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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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THE COURT OF APPEALS for the Seventh Circuit this year continued to lead the way in setting precedent in federal criminal cases. With no diminution in the number of appeals and despite multiple issues, the court has resolved hundreds of legal questions dealing with individual factual situations. Faced with such a volume of material the practitioner has the burden of sifting through the cases attempting to cull out information which is meaningful and could reflect alteration of existing law and procedure.

For those reasons, this article will deal with the court's pronouncements in two ways. First, consideration will be given to several major decisions having special significance, either because they are of first impression nationally or locally, or because of their relevance to events within the circuit. Second, treatment will be given to cases falling into several general categories of law and procedure, focusing on new or emerging concepts within those areas.

ELECTION OF REMEDIES UNDER THE ORGANIZED CRIME CONTROL ACT

Continued federal prosecution of organized crime this year resulted in the application of a previously unused provision of the Organized Crime Control Act of 1970.[1] Although the Act was intended to

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1. 18 U.S.C. § 1962 (1970), which provides in pertinent part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in; or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is en-

apply to a variety of criminal conduct,[2] it also contains provisions for civil proceedings to be initiated against suspected criminal elements, which are to be governed by the Federal Rules of Civil Procedure.[3] The Seventh Circuit this year approved the election of such a civil remedy by the government in a case of national first impression.

In *United States v. Cappetto*,[4] the court of appeals was confronted with the dual questions of 1) the constitutionality of the provisions allowing the election of a civil remedy, and 2) the validity of an application of those provisions to local gambling activities. In electing the civil remedy, the government had brought an action in the district court seeking injunctive relief, and full discovery under rule 26 of the Federal Rules of Civil Procedure.[5] The district court or-

gaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt . . . .

2. 18 U.S.C. § 1961 (1970), which provides in pertinent part:

As used in this chapter—

(1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; . . .

3. 18 U.S.C. § 1974 (1970), Civil Remedies, provides as follows:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of an interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the right of innocent persons.

(b) The Attorney General may institute proceedings . . . . the court may at any time enter such restraining orders or prohibitions, or take such other actions including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Defendants in the instant case allegedly violated § 1955; *see infra* note 81.

4. 502 F.2d 1351 (7th Cir. 1973).

5. FED. R. CIV. P. 26, provides in part:

(a) Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission . . . .

dered the defendants to submit to a deposition and to produce requested books and records for inspection by the government.

When the defendants refused to comply with the discovery order, and invoked the fifth amendment privilege against self-incrimination, the court granted the government's petition for a temporary injunction prohibiting further gambling activity during the pendancy of the litigation, defaulted the defendants for failure to answer or otherwise properly plead to the complaint, and issued contempt citations against the defendants for their refusal to attend and testify at the deposition.[6]

Under the Act, the district court also had the power to order a defendant to divest himself of ownership in realty if it were determined that the property was in any way involved in gambling operations. Further, the Act provides that a court may require the defendants to report to the Government on a quarterly basis for a period of up to ten years upon the entry of any decree or judgment.[7] The district court in *Cappetto* entered no order as to the government's request for such divestiture and reporting, however, but reserved ruling pending the termination of the litigation.

The defendants on appeal contended that local gambling, if it is indeed an offense under the federal law,[8] would entitle them to the protection of the Constitution and to the application of procedures in the Federal Rules of Criminal Procedure. They further argued that this action, despite its civil label, was in reality punitive insofar as it would provide for divestiture and quarterly reporting, and that if the intent of Congress was to curb criminal activity, the provisions of Section 1964 clearly reflect an abuse of the congressional power.

In affirming, the Seventh Circuit held that the Organized Crime Control Act does have as a purpose the elimination of such illegal enterprises. But the fact that Congress provided for an election of remedies to prevent or proscribe such illegal "enterprises"[9] is clearly within the commerce power of article I, section 8 of the Constitution, whether or not such activity may be made criminal by state or federal law. Congress has always had the power to vest equitable jurisdiction in courts to provide civil injunctive relief against any activity which has even a minimal effect on interstate commerce. Divestiture and re-

6. 502 F.2d at 1355.
7. 18 U.S.C. § 1964.
8. 502 F.2d at 1355 (7th Cir. 1974).
9. *Id.* at 1358.

porting are only aspects of that equitable power, intended to remove any obstacle from the free flow of commerce, as demonstrated by the extensive application of such procedures in anti-trust cases.[10] The concern of Congress for the elimination of such activities can allow for both civil and criminal remedies; clearly, the defendants in *Cappetto* failed to make any showing of prejudice in the Congress' decision to allow both to the government.

In declaring that the defendants had not been denied their fifth amendment rights by the district court's contempt order for failure to submit to deposition, the court said that such rights could have been invoked at any time during the contemplated deposition if the questions that were asked did tend to incriminate the witness. However, civil rule 37[11] provides that the defendants could not refuse to even attend or testify at such a deposition. The contempt orders were, therefore, properly entered.

OFFICIAL CORRUPTION CASES: THE HOBBS ACT

Enforcement of federal laws in the Seventh Circuit has not been confined solely to organized crime. Prosecution for violations of the Hobbs Act[12] have resulted in the conviction of police officers and other public officials who used their official positions to extort money, either by instilling fear in their victims or by acting under color of official right. When called before grand juries investigating the allegations,

10. *Id.* at 1359.

11. FED. R. CIV. P. 37, provides in pertinent part:

. . . . (b) Failure to Comply With Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court . . . .

12. 18 U.S.C. § 1951 (1948):

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

. . . .

(2) The term 'extortion' means obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction . . . .

many of the defendants perjured themselves by denying they had taken money.[13]

During their trials, and on appeal, all defendants uniformly contested the extension of federal jurisdiction to "primarily local"[14] matters, which therefore resulted in an unconstitutional reach of the commerce clause under the Hobbs Acts. The court of appeals, in the first case to present that argument, *United States v. DeMet*,[15] considered the conviction of a police officer who allegedly extorted money from a tavern owner under threat of potential liquor license violations, and harassment of the customers of the establishment. The facial attack on the Hobbs Act in this case asserted that there was no discernible effect on interstate commerce and thus the particular violation fell outside the power of Congress to legislate. The defendant argued that the payment should be considered to be a bribe and not extortion. In affirming the conviction, the court of appeals held that section 1951 was intended to protect against extortionate conduct resulting from fear, actual or threatened, of economic harm, or by the actions

13. 18 U.S.C. § 1623 (1970), provides as follows:

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

14. U.S. v. DeMet, 486 F.2d 812, 821 (7th Cir. 1973); United States v. Gill, 490 F.2d 233, 236 (7th Cir. 1973).

15. 486 F.2d 812 (7th Cir. 1973).

of one acting under color of official right. The court, conceding that the extortionate conduct in the instant case had only an arguably de minimis[16] effect on commerce, found the defendant was able to induce "fear"[17] in his victim, and that effect was present when the tavern owner, who purchased goods from interstate commerce met the officer's demands in order to be free from intimidation. The court accepted a "depletion of assets" theory as a basis for showing the direct effect on interstate commerce. In the subsequent cases, police officers indicted for violations of section 1951 and related offenses presented similar arguments, which the court of appeals disposed of within the scope of its holding in *DeMet*. In each case, however, several different approaches were presented by the defendants in an effort to defend against the indictments.

In *United States v. Gill*,[18] the defendant was indicted for extortion and for making a false material declaration before a grand jury.[19] In denying that he demanded $300 to overlook an alleged sale of liquor to a minor, the assertion was made that the ratification of the twenty-first amendment, repealing prohibition, placed control of all liquor laws in the hands of the states. The defendant argued that the interstate portion of liquor shipments ended when the goods came to rest in warehouses in Illinois, and as such became intrastate commerce, beyond the reach of federal law. The court of appeals rejected the applicability of the twenty-first amendment, holding that state pre-emption in regulating liquor within its jurisdiction, does not preclude the federal government from prohibiting extortion and its effect on interstate commerce under the authority of the commerce clause. The contention that extortion of $300 did not deplete assets and had only a de minimus effect was again rejected.[20] Congress has the power to proscribe conduct that in any way or degree obstructs, delays or affects commerce or the movement of articles or commodities in commerce.[21]

In *United States v. Pacente* the defendant was indicted for violation of section 1951 and for making a false material declaration to a

16. *Id.* at 822.

17. Fear as used in § 1951 includes not only fear from physical violence, but fear of economic harm. Bianchi v. United States, 219 F.2d 182, 189 (8th Cir. 1955), *cert. denied*, 349 U.S. 915 (1955); United States v. Sophis, 362 F.2d 523, 527 (7th Cir. 1966), *cert. denied*, 385 U.S. 928 (1966).

18. 490 F.2d 233 (7th Cir. 1973).

19. 18 U.S.C. § 1623 (1970).

20. 490 F.2d at 236 (7th Cir. 1973).

21. *Id.* at 237.

grand jury. Attacking the joinder of the two substantive charges, the conviction, first considered by a panel of the court of appeals, was reversed.[22] The Government requested rehearing and the matter was presented to the Seventh Circuit sitting en banc,[23] which rejected the prior decision and affirmed the conviction in the trial court. The defendant contended that prejudice was an inevitable result when the jurors heard evidence of the false grand jury testimony alleged to have been made by defendant. The prejudice would manifest itself when the jury considered the question of his guilt under the extortion charge. Finding no impropriety in the joinder under rule 8 (a)[24] and rule 14,[25] Federal Rules of Criminal Procedure, the court concluded that any claim of prejudice was merely speculative, and that the trial court had adequately instructed the jury not to consider the evidence adduced before the grand jury as evidence of the commission of the crime of extortion.[26] Chief Judge Swygert and Judge Sprecher, members of the original panel, dissented, and reiterated their position that the joinder of the two substantive counts had "a double-teaming effect" on the defendant.[27]

In *United States v. Devitt*,[28] the defendant appearing before the grand jury testified to a lack of recall or knowledge of engaging in any extortionate conduct. He argued that the grand jury had sufficient information for the indictment before calling him to testify, and that the purpose of calling him was to force him into the position of perjuring himself. The claimed effect was to make his testimony duplicitous, and therefore not "material", as was required for conviction under section 1623. Judge Campbell, in his opinion, reaffirmed the

22. United States v. Pacente, 490 F.2d 661 (7th Cir. 1973).
23. United States v. Pacente, 503 F.2d 543 (7th Cir. 1974) (*en banc*).
24. FED. R. CIV. P. 8(a):
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
25. FED. R. CIV. P. 14:
If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.
26. 503 F.2d at 547.
27. *Id.* at 553.
28. 499 F.2d 135 (7th Cir. 1974).

broad powers of a grand jury to uncover Hobbs Act violations, and held that the investigative process, duplicitous or not, was therefore relevant and material to its inquiry. A "false material declaration", as contemplated in section 1623,[29] is one that has a natural effect or tendency to impede, influence or dissuade a grand jury from pursuing its investigation.[30]

The defendant in *United States v. Nichols*,[31] attacked the federal court's jurisdiction, and the grand jury investigation of his conduct as the statute of limitations had run since the time he was alleged to have committed the extortionate conduct being investigated. He further contended that the warnings given to him by the United States Attorney prior to his testimony were improper since he was not told that he was a potential defendant in the investigation.[32] Finally, he alleged that he was under duress at the time of his appearance before the grand jury because a police department regulation required him to testify or be subject to disciplinary measures within the department. In a sweeping rejection of all of the defense arguments, the court noted that the police department regulation had been previously declared unconstitutional,[33] and that the Seventh Circuit adopts the common law rule of duress, which requires a showing that the defendant must reasonably fear death or serious bodily harm in order to avoid the consequences of his own criminal acts. Likewise, the failure to warn the de-

29. *Id.* at 139.

30. *See* United States v. Stoner, 429 F.2d 138, 140 (2nd Cir. 1970).

31. 502 F.2d 1173 (7th Cir. 1974).

32. In United States v. Lardieri, 497 F.2d 317 (3rd Cir. 1974), the defendant made a false material declaration to a grand jury in violation of 18 U.S.C. § 1623. In remanding the case to the district court, the Court of Appeals for the Third Circuit considered the recantation provisions of § 1623(d), which provide that a witness can admit the falsity of his testimony if, "at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." *Id.* Although the court did not find a duty on the part of the government to give such a warning, if the prosecutor does undertake to warn, the court suggests that the obligation to warn of § 1623(d) may attach. Such a recantation would act as a bar to further prosecution under 1623. The court announced the purpose of § 1623 was to have a witness testify before a grand jury to discover the truth of the charges, and not to lay the foundation for an additional charge of perjury. *See* 18 U.S.C. § 1623(d).

