was held sufficient to satisfy the RICO Act.¹⁴¹ *United States v. McNary*¹⁴² involved the forfeiture provisions of the RICO Act,¹⁴³ and held that an otherwise lawful business is subject to forfeiture upon a showing of the "indirect investment of the proceeds of racketeering activity."¹⁴⁴

The Seventh Circuit's decisions in *Grzywacz*, *Aleman*, and *McNary* are consistent with the majority view that the RICO Act is to be liberally construed in favor of punishing wrongdoers. The Third,¹⁴⁵ Fourth¹⁴⁶ and Fifth¹⁴⁷ Circuits have explicitly held, as did the Seventh Circuit in *Grzywacz*, that the "enterprise" contemplated by the RICO Act includes public entities. The only decision to the contrary is that of the district court in *United States v. Mandel*,¹⁴⁸ a view which was disapproved by the Fourth Circuit in *United States v. Baker*.¹⁴⁹ The Second,¹⁵⁰ Fifth,¹⁵¹ Sixth¹⁵² and Ninth¹⁵³ Circuits have held, as did the Seventh Circuit in *Aleman*, that the "enterprise" contemplated by the RICO Act need not exist separately from the racketeering activity, *i.e.*, the "enterprise" may be the "home robbery business."¹⁵⁴ Views to the contrary have been expressed by the First¹⁵⁵ and Eighth¹⁵⁶ Circuits. Sheer weight of numbers, of course, does not insure the correctness of decisions, and it might well be that the Supreme Court, whenever it elects to resolve these conflicts, will, as it did in *Bifulco v. United States*,¹⁵⁷ adopt what is now the minority view when it decides *Turkette*

139. *Id.* at 311-12 (Swygert, J., dissenting).

140. *Id.* at 304.

141. *Id.* at 304-05.

142. 620 F.2d 621 (7th Cir. 1980).

143. *See* note 122 *supra*.

144. 620 F.2d at 628.

145. *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

146. *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980).

147. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

148. 415 F. Supp. 997 (D. Md. 1976).

149. 617 F.2d 1060, 1061 (4th Cir. 1980).

150. *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

151. *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978).

152. *United States v. Sutton*, Nos. 78-5134-39, 78-5141-43 (6th Cir. Dec. 3, 1980) (en banc), *rev'g*, 605 F.2d 260 (6th Cir. 1979).

153. *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

154. *See United States v. Aleman*, 609 F.2d 298, 304 (7th Cir. 1979).

155. *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (1980).

156. *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

157. 447 U.S. 381 (1980). At the time of the Supreme Court's decision in *Bifulco*, only the Third Circuit had held that the special parole provisions applicable to convictions of certain sub-

v. *United States*.¹⁵⁸

FOURTH AMENDMENT ISSUES

In recent years, decisions of the Supreme Court involving fourth amendment issues have narrowed the applicability of the exclusionary rule,¹⁵⁹ and placed an increased emphasis upon the warrant clause of the fourth amendment¹⁶⁰ to protect against unlawful searches and seizures.¹⁶¹ The trend discernible from the 1979-80 decisions of the Seventh Circuit is somewhat different, and is in the direction of upholding searches and seizures whenever the law enforcement agents act in "good faith."¹⁶²

The Seventh Circuit's reliance upon the "good faith" of law enforcement officials is exemplified by the court's decision in *United States v. Berkwitz*.¹⁶³ At issue in *Berkwitz* was the warrantless search and seizure of the contents of a van, which had been under surveillance by agents for approximately eight hours prior to the search and seizure.¹⁶⁴ On appeal, the defendants argued that a warrant should have been obtained prior to the search,¹⁶⁵ and contended that probable cause for a warrant had existed at 10:00 a.m. or at 4:30 p.m., sufficiently in advance of the 7:00 p.m. search to have allowed issuance of a warrant.¹⁶⁶ The Seventh Circuit rejected this argument, finding that probable cause had not come into being until the agents had observed a "flurry of activity" five minutes before the search.¹⁶⁷

stantive drug offenses did not apply to convictions of conspiracy to commit those offenses. *United States v. Mearns*, 599 F.2d 1296 (3d Cir. 1978).

