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This article briefly summarizes important developments reflected in Seventh Circuit criminal procedure and habeas corpus decisions of the past year and then treats more extensively a single area of change.[1] The summary is necessarily selective. Only a small percentage of published opinions are discussed. The author emphasizes Seventh Circuit "rules" rather than cases of national interest. The survey is limited to procedural decisions. Substantive criminal law issues—the law of crimes and of defenses—are noted in an appendix.[2] The article is intended to be informational. It avoids the hopeless task of generalizing about Seventh Circuit philosophy or directions in criminal cases.[3]

The choice of federal habeas corpus for state prisoners as the special area of concern will surprise some. The bar's lack of participation in these cases contributed to the problems treated by the court in the author's "main" case, *United States ex rel. Williams v. Brantley*.[4] It also inhibited their solution. Judge (then Chief Judge) Swygert's call in *Williams* for more frequent appointment of counsel for habeas corpus petitioners is adequate justification for the extensive discussion of this area.

Both parts of the article reflect the author's parochial preferences for the state-court procedures with which he is most familiar. Thus he is quick to criticize federal practice where it varies from Illinois law and sensitive to federal criticism of state procedures. The author's only "defense" for his bias is that he has genuine respect for the Supreme Court of Illinois and (as to

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1. Cases discussed in this article were decided within the one year period ending August 15, 1975.

2. An understanding of factual situations too complex to be treated is necessary to a discussion of many of the Seventh Circuit's interpretations of important federal penal statutes. Additionally, opinions announced after the author's cut-off date of August 15, 1975, would have to be treated in any meaningful discussion of the Circuit's interpretation of 18 U.S.C. § 1341 (1970) (mail fraud). See United States v. Bush, 522 F.2d 641 (7th Cir. 1975); United States v. Bryza, 522 F.2d 414 (7th Cir. 1975); United States v. Keane, 522 F.2d 534 (7th Cir. 1975).

3. Generalizations about "the court" are almost meaningless because so many senior district and circuit judges, from various parts of the country, sit in the Seventh Circuit. Some of last year's reviewers made this same point. *See* Eglit, Fritzsche, & Muller, *Civil Rights and Civil Liberties*, 51 CHI.-KENT L. REV. 337, n.1 (1974) and accompanying text.

4. 502 F.2d 1383 (7th Cir. 1974).

the second part of this article) high regard for that court's efforts to provide fair and orderly post-conviction procedures.

No doubt the Seventh Circuit's harsh words in *Williams* for the Supreme Court of Illinois inspired the section dealing with the issue of federal habeas corpus for state prisoners. Many words appear in that section in response to the advice which the Seventh Circuit, "[w]ithout meaning to be gratuitous,"[5] gave to the Illinois high court. Nevertheless this article pays deserved tribute to the Seventh Circuit's efforts in *Williams* to get its own post-conviction house in order.

A General Summary

Police Practices and Exclusionary Principles

Eye-Witness Identification

The utilization of jury instructions and the invocation of exclusionary principles are contrasting methods designed to decrease the possibility of convicting the innocent through faulty eye-witness identification.[6] This past year the Seventh Circuit gave increased emphasis to the jury-instruction alternative and limited the importance of the exclusionary rule promulgated in *Stovall v. Denno*.[7]

In *United States v. Hodges*[8] the circuit adopted as a required practice the giving of a detailed jury instruction as to eye-witness identification, at least where identity is a crucial issue and the defense has made the request. The court strongly suggested that the instruction must be the substantial equivalent of one adopted by the District of Columbia Circuit in *United States v. Telfaire*.[9]

The *Hodges* rule represents an exercise of supervisory powers. Dictum in an earlier decision says that no identification instruction is constitutionally mandated.[10] This is an important distinction, particularly in habeas corpus cases arising in Illinois, where the state rule of law is that ordinarily no detailed instruction concerning eye-witness identification should be given.[11]

5. *Id.* at 1387.

6. *See generally* Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 790-97 (1974).

7. 388 U.S. 293 (1967).

8. 515 F.2d 650 (7th Cir. 1975).

9. 469 F.2d 552 (D.C. Cir. 1972). The lengthy instruction is set forth in an appendix to *Telfaire*. 469 F.2d at 558-59.

10. United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 408 n.34 (7th Cir.), *cert. denied*, 95 S. Ct. 2424 (1975).

11. With respect to the circumstances of identification, Illinois Pattern Jury Instruction (Criminal) 3.15 recommends that no special instruction be given. *See also* People v. Hope, 22 Ill. App. 3d 721, 318 N.E.2d 128 (1974).

Most courts have concluded that where police practices are unnecessarily suggestive in violation of the principles of *Stovall*, proof of the out-of-court identification is per se inadmissible, if the defense wishes, with the in-court identification admissible only if the prosecution can demonstrate independent origins.[12] The *Stovall* opinion did not expressly say this. That decision did not even indicate whether it was considering the out-of-court identification or the in-court identification or both. Nevertheless the two-step model of *United States v. Wade*[13] and *Gilbert v. California*,[14] designed to remedy violations of the right-to-counsel at corporeal identification procedures, has been borrowed where the *Stovall* due process right has been violated.

In very thoughtful and highly sophisticated opinions, the Seventh Circuit this past year rejected a per se rule of exclusion, even as to out-of-court identifications, in cases where law enforcement officials have utilized unnecessarily suggestive procedures.[15] Largely ignoring the gloss placed upon *Stovall* by other state and federal reviewing courts, and concentrating on the language of *Stovall* and subsequent United States Supreme Court opinions, the Seventh Circuit has held that the constitutional right recognized in *Stovall* is violated only where, following unnecessarily suggestive police practices, identification evidence which is in fact unreliable is admitted at trial.[16] If there is no doubt about the reliability of an identification, despite grossly suggestive and unnecessary police procedures, even proof of the out-of-court identification may be admitted. Stated more theoretically, the suspect has no right to the utilization of fair procedures but only a right not to be convicted on the basis of an unreliable identification caused by unnecessarily suggestive police procedures.[17] A per se rule of exclusion will not be adopted in the hope of deterring unfair police procedures.[18]

Each of the opinions in which the court reached this result arose from a state prosecution, leaving open the possibility that the Seventh Circuit might adopt a per se supervisory rule of exclusion, at least as to out-of-court identifications, in federal prosecutions where law enforcement officials have used unnecessarily suggestive procedures. Assuming this power exists,[19] at least

12. People v. Blumenshine, 42 Ill. 2d 508, 250 N.E.2d 152 (1969), typifies decisions which effortlessly import the *Wade-Gilbert* two-stage reasoning into the *Stovall* situation.

13. 388 U.S. 218 (1967).

14. 388 U.S. 263 (1967).

15. The key decision is United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir.), *cert. denied*, 95 S. Ct. 2424 (1975). Also important is United States *ex rel.* Pierce v. Cannon, 508 F.2d 197 (7th Cir. 1974). Principles announced in those decisions were applied in Israel v. Odom, 521 F.2d 1370 (7th Cir. 1975).

16. United States *ex rel.* Kirby v. Sturges, 510 F.2d at 406.

17. *Id.*

18. *Id.* at 408.

19. To the extent that the Constitution does not mandate an exclusionary rule, Congress may have precluded a court's exercise of supervisory powers, at least as to in-

one panel of the court seemed disinclined to adopt such a rule.[20]

Statements, Admissions, and Confessions

In *United States v. Oliver*[21] the Seventh Circuit adhered to the minority position it had espoused in *United States v. Dickerson*:[22] Internal Revenue Service Intelligence Division agents must give the *Miranda* warning to suspects before non-custodial interrogation. In a tax case, the court says, the transfer of an investigation to the Intelligence Division marks the citizen as the focus of a criminal investigation. Nevertheless the Seventh Circuit continues to insist that in other situations "focus" will not suffice to trigger *Miranda* rights.[23] In a case arising from another circuit, the Supreme Court in the October, 1975, Term, even if it does not resolve the focus-custody debate, may well pass judgment upon the soundness of the *Dickerson-Oliver* line of decisions.[24]

The other major Seventh Circuit confession decisions condemned police practices of more than a decade ago.[25] The opinions are anachronisms which

court identification, by enacting 18 U.S.C. § 3502, which provides that a witness may testify that he saw the accused commit or participate in the commission of a crime. For a discussion of an analogous question, see United States v. Crook, 502 F.2d 1378 (3rd Cir. 1974), *cert. denied*, 417 U.S. 1123 (1975). Additionally, after July 1, 1975, all relevant evidence, subject to certain exceptions not here applicable, is admissible in United States courts under Federal Rule of Evidence 402. Perhaps this rule will be read to prohibit circuits from excluding evidence in the exercise of their supervisory powers.

20. United States *ex rel.* Kirby v. Sturges, 510 F.2d at 407-08.

21. 505 F.2d 301 (7th Cir. 1974).

22. 413 F.2d 1111 (7th Cir. 1969).

23. *See* United States v. Jeffers, 520 F.2d 1256, 1268 (7th Cir. 1975); United States v. Gardner, 516 F.2d 334, 339-40 (7th Cir. 1975).

24. United States v. Beckwith, 510 F.2d 741 (D.C. Cir. 1974), *cert. granted*, 422 U.S. 1006 (1975). The focus-custody dispute arose from a curious note in Miranda v. Arizona, 384 U.S. 436, 444, n.4 (1966), stating that custody is what the Court meant when it used the term focus in Escobedo v. Illinois, 378 U.S. 478 (1964). *See* United States v. Hall, 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970) for an excellent discussion of this issue.

25. In addition to the case mentioned in the text, another case in the same category is United States *ex rel.* Adams v. Bensinger, 507 F.2d 390 (7th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975). The court granted relief to an individual of subnormal mental capacity, relying heavily on I.Q. tests and a psychologist's opinion that Adams, when he confessed in 1962, was extremely docile. Although the decision is based upon the old voluntariness, totality-of-the-circumstances test, perhaps the type of evidence relied upon could be utilized in litigating the voluntary nature of a suspect's waiver of *Miranda* rights.

