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I. INTRODUCTION

During the 1983-84 term, the Seventh Circuit Court of Appeals considered a wide range of criminal law issues. This article will briefly describe some of the important cases which were decided, as well as articulate the court's posture on the issues presented.

II. STATUTES ANALYZED

A. Embezzlement of Federal Funds

The Seventh Circuit broke new ground in *United States v. Petullo*[1] by holding that federal jurisdiction is triggered by the authorization, as opposed to the expenditure, of federal relief disaster funds obtained through misrepresentation.[2] While the holding is not directly supported by precedent, the conclusion is well reasoned and logically extends prior case law.

Following the record snowfalls in early 1979, President Carter authorized the Federal Disaster Assistance Administration to reimburse the City of Chicago for two-thirds of certain snow removal costs.[3] The court of appeals characterized this authorization as "a line of credit" from the federal government to the city since the city could pay its bills and then rely on the federal government for reimbursement.[4] Petullo and his partner submitted false vouchers to the city for snow removal services they allegedly performed. The city promptly discovered the fraudulent vouchers before paying any of the commingled federal, state and local funds designated for snow removal.[5] Petullo and his partner were subse-

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1. 709 F.2d 1178 (7th Cir. 1983).
2. *Id.* at 1181.
3. *Id.*
4. *Id.*
5. *Id.* at 1180.

quently convicted in district court under the federal false statement statute.[6]

On appeal, the defendants raised three issues: 1) that the matter was not within the jurisdiction of any department or agency of the United States because vouchers were neither submitted to nor paid by a federal agency;[7] 2) that the district court gave an improper jury instruction as to the *mens rea* element of their crime;[8] and 3) that Petullo was entitled to a new trial because his partner offered a "mutually antagonistic defense."[9] All three arguments failed. This section will focus solely on the first of these arguments.

In an opinion written by Judge Cudahy, the court relied on a line of cases which support imposing federal jurisdiction because of the federal government's strong interest in assuring that its funds are properly spent.[10] Because this interest is so pervasive, the court found it unnecessary to consider whether the federal funds had actually been paid out. So long as the funds were earmarked for a specific program, federal jurisdiction would lie when the defendant applied for those funds through misrepresentations.[11] The court found the existence, as opposed to the exercise, of federal supervisory authority to be the crucial factor. Accordingly, the mere authorization of federal funds, such as a "line of credit," triggers potential federal jurisdiction.[12]

This conclusion follows prior case law extending federal jurisdiction when false statements are made to obtain federal funds[13] whether the party paying the money was itself entitled to the federal funds, or whether it acted as a conduit for those funds.[14] Since the justification in those cases stems from the concern that federal money should not be misused, the *Petullo* court found no difference between the defendant's actual receipt of the federal funds, and the possibility of receiving those

6. Whomever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1982).

7. *Petullo*, 709 F.2d at 1180.

8. *Id.* at 1181.

9. *Id.*

10. *See* United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982); United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979).

11. *Petullo*, 709 F.2d at 1180.

12. *Id.* at 1181. *See* United States v. Montoya, 716 F.2d 1340 (10th Cir. 1983).

13. United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983).

14. United States v. Wolf, 645 F.2d 23 (10th Cir. 1981).

funds through a "line of credit."[15]

While the *Petullo* court limited its holding only to situations where federal disaster relief funds are involved, the holding is consistent with other cases involving the acquisition of federal money by misrepresentation.[16] Since the narrow holding was a logical extension of prior case law, the decision was proper.

The court affirmed another conviction for embezzling public funds[17] in *United States v. Bailey*.[18] As in *Petullo*, the rationale for the *Bailey* decision was federal dominion and control over the funds.

Bailey's conviction arose out of three separate real estate transactions during which he acted as an escrow agent and private closing attorney for a Farmer's Home Administration (FmHA) loan.[19] In each of the transactions, Bailey received specific instructions to return money from the transaction to FmHA. However, in each transaction, he failed to return the balance due to FmHA.[20]

On appeal, Bailey contended that his convictions should be reversed because the money involved was not the federal government's property.[21] He claimed that once the checks issued by FmHA were endorsed over by the borrower, the money became the borrower's property.[22] The court rejected Bailey's contentions and relied on *United States v. McIntosh*.[23] The court concluded that so long as the government has supervision and control over the property, title is not necessary to establish federal liability.[24] Accordingly, since Bailey was required to account for the balance of the FmHA loan, the government maintained sufficient control to trigger federal jurisdiction.

In *United States v. Harris*,[25] the court held that federal jurisdiction

15. *Petullo*, 709 F.2d at 1181.

16. *See supra* notes 10 and 12-14.

17. Whoever embezzles, steals, purloins or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money or thing of value of the United States or any department or agency thereof, or . . .

Whoever receives, conceals, or retains the same with intent to convert it to his own use or gain, knowing it to be embezzled stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .

18 U.S.C. § 641 (1982).

18. 734 F.2d 296 (7th Cir.) *cert. denied*, 105 S. Ct. 327 (1984).

19. 734 F.2d at 298.

20. *Id.* at 299.

21. *Id.* at 300.

22. *Id.*

23. 655 F.2d 80 (5th Cir. 1981) *cert. denied*, 455 U.S. 948 (1982).

24. *Bailey*, 734 F.2d at 300-301.

25. 729 F.2d 441 (7th Cir. 1984).

was triggered by the defendant's theft of property, even if there was no conclusive evidence that the materials stolen were purchased with federal funds.

The defendants, Harris and Gray, were assigned to lay tile in a public housing complex, owned by the Chicago Housing Authority (CHA).[26] The materials for the job were financed out of a grant from the Department of Housing and Urban Development (HUD), which paid sixty percent of CHA's operating expenses.[27] Based on a tip that the defendants were stealing government property, an undercover agent arranged to have Harris tile the kitchen and bathroom of a home where the agent supposedly lived. The next day, the materials for the job were delivered. The agent found six boxes of tile in the house, one of which was open. The court noted that one box of tiles costs $17.28. Consequently, if all six boxes were full, the total value of them would be $103.68. Only four of the boxes were used, however; the two remaining boxes were given to the undercover agent.[28] Therefore, the issue became one of supplying provisions of the appellate caseload statute.[29]

Harris and Gray were each charged with embezzling tile belonging to HUD. On appeal, the court considered the applicability of the statute to the defendants, since they were employees of a state agency which received 60% of its operating funds from a federal agency, and had embezzled items which were paid for 100% by HUD.[30]

The court decided that the defendants, while not technically agents of HUD, were doing its work, and therefore the case was analogous to *United States v. Coleman*.[31] The *Coleman* court held that misapplication of services generated from federal funds was indistinguishable from misapplication of the funds themselves. Therefore, Coleman was guilty of

26. *Harris*, 729 F.2d at 444.

27. *Id.* at 445.

28. *Id.* at 444. *See also supra* note 29.

29. Whoever, being an officer, agent or employee of or connected in any capacity with. . . . [HUD] . . . embezzles . . . things of value belonging to such institution . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled . . . does not exceed $100, he shall be fined out more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 657 (1982).

30. *Id.* at 445.

31. 590 F.2d 228 (7th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979). Coleman was found liable under 18 U.S.C. § 665, which punished individuals who embezzled money from an agency receiving financial assistance under the Comprehensive Employment and Training Act (CETA). *Coleman*, 590 F.2d at 229. Coleman was Assistant Director to the General Services Department of the City of Gary, Indiana. *Id.* at 230. In that capacity, Coleman supervised Gary Manpower, a CETA funded department. Coleman's liability was derived from his direction to a Manpower crew to construct political signs and perform tasks for Coleman's construction business. *Id.*

embezzling public funds.[32] Similarly, the *Harris* court found a strong federal interest in deterring the embezzlement of federal property (tiles). Consequently, it had no difficulty asserting federal liability "when the embezzler happens to be an employee not of the federal agency that owns the property but of a contractor who has custody of it."[33] The court was not impressed with the burden which employees must face to determine the financial relationships between their employer and the federal agency which funds their employer.

The most interesting aspect of the case was the court's analysis that the tiles were " 'things of value belonging to' HUD."[34] The defendants argued that since the CHA used federal money to purchase the tiles, the titles became tangible property of the CHA, as opposed to HUD. Therefore, the defendants claimed they were not liable under the federal statutes. Concluding otherwise, the court held that there is no difference between converting money from a HUD account and converting property which was purchased with HUD money. Any other interpretation would "encourage the aspiring embezzler to wait till the grant money was expended" to escape federal liability.[35] The court noted that it would have reached a different conclusion had the money not been traceable to a particular piece of property, i.e. the tiles.[36] However, because the federal funds used to purchase the tiles were maintained in a separate account, the *Harris* court was able to trace the funds.

B. "Possession" Construed

In *United States v. Taylor*,[37] the court held that exclusive ownership of a townhouse constituted constructive ownership of all the contents found on the premisis. Therefore, the defendant was guilty of "knowingly possessing" firearms found on the premisis.

Pursuant to a search warrant, Taylor's house was searched on January 12, 1982, just after Taylor had allegedly returned from an out of state trip. The purpose of the search was to locate cocaine and proof of residency.[38] During the search, the police discovered an unregistered auto-

32. *Id.* at 231. *See also* Chappell v. United States, 270 F.2d 274 (9th Cir. 1959).
33. *Coleman*, 590 F.2d at 445.
34. *Id.* at 446.
35. *Id.* ". . . federal funds commingled with with nonfederal funds [do] not lose their federal character simply because the account was administered by a nonfederal agency . . . evidence of federal control and monitoring of those funds [is] sufficient to support convictions [under a federal statute]." United States v. Gibbs, 704 F.2d 464, 466 (9th Cir. 1983).
36. *Harris*, 729 F.2d at 447.
37. 728 F.2d 864 (7th Cir. 1984).
38. *Taylor*, 728 F.2d at 865.

matic submachine gun with a fully loaded clip, and a silencer which fit over the barrel of the gun.[39] Taylor was immediately arrested. He denied possession of the gun and silencer and claimed that they belonged to a friend who was staying over at his residence while Taylor was away.[40]

A grand jury charged Taylor with possession of an unregistered machine gun and an unregistered silencer in violation of the National Firearms Act.[41] Despite Taylor's claim that the gun, silencer, and other confiscated contraband belonged to a friend whom Taylor had not seen, the jury convicted him.[42] This discussion focuses on Taylor's second point of appeal: that the evidence presented by the government was insufficient to prove that he "knowingly possessed" the machine gun and silencer.[43]

Taylor claimed that mere ownership of the house, standing alone, did not conclusively prove that he possessed all the contents in the house.[44] To support his contentions, he relied on *dicta* contained in *United States v. Craven*.[45] In *Craven*, the Sixth Circuit noted that "possession of a residence is insufficient to establish possession of all the contents of the house."[46] The *Taylor* court, however, based its opinion on the sufficiency of the evidence used to convict Taylor, as opposed to the legal definition of possession under the National Firearms Act.[47] Consequently, the *Craven* dicta was inapplicable insofar as it defined actual possession. However, the court relied on *Craven* to establish the necessary elements of constructive possession, which exists when one has dominion and control over an entity.[48] The *Taylor* court reasoned that since Taylor owned the townhouse and exercised complete dominion and control over it, he had constructive possession of the gun and silencer

39. *Id.* at 866, n.2.

40. *Id.* at 866-67.

41. "It shall be unlawful for any person . . . to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or . . . to receive or possess a firearm made in violation of this chapter; or . . . to receive or possess a firearm which is not registered to him . . ." 26 U.S.C. § 5861(b)-(d) (1982).

42. *Id.* at 867.

43. *Id.*

44. *Id.* at 868.

45. 478 F.2d 1329 (6th Cir.), *cert. denied*, 414 U.S. 866 (1973).

46. *Id.* at 1333.

47. *Taylor*, 728 F.2d at 868.

48. *Craven*, 478 F.2d at 1333. *Accord* United States v. Beason, 690 F.2d 439, 443 (9th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983); United States v. Alverson, 666 F.2d 341, 345 (9th Cir. 1982); United States v. Smith, 591 F.2d 1105, 1107 (5th Cir. 1979); United States v. Kalama, 549 F.2d 594, 596 (9th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977); United States v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976); United States v. Daniels, 527 F.2d 1147, 1149-50 (6th Cir. 1975); United States v. Hawke, 505 F.2d 817, 823 (10th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975); United States v. Black, 472 F.2d 130, 131 (6th Cir. 1972), *cert. denied sub nom.*, Leach v. United States, 411 U.S. 969 (1973).

which were found on the premises. Overall, the opinion is consistent with other cases which have relied on constructive possession to hold defendants guilty on similar charges.[49]

The court considered another appeal for possession of a firearm in *United States v. Martin*.[50] In *Martin*, the Seventh Circuit considered whether the defendant's conviction for receipt of a firearm,[51] or for possession of a firearm[52] should stand.[53]

Martin was convicted at trial after he was stopped by police while carrying a .22 caliber rifle. The rifle was manufactured for an auto supply company, but somehow made its way to Martin's sister's home, where he acquired it on the day he was arrested. A jury convicted Martin for possession and receipt of an unregistered firearm.[54]

On appeal, Martin convinced the court that the legislative history indicated that Congress did not intend to punish cumulatively both the receipt and possession of firearms.[55] The court held that possession is not the lesser included offense of receipt, but actually part of the same crime. Consequently "one cannot possess a firearm without receiving it. And when received, a firearm is necessarily possessed."[56]

Accordingly, the court held that both convictions could not stand, and the case was remanded to vacate one of the convictions.

C. Intent Versus Preparation to Commit a Crime

In *United States v. Schramm*,[57] the court of appeals gave new meaning to the phrase "intent to commit a robbery." The court held that Schramm committed sufficient preparatory steps and a crime would have

49. *See, e.g.*, United States v. Freed, 401 U.S. 601, 612 (1971) (Brennan, J., concurring); United States v. Gates, 491 F.2d 720, 721 (7th Cir. 1974).