33. *See* Confederation of Police v. Conlisk, 489 F.2d 891, 895 (7th Cir. 1973), where Chicago Police Department Rule 51 was declared unconstitutional. That rule prohibited police officers from refusing to give evidence to a grand jury, when properly called upon, or refusing to give testimony under the claim of self-incrimination, or refusing to sign a waiver of immunity. The court held that disciplinary action cannot be taken against an officer for invoking a constitutional right under the Fifth or Fourteenth Amendment. *See also* Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men v. Comm'r of Sanitation, 392 U.S. 280 (1968).

fendant of the consequences of his grand jury testimony may indicate poor judgment on the part of the prosecutor, but it did not prejudice the rights of the accused.[34]

The Hobbs Act has been applied to cases involving persons in the public trust, other than police officers. In *United States. v. Irali*,[35] the defendant, a clerk in the Chicago City Hall, offered to help obtain a liquor license for an individual who had difficulty in obtaining the needed approval to commence business. The defendant represented that upon receipt of a sum of money he could arrange for the immediate issuance of the license. After payment, the license did in fact issue, and the victim opened the tavern for business. After denying the transaction before the grand jury, the defendant was charged with perjury, and violation of section 1951. The indictment, in addition to alleging that the extortionate conduct involved the element of fear, also charged that the defendant was acting under "color of official right"[36] when he claimed that he had the ability to arrange for the immediate issuance of the liquor license. The defense claimed a lack of federal jurisdiction under section 1951, since there was no effect, de minimis or otherwise, on the victim's business as it was not in existence at the time of the issuance of the license. Without a viable business operation, there was no possible connection with interstate commerce. In affirming the conviction, the court of appeals held that the defendant's conduct offended the Hobbs Act because the victim had borrowed the money to open the tavern, and the sums extorted by the defendant constituted a substantial depletion of the total assets of the business. The effect here was to delay the victim's ability to enter the market place, engage in business, and make purchases from interstate commerce. The court further approved the application of the acting "under color of official right" provisions of section 1951, since the victim was led to believe that the defendant, acting with others, had the ability and power to obtain the license.

In *United States v. Staszcuk*,[37] the court of appeals reviewed the conviction of an alderman who was charged solely with violation of the "color of official rights" provisions of section 1951. It was alleged that the defendant had accepted money not to oppose a zoning change within his ward. After the zoning approval had been obtained, the

34. *See also* United States v. DiMichele, 375 F.2d 959 (3rd Cir. 1967), which held that there is no duty on the part of the government to explain rights to a witness prior to testifying before a grand jury.

35. 503 F.2d 1295 (7th Cir. 1974).

36. *Id.* at 1299.

37. 502 F.2d 875 (7th Cir. 1974).

proposed construction contract was cancelled, and no work had been done on the project, although other construction was completed at that site in conformity with the zoning laws. Alleging that the failure of the contract defeated federal jurisdiction, the defendant moved for the dismissal of the indictment. The prosecution, at trial, introduced the testimony of three contractors who stated that had the contract been executed on the project that was abandoned, they would have made purchases of building supplies that would have come from sources in interstate commerce. The court of appeals, in affirming the conviction count I and II, and reversing count III of the Hobbs Act violations, stated that the effect on interstate commerce in this case was direct and demonstrable in those counts of the indictment where construction was commenced and construction of other buildings was done on the property zoned for that purpose. But, the court further held that in the instance where the defendant was alleged to have acted to zone for a building that never materialized, and nothing was done in furtherance of the failure or success of the extortion, then that count of the indictment must be reversed, as the commerce element of the Hobbs Act had not been proven.

The most recent case concerning this issue to come before the court of appeals is *United States v. Crowley*.[38] The defendant, a police officer, was charged only with acting under color of official right where he accepted money to prevent crimes from being committed on the victims' premises, located in a racially changing area. The defendant never performed any services for the victims, merely accepted money on the pretense of providing protection while on and off duty. The defendant predicated his case on the concept that he had been bribed, and did not extort any funds from the victims, and in the absence of any allegation of instilling fear, his conduct fell outside the scope of the Hobbs Act. The court, in considering the separation of the fear concept and the official rights provision of the Act, stated that the use of the conjunctive "or" between the clauses clearly demonstrated that there are two separate and distinct types of conduct contemplated by the statute.[39] The defendant in this case accepted money while in uniform to perform duties that he was required to do within the scope of his official position. The defendant's uniform and his office established a sufficient inducement on the victims to pay for the purported services.

38. No. 73-1437 (7th Cir., Sept. 30, 1974).
39. 18 U.S.C. § 1951.

SEARCH AND SEIZURE

Warrantless Arrests

In *United States v. Cooks*,[40] the defendant was arrested in his home, without a warrant, by agents who had obtained fresh information that marijuana was on the premises. An officer knocked at the door in an attempt to make a "buy and bust", and was confronted by an individual wearing a shoulder holster and pistol. When another occupant recognized the agent, the remaining agents moved in and made an immediate search of the entire building. During that search defendant was found sitting at a kitchen table with evidence which was suppressed in the district court. The government appealed the suppression arguing that officers seeing an armed man were justified in entering the house without a warrant, and that a "protective sweep" was necessary to protect those officers, who in the course of their sweep observed the contraband in "plain view". The court of appeals, affirming the suppression of the evidence and ruling on the application of *Coolidge v. New Hampshire*,[41] held that nothing in the facts established probable cause to make the arrest without a warrant. The fourth amendment makes searches outside the judicial process unreasonable unless they fall within several strictly defined exceptions. The court of appeals in *Cooks* concluded that there was no showing made to justify the right of the agents to be on the premises at the outset. Observing evidence in "plain view" alone is not enough to justify a search; the discovery of contraband here occurred after the agents had made their entry and had almost concluded the "protective sweep". The court in considering the government's continued justification of the "protection sweep" concluded that it was too broad and not within the rule of *Chimel v. California*.[42] The exclusionary rule was properly applied.[43]

40. 493 F.2d 668 (7th Cir. 1974). *See also* United States v. Gable, 473 F.2d 1274 (7th Cir. 1973) where the court of appeals struck down a "protective sweep" because the defendant had a reputation for violence and on entering the residence police heard "rustling noises" in the house.

41. 403 U.S. 443 (1971).

42. 393 U.S. 958 (1968) (limiting warrantless searches incident to an arrest to the area within the immediate control of the defendant).

43. *See also* Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974), a civil action against federal agents for civil rights violations. Plaintiff claimed he was wrongfully arrested and charged with an illegal weapons violation where defendant agents acted without probable cause. Affirming a summary judgment of dismissal, the court of appeals adopted the Second Circuit rule of Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972), where police need only allege and prove that they acted in good faith, that their conduct was lawful, and that the belief was reason-

Consensual Searches

In *United States v. Mattlock*,[44] the court of appeals approved the suppression of evidence taken from the room of the defendant, without having obtained his consent. Permission to search had been given by another occupant of the residence who upon occasion shared the room with the defendant and kept some personal effects there. The Supreme Court granted certiorari, and in reversing the decision of the Seventh Circuit, held that the consent given by one who possesses common authority over premises or effects is a valid authorization to search in the absence of the non-consenting party with whom that authority is shared.[45]

The Seventh Circuit then reached a similar result in *Hayes v. Cady*,[46] when it was presented with a habeas corpus action. Without reference to the holding in *Mattlock*, the court approved a search of the defendant's residence predicated on permission obtained from a landlady. The essential difference in *Hayes* was the defendant's denial of a possessory interest in the premises sought to be searched, thereby justifying police reliance on the permission of one who otherwise logically and legally was entitled to grant it.[47]

Warrants

In *United States v. Carmichael*[48] the court of appeals, sitting en banc, for the first time permitted collateral attack on the adequacy of probable cause in a complaint for a search warrant, which was other-

able. *Id.* at 1348. In *Tritsis*, the agents submitted affidavits to that effect, and the court of appeals held that plaintiff's counter-affidavits of a factual nature did not go to defendants' state of mind, the real issue. 501 F.2d at 1023.

Proposed amendments to the federal rules are designed in part to make explicit that probable cause for arrest warrants may be based on hearsay evidence. *See*, Advisory Committee Note, *Proposed Amendments to* FED. R. CRIM. P. 4.

44. 476 F.2d 1083 (7th Cir. 1973).

45. 94 S. Ct. 988 (1974).

46. 500 F.2d 1212 (7th Cir. 1974).

47. *See also* United States v. Piet, 498 F.2d 178 (7th Cir. 1974) where foreman of warehouse containing defendant's goods gave permission to search, and court interpreted United States v. Matlock, 94 S. Ct. 988 (1974), to allow search where defendant knew others had keys and access to his storage area, on grounds of lack of reasonable expectation of privacy. Similarly, the court in United States v. Sells, 496 F.2d 912 (7th Cir. 1974), allowed search, where permission was given by other than seller, on the basis of reasonable belief by police of authority to give such permission. Defendant in *Sells* also raised an issue of such permission being obtained fraudulently by police.

The Sixth Circuit this year extended this line of reasoning into the area of search of a co-conspirator's premises, holding that one conspirator never has standing to object to the search of another's premises. United States v. Hearn, 15 C.L.R. 2191 (6th Cir., May 7, 1974).

48. 489 F.2d 983 (7th Cir. 1973).

wise facially sufficient. In reversing and remanding to the trial court for an evidentiary hearing, the court determined that the facts presented by defendant made an "initial showing"[49] sufficient to support a belief that there had been a misrepresentation by a government agent in procuring the search warrant. Setting up guidelines for the determination of the need for such a hearing on probable cause the court said it should first be determined whether there had been "(1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material."[50] If the trial court concludes that such misrepresentation was made, the exclusionary rule should be applied if the evidence shows that the agent was either recklessly or intentionally untruthful.[51] An innocent or merely negligent misrepresentation, whether material or not, will not suffice as a basis for the suppression of evidence.[52]

Carmichael has not been overruled or modified, nor has the Supreme Court determined or considered such collateral attack on a search warrant.[53] Several of the other circuits, however, are at variance with its application[54] and other cases decided in the Sev-

49. *Id.* at 988.
50. *Id.*
51. *Id.* at 989.
52. *See also* Kipperman, *Inaccurate Search Warrants as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971).
53. *See* Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. U.S., 362 U.S. 257 (1960) where the Supreme Court has indicated or assumed that such an attack may be permissible.
54. The Fifth Circuit, in United States v. Thomas, 489 F.2d 664 (5th Cir. 1973) takes a different approach. Although permitting collateral attack on the probable cause for the issuance of a search warrant, it has applied a different standard for weighing the effect of misrepresentations in the affidavit. The court said "[A]ffidavits containing misrepresentations are invalid if the error was (1) committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause, or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search." *Id.* at 669.

The Ninth Circuit takes a third approach in a somewhat different factual situation. In United States v. Damitz, 15 C.L.R. 2121 (9th Cir., Apr. 8, 1974), the informant signed the affidavit for the search warrant, which contained false statements based on information which he had given the agents. The agents were not aware of the falsity in the warrant. Citing neither *Carmichael*, nor *Thomas*, the court upheld the warrant by applying the reliability tests in Aguilar v. Texas, 378 U.S. 108, 114 (1964); Spinelli v. U.S., 393 U.S. 410 (1969); and United States v. Harris, 403 U.S. 573, 583 (1971). The attack on the probable cause to issue the warrant, said Judge Duniway, must be confined to the four corners of the warrant. Had the agents sworn to the false and material representations, a different result could have been reached.

The Eighth Circuit, sitting en banc in United States v. Marihart, 15 C.L.R. 2036 (8th Cir., Mar. 6, 1974), accepted the *Carmichael* rule. (Officer's uncertainty in recollecting certain conversations was not a material misstatement made to secure a warrant.)

enth Circuit have distinguished or limited the rule.[55]

At trial in *United States v. Smith*,[56] the defendant moved to quash the warrant and suppress evidence seized during a search of his home. The affidavit, which detailed the surveillance of investigating government agents, stated that odors were detected coming from the house which, from the experience of the agent who obtained the warrant, indicated that a certain process in the manufacture of a controlled substance was being conducted within the building. The defendant presented counter affidavits, executed by himself and a chemist, to establish that it would be impossible for a person to detect the particular odor described in the warrant affidavit. Contending that the counter affidavits established an "initial showing",[57] the defendant requested an evidentiary hearing to determine if there had not been a material misrepresentation in the complaint for the warrant, within the rule of *Carmichael*. The district court denied the defendant's motion, and the court of appeals affirmed. In distinguishing *Carmichael*, the court stated that it had read the agent's affidavit in *Smith*, and found sufficient probable cause on its face for the issuance of the warrant. The counter affidavits merely challenged the hearsay reported by the agents, and as such did not constitute an "initial showing" of a material or intentional misrepresentation by the agents.[58] The chemist's opinions were likewise rejected by the court since it was logical to believe that the agent was in a better position to make such a subjective determination of the odor and its source.