Adams is a sad case. The Seventh Circuit delayed decision on the merits of petitioner's claim for seven years while the federal courts debated whether Adams had raised the voluntariness issue in the state supreme court. The court suggested that this question was relevant to the issue of whether Adams still had an available state remedy. In fact, the question was wholly irrelevant. Whether raised on appeal or not, that issue would not be considered in any further state proceeding, being barred either by res judicata or by waiver. *See* note 147 and accompanying text. According to counsel for Adams, the state post-conviction judge who considered the issue (only to be told by the Supreme

will have little effect on future prosecutions. One is worth mentioning because it is unique. In *United States ex rel. Mattox v. Scott*,[26] the court remanded for a determination of whether "*Escobedo* warnings" were given preceding questioning at a time when *Escobedo*, but not *Miranda* compliance was necessary.[27] The per curiam opinion creating the concept of *Escobedo* warnings ignores a long line of cases approved by the United States Supreme Court. Those cases hold that *Escobedo* applies only where the suspect requested counsel and does not require admonitions.[28] The *Mattox* opinion gave the district court no guidance as to what constitutes adequate *Escobedo* warnings.[29]

Arrest, Search, and Seizure

A few of the year's fifteen or so published Seventh Circuit search and seizure opinions treat routine questions. Two, for instance, discuss whether the facts before the district court demonstrated sufficient governmental involvement in searches conducted by private citizens to require application of the exclusionary rule.[30] Most of the published opinions, however, are of substantial intellectual interest. Many reflect a high degree of expertise and a grasp of subtle principles.

The decisions show an increasing awareness of Professor LaFave's question, "Probable cause as to what?"[31] The opinions also reflect an

Court of Illinois that he should not have) did so because he was embarrassed by the judicial run-around Adams had received from the federal courts. Adams was paroled shortly before the Seventh Circuit reached the merits of his claim.

26. 507 F.2d 919 (7th Cir. 1974).

27. The original trial came between the date of the *Escobedo* decision and the date of the *Miranda* decision. See Johnson v. New Jersey, 384 U.S. 719 (1966).

28. Before the *Miranda* decision very few jurisdictions had read *Escobedo* to require certain warnings. *See, e.g.*, People v. Dorado, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965). However, after the Supreme Court held that *Escobedo* applied to cases tried after the *Escobedo* decision and that *Miranda* applied to cases tried after the *Miranda* decision (see note 27 *supra*), the restrictive reading of *Escobedo* seemed to be the correct one. In Frazier v. Cupp, 394 U.S. 731 (1969), the United States Supreme Court expressly held that *Escobedo* was not violated absent a clear request for counsel.

29. The opinion directed a determination of whether "petitioner was properly advised of his *Escobedo* rights." 507 F.2d at 921. The district court on remand denied relief. The Seventh Circuit reversed and vacated the state conviction. Mattox v. Finkbeiner, 519 F.2d 1404 (7th Cir. 1975). Its memorandum opinion will remain unpublished and cannot be cited as authority. See Seventh Circuit Rule 28. This decision interprets the first *Mattox* decision as holding that in a post-*Escobedo*, pre-*Miranda* case, a suspect's reference to a desire to see counsel gave rise to the obligation to warn the suspect of his right to remain silent, even where authorities did nothing to prevent the suspect from contacting a lawyer. This narrow interpretation is more respectable than anything appearing on the face of the first *Mattox* decision.

30. United States v. Newton, 510 F.2d 1149 (7th Cir. 1975); United States v. Issod, 508 F.2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975).

31. LaFave, *Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth*," 1966 U. ILL. L.F. 255, 260.

answer in accord with the present author's suggestion that probable cause is of four types: crime, offender, search, and seizure.[32]

The Seventh Circuit decisions pay heed to search probable cause and seizure probable cause issues which some defense lawyers overlook in their concentration upon crime probable cause or offender probable cause. Thus in *United States v. DiNovo*[33] Judge Swygert noted "the difficult question of whether the mere fact that an individual is selling drugs and has possession of a large quantity of drugs someplace is sufficient cause to search his residence."[34] In an extortion case where money had been obtained Judge Pell considered the broader search probable cause issue of the "quantum of information needed to search a suspect's house after he has been linked to a crime," as well as what constitutes probable cause to search a criminal's car.[35] Because of more specific information suggesting in each case that a search would prove fruitful, the court approved the issuance of warrants in both cases. Neither opinion found it necessary to treat the broad issues which the court suggests will undoubtedly arise in future cases.

United States v. Jones[36] is, in the author's terminology, a seizure probable cause decision. On July 10, 1973, Chicago police officers executed a valid warrant which directed the seizure of heroin and narcotics paraphernalia. Probable cause for the issuance of the warrant was based on a July 2, 1973, $2,500 controlled purchase of narcotics at the apartment to be searched and also upon more recent narcotic transactions elsewhere. The police seized $2,000, even though money was not an item named in the war-

32. This four-fold analysis of probable cause is developed in Haddad and Zagel, *Arrest Search and Seizure*, 1975 Manual, Northwestern University Short Course for Prosecuting Attorneys 5-12.

Crime probable cause refers to the probability that an offense has been committed. It is necessary for arrest and for the issuance of a search warrant but not, for instance, for plain view observations or a consent search.

Offender probable cause refers to the probability that a particular individual has committed an offense. It is necessary for arrest but not, for instance, for the issuance of a search warrant. *See, e.g.*, People v. Daugherty, 324 Ill. 160, 154 N.E. 907 (1927); People v. Simmons, 330 Ill. 494, 161 N.E. 716 (1928).

Search probable cause refers to the probability that a search will prove fruitful. It is necessary for the issuance of a search warrant but not, for instance, for the conducting of a consent search nor for a search incident to a lawful custodial arrest. *See* United States v. Robinson, 414 U.S. 218 (1973).

Seizure probable cause refers to the probability that an item constitutes evidence of an offense. It is a requirement for the taking and carrying away of a citizen's property even where the property has been observed in plain view or even where (absent a broadly worded authorization) consent to search has been granted. *See, e.g.*, Commonwealth v. Hawkins, 280 N.E.2d 665 (Mass. 1972). It is not a requirement, for instance, for certain administrative seizures, such as the taking of a prisoner's street clothes before he enters a cell.

33. 523 F.2d 197 (7th Cir. 1975).

34. *Id.* at 200-01.

35. United States v. Spach, 518 F.2d 866, 873 (7th Cir. 1975).

36. 518 F.2d 384 (7th Cir. 1975).

rant and even though at the time of the seizure, the police did not know whether the money was part of the cash used in the controlled purchases.

Judge Sprecher's majority opinion noted that observations of the money during execution of the warrant were justified on plain view principles. The opinion also recognized, however, that the inquiry must go further. It must be determined whether there was seizure probable cause, that is, whether, at the time of the seizure, the officers had reason to believe that the cash was evidence of a crime. On the particular facts, over Judge Swygert's dissent, the majority found seizure probable cause.

The *Jones* dissent demonstrates the narrow path the prosecution must follow to justify a warrant officer's plain view seizure of items not named in the warrant. On the one hand, if, at the time of the issuance of the warrant, officers already had probable cause to believe that the item was at the place to be searched, the *Coolige v. New Hampshire*[37] requirement of "inadvertence" might preclude invocation of the plain view doctrine. On the other hand, if, at the time of the seizure, there still was not probable cause to believe that the plain view item constituted evidence of a crime, for want of seizure probable cause, the seizure of that item was unlawful.

United States v. Lisk[38] is a prime example of highly sophisticated fourth amendment reasoning. Judge Stevens resolved a standing question in a fashion which, to the author's knowledge, is without precedent. Yet his brilliant opinion logically follows from basic principles.

To acquire standing Lisk alleged a possessory interest in a bomb which had been found in an illegal search of the trunk of Hunt's car at a time when Lisk was not present.[39] The court held that the search did not violate Lisk's rights. It further held that the seizure was lawful as to anyone whose rights had not already been violated before authorities observed the contents of the trunk.

Phrased another way, even if he had a possessory interest in the item seized, Lisk had standing to contest only the seizure of his property and not the search of someone else's car. The seizure could be justified on normal plain view principles. Only those whose rights had been violated before the

37. 403 U.S. 433, 469 (1971). Only four justices acknowledged an "inadvertence" requirement for plain view seizures. Accordingly, some courts refuse to recognize such an exception. *See* North v. Superior Ct., 8 Cal. 3d 301, 104 Cal. Rptr. 833, 502 P.2d 1305 (1972).

38. 522 F.2d 228 (7th Cir. 1975).

39. Perhaps cases similar to *Lisk* are unusual because rarely will the accused allege an interest in property found in another's control. Even if his allegations on the motion cannot be used by the prosecution in its case-in-chief, Simmons v. United States, 390 U.S. 377 (1968), in many jurisdictions the use of such allegations for impeachment purposes has been approved. *See, e.g.*, Woody v. United States, 379 F.2d 130 (D.C. Cir. 1967); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974). Thus a defendant who is considering testifying at his own trial may choose not to make admissions on the motion.

observations were made could complain that the officers were not in a place where they had a right to be at the time of their observations. The seizure was unlawful only because the search was unlawful, so that one without standing as to the search could not complain that the seizure was unlawful as to him.

At least at the trial level, the prosecutor had not suggested this thoughtful analysis of the issue. Instead he had stipulated that both the search and the seizure were illegal.[40]

Those who practice criminal law in district courts within the Seventh Circuit should review other important recent fourth amendment opinions.[41] A reading of the decisions discussed above will suffice, however, to demonstrate that the attorney who comes before the Seventh Circuit feeling a need to educate the court on the finer points of the fourth amendment may himself or herself receive some advanced learning.

Wiretapping and Electronic Eavesdropping

Practically every circuit has considered routine wiretapping and eavesdropping issues similar to those treated by the Seventh Circuit during this past year.[42] Although the opinions of our circuit offer nothing new or surprising, the author, departing from case selection criteria used elsewhere in this article, notes one decision which simply follows prior Seventh Circuit precedent. He believes that the question of alleged violations by federal officials of state eavesdropping statutes deserves more attention than it has received.

Ever since the Illinois Supreme Court's "surprising" opinion in *People v. Kurth*[43] (over the dissents of Justices Schaefer and Underwood), federal authorities overhearing and recording conversations with the consent of one party have been out of compliance with Illinois law.[44] The Seventh Circuit

40. The court did not consider itself bound by the legal conclusion contained in the stipulation. 522 F.2d at 231.

41. Important decisions include United States v. McCoy, 517 F.2d 41 (7th Cir. 1975) (search incident to arrest; thoughtful discussion of significance of arrest's being "unlawful" under state law); United States v. Davis, 514 F.2d 1085 (7th Cir. 1975) (stop-and-frisk). United States v. Spach, 518 F.2d 866 (7th Cir. 1975), contains an important discussion of the reliability of various types of informants for purposes of establishing probable cause.

42. See United States v. Finn, 502 F.2d 938 (7th Cir. 1974); United States v. Quintana, 508 F.2d 867 (7th Cir. 1975).

43. 34 Ill. 2d 387, 216 N.E.2d 154 (1966). Justice Klingbiel's interpretation of the Illinois statute, discussed *infra* note 44, was called a surprise by the court in People v. Rhodes, 71 Ill. App. 150, 217 N.E.2d 123 (1966). Based on past precedents, Justice Samuel O. Smith asserted that to have anticipated such an interpretation a lawyer would have needed not legal "competency" but instead "divination." 71 Ill. App. 2d at 152, 217 N.E.2d at 125.