50. 732 F.2d 591 (7th Cir. 1984).

51. "Any person who . . . has been convicted by a court of the United States or of a State . . . of a felony . . . and who receives, possesses, or transports in commerce . . . any firearm shall be fined not more than $10,000 or imprisoned not more than two years or both." 18 U.S.C. APP. § 1202 (1984).

52. "It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(h)-(i) (1982).

53. *See also* Ball v. United States, 734 F.2d 965 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 82 (1984).

54. *Martin*, 732 F.2d at 592.

55. *Id. See, e.g.*, United States v. Taylor, 635 F.2d 232, 233 (3d Cir. 1980); United States v. Conn, 716 F.2d 550, 552 (9th Cir. 1983); United States v. Girst, 645 F.2d 1014, 1017 (D.C. Cir. 1979); United States v. Larson, 625 F.2d 67, 69 (5th Cir. 1980).

56. *Martin*, 732 F.2d at 592.

57. 715 F.2d 1253 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1717 (1984).

occurred, but for the intervention of and Schramm's arrest by the FBI.[58] The decision is internally inconsistent and unsupported by the authority upon which it relies.

While Dan Schramm was on parole, he allegedly planned to rob a bank on the Northeast side of Milwaukee with Recardo Reys.[59] At 1:30 p.m. on the day of the planned robbery, Schramm and Reys met with an accomplice who was to obtain a hotel room which would serve as a hiding place after the robbery. The robbery was scheduled for 5:00 p.m.[60] Meanwhile, Schramm was scheduled to meet his parole officer downtown. Afterwards, he planned to go to the south side of town to obtain walkie-talkies for the robbery, then return downtown to commit the robbery.[61] The robbery never occurred, however, because Schramm was arrested during the meeting with his parole officer. He was subsequently convicted for attempted bank robbery.

Schramm denied planning a robbery and claimed that his preparatory activities were actually part of a scheme designed to entice Reys into a sexual liason at the hotel room.[62] The jury disbelieved his story and the court of appeals held that the robbery was thwarted only by Schramm's timely arrest.[63]

The court relied on its analysis from *Rumfelt v. United States*[64] to hold Schramm liable for attempted robbery.[65] The *Rumfelt* court held that "preparation alone is not enough, *there must be some appreciable fragment of the crime committed*, [the crime] must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter. . . ."[66]

In *Rumfelt*,[67] and in *United States v. Baker*,[68] the opinions relied on in *Schramm*, the defendant's criminal acts had progressed appreciably further than in the instant case.[69] Schramm, however, failed to commit

58. *Schramm*, 715 F.2d at 1255.
59. *Id.*
60. *Id.*
61. *Id.* at 1256 (Cudahy, J., concurring).
62. *Id.* at 1254.
63. *Id.* at 1253.
64. 445 F.2d 134 (7th Cir.), *cert. denied*, 404 U.S. 853 (1971).
65. *Rumfelt* held that the elements necessary to establish an attempt to commit a crime were 1) the intent to commit the crime; 2) execution of some overt act in pursuance of the intention; and, 3) failure to consummate the crime. 445 F.2d at 136.
66. *Id.* (emphasis added), *citing* People v. Buffum, 40 Cal. 2d 709, 256 P.2d 317, 321 (1953).
67. 445 F.2d 134 (7th Cir. 1971), *cert. denied*, 404 U.S. 853 (1971).
68. 129 F. Supp. 684 (S.D. Calif. 1955).
69. In *Baker*, the defendant entered a bank, wrote out a robbery demand note, discarded the note, left the bank to obtain a larger sack for the robbery proceeds, and then continued on to another bank which he ultimately robbed. He was prosecuted for the attempted robbery of the second bank. *Baker, Id.* at 686-87. In *Rumfelt*, the masked defendant threatened a witness with a gun in front of

an appreciable fragment of the crime with which he was charged. In fact, he merely began preparations to commit the crime. He had yet to complete his preparations (as evidenced by his failure to procure the walkie talkies); nor was his crime about to occur at the time he was arrested. Therefore, the opinion is inconsistent with the cases which it relies on. Moreover, in *United States v. Green*,[70] another Seventh Circuit case, the court found that a criminal attempt did not exist until the criminal completed all the elements of the offense which he could ever commit and which were within his control.[71]

Commentators have claimed that the distinction between preparing and attempting to commit a crime is nebulous.[72] However, neither those commentators, nor case law,[73] support the majority's conclusion in the instant case. Even the concurring opinion agrees that an appreciable fragment of the crime was not committed.[74] Rather, the concurring opinion felt Schramm's arrest was justified because some of his preparatory steps could have caused public safety concerns.[75] Overall, *United States v. Schramm*[76] is a poorly reasoned and wrongly decided case.

III. FOURTH AMENDMENT

A. Airport Encounter Cases

During the 1983-84 term, the court considered four cases[77] relating to whether the encounter between an individual and police officers or federal Drug Enforcement Administration agents (DEA) at O'Hare In-

the bank which the defendant intended to rob, then changed his mind and retreated without committing the robbery. *Rumfelt*, 445 F.2d at 135.

70. 511 F.2d 1062 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975).

71. *Id.* at 1072.

72. "[T]he corpus delicti of attempted robbery does not happen until the intended victim's vicinity is reached or he is subjected to some physical contact or put in fear." Stahorn, *Preparation for Crime as a Criminal Attempt*, 1 WASH. & LEE L. REV. 1, 13 (1939). "[T]he defendant's conduct must pass that point where most men . . . would think better of their conduct and desist." Skilton, *The Requisite Act in Criminal Attempt*, 3 U. PITT. L. REV. 308, 309-10 (1937).

73. In United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975), the court held that "the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime." *Id.* at 376. In Gregg v. United States, 113 F.2d 687, 690-91 (8th Cir.), *rev'd on other grounds*, 116 F.2d 609 (8th Cir. 1940), where the court noted that "an attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution, . . . [t]he direct movement towards the commission of the crime after preparations have been made." 113 F.2d at 690. *See also* People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927).

74. *Schramm*, 715 F.2d at 1256 (Cudahy, J., concurring).

75. *Id.* at 1253.

76. *Schramm*, 715 F.2d at 1253.

77. United States v. Cordell, 723 F.2d 1283 (7th Cir. 1983) *cert. denied*, 104 S. Ct. 1291 (1984); United States v. $84,000 U.S. Currency, 717 F.2d 1090 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 131 (1984); United States v. Morgan, 725 F.2d 56 (7th Cir. 1984); United States v. Notorianni, 729 F.2d 520 (7th Cir. 1984).

ternational Airport constituted a seizure within the ambit of the fourth amendment.[78] Each case involved Chicago police officers or DEA agents, assigned to narcotics duty at O'Hare, who monitored passengers arriving from flights originating in narcotics "source cities."[79]

As passengers disembarked, police authorities surveyed the passengers for suspicious persons.[80] In each case the defendants[81] attracted the attention of the authorities who then proceeded to follow them through the airport. At a certain point, the authorities approached the defendants and identified themselves as police or DEA agents. In two cases[82] the authorities asked the defendant to speak with them. In the third case,[83] the agent asked the defendant and his companion if the agent could question them. In the fourth case,[84] the agents simply asked the two defendants for identification. In each instance, the defendants agreed to the requests and spoke with the agents. Subsequently, the agents asked the defendants if they would consent to a search of their luggage. All consented.[85] In three of the cases, *United States v. Cordell*,[86] *United States v. Morgan*,[87] and *United States v. Notorianni*,[88] agents found narcotics in the defendant's luggage. In the fourth case, *United States v. $84,000 U.S. Currency*,[89] agents discovered large quantities of money upon conducting a pat-down search of the two defendants.

78. The fourth amendment provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV.

79. "Source cities" are cities which serve as distribution points for large quantities of drugs to other points in the United States. *See* United States v. $84,000 U.S. Currency, 717 F.2d 1090, 1092 n.1 (7th Cir. 1983) *cert. denied*, 105 S. Ct. 131 (1984).

80. *See Id.* n.2 and accompanying text. The Drug Enforcement Agency has developed a "drug courier's profile" listing common characteristics of drug couriers. Some characteristics are an anxious manner, causal dress, suspicious conduct, and arriving from Florida fair-skinned rather than tanned. The opinion in *$84,000 U.S. Currency* indicates that DEA agents followed the defendants because they displayed characteristics included in the DEA courier profile. It is likely that authorities also used the DEA courier profile in deciding to follow the defendants in the other three cases. However, the court's opinions do not explicitly state this.

81. One case, United States v. $84,000 U.S. Currency, 717 F.2d 1090 (7th Cir. 1983) *cert. denied*, 105 S. Ct. 131 (1984), was an action brought by the United States government involving a civil forfeiture proceeding against money in possession of Donald Holmes and Max Reyes. Although Holmes and Reyes were claimants in the civil case, they will be included in the general designation of "defendants" in the course of this discussion.

82. *Cordell*, 723 F.2d at 1284; *Morgan* 725 F.2d at 57.

83. *Notorianni*, 729 F.2d at 521.

84. *$84,000 U.S. Currency*, 717 F.2d at 1093.

85. Although there was conflicting testimony in some cases at the district court level, the appellate court in those instances deferred to the district courts which believed the police officers' or DEA agents' testimony rather than the defendants'. *See Morgan*, 725 F.2d at 58 and *$84,000 U.S. Currency*, 717 F.2d at 1096. Furthermore, each case involved a bench trial.

86. 723 F.2d 1283 (7th Cir. 1983), *cert. denied* 704 S. Ct. 1291 (1984).

87. 725 F.2d 56.

88. 729 F.2d 520 (7th Cir. 1984).

89. 717 F.2d 1090 (7th Cir. 1983) *cert. denied* 105 S. Ct. 131 (1984).

After discovering the money or drugs, the agents arrested the defendants. The defendants in *Cordell, Morgan* and *Notorianni* were convicted of possession of cocaine with intent to distribute.[90] The defendants' $84,000 in *$84,000 U.S. Currency* was seized pursuant to 21 U.S.C. § 881(a)(6).[91]

The common question presented in each case concerned whether the initial consensual encounter between the authorities and the defendants developed into an illegal detention or "seizure" under the fourth amendment so that any evidence obtained in the subsequent searches was tainted and inadmissible as "fruit of the poisonous tree."[92] The court approached each of the cases with the assumption made explicit by the Supreme Court in *Florida v. Royer*.[93]

> Law enforcement officers do not violate the fourth amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.[94]

However, the court also applied tests to determine if the airport encounters rose to the level of a seizure[95] and, if a seizure had occurred, whether it was justified[96] under the fourth amendment.[97]

90. 21 U.S.C. § 841(a)(1).

91. 21 U.S.C. § 881(a)(6) provides that money that is intended for use in a drug transaction is subject to forfeiture.

92. *See* Wong Sun v. United States, 371 U.S. 471, 484-87 (1963).

93. 460 U.S. 491 (1983).

94. *Id.* at 497 (1983). *See also infra* notes 82 and 83.

95. *See infra* notes 98-101 and accompanying text.

96. *Citing* United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975), the Seventh Circuit stated that the test was "whether the officers had a reasonable, articulable suspicion of criminal activity—the standard of justification for investigatory steps." 723 F.2d at 1285.

97. The issues of whether an encounter between air travelers and authorities constitutes a seizure and whether such a seizure is justified have been addressed in three Supreme Court cases: Florida v. Royer, 460 U.S. 491 (1983), Reid v. Georgia, 448 U.S. 544 (1980), and United States v. Mendenhall, 446 U.S. 544 (1980). In these cases, government agents approached defendants who displayed characteristics included in the DEA drug courier profile. With the defendants' alleged consent, the agents searched the defendants' luggage or person, found narcotics and arrested the defendants.

In a plurality opinion in *Mendenhall*, two justices concluded that the defendant had not been seized because she had "no objective reason to believe that she was not free to leave." *Mendenhall* at 555. Three other justices concluded that although the defendant may have been seized, the seizure was lawful because the agents had a reasonable and articulable suspicion of criminal activity based on her behavior in the terminal. *Id.* at 564, and 565. The dissent, however, disagreed, and characterized the defendant's behavior as consistent with "the kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal." *Id.* at 576.

In *Reid* the Court held that a reasonable suspicion of criminal behavior does not automatically arise because an individual fits within the DEA courier profile. Finally, in *Royer*, a plurality of four justices, stated that while authorities initially had a reasonable suspicion of criminal activity upon which to detain the defendant, when the detention later rose to the level of an arrest unsupported by probable cause, the defendant's subsequent consent to a luggage search was tainted and the evidence seized had to be suppressed. *Royer* at 502-3, 507. In a concurring opinion Justice Brennan con-

The seventh circuit's test for determining whether an individual has been seized was first articulated in *United States v. Black*.[98] In *Black*, the court stated that "[a]s long as a person remains at liberty to disregard a police officer's request for information, no constitutional interest is implicated."[99] This test was based on the plurality opinion in *United States v. Mendenhall*.[100] In *Mendenhall*, Justice Stewart held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person could have believed that he was not free to leave."[101]

Recognizing that determination of whether an individual has been seized involves a highly factual analysis, the *Black* court took two additional steps. First, it outlined three factors to be considered in determining whether a seizure in the context of an airport surveillance had occurred: the conduct of the police, the characteristics of the individual citizen, and the physical surroundings of the encounter.[102] Second, it held that because the district judge has "the opportunity to observe the testimony and demeanor of the witnesses"[103] the court should defer to the district court's decision as to whether a seizure had occurred by employing only a "clearly erroneous" standard of review.

The differences among the four cases turn on the facts and the court's interpretation of the facts. In addition, dissenting opinions in two cases[104] and a reluctant concurrence in a third case[105] indicate dissatisfaction within the court regarding the development and application of the law at issue.