158. See note 155 *supra*.

159. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1980) (overruling "automatic standing" of *Jones v. United States*, 362 U.S. 257 (1960)); *United States v. Ceccolini*, 435 U.S. 268 (1978) (exclusionary rule should be invoked with much greater reluctance where the claim is based on causal relationships between constitutional violation and discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object); *Stone v. Powell*, 428 U.S. 465 (1976) (fourth amendment claims not cognizable in federal habeas corpus proceedings as long as the prisoner had a "full and fair opportunity" to raise and have adjudicated the claim in state court).

160. U.S. CONST. amend. IV provides, in pertinent part:

[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

161. See, e.g., *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

162. See, e.g., *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *rev'g*, 594 F.2d 86 (5th Cir. 1979).

163. 619 F.2d 649 (7th Cir. 1980).

164. *Id.* at 651-52.

165. *Id.* at 653.

166. *Id.*

167. *Id.* at 654.

In upholding the legality of the warrantless search, the Seventh Circuit relied upon the fact that the agents had inquired about issuance of a warrant at 6:30 p.m., prior to the "flurry of activity" which gave rise to probable cause.¹⁶⁸ The problem with the court's reliance upon "pre-flurry" attempts to obtain a warrant is that at the time the warrant was requested, the agents did not have probable cause to search, so any application for a warrant then should have been rejected.¹⁶⁹ Reliance upon attempts to obtain a warrant before one should have been issued can only be relevant to the "good faith" of the agents, rather than to the reasonableness of the search.

Another example of the Seventh Circuit's growing reliance upon "good faith" is *United States v. White*,¹⁷⁰ a case involving the warrantless search of a locked attaché case seized from the defendant's car at the time of his arrest. Absent exigent circumstances, a warrant would have been necessary for this search,¹⁷¹ but by relying on the officer's "good faith" the Seventh Circuit was able to find a sufficient exigency.¹⁷²

In explaining why they had acted without a warrant to search the defendant's locked briefcase, the agents in *White* claimed that immediately prior to stopping White, they had observed him "lean toward the right seat and make a gesture toward the flap of his coat."¹⁷³ This observation, coupled with the fact that when stopped the defendant was wearing an empty shoulder holster,¹⁷⁴ suggested that the defendant had removed a gun from his holster and either placed it in the locked attaché case or thrown it from his car.¹⁷⁵ In the view of the Seventh Circuit, the possibility that the gun had been thrown out of the car created a sufficient exigency to justify the warrantless search of the locked attaché case.¹⁷⁶

168. *Id.* at 652.

169. *Id.*

170. 607 F.2d 203 (7th Cir. 1979).

171. See *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

172. In *United States v. Jimenez*, 626 F.2d 39 (7th Cir. 1980), the court was confronted with a warrantless search of a paper bag found in the trunk of an automobile, and held that the expectation of privacy which attaches to a locked suitcase does not extend to a paper bag.

173. 607 F.2d at 206.

174. *Id.* at 205.

175. *Id.* at 208.

176. The Seventh Circuit concluded as follows:

The agents had the right and duty to avert possible danger to themselves and the public by finding and holding the gun. The most expeditious way to go about finding it was to search the limited area of the automobile before expanding the search to other areas. It would have been unreasonable to require the agents to search the entire termi-

The Seventh Circuit's reasoning in *White* is hard to defend absent any evidence that one of the arresting officers had observed White appear to throw the gun out of the car window. The only factual support for this possibility referred to by the court was the testimony of one of the arresting officers that prior to searching the attaché case he had told another agent that "I think [White] threw it [the gun] out the window."¹⁷⁷ Such an unsupported hunch would not be the basis for probable cause,¹⁷⁸ and should not be sufficient to establish exigent circumstances to avoid the need for a search warrant. The fact that the agent had communicated his suspicion to another agent, though, provides some support for his good faith in acting on that hunch, and this is the apparent underpinning of the Seventh Circuit's decision.