In *United States v. Bridges*,[59] the defendant was indicted and convicted for unlawful use and possession of a dynamite bomb to dam-

55. *See also* United States v. Ott, 489 F.2d 872 (7th Cir. 1973). Defendant was convicted in the district court for possession of checks stolen from the mails. On cross examination the defendant's attorney attempted to determine if the witness was employed as a government informer. The prosecution objected to the question and represented to the court that the witness was not, nor had he ever been, an informant. During arguments before the court of appeals, exhibits tendered by the defense showed that the witness had in fact been a government informant and was mentioned by name in the affidavit for warrant in the case of United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973). In reversing the *Ott* conviction, the court held that the government will be charged with the knowledge of all its agents and employees, and whether a prosecutor's statement was the result of neglect or a deliberate attempt to mislead the court, such conduct by the prosecution cannot be condoned and is inconsistent with the fair administration of justice. 489 F.2d at 874. The falacious statement by the government at the trial denied the defendant the right to cross examine a major prosecution witness. 489 F.2d at 875, 877.

56. 499 F.2d 251 (7th Cir. 1974).

57. *Id.* at 255.

58. *Id.*

59. 499 F.2d 179 (1974) reversed on other grounds. *See infra*, note 226 and accompanying text.

age a building. In the district court the defendant sought to suppress the evidence obtained as a result of a search of his car with a warrant. The affidavit for the warrant stated that "dynamite" had been found on the defendant's hands, and further that he had submitted to a swabbing of his hands on the advice of his attorney. Neither statement proved to be true since the chemicals detected on the defendant's hands were only the "components of dynamite",[60] and the attorney had not instructed his client to submit to the test. The court of appeals, reversing the defendant's conviction on other grounds, upheld the validity of the search under the warrant, and rejected the applicability of *Carmichael* in this instance. The court found that the differences in the warrant, at best, could be considered only as "unintentional misrepresentations of an immaterial fact," which were excluded as grounds for quashing a warrant.[61]

In *United States v. Darrow*,[62] defendants were indicted for possession of counterfeit currency. They had been arrested while in a tavern and the search of one defendant produced a set of car keys for a vehicle bearing Kentucky plates and, without *Miranda* warnings, one defendant made a statement indicating further evidence was in that car. An officer went into the parking lot and found the car, which was locked. Returning to the tavern, the officer requested the owner of the car to identify himself but no one claimed ownership. After secret service agents arrived and identified the bills as counterfeit, one of them went to the parking lot and, peering through a window, observed a rolled-up sock on the front seat. A search warrant was obtained for the car, and in the affidavit for warrant executed by the officer it was asserted that the defendants admitted ownership of the vehicle and told the officer that additional contraband would be found in the vehicle. The defendant claimed these statements were made without *Miranda* warnings. The court of appeals never reached the question of the validity of the search warrant, but upheld the search of the vehicle and the seizure of the evidence as a warrantless search under *Chambers v. Maroney*.[63] The Seventh Circuit found ample probable cause to search the vehicle without a warrant while it was

60. *Id.* at 185.

61. *Id.* *See also* United States *Ex Rel.* Saiken v. Bensinger, *infra* note 264 and text accompanying, for an unusual case where warrant deficiencies result in suppression, for the first time anywhere, of murder victim's body, on habeas corpus petition.

62. 499 F.2d 64 (7th Cir. 1974).

63. 399 U.S. 42 (1970) (automobile searches requiring special rules).

still parked at the tavern, prior to the warrant application. The court reasoned that the affidavit for the warrant was harmless error, and over-diligence on the part of a police officer unnecessarily seeking a warrant should not be penalized.[64] More important is the fact that the appellate court recognized that the events in this case present a significant constitutional question stemming from the trial court's suppression of the statement made to an officer without the required *Miranda* warnings.[65] Those statements were then used to establish probable cause for the issuance of a warrant. The court declined to resolve the issue because the search was ultimately justified as not requiring a warrant.[66] The question of whether the exclusionary rule of *Miranda* and other cases is applicable to probable cause determinations remains unresolved.[67]

SEARCH AND SEIZURE

Wire Tapping Under Title III of the Omnibus Crime Control And Safe Streets Act of 1968

The broad power to intercept oral communications without the consent of the parties to the conversation has been controversial both in terms of constitutional validity and application of the provisions of the Act.[68] Although a recent facial attack on the constitutionality of the entire Act was rejected by the Seventh Circuit Court of Appeals in *United States v. Ramsey*,[69] the court continues to deal with a multitude

64. 499 F.2d at 69.

65. *Id.* at 68.

66. *Id.*

67. The court never came to the point of considering the sufficiency of the affidavit under the rule of U.S. v. Carmichael, *supra* note 50.

68. 18 U.S.C. §§ 2510-20 (1968).

In U.S. v. DeCesaro, 502 F.2d 604 (7th Cir. 1974), Judge Pell stated, "While governmental interception of telephonic communications is the subject of stigmatic regard by those devoted to the preservation of civil liberties and the right of privacy, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. sec. 2510 et seq., permits such electronic surveillance subject to the safeguards and restrictions of that Title."

69. 503 F.2d 524 (7th Cir., 1974).

In *Ramsey* the defendant, convicted of narcotics violations, attacked the constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, *supra* note 6, alleging as his ground the following: (1) authorization to listen continuously to all conversations over a phone for 30 days was in the nature of a general warrant forbidden by the fourth amendment; and (2) that the statute fails to require that notice be given to every person whose conversations have been overheard. Although the defendant failed to establish his standing to raise the issue, the court elected to rule on the matter. While conceding that there will be violations of the Constitution in applying the Act, the court of appeals reasoned that strict enforcement of the provisions of the statute, and Court decisions such as Berger v. New York, 388 U.S. 41 (1967), would serve to guide the federal courts to substantial adherence with the fourth amendment.

of problems created by the application of the procedural and fourth amendment safeguards contained in the legislation. In *United States v. Roberts*,[70] federal agents obtained approval to tap the telephone of the defendant under the provisions of section 2516.[71] That section requires that prior to court issuance of the warrant to intercept wire communications, an authorization signed by the Attorney General or his duly authorized assistant[72] must accompany the affidavits to estab-

In U.S. v. Chun, 503 F.2d 533 (9th Cir. 1974) the question of notice to persons whose conversations were overheard on a wire tap was considered. Defendants in that case were not served with the statutory notice in § 2518(8)(d), of a tap on their conversations at the termination of the period set out in the warrant. The government had failed to furnish that information to the district judge, and upon proper motion, an order suppressing the evidence as to the defendant was issued. On appeal, the Ninth Circuit held that the government possessed the sole knowledge of who was overheard on the taps, and what was said. The failure to disclose this to the judge deprived him of the discretion as to what party was entitled to the information. In remanding to the district court, the court of appeals did not rule on the question of suppression, but directed a reconsideration of the matter in light of the recent Supreme Court decisions in *Giorgano* and *Chavez, infra* note 70, as to the effect of failure to comply with the statutory requirements under Title III.

70. 477 F.2d 57 (7th Cir. 1973).

On May 13, 1974, the U.S. Supreme Court in United States v. Giordano, 94 S. Ct. 1820 (1974) and U.S. v. Chavez, 94 S. Ct. 1849 (1974), ruled on the scope and application of 18 U.S.C. §§ 2510-20 (1968), dealing with authorization for wire interception. Upholding the position of the Seventh Circuit in United States v. Roberts, the court in *Giordano* held that § 2516(1), required all applications for electronic intercepts be initiated by authorization of the Attorney General or an Assistant Attorney General who has been specifically delegated with the power to represent the government in such cases. Failure to comply with that procedure will result in suppression of evidence pursuant to the provisions of § 2515. In *Chavez*, the Court distinguished part of its ruling in *Giordano* as it applied to misidentification. *Chavez* involved two authorizations to tap. The first was signed by the Attorney General's executive assistant. The Court found this to be insufficient on its face pursuant to § 2518(10)(a)(ii). The second was designated as having been signed by an Assistant Attorney General, when in fact it had been signed by the Attorney General himself. The misdesignation or identification was not fatal to the authorization, said the Court, and the defendant's rights were not prejudiced, nor should evidence obtained thereunder be suppressed.

71. 18 U.S.C. § 2516 (1968):

> (1). The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of . . . .

72. 18 U.S.C. 2518. Procedure for Interception of Wire or Oral Communications.

> (1). Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information: . . . .
>
> (b). A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued including (i) details as to the particular offense that has been, is being, or is about to be committed (ii) a particular description of the nature and location

lish probable cause. The authorization in the instant case bore an improper signature, which was discovered after an indictment for gambling. The defendant's motion to suppress the evidence obtained from the wire tap was upheld by the court of appeals, after it was established that the letter purporting to have been signed by an Assistant Attorney General had in fact been signed by another. The Seventh Circuit, however, limited the scope of their ruling and held that only information gained directly from the illegal wire taps would fall within the exclusionary rule;[73] thus if other independent evidence were discovered to support the charge, the district court could proceed on the indictment.

In *United States v. McHale*,[74] the defendants attempted to apply the suppression order in the *Roberts* case to the evidence obtained from the interception of their communications. During pretrial discovery, defendants learned that some of the calls uncovered in the *Roberts* case had been made to an individual living in the same area as the defendants, but who was in no way involved with the defendant's gambling activities. Federal agents, using telephone company records, informants and other independent sources had learned of the defendants and their operation prior to the suppression of the *Roberts* evidence, although the existence of the *Roberts* phone calls was mentioned in the affidavits for the interception order. The court of appeals in affirming the conviction noted that the affidavits in the instant case, stripped of any reference to *Roberts*, and coupled with the independent evidence obtained by the government, would support a finding of probable cause.

The defendants also raised a unique argument, which was intended to defeat federal jurisdiction. They asserted that the evidence failed to prove that "6 or more persons"[75] were involved in gam-

of the facilities from which or the place where the communication is to be intercepted . . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted . . . .

73. 18 U.S.C. 2518(10)(a) (1968):

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval . . . .

74. No. 73-1860 (7th Cir., April 8, 1974).

75. 18 U.S.C. § 1955(b)(1)(ii) (Prohibition of Illegal Gambling Businesses):

. . .

"(b) As used in this section—

bling since only three persons were indicted and some were only lay-off bettors. In considering the requirement of having a statutory number of persons for federal jurisdiction to attach, the court held that the act was intended to apply to professional gamblers, not customers or bettors. But in counting the persons who fell into that category, runners, agents or other independent contractors, such as "lay-off bettors",[76] would be included to comply with the inclusion of those numerically required to satisfy 18 U.S.C. § 1955.

In *United States v. McLeod*,[77] the defendant transmitted gambling odds and results from Las Vegas to Indiana by public telephone. Federal agents, who had her under surveillance, were able to stand close enough to hear her relay to the party at the end of the line the betting information she had obtained legally from her sources in Nevada. No wire taps were involved and no court order existed authorizing the interception of the defendant's oral communications. On indictment, the defendant moved to suppress the conversations overheard by the agents asserting that section 2510 prohibited the interception of her phone conversations.[78] The court of appeals affirmed the district court's denial of the motion to suppress, and applying the *Katz*[79] decision held that what a person knowingly exposes to the public cannot serve as a basis for seeking fourth amendment protection. Conversations, carried on in a normal tone of voice, and audible to the agents standing near her, were not the type of conversations contemplated in section 2510, and the right to privacy had not been invaded in a way capable of producing evidence capable of suppression.

In *United States v. DeCesaro*,[80] the defendants were indicted for

> (1) 'Illegal Gambling Business' means a gambling business which—
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business . . ."

76. A "lay off bettor" is defined as:

> (A) bookmaking business of any size requires that the bookmaker balance his books . . . . In this way the bookmaker cannot be a loser . . . . (T)he large scale bookmaker . . . tak(es) those bets on a favorite in excess of those placed on the remainder of the participants in the contest and bet(s) them again with an even larger bookmaker who is able to balance his books by taking all of these excess bets from many bookmakers in different locations. This operation is known as 'laying off' . . . . (T)he bets thus insured are known as 'lay off bets.'

United States v. DeCesaro, 502 F.2d 604 (7th Cir. 1974) (quoting from pretrial testimony of F.B.I. Agent).

77. 493 F.2d 1186 (7th Cir. 1974).

78. 18 U.S.C. § 2510 (1968).