44. Kurth interpreted ILL. REV. STAT. ch. 38, § 14-2(a) (1963), to prohibit electronic overhearing or recording of anyone's conversations without that person's consent.

has avoided resolution of the troublesome question of whether federal authorities must comply. As in *United States v. Infelice*,[45] decided this past year, the court has done so by noting that the admissibility of evidence in federal court is a federal question.[46] Of course it is. But neither *Infelice* nor its predecessors reflect much thought as to how the question should be answered.

Mr. Justice Holmes, one of four dissenters in *Olmsted v. United States*,[47] declared that federal courts should not admit the fruits of governmental conduct performed in violation of state penal laws.[48] Mr. Justice Brandeis agreed.[49] In many other contexts, the *Olmsted* views of Holmes and Brandeis are now thought to be the law of the land.[50] At the very minimum, those views deserve serious attention.

In whatever fashion the court resolves the admissibility issue, the circuit would be doing all concerned a favor if it decided the question of whether federal authorities are, in fact, bound by restrictive state eavesdropping statutes. A well considered dictum would be appropriate. Eventually in civil or criminal litigation, with federal authorities as defendants, the circuit will have to face the issue.[51] If federal authorities are wrong in their interpretation of the law, they should be told so as soon as possible.[52]

A 1969 statutory amendment permitted such overhearing and recording with the consent of one party to the conversation *and* a state's attorney. *See* ILL. REV. STAT. ch. 38, § 14-2(a) (1973). Before the amendment federal authorities refused to comply with Illinois law, as interpreted in Kurth. After the amendment, federal authorities generally did not seek the consent of local prosecutors that is required for compliance with § 14-2.

45. 506 F.2d 1358 (7th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975).

46. 506 F.2d at 1365. *See also* United States v. Pullings, 321 F.2d 287 (7th Cir. 1963); Magee v. Williams, 329 F.2d 470 (7th Cir. 1964); United States v. Martin, 372 F.2d 63 (7th Cir. 1967); United States v. Teller, 412 F.2d 374 (7th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); United States v. Escobedo, 430 F.2d 603 (7th Cir. 1970), *cert. denied*, 402 U.S. 951 (1971); United States v. Krol, 374 F.2d 776 (7th Cir. 1967).

47. 277 U.S. 438 (1928).

48. *Id.* at 469-471 (Holmes, J., dissenting).

49. *Id.* at 479-85 (Brandeis, J., dissenting).

50. *See* Katz v. United States, 389 U.S. 347, 353 (1967); Mapp v. Ohio, 367 U.S. 643, 659 (1961) (Brandeis' denunciation of Government as a lawbreaker cited to support exclusionary rule). If exclusion of evidence secured through violation of state penal law is not constitutionally mandated, then Federal Rule of Evidence 402 might pose an additional barrier to a circuit's adopting a supervisory rule of exclusion. *See* note 19 *supra*.

51. Illinois law provides a civil remedy for the violation of its eavesdropping statute by law enforcement officers and others. ILL. REV. STAT. ch. 38, § 14-6 (1973). The possibility of a local prosecutor indicting a federal law enforcement officer is real. In a jurisdiction within a different circuit, a dispute, perhaps in part political, very nearly led to a local prosecutor's indicting federal officials under a restrictive state eavesdropping statute. Presumably such a state prosecution would be removed to federal court, as would any civil suit, leaving the ultimate decision to the United States courts.

52. The federal argument largely rests upon the proposition that 18 U.S.C. § 2511 (2)(c) (1970) makes one-party consents lawful. One federal decision reads this statute literally and concludes that the statute merely means that under *that act* electronic eaves-

Limitations Upon Exclusionary Rules: The Boundaries of Derivative Evidence Principles, and Collateral Use of Illegally Obtained Evidence

When a defense lawyer argues that evidence should be excluded as the fruit of police illegality, occasionally a prosecutor will try to invoke doctrines with names like "attenuation" or "dissipation," "independent origin," or "inevitably discoverable." *United States ex rel. Owens v. Twomey*[53] is required reading for all who wish to understand these principles. Clearly and concisely Judge Hasting's opinion defines these doctrines and their boundaries, while rejecting the claim that a particular identification should have been excluded as the product of illegal seizures of a photograph and an address book.

Another limitation upon exclusionary principles permits utilization of unlawfully obtained evidence for impeachment purposes. In *United States v. Tweed*,[54] the Seventh Circuit permitted the Government to use illegally seized evidence to contradict the defendant's testimony on direct examination. Following *Harris v. New York*,[55] *Tweed* went a step beyond the older search case of *Walder v. United States*.[56] *Walder* permitted use of illegally obtained evidence to impeach as to a collateral issue which the defendant had injected into the case. In *Tweed*, as in *Harris*, the court permitted impeachment of defendant's testimony on a matter directly in issue.

Finally, *United States v. Johnson*[57] places limits upon inferences which defense counsel can draw from the absence of evidence which the trial court has suppressed. Before trial a witness in *Jones* had made a photographic identification, which later was suppressed. She had failed to make an identification at a lineup; thus defense counsel made no motion as to the lineup procedures. At trial, following questioning *concerning the lineup*, counsel concluded by asking the witness whether it was her testimony that she had been unable to identify the defendant. The witness said that this was true.

Judge Pell's opinion for the court read this testimony to suggest the inference that the witness had never made an identification. Accordingly, the court sanctioned the prosecution's pursuit of the truth on re-direct examination, despite the suppression order.

dropping with one-party consent is not unlawful. United States v. Keen, 508 F.2d 986 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). If no federal statute affirmatively authorizes such overhearing, then under much older decisions, federal law enforcement powers might well be limited by state law. *Cf.* Johnson v. United States, 333 U.S. 10, 15, n.5 (1948). Even the *Olmsted* majority left open the issue of state prosecution of federal officials for violation of restrictive state statutes. 277 U.S. at 469.

53. 508 F.2d 858 (7th Cir. 1974).
54. 503 F.2d 1127 (7th Cir. 1974).
55. 401 U.S. 222 (1971).
56. 347 U.S. 62 (1954).
57. 502 F.2d 1373 (7th Cir. 1974), *cert. denied*, 420 U.S. 977 (1975).

Defense lawyers frequently suggest and argue inferences which they know are untrue where deficiencies in the prosecution's case make such suggestions plausible. Judge Pell seems to be saying that where the deficiency of proof arises from a suppression order, the tactic is unfair and opens the door to prosecution response.[58] The moral is that defense lawyers who have won suppression motions dare not exploit their victories too fully.

Pre-Trial, Trial, and Sentencing Proceedings

Discovery and Disclosure

The Seventh Circuit's important criminal discovery decisions of this past year (apart from Jencks Act decisions of special applicability to tax cases[59]) must be considered in light of subsequent amendments to Federal Rule of Criminal Procedure 16.[60]

In *United States v. Jackson*,[61] the Seventh Circuit for the first time held that a trial judge has discretion to require the prosecution to supply the defense with a list of witnesses before trial. All but a few states provide the defendant with such a list as a matter of right.[62] Thus many practitioners viewed *Jackson* as a long overdue step in taking federal criminal discovery into the modern era.

The issue of the future, however, is whether *Jackson* will survive past December 1, 1975, when amendments to rule 16 take effect. It is true that rule 16 as it read when *Jackson* was decided no more expressly provided for a list of witnesses then does the newest version. Now, however, because the Senate-House Conference Committee recommendations were accepted, and all references to a list of witnesses were expressly deleted from the final version of rule 16 amendments, a stronger statutory argument can be made against the right of a court to order the Government to provide such a list.

58. Of course, frequently the inference will not be drawn until closing arguments. Whether the prosecution can respond in that situation simply by declaring "the truth" is a different question because then the prosecutor would be commenting on matters not in evidence. *See* United States v. Latimer, 511 F.2d 498 (10th Cir. 1975). Perhaps on rare occasions unfair comment may justify re-opening of the evidence.

59. See United States v. Krilich, 502 F.2d 680 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); United States v. Cleveland, 507 F.2d 731 (7th Cir. 1974). Both decisions concern access to the special agent's report in a net worth case. *Krilich* was treated in last year's review, as was United States v. Cleveland, 477 F.2d 310 (7th Cir. 1973) (Cleveland I), to which Cleveland II is an important sequel. See Ettinger, *Criminal Law*, 51 CHI.-KENT L. REV. 465, 493-94 (1974).

60. President Ford signed H.R. 6799 on July 31, 1975. That bill deleted proposed rule 16A(1)(e) entirely, so that the list-of-witnesses provision, scheduled to become effective August 1, 1975, does not appear in the final version of rule 16. Rule 16, as amended, became effective on December 1, 1975. 17 CRIM. L. RPTR. 3215-18 (1975).

61. 508 F.2d 1001 (7th Cir. 1975).

62. *See* Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 600-50.

Apparently, it now is national policy to deny the accused knowledge, in advance of trial, of the witnesses against him.[63]

If Congress intended to forbid a judge from ever ordering a list of witnesses, it may have created a serious sixth amendment question. In *United States v. Krilich*,[64] a recent Jencks Act decision, the Seventh Circuit related the purpose of discovery (in that case, mid-trial discovery) to the right to confront witnesses. This is a fitting analysis, even though it has rarely been used as a basis for devolping the law of criminal discovery.

Considering the denial of mid-trial discovery (the true name of a witness), the Supreme Court in *Smith v. Illinois*[65] in 1968 declared: "The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."[66]

In the real world where efficient administration is a valued goal, mid-trial continuances are almost never granted. Accordingly, the kind of out-of-court investigation contemplated by the *Smith* decision is impossible absent a list of witnesses before trial.

Thus the *Jackson*-rule 16 issue facing the Seventh Circuit after December 1, 1975, must be decided against a sixth amendment background, just as was the Jencks Act question in the *Krilich*[67] decision this past year.

The Government's major criminal discovery victory this year was *United States v. Feinberg*.[68] There the court held that a trial judge cannot require the Government to disclose in advance of trial the substance of oral statements made by the accused to any prospective government witnesses. The decision turned upon a close reading of rule 16 and the Jencks Act. After December 1, 1975, *Feinberg* will be of limited applicability. Under amended rule 16 the defendant will be entitled to discover the substance of oral statements he or she made in response to interrogation by a government agent, before or after arrest, if at the time of the statement the accused knew he or she was speaking to a government agent.[69] Presumably *Feinberg* will

63. The Conference report declared:
A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.
H.R. REP. No. 94-414, 94th Cong., 1st Sess. 12 (1975).

64. United States v. Krilich, 502 F.2d 680, 682 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

65. 390 U.S. 129 (1968).

66. *Id.* at 131.

67. 502 F.2d 680, 682 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

68. 502 F.2d 1180 (7th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975).