Another example of reliance upon the arresting officer's good faith is Judge Bauer's opinion in *United States v. Garcia*,¹⁷⁹ a case involving the warrantless search of a suitcase seized during an arrest.¹⁸⁰ The general rule for such a search is that a warrant is required when the police "without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase."¹⁸¹ As Judge Swygert pointed out in his dissenting opinion,¹⁸² these conditions were met in *Garcia*, where the defendant had been arrested and her hand luggage seized by the arresting officers.¹⁸³

In addition to deeming the search to have been incident to the arrest¹⁸⁴—the basis for Judge Sprecher's three sentence concurring opinion¹⁸⁵—Judge Bauer was of the opinion that a warrant was not

nal area prior to searching the briefcase in order to find the missing revolver. The need to locate and take possession of a dangerous instrumentality was an exigent circumstance which justified the warrantless search. The motion to suppress was properly denied.

607 F.2d at 208 (citation omitted).

177. *Id.* at 208 n.5.

178. *Cf.* *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Court noted that where the facts available to the officer at the moment of the search would not satisfy a "man of reasonable caution" that the search was necessary, the search would be based on nothing more than "inarticulate hunches" and would amount to a constitutional violation. *Id.* at 22.

179. 605 F.2d 349 (7th Cir. 1979), *cert. denied*, 446 U.S. 984 (1980).

180. Upon being placed under arrest, the defendant dropped the two suitcases she was carrying, became hysterical, and urinated on her clothing. The arresting officers escorted her out of the flow of pedestrian traffic, and moved her suitcases "to within one foot of her new position." *Id.*

181. *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979).

182. 605 F.2d at 360-68 (Swygert, J., dissenting).

183. *Id.* at 368.

184. *Id.* at 357-58.

185. *Id.* at 360. Judge Sprecher's concurrence appears to have been written in response to Judge Swygert's dissenting opinion. It is difficult, however, to understand how the suitcases were in the defendant's "immediate control"—the *sine qua non* of a search incident to an arrest, *Arkansas v. Sanders*, 442 U.S. 753, 763 n.11 (1979)—when the defendant had already been arrested, and custody of the suitcases had been assumed by the arresting officers.

required if the arresting officers had acted in a manner which they deemed to be reasonable.¹⁸⁶ In Judge Bauer's view, the question of the existence *vel non* of exigent circumstances depends upon the police officer's "subjective analysis of the situation confronting him."¹⁸⁷ As Judge Swygert pointed out in his dissenting opinion, the view that the existence of exigent circumstances "is to be determined by the 'subjective' assessment of the official on the scene," if adopted, would mean that it would be "difficult to imagine any arrest situation in which the warrant requirement would be operative."¹⁸⁸

Taken together, the Seventh Circuit's decisions in *United States v. Berkwitz*,¹⁸⁹ *United States v. White*¹⁹⁰ and *United States v. Garcia*¹⁹¹ suggest that the court is moving in the direction taken by a majority of the Fifth Circuit in *United States v. Williams*,¹⁹² to distill from decisions of the Supreme Court the principle that a law enforcement official who acts in "good faith" has acted "reasonably" within the proscriptions of the fourth amendment.¹⁹³ Such a result would be contrary to the emphasis placed by the Supreme Court upon the warrant clause of the fourth amendment, and it remains to be seen if the "good faith" approach to the fourth amendment will be adopted by the Supreme Court.

DE NOVO REVIEW OF POST-VERDICT JUDGMENTS OF ACQUITTAL

The current view of the double jeopardy clause of the fifth amendment¹⁹⁴ allows the government to appeal from a post-verdict grant of a judgment of acquittal.¹⁹⁵ In *United States v. Beck*,¹⁹⁶ the Seventh Cir-

186. *Id.* at 356.

187. *Id.*

188. *Id.* at 368 (Swygert, J., dissenting).