In the first case, *United States v. Cordell*,[106] the court held that the initial encounter between police officers and the defendant at O'Hare

cluded that the defendant was seized once the DEA agent identified himself and asked for Royer's ticket and identification. He further concluded that the facts of the situation did not provide the authorities with a basis for a reasonable suspicion of criminal activity.

98. 675 F.2d 129 (7th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983).

99. *Id.* at 134. *But see Id.* at 138 (J. Swygert dissenting).

100. 446 U.S. 544 (1980).

101. *Id.* at 554. An objective reasonable person test has since been adopted in a civil suit by a majority of the Supreme Court to determine whether or not an individual has been seized or is in custody. Immigration and Naturalization Service v. Delgado, 104 S. Ct. 1758, 1762 (1984). An objective reasonable person test has also been applied in the criminal context. *See* Berkemer v. McCarty, 104 S. Ct. 3138 (1984). *See also*, Minnesota v. Murphy, 104 S. Ct. 1136 (1984).

102. The three factors are: the conduct of the police, the characteristics of the individual citizen, and the physical surroundings of the encounter. 675 F.2d at 134.

103. *Id.* at 134. In his dissent, Judge Swygert believed that the use of the "clearly erroneous" standard of review was incorrect because the matter in dispute was one of law rather than fact. He observed that the court was not disputing the district court factual findings, but whether those facts constituted a seizure under the Fourth Amendment. *Id.* at 138.

104. *$84,000 U.S. Currency*, 717 F.2d at 1102, and *Notorianni*, 729 F.2d at 523.

105. *Cordell*, 723 F.2d at 1286.

106. 723 F.2d 1283 (7th Cir. 1983).

initial encounter between police officers and the defendant at O'Hare Airport developed into a detention, *i.e.* a seizure within the meaning of the fourth amendment. However, the court determined that the detention was justified under the fourth amendment because the police had a reasonable, articulable suspicion of criminal activity at the time the encounter became a detention.[107]

In *Cordell*, two Chicago police officers, assigned to narcotics duty at O'Hare, observed Cordell leave the arrival area at a fast pace.[108] The officers followed him out of the airport to a well-lit public area. They approached Cordell, identified themselves, and asked Cordell if he would speak to them. Cordell agreed.[109] The officers asked him for identification. Cordell gave one officer his driver's license and his airline ticket. The officers noted that Cordell's ticket had been paid for in cash and issued under a different name. During this period, Cordell appeared very nervous.[110] The officer to whom he had initially given his ticket handed it to the second officer and informed him that they were conducting a narcotics investigation. He asked Cordell if he was carrying narcotics. When Cordell answered no, the officer asked if he could look in Cordell's travel bag. Cordell agreed.[111] Cordell further consented to the officer's request to open an envelope he found inside the travel bag. The officer discovered a plastic bag containing white powder and arrested Cordell.[112]

The court held that Cordell was detained once the officer to whom Cordell had given his ticket and driver's license handed them over to the second officer. However, the court found that this detention did not exceed the bounds of an investigatory stop.[113] Thus in determining whether the detention violated Cordell's constitutional rights, the court considered whether the officers had a reasonable articulable suspicion of criminal activity which would justify an investigatory stop.[114] The court concluded that the officers did have a reasonable suspicion at the time the encounter turned into a seizure.[115] At that point, the officer knew that Cordell had arrived from Miami, a source city; the names on his ticket and driver's license were different; Cordell had paid for his ticket in cash;

107. *Id.*, at 1285, *citing* United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975).
108. *Cordell*, 723 F.2d at 1284.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1285, *citing Royer*, 460 U.S. 491, 497, 501 (1983).
114. *Id.* at 1285, *citing Brignoni-Ponce*, 422 U.S. at 882.
115. *Id.* at 1285.

Cordell appeared quite nervous and became more so as the officers continued to question him. The court held that the "officers clearly were 'entitled to assess the facts in light of [their] experience' . . . and to suspect Cordell of a violation of the narcotics laws."[116]

Although Judge Swygert concurred with the opinion, he did so reluctantly as he felt "constrained by the principle of *stare decisis* to vote for affirmance."[117] Citing *Mendenhall*, he observed that an encounter with the police rises to the level of a seizure when, if in view of all the circumstances, a "reasonable person would have believed that he was not free to leave."[118] Judge Swygert believed that as a factual matter people do not feel free to leave when they are stopped by officers who identify themselves as narcotics investigators.[119] However, he acknowledged that cases such as *Mendenhall* and *Royer* demonstrate that "whether a reasonable person would feel free to leave is a technical legal construct rather than a simple factual inquiry"[120] and that situations involving requests for questioning do not rise to the level of a seizure.[121]

Judge Swygert also took issue with the majority's approval of the officer's interpretation of the facts of the situation in light of their experience as a basis for an articulable suspicion. Swygert observed that, "[t]he officer's intuition based on experience does not constitute an independent datum."[122] However, once again deferring to precedent, he acknowledged that the facts of the instant case, although weak, were similar to those in *Royer v. Florida*,[123] where the Supreme Court found adequate grounds for temporarily detaining an individual[124] in order to verify or

116. *Id.* at 1285, *citing Brignoni-Ponce*, 422 U.S. at 885.

117. *Id.* at 1286.

118. *Id.*

119. Judge Swygert here takes a position similar to Justice Brennan in his concurring opinion in *Royer*.

120. *Cordell*, 723 F.2d at 1286.

121. In a plurality opinion in *Mendenhall*, Justice Stewart said that "[t]he respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions." 446 U.S. 544, 555 (1980). In *Royer*, a majority of the court made clear that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. 460 U.S. at 497.

122. *Cordell*, 723 F.2d at 1287.

123. 460 U.S. 491 (1983).

124. In *Royer*, the court ultimately found that the defendant had been unlawfully arrested prior to consenting to a search. However, in *dicta*, the Court noted that prior to the time the encounter developed into an arrest, the police had a reasonable articulable suspicion of criminal activity, sufficient to support a temporary detention. The court observed that the officers discovered Royer was using an assumed name, had paid cash for a one-way ticket, had put a different name on his luggage tickets, and appeared nervous. *Id.* at 501.

dispel their suspicions.

Finally, after taking issue with the court's conclusion that Cordell's consent was in fact true consent, but again deferring to precedent,[125] Swygert concluded with a strong warning. He warned that the practice of stopping people for questioning when

> [f]ew people will assert their rights, even if known in the face of police authority. . . . [This] erodes the principle of freedom from official interference guaranteed by the fourth amendment, and invites the use of arbitrary or discriminatory principles of selection abhorrent to the fourth amendment.[126]

In contrast to *Cordell*, the court in *United States v. $84,000 U.S. Currency*,[127] found that no seizure had occurred from the time Drug Enforcement Administration (DEA) agents at O'Hare Airport approached and questioned the appellants up until the time appellants consented to a search of their luggage.

Like the police officers in *Cordell*, the DEA agents were assigned to monitor passengers arriving on flights from cities considered to be sources for drugs. Upon determining that defendants Holmes and Reyes fit the DEA "drug carrier profile,"[128] the agents followed the appellants from the time they disembarked from their first flight until they checked in at a different gate approximately fifty minutes later for another flight. After the last boarding call, the agents approached the two appellants and asked them for identification. They each produced a driver's license and airline ticket. The names on the tickets matched the names on the licenses. However, the agents retained the tickets. One agent asked Holmes and Reyes if they had luggage. They responded affirmatively. The agents observed that Reyes' ticket had no baggage stub. They also observed that Holmes and Reyes were nervous.[129] The agents asked Holmes and Reyes if they would consent to a search of their luggage and informed them of their right to refuse. Holmes and Reyes consented.[130] After one of the agents located the luggage, the two agents and the two appellants went downstairs to a non-public area in order to conduct a

125. *See Mendenhall*, 446 U.S. at 557-58. (Whether respondent's consent to accompany agents was voluntary is to be determined by the totality of the circumstances.)

126. *Cordell*, 723 F.2d at 1288.

127. 717 F.2d 1090 (7th Cir. 1983). In addition to claiming that the evidence was inadmissible as "fruit of the poisonous tree" the claimants/appellants contended that the DEA agent's pat-down search was unreasonable under the Fourth Amendment and that the money discovered was thus inadmissible. The appellate court affirmed the district court's rejection of this argument on the grounds that it was a proper protective search. *Id.* at 1098 *citing* Terry v. Ohio, 392 U.S. 1 (1968) and Sibron v. New York, 392 U.S. 40 (1968).

128. *See supra* note 80.

129. *$84,000 U.S. Currency*, 717 F.2d at 1092.

130. *Id.*

search. There, one of the agents observed bulges in Reyes' pant legs near the tops of his boots. The agent proceeded "for [his] own safety" to perform a pat-down search[131] of Reyes. He also directed Reyes to remove his boots, whereupon large quantities of money came spilling out. Upon searching Holmes, the agent found more money. Holmes and Reyes were then arrested.

In reviewing the district court's application of *Mendenhall*'s "reasonable person" test,[132] the appellate court employed a clearly erroneous standard of review. The court would accord deference to the lower court's findings of fact unless they were unsupported by the record.[133] The court examined the factors articulated in *Black*[134] in determining whether a "reasonable person would have believed that he was not free to leave."[135] The court upheld the district court's determination that no seizure had occurred in the concourse area and that the defendants "were free to walk away at that time."[136] The court further upheld the district court's finding that the appellants had voluntarily consented to the luggage search before going downstairs and had voluntarily accompanied the agents downstairs.[137] After considering other issues,[138] the court affirmed the district court's forfeiture order.[139]

Unlike *Cordell* where he reluctantly concurred, Judge Swygert dissented. He reiterated his position in *Black* that the clearly erroneous standard of review is inappropriate. Judge Swygert maintained that the question before the court was a question of law—whether the facts con-

131. *See supra* note 127.

132. *See supra* note 101 and accompanying text.

133. *See supra* note 103 and accompanying text.

134. *See supra* note 102.

135. *$84,000 U.S. Currency*, 717 F.2d at 1096. The district courts found that 1) the officers did not restrain the appellants physically or by force of authority; 2) there was no evidence to suggest the appellants required special protection from police contacts; 3) there was nothing coercive in the physical setting of the initial encounter at the concourse. *Id.* at 1095-96.

136. *Id.* at 1097.

137. The dissent believed this finding to be clearly erroneous. According to the facts recited by the majority, when Reyes expressed hesitation about consenting to a search of the luggage, the DEA agents told Holmes and Reyes that they were not interested in small quantities of drugs. The agents told them that if they found such small quantities, they would take them and let Holmes and Reyes go. The majority found that Holmes and Reyes "voluntarily accompanied the officers in a spirit of apparent cooperation." *Id.* at 1096. By contrast, the dissent found that consent was not voluntarily given and the "petitioners could reasonably conclude that their freedom to leave was contingent upon their consent to the search." *Id.* at 1103. In note 8, the majority characterises Swygert's finding as "mere speculation, at best," claiming that Swygert "once again . . . has chosen to credit" the defendant's testimony.

138. The court held that the pat-down search was justified under Terry v. Ohio, 392 U.S. 1 (1968). It also held that statements Holmes and Reyes made to one of the agents were admissible at the forfeiture proceedings. Finally the court found that the $84,000 seized was properly seized pursuant to the forfeiture statute.

139. *$84,000 U.S. Currency*, 717 F.2d at 1102.

stitute a fourth amendment seizure—and therefore, deference is inappropriate.[140]

In reviewing the record, Judge Swygert criticized the district court's findings. Applying Justice Stewart's "reasonable person" test, he concluded that the agents had actually seized the appellants in the concourse area, prior to obtaining their consent to search their luggage. In support of his conclusion, Justice Swygert first observed that even though the defendants' licenses and tickets were in order, the agents took and retained the documents. The agents returned Reyes' ticket only to permit him to ask the airline why no baggage stubs were attached.[141] Second, in further disagreement with both the appellate and district courts, Judge Swygert concluded that the defendants did not voluntarily consent to the search of their luggage.[142] Finally Judge Swygert concluded that given that Holmes and Reyes were seized, the seizure was nonetheless unlawful because the DEA agents lacked "knowledge of specific and articulable facts to justify the seizure."[143]

In *United States v. Morgan*,[144] the court never decided whether the defendant had been seized. Morgan arrived at O'Hare Airport. She and a traveling companion, Steuwe, attracted DEA agents' attention. The agents followed them. After Morgan and Steuwe separated, two agents approached Steuwe and talked with him. He told them he was traveling alone. With Steuwe's consent, the agents searched a handbag he was

140. *Id.* at 1103. In a concurring opinion, Judge Cudahy also stated that the question of whether an individual has been seized is a matter of law and that the "clearly erroneous" standard is therefore inapplicable. *Id.* at 1102. However Judge Cudahy agreed with the majority's result and found that "as a matter of fact and law . . . there was no seizure." *Id.* In response, the majority observed that Judge Cudahy previously accepted the "clearly erroneous" standard, but was "now choos[ing] to disregard the accepted law of this circuit." The majority also noted that Judge Swygert was disregarding the established precedent and refusing to defer to the district court findings. *Id.* at 1095 n.6.

141. Judge Swygert observed that the defendants could reasonably conclude that they were not free to leave because they had been deprived of their tickets and they perceived they could move only with permission. *Id.* at 1102-3. Inexplicably, neither the majority nor the dissent attempted any explicit comparison with *Cordell*, which was decided the same day, on the issue of the agents retaining the tickets.

142. *See supra* note 138.

143. Here again the majority and the dissent collided head-on in regard to the district court's finding regarding this matter. Although not necessary to its legal conclusions, the majority strongly defended the district court's finding that the facts gave rise to an articulable suspicion and chastised the dissent for not giving due deference to the factual findings of the district court. *See* 717 F.2d 1096 n.7, 1103-04.