69. FED. R. CRIM. P. 16(a)(1)A, as amended effective December 1, 1975. See 17 CRIM. L. RPTR. at 3216.

remain the law as to oral conversations with undercover agents and with private citizens.

Severance

For reasons of judicial efficiency, the Seventh Circuit, like other reviewing courts, demands "most cogent reasons" for severance of properly joined counts or defendants.[70] A recent case demonstrates that the court adheres to this declared principle and has made reversals for failure to sever, in its own language, almost "non-existent."[71]

In *United States v. Barrett*[72] the defendant was charged with two schemes which had nothing in common except (a) voting machines and (b) a violation of the public trust for financial gain.[73] Barrett allegedly shared secretly in premiums paid to insure county voting machines. He did this at a time when as Cook County Clerk he played a significant role in the county's awarding of the insurance contracts. The conflict-of-interest arrangement allegedly dated back to 1961. The case undoubtedly was based upon books and records and upon the testimony of county and business associates of Barrett whose word he did not seriously challenge. The defenses were legal rather than factual: the arrangement did not constitute mail fraud.[74]

In the second scheme Barrett allegedly received bribes from 1967 through 1971 in connection with the purchase of new voting machines. Barrett strongly attacked the credibility of the key government witness, belief in whom the Government conceded was essential to a conviction.[75]

The proof as to the two schemes did not overlap, save for the testimony of one minor witness. Thus there was almost no administrative convenience in holding a joint trial except to the extent that joinder of any two charges

70. United States v. Allstate Mortgage Corporation, 507 F.2d 492, 495 (7th Cir. 1974).

71. United States v. Barrett, 505 F.2d 1091, 1106 (7th Cir. 1975). Most cases involve severance of defendants. *See, e.g.*, United States v. Robinson, 503 F.2d 208 (7th Cir. 1974), *cert. denied,* 420 U.S. 949 (1975) (impeachment of co-defendant through use of his prior convictions held inadequate for severance); United States v. English, 501 F.2d 1254 (7th Cir. 1974), *cert. denied,* 419 U.S. 1114 (1975) (redaction of confession to read "with two other persons" sufficient to avoid severance despite Bruton v. United States, 391 U.S. 123 (1968)); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974) (joint trial of twenty-four co-defendants approved; rejection of attack on joinder of substantive count with perjury count, the court following United States v. Pacente, 503 F.2d 543 (7th Cir.), *cert. denied,* 419 U.S. 1048 (1974) (en banc)).

72. 505 F.2d 1091 (7th Cir. 1975).

73. There were also tax counts, but these apparently charged evasion of taxes only as to funds collected in the bribery scheme. The majority did not suggest that the tax counts constituted a rationale for denying severance.

74. The Seventh Circuit in *Barrett* rejected claims that either a loss to the county or active concealment by the defendant was necessary for a mail fraud conviction in a conflict-of-interest case. 505 F.2d at 1103-05.

75. The concession came in closing argument at trial. The witness had received settlement of a very large civil tax liability in return for his testimony. 505 F.2d at 1100.

is administratively convenient because only one trial, with one judge and one jury, need be held.

The dissent, another most thoughtful opinion of Judge John Paul Stevens, points out the prejudice.[76] It shows how the factual strength of the insurance case painted Barrett as a greedy man and thus reinforced a bribery case which could not be called overwhelming.

Nevertheless, the majority upheld the denial of severance. Referring to the fact that both cases involved a violation of public trust, the panel, without detailed analysis of either administrative convenience or the alleged prejudice, simply declared: "Reversal of a conviction for failure to sever under Rule 14 is almost non-existent."[77] Given the breadth of permissible joinder under rule 8, the court seems to be saying that the Government can join almost any federal offenses without fear of reversal if the district court denies severance.[78] Once a court refuses to balance administrative convenience against possible prejudice—which is what rules of joinder and severance are all about—such indeed is the state of the law.[79]

Effective Assistance of Counsel

Once upon a time, a long time ago, probably in a far off place, some now forgotten judge, in refusing to reverse a conviction because of defense counsel's alleged incompetency, engaged in bits of hyperbole, which somehow became black-letter law in many jurisdictions. In effect he stated that the type of representation which the Bill of Rights solemnly guarantees an accused is that which is a little better than a "sham or a farce," so as not to be the equivalent of "no representation at all."[80] During the past year the Seventh Circuit utilized a state case on habeas corpus review to announce a new standard and to banish the professionally embarrassing language from the law.[81] Under *United States ex rel. Williams v. Twomey*,[82] the test is

76. This may be an appropriate place to note the consistent high quality of the criminal procedure opinions of Judge Stevens. If these opinions are typical, Judge Stevens must be ranked among the very best of the country's reviewing court justices.

77. 505 F.2d at 1106.

78. A high-ranking federal prosecutor commented after reading *Barrett* that federal severance rules are much more favorable to prosecutors than state rules. Guaranteed anonymity, he noted that the federal rule seems to be, "What do you mean you need two trials? It's the same defendant, isn't it?"

79. The dissent rests primarily upon misjoinder under rule 8 rather than denial of discretionary severance under rule 14. However, it seems to construe the rules together in a less mechanical fashion than does the majority, with the end of effectuating the basic purposes of joinder and severance rules.

80. The author has not paused to search for the original source of the "sham or farce" test. *See generally* Y. KAMISAR, W. LA FAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 61-62 (4th ed. 1974) and authorities cited therein. Many courts, of course, have rejected the old test. *See, e.g.*, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). *But see* Bucci v. State, 17 CRIM. L. RPTR. 2482 (Ind. Aug. 18, 1975).

81. The court bypassed at least one opportunity to announce the new standard in the context of reviewing a federal decision. *See* United States v. Robinson, 502 F.2d

whether defense counsel "meets a minimal standard of professional representation."

Critical, of course, is the administration of any standard and not the rhetoric. *Williams* involved a late appointment, inexperienced defense counsel, and a rather thin showing of prejudice.[83] The case may not be of great precedential value because, at least in the view of a concurring judge and in the author's view, the decision gave justice to a habeas corpus petition where the issue was not strictly one of incompetency of counsel. Under Illinois law an incarcerated defendant, absent a waiver, has a right to be tried within 120 days of arrest. If he agrees to a continuance, the 120-day term begins anew from the agreed upon date. Sometimes, as in *Williams*, indictment, arraignment and the appointment of counsel are delayed until very late in the term, leaving the accused with a choice of postponing his statutory right to trial for 120 days or going to trial with an unprepared lawyer.[84] Williams chose to go to trial within the original 120 days. Against the background of this dilemma Judge Wyzanski deemed counsel incompetent on a record which otherwise, for want of prejudice, might not have supported reversal.[85] Even in Illinois,

894 (7th Cir. 1974). Dicta in subsequent cases adopt the same new standard for use in reviewing federal convictions. See Matthews v. United States, 518 F.2d 1245 (7th Cir. 1975); United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975). In rejecting a claim that a heavy case load makes a defense attorney per se incompetent, the *Matthews* decision spoke of the new standard as if no dichotomy exists in the applicable standard depending upon whether counsel is appointed or retained.

82. 510 F.2d 634 (7th Cir. 1975).

83. Years after conviction Williams claimed that a certain person whom defense counsel should have contacted would have vindicated him. This person came forward years later to say that it was he who had broken into the store. How this would have aided Williams is not apparent. Persons who looted buildings during the April, 1968 civil disturbances (during which this incident occurred) were guilty of burglary under ILL. REV. STAT. ch. 38, § 19-1 (1967). Apparently Williams was caught at the store in possession of goods. See People v. Williams, 116 Ill. App. 418, 253 N.E.2d 903 (1969); People v. Williams, 5 Ill. App. 2d 56, 58, 282 N.E.2d 503, 504 (1972) (evidence characterized as overwhelming). The witness who would have vindicated Williams was at the time of the trial (a) under indictment as a co-defendant of Williams and (b) incompetent to stand trial. 510 F.2d at 637. Another claim of prejudice, which even Judge Wyzanski rejected, related to four mysterious "alibi" witnesses whom Williams could never identify with any sort of specificity. 510 F.2d at 639-40. Finally petitioner claimed that he had not been told that his prior convictions could be used to impeach him if he testified. The Seventh Circuit makes no reference to the evidence, does not cite the Illinois opinions in this case, and by implication erroneously suggests that the competency-of-counsel issue was never considered by Illinois reviewing courts.

84. Given the staggering number of indictments following incidents of April, 1968, perhaps the delayed arraignment in Williams is understandable. Nevertheless the late appointment-speedy trial choice has faced too many Cook County defendants. See People v. Williams, 59 Ill. 2d 402, 320 N.E.2d 849 (1974) (a different Williams); People v. Johnson, 45 Ill. 2d 38, 257 N.E.2d 3 (1970); People v. Lewis, 60 Ill. 2d 153, 330 N.E.2d 857 (1975); People v. Lee, 27 Ill. App. 3d 712, 327 N.E.2d 574 (1975). All Illinois decisions have denied relief to those who chose to go to trial without "breaking the term."

85. *See* note 83 *supra.*

as to arrests after July 1, 1976, the dilemma should not appear again. Acting on the suggestion of the Supreme Court of Illinois, the legislature apparently has solved the problem.[86] A defense continuance ordinarily will merely toll the statute rather than causing the 120-day period to run anew.[87]

The other Seventh Circuit reversal based upon ineffective assistance also followed from a late appointment. Counsel in *United States v. Miller*[88] was appointed two days before trial. The next day the accused sought and was denied a continuance. Rejecting a Government argument (which apparently was based upon facts not appearing in the appellate record), the court held that counsel need not prepare for trial before formal appointment, even if he anticipates that appointment, especially where the prospective client is incarcerated in another jurisdiction.[89]

Perhaps the most important effective representation rules fashioned by the Seventh Circuit this past year came in the area of conflict-of-interests. The Seventh Circuit in *United States v. Mandell*[90] refused to require a district judge to admonish defendants of the dangers of multiple representation when they appear before the court represented by a single retained attorney. Carefully reviewing the policy considerations and the division among federal opinions, the court held that, at least until it observes indicia of conflict, the trial court should leave to defense counsel the recognition of conflicts and the adherence to ethical standards.[91]

In *Mandell* the court also said that it would not reverse in joint-representation cases when the record shows the mere possibility of a conflict, however remote. Instead, a conflict must appear "with a reasonable degree of specificity."[92] Only then is a showing of prejudice unnecessary to merit reversal under *Glasser v. United States*.[93]

Jury Instructions and Deliberations

United States v. Lawson[94] held that a trial judge need not define for the jury the meaning of "reasonable doubt" even when a party has tendered