189. See text accompanying notes 161-67 *supra*.

190. See text accompanying notes 168-76 *supra*.

191. See text accompanying notes 177-86 *supra*.

192. 622 F.2d 830 (5th Cir. 1980) (en banc), *rev'g*, 594 F.2d 86 (5th Cir. 1979).

193. Under the "good faith" approach, the court will have little sympathy for a search conducted pursuant to a warrant which had been issued upon a perjured affidavit. See *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980).

194. U.S. CONST. amend. V provides in pertinent part:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of Life or Limb. . . .

195. Little more than ten years ago, an authoritative treatise was able to state as black-letter law the proposition that an appeal by the government from the grant of a post-verdict motion for judgment of acquittal would constitute double jeopardy. 2 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE, CRIM.*, § 469, at 264 & n.2 (1969). Starting with *United States v. Wilson*, 420 U.S. 332 (1975), however, the Supreme Court has reassessed the scope of the double jeopardy clause of the fifth amendment. See, e.g., *Burks v. United States*, 437 U.S. 1 (1978); *Sanabria v. United States*, 437 U.S. 54 (1978); *United States v. Scott*, 437 U.S. 82 (1978).

196. 615 F.2d 441 (7th Cir. 1980).

cuit held that the “standard for appellate review of a trial court post-verdict judgment of acquittal is the same as that applied by the trial court.”¹⁹⁷ The court’s explicit adoption of this standard of review is a substantial development in the law.

In ruling on a motion for a judgment of acquittal, the district court must view the evidence in the light most favorable to the government, and determine if there is sufficient evidence for the jury to have found the defendant guilty beyond a reasonable doubt.¹⁹⁸ This determination can be characterized as a mixed question of law and fact because it involves “the application of a legal standard to a particular set of facts.”¹⁹⁹ In general, appellate review of determinations of mixed questions of law and fact starts with assessing the correctness of the legal standard applied by the district court.²⁰⁰ If the correct legal standard has been applied, the district court’s conclusion is reviewed under the “clearly erroneous” standard applicable to findings of fact.²⁰¹ If the incorrect legal standard was applied, the reviewing court may apply the proper standard to the facts as found by the district court, unless those facts are rejected as clearly erroneous.²⁰²

In its prior decisions reviewing post-verdict grants of judgments of acquittals, the Seventh Circuit applied the ordinary standards of review applicable to determinations of mixed questions of law and fact. Thus, in *United States v. Allison*,²⁰³ the Seventh Circuit reversed a post-verdict grant of a judgment of acquittal only after it had disapproved the district court’s view of the elements of the offense which the government was required to establish.²⁰⁴ Similarly, in *United States v. Biasco*,²⁰⁵ the Seventh Circuit held that the district court had applied an improper legal standard in granting the post-verdict judgment of acquittal.²⁰⁶

In *United States v. Beck*,²⁰⁷ however, the Seventh Circuit concluded that the district judge had “applied the proper standard and

197. *Id.* at 447.

198. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

199. *Cf. TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

200. *See, e.g., United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948).

201. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977).

202. *Id.* at 417-18. *See, e.g., United States ex rel Wilson v. Warden*, 600 F.2d 66, 69 (7th Cir. 1979), *cert. denied*, 444 U.S. 1019 (1980) (district court’s findings that error was not harmless reversed as “clearly erroneous”).

203. 555 F.2d 1385 (7th Cir. 1977).

204. *Id.* at 1388.

205. 581 F.2d 681 (7th Cir.), *cert. denied*, 439 U.S. 966 (1978).

206. *Id.* at 684.

207. 615 F.2d 441 (7th Cir. 1980).

based his decision on proper grounds.”²⁰⁸ Under ordinary standards of appellate review, this conclusion should have resolved the appeal in the defendant’s favor, unless the court was able to reject the district court’s findings as clearly erroneous. But under the Seventh Circuit’s *de novo* standard of review, the findings of the district court were irrelevant, and the judgment of acquittal was reversed merely because the judges of the Seventh Circuit, had they been sitting as the district court, would have reached a different result.²⁰⁹

It is far from clear that the appropriate standard of review of a post-verdict grant of a judgment of acquittal is review *de novo*. It is only recently that appeals by the government from judgments of acquittal have been deemed permissible under the double jeopardy clause.²¹⁰ Future developments may well reject the *de novo* standard of review adopted by the Seventh Circuit in *Beck*.