144. 726 F.2d 56 (7th Cir. 1984). The defendant was convicted of possession of cocaine with intent to distribute and appealed the district court's denial of her motion to suppress evidence. The defendant contended that the cocaine had been seized pursuant to an unlawful seizure of her own person. At the bench trial the district court believed the agents' testimony rather than Morgan's. The facts that follow are based on the findings of the district court.

Morgan and asked to speak to her. When she agreed, they asked her for identification. She presented her own driver's license and airplane tickets in the name of Mr. and Mrs. Steuwe. She appeared nervous.[146] The agents identified themselves as narcotics agents and asked if she would consent to a search of her baggage. Morgan consented to a search. The agents searched and found nothing.[147] During this time Morgan was looking about for Steuwe, and one of the agents suggested she look outside. Morgan did so and left her luggage with the agents. When she returned the agents asked her if she would consent to a second search. She did, and the agents found cocaine in the center of a sanitary napkin box and arrested her.[148]

After finding that the defendant voluntarily consented to both searches, the court raised the question of whether Morgan nonetheless had been seized under the *Mendenhall* and *Black* standards. Specifically, the court compared the facts of the *Morgan* case to *Mendenhall*[149] and *Cordell*.[150] However, the court concluded that it did not have to decide whether she was actually detained because during the course of the consensual conversation the agent had "enough reasonable, articulable suspicions to detain her for investigation."[151] The court based this conclusion on three facts. First, Morgan's ticket had Steuwe's name on it. Second, Morgan said she was travelling with Steuwe and that one of her pieces of luggage was his, whereas Steuwe said he was travelling alone without luggage. Third, Morgan "appeared to be nervous and frightened."[152]

The court also rejected Morgan's contention that, after the agents searched her luggage and found nothing, the subsequent questioning constituted an illegal detention. Rather, the judges agreed with the district court which distinguished *Royer* and other cases.[153] The judges appar-

146. *Id.*

147. *Id.*

148. *Id.* at 58.

149. 446 U.S. 544 (1980).

150. 723 F.2d 1283. *See supra* notes 221-241 and accompanying text. The court found that the circumstances in the instant case were less restrictive than *Mendenhall*, where Justice Stewart, joined by Justice Rehnquist, found that no seizure had occurred. It also found the situation quite similar to *Cordell* except for the fact that the agents did not retain Morgan's tickets during their initial encounter. In *Cordell* the fact that the agents retained Cordell's ticket transformed the encounter into a seizure. *See Cordell*, 723 F.2d 1283.

151. *Morgan*, 725 F.2d at 60.

152. *Id.*

153. In *Royer* the defendant, without his consent, was taken to a small room to wait while detectives retrieved his bags. The Court found that "[a]s a practical matter, Royer was under arrest." *Cf.* United States v. Place, 462 U.S. 696, (1983) *and* United States v. Moya, 704 F.2d 337 (7th Cir.), *vacated and remanded*, 104 S. Ct. 418 (1983) *on remand* 445 F.2d 1044 (7th Cir. 1984).

ently found that Morgan was free to leave because the agents never moved or took her luggage. In addition, the court reiterated that Morgan "consented to both searches in a public place 'on the spot.' "[154] A unanimous court affirmed the lower court conviction.

Finally in *United States v. Notorianni*,[155] the Seventh Circuit once again considered whether a consensual encounter at O'Hare Airport escalated into an unlawful seizure and thereby vitiated the citizen's subsequent consent to the search of his luggage. The court took the opportunity to reaffirm, although somewhat defensively, the objective reasonable person test which it had borrowed from Justice Stewart's plurality opinion in *Mendenhall* and articulated in *Black*.[156] The court emphasized that the issue was not whether Notorianni felt free to disregard the DEA agent's questions, but whether the reasonable person would have felt free to disregard the agent's questions. Although the court was "troubled" that the district court did not make a specific finding of fact that a reasonable person in the defendant's position would have felt free to disregard the agents, the court reviewed the record, applied the test and concluded as a matter of law that the defendant had not been seized.[157]

In *Notorianni* the defendant and his girlfriend were approached by an agent. The agent identified himself and asked the couple's permission to ask some questions. Notorianni agreed and the three moved to the side of the concourse. The agent asked for identification. Notorianni presented his ticket. The agent told him that he was conducting a narcotics investigation. He asked Notorianni if he could search his luggage, informing him of his right to refuse. Notorianni consented; the agent found cocaine in one of his suitcases and arrested Notorianni.

In concluding that Notorianni had not been seized, the court observed:

> We know from *Royer* and *Black* and a host of other airport-surveillance cases that merely accosting a person in an airport, identifying yourself as a federal agent and asking that person whether he is willing to answer questions do not create a setting in which the average person does not feel free to thumb his nose at the agent. (Maybe this is a wrong guess about what the average person feels in this situation but it is the law of this circuit).[158]

154. In *Royer* the court observed that if Royer had consented to a search "on the spot" while in a public area, the evidence would have been admissible. 460 U.S. at 505.

155. 729 F.2d 520 (7th Cir. 1983).

156. As a result of later Supreme Court cases, the objective reasonable person test is now clearly the test to apply to determine when an individual has been seized. *See* note 101 *supra*.

157. *Id.* at 523.

158. *Id.* at 522.

is the law of this circuit).[158]

In support of its conclusion the court found the fact that the agent told Notorianni that he was conducting a narcotics investigation made the circumstances less coercive.[159] The court also found that the fact that a total of four people were ultimately accosted by two agents made no difference[160] to the determination. Finally, the majority refused to attach any significance to the fact that the agent questioning Notorianni did not explicitly state that he was free to leave. Rather, the court found the statement implicit in the agent's inquiry. The court observed that "the interrogatory mode impl[ied] that the choice to cooperate was Notorianni's."

Judge Cudahy in his dissent found unacceptable the majority's willingness to conclude as a matter of law that Notorianni was not seized. He objected to the majority's willingness to overlook the absence of a specific district court finding on Notorianni's freedom to leave. He reminded the court of its previous reliance on and deference to the district court's findings of facts.[161] Judge Cudahy stated that "[t]he requirement of unequivocal factual findings is . . . hardly excessive in light of the almost unlimited combinations of factual circumstances which surround a procedure obviously open to subtle and not so subtle abuse."[162]

B. Warrantless Searches

In *United States v. Griffin*,[163] the Seventh Circuit held that an automobile inventory search which consisted of opening an unlocked storage compartment in the interior of a car, removing an unsecured brown paper bag, removing from the bag a partially secured taped package, and opening the unsecured end of the package did not constitute an unreasonable search under the fourth amendment. The court reversed the lower court's order which suppressed the introduction of the narcotic substance into the criminal proceeding.

In *Griffin*, the Indiana state police stopped a motorist, Jerome Griffin, for a traffic violation. The police impounded the car upon discovering that neither the defendant, Jerome, nor his passenger Charles Griffin, could lawfully drive the vehicle.[164] Later, in the presence of Jerome and a towing service attendant, a state trooper began a routine inventory

158. *Id.* at 522.
159. *Id.* at 522-23.
160. *Id.* at 523.
161. *See, e.g.*, United States v. Black, 675 F.2d 129 (1982).
162. *Notorianni*, 729 F.2d at 523.
163. 729 F.2d 475 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 117 (1984).
164. Jerome Griffin was unable to produce a driver's license. As for Griffin's passenger, police

search of the automobile.[165] The trooper opened the lid of the storage compartment and found two loaded guns.[166] He also noticed a paper bag underneath the guns. He smelled a strange odor eminating from the bag. Upon opening the bag, he found a package wrapped in brown paper and secured with tape. The trooper then placed the package back in the bag and returned the bag and the guns to the storage compartment.[167] He directed the towing service attendant to drive the automobile two miles down the road to a state police gas station.[168]

There, the trooper continued his inventory search. At that time, the trooper decided to inventory the contents of the bag. The trooper removed the brown package from the bag and opened the untaped end. He observed a clear plastic bag containing a yellow substance, later identified as a controlled substance.[169]

In reviewing the government's appeal of the trial court's order suppressing the evidence, the court agreed with the district court's finding that the trooper lawfully impounded the automobile.[170] However, unlike the district court, the Seventh Circuit concluded that the trooper conducted a routine inventory search in accordance with state police standard operating procedures.[171] In addition, the court disagreed with the district court's finding that the trooper should not have opened the brown paper bag.[172] In reaching that conclusion, the court relied heavily on two Supreme Court cases, *South Dakota v. Opperman*,[173] and *Illinois v. Lafayette*.[174]

In *Opperman*, the Supreme Court upheld an automobile inventory search in which police opened an unlocked glove compartment and found a plastic bag containing marijuana. In *Lafayette*, the Supreme Court upheld a stationhouse inventory search in which police searched inside the arrestee's shoulder bag and found a cigarette case package containing amphetamines. The *Lafayette* court employed a balancing test in determining that the search was reasonable. Specifically, it balanced the

arrested him after discovering that an outstanding bench warrant existed for his failure to appear in court for an unrelated traffic violation. *Id.* at 477.

165. *Id.* at 478.

166. *Id.* at 479.

167. *Id.*

168. *Id.*

169. 805 grams of phencycledine, a controlled substance. *Id.*

170. *Id.* at 482. *See also* South Dakota v. Opperman, 428 U.S. 364 (1976).

171. *Griffin*, 729 F.2d at 482-83, n.10. *See also* South Dakota v. Opperman, 428 U.S. 364 (1976).

172. The district court believed that the trooper simply should have inventoried the paper bag or at most should have removed the package and inventoried that, but should not have opened it. *Griffin*, 729 F.2d at 484.

173. 428 U.S. 364 (1976).

174. 462 U.S. 640 (1983).

degree to which the inventory search promoted the government's interests, against the degree to which the search intruded upon the arrestee's fourth amendment interests. The court found that the government's interests, first articulated in *Opperman*, in protecting the owner's property, protecting the police from false claims and protecting the police or others from danger, outweighed the intrusion on the arrestee's fourth amendment rights.[175]

In *Griffin*, the Seventh Circuit applied the same balancing test to the automobile inventory search. The Seventh Circuit held that in light of all the circumstances, including the guns and the strange smelling bag, the government's interests incident to the search outweighed the defendants' privacy interest in the unsecured brown bag. The court further held that the government's interests outweighed any expectations of privacy that the defendants may have had in the partially taped, wrapped package inside the brown bag. Here, the court relied particularly on the government's interest in protecting the police from danger. The court stated that, "[t]he contents . . . could have ranged from worthless sand to valuable diamonds to dangerous instrumentalities of a crime, including additional weapons, contraband or explosives."[176]

Finally, relying on *Lafayette*, the Seventh Circuit concluded that although the inventory search could have been conducted by less intrusive means,[177] that did not render it unreasonable. Citing *Lafayette*, the court stated that " 'our role is to assure against violations of the Constitution' not to 'write a manual on administering [the] routine, neutral procedure' of an automobile search."[178]

In his dissenting opinion, Judge Eschbach argued that the search was unconstitutional because the government failed to demonstrate that the search "was truly inventorial, and not investigative."[179] In Judge Eschbach's view, the government failed to demonstrate that the inventory search was conducted in "accordance with established inventory procedures" required by *Opperman*.[180] Judge Eschbach noted that the trooper did not comply with the Indiana State Police procedures which reflected a policy of inventorying cars prior to towing them away. Rather, the trooper first searched the car, observed the guns and brown paper bag and then turned the car over to the towing service attendant.

175. *Id.* at 643-45.
176. *Griffin*, 729 F.2d at 486, citing *Lafayette*, 462 U.S. at 644.
177. *Griffin*, 729 F.2d at 487.
178. *Id.*
179. *Id.* at 488.
180. *Id.* at 488. *See Lafayette*, 462 U.S. at 647 and *Opperman*, 428 U.S. at 372.

Only later, did the trooper continue his search and decide to open what he described as the "suspicious"[181] package. Because the trooper's actions did not conform to the established procedures, the judge concluded that the inventory search was unconstitutional. Finally, Judge Eschbach warned that the constitutional requirement that inventory searches be carried out in accordance with standard procedures would be rendered "meaningless" if such procedures allowed for the exercise of absolute discretion by the searching officer.[182]

C. *Franks Hearing*

In two related cases, *United States v. McDonald*[183] and *United States v. Reed*,[184] the court considered whether the defendants were entitled to a *Franks*[185] hearing regarding the validity of an affidavit supporting a search warrant. In both *McDonald* and *Reed* the court held that self-serving testimony was insufficient to rebut the presumption of the validity of an affidavit.[186] Therefore, the court rejected the defendants' claims that they were entitled to a *Franks* hearing in order to prove that the affiant had included false statements intentionally or recklessly. The court also directly criticized *People v. Garcia*,[187] an Illinois appellate case, upon which McDonald relied.

Both McDonald and Reed were arrested after police searched McDonald's apartment pursuant to a search warrant. At the time, Martha Reed was living with McDonald in the apartment. The warrant provided for the search of James McDonald's apartment in order to seize cocaine and proof of residency. The warrant was issued pursuant to an affidavit sworn to by a police detective. The detective had obtained information, from an historically reliable informant, that McDonald had cocaine in his apartment.

On appeal, McDonald and Reed argued that the lower court erred in denying them a *Franks* hearing pursuant to their motions to suppress the seized evidence. McDonald argued that he was entitled to a *Franks*

181. *Griffin*, 729 F.2d at 488.

182. *Id.* at 489.

183. 723 F.2d 1288 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2360 (1984).

184. 726 F.2d 339 (7th Cir. 1984).

185. *See* Franks v. Delaware, 438 U.S. 154 (1978). In a *Franks* hearing a defendant is given the opportunity to show that an affiant, intentionally or with reckless disregard for the truth, included false statements in the affidavit and that the finding of probable cause depended on those false statements. However, the defendant must first make a "substantial preliminary showing" of the above before being granted an evidentiary hearing.

186. 723 F.2d at 1294, citing *Franks*, 438 U.S. at 171 ("[T]here is . . . a presumption of validity with respect to the affidavit supporting the search warrant."); *see also Reed*, 726 F.2d at 342.