86. *See* People v. Lewis, 60 Ill. 2d 153, 158, 330 N.E.2d 857, 861 (1975).
87. ILL. REV. STAT. ch. 38, § 103-5 (1975) (as amended).
88. 508 F.2d 444 (7th Cir. 1974).
89. It seems strange that neither *Williams* nor *Miller* cites the most recent important "tardy appointment" decision of the United States Supreme Court, Chambers v. Maroney, 399 U.S. 42 (1970). *Miller* relies on much older Supreme Court precedents. *Williams* cites no authority at all, except the Seventh Circuit decisions which it overruled.
90. 525 F.2d 671 (7th Cir. 1975). Another conflict case involving cross-examination by a lawyer of his former client was decided as a companion case. See United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975).
91. 525 F.2d at 677. Appropriate action includes (a) refusal to enter into representation, (b) withdrawal from a conflict situation, or (c) warnings to the client where the conflict is one for which disclosure is sufficient remedial action.
92. *Id.*
93. 315 U.S. 60, 75 (1942).
94. 507 F.2d 433 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 1446 (1975).

a fair instruction on that subject. Apart from that issue, which the court said was of first impression in the Seventh Circuit, few significant jury instruction cases were decided this past year.[95] Of course, earlier the article discussed the new policy on eye-witness identification instruction.[96] The appendix also notes substantive law cases which include instruction issues, including the new Seventh Circuit instruction concerning insanity.[97]

The Seventh Circuit decisions on jury deliberations were of little moment this past year. One noted that a trial judge has discretion to honor a jury's request to have portions of trial testimony read back.[98] That same decision nevertheless affirmed in a case where a judge, in denying such a request, had declared that such a practice was impermissible.[99] The court also affirmed a district judge who, upon request, played for the jury a tape of the instructions.[100] On the other hand, the court affirmed a judge who, during evening hours, responded to a request for a rereading of instructions by a message, sent through the marshall, telling the jury to keep deliberating.[101]

Guilty Pleas, Sentencing and Parole

The topics of guilty pleas and of sentencing are interrelated because of the requirement that an accused be admonished of the penal consequences of his plea. Frequent changes and increased complexity in sentencing structures make it difficult to comply with rule 11 requirements even in negotiated plea cases where the sentence is far short of the maximum. The "costs" of change and the value of administrative simplicity are of little concern to penal reformers of whatever philosophical persuasion.[102] Without discussion here,

95. In United States v. Demopoulos, 506 F.2d 1171 (7th Cir. 1974), *cert. denied,* 420 U.S. 991 (1975), the court suggested that an "informer" instruction was unnecessary in cases where a witness testifies under a grant of immunity, absent some other indication of informer status. In United States v. Gardner, 516 F.2d 334 (7th Cir. 1974) the court reminded district judges that not every statement or admission of the defendant constitutes a confession, so that the word "confession" should not be used inappropriately in jury instructions.

96. See text at note 8 *supra.*

97. The insanity decision is United States v. Sennett, 505 F.2d 774 (7th Cir. 1974).

98. United States v. McCoy, 517 F.2d 41 (7th Cir. 1975). *Cf.* United States v. Kuta, 518 F.2d 947 (7th Cir. 1975), holding it was not error to permit counsel to read from transcript during closing argument. Both *McCoy* and *Kuta* reject arguments that use of transcripts singles out that portion of the testimony for undue emphasis.

99. The reviewing court assumed that the district judge knew he had discretion despite his facile statement to the jury that he was without authority. *Cf.* People v. Queen, 56 Ill. 2d 560, 310 N.E.2d 166 (1974) (reversing under nearly identical circumstances).

100. United States v. Braverman, 522 F.2d 218 (7th Cir. 1975). Jurors were also permitted to take notes during the playing of the tape.

101. United States v. Quintana, 508 F.2d 867 (7th Cir. 1975).

102. This is as true in state systems as it is under federal law. After the Unified Code of Corrections, ILL. REV. STAT. ch. 38, §§ 1000 *et seq.* (1973), became effective on January 1, 1973, dozens of questions appeared, many related to transition from the old law to the new. Even the most conscientious trial judges had no assurance that their

the author refers readers to *Gates v. United States*[103] as an example of the lengthy legal analysis necessary to determine the possible penalties before admonishing a defendant on a plea.

Ironically, except in rare instances, the required admonitions are in terms of the statutory penalties without regard to the realities of parole eligibility.[104] Thus it is left to the lawyer to explain what the time imposed will really mean. *Garofola v. Benson*[105] demonstrates that sometimes even the statutory provision for parole eligibility will be deceptive. In sentencing for most federal crimes, the court has the option of making the defendant eligible for immediate parole consideration instead of requiring service of one-third of a determinate sentence.[106] As it turns out, as a matter of policy, the Board of Parole rarely gave serious consideration to the parole possibility when it first reviewed the case of a person shortly after he arrived at the institution under an "immediately eligible" sentence. Instead, the Board "set" the matter over to a date which frequently fell after the one-third point in the sentence. On the other hand, a prisoner who had not received special consideration from the district judge received full consideration of his parole request at the completion of one-third of his sentence. The Seventh Circuit opinion in *Garafola*, together with administrative changes referred to therein, prompted by litigation, has ended this anomaly, assuming good-faith compliance.

Another guilty plea-sentencing issue arises after a defendant successfully attacks a negotiated plea. *United States v. Anderson*[107] permits the prosecutor to reinstate the greater charge where the plea had been to a lesser included offense. Without necessarily reaching the important general issue,

admonitions as to sentence possibilities were adequate. A book could be written on the Illinois experience. The author's review of the situation led him to the conclusions that (a) simplicity is an important value and (b) every statutory sentencing change, including those as to parole eligibility, should include a provision specifying that it does *not* apply to offenses committed before the effective date of the act. Efforts to treat "equally" those whose crimes were committed earlier just are too complex. Let the pardoning authority handle the worst cases of injustice, as it did quite well following the mitigation of drug penalties in Illinois in 1971.

103. 515 F.2d 73 (7th Cir. 1975). The case involves the "no parole" provisions of certain narcotic statutes, amended by Congress, interpreted by the Supreme Court, and amended again, all between the date of the offense and the Seventh Circuit's decision.

104. The exceptions include cases where no parole is possible. See Gates v. United States, 515 F.2d 73 (7th Cir. 1975). In most circuits they also include cases where a "special parole term" is to be applied. *Cf.* United States v. Johnson, 506 F.2d 305 (7th Cir.), *cert. denied*, 420 U.S. 1005 (1975). In other cases the nuances of parole eligibility need not be explained by the court. See Kemp v. Snow, 464 F.2d 579, 580-81 (10th Cir. 1972).

105. 505 F.2d 1212 (7th Cir. 1974).

106. 18 U.S.C. § 4208(a)(2) (1970).

107. 514 F.2d 583 (7th Cir. 1975).

on the peculiar facts of the case, the trial judge in *Anderson* nevertheless was forbidden to impose a higher sentence than that originally imposed.[108]

On the other hand, in *United States v. Turner*,[109] where a judge had improperly sentenced an accused to consecutive terms, he was not thereafter permitted to increase the original sentences, even though this would have effectuated both his intent and the understanding of the parties as to how much time the defendants would receive.

Finally, two rule 11 decisions not involving sentencing questions should be mentioned. A district judge need not refuse a guilty plea where there is a basis in fact, even if the defendant denies his guilt and insists that testimony against him would be false.[110] Neither must he have the accused recite his understanding of the elements of the offense.[111]

FEDERAL HABEAS CORPUS FOR STATE PRISONERS

The Holding and the Dicta of Williams v. Brantley

In *United States ex rel. Williams v. Brantley*,[112] the Seventh Circuit directed that district judges look at the realities of the Illinois post-conviction system in determining whether a petitioner has available state remedies. A federal judge must not dismiss for failure to exhaust absent "direct precedent" indicating that waiver doctrines will not bar relief in state court.[113]

Chief Judge Swygert added a suggestion for the Supreme Court of Illinois. His dictum, reduced to simplest terms, is that in the administration of the Illinois Post Conviction Hearing Act,[114] traditional waiver concepts should be replaced by the federal habeas corpus "deliberate bypass" standard.[115]

108. *See generally* Borman, *The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure*, 69 NW. U.L. REV. 663 (1973); Comment, *The Constitutionality of Reindicting Successful Plea Bargain Appellant on the Original Higher Charges*, 62 CALIF. L. REV. 258 (1974). Some language in *Anderson* could be read to apply North Carolina v. Pearce, 395 U.S. 711 (1969), to all resentencing including cases where a negotiated plea has been vacated.

109. 518 F.2d 14 (7th Cir. 1975). The holding assumes that the original term was not below the statutory minimum so as to be void.

110. United States v. Davis, 516 F.2d 574 (7th Cir. 1975).

111. United States v. Madrigal, 518 F.2d 166 (7th Cir. 1975).

112. 502 F.2d 1383 (7th Cir. 1974).

113. *Id.* at 1386.

114. ILL. REV. STAT. ch. 38, §§ 122-1 *et seq.* (1973).

115. 502 F.2d at 1386. The decision also seems to criticize the Illinois res judicata doctrine, discussed in the text at note 125 *infra*. However, the Seventh Circuit's suggestion that Illinois reach the merits of any federal constitutional claim which the federal courts would adjudicate on the merits does not mean that the Illinois courts should review the same issue twice. Once the state reviewing court system has finally rejected the merits of a claim, a federal court must consider the merits of the constitutional claim. See Francisco v. Gathright, 419 U.S. 59 (1974); Roberts v. LaValle, 389 U.S. 40 (1967); Lefkowitz v. Newsome, 420 U.S. 283 (1974).

Finally, *Williams* strongly urges that district judges more frequently appoint counsel for the indigent state prisoner who has filed a federal habeas corpus petition.[116]

The Journeys of George Williams and of Other Federal Habeas Corpus Petitioners

George Williams was tried and convicted in the Circuit Court of Cook County.[117] The Illinois Appellate Court affirmed, and the Supreme Court of Illinois denied leave to appeal.[118] Some time later Williams desired to raise new claims which he had not raised on appeal but which appeared on the face of the record.[119] A well established Illinois post-conviction waiver principle barred state relief.[120]

Accordingly Williams filed a federal habeas corpus petition. The district judge, without appointing counsel for the indigent petitioner, dismissed the petition for failure to exhaust available state remedies. Two more federal petitions received the same treatment. Williams then took the federal court's advice and filed a state petition. After appointing counsel and hearing argument, the state judge ruled that claims appearing on the face of the record could not be raised for the first time in a post-conviction petition following affirmance of the conviction on direct review. Williams did not appeal this decision because it was manifestly in accord with Illinois law.