79. Katz v. United States, 389 U.S. 347, 351 (1967), *see also* United States v. Llanes, 389 F.2d 880 (2d Cir., 1968).

80. 502 F.2d 604 (7th Cir. 1974).

gambling in violation of section 1955,[81] and prior to trial filed motions for discovery and to suppress certain evidence obtained through wire taps. The district court suppressed the evidence on the ground that the affidavit executed by the federal agent contained primarily the hearsay of a self-confessed bookmaker-informant, and was vague and not easily understandable, thereby failing to establish probable cause in the court's opinion. The government sought review of the district judge's order. The court of appeals reversed and vacated the suppression order, holding that hearsay evidence obtained from an informant who was credible, although confessing to being a bookmaker, would support probable cause for the issuance of a warrant. Applying the *United States v. Spinelli*[82] decision, the court of appeals stated that "only the probability, and not a prima facie showing of criminal activity is the standard of probable cause".[83] The factual basis for probable cause had clearly been established within the framework of the affidavit.

In *United States v. Finn*,[84] the defendants were charged with violation of section 1955, and moved to suppress evidence obtained from intercepted wire communications. Prior to trial, the district court suppressed the evidence obtained from the taps, holding that the affidavit executed by the federal agent failed to substantiate the reliability of the major informant, and set out only hearsay facts dealing with the underlying circumstances of gambling. As in *DeCesaro*, the court of appeals reversed the district court and observed that although the affidavit on its face appeared to fail the two-fold test set out in *Spinelli*[85] since the affidavit failed to establish the reliability of the informant, other facts, and observations by F.B.I. agents and informants, who were reliable, created the corroboration necessary to establish probable cause. As to hearsay, the court suggested that there were "multiple levels of hearsay",[86] and that in testing to determine the hearsay to be permitted, courts should decide if the source of the knowledge of each declarant is sufficiently shown so as to be considered credible.[87]

81. 18 U.S.C. 1955 (1970): "(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both."
82. 393 U.S. 410 (1968).
83. 502 F.2d at 610.
84. 502 F.2d 938 (7th Cir. 1974).
85. 393 U.S. 410 (1968).
86. 502 F.2d at 941.
87. *Id.*

Border Searches

Although the area comprising the geographical jurisdiction of the Seventh Circuit is not usually associated with border searches, the locations of O'Hare Field[88] and the great lakes ports, and increased activities of narcotics smuggling[89] have nonetheless created problems here connected with border searches. Such searches fall outside most of the traditional protections of the fourth amendment,[90] leading the courts to apply various statutory provisions in deciding the cases.[91]

In a case of national first impression the Court of Appeals for the Seventh Circuit upheld the conviction of defendant for importing narcotics into the United States by mailing cocaine in a first class envelope from a foreign country. The envelope was opened by customs officials in New York and its contents dicovered.[92] In *United States v. Odland*,[93] the court rejected the defendant's contention that customs officials were without authority to open first class mail,[94] and that a search warrant based in part on the opened mail was improperly granted.[95]

The court held that first class mail is protected from unwarranted inspection only if it is of domestic origin. Basing its analysis on cases from other circuits which, while not approaching the problems encountered with first class mail, had allowed the government a broad border search authority,[96] the court found that the power of the government to inspect private mail of any class at the point of entry is unlimited.

In what is apparently dicta, however, the court did recognize some limitations on the border search power of the Government in *United*

88. See Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (airport border search).

89. *See, e.g.*, Acree, *This Is Customs*, 1 DRUG ENFORCEMENT, Spring, 1974, at 10-11 (Drug Enforcement Administration, Dept. of Justice).

90. *See* United States v. Odland, 502 F.2d 148 (7th Cir. 1974). According to the court, this problem has yet to be faced by the Supreme Court, although dealt with in several other circuits. *See* Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973); United States v. McDaniel, 463 F.2d 129, 132 (5th Cir. 1972); United States v. Stornini, 443 F.2d 833, 835 (1st Cir. 1971). *See also* Carroll v. United States, 267 U.S. 132, 153 (1925); Boyd v. United States, 116 U.S. 616, 623 (1886).

91. *See* 19 U.S.C. § 482 (1866); 19 U.S.C. § 1582 (1930); 19 C.F.R. § 162.6.

92. It was then delivered to defendant under controlled conditions in Wisconsin. 502 F.2d at 152.

93. 502 F.2d 148 (7th Cir. 1974).

94. Defendants relied upon 39 U.S.C. § 3623(d) (1970), and 39 C.F.R. § 61.1.

95. 502 F.2d at 152.

96. *See supra*, note 90.

States v. Brown,[97] which involved a search of defendant's person. While the court of appeals upheld a search under a female defendant's clothing by customs inspectors at O'Hare International Airport, it did so in a decision discussing at length the concepts of "reasonable suspicion", "real suspicion", and the limitations in body searches by "common standards of decency and propriety".[98] While concluding in the case only that the level of suspicion harbored by the customs inspectors was "high enough" to allow a "relatively dignified search",[99] the court intimates that a higher level of suspicion may be required to justify a stripping or strip search, or an intrusion into body orifices.[100] In these situations, *Brown* indicates that a "mere" suspicion would be insufficient, and that the courts should require a showing of "real suspicion" on the part of a prudent customs officer, based on clearly ascertainable facts indicating that a suspect is concealing something on his person.[101]

In a shorter section of the *Brown* decision, the court also allowed the customs officials' search of another defendant who had, prior to the search discussed above, departed from the actual customs area in the airport and who was, on the basis of the prior search, returned to the inspection area. Citing only one case from another circuit on this problem, the court in allowing the second search noted approvingly the lower court decision of *Brown* and its language regarding "reasonable grounds to suspect" based on the first search.[102]

The rules of *Brown*, vague as they are, are apparently the only ones for the Seventh Circuit. That decision preceded by one and a half months the statement in *Odland* that "we of course express no view on what have been termed extended border searches or intrusive personal searches."[103]

97. 499 F.2d 829 (7th Cir. 1974).

98. *Id.* at 833, where the court cites several other circuits. *See, e.g.*, United States v. Thompson, 475 F.2d 1359, 1362 (5th Cir. 1973) ("reasonable suspicion"); Henderson v. United States, 390 F.2d 805, 808 (9th Cir., 1967) ("real suspicion"); United States v. Storm, 480 F.2d 701, 704 (5th Cir. 1973) ("common standards").

99. 499 F.2d at 834.

100. *Id.* at 833. *But see* United States v. Chase, 503 F.2d 571 (9th Cir. 1974) (Customs order to strip not automatically effective as "strip search", with prerequisite of real suspicion).

101. 499 F.2d at 833.

102. *Id.* at 834.

103. *Odland, supra*, 502 F.2d at 151, *citing* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968). *But see* Almeida—Sanchez v. United States, 413 U.S. 266 (1973) (must satisfy normal fourth amendment requirements except at border or its functional equivalent); United States v. Bowen, 15 C.L.R. 2229 (9th Cir., May 9, 1974).

FIFTH AMENDMENT

Miranda Voluntary Confessions

In *United States v. Fowler*[104] a sixteen year old boy was arrested, charged with participation in the burglary of a post office and subsequently prosecuted as a juvenile.[105] The evidence indicated that he was given only limited warnings under *Miranda v. Arizona*,[106] in that postal inspectors did not fully advise him of his right to an attorney,[107] or that his statements could be used in evidence against him. The court of appeals held that these omissions created prejudice to the juvenile, and warranted reversal of the district court conviction. Considering the Supreme Court decisions of *In re Gault*[108] and other juvenile cases,[109] the Seventh Circuit held that minors are entitled to many of the same protections and constitutional safeguards as adults.

More interesting than the *Fowler* court's application of *Miranda* requirements to juveniles, however, is the reasoning used in reaching a final decision. Cases from the Supreme Court are cited by the majority in their rejection of a *parens patriae* approach to the treatment of juveniles,[110] in reasoning which awards the rights of an adult to the child. But in the portion of the decision analyzing the sufficiency of the warnings given, that majority reassumes its paternal cloak, recalls to mind the insecurities of adolescence,[111] and seems to say that special care must be given to the juvenile who is unable to fend for himself.[112]

104. 476 F.2d 1091 (7th Cir. 1973).
105. *See* 18 U.S.C. § 5032 (1948).
106. 384 U.S. 436 (1966).
107. In its holding, the court specifically declines to decide whether the absence of an attorney at a juvenile interrogation per se renders a confession involuntary. 476 F.2d at 1094.
108. 387 U.S. 1 (1967).
109. Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49 (1962). The court also distinguishes the pre-*Gault* Seventh Circuit decision of United States *ex rel.* Richardson v. Vitek, 395 F.2d 478, 480-81 (7th Cir. 1968) (habeas corpus) *reviewing* People v. Richardson, 32 Ill. 2d 472, 207 N.E.2d 478, *cert. denied*, 384 U.S. 1021 (1966).
110. *Supra*, note 109, cases cited.
111. The majority, 476 F.2d at 1093, distinguished one case used by the government, West v. United States, 399 F.2d 467, 469 (5th Cir. 1968) (juvenile may knowingly waive *Miranda* rights), noting in that case indications of the juvenile's maturity and independence. The dissent, doubting but assuming the requirement of *Miranda* warnings here, found them adequate. 476 F.2d at 1094 (Kilkenny, Senior Circuit J., dissenting).
112. This circuit also decided, however, that some arguably incompetent defendants need not be given *Miranda*-type warnings on the right to silence by examining government psychiatrists. Relying on its previous case of United States v. Bohle, 445 F.2d 54, 66-67 (7th Cir. 1971) (such examinations do not per se violate fifth amendment rights). The court extended that holding to cover the advisement situations in United States v. Green, 497 F.2d 1068, 1081 (7th Cir. 1974).

The defendant in *United States v. English*[113] established that he had been addicted to heroin for many years, and contended that after his arrest for murder he was denied drugs or medical attention, and became ill. Claiming that he was without such aid or treatment for three days, and was suffering from withdrawal when he gave a confession to the authorities, he sought to suppress that confession as involuntary and solely as a result of the narcotics withdrawal. The defendant did not allege a failure to warn under *Miranda*.[114]

Evidence was adduced from the testimony of several agents that there were in fact no signs of withdrawal, and the trial court concluded that the defendant had failed to show any factual basis for the claimed involuntariness. The appellate court affirmed, and held that as the self-serving statements of the defendants were unsupported, the confession was not suppressable. The question of the voluntariness of that confession, and the weight to be given it, were properly for the jury's consideration under an appropriate instruction from the court.

TESTIMONY

At the trial in *United States v. Zouras*,[115] the prosecutor sought on cross examination to establish as impeachment the fact that a witness had previously refused to make any statement to federal officers regarding the defendant.[116] The defendant objected to this tactic claiming that such comment on a witness' prior silence compromised that witness's fifth amendment rights. The court of appeals held that while the witness did have the right to remain silent at the time of her own interrogation, since she was neither a defendant in the case, nor under any charge, it was not a violation of her fifth amendment privilege for the prosecutor to comment on her refusal to speak. The rights afforded under the Constitution inure only to the person,[117] and in

113. 501 F.2d 1254 (7th Cir. 1974).
114. Miranda v. Arizona, 384 U.S. 436 (1966).
115. 497 F.2d 1115 (7th Cir. 1974).
116. As to comments on the silence of defendant himself, at whatever stage in the proceeding—including initial questioning—the Seventh Circuit continued to warn the government of its opposition to such tactics. United States v. Bridges, 499 F.2d 179, 183 (7th Cir. 1974) (questions to agent on direct as to defendant's interrogation answers, require reversal). Two months later the court, in what is plainly labelled dicta, also warned the government on the practice of commenting on its own uncontested evidence, when the record indicates that only defendant could have controverted such evidence. This would be an improper comment on defendant's silence. United States v. Fearns, 501 F.2d 486 (7th Cir. 1974); United States v. Handman, 447 F.2d 853, 855-56 (7th Cir. 1971) (test is effect on jury).
117. *Citing* Johnson v. United States, 228 U.S. 457, 458 (1913) (books and records).

such a situation may only be claimed personally. Thus the defendant had no stake in the witness's fifth amendment right.[118]

On the other hand, a defense witness may use that personal privilege on cross-examination. Without the opportunity for such witnesses to remain silent under the fifth amendment, the court held in *Wisconsin ex. rel. Monsoor v. Gagnon*,[119] the principal defendant's right to call witnesses in his own defense is improperly abridged. Thus, defendant's witness may plead a personal fifth amendment privilege on cross-examination without fear of having his answers on direct striken for failure to submit to cross-examination.[120]

In a distinct area of testimonial privilege, the Seventh Circuit this year further limited the privilege against testimony of a spouse. Expanding upon its own prior decisions,[121] the court in *United States v. Van Drunen*[122] stated that the privilege will not apply where both spouses have participated in the alleged offense. Distinguishing a contrary Supreme Court decision,[123] the court found the facts of *Van Drunen* to be sufficiently different due to the alleged joint participation, and further went so far as to hold that "we decline to read the *Hawkins* opinion as foreclosing the possibility of other exceptions".[124] This decision creates for the Seventh Circuit a complete exception to marital privilege where joint participation of the spouses is alleged, which now applies to both the privilege against testimony and the privilege for confidential marital communications.[125]

118. United States v. Zouras, 497 F.2d 1115, 1120 (7th Cir. 1974).

119. 497 F.2d 1126 (7th Cir. 1974); *see* Washington v. Texas, 388 U.S. 14, 19 (1967) (right to compulsory process).