187. 109 Ill. App. 3d 142, 440 N.E.2d 269, *cert. denied*, 460 U.S. 1040, 1433 (1983).

hearing because he had made the necessary "substantial preliminary showing"[188] that the affiant had intentionally or recklessly included false statements in the affidavit. McDonald relied on his own trial testimony and *Garcia* to support his argument.

At trial, McDonald had stated that he was not in his apartment at the time identified by the informant. Although the trial court did not believe him, McDonald attempted to bolster his appellate argument by relying on *Garcia*. In *Garcia*, the Illinois Appellate court found that a defendant satisfied the preliminary substantial showing when he submitted an affidavit claiming that the warrant was in error. The Illinois court noted that requiring the defendant to do more would "plac[e] an insurmountable burden upon the defendant" and it would be "presuming," without any basis, "that a police officer was telling the truth."[189]

In response, the Seventh Circuit pointedly observed that the Illinois court overlook[ed] the Supreme Court's statement that "there is . . . a presumption of validity with respect to the affidavit supporting a search warrant."[190] Therefore, the seventh circuit rejected the reasoning of *Garcia* and found that McDonald's "self-serving" testimony was insufficient to rebut this presumption.[191]

Reed, too, relied on similar testimony given by McDonald at her trial. Likewise, the court found that she failed to make a "substantial preliminary showing."[192] In addition, the court rejected Reed's second argument that the detective was reckless in not verifying the informant's statements. Specifically, the court held that the detective was not required to verify statements that were "sufficiently descriptive, current, and of apparent reliability."[193]

D. Plain View Exception to the Warrant Requirement

In *United States v. McDonald*,[194] *United States v. Reed*,[195] and *United States v. Jefferson*,[196] the Seventh Circuit applied its plain view exception test[197] to determine if evidence seized, but not named in a war-

188. *See supra* note 185.
189. *McDonald*, 723 F.2d at 1294 quoting *Garcia*, 109 Ill. App. 3d at 146-47, 440 N.E.2d at 273.
190. *Id.* at 1294 quoting *Franks*, 438 U.S. at 171.
191. *Id.* at 1294.
192. *Reed*, 726 F.2d at 342.
193. *Id.*
194. 723 F.2d 1288 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2360 (1984). *See also supra* notes 183-191 and accompanying text.
195. 726 F.2d 339 (7th Cir. 1984). *See supra* notes 184-193 and accompanying text.
196. 714 F.2d 689 (7th Cir. 1983).
197. The test, set forth in United States v. Schire, 586 F.2d 15, 17 (7th Cir. 1978), states that the plain view exception to the warrant requirement applies if 1) the initial intrusion which afforded the

rant, was nonetheless admissible at trial. In each case, the court elaborated on the requirement that the incriminating nature of the evidence be immediately apparent.

In *Jefferson*, police suspected that a particular residence was the center of an elaborate drug distribution operation. The warrant issued authorized seizure of particular controlled substances and "records of drug dealing activity and currency."[198] In addition to seizing drugs and cash, the police seized five fur coats, 142 pieces of jewelry, and nine firearms. Much of this evidence was introduced at trial despite the defendant's prior objection. On appeal, the court held that the evidence was admissible under the plain view doctrine.

While the court admitted that the furs, jewelry and guns could have been used for solely personal or sporting purposes, it held that considering the nature of the operation contemplated by the warrant, the officers could have "logically concluded that the furs and jewelry were fruits of an illegal operation tantamount to cash receipts."[199] Moreover, the court stated that "[w]here a logical nexus" exists between items seized but unnamed in the warrant, and items named in the warrant, "the unnamed items are admissible."[200] The court continued, stating that even if the furs and jewelry were not actually received as currency, they could nonetheless be seized because the circumstances of the search "reasonably alerted the officers to the possibility that the items were fruits of another illegal activity."[201]

Similarly, in *McDonald* and *Reed* the warrant provided for the seizure of cocaine and proof of residency.[202] However, the police also seized mail, credit cards, automobile insurance cards, drivers' licenses, and loan papers all of which bore names and addresses other than McDonald's. They also seized a gold bar and gold coins. On appeal, McDonald challenged the seizure of the mail, credit cards, auto insurance cards, driver's licenses, money orders and loan papers, contending that the incriminating nature of the items was not immediately apparent.[203]

In *McDonald* the court framed its analysis somewhat differently from that in *Jefferson*. Specifically, the court adopted the Supreme

authorities the plain view was lawful; 2) the discovery of the evidence was inadvertent; and 3) the incriminating nature of the evidence was immediately apparent.

198. *Jefferson*, 714 F.2d at 694.

199. *Id.* at 695.

200. *Id.*

201. *Id.*

202. *McDonald*, 723 F.2d at 1290.

203. *Id.* at 1295.

Court's plurality interpretation of "immediately apparent"[204] in *Texas v. Brown*.[205] In *Brown* the Court found that the criterion of "immediately apparent" is satisfied upon a showing that there is "probable cause to associate the property with criminal activity."[206] Furthermore, the Court emphasized that "probable cause is a flexible, common sense standard."[207]

Within this framework the Seventh Circuit determined that the items seized satisfied the "immediately apparent" criterion. First the court held that the mail was properly seized because by the time the search was over,[208] the mail appeared to incriminate McDonald in a crime involving the United States mails. Then, echoing *Jefferson*, the court held that the other items also satisfied the "immediately apparent" test on the grounds that "a well-trained law enforcement officer, operating under a search warrant, contemplating the uncovering of a criminal cocaine scheme, would instinctively suspect these items to incriminate McDonald in some type of illegal conduct associated with cocaine transactions or mail tampering."[209]

As in *McDonald*, the court in *Reed* rejected Reed's claim that the incriminating nature of the mail was not immediately apparent. Then, in dicta, the court justified the seizure of the gold. Specifically, the court relied directly on the rationale employed in *Jefferson* without reference to the "probable cause" language of *Texas*. The court simply stated that, "[p]olice suspecting a cocaine dealing operation reasonably could surmise that the gold represented the proceeds of such an operation, or that it was the fruit of another illegal activity."[210]

IV. FIFTH AMENDMENT

The Seventh Circuit did not, in any significant way, add to the body of case law governing fifth amendment issues. As the cases which follow illustrate, the court reaffirmed its position in earlier cases and confined its analysis to existing case law. Little attempt was made to break new fifth amendment ground in the Seventh and other circuits.

204. *Id.*
205. 460 U.S. 730 (1983).
206. *Id.* at 741-42.
207. *McDonald*, 723 F.2d at 1295 *citing Brown*, 460 U.S. at 742.
208. The Seventh Circuit has held that "immediately apparent" does not mean apparent at first glance, but "apparent without other information than that which the officers properly possessed before their search was over." *McDonald*, 723 F.2d at 1295, *citing* United States v. Thomas, 676 F.2d 239, 244 (7th Cir. 1980) *cert. denied*, 450 U.S. 931 (1981).
209. *McDonald*, 723 F.2d at 1296.
210. *Reed*, 726 F.2d at 343-44.

In *United States ex rel Clauser v. McCevers*[211] the defendant alleged that his fifth amendment right against double jeopardy had been violated. Briefly, the defendant was indicted for the unlawful delivery of a controlled substance.[212] The trial judge denied the defendant's motion for a judgment of acquittal.[213] During his trial, however, it became evident that state law enforcement officers had misrepresented the evidence before the grand jury. The trial judge characterized the officers' conduct as "grossly negligent"[214] and concluded that the indictment was invalid. Accordingly, the trial was terminated.[215] When the defendant was later re-indicted, he moved to dismiss on the ground of double jeopardy. This motion was denied.[216]

The district court observed that if the first trial was terminated due to a "manifest necessity" the fifth amendment's double jeopardy provision was not invoked,[217] and the court of appeals affirmed.[218] Whether a trial was terminated due to "manifest necessity" involves a determination of whether the trial judge exercised sound discretion in terminating the first trial.[219] Since judges have broad discretion in this area,[220] the court of appeals held that a decision to terminate a trial because an indictment was based on perjured testimony satisfied the "manifest necessity" requirements.[221] Thus the subsequent trial did not invoke the double jeopardy clause of the fifth amendment.

Recently, the "entrapment" and "outrageous governmental conduct" defenses have been resurrected. Very few litigants have prevailed on the latter theory, however, because they have not been able to show that the government's conduct was so outrageous that it shocked the

211. 731 F.2d 423 (7th Cir. 1984).

212. *Id.* at 424.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Clauser v. Shadid, 563 F. Supp. 392, 395 (C.D. Ill. 1983).

218. *Fahner*, at 425, *citing* United States v. Perez, 22 U.S. 579 (9 Wheat.) (1824); Illinois v. Somerville, 410 U.S. 458, 462-63 (1973); and United States v. DiFrancesco, 449 U.S. 117, 130 (1980). The court also observed that in cases where the trial was terminated without the defendant's consent, the burden was on the government to show that it was due to a "manifest necessity" in order to sustain a reindictment and retrial. *Fahner*, 731 F.2d at 426, *citing* United States v. Di Francesco, 449 U.S. at 130.

219. *Id.* at 427.

220. *See* Gori v. United States, 367 U.S. 364, 368 (1961); Illinois v. Somerville, *supra* note 218; Arizona v. Washington, 434 U.S. 497, 517 (1978) (holding that a trial court is not required to make an express finding of "manifest necessity" in order to demonstrate that there was a sound exercise of its discretion).

221. 731 F.2d 427-29. *See* Illinois v. Rivera, 72 Ill. App. 3d 1027, 1038, 390 N.E.2d 1259, 1267 (1979); Illinois v. Wolfe, 114 Ill. App. 3d 841, 844-45, 449 N.E.2d 980, 983-84 (1983).

conscience.[222]

The Seventh Circuit, in *United States v. Thoma*,[223] was faced with an entrapment and outrageous governmental conduct defense. The court held that neither defense was available to the defendant.[224] Arguably, however, the Seventh Circuit's reasoning is not consistent with Supreme Court precedent.

The defendant in *Thoma* argued on appeal that his alleged illegal conduct was the direct result of the government's inducement.[225] The court observed that this argument raised both the entrapment defense and the defense of outrageous governmental conduct.

In *Thoma*, John Ruberti, a Postal Inspector, received information that Thoma had been purchasing pedophilia material through the mail and might be involved in its production. On November, 1981 Ruberti contacted Thoma by mail and asked him to join an organization known as Crusaders for Sexual Freedom (CSF).[226] Thoma ignored this letter.

Later in November, Roberti again communicated with Thoma, sending him an eight page pamphlet containing, *inter alia*, various advertisements that dealt with "a wide variety of sexual tastes."[227] Again Thoma did not respond. In December, Roberti sent Thoma a letter informing him that he had been sponsored for a free membership in CSF. Thoma filled out the membership form and thereafter responded to the advertisements in the pamphlet. Thoma also sold, through the mail, video tapes of minors engaged in sexual conduct.[228]

The court of appeals observed that the success of the entrapment defense hinges on whether the defendant was predisposed to commit the crime or whether the government had induced an unpredisposed person to engage in criminal activity.[229] The court held that there was not enough evidence to establish entrapment as a matter of law because the evidence presented was only sufficient to send the question of entrapment to the fact finder.[230]

Furthermore, the court rejected the defendant's argument that his

222. This has been the burden of proof in "outrageous government conduct" defenses since 1973 (*see* United States v. Russell, 411 U.S. 423, 431-32 (1973)). The Supreme Court has been unwilling to relax this standard even slightly.

223. 726 F.2d 1191 (7th Cir. 1984).

224. *Id.* at 1198-99.

225. *Id.* at 1196.

226. *Id.* at 1194.

227. *Id.*

228. *Id.* at 1195.

229. *Id.* at 1196. *See* Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973).

230. 726 F.2d at 1196-97.

reluctance to join the CSF was determinative of the predisposition issue.[231] The court observed that there may have been numerous reasons for Thoma's reluctance.[232] Moreover, there is a presumption that the trier of fact considers all these inferences[233] when making its decision. Since the fact finder did not think that Thoma's reluctance evidenced a lack of predisposition,[234] the entrapment defense failed.

The court also rejected Thoma's argument that the government's inducement was such that "his capitulation cannot be ascribed to predisposition."[235] The court held that the government merely offered the defendant an opportunity to engage in both legal and illegal conduct.[236] The court further stated that "the mailings of CSF were spread out over a period of time and, unlike personal contact, could easily be ignored by one not interested in their contents."[237] In addition, the court observed that it was significant that Thoma set the sale price on the tapes he solicited through the mails.[238] Accordingly, the court held that the government merely offered Thoma an opportunity to commit a crime and this, coupled with what can at most be described as mild inducement, did not support a claim of entrapment.[239]

Similarly, the court rejected Thoma's due process argument that a) a standard lower than "truly outrageous" governmental conduct should be applied to the case, and b) if the "truly outrageous" standard is applied, the government's conduct clearly met this standard.[240]

Thoma's first argument was based on the grounds that the government violated his constitutional right to possess pornographic material in his own home by "luring" him into placing this material in the mails. The court agreed that the defendant did have a constitutional right to keep such material in his home,[241] but held that this right had not been violated. It is significant, however, that the court stated that had Thoma's constitutional right been violated, the "truly outrageous" stan-

231. The court stated: "Reluctance at joining CSF, which was not itself illegal and which offered both legal and illegal activities, cannot be equated with reluctance at committing the prohibited mailings." *Id.* at 1197.

232. *Id.*

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

234. 726 F.2d at 1197.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1197-98. Thoma was indicted for mailing for the purpose of sale obscene material that involved the use of minors engaged in sexual conduct; a violation of 18 U.S.C. § 2252(a)(1).

239. 726 F.2d at 1197-1198.

240. *Id.* at 1198-99.

241. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

dard would not have applied.[242] Although this is only dicta, it is important to note that up until now courts have not considered lessening or modifying the standard of proof in an "outrageous governmental conduct" allegation. In fact, courts have adhered to it very closely and only a few litigants have prevailed on this theory.[243] The *Thoma* court held that because Thoma willingly sold his tapes, he was not impermissibly induced into leaving the zone of protection under *Stanley v. Georgia*[244] but that he in fact chose to forfeit that protection in order to make a profit.[245]

The court further held that in light of the past cases, the government's conduct was not outrageous.[246] In cases where the government's conduct was deemed outrageous, the government was more intimately involved in the illegal conduct, and such involvement warrants a closer inspection of its conduct.[247]

The *Thoma* court was also concerned with predisposed defendants using the outrageous governmental conduct defense to escape prosecution. Thus it held that the defense was not available to predisposed defendants.[248] Although this is a legitimate concern, it could be argued that the court erred on this point. The outrageous governmental conduct defense focuses on the government's conduct, not on whether the defendant was predisposed.[249] The defendant's predisposition, or lack of it, is not an issue. The concern in this defense is whether the government, by engaging in a certain type of conduct, violated an individual's constitu-

242. 726 F.2d at 1198.

243. *See* United States v. West, 511 F.2d 1083 (3d Cir. 1975); Greene v. United States, 454 F.2d 783 (9th Cir. 1981).

244. *See supra* note 241.

245. 726 F.2d at 1198.

246. The court stated that

> . . . those members of the Supreme Court who have recognized that due process is violated by outrageous Government conduct have drawn a line between situations in which the Government provides contraband and those in which it does not. Similarly, we will closely examine those cases in which the Government misconduct injures third parties in some way.

Id. at 1199 (citations omitted). *See* U.S. v. Twigg, 588 F.2d 373 (3d Cir. 1978) (government supplied chemicals, glassware, and farmhouse used in manufacturing narcotics; informer did lion's share of manufacturing); Greene v. U.S., 454 F.2d 783 (9th Cir. 1971) (government supplied ingredients for manufacture of illicit whiskey and was only purchaser of final product); Hampton v. U.S., 425 U.S. 484, 498 (1976) (Brennan, J., dissenting); U.S. v. Archer, 486 F.2d 670, 657-77 (2d Cir. 1973).

247. 726 F.2d at 1199.

248. *Id.* The court stated that

> [w]hen a defendant is predisposed to commit the offense due process cannot be violated by Government inducement; to hold otherwise would be to allow a predisposed defendant to raise the functional equivalent of an entrapment defense—a result at odds with the Supreme Court's holdings in this area.

Id. See also U.S. v. Janotti, 673 F.2d 578, 608 (3d Cir. 1982).

249. *See* United States v. Russell, 411 U.S. 423 (1973).

tional right.[250]

V. SIXTH AMENDMENT

A. Pretrial

In *United States v. Bunch*,[251] a case of first impression, the Seventh Circuit held that a district court judge who tentatively accepted a defendant's plea agreement, then read a presentencing report and subsequently rejected the plea agreement, was not required to recuse himself from presiding over the defendant's trial.

The defendant argued that the judge should have recused himself because he may have been prejudiced from the "premature disclosure" of the report.[252] The defendant relied on *Gregg v. United States*.[253] In *Gregg*, the Supreme Court emphasized that under Federal Rule of Criminal Procedure 32(c)(1),[254] it is error to submit a presentence report to a judge prior to a defendant's plea of guilty or a finding of guilt.

The court distinguished *Bunch* from *Gregg* on the basis that the presentencing report in *Bunch* was submitted *after* the defendant's plea of guilty.[255] Therefore Rule 32(c)(1) was not violated. Additionally, the court concluded that the judge's decision to recuse himself was a matter of discretion subject only to the appellate court's limited review.[256] The court stated that the lower court judgment could only be set aside if the defendant could demonstrate an abuse of discretion or actual prejudice.[257] The court found that the defendant did not suffer any prejudice particularly because the jury, rather than the judge, was the fact finder and the judge did not have occasion to rule on any objections in front of the jury during trial. Accordingly, the court held that the district court

250. *Id.*
251. 730 F.2d 517 (7th Cir. 1984).
252. *Id.* at 518.
253. 394 U.S. 489 (1969).
254. FED. R. CRIM. P. 32(c)(1) provides:

> (c) *Presentence Investigation.*
> (1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.
>
> The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

255. *Bunch*, 730 F.2d at 519.
256. *Id.*
257. *Id.*

did not err in denying the defendant's motion for recusal.[258]

B. Jury Selection

In *United States v. Gometz*,[259] the defendant presented a novel argument on appeal, challenging the selection of his jury. Gometz contended that 1) his sixth amendment right had been violated because blacks had been under-represented on the master jury wheel,[260] and 2) he had been denied his right under the Jury Selection and Service Act,[261] (Jury Act) to a hearing to determine whether the jury wheel was truly representative.

The court rejected Gometz's first contention because the number of blacks on the jury wheel was not disproportionate to the number of blacks in the Southern District of Illinois counties. Gometz failed to prove "[s]ystematic discrimination against counties with large black populations.[262]

With respect to his second contention, Gometz argued that blacks constituted the vast majority of people who did not return their juror qualification forms, and, because of this, blacks were under-represented on the qualified jury wheel.[263] The court, however, held that there was no evidence to support this theory.[264] Specifically, Gometz's jury was selected from thirty veniremen, one of whom was black. The black population of that area was 3.9%;[265] this juror represented 3.33% of the black population.[266] The court held that this discrepancy was insignificant.

Gometz further argued that the Jury Act imposed a duty on the court to follow up on people who did not respond to questionnaires.[267] However, the court observed that the committee reports to the Jury Act only required courts to follow up on these people when the number of names on the qualified jury wheel was insufficient to staff the number of juries required.[268] The court also said that while the Jury Act empowered

258. *Id.*
259. 730 F.2d 475 (7th Cir. 1984).
260. *Id.* at 477.
261. 28 U.S.C. §§ 1841 *et. seq.* (1982).
262. *Gometz*, 730 F.2d at 478.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 479.
268. If the voter lists are used and supplemented where necessary, and if the procedures outlined in the bill are otherwise rigorously followed, it is no departure from the standards of the legislation that the qualified jury wheel, the venire or array, or the jury itself, may not reflect a community cross section. The act . . . does not require that at any stage

a court to summon people who failed to respond to the questionnaires,[269] it was not required to do so.

In essence the *Gometz* court viewed the purpose of the Jury Act as making it possible for all qualified persons to serve as jurors;[270] this is very different from forcing all qualified people to be available for jury service.[271]

As a practical matter, courts do not have the time or the manpower to summon and prosecute people who do not respond to the questionnaires. An accurate representation of the community on each jury is the ideal. But without more effective administrative resources, it is unlikely that courts can effect this desired result. The *Gometz* court referred to this problem in dicta.[272] The court also remarked that even if a court could pursue all those people who failed to respond, there was the distinct possibility that this would lead to more harm than good. It is inadvisable to force someone to serve as a juror because an angry juror is a bad juror.[273]

C. *Right to Counsel*

It is well settled that criminal defendants are constitutionally entitled to counsel once legal proceedings have been commenced against them.[274] In *Young v. Duckworth*[275] however, the Seventh Circuit was faced with a novel aspect of that proposition: must a criminal conviction be set aside when the defendant was not represented by counsel between the time of his preliminary examination and his arraignment?[276]

John Young was arrested in Alabama in connection with a murder charge that arose in Indiana.[277] He was immediately returned to Indiana and appeared for a preliminary examination in municipal court, where he was represented by a public defender.[278] Upon finding probable cause, the case was bound over to a grand jury. Three months later, at his

> beyond the initial source list the selection process should produce groups that accurately mirror community makeup. Thus no challenge lies on that basis.

Id. at 479-80 *citing to* S. Rep. No. 891, 90th Cong., 1st Sess. 10 at 17 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess. 5, at 1794 (1968).

269. 28 U.S.C. § 1864(a). *See also* United States v. Santo, 588 F.2d 1300, 1303 (9th Cir. 1979).

270. *Id.* at 480.

271. *Id.*

272. *Gometz*, 730 F.2d at 480-1.

273. *Id.*

274. *See generally*, Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961).

275. 733 F.2d 482 (7th Cir. 1984).

276. *Id.* at 483.

277. *Id.*

278. *Id.*

arraignment, he was represented by another public defender. Ten months after his arraignment, he was convicted of first degree murder.[279] The conviction was affirmed by the Indiana Supreme Court.[280] Young subsequently filed a petition of habeas corpus in federal district court.[281]

In federal district court, Young claimed he was denied his constitutionally protected right to counsel during the three month lapse between the preliminary hearing and his arraignment. Consequently, he argued that his conviction should be overturned. The court disagreed, and Young appealed.[282]

The court of appeal's decision, written by Judge Posner, contained three main findings: first, legal proceedings had been commenced against Young when he was first brought to Indiana since the purpose of the preliminary hearing was to ascertain whether there was sufficient evidence to justify presenting Young's case to a grand jury. Therefore, Young's right to counsel attached at that point.[283] Second, the mere lapse in representation of counsel did not in and of itself deprive Young of his sixth amendment right to counsel.[284] Third, the lapse in representation of counsel did not justify nullifying Young's conviction unless the lapse prejudiced him in defending himself against the criminal charge.[285] As a result, the court remanded the case to the district court so that a factual record could be compiled to establish whether Young was prejudiced by the lapse. This discussion will focus on this third point.

Although the court refused to label it as such, its analysis followed Supreme Court precedent established in many of the 'harmless-error' cases.[286] In the 'harmless error' cases the Supreme Court has recognized that criminal convictions may stand despite constitutional errors that occurred during the defendant's trial, providing the conviction would have resulted despite the error.

Curiously, the court of appeals failed to enunciate a standard of review that it would employ in determining whether Young was harmed by the lapse. Theoretically, the court could employ the "reasonable possibility" standard which the Supreme Court adopted in *Chapman v. Cali-*

279. Young v. State, 267 Ind. 434, 370 N.E.2d 903 (1977).
280. *Young*, 733 F.2d at 483.
281. *Id.*
282. *Id.*
283. *Id.* at 483-84.
284. *Id.* at 484.
285. *Id.*
286. *See generally* Stovall v. Denno, 388 U.S. 293 (1967); Chapman v. California, 386 U.S. 18 (1967).

fornia.[287] Under that standard, Young's conviction would be overturned if he could show that there was a reasonable possibility that a three month lapse in representation contributed to his conviction. However, *Chapman* involved a fifth amendment violation. Although the reasonable possibility standard has been relied on in other sixth amendment cases,[288] none of those cases presented the same issues for review as *Young v. Duckworth*[289] presents.

As a practical matter, the court noted that criminal defendants often switch counsel during the course of their trials.[290] Therefore, if the court employed a standard of less than "reasonable possibility," defendants would have access to a large loophole allowing them to avoid conviction by merely firing their attorneys and not informing the court. Also, a less than "reasonable possibility" standard would clothe the court with an additional supervisory role, demanding its attention to assure that all criminal defendants always have counsel.

Overall, *Young v. Duckworth*[291] is a sound decision. Absence of counsel is a serious irreversable error.[292] Young's basis of appeal, however, was a lapse, not an absence, of counsel. While a continued lapse may become as serious as an absence, a defendant should be forced to prove that he experienced a harm commensurate with an absence of counsel in order to obtain an automatic reversal. Otherwise, the court could infer that the lapse was a non-prejudicial harmless error, and his conviction would stand.

D. Joint Representation

In *Wilson v. Morris*,[293] the Seventh Circuit held that when an attorney represents two defendants on the same charges and objects to consolidation of the cases at a preliminary hearing, the court does not have a *sua sponte* duty to inquire into the propriety of joint representation, absent special circumstances.[294]

Wilson and Tyler were arrested and charged with rape and robbery.[295] Both defendants appeared together for preliminary examination

287. 386 U.S. at 22.
288. Cyler v. Sullivan, 446 U.S. 335 (1980); United States v. Wade, 388 U.S. 218 (1967); Wade v. Frazen, 678 F.2d 56 (7th Cir. 1982).
289. 733 F.2d 482 (7th Cir. 1984).
290. *Id.* at 484.
291. 733 F.2d 482 (7th Cir. 1984).
292. Powell v. Alabama, 287 U.S. 45 (1932).
293. 724 F.2d 591 (7th Cir.), *cert. denied*, 104 S. Ct. 2357 (1984).
294. *Id.* at 594-95.
295. *Id.* at 592.

and were represented by the same public defender.[296] Over the public defender's objection, the court granted the prosecutor's motion to consolidate the cases for preliminary examination.[297] Both defendants were subsequently tried for rape and robbery and were represented by the same public defender at separate trials.[298] During their trials, the public defender neither reaffirmed his prior objection, nor made a new objection to representing both defendants.[299] Wilson and Tyler were both convicted and sentenced. Wilson filed a petition of habeas corpus contesting joint representation by the public defender at the preliminary hearing and at the trial.[300]

At an *en banc* hearing, the court rejected Wilson's appeal. The court distinguished between an objection to joint representation made at a preliminary hearing and a similar objection made at trial.[301] The purpose of a preliminary hearing is to determine whether there is probable cause, as opposed to ascertaining the defendant's guilt or innocence.[302] The court reasoned that an attorney's warning of a potential conflict made at a preliminary hearing does not imply that the same conflict will exist at trial. Therefore, when an attorney objects at a preliminary hearing, but fails to object during the trial, the defendant must prove that he was harmed by the joint representation in order to establish a constitutional violation.[303] If, however, the attorney makes an objection at trial and is overruled without an inquiry into its basis, the defendant need not prove he was harmed by the conflict to establish a constitutional violation.[304] Accordingly, for Wilson to prevail on appeal, he had to prove that an actual conflict of interest affected his defense attorney's performance.[305] Wilson failed to do so, and lost his appeal.