FEEs OF APPOINTED COUNSEL UNDER THE CRIMINAL JUSTICE ACT: A REFUSAL TO SET STANDARDS

Judges asked to approve compensation for counsel appointed under the Criminal Justice Act²¹¹ have few standards to guide the exercise of their discretion.²¹² In its 1979-80 term, the Seventh Circuit rejected two opportunities to fill this void.²¹³

The Criminal Justice Act was intended “to concretize the constitutional pledge of an adequate defense irrespective of economic status.”²¹⁴ As originally enacted,²¹⁵ the CJA authorized compensation at maximum hourly rates of fifteen dollars per hour for time spent in court and ten dollars per hour for time reasonably expended out of court.²¹⁶ The ceiling originally set was five hundred dollars for felony cases and three hundred dollars for misdemeanor cases.²¹⁷ Upon a finding by the trial judge of “extraordinary circumstances” requiring payment in excess of the ceiling “to provide fair compensation for pro-

208. *Id.* at 448.

209. *Cf. Zenith Radio Corp v. Hazeltine Research Corp.*, 395 U.S. 100, 123 (1969) (function of the court of appeals is not to decide factual issues *de novo*).

210. *See* note 193 *supra*.

211. 18 U.S.C. § 3006A (1976 & Supp. III 1979) [hereinafter referred to in text as the CJA].

212. *See* text accompanying notes 224-237 *infra*.

213. *See United States v. D'Andrea*, 612 F.2d 1386 (7th Cir. 1980); *United States v. Smith*, 633 F.2d 739 (7th Cir. 1980).

214. *United States v. Bailey*, 581 F.2d 984, 988 (D.C. Cir. 1978).

215. Pub. L. No. 88-455, 78 Stat. 552 (1964) (current version at 18 U.S.C. § 3006A (1976 & Supp. III 1979)).

216. 18 U.S.C. § 3006A(d) (current version at 18 U.S.C. § 3006A(d)(1) (1976)).

217. *Id.*

tracted representation," payment in excess of the statutory ceiling could be made, upon approval by the chief judge of the circuit.²¹⁸ No provision was made in the original act for payment in excess of the statutory ceiling for appellate representation.

The 1970 amendments to the CJA were intended, in part, to render "the maximum rates of compensation payable to appointed counsel more realistic in terms of today's conditions."²¹⁹ The amendments increased the maximum hourly rates to thirty dollars per hour for court time, and twenty dollars per hour for out of court time,²²⁰ and raised the statutory ceiling to one thousand dollars for a felony case in the district court, and to four hundred dollars for a misdemeanor.²²¹ The ceiling for appeals in both felony and misdemeanor cases was set at one thousand dollars.²²² Compensation in excess of the statutory ceiling continued to require the approval of the chief judge of the circuit upon a finding by the court before which the services had been rendered that the case had been "extended or complex" and that compensation in excess of the statutory ceiling "is necessary to provide fair compensation."²²³

Neither the original 1964 Act nor the 1970 amendments provides any further standards for determining "fair compensation" or for determining when compensation in excess of the statutory ceiling is appropriate. In *United States v. D'Andrea*²²⁴ and *United States v. Smith*,²²⁵ the Seventh Circuit had an opportunity to articulate standards, but declined to do so.

United States v. D'Andrea arose from suggestions for en banc reconsideration of orders reducing the amount of fees requested by two court appointed attorneys.²²⁶ One attorney had requested \$6,859.23, but only \$3,710.12 had been approved by a circuit judge, of which only \$2,213.70 was authorized by the chief judge.²²⁷ The other court appointed attorney in the case had requested \$7,142.73; \$2,213.70 was approved by a circuit judge, the entirety of which was authorized by the

218. *Id.*

219. H.R. REP. NO. 1546, 91st Cong., 2d Sess. 1, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 3982, 3983.

220. 18 U.S.C. § 3006A(d)(1) (1976).