120. Government witnesses may also refuse some questions on cross examinations. The court reaffirmed its sixth amendment—confrontation exception as to the background of U.S. agent in personal safety context. United States v. Penick, 496 F.2d 1105, 1108 (7th Cir. 1974) (address of agent). *See also* United States v. Daddano, 432 F.2d 1119 (7th Cir. 1970), *cert. denied*, 402 U.S. 905 (1971) (address and place of employment, co-conspirators becoming government witnesses).

For a discussion of one co-conspirator's claim to another's rights as to search, an analogy to 5th Amendment testimonial privilege with similar results, *see* United States v. Hearn, *supra* note 47.

121. United States v. Doughty, 460 F.2d 1360, 1363 (7th Cir. 1972) (tax returns prepared by wife); United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972) (wiretap including wife's conversation—wife joint participant in crime) *reversed on other grounds* 415 U.S. 143 (1974), *defendant's appeal on marital privilege, cert. denied* 411 U.S. 986 (1973). *Cf.* Note, *Future Crime or Tort Exception to Communications Privilege*, 77 HARV. L. REV. 730, 734 (1964).

122. 501 F.2d 1393 (7th Cir. 1974).

123. Hawkins v. United States, 358 U.S. 74, 78 (1958); *but see* Wyatt v. United States, 362 U.S. 525, 531 (1960) (husband leading wife into prostitution might lead her to silence).

124. 501 F.2d at 1397.

125. *See* Kahn v. Doughty, *supra* note 121, 471 F.2d at 194. The court of appeals

OTHER EVIDENCE UNDER FIFTH AMENDMENT

In a situation much like that in *Zouras*, the defendant in *United States v. Manson*[126] sought to suppress the income tax returns of his employee in an illegal gambling business. In *Manson*, however, the defendant also alleged that the information used to prepare the return had originated with him. Reiterating the personal nature of the fifth amendment privilege, the court denied suppression and noted the unavailability of that privilege to one supplying information to an accountant.[127]

Later this year, the court also interpreted *Schmerber v. California*[128] to allow the taking of swab samples from the hands of a defendant. Holding that such swabs are not of a testimonial or communicative nature, the court found in *United States v. Bridges*[129] that it was unnecessary to look for a defendant's consent to affirm the district court's admission of the swabs.[130]

And finally, the requirement in narcotics cases that a defendant affirmatively overcome the presumption that he does not have the appropriate license was found compatible with the fifth amendment in *United States v. Kelly*.[131] Relying on prior Seventh Circuit cases dealing with federal food and drug laws,[132] the court distinguished the Supreme Court case of *Leary v. United States*,[133] contending that *Leary* should be limited to a ban on presumptions going to the elements of an offense. The statutory presumption[134] in *Kelly*, on the other hand, merely creates an affirmative defense, shifting the burden of going forward with the evidence.[135]

in United States v. Cleveland, 477 F.2d 310, 313 (7th Cir. 1973) also adopted a preference for a Second Circuit ruling which allows testimony by a government agent as to statements by a spouse. United States v. Mackiewicz, 401 F.2d 219, 225 (2d Cir. 1968); *but see* United States v. Williams, 447 F.2d 894 (5th Cir. 1971), where defendant and wife were co-conspirators, but statements made as to inter-spousal communications on conspiracy not allowed. *Id.* at 898.

126. 494 F.2d 804, 806 (7th Cir. 1974).

127. *See also* Couch v. United States, 409 U.S. 322, 337 (1973) (Brennan, J., concurring) (privilege as to records in custodial safekeeping).

128. 384 U.S. 755 (1966) (blood samples).

129. 499 F.2d 179, 184 (7th Cir. 1974).

130. The court also relied on the Second Circuit's United States v. D'Amico, 468 F.2d 331, 333 (2d Cir. 1969) (hair clippings) in finding that the fourth amendment requirements on reasonable intrusion were satisfied in U.S. v. Bridges, 499 F.2d at 184.

131. 500 F.2d 72 (7th Cir. 1974).

132. United States v. Rowlette, 397 F.2d 475 (7th Cir. 1968) (amphetamines, burden on defendant); United States v. Reiff, 435 F.2d 257 (7th Cir. 1970) *cert. denied*, 401 U.S. 938 (1971) (keeping of records).

133. 395 U.S. 6, 45-46 (1969) (presumption of importation, marihuana).

134. 21 U.S.C. § 885(b) (1970).

135. While the majority worried at some length over the use of conclusive labels,

MERGER AND JOINDER OF COUNTS

In *United States v. Hunter*,[136] the defendants were convicted for conspiracy to violate the provisions of the organized crime control Act of 1970[137] which prohibited illegal gambling, and for substantive violations under the same act. The court of appeals held that conspiracy to violate the gambling provisions, which require the involvement of five or more persons acting in concert, completed the offense, and would not serve as satisfaction of the requirement for conspiracy that two or more persons act in agreement, where the elements for each offense are identical. The court reversed the conspiracy conviction and affirmed the substantive gambling conviction.

The *Hunter* holding was specifically limited, however, in *United States v. McLeod*.[138] There, the court found that the substantive conviction of defendant under 18 U.S. §§ 1084 and 1952[139] differed from the "five or more" requirement in *Hunter*[140] a section 1955 prosecution—as there are no requirements in these sections that there be more than one person to complete the offense. As a result, the elements of proof are more distinct. In this situation, then, it is immaterial that some of the same evidence is used to prove both the substantive and conspiracy counts. *Hunter* seems limited by *McLeod* to situations where the substantive offense would *require* a conspiracy.

In a similar case, a prosecution under 26 U.S.C. § 5861[141] for possession of a destructive device, the court also dealt with the problem of a single course of conduct. In *United States v. Tankersley*,[142] the court of appeals adopted the Ninth Circuit's rule and reasoning[143]

Judge Stevens in concurrence found no difficulty distinguishing the difference between the proof of an element of an offense and proof of an affirmative defense's existence. *Kelly*, 500 F.2d at 74.

136. 478 F.2d 1019 (7th Cir. 1973).

137. 18 U.S.C. § 1955 (1970).

138. 493 F.2d 1186 (7th Cir. 1974).

139. 18 U.S.C. § 1084 (1961); 18 U.S.C. § 1952 (1970).

140. *See infra* note 75 and accompanying text.

141. 26 U.S.C. §§ 5861(d), 5861(i) (1968).

142. 492 F.2d 962 (7th Cir. 1974).

143. United States v. Clements, 471 F.2d 1253 (9th Cir. 1972). Also in the area of merger of offenses, the Seventh Circuit in United States v. Dilts, 501 F.2d 531 (7th Cir. 1974), that each security cashed by defendant may be the basis for a separate indictment, and in such case allows an assumption that each crosses a state line separately. The court distinguishes Castle v. United States, 368 U.S. 13 (1961) (Mem.) *reversing* 287 F.2d 657 (5th Cir. 1961). Choosing among the circuits, divided on this issue, the court of appeals followed the Eighth Circuit. Amer v. United States, 367 F.2d 803, 805 (8th Cir. 1966).

that where such multiple prosecutions are brought under Section 5861, multiple convictions may stand, but cumulative punishment is limited to the maximum allowed for a single count.[144] Nor is it improper for the government to bring both a substantive count and a grand jury perjury count relating to the same issue. In *United States v. Pacente*,[145] the court reaffirmed its stand on the discretionary nature of severance,[146] where reversal is available only on a showing that discretion has been abused.[147] With two dissents,[148] the court en banc held that speculation on the cumulative nature of the proof with these counts, the effect of the grand jury's determination of perjury on the petit jury's fact finding as to the counts, and the ability of that petit jury to distinguish the elements and levels of proof required, do not of themselves show such an abuse. The court found that curative instructions, with the presumed ability of a juror to apply them, will prevent the prejudice claimed by the defendant. Without that prejudice, public interest in court efficiency allows the joinder of connected offenses.[149]

The court stretched the reach of its prior guidelines[150] on joinder and severance in *United States v. Zouras*.[151] There, the court found that it was not prejudicial to join counts which alleged that defendant had both committed the substantive crime, and attempted by extortion to prevent a principal witness from testifying as to that substantive count. The defendant's scheme to commit the substantive count, the court found, included a scheme to conceal such activity from the police, which scheme in turn included the extortion scheme. Thus, while the inclusion in the *Hunter* scheme of the conspiracy to commit the substantive crime caused the offenses to merge, the court in *Zouras* sought out such a scheme to permit joinder of offenses.

144. 492 F.2d at 962.

145. 503 F.2d 543 (7th Cir. 1974) (en banc), *reversing* 490 F.2d 661 (7th Cir. 1973).

146. FED. R. CRIM. P. 14 (severance); FED. R. CRIM. P. 8(a) (Joinder).

147. *See* United States v. Rogers, 475 F.2d 821, 828 (7th Cir. 1973); United States v. Kahn, 381 F.2d 824, 841 (7th Cir. 1967), *cert. denied*, 389 U.S. 1015 (1967).

148. 503 F.2d at 553 (Swygert, Ch. J., dissenting); *id.* (Sprecher, J., dissenting).

149. *Citing* United States v. Rogers, *supra* note 12, 475 F.2d at 828.

150. *See* United States v. Quinn, 365 F.2d 256, 263 (7th Cir. 1966), holding as joinder requirements that the crimes must be (1) of the same or similar character, (2) based on the same act or transaction or (3) constituting part of a common scheme or design.

151. 497 F.2d 1115 (7th Cir. 1974).

DISCLOSURE OF EVIDENCE BY PROSECUTION

In *United States v. Krilich*,[152] the court of appeals, relying on prior Seventh Circuit cases,[153] affirmed a conviction based in part on the testimony of agents to whose reports the defendant had been denied access before trial. More recently, however, the court in *United States v. Cleveland*[154] ruled that an I.R.S. agent's report is discoverable in some cases. At trial, the defense in *Cleveland* demanded that an I.R.S. agent's report be furnished to the defendant under the provisions of the Jencks Act.[155] The district judge there stated only that he would "take a look",[156] *in camera*, to determine if there was anything in the report which related to the agent's testimony. Although there was nothing in the record to indcate such an inspection, it was held that the agent's report was not a statement within the purview of section 3500[157]

Remanding, the court of appeals stated that under section 3500, two considerations must be made to determine discoverability. First, it must be determined whether a document falls within the statutory definition of a statement in section 3500(e).[158] While the court determined that the agent's report will indeed fit this definition of a statement,[159] it also concluded that a trial court must apply a second test. That is, does the content of the report relate to the witness' testimony at trial,[160] and therefore require production under subsection (b) of section 3500,[161] The remand in *Cleveland*, it should be noted,

152. 470 F.2d 341 (7th Cir. 1972), *reconsidered and affirmed*, 502 F.2d 680 (7th Cir. 1974).

153. *E.g.*, United States v. Keig, 334 F.2d 823 (7th Cir. 1964).

154. 477 F.2d 310 (7th Cir. 1974).

155. 18 U.S.C. § 3500 (1970).

156. 477 F.2d at 315.

157. *Id.*

158. 18 U.S.C. § 3500(e) (1970):

> (e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

159. *See* United States v. O'Brien, 444 F.2d 1082 (7th Cir. 1971) (definition of "statement").

160. The court held that the views of a prospective government witness who was not called are not thereafter subject to disclosure. United States v. Greene, 497 F.2d 1068, 1083 (7th Cir. 1974).

161. 18 U.S.C. § 3500(b) (1970):

> (b) After a witness called by the United States has testified on direct ex-

included provision for a sealed transmission of the report to the court of appeals for further review should the trial court again find that it was not producible under the tests set out.

Following the *Cleveland* decision, *Krilich* moved to vacate his prior conviction under 28 U.S.C. § 2255,[162] re-alleging a denial of access to the agent's report during his first trial. Basing the further action on *Cleveland*, the defendant claims that the first *Krilich* holding had denied his constitutional rights of confrontation and effective assistance of counsel.[163] At the section 2255 hearing, defendant readily established for the district court a similarity between his case and the facts in *Cleveland*. The district court nevertheless denied his petition, and held for a prospective application of *Cleveland*.