Because Wilson's counsel failed to object to joint representation at trial, and the court refused to carry the initial objection over from the preliminary hearing, the record was devoid of any circumstances creating a *sua sponte* duty by the court to inquire into the propriety of joint representation. The court of appeals specifically refused to comment on whether it was prudent of the state court not to inquire into the adequacy

296. *Id.*
297. *Id.* at 593.
298. *Id.*
299. *Id.* at 594.
300. *Id.* at 593.
301. *Id.* at 595.
302. *Id.*
303. *Id.* at 594; *see also* Cyler v. Sullivan, 446 U.S. 335, 350 (1980).
304. Holloway v. Arkansas, 435 U.S. 475, 488 (1978).
305. *Wilson*, 724 F.2d at 594.

of joint representation.[306] But the court of appeals did state that joint representation in and of itself is not a special circumstance.[307]

The *Wilson* opinion is well reasoned and consistent with the Supreme Court's holding in *Holloway v. Arkansas*.[308] In *Holloway*, the Supreme Court held that a per se violation of the constitutional guarantee of effective counsel occurs when an objection to joint representation made by counsel is overruled by the trial court without an inquiry into its basis.[309] By refusing to allow Wilson's attorney's objection to carry over to trial, the court of appeals accurately recognized the difference between the various phases of a criminal prosecution. Also, by refusing to acknowledge a *sua sponte* duty by the court to investigate the adequacy of counsel, the court avoided hypothesizing about a situation which would create the necessary absent "special circumstances." Therefore, the decision was correct.

In *United States ex rel. Gray v. Director, Department of Corrections, State of Illinois*,[310] [hereinafter referred to as *Gray*] the trial court probably should have made a *sua sponte* inquiry into the propriety of joint representation. Since it did not, and joint representation continued, the court of appeals reversed a state court's conviction and established a test for determining when a conflict exists between defendants represented by the same attorney.

When she was 17 years old, Paula Gray, who is mentally retarded, observed, but did not participate in, a gruesome robbery, kidnap, rape and murder.[311] During the police investigation into the crime, Paula came forward, on her mother's urging, and gave a statement which implicated Williams, Adams, Rainge and Jimmerson.[312] Since she lived in the same neighborhood as the implicated defendants, Paula was concerned about her safety. At the suggestion of the State's Attorney office, Paula was temporarily relocated prior to testifying before a grand jury.[313] Shortly thereafter, the Gray family was put in touch with Archie Weston, an attorney who was representing three of the four implicated defendants.[314]

306. *Id.* at 595.
307. *Id.* at 594-95.
308. 435 U.S. 475 (1978).
309. *Id.* at 488.
310. 721 F.2d 586 (7th Cir. 1983) *cert. denied*, 104 S. Ct. 1690 (1984).
311. *Id.* at 587-88.
312. *Id.* at 589.
313. *Id.* at 589-90.
314. *Id.* at 590. The court indicated that since the Williams family was so close to Mrs. Gray and was obviously interested in Paula because of her potential for giving implicating testimony, it was the Williams family which gave Weston's phone number to Mrs. Gray. *Id.*

Subsequently, Paula testified under oath before the grand jury. She recounted the story which she had already told the police and State's Attorney, including William's threats against her life should she come forward.[315] At Paula's request, and out of concern for her safety, she was relocated for one night after the grand jury hearing. Following that night, Paula asked to return to her family.[316]

A few days after she moved back in with her family, Paula and her family moved in with the Williams family.[317] About that same time, Paula and her family began having additional contacts with Archie Weston concerning her testimony about Williams, Rainge and Jimmerson.[318] A month later, Paula testified as a State's witness at a preliminary hearing against Williams, Rainge and Jimmerson. She arrived at the hearing holding hands with Weston.[319]

She testified that she knew nothing about the crimes committed by the defendants and that she had been forced by the police to make prior statements before the grand jury. Absent her testimony, the charges against Jimmerson were dismissed, but the charges against Williams, Rainge and Adams were sustained.[320] Paula then left the courtroom with Weston.

An information was filed against Williams, Rainge and Adams charging them with the crimes committed by them as principals. Subsequently, an information was filed against Paula for aiding and abetting, and for perjury at the preliminary hearing. When the indictment against Paula was filed, Weston entered a formal appearance as her attorney.[321]

Williams, Rainge and Adams were all found guilty. The state informed the court that it would seek the death penalty against all three. The jury concluded that Williams should be sentenced to death. Rainge and Adams were sentenced to long prison terms.[322]

Paula was found guilty of aiding and abetting, as well as perjury. She was sentenced to 50 years for the aiding and abetting charge and 10 years for perjury.[323] The Supreme Court of Illinois subsequently disbarred Weston for improper conduct in an unrelated matter.[324]

315. *Id.* at 590-91.
316. *Id.* at 591.
317. *Id.*
318. *Id.*
319. *Id.* at 591-92.
320. *Id.* at 592.
321. *Id.*
322. *Id.* at 593.
323. *Id.*
324. *Id.* at 595; *see also In re* Weston, 92 Ill. 2d 431, 442 N.E.2d 236 (1982).

On appeal before the Illinois Appellate Court, Paula's court appointed counsel argued that Paula's constitutional right to conflict-free counsel was violated since Weston represented Paula, Williams and Rainge.[325] The Illinois Appellate Court disagreed, and Paula's conviction was affirmed. She petitioned the Illinois Supreme Court for leave to appeal, but was denied. Paula's court appointed counsel then filed a writ of habeas corpus with the district court.[326] The writ was denied.[327]

During the interim, the Supreme Court of Illinois decided that there was sufficient evidence to find Williams guilty beyond a reasonable doubt. But rather then affirm the conviction, the court reversed and remanded it to the circuit court for a new trial to determine whether Weston's misconduct in the unrelated matter had any bearing on the quality of his representation.[328] Paula then filed a motion for a new trial, or alternatively for reconsideration of her leave to appeal to the Illinois Supreme Court.[329] The motion was denied "without prejudice to [Paula] to file a petition for post-conviction relief in the trial court."[330] Paula then appealed from the district court's decision denying her writ of habeas corpus.

In an opinion by Judge Wyatt,[331] the court of appeals concluded that there was an actual conflict of interest between Paula and her co-defendants. The court noted that because of her age when the crimes were committed, and since she was merely an eyewitness, Paula was not subject to the death penalty.[332] Williams, on the other hand, was over 21, had a criminal record which included guilty pleas from prior felonies and was actively involved in the robbery, kidnap, rape and murder in the instant case. Consequently, Williams was subject to the death penalty.[333]

The court noted that an "independent, conflict-free, competent attorney for Paula would . . . have carefully considered continued cooperation with the State as a means of avoiding any prosecution . . . immunity . . . [including] a plea bargain."[334] Because Weston represented Williams and Paula, a conflict existed since Williams' defense

325. *Gray*, 721 F.2d at 593-94; *See also* People v. Gray, 87 Ill. App. 3d 142, 408 N.E.2d 1150, *appeal denied*, 81 Ill. 2d 604 (1980), *cert. denied*, 450 U.S. 1032 (1981).

326. *Gray*, 721 F.2d at 594.

327. *Id.* at 595.

328. *Id.*; *See also* People v. Williams, 93 Ill. 2d 309, 444 N.E.2d 136 (1982).

329. *Gray*, 721 F.2d at 595.

330. *Id.*

331. Sitting by designation.

332. *Id.* at 596.

333. *Id.* at 597.

334. *Id.* at 596.

could be harmed by Paula's cooperation with the state.[335]

The court held that "[t]he test for conflict between defendants is not whether the defenses actually chosen by them are consistent but whether in *making the choice* of defenses the interests of the defendants were in conflict."[336] So long as Weston represented Williams, he was not conflict-free and could not make an independent judgment. Consequently, the court of appeals reversed the district court's decision and granted Paula's writ of habeas corpus, subject to the state's election to retry her within a reasonable length of time.[337]

The decision is well reasoned and fair, but given the uniqueness of the fact situation, it is unclear what precedential value it provides. It should, however, provide the courts with an opportunity to observe when a *sua sponte* inquiry into joint representation would have been appropriate, given Weston's interest in Paula and her radical change in testimony between the time of the grand jury and the preliminary hearing.

E. Right to Cross-examine Witnesses

In *United States v. Key*,[338] the defendant's conviction was partially reversed because the introduction of a statement by a non-testifying co-defendant violated the defendant's sixth amendment right to cross-examine a witness.

Key was charged under a seven count indictment for using the mails to defraud insurance companies, submitting false receipts for losses, and falsely representing to an insurer that he had been injured in an automobile accident.[339] Prior to trial, Key filed a motion *in limine* requesting that the government be prohibited from introducing a statement given by Key's codefendant. The trial judge denied his motion and Key was subsequently convicted.[340]

The charges arose from an alleged accident involving automobiles driven by the co-defendant and Key, and an insurance claim which was subsequently filed by Key. The government sought to prove through a number of witnesses that the accident never occurred. One of those witnesses testified that the co-defendant had admitted to him that the accident never occurred.[341]

335. *Id.* at 596-97.
336. *Id.* at 597 (emphasis in original).
337. *Id.* at 598.
338. 725 F.2d 1123 (7th Cir. 1984).
339. *Id.* at 1125.
340. *Id.*
341. *Id.* at 1126.

The court agreed with Key that under *Bruton v. United States*,[342] it was improper to introduce the witness' testimony regarding the co-defendant's confessions without giving Key the opportunity to cross-examine the co-defendant.[343] The court noted that the co-defendant's confession was "the only proof of fraud that the accident was staged," and therefore constituted a crucial part of the government's case.[344] Consequently, *Key* was distinguishable from *United States v. Madison*,[345] where independent proof sufficed to convict the defendant, aside from the proof deduced from the potentially incriminating statements. Since the decision accurately identifies the extent of a defendant's rights under the Confrontation Clause,[346] it was correctly decided.

F. Right to a Speedy Trial

The Seventh Circuit's decision in *United States v. Janik*[347] provides an in-depth analysis of the application and purpose of the Speedy Trial Act[348] (Trial Act). In *Janik*, the defendant was indicted on October 27, 1981[349] following the discovery of firearms in his apartment on March 26, 1981.[350] He was eventually convicted for possession of two unregistered guns.[351] On appeal, Janik contended that his sixth amendment right to a speedy trial had been violated by the court's delay in ruling on his pre-trial motion to suppress.

The *Janik* court observed that although the purpose of the Trial Act is "to implement the sixth amendment's right to a speedy trial,"[352] the sixth amendment is only implicated when charges are pending against the defendant.[353] The court held that Janik's sixth amendment rights attached when he was arraigned on November 4, 1981.[354] The court

342. 391 U.S. 123 (1968).
343. *Burton*, 391 U.S. at 135-36; *Key*, 725 F.2d at 1127.
344. *Key*, 725 F.2d at 1126.
345. 689 F.2d 1300 (7th Cir. 1982), *cert. denied*, 457 U.S. 1117 (1983).
346. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witness against him . . .

U.S. CONST. amend. XI, § 2.
347. 723 F.2d 537 (7th Cir. 1983).
348. 18 U.S.C. §§ 3161 *et. seq.* (1982).
349. 723 F.2d at 541.
350. *Id.*
351. *Id.*
352. *Id.* at 542.
353. *Id.*
354. *Id.*

therefore confined its analysis to delays after this date.[355]

The Trial Act provides that a defendant's trial must be commenced within 70 days of his arraignment.[356] The various subsections of the Trial Act allow for excludable time.[357] Because there was a delay of fourteen and one-half months before Janik was tried, it was necessary to see whether this delay was permitted by the "excludable time" provisions of the Trial Act. The parties in *Janik* agreed that forty-two days between the arraignment and trial were not excludable. Thus, of the 70 day excludable time allowance, only 28 days remained. Because more than 28 days elapsed in *Janik*, the court considered whether the remaining days were "excludable time" under the other provisions of the Trial Act.

The *Janik* court identified three periods at issue:[358] 1) the seventy day delay beginning February 5, 1982 when the hearing was cancelled until a new date could be set; 2) the sixty-eight days between September 5, 1982 and November 12; and 3) the thirty-one days between the order to re-open the hearing and the disposition of the motion to suppress. All of these delays occurred during the defendant's motion to suppress and, as the court said, they were arguably excludable under the Trial Act.[359] The court said that the words "other prompt disposition" in the statute imposed a limitation on the longevity of pre-trial motions.[360] The court stated that the Trial Act defined these words in § 3161(l)(1)(J),[361] which allows an additional 30 excludable days while a matter is under the advisement of a court. While § 3161(l)(1)(J) does not specifically refer to pre-trial motions, the *Janik* court held that based on legislative history it was only logical that this section should apply to pre-trial motions covered by § 3161(h)(1)(F).[362] A contrary conclusion would allow a judge

355. *Id.* The significant dates in Janik's trial are: November 23, 1983 (Janik moved to suppress the evidence seized on March 26, 1981); February 5, 1982 (hearing on motion set for this date but later cancelled by the court due to administrative problems); April 28 and May 3, 1982 (hearing on motion took place); August 6, 1982 (last post-hearing brief filed; court took matter under advisement); November 12, 1982 (court ordered hearing re-opened); December 2, 1982 (additional testimony taken); December 13, 1982 (motion denied).

356. 18 U.S.C. § 3161(c)(1) (1982).

357. The Trial Act allows a certain number of days to elapse between the various stages of the proceedings. These periods of delay are excluded under the act and are not taken into consideration when determining whether a defendant's right to a speedy trial has been violated. It is only delays in excess of this excludable time that can constitute a violation. 18 U.S.C. §§ 3161 *et. seq.* (1982).

358. *Janik*, 723 F.2d at 543.

359. *Id.* The court observed that under 18 U.S.C. § 3161(h)(1)(F) delays resulting from pre-trial motions "from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion constitute excludable time."

360. *Id.*

361. This section states that "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion" shall constitute excludable time. 18 U.S.C. § 3161(h)(1)(F) (1982).