Williams returned to the federal district court. In his fourth federal pro se petition he was careful to point out that Illinois waiver rules precluded relief as to issues "of record" once his direct appeal was lost. The district judge, without appointing counsel, dismissed for failure to exhaust available state remedies. On appeal the Seventh Circuit reversed, in accordance with the holding stated above, and directed the district court to reach the merits of petitioner's claims.

The treatment Williams had received in federal court before the August, 1974, Seventh Circuit decision was typical of that accorded Illinois prisoners, at least in the Northern District of Illinois. In the first place, counsel was rarely appointed for the indigent pro se petitioner. For instance, in one nine-month period during 1971, counsel was not appointed for any of the 121 indigent state prisoners who filed habeas corpus petitions.[121]

116. 502 F.2d at 1387-88.

117. The history of this case is gathered from the Seventh Circuit opinion, the Illinois opinion cited therein, and the original papers in both state and federal courts.

118. People v. Williams, 75 Ill. App. 2d 342, 221 N.E.2d 28, *petition for leave to appeal denied*, 35 Ill. 2d 630 (1966).

119. These issues, purportedly of constitutional dimensions, concerned such matters as the sufficiency of the indictment and the legality of the sentence.

120. See text at note 133 *infra*.

121. These figures and others utilized herein are taken from an unpublished study conducted by Mariann Twist and Catherine Ryan (then law students, now Assistant

Secondly, a high percentage of cases were dismissed for failure to exhaust available state remedies. Many of the dismissals were erroneous because Illinois doctrines of waiver or res judicata barred state relief. Without counsel, the petitioners rarely appealed the federal dismissal but instead followed the erroneous directions of the federal judge and returned to state court.[122] There counsel would be appointed, as a matter of right, both in the trial court and on appeal. The state courts would duly note that state relief was barred by res judicata or waiver principles. Quite frequently the federal courts would not see the matter again, the prisoner now having completed the sentence.

From January 1, 1969, through August of 1974, only four Illinois State Penitentiary inmates finally attained new trials through habeas corpus proceedings initiated in the Northern District of Illinois. These four, although indigent, had the benefit of counsel, but their attorneys had *not* been appointed by the district court.[123] Only on rare occasions did the district court conduct an evidentiary hearing.[124] The system was, to say the least, efficient from the viewpoint of federal administration.

Illinois Res Judicata and Waiver Principles

Res Judicata

Before *Williams v. Brantley*, federal district judges were able to dispose of state petitions quickly if they were willing to overlook the realities of Illinois res judicata and waiver principles. They would send prisoners back on a fruitless journey through the state courts.

The Illinois res judicata rule in question is extremely simple. It was enunciated in 1950 in the first case arising under the Post Conviction Act.[125]

Cook County State's Attorneys) under the author's supervision. With the aid of a district court clerk who handles in forma pauperis proceedings, every habeas corpus file over a nine-month period was carefully reviewed.

122. Non-quantified assertions are based upon the author's experience as a director of a prison post-conviction assistance program which served about 450 inmates at the Illinois State Penitentiary (Stateville and Joliet Branches) and at the Dwight Reformatory from 1969 to early 1972.

123. These figures were derived through consultation with Assistant Illinois Attorney General James Zagel. The unit he headed throughout this period represented the respondents in every case where an Illinois Penitentiary inmate filed a federal petition in the Northern District of Illinois. The author has checked Zagel's figures against his own compilation. The success figures exclude cases brought by jail inmates and juvenile detainees. These also exclude two cases where the Seventh Circuit ordered a new trial but was reversed by the Supreme Court, and two where the circuit reversed district judges who had granted relief. They also exclude cases where only a sentence (*e.g.* the death penalty) was vacated.

124. Again the source is Mr. Zagel. Even where relief was granted, it was on the basis of the state trial record or, in one case, on the basis of the record of the Illinois post-conviction hearing.

125. People v. Dale, 406 Ill. 238, 92 N.E.2d 761 (1950).

If a reviewing court has rejected a claim on the merits, a trial judge shall not thereafter grant relief based on the same claim. The one significant exception permits relief because of an intervening change of law. The rule and the exception precisely parallel doctrines utilized in handling post-conviction claims of federal prisoners whose arguments have already been rejected by a reviewing court.[126]

Nevertheless, some federal judges, in dismissing for failure to exhaust, implicitly and sometimes expressly, told state prisoners to renew in the state trial court claims which had already been adjudicated on the merits. It is difficult to say how often this occurred. When Judge Hubert Will in 1971 wrote an opinion[127] condemning the practice, however, many persons treated it as a ground-breaking precedent. The *Williams* opinion, in fact, cites it as authority for the new "realistic" view the Seventh Circuit was taking of Illinois law.[128]

Waiver

More so than res judicata principles, Illinois waiver rules were frequently ignored by the district judges in dismissing for failure to exhaust "available" state remedies. These rules are also quite simple. Like the Illinois Post Conviction Hearing Act itself, which was originally drafted by a committee appointed by the Supreme Court of Illinois,[129] these waiver rules embody a notion that every litigant, at all times aided by counsel, should have one full and fair opportunity to raise a claim.[130] In the interest of efficient administration, and to avoid piecemeal litigation, issues not raised when the opportunity is available are thereafter deemed waived.

The first rule is that a claim not raised at trial is waived not only for appellate purposes but also for post-conviction purposes.[131] The notion is that if waiver principles were abandoned once the case reached the post-conviction stage, there would be no point in invoking a waiver principle on direct appeal. Every state and federal court, dozens of times each year, approves and utilizes the waiver rule on direct review.[132]

126. *See* People v. Strader, 38 Ill. 2d 93, 230 N.E.2d 569 (1967). *Cf.* Davis v. United States, 417 U.S. 333 (1974).

127. United States *ex rel.* Gates v. Twomey, 325 F. Supp. 920 (N.D. Ill. 1971).

128. 503 F.2d at 1385, 1387.

129. *See* Jenner, *The Post Conviction Hearings Act*, 9 F.R.D. 347 (1950).

130. *Id.* at 360.

131. People v. Somerville, 42 Ill. 2d 1, 13, 245 N.E.2d 461, 468 (1969).

132. *See* United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975) for an example of the strict invocation of waiver. A lawyer refused to examine an important witness on the mistaken notion that a conflict-of-interest prevented him from examining that witness. He was deemed to have waived the defendant's right to confront and cross-examine even though it was the lawyer who made the decision obviously for reasons which meant nothing to the defendant. Of course both state and federal courts do have plain error exceptions. In the Illinois post-conviction context, "plain error" goes under the name "fundamental fairness."

Secondly, where a defendant does not raise on direct appeal an issue which appears on the face of the record, he cannot raise the issue in a post-conviction attack, subject to a narrow fundamental-fairness exception.[133]

Finally, where a post-conviction litigant fails to raise a claim in his first original or amended post-conviction petition, he cannot thereafter file a second petition to raise that claim. Because he has been guaranteed the right to competent counsel in post-conviction proceedings, both at trial and on appeal, he is required to bring all his claims at once. This rule is statutory, not court-created.[134]

The three rules are not difficult to understand. George Williams correctly stated them in his federal pro se petitions.[135] Nor are they indefensible. The United States Supreme Court has deemed it proper for states to utilize waiver rules in criminal cases and quite recently has noted the legitimate state interests in avoiding piecemeal post-conviction litigation.[136] Yet these waiver rules are the ones the Seventh Circuit said the Illinois high court should abandon.

The Federal Deliberate Bypass Rule

The *Williams* opinion urges the Supreme Court of Illinois to utilize the "deliberate bypass" rule in place of traditional waiver concepts in interpreting the Illinois Post Conviction Hearing Act. That standard was first enunciated in 1963 in *Fay v. Noia*[137] as a test in federal habeas corpus cases for determining when a state prisoner had waived his right to raise a constitutional claim.

No one can agree on what "deliberate bypass" means. Some opinions suggest that unless a state prisoner personally participated in the decision not to raise his claim in state court, he is not precluded from raising the claim

133. For instance, a petitioner can raise a claim of incompetency of counsel for the first time in a post-conviction petition if he was represented at trial and on appeal by the same attorney appointed to represent him in the post-conviction litigation where he raises that allegation. *Cf.* People v. Smith, 37 Ill. 2d 622, 230 N.E.2d 169 (1967).

134. ILL. REV. STAT. ch. 38, § 122-3 (1973). Again a change in the law or incompetent representation on the first petition would allow a second petition.

135. On his final federal petition, in response to the form question about why he had not appealed the Illinois dismissal, he correctly summarized Illinois law. The fact that he had filed three federal petitions before returning to state court indicates he understood the Illinois waiver rules all along. The author's interviews with inmates and those conducted by his students and his fellow lawyers in the program mentioned in note 122 *supra*, left the belief that Illinois inmates had no difficulty understanding Illinois waiver rules. What they could not understand were federal district court orders informing them that they did have available state remedies. As bad as the federal run around was in the cases of George Williams and John Adams, (see note 25 *supra*), there were inmates who were treated worse by federal district judges. One who was clearly without a state remedy spent over a decade trying to get a federal district judge to reach the merits of his claim.

136. *See* Murch v. Mottram, 409 U.S. 41 (1972), discussed in text at note 164 *infra*. *See also* Henry v. Mississippi, 379 U.S. 443 (1965).

137. 372 U.S. 391, 438 (1963).

in a federal petition.[138] Others, including one 1973 Seventh Circuit decision, have said that ordinarily a lawyer's failure to raise an issue will constitute a deliberate bypass.[139] Some courts, including the court in *Williams*, will not find deliberate bypass unless there had been some possible tactical reason not to raise the issue in state court.[140] Others argue that a strategic decision not to raise a claim is not essential.[141] As discussed below, the most recent Supreme Court decision seems to have narrowed the concept in a fashion which the Seventh Circuit in *Williams* ignored despite an earlier Seventh Circuit opinion which took note of the recent change.[142]

Whatever else is true, it is safe to say that under the deliberate bypass test a defendant will less often be deemed to have forfeited his right to raise a claim. Phrased another way, piecemeal post-trial litigation will be tolerated more often under the deliberate bypass rule.

Reasons Offered for an Illinois Adoption of Deliberate Bypass

The Seventh Circuit offers several reasons in support of its suggestion that Illinois adopt the deliberate bypass test. Remarkably, despite the vigorous nature of its criticism of the Supreme Court of Illinois,[143] the Seventh

138. *See, e.g.*, Henderson v. Heinze, 349 F.2d 67 (9th Cir. 1965). This interpretation is based upon language in *Fay* which equates deliberate bypass with an intentional relinquishment of a known right. 372 U.S. at 439. The *Fay* court also said, "A choice made by counsel not participated in by the petitioner does not *automatically* bar relief." 372 U.S. at 439 (emphasis supplied).