221. *Id.* § 3006A(d)(2).

222. *Id.*

223. *Id.* § 3006A(d)(3).

224. 612 F.2d 1386 (7th Cir. 1980).

225. 633 F.2d 739 (7th Cir. 1980).

226. 612 F.2d at 1387.

227. *Id.*

chief judge.²²⁸

In resolving the requests of the court-appointed attorneys for reconsideration of the fee awards, the Seventh Circuit had an opportunity to explain its decision to reduce the amounts which had been sought. This, however, the court refused to do. After carefully explaining its resolution of the obscure jurisdictional issues,²²⁹ the court concluded that while it could not sit en banc to reconsider an order of the chief judge refusing to approve the full amount certified by a circuit judge, the court could reconsider its fee determination when the full amount approved by a circuit judge had in turn been approved by the chief judge.²³⁰ It was at this point in its decision that the court could have explained the basis for its decision to reduce the amount claimed by the attorney. The court, however, resolved this issue in conclusory fashion, stating only that it "considers its certification adequate in amount."²³¹

Another opportunity to articulate standards for compensation of court-appointed counsel was rejected by the Seventh Circuit in *United States v. Smith*,²³² which consolidated appeals of three cases seeking review of district court orders refusing to authorize fees in excess of the statutory ceiling of the Criminal Justice Act.²³³ As in *D'Andrea*,²³⁴ the Seventh Circuit carefully explained its resolution of the jurisdictional issues, finding that Criminal Justice Act fee determinations by a district judge are not reviewable by appeal.²³⁵ The court, however, could have gone one step further and established guidelines for the district court, but declined to do so.²³⁶

A comprehensive analysis of practices in implementation of the CJA prior to the 1970 amendments concluded that the standards for setting fees "varied dramatically from district to district, and indeed from judge to judge within single districts."²³⁷ The continued absence of standards means that this problem continues.

228. *Id.*

229. *Id.* at 1388.

230. *Id.*

231. *Id.* at 1389.

232. 633 F.2d 739 (7th Cir. 1980).

233. One appellant, appointed to represent a defendant in two felony cases, requested \$3,901.16 in one case and \$2,263.00 in the other. In each case \$1,000.00 was approved. The second appellant requested fees of \$3,050.67, and was granted \$1,000.00. The third appellant requested fees of \$1,444.00, and \$250.00 was approved.

234. See text accompanying note 229 *supra*.

235. 633 F.2d at 741-42.

236. *Id.*

237. *United States v. Bailey*, 581 F.2d 984, 986 (D.C. Cir. 1978), discussing SUBCOMM. ON CONST. RIGHTS OF SEN. COMM. ON THE JUDICIARY, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS, 91st Cong., 1st Sess., (Comm. Print 1969) (Report to the Judicial Conference of the United States by Prof. Dallin Oaks).

CONCLUSION

The most disturbing trend in the Seventh Circuit's decisions in criminal law-related cases is the court's inappropriate use of unpublished orders. While the virtual invisibility of this practice renders it effectively immune from review by the Supreme Court, it is worthy of greater scrutiny from the practicing bar.

In those of its decisions which it chose to publish—either *sua sponte* or on motion—the Seventh Circuit continued its broad reading of federal criminal statutes, and moved in the direction of relying on the “good faith” of a law enforcement official in applying the exclusionary rule for fourth amendment violations. Future decisions of the court will establish whether these observations represent actual trends or merely the myopic conclusions of a humble reviewer.

The Seventh Circuit's creation of a new standard of review of a district court's post-verdict grant of a judgment of acquittal, and the court's refusal to fashion standards for compensation of appointed counsel under the Criminal Justice Act, though, are unmistakable developments in the law worthy of renewed challenge.