The court of appeals concurred and held in the second *Krilich*[164] that there are two instances where a new rule is to be applied retroactively. First, a rule which, if applied retroactively, would have prevented the original trial from taking place rather than merely prescribing procedural rules to govern its conduct, should apply retroactively.[165] Second, if the retroactive application of a rule would remove a substantial impediment to the original trial's truth finding function,[166] and so raises a serious question as to the accuracy of a prior guilty verdict, such application is given. Having established these criteria, the *Krilich* court cited two Supreme Court[167] cases to justify four further balancing tests: (1) how well did other safeguards protect the court's fact finding function; (2) what purpose do the new standards serve; (3) how much did law enforcement authorities rely on the old standards; and (4) what effect would retroactive application of the new standards have on the administration of justice?

A different problem with discovery arose in *United States v. Eng-*

amination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

162. 28 U.S.C. § 2255 (1949).

163. The court held that the purpose of disclosure in this situation would be to allow defendant a meaningful confrontation. Krilich v. United States, 502 F.2d 680 (7th Cir. 1974).

164. *Id.*

165. *See, e.g.*, Robinson v. Neil, 409 U.S. 505, 509 (1973) (double jeopardy).

166. The court also cites Williams v. United States, 401 U.S. 646, 653 (1969) to the effect that such a result must also be the purpose of a new rule. 502 F.2d at 684.

167. Johnson v. New Jersey, 384 U.S. 719, 728 (1966); Stovall v. Denno, 388 U.S. 293, 297 (1967).

lish.[168] In *English*, the government delayed delivery[169] of material to the defendant under a discovery order, pleading that such delivery could prejudice its case against potential co-defendants who, though unindicted, were represented by the same attorney. The court of appeals held that this delay was not frivolous, and that the facts presented a real danger of conflict of interest.[170] The court also apparently approved the trial judge's decision to condition discovery on a hearing to determine the propriety of the original defendant's waiver of independent counsel.

GUILTY PLEAS

The defendants, after the court denied motions to suppress, entered into plea bargaining with the district judge which resulted in the entry of guilty pleas to narcotics violations. As part of the bargaining reached during negotiations for the plea, the district judge agreed that the defendants could raise on appeal the basis for his denial of their motion to suppress evidence obtained in a search at O'Hare Field. The prosecutor objected to such a proviso in the agreement for the sentence. In conformity with the agreement, the defendants appealed the rejection of their motion to suppress. The court of appeals, in *United States v. Brown*,[171] after affirming the ruling on suppression, turned its attention to the propriety of the district court's agreement in the plea bargaining process. Although the appellate court elected to honor the commitment made by the district judge, it was held that they would be reluctant to entertain such a stipulation in the future. Adopting the position taken in another circuit in *United States v. Cox*,[172] and in *Tollett v. Henderson*,[173] it was suggested that the defendants were gaining the best of two worlds, since they had freely proclaimed their guilt and then were permitted to raise new claims of innocence by virtue of a dubious agreement confering appellate jurisdiction on a reviewing court. The court of appeals suggested strongly that such procedures be discontinued in future cases.[174]

168. 501 F.2d 1254 (7th Cir. 1974).

169. In United States v. Robinson, 503 F.2d 208 (7th Cir. 1974), the court avoided defendant's contention that government actions which arguably prevent any discovery (through destruction) of potentially exonerating evidence, require reversal regardless of the government's good or bad faith. Defendant's trial tactics obscured, and thus waived, the issue. *Id.* at 218. *See* United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

170. *See* Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965).

171. 499 F.2d 829 (7th Cir. 1974).

172. 464 F.2d 937 (6th Cir. 1972).

173. 411 U.S. 258, 267 (1973).

174. 499 F.2d at 832. The *Brown* court also examined the ability of one possibly under the influence of drugs to intelligently enter a plea of guilty. Denial of defend-

SPEEDY TRIAL

In *United States v. Macino*,[175] another case articulating a new rule for the Seventh Circuit, the defendants alleged a violation of their rights to a speedy trial in the twenty-six month delay between their initial arrest and the return of an indictment. They had, however, been free on bond during the entire period, and they made no demand for trial until after indictment. Reversing, the court of appeals stated that it was compelled to adopt the balancing tests of *Barker v. Wingo*,[176] where the Supreme Court announced four factors to be considered in finding such a violation of the sixth amendment's speedy trial protections. The *Barker* tests were: (1) length of delay: (2) reason for delay; (3) defendant's assertion of his right; and (4) prejudice to defendant.[177] The fourth test, prejudice, must be further measured by the interests to be protected: (1) prevention of excessive pre-trial incarceration; (2) minimizing the anxiety and concern of the defendant; and (3) impairment of the defense.[178]

The defendant in *Macino* was not penalized for failure to demand trial as the failure did not constitute a waiver, but was only one factor to be considered.[179] Nor did the prosecution in *Macino* have an explanation for the lengthy delay, another factor which had to be considered in defendant's favor.[180] The twenty-six month delay was not in and of itself prohibited, the court of appeals held, but such lengthy delay can trigger the speedy trial issue, particularly the question of prejudice. The apparently critical element was the actual prejudice resulting from the delay. Prejudice can result when the de-

ant's contention on that point was based on defendant's failure to raise it at the time of the plea, and on the court's personal observation. *Id.* at 835.

175. 486 F.2d 750 (7th Cir. 1973).

176. 407 U.S. 514 (1972).

177. 486 F.2d at 752.

178. *Id.* at 753. While citing as a proposition of United States v. Strunk, 412 U.S. 434 (1973), *appeal from* 467 F.2d 696 (7th Cir. 1972), that it is not a remedy for lack of speedy trial, the court in United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974) added as another factor the sentencing of defendant under 18 U.S.C. § 4208(a)(2) (1958).

179. *But see* 486 F.2d at 755 (Moore, J., dissenting).

180. *See* United States v. English, 501 F.2d 1254 (7th Cir. 1974). The Seventh Circuit in *English* found no prejudice where the government could explain a four month delay as a result of defendant's repudiation of an oral confession, initial waiver of preliminary hearing and subsequent renewed demand for such hearing. *See also* United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974), where the court took *judicial notice* of reasons for an 11 month post-indictment delay, including difficulty of proof for government and fact that trial judged newly appointed. *But see* U.S. v. Jackson, 15 C.L.R. 2130 (N.D. Ill. 1974) (government delay of discovery causing 17 month trial delay requires dismissal).

lay affects the defendant's ability to preserve his defense, as in this case, where one potential witness died during the interim and the record showed faded memories in others. In balancing, as per *Baker*, the court found a violation of the right to a speedy trial.[181]

In other sixth amendment speedy trial appeals, the Seventh Circuit dealt with the problem of pre-indictment delays by the government without the arrest seen in *Macino*. Interpreting a recent Supreme Court decision to the effect that speedy trial protections do not apply until a putative defendant becomes an accused,[182] the Seventh Circuit held that simply targeting a suspect for investigation does not qualify him as "accused".[183] Thus, a right to speedy trial will not normally, under *United States v. Joyce*,[184] accrue until the defendant is actually indicted. Further, without a specicific showing of prejudice, the defendant's only protection in such a situation will normally be the statute of limitations.

The effect of the Interstate Agreement on Detainers Act[185] on a defendant's right to speedy trial was also examined this year. In *United States v. Ricketson*[186] the court held the defendant to strict compliance with written notice requirements as to some sections of the Act and also defined the starting point for the time limitations in other sections. The court held that when the United States Attorney has not actually lodged a detainer with state officials, prior appearances in federal court by a defendant in state custody will not act as such a starting point for those limitations. Instead, the time starts to run only at the point where such a request has been made by the government. Prior appearances for arraignment or other purposes are immaterial when the government wants the defendant's presence only for short periods and has no intention of holding him until trial.[187]

181. *But see*, United States v. DeTienne, 468 F.2d 151 (7th Cir. 1973). *See also*, United States v. Cabral, 475 F.2d 715 (1st Cir. 1973); United States v. Taddeo, 434 F.2d 228 (2d Cir. 1970), *cert. denied*, 401 U.S. 944 (1971); United States v. Lebosky, 413 F.2d 280 (3d Cir. 1969) *cert. denied*, 397 U.S. 952 (1970).

182. United States v. Marion, 404 U.S. 307, 313 (1971).

183. 499 F.2d 9, 19 (7th Cir. 1974).

184. *Id.*

185. ILL. REV. STAT. Ch. 38, § 1003-8-9 (1973).

186. 498 F.2d 367 (7th Cir. 1974).

187. Where a federal detainer had in fact been lodged with state authorities in United States v. Skelly, No. 73-1863 (7th Cir., June 7, 1974), the court held a delay in arraignment on the federal charges not prejudicial. Skelly also complained of a violation of his right under FED. R. CRIM. P. 5(a) on a delay of such arraignment while he was held on a related *state* charge. The court held that this merely constitutes a delay in arrest, a pre-indictment delay not prejudicial to defendant, and also held that while defendant is so held by a state, the federal government may continue any investigation

DOUBLE JEOPARDY

In *United States v. Haygood*,[188] the defendant purchased drugs in Detroit and sold them in Chicago. Separate indictments issued for the two transactions, and were assigned to different judges in the same district. Plea bargaining resulted in a reduction of one charge, to which defendant pleaded guilty. A pre-sentence investigation, submitted after that plea, referred to the remaining indictment and set forth all the underlying facts. Those facts, including those still charged in the remaining indictment, were then relied upon in sentencing on the guilty plea. When the government proceeded to prosecute on the remaining charge, defendant claimed that reliance on it in the prior sentencing procedure would require that continued prosecution be seen as double jeopardy.

While the court of appeals found the procedure here unfair, they nonetheless found also that double jeopardy did not attach under these facts. Jeopardy attaches when a jury is impanelled or, in a bench trial, when evidentiary proceedings commence. When a sentencing judge obtains evidence of other charges or convictions they are used only for the purpose of imposing sentence, and are not evidentiary in nature; nor does that disclosure relate to the question of guilt or innocence. Their consideration by the sentencing judge does not then grant defendant a future transactional immunity.

Although affirming in *Haygood*, the Seventh Circuit did make plain its distaste for the result in this case. Prosecutors should encourage one final disposition of all pending charges.[189] The court gave tacit approval to the Wisconsin "read-in" procedure. Under that procedure, prosecutor and accused may make an enforceable agreement under which those offenses relied on by a sentencing judge may not

without incurring an obligation to arraign defendant in order that he be afforded his right to counsel in preparation for defense on the related *federal* charge. *Id.*, slip opinion at 4. *See also* United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974).

188. 502 F.2d 166 (7th Cir. 1974).

189. *Id.* at 169:

> In a practical sense, therefore, the prosecutor has two opportunities to use one charge as a basis for imposing what he regards as an adequate sentence. The constitutional protection is intended to forestall such unfairness and to give a defendant the right to one final disposition of any pending charge. (footnotes omitted).

But the court in *In re*: Special Sept., 1972 Grand Jury, Lufman v. United States, 500 F.2d 1283 (7th Cir. 1974), found that defendant's two refusals to supply information to the grand jury did not constitute double jeopardy. Defendant, originally granted immunity, had refused to answer questions regarding others and was sentenced for civil contempt. Later, defendant refused to give voice exemplars to the same grand jury, this time seeking to indict him, and was found to be in criminal contempt. *Id.* at 1285.

then be prosecuted.[190]

In an opposite result, the court held that an attempt by the government to assess against the defendant the costs of post-judgment, appeal-connected hearings was improper. In *United States v. Hoffa*,[191] the court found that such an assessment would be an addition to the original sentence, and further is improper as an attempt to limit the exercise of a defendant's constitutional right to appeal.

JURY SELECTION

During jury selection, defense counsel in *United States v. Booker*[192] requested that the jury be examined for any possible racial prejudice which might exist against the defendant, a black. The district judge refused to question the prospective jurors on that subject. The jury, when finally selected, contained five black and seven white jurors. The court of appeals, voiding a conviction, found prejudicial error in the failure of the district court to conduct the requested voire dire. *Booker* was distinguished from *Case v. United States* decided in the prior year by the Seventh Circuit[193] and the court relied on recent, analagous Supreme Court decisions in this area.[194] An inquiry into racial prejudice was essential to a fair and impartial trial of the defendant's case, and its denial mandated reversal. The court found that the inclusion of five blacks on the final panel was immaterial, and that even one prejudiced juror can deprive defendant of a fair and impartial hearing. However, as this was an appeal from a federal district court, the court of appeals held that it was not required to examine either the actual likelihood of prejudice, or the requirement for such a reversal under the constitution.

In *United States v. Drake*,[195] the defendant challenged the entire jury array for cause. Basing his challenge primarily on the panel's prior exposure to the prosecuting Assistant United States Attorney, the

190. 502 F.2d at 171. The court also seems to approve the MODEL PENAL CODE § 7.05(4), with similar provisions.