139. United States *ex rel.* Allum v. Twomey, 484 F.2d 740 (7th Cir. 1973). *See* text at note 173 *infra*.

140. "A claim will not be deemed waived for purposes of federal habeas corpus relief in the absence of a deliberately tactical decision to forego such claim." 502 F.2d at 1386-87.

141. Petitioner in *Fay* himself deliberately chose not to appeal, fearful of receiving a more severe punishment on retrial. Hence it is difficult to understand how a "deliberately tactical decision" can be the key because *Fay* was held *not* to have deliberately bypassed state remedies.

142. *See* text at note 164 *infra*.

143. The criticism of the state high court is sharp. The supreme court is told that it has emasculated the Post Conviction Act. The Seventh Circuit says that it should be clear that the circuit does not approve. However, if the state high court follows the path outlined by the circuit, the circuit "would welcome an opportunity to declare the Illinois Post Conviction Hearing Act a generally effective remedy." 502 F.2d at 1387.

It was the Supreme Court of Illinois which fashioned the act in 1948 and which breathed new life into it in the mid-1960's by setting standards for appointed counsel. *See* Jenner, *The Post Conviction Hearing Act*, 9 F.R.D. 347 (1950); People v. Smith, 37 Ill. 2d 622, 230 N.E.2d 169 (1967); People v. Slaughter, 39 Ill. 2d 278, 235 N.E.2d 566 (1968); ILL. REV. STAT. ch. 110A, § 651 (Supreme Court Rule 651) (1973). *See also* People v. Eatmon, 47 Ill. 2d 90, 264 N.E.2d 194 (1970) (absolute right to trial transcript.)

By contrast, before *Williams*, the Seventh Circuit did very little for either state or federal prisoners pursuing post-conviction remedies. It certainly did not encourage the appointment of counsel. *See* text at note 121 *supra*. The difference between effective post-conviction remedies and ineffective ones, in the author's view, is the availability of

Circuit did not argue for the inherent superiority of the deliberate bypass test. It did not even pause to recognize the debate between proponents of the two approaches, the one arguing against strict waiver rules, the other affirmatively encouraging a unified system of post-trial review.[144] Accordingly, this article does not enter that dispute. Instead the author examines the pragmatic considerations which the Seventh Circuit offered in support of its suggestion to the Supreme Court of Illinois.

Confusion of Prisoners

Chief Judge Swygert suggested that the Illinois waiver rules are confusing.[145] As previously noted, this simply is not true.[146] For example, as the Seventh Circuit itself acknowledged, where a direct appeal has been lost, ordinarily an issue appearing on the face of the record cannot thereafter be raised in a post-conviction petition.[147] Either res judicata or waiver will bar relief. The Post Conviction Act is not to be used as a second appeal for matters of record. If that is an "emasculation" of the Act, as the Seventh Circuit suggests,[148] it is still an interpretation that can be understood.

On the other hand, "deliberate bypass" is not a readily understandable concept.[149] The carefully written 1973 Seventh Circuit opinion in *United States ex rel. Allum v. Twomey*[150] sharply varies from the 1974 *Williams*

counsel. See note 123 *supra* and accompanying text. Not until lawyers got involved in federal habeas corpus litigation did *Williams* come about. It took attorneys to demonstrate to the Seventh Circuit when Illinois remedies are available and when they are not. The marked increase in successful petitions in the Northern District of Illinois since *Williams*, at least in part, may be attributed to the increased participation by counsel.

144. The split is reflected in the difference between the A.B.A. standards and the recommendations of the National Advisory Commission. The former favors a kind of deliberate bypass standard. The latter would require that ordinarily all issues to be raised after trial in a single unified post-conviction proceeding. *See* COMPARATIVE ANALYSIS OF STANDARDS AND GOALS OF THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS WITH STANDARDS FOR CRIMINAL JUSTICE OF THE AMERICAN BAR ASSOCIATION 554-583 (1974). A leading critic of Fay v. Noia and of the A.B.A. approach is Judge Henry Friendly. *See* Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 157-60 (1970). The most respected academician currently in the field favors the unified approach. *See generally* D. MEADOR, CRIMINAL APPEALS; ENGLISH PRACTICES AND AMERICAN REFORM (1973).

145. 502 F.2d at 1387.

146. *See* note 135 *supra*.

147. 502 F.2d at 1387. *See* text following note 125 and text at note 133 *supra*.

148. 502 F.2d at 1385. The waiver doctrine does narrow the use of the Act. Before free transcripts were available, the Act *was* necessary to provide an indigent full review of trial errors of constitutional dimension. After 1956 free transcripts were awarded (and, in Illinois, counsel appointed) for direct appeal. Then the Act no longer had to serve as a substitute for direct appeal. Elimination of this use of the Act was hardly a sinister action.

149. *See* text beginning at note 138 *supra*.

150. 484 F.2d 740 (7th Cir. 1973).

opinion on the subject. It surely would be no guidance to tell state prisoners to file in state court unless the Supreme Court of Illinois would find a "deliberate bypass." Additionally, discarding a rule which has been the subject matter of twenty-five years of interpretation, in favor of one the Illinois courts have never used, would add no certainty.

Tension from Federal Release of State Prisoners Based Upon Claims Deemed Waived by the State Courts

The *Williams* opinion maintains that federal judges may sometimes be required to grant relief to state prisoners whose claims have never been treated on the merits by state courts. This, it says, is a result of the difference between deliberate bypass and waiver. The solution, the court says, is for Illinois to adopt the deliberate bypass test. The solution would end state-federal tension.[151]

There is no empirical evidence to support the view that state judges are offended by the federal release of state prisoners whose claims the state judges have deemed waived. In the Northern District of Illinois, before *Williams*, that rarely happened, primarily because Northern District judges so often sent state prisoners back on futile journeys through the state court if the Illinois courts had not considered the issue on the merits.[152] The only instances in which judges of the Northern District of Illinois granted Illinois State Penitentiary inmates new trials from January 1, 1969, through August, 1974, involved cases where the state reviewing courts had already rejected on the merits the federal claim.[153] This kind of phenomenon has caused tension elsewhere, if not in Illinois.[154] However, in habeas corpus cases, federal judges have the duty to consider questions of law without any special deference to the prior state decision.[155] Any tension is a result of United States Supreme Court decisions not now under discussion.[156] It is important to note that if state courts and federal courts had identical waiver rules—as *Williams* suggests—in absolutely every case where a district judge granted habeas corpus relief he would be "reversing" a decision of a state appellate tribunal which had rejected on the merits petitioner's claim.

Assume that the two standards remain different and that federal judges do release a state prisoner whose claim was deemed waived in state court.

151. 502 F.2d at 1387.

152. *See* text at note 122 *supra.*

153. The author refers to the eight cases where habeas corpus relief was granted, including the four where a higher court later reversed new trial awards. *See* note 123 *supra.*

154. Here the reference is to the now-famous reaction by the National Conference of Chief Justices following Brown v. Allen, 344 U.S. 443 (1953).

155. The district judge "may not defer to" the state court's "findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently." Townsend v. Sain, 372 U.S. 293, 318 (1963).

156. See Brown v. Allen, 344 U.S. 443 (1953); Townsend v. Sain, 372 U.S. 293 (1963).

Assume further that some state judge is offended. A federal solution that suggests that the state judiciary solve the "problem" by entertaining in piecemeal fashion post-conviction claims heretofore deemed waived will not soothe tensions. Such a judge would suggest that the problem would be better solved by a federal rejection of the deliberate bypass concept in favor of traditional waiver rules.

The Federal Caseload

The *Williams* opinion says that through use of traditional waiver rules the Supreme Court of Illinois has "forced" post-conviction litigation into federal courts.[157] This is a curious view of efforts to administer an efficient system which gives every litigant one full and fair opportunity to pursue a claim.

The truth is that the United States Supreme Court has pulled post-conviction litigation into federal courts. It has done so (a) by permitting state prisoners to use federal habeas as another tier of review, and (b) by limiting findings of waiver through the adoption of the deliberate bypass rule.

For a long while, by misapplying exhaustion requirements, some federal courts avoided the impact of the United States Supreme Court decisions.[158] Laudably the *Williams* court has said, "No more." Realizing what faithful adherence to *Fay v. Noia* could mean, however, the *Williams* opinion proposes a new solution to the problem: state courts, instead of federal courts, should entertain the belated claims of state prisoners. This should be done in the name of easing federal-state tensions.[159]

The *Williams* proposal is fundamentally inconsistent with the underlying rationale of *Fay v. Noia*. *Fay* did not hold that the states could not, or should not, apply traditional waiver rules to preclude relief in state courts based upon belated federal claims. On the contrary, implicit in *Fay* is the recognition that the states have sufficient state interest in judicial economy to preserve their own waiver rules even where federal rights are involved.[160] Instead, the *Fay* Court noted that since the only rights at stake in federal habeas corpus proceedings are federal rights, the *federal* courts have a *special* interest in resolving those claims.[161] Accordingly, a state determination of waiver would not bar federal relief. Instead, the *federal* courts would dispense with traditional waiver rules and expend the effort in reviewing belated federal claims unless the respondent could meet the stiff burden of showing that the petitioner had deliberately bypassed an earlier opportunity to raise his claim.[162]

157. 502 F.2d at 1387.
158. *See* text at note 122 *supra.*
159. 502 F.2d at 1387.
160. 372 U.S. at 431. *See also* the cases cited in note 136 *supra.*
161. 372 U.S. at 431.
162. 372 U.S. at 438-39.

The Future of the Controversy

There are already signs that the Supreme Court of Illinois, in accord with the suggestions of well-respected authority, is moving toward a more compact system of post-trial review rather than adopting the piecemeal approach which follows from an easing of waiver rules.[163] There is no indication that the court will soon replace traditional waiver rules with the federal deliberate-bypass test.

What is more interesting is a phenomenon that *Williams* completely overlooked: an apparent federal movement to reject the deliberate bypass test in favor of traditional waiver rules.

Without purporting to reject the deliberate bypass standard the Supreme Court in *Murch v. Mottram*[164] cast serious doubt upon its vitality. The petitioner had been convicted in a Maine trial court. On appeal he failed to raise a claim concerning the composition of the jury although it was an issue which appeared on the face of the record. Later in a state post-conviction proceeding he raised this issue and some others relating to parole revocation. His counsel then advised the trial court that petitioner was withdrawing all but his claim concerning the revocation proceedings. The trial judge indicated that he felt that if the prisoner proceeded on only one claim he would waive the right to raise other issues in a second post-conviction proceeding. Counsel disagreed. After discussing the matter with his client, counsel announced he was withdrawing the other claims. Later when a second petition raised the jury claim the Maine Supreme Court held it had been waived by the failure to include it on appeal or in the first post-conviction proceeding.

After holding a four-day hearing to determine whether a deliberate bypass had occurred (a fact which did not escape the Supreme Court's attention), a district judge dismissed a federal habeas corpus petition upon a determination that the respondent had met its burden. The Court of Appeals reversed and granted relief on the basis of facts appearing in the original trial record. It noted that the defendant could not be said to have intentionally relinquished or abandoned a known right or privilege.[165]

The United States Supreme Court reversed the Court of Appeals and reinstated the conviction. Commenting on Maine waiver rules, which are strik-

163. Effective July 1, 1975, the court amended its rules to require that a defendant who seeks to attack a guilty plea must take prompt action, so that the trial court can immediately vacate the plea if necessary. Prompt appellate review of such a claim rather than a belated post-conviction petition is also encouraged. Again the right to counsel is absolute, and again waiver will result from failure to take prompt action. See ILL. REV. STAT. ch. 110A, § 605 (Illinois Supreme Court Rule 605) (1975). Strict enforcement of this rule will end belated state-court post conviction attacks on guilty pleas.

164. 409 U.S. 41 (1972).

165. The case history is taken from the Supreme Court opinion and from the earlier decisions cited therein.

ingly similar to those of Illinois, the Court noted that the state has a valid interest in orderly procedures and declared that a defendant has no constitutional right to piecemeal review in the face of such valid state rules.[166] Ignoring the intentional relinquishment language of *Fay*, the Court noted that the petitioner may not have intended to waive his right to present his jury claim.[167] It then observed:

> But if a subjective determination not to waive or abandon a claim were sufficient to preclude a finding of a deliberate bypass of orderly state procedures, constitutionally valid procedural requirements, such as those contained in the Maine system requiring the joinder of all bases for attack in one proceeding, would be utterly meaningless.[168]

The theme that a strictly applied deliberate bypass standard in federal habeas corpus matters undermines orderly rules of waiver was renewed in *Davis v. United States*.[169] There a *federal* prisoner had sought relief under 28 U.S.C. § 2255. The Supreme Court in *Kaufman v. United States*[170] had already held that the deliberate bypass standard of *Fay* must be utilized in evaluating federal prisoners' constitutional claims. In *Davis*, however, the "deliberate bypass" test which had been adhered to in *Kaufman* was itself seriously undermined. The Court observed that Federal Rule of Criminal Procedure 12(b)(2) requires that challenges to an indictment be made before trial or not at all, absent a showing of good cause. It deemed it "inconceivable" that the more liberal requirement of waiver in federal habeas corpus matters should be permitted to "perversely negate" the rule's purpose in requiring that challenges ordinarily be made before trial.[171] Application of the deliberate bypass standard in collateral proceedings would permit a defendant to "flout" reasonable time limits and would remove "incentive" for complying with their terms.[172]

It is surely a short step from *Davis* to an overruling of *Fay*. If failure to comply with time limits of a federal rule can be the basis of a finding of waiver in a collateral attack, then failure to comply with a state rule—whether embodied in case decisions, statutes, or court rules—should ordinarily be sufficient. The Seventh Circuit opinion in *United States ex rel. Allum*

166. There can be no doubt that States may provide, as Maine has done, that a prisoner seeking post-conviction relief must assert all known constitutional claims in a single proceeding. Indeed, the Court of Appeals agreed that the statutory scheme was 'orderly procedure of the state courts,' as that term is used in *Fay v. Noia* . . . . No prisoner has a right either under the Federal Constitution or under 28 U.S.C. § 2241 to insist upon piecemeal collateral attack on a presumptively valid criminal conviction in the face of such a statutory provision.

409 U.S. at 45-46.

167. 409 U.S. at 46.

168. *Id.*

169. 411 U.S. 233 (1973).

170. 394 U.S. 217 (1969).

171. 411 U.S. at 242.

172. 411 U.S. at 241.

v. Twomey,[173] which preceded the *Williams* opinion by one year, recognized this when it reinterpreted the deliberate bypass test in light of *Davis*. It declared that generally a failure by counsel to raise a claim at trial or on appeal will bar habeas corpus relief.[174] The result in *Allum* is very much akin to the waiver rule and the "fundamental fairness" exception now utilized in Illinois.

The *Williams* opinion ignores the *Allum* opinion's careful redefinition of deliberate bypass. Accordingly, it may not be fair to say that the Seventh Circuit is moving toward utilization of the Illinois rule. However, if the author were to speculate based on *Davis*, he would guess that, whatever the Seventh Circuit does, the United States Supreme Court will very shortly overrule the *Fay v. Noia* deliberate bypass test in favor of a rule that says that claims not raised in a timely fashion at trial or on appeal may not be raised in habeas corpus cases absent unusual circumstances. In short, the United States Supreme Court will adopt the Illinois test before the Supreme Court of Illinois accepts the Seventh Circuit's gratuitous advice by adopting the *Fay* standard for use in Illinois post-conviction proceedings.[175]

CONCLUSION

The harsh criticism, in the section on federal habeas corpus, of the views expressed by the Seventh Circuit in *Williams* should not overshadow the deserved recognition of what the court did in that decision. It ended federal treatment of state prisoners which was often in law contrary to *Fay v. Noia* and in fact quite heartless. The court finally accepted, although not graciously, an added burden for the federal judiciary.

Nor should dictum in a single opinion overshadow the rest of the year's work. Particularly in the area of police practices, the court's opinions were, with rare exception, of high quality.

Any criticism must be placed in the proper context, with due recognition of the caseload pressures and of the time and effort necessary to keep up with developments even in the single field of criminal procedure.

173. 484 F.2d 740 (7th Cir. 1973).

174. 484 F.2d at 744-45.

175. Another possibility, of course, is that the Supreme Court will end the use of habeas corpus as a means of reviewing state convictions, at least in cases where the constitutional claim is unrelated to the integrity of the fact-finding process. Two grants of certiorari in June, 1975, suggest such a possibility. *See* Wolff v. Rice, 513 F.2d 1280 (8th Cir.), *cert. granted*, 422 U.S. 1055 (1975) and Stone v. Powell, 507 F.2d 93 (9th Cir. 1974), *cert. granted*, 422 U.S. 1055 (1975).

APPENDIX—CRIMES AND DEFENSES

Among the Seventh Circuit opinions for the year ending August 15, 1975, those cited below treat important substantive criminal law issues. The author has not attempted to summarize the holdings of these decisions.* Instead, descriptive phrases have been supplied to indicate the particular focus of each opinion.

CRIMES

Assault: United States v. Bell, 505 F.2d 539 (7th Cir.), *cert. denied*, 420 U.S. 964 (1975) (elements of offense).

Civil Rights: United States v. Barker, 514 F.2d 1077 (7th Cir. 1975); United States v. Bryant, 516 F.2d 307 (7th Cir. 1975); United States v. Bradbury, 518 F.2d 498 (7th Cir. 1975) (elections).

Conspiracy: United States v. Miller, 508 F.2d 444 (7th Cir. 1974) (doctrine of merger); United States v. Johnson, 515 F.2d 730 (7th Cir. 1975) (one conspiracy or two).

Contempt: *In re* Dellinger, 502 F.2d 813 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (direct); United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1975) (indirect).

Drugs: United States v. Waller, 503 F.2d 1014 (7th Cir. 1974) (constructive transfer); United States v. Johnson, 506 F.2d 305 (7th Cir.), *cert. denied*, 420 U.S. 1005 (1975); Gates v. United States, 515 F.2d 73 (7th Cir. 1975) (recidivist provisions); United States v. Infelice, 506 F.2d 1358 (7th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975) (controlled substance schedules); United States v. Lawson, 507 F.2d 433 (7th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975) (importation); United States v. Moser, 509 F.2d 1089 (7th Cir. 1975) (indictment, variance); United States v. Green, 511 F.2d 1062 (7th Cir. 1975) (violation by physician); United States v. DiNovo, No. 74-1681 (7th Cir., July 7, 1975) (constructive possession, control).

Dyer Act: United States v. Shanks, 521 F.2d 83 (7th Cir. 1975) (transportation of vehicle parts).

Firearms: United States v. Kowalski, 502 F.2d 203 (7th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975) ("business of dealing," vagueness challenge); United States v. Horton, 503 F.2d 810 (7th Cir. 1974) (receiving weapons in commerce); United States v. Calhoun, 510 F.2d 861, *cert. denied*, 95 S. Ct. 1683 (1975) (false statements at purchase, commerce element); United States v. Sutton, 521 F.2d 1385 (7th Cir. 1975) (false statements at purchase, effect of Illinois pardon).

Gambling: United States v. Capetto, 502 F.2d 1351 (7th Cir. 1974) (federal jurisdiction under 18 U.S.C. § 1955).

Hobbs Act:** United States v. Staszcuk, 517 F.2d 53 (7th Cir. 1975), *vacating in part* 502 F.2d 875 (1974); United States v. Irali, 503 F.2d 1295 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974); United States v. Kuta, 518 F.2d 947 (7th Cir. 1975) (effect on commerce); United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974); United States v. Kuta, 518 F.2d 947 (7th Cir. 1975) (color of right).

Mail Fraud: United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974), *vacated in part* 517 F.2d 73 (1975); Strauss v. United States, 516 F.2d 980 (7th Cir. 1975) (mailing); United States v. Barrett, 505 F.2d 1091 (7th Cir. 1975) (public official conflict of interest; loss).

Mann Act: United States v. Snow, 507 F.2d 22 (7th Cir. 1974); United States v. Prater, 518 F.2d 817 (1975) (intent).

Murder: United States v. Brown, 518 F.2d 871 (7th Cir. 1975) (premeditation).

Perjury: United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974) (hedged responses; variance; defenses of entrapment and duress); United States v. Demopoulos, 506 F.2d 1171 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975) (materiality).

Selective Service: United States v. Bush, 509 F.2d 776 (7th Cir. 1975) (conscientious objection); Burke v. United States, 509 F.2d 1227 (7th Cir. 1975) (physical condition).

Tax: United States v. Liskowski, 504 F.2d 1268 (7th Cir. 1974); United States v. Martin, 507 F.2d 428 (7th Cir. 1974); United States v. McCorkle, 511 F.2d 482 (7th Cir. 1975), *vacating* 511 F.2d 477 (1974) (wilfulness); United States v. Jordan, 508 F.2d 750 (7th Cir. 1974) (fifth amendment defense); United States v. McMullen, 516 F.2d 917 (7th Cir. 1975) (withholding laws; liability for corporate conduct); United States v. Esser, 520 F.2d 213 (7th Cir. 1975) (bank deposit theory).

DEFENSES

United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974) (duress); United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974); United States v. Smith, 508 F.2d 1157 (7th Cir. 1975); United States v. Gardner, 516 F.2d 334 (7th Cir. 1975) (entrapment); United States v. Sennett, 505 F.2d 774 (7th Cir. 1974) (insanity).

* See note 2 *supra.*

** See note 2 *supra.*