191. 497 F.2d 294 (7th Cir. 1974).

192. 480 F.2d 1310, 1311 (7th Cir. 1973).

193. 468 F.2d 141 (7th Cir. 1972), Noted in Dienes, *1973 Seventh Circuit Review, Criminal Law and Procedure*, 50 CHI-KENT L. REV. 285, 596 (1973). *Chase* was distinguished on the ground that the possibility of prejudice, where voire dire concerned courtroom security and defendant alleged exclusion of young adults from the jury, was more remote. The *Chase* court felt that the omission from *voire dire* was relatively minor and the evidence of guilt overwhelming. *Id.* at 147.

194. Aldridge v. United States, 283 US. 308 (1931); Ham v. S. Carolina, 409 U.S. 524 (1973); *see also* United States v. Robinson, 466 F.2d 780 (7th Cir. 1972) (*Aldridge* not limited to black defendant, white victim).

195. 494 F.2d 648 (7th Cir. 1974).

defendant also requested the right to examine the prosecutor in court to determine the extent of his contact with the jurors. Affirming, the court of appeals found that the district judge had not abused his discretion by denying both the challenge and the requested examination of the prosecutor. The district court had determined that the results of the prosecutor's two prior appearances before those jurors were ambiguous, and that the impact of those cases could have been elicited on voir dire.[196] Further, the court of appeals held that while the jurors had been on call for a number of months, defendant had not properly shown any violation of the statutory limitations on jury service.[197]

Verdicts by less than twelve jurors were reviewed by the Seventh Circuit in two cases. In *United States v. Pacente*,[198] the parties stipulated before trial that if "one but not more than two"[199] jurors became ill during trial, the proceedings could continue to verdict with an abbreviated panel. In *United States v. Baker*,[200] only eleven jurors were in the jury box after the exhaustion of all peremptory challenges required by the rules,[201] and the parties stipulated to proceed to trial with that number. In both cases, conviction was affirmed. The defendant in *Pacente* argued that agreement by his counsel to an abbreviated jury could not bind him personally.[202] The court of appeals, apparently extending the rulings of prior cases,[203] held however that defendant could not repudiate his counsel's stipulation but was bound by it. Although the record showed neither a personal waiver by defendant, nor evidence that he had conferred with counsel prior to the stipulation, he was evidently bound by his counsel's and his own actions after one juror had been excused due to illness in the family.[204] In *Baker*, the defendant objected to the trial court's failure to allow further peremptory challenges.[205] In light of his failure to

196. The prosecutor had previously obtained 3 verdicts, "guilty", "non-guilty", and "hung-jury" in the two prior cases. *Id.* at 649.

197. 28 U.S.C. § 1866(e) (1968) (limit of 30 days service in two years).

198. 503 F.2d 543 (7th Cir. 1974) (en banc), *reversing* United States v. Pacente, 490 F.2d 661 (7th Cir. 1973) (district court reversed on other grounds).

199. *Id.* at 551.

200. 499 F.2d 845 (7th Cir. 1974).

201. FED. R. CRIM. P. 24(b).

202. 503 F.2d at 551.

203. *E.g.* Beatty v. United States, 377 F.2d 181, 185 (5th Cir. 1967) (10 jurors within limit); Horne v. United States, 264 F.2d 40 (5th Cir. 1959) (open court discussion) *cert. denied*, 360 U.S. 934 (1959). The *Pacente* court distinguishes between requirements on direct appeal and collateral attack. 503 F.2d at 552.

204. The court found family illness to be within the meaning of defendant's stipulation. 503 F.2d at 552.

205. 499 F.2d at 849 (10 challenges allowed under FED. R. CRIM. P. 24(b)).

object at the proper time, and of his attorney's stipulation as to eleven jurors, however, the court of appeals found no error in the smaller jury's verdict.

SUFFICIENCY OF THE EVIDENCE

After a trial without jury and a verdict of guilty on four counts of an indictment, the district judge in *United States v. Penick*[206] allotted Criminal Justice Act[207] funds to allow the defendant a polygraphic examination as to the first count. The trial judge stated that if the defendant could, using the lie detector, raise a reasonable doubt as to the controlled substance transaction in that count, he would be willing to reconsider the verdict. As the court of appeals later noted carefully, this offer was termed an "experiment."[208] Two months later, based on the results of that examination, and on the testimony of a polygraph expert[209] the district court reversed its findings as to that count. The defendant immediately requested funds for the administration of similar tests as to the remaining counts, and then appealed the denial of that request.

Faced with the problem of lie detector tests in the federal courts, the Seventh Circuit affirmed. That decision, however, did change the circuit's situation for these tests. Although the court of appeals rejected the defendant's contention that the further examinations on the other counts were required under due process constitutional rights, implicit in its affirmation of *Penick* is the conclusion that polygraphic examinations may indeed raise a reasonable doubt as to a defendant's guilt. This is an apparent extension of the lie detector's previous evidentiary value.[210]

The court of appeals couched its holding in the terms of prior decisions,[211] and held that admission of the polygraphic evidence was a matter "within the sound discretion of district court."[212] While not a wholesale acceptance, the decision here is some distance from au-

206. 496 F.2d 1105 (7th Cir. 1974).
207. 18 U.S.C. § 3006(a) (1964).
208. 496 F.2d at 1109-10.
209. *Cf.* J. REID & F. INBAU, TRUTH AND DECEPTION; THE POLYGRAPH (LIE-DETECTOR) TECHNIQUE, 237 *et seq.* (1966).
210. A similar result was reached by a state court recently in Commonwealth v. A Juvenile (No. 1), 15 C.L.R. 2323 (Mass. 1974). Citing an extensive bibliography, the court there found four situations permitting use of polygraph tests, all requiring a motion by defendant and differing only as to methods for choice of examiner. As with *Penick*, the Massachusetts court leaves admission to the trial judge's discretion. *Id.*
211. *E.g.*, United States v. Chastain, 435 F.2d 686, 687 (7th Cir. 1970).
212. 496 F.2d at 1110.

thority cited by the court to the effect that lie detector tests are inadmissible as a settled rule.[213] While the court notes in qualification that the defendant in *Penick* appealed on the allocation of funds, and *not* directly on the question of admissibility, it does hold that such allocation may be justified under "special circumstances".[214] Such a holding would seem to require admissibility, however, in those situations.

JURY INSTRUCTIONS

The Seventh Circuit was also faced this year with the continuing problem of insanity as a defense in federal criminal cases,[215] as it affects jury instructions. The court, in *United States v. Greene*,[216] decided that such a defense does not require that the jury be charged with a special instruction as to the significance of a not guilty finding, where such a finding will result in the total freedom of the defendant.

Charged with air piracy, the defendant in *Greene* asserted insanity at the time of the offense as an affirmative defense. At the conclusion of the case, he requested that the jury be instructed to make a special finding of insanity, allowing the district court to direct the Secretary of Health, Education and Welfare to take custody of and commit defendant until he should be cured of any mental disease. The defendant predicated such a commitment procedure on 24 U.S.C. § 211.[217]

Affirming the district court, the majority in *Greene* adopted the

213. *E.g.*, United States v. Frogge, 476 F.2d 969, 970 (7th Cir. 1973) *cert. denied* 414 U.S. 849 (1973) ("settled rule"); United States v. Tremont, 351 F.2d 144, 146 (1965) *cert. denied*, 383 U.S. 944 (1966) ("judicial distrust of such evidence"); United States v. Salazar-Gaeta, 447 F.2d 468 (9th Cir. 1971).

214. 496 F.2d at 1110.

215. *See, e.g.*, Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 YALE L.J. 684 (1944); Figinski, *Commitment After Acquittal On Grounds of Insanity*, 22 MD. L. REV. 293 (1962).

216. 497 F.2d 1068 (7th Cir. 1974).

217. 24 U.S.C. §§ 211, 211(a) (1916):

> If any person, charged with crime, be found, in the court before which he is so charged, to be an insane person, such court shall certify the same to the Secretary of Health, Education and Welfare, who may order such person to be confined in Saint Elizabeth's Hospital, and, if he be not indigent, he and his estate shall be charged with expenses of his support in the hospital.
>
> Any person becoming insane during the continuance of his sentence in the United States penitentiary shall have the same privilege of treatment in Saint Elizabeth's Hospital during the continuance of his mental disorder as is granted in section 211 of this title to persons who escape the consequences of criminal acts by reason of insanity, unless it be the opinion, both of the physician to the penitentiary and the superintendent of the hospital, that such insane convict is so depraved and furious in his character as to render his custody in the hospital insecure, and his example pernicious.

rule of all the circuits which have so far considered the question, and ruled that 24 U.S.C. Section 211 applies only to the courts of the District of Columbia, and does not provide an avenue to commitment for the courts of any other district.[218] Seeking to limit its ruling to the application of Section 211, the court of appeals cited the legislative history of the section,[219] and noted with approval the decisions in other circuits.[220] While the court recognized the need for an instruction enabling juries to fairly weigh the effect of their deliberations on a defense of insanity, it declined to act. The problem's resolution, as stated by Judge Pell, rests with the Congress, which has been aware of this gap in the federal system and has not acted.[221]

In his well reasoned and lengthy dissent, Judge Stevens agreed with the defendant that such a situation requires at least some special instruction to avoid the manifest prejudice which must attach if a jury is to assume that a verdict of not guilty by reason of insanity is tantamount to a simple finding of not guilty.[222] While Judge Stevens does accept the majority analysis of 28 U.S.C. § 211, he noted that a jury need not be confronted with the spector of endangering society by freeing a violent and mentally disturbed defendant. Disagreeing with the majority contention that the federal courts must wait for congressional action, the dissent demonstrates the power of a federal court to commit a defendant under case[223] and statutory law,[224] and under the traditional commonlaw powers of a federal judge. Judge Stevens finds unacceptable the government's contention that the federal courts are impotent when faced with the dilemma of freeing or convicting the insane defendant.[225]

218. Pope v. United States, 298 F.2d 507 (5th Cir. 1962) *cert. denied*, 381 U.S. 941 (1965); White v. United States, 387 F.2d 367 (5th Cir. 1967); Pope v. United States, 372 F.2d 710, 731-32 (8th Cir. 1967), *vacated for resentencing* 392 U.S. 651 (1968), *cert. denied*, 401 U.S. 949 (1971); United States v. Borum, 464 F.2d 896 (10th Cir. 1972).

219. 11 Stat. 157-58 (1857).

220. *Supra*, note 218.

221. *E.g.*, S. 979, 91st Cong., 1st Sess. (1969); S. 2740, 90th Cong., 1st Sess. (1967). *See also* Note, *Federal Commitment of Defendants Found Not Guilty by Reason of Insanity—Proposed Legislation*, 52 IOWA L. REV. 930 (1967); S. 3689, 89th Cong., 2d Sess. (1966).

222. 497 F.2d at 1087 (Stevens, J., dissenting).

223. *See* Davis v. United States, 160 U.S. 469, 487 (1895); *Ex Parte* Peterson, 253 U.S. 300, 312 (1920); Quercia v. United States, 289 U.S. 466, 469 (1933).

224. 18 U.S.C. §§ 4244-48 (1949).

225. At the opposite end of the spectrum, the court this year held that defendant is not entitled to an instruction (or argument) informing the jury of a mandatory sentence. United States v. Johnson, No. 74-1030 (7th Cir. Sept. 11, 1974), *adopting rule in* Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962), *cert. denied*, 381 U.S. 941 (1965). *See also* Chapman v. United States, 443 F.2d 917, 920 (10th Cir. 1971); United

In *United States v. Bridges*,[226] the Seventh Circuit reversed and remanded based on improper jury instructions defining reasonable doubt. In setting forth the proper basis upon which a jury must decide whether reasonable doubt exists, the given instructions had directed that reasonable doubt is "not for the purpose of permitting guilty men to escape",[227] and in a succeeding paragraph equated reasonable doubt with a "substantial doubt based upon the evidence or lack of evidence".[228] The offending sections are not contained in LaBuy,[229] and the Seventh Circuit joined with other circuits[230] in refusing to allow such prejudicial definitions.[231]

The court of appeals also dealt with the problem of omissions from jury instructions. Unlike the improper definition of *Bridges*, in *U.S. v. Knippenberg*[232] the court examined the lack of a proper definition of the term "wilfully", where the judge had instructed the jury that the defendant might be found guilty if he wilfully participated in the commission of a crime.[233] And in *United States v. Van Drunen*, the district judge omitted the word "not" when giving a LaBuy instruction to the effect that "[a] defendant has the absolute right [sic] to testify, and the jury must not draw a presumption of guilt or any inference against the defendant because he did not testify".[234]

In both *Knippenberg* and *Van Drunen* the court of appeals held on the basis of rule 30 that the ommissions did not constitute reversable error. In each case the defendant had failed to properly object and request specific curative instructions, where the error was not an

States v. Del Toro, 426 F.2d 181, 184 (5th Cir. 1970), *cert. denied*, 400 U.S. 829 (1970).

226. 499 F.2d 179 (7th Cir. 1974).

227. *Id.*, at 186.

228. *Id.*

229. LaBuy, Jury Instructions in Federal Criminal Cases, 36 F.R.D. 601 (1962).

230. Reynolds v. United States, 238 F.2d 460 (9th Cir. 1956) (permitting guilty men to escape); Gomila v. United States, 146 F.2d 372 (5th Cir. 1944); United States v. Atkins, 487 F.2d 287 (8th Cir. 1973) (substantial doubt); United States v. Alvero, 470 F.2d 981 (5th Cir. 1972).

231. The court also dealt with reasonable doubt in United States v. Joyce, 499 F.2d 9 (7th Cir. 1974), stating as a preference that in the future this phrase would be better understood by juries if not used in conjunction with the "troublesome" words, "sufficient legal evidence." *Id.* at 23.

232. 502 F.2d 1056 (7th Cir. 1974).

233. The Seventh Circuit also found the lack of definition for the word "wilfully" to be free of error in United States v. Greene, 497 F.2d 1068 (7th Cir. 1974). *Greene*, however, involved the crime of air piracy, which the court found to be one of general intent. 49 U.S.C. § 1472 (1958). The indictment used the word "willfully", though the court found such surplussage immaterial. The problem of *Greene's* defense of diminished capacity should be considered together with this alleged error. *Id.*

234. 501 F.2d 1393, 1395 (7th Cir. 1974). LaBuy, *supra* note 229, instruction 6.09.

incurable ground for mistrial.[235] The court found this policy particularly apt in *Van Drunen*, where it found the error to be no more than the mere slip of a trial judge's tongue.

SENTENCING

The court of appeals has been faced with several cases attempting to define the parameters of rule 32[236] on sentencing procedures. Although there are currently proposed changes to rule 32,[237] recent experience still requires consideration of the cases dealing with several sections of that rule. In *United States v. Rosciano*[238] the court was faced with a defense assertion that the district judge is required by rule 32(c)(1) to order a pre-sentence report, or to give explicit reasons for his failure to do so. The court in its original *Rosciano*[239] decision, while reiterating its preference for the use of pre-sentence reports,[240] held that despite such preference it will not constitute an abuse of discretion for a trial judge to forego the use of such a report where he determines that it is unnecessary.[241] Indeed, the court also reiterated its prior holding[242] that the sentencing authority of a district court is simply not subject to review except under extraordinary circum-

235. FED. R. CRIM. P. 30. *See* United States v. Zweig, 467 F.2d 1217, 1222 (7th Cir., 1972).

Rule 30 was also employed by the court this year in United States v. Joyce, 499 Fed. 2d 9, 23 (7th Cir. 1974), when it decided that LaBuy Instruction 16.02, 36 F.R.D. 601 (1962), on completion of part of a scheme or schemes as sufficient for conviction under an indictment, was valid. While the court held under Rule 30 that the error was waived by defendant's failure to object, the court did state that in the future this circuit should follow the instruction and modification approved in the Eighth Circuit case of Schaefer v. United States, 265 F.2d 750, 753 (8th Cir. 1959), *cert. denied*, 361 U.S. 844 (1959), to the effect that the government must "prove one or more or a sufficient number of the representations to indicate and show that the scheme alleged was actually set up. . . ." *Id. See also*, Myrick v. United States, 332 F.2d 279, 281 (5th Cir. 1963), *cert. denied*, 377 U.S. 952 (1964).

236. FED. R. CRIM. P. 32.

237. Changes to Rules 4, 9, 11, 12, 15, 16, 17, 20, 29, 32 and 43 were transmitted by the Chief Justice to Congress on April 22, 1974, with a proposed effective date of August 1, 1974. *See* 94 S. Ct. (advance sheet No. 14) at 1 (May 15, 1974) (the proposed change was delayed). *See infra* note 245.

238. 499 F.2d 166 (7th Cir. 1974), *rehearing en banc withdrawn as improvidently ordered*, 499 F.2d 173 (7th Cir. 1974).

239. 497 F.2d 166 (7th Cir. 1974).

240. *E.g.*, United States v. Teague, 445 F.2d 114, 122 (7th Cir. 1971); United States v. Hutel, 416 F.2d 607, 627 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

241. *See* Farbo v. United States, 452 F.2d 132, 134 (7th Cir. 1971).

242. United States v. Kaczmarek, 490 F.2d 1031 (7th Cir. 1974), where defendant claimed imposition of two year sentence and $10,000 fine to be penalty for standing trial where co-defendants pleading guilty received probation. The Seventh Circuit upheld that sentence, finding it within the statutory limit, and finding that the extraordinary circumstances required to review trial judge's discretion were not present. *Id.* at 1036.

stances.[243]

Later sitting en banc, the court of appeals held that this was not a proper matter for an en banc hearing.[244] Discussing the proposed amendments to the Federal Rules of Criminal Procedure, the court noted that after the effective date of the new rules judges would be required to state for the record any reasons for failure to request a pre-sentence report.[245] The court refused, however, to apply such a rule for *Rosciano*. Chief Judge Swygert, Judge Stevens, and Judge Sprecher dissented to the en banc denial of further deliberation.[246] In his his separate dissent, Chief Judge Swygert noted the paramount importance of fairness in sentencing procedures to the individual defendant.[247] Pointing out that future rules or parole boards cannot be expected to correct judicial errors, he stated that "[c]ourts should be ever so sensitive to the rights and liberties of individuals."[248] Judge Stevens also argued that sentencing is a critical stage of the criminal process, and that a pre-sentence report is essential to a trial judge exercising broad discretion in fixing punishment. To preclude any fundamental unfairness, he felt that a district judge should announce and explain why a pre-sentence report is not needed.[249]

A similar problem arose in cases where a pre-sentence report had been made to the district court, but was not then made available to defendant. In *United States v. Miller*,[250] the Seventh Circuit went to great lengths to show that a decision which *generally* makes such reports available to the defendant was not in conflict with prior decisions in the circuit.[251] As with the preparation of such reports in *Rosci-*

243. *See* United States v. Humphreys, 457 F.2d 242 (7th Cir. 1972). But, the court remanded United States v. Van Drunen, 501 F.2d 1393 (7th Cir. 1974) to the district court for resentencing on a record which disclosed that the sentencing procedure violated Rule 32(a)(1). The district judge had failed to ask the defendant personally if he wished to make any statement of his own, or to present anything in mitigation of the offense. Such an omission was, without any citation of authority by the court of appeals, held to require a remand.

244. 199 F.2d 173, 174 (7th Cir. 1974).

245. The effective date for those changes was revised to August 1, 1975. P.L. 93-361 (1974).

246. Chief Judge Swygert had previously been the only dissent in the original *Rosciano* decision. 499 F.2d 166, 170 (7th Cir. 1974) (Swygert, C.J., dissenting).

247. *Id.* In his original *Rosciano* dissent, Chief Judge Swygert had noted the problem of disparity in sentencing, in a factual setting apparently more extreme than that of *Kaczmarek*, *supra*, note 242.

248. 499 F.2d 173, 175 (7th Cir. 1974) (Swygert, C.J., dissenting).

249. *Id.* at 178 (Stevens, J., dissenting, joined by Swygert, C.J., and Sprecher, J.).

250. 495 F.2d 362 (7th Cir. 1974).

251. *See, e.g.* United States v. Humphreys, 457 F.2d 242 (7th Cir. 1972); United States v. Trigg, 392 F.2d 860, 864 (7th Cir. 1968), *cert. denied*, 391 U.S. 961 (1968); United States v. White, 382 F.2d 445, 449 (7th Cir. 1967).

ano,[252] their disclosure under *Miller* remains in the discretion of the trial judge, but that discretion is more closely limited by *Miller*. Now, a trial judge must, if he is to consider the report in his sentencing deliberations,[253] at least summarize to the defendant those portions which are significant in that deliberation.[254] While it leaves some room for complete non-disclosure in exceptional cases,[255] *Miller* dictates an abandonment of any policy of non-disclosure on the part of district judges.[256]

CRUEL AND UNUSUAL PUNISHMENT

The defendant in *United States v. Gorden*[257] claimed that he was being imprisoned for debt, in violation of his fifth amendment rights. Having pleaded guilty to failure, after notice, to make deposits of employees' withholding taxes in an account for the benefit of the United States, defendant was sentenced to incarceration. Rejecting the imprisonment-for-debt contention, the Seventh Circuit held that the defendant was in fact being punished for using as his own the taxes that he was required to hold for the Government.[258]

In another opinion, the court held that custody in lieu of bond while awaiting trial is not punishment at all, and therefore cannot be of a cruel and unusual nature. In *Potter v. Clark*,[259] the defendant had been placed in isolation for damaging jail cameras. Such actions are not punishment, the court held, and are merely administrative actions taken to preserve the security of the jail.

252. *Supra* note 238.

253. In United States v. Haygood, 502 F.2d 166 (7th Cir. 1974), the court also agreed that a trial court may consider "sentencing charges based on the same transaction as that before the court. *See* the discussion under double jeopardy, *supra*, note 188 and accompanying text. The *Haygood* court also discussed the attachment of "minimal significance" to such facts by the trial judge. 502 F.2d at 169.

254. The court extends its ruling on pre-sentence report to reports by prosecutors, which it feels may require greater safeguards due to the prosecutor's adversary role, 495 F.2d at 366. *See* United States v. Solomon, 422 F.2d 1110, 1119, *cert. denied*, 399 U.S. 911 (1970).

255. The court leaves to trial courts' discretion the problem arising where disclosure would of necessity reveal the source of information contained in the report. 495 F.2d at 365.

256. Five days after the *Miller* decision, it was interpreted in United States v. Gorden, 495 F.2d 308, 310 (7th Cir. 1974) where the court held that the district court's disclosure in summary of, "trust fund tax delinquencies and his marital infidelity", as its basis in the report for sentencing was proper. *Id.* at 310.

257. 495 F.2d 308 (7th Cir. 1974).

258. *Citing* United States v. Patterson, 465 F.2d 360 (9th Cir. 1972), *cert. denied*, 409 U.S. 1038 (1973).

259. No. 73-2135 (7th Cir., May 16, 1974) (per curiam). Nor do due process hearings requirements apply in this situation. *Id.*

HABEAS CORPUS

In *Hayes v. Cady*,[260] the court of appeals held that where a murder suspect denied a possessory interest in the premises to be searched without a warrant, police were justified in seeking out permission from anyone legally or logically able to furnish the requisite consent. The defendant's disclaimer acted as a reversion to the landlady,[261] who properly admitted the officer. The evidence was not obtained in violation of the fourth amendment. More importantly, the *Hayes* court also rejected the defendant's contention that he had been improperly advised under *Miranda* when officers did not tell him of his right to appointed counsel if he was indigent, prior to his interrogation. The court was aware of the fact that Wisconsin law made no provision for the appointment of free counsel in this situation,[262] and the authorities could not have complied with that aspect of the *Miranda* warnings. The defendant in *Hayes*, the court held, was not prejudiced by this failure of the *Miranda* warnings.[263]

In *United States ex. rel. Saiken v. Bensinger*,[264] another murder case, a state prisoner contended that his fourth amendment rights were violated in state court when his motion to quash a search warrant and suppress the evidence recovered thereunder was improperly denied. The petitioner claimed that the warrant failed to sufficiently describe the underlying circumstances necessary to show that the informant was credible. The affidavit did not show how the informant knew that the body of a murder victim would be found at the location described in the warrant. The court, applying the two-pronged test announced in *Aguilar v. Texas*,[265] found the affidavit insufficient as a matter of law, and remanded to the state court for further proceedings. Judge Sprecher concurred in the decision to return the case to the state court, but argued that this is the first instance where the body of a murder victim is to be suppressed by the imposition of the exclusionary rule.[266]

260. 500 F.2d 1212 (7th Cir. 1974). See discussion of this case under consensual searches, *supra* note 46 and accompanying text.

261. *Id.* at 1214.

262. *Id.*

263. *See* Michigan v. Tucker, 94 S. Ct. 2357 (1974). See discussion of *Miranda* requirements, *supra* notes 104-14 and accompanying text.

264. 489 F.2d 865 (7th Cir. 1974).

265. 378 U.S. 108, 114 (1964).

266. 489 F.2d at 899 (Sprecher, J., concurring). Judge Sprecher points to this action as the fulfillment of many jurists' worst nightmares on the subject of the exclusionary rule. His research and comments are most interesting. *Id.*