362. S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979). This report explicitly stated that the

more than thirty days to decide pre-trial motions but only thirty days to decide all other motions. This argument has been considered and rejected by other circuits.[363]

In applying this statutory interpretation the *Janik* court held that the February 5th delay was not excludable.[364] It was not significant that this delay was due to administrative inefficiencies or a crowded docket.[365] The Trial Act was designed to induce federal court judges to clear up congested dockets rather than to rely on them as an excuse for delaying trials.[366]

The *Janik* court further held that this delay could not be excluded under § 3161(h)(8)(A).[367] This section provides for excludable continuances but, as the court observed, it rejects the "general congestion of [a] court's calendar as a ground for an excludable continuance."[368]

Similarly, the court held that the second delay was not excludable.[369] After taking the matter under advisement on August 6, 1982, the trial court had thirty days,[370] or until September 5, 1982, to rule on the motion. Section 3161(h)(8)(A) allows a judge to grant a continuance on his or counsel's motion.[371] However, in *Janik* the trial court failed to grant a continuance at the appropriate time. Thus, the period between September 5, 1981 and November 12, 1981 was not excludable under this section. The court observed that although the trial judge found that the

words "prompt disposition" were not intended to circumvent the requirements of § 3161(h)(1)(J) of the Trial Act.

363. *See* United States v. Raineri, 670 F.2d 702, 708 (7th Cir. 1982); United States v. Bufalino, 683 F.2d 639, 642-44 (2d Cir. 1982); United States v. Cobb, 697 F.2d 38, 43 (2d Cir. 1982); United States v. DeLong Champs, 679 F.2d 217, 220 (11th Cir. 1982).

364. *Janik*, 723 F.2d at 543.

365. *See* note 342 and accompanying text. Janik's hearing on the motion to suppress was originally set for February 5, 1982. *See* note 342. This hearing had to be cancelled because the minute clerk was on maternity leave and the new clerk did not begin work until late February, at which time there were over 400 cases on the court's docket. *Id.* at 542.

366. *Id.* at 542, *citing* United States v. Nance, 666 F.2d 353, 356 (9th Cir. 1982); H.R. Rep. No. 1508, 93d Cong. 2d Sess. 16 (1974).

367. *Janik*, 723 F.2d at 544-5.

368. *Id.*

369. *Id. See* note 355 and accompanying text.

370. 18 U.S.C. § 3161(h)(1)(J) (1982).

> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant on a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under the subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

371. 18 U.S.C. § 3161(h)(8)(A) (1982).

ends of justice warranted the delays,[372] "the continuance itself must be granted before the period sought to be excluded begins to run."[373]

The third delay[374] was also held not excludable. The court rejected both arguments advanced for its exclusion.[375] The first argument was that a) the period between November 12, 1982 (when the hearing was ordered reopened) and December 2, 1982 (when additional testimony was taken) was excludable under § 3161(h)(1)(F) because this was the period between the filing and the hearing of a pre-trial motion;[376] and b) the period between December 2 and December 13 should be excluded under § 3161(h)(1)(J) because it fell within the thirty day exclusion period allowed for matters under the advisement of the court. The *Janik* court did not reach the question of whether the matter was under the court's advisement, but held that "the requirements of prompt disposition in § 3161(h)(1)(F) may not be circumvented by indefinitely deferring the scheduling of the hearing, no more may it be circumvented by ordering the hearing re-opened more than 30 days after the matter has been taken under advisement."[377]

The defendant also argued that the order to reopen the hearing constituted a continuance, excludable under § 3161(h)(8)(A).[378] The court rejected this argument on the ground that "[o]nly continuances based on 'findings that the ends of justice . . . outweigh the best interest of the public and the defendant in a speedy trial' create excludable time" under § 3161(h)(8)(A).[379] Since the trial court judge did not make any such finding at the time she ordered the hearing re-opened, this period did not fall under § 3161(h)(8)(A). The *Janik* court observed that when the defendant's motion to dismiss the indictment due to violations of the Trial Act was denied, the district judge found that this period could have been excluded under § 3161(h)(8)(A).[380] Nonetheless, the appellate court held that this reference to § 3161(h)(8)(A) was not sufficient to "satisfy the Trial Act's requirement of specific findings showing that the exclusion is justified."[381]

372. *Janik*, 723 F.2d at 545.
373. *Id.*
374. *See* note 355 and accompanying text.
375. *Id.* at 544.
376. *Id. See also* notes 359-368 and accompanying text.
377. *Id.*
378. *Id. See also* note 371.
379. *Id.*
380. *Id.* at 545.
381. The court observed that:

> If the judge gives no indication that a continuance was granted upon a balancing of the factors specified by the Speedy Trial Act until asked to dismiss the indictment for violation

Essentially, the *Janik* court did not break any new ground in the application and interpretation of the Speedy Trial Act.[382] It affirmed its decisions in prior cases[383] and underlined the fact that the Seventh Circuit's position conforms with that of other circuits.[384]

The Seventh Circuit also addressed a defendant's right to a speedy trial in *Terry v. Duckworth*.[385] In *Terry* a warrant was issued for the defendant's arrest in connection with an alleged robbery, on March 15, 1975. The warrant, however, stated the wrong address.[386] Consequently, the police were not able to arrest Terry until November 14, 1977 when he was stopped for an expired auto safety sticker. The trial for the alleged robbery commenced on August 14, 1985, and Terry testified that due to the forty month delay between the issuance of the warrant and the trial, he was unable to remember anything concerning his whereabouts on the day of the alleged robbery.[387]

The sole issue before the trial court was whether the thirty-two month delay between the issuance of the warrant and Terry's arrest violated his sixth amendment right to a speedy trial. The appellate court observed that whenever a person is accused of a crime, the sixth amendment is implicated. In *Terry* the defendant was accused of robbery when the information was filed against him on March 19, 1975.[388] The court applied the test formulated by the Supreme Court in *Barker v. Wingo*[389] to determine whether Terry's sixth amendment rights had been violated. That test balances 1) the length of delay; 2) the reason for the delay; 3) the timeliness of defendant's assertion of his right; and 4) the resultant prejudice to the defendant.[390]

> of the Act, the danger is great that every continuance will be converted retroactively into a continuance creating excludable time . . . .

Id. at 544-5.

382. 18 U.S.C. §§ 3161 *et. seq.* (1982).

383. *See* United States v. Raineri, 670 F.2d 702 (7th Cir. 1982); United States v. Carlone, 666 F.2d 1112 (7th Cir. 1981) (section 3161(h)(8)(A) does not apply to continuances granted after the fact).

384. *See* United States v. Brooks, 697 F.2d 517, 522 (3d Cir. 1982); United States v. Carrasquillo, 667 F.2d 382, 386 (3d Cir. 1981) wherein the court states that § 3161(h)(8)(A) does not apply to continuances granted after the fact. *See also* United States v. Nance, 666 F.2d 353, 356 (9th Cir. 1982) (a congested docket is not grounds for an excludable continuance under § 3161(h)(8)(c); United States v. Cobb, 697 F.2d 38, 43 (2d. Cir. 1982) (the words "prompt disposition" in § 3161(h)(1)(F) are defined by § 3161(h)(1)(J) to mean no more than 30 days).

385. 715 F.2d 1217 (7th Cir. 1983).

386. *Id.* at 1218.

387. *Id.* This was a critical part of Terry's defense; the victim had identified Terry from police photograph files and in order to rebut this identification Terry had to show that he was somewhere else at the time of the robbery.

388. *Id.* at 1219.

389. 407 U.S. 514 (1972).

390. *Id.* at 530.

With respect to the length of the delay, the *Terry* court said that although *Barker* did not specify durational limits, it did state that the prejudicial effect of a delay depended on the nature of the crime.[391] Because Terry was only accused of an ordinary street crime, the court held that a thirty-two month delay was presumptively prejudicial.[392]

The court found that the reason for the delay was the state's negligence. Under *Barker*, both negligent and intentional attempts to cause a delay weigh heavily against the government, but a negligent delay weighs less heavily.[393] This is the general rule in the Seventh Circuit.[394] Therefore, the *Terry* court held that this factor weighed in the defendant's favor.[395]

In considering the timeliness of the defendant's assertion of his right, the court observed that Terry filed his motion to dismiss the indictment three and one-half months after his arrest.[396] The court held that although this was not timely, the fact that he was unaware of the pending charge and outstanding warrant weighed in his favor.[397]

The fourth factor in this balancing process, the prejudice to the defendant, caused the greatest concern for the court. The court observed that the right to a speedy trial protects three interests: 1) the prevention of oppressive pre-trial incarceration; 2) the minimization of the anxiety and concern the defendant must endure; and 3) a reduction of the risk that the accused's defense will be impaired. Only this last concern was at issue in *Terry*. Upon examining the record, it was evident that Terry's defense had not been impaired because he could not remember his whereabouts on the date of the alleged robbery.[398] Accordingly, the court held that since only two of the four factors weighed "moderately" in Terry's

391. *Terry*, 715 F.2d at 1219 *citing Barker*, 407 U.S. at 531.

392. *Id.*

393. *Barker*, 407 U.S. at 531.

394. *Terry*, 715 F.2d at 1220, *citing* United States v. Carreon, 626 F.2d 528, 534 (7th Cir. 1980) (negligence to be weighed less heavily than intentional delay); Jones v. Morris, 590 F.2d 684, 686 (7th Cir. 1979) (absence of reason for delay should be weighed against the state); United States v. Jackson, 542 F.2d 403, 407 (7th Cir. 1976) (failure to account for delay must be weighed against the state); United States v. Lockett, 526 F.2d 1110, 1111-12 (7th Cir. 1975) (government's failure to give a reason tends to favor defense).

395. *Terry*, 715 F.2d at 1219.

396. *Id.* at 1220.

397. *Id.*

398. The court stated that:

> The jury had the opportunity to observe Terry's demeanor on the witness stand and to judge his credibility. The jury did not believe him. By returning a verdict of guilty, we may assume that the jury found that Terry did recall his whereabouts and activities on the night of March 5, 1975, and that his loss of memory was merely a convenient alibi.

Id. at 1221.

favor, his right to a speedy trial had not been violated.[399]

The dissent sharply disagreed with the majority's analysis and application of the fourth factor.[400] The dissent defined the critical legal issue as "how . . . one [can] demonstrate a complete loss of memory for purposes of showing actual prejudice in a speedy trial context."[401] The majority had avoided this issue, the dissent said, by relying on a illogical syllogism: if a man says he cannot defend himself because the passage of time has eradicated his memory, then a guilty verdict means the man is lying.[402] The dissent said that this was illogical because "a general guilty verdict extends only to those facts necessary to support the elements of the crime charged. Loss of memory is neither a denial nor a defense to any element of the crime of robbery."[403] Thus, the majority erroneously concluded that Terry had been lying simply by focusing on the guilty verdict.[404]

Furthermore, the majority and the lower court agreed that a thirty-two month delay was presumptively prejudicial and yet neither of these courts gave Terry the benefit of that presumption.[405] When this case was before the Indiana Court of Appeals, the court advanced a similar concern: "In practical terms could we reconstruct our activities on a day which occurred two and one-half years ago? I doubt it."[406]

There were, however, strong policy reasons for the court's position in *Terry*. If the court had been more sympathetic to the significant delay, it might have been obliged to give greater weight to this one factor in future cases. Evidently, the court was concerned about future defendants using a "loss of memory" excuse in order to get an indictment dismissed and therefore did not want this case to act as precedent for the proposition that a significant delay is highly probative of a defendant's alleged loss of memory. Absent more substantial proof of loss of memory the presumption that the delay was not prejudicial would be made in favor of the government.

VI. EIGHTH AMENDMENT

In *Walsh v. Brewer*[407] the court decided the rights of an inmate who

399. *Id.* at 1222.
400. *Id.* (Cambell J., dissenting).
401. *Id.*
402. *Id.*
403. *Id.* at 1225.
404. *Id.*
405. *Id.*
406. Terry v. State, 400 N.E.2d 1158, 1164 (Ind. App. 1980).
407. 733 F.2d 473 (7th Cir. 1984).

claimed that his eighth and fourteenth amendment rights were violated when he was assaulted while in Statesville.

While incarcerated at the Menard Correctional Center during 1973, Walsh helped prison officers repel an attack by inmate members of two street gangs.[408] In 1978, Walsh was sent to Statesville for three felony convictions. Because he feared reprisal attacks for his role at Menard, Walsh asked to be put in protective custody.[409] His request was denied, so he intentionally committed a disciplinary violation in order to be put in twenty-four hour lockup, which he felt offered protection comparable to protective custody. He was assigned to an empty cell. Subsequently, an inmate member of one of the street gangs which Walsh feared was assigned to Walsh's cell, over Walsh's objections. Later that day, Walsh was stabbed and found hanging with the gang member next to him.[410] Walsh brought a civil rights action for damages.[411] He argued that the prison guards and warden were responsible for Walsh's security while at Statesville, and their failure to adequately protect him deprived him of his constitutional rights to be free from cruel and unusual punishment.

The district court agreed. It determined that placing a gang member in Walsh's cell constituted deliberate indifference toward Walsh's safety and violated his constitutional rights against cruel and unusual punishment.[412] However, the district court held that the guards were not liable to Walsh for damages because Walsh failed to prove that deprivation of his constitutional rights was the proximate cause of his injuries.[413]

The court of appeals determined that the lower court's analysis was incomplete because it did not adequately explain the basis for its conclusion that Walsh's constitutional rights were violated. Specifically, while Walsh claimed that the prison guards allowed an atmosphere of lawlessness to prevail at Statesville, the district court failed to discuss whether the evidence proved that Statesville inmates were exposed to an unconstitutionally high risk of harm. The court of appeals held that for Walsh to prevail, he would have to establish that prison conditions amounted to a

408. *Id.* at 475.
409. *Id.*
410. *Id.*
411. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
42 U.S.C. § 1983 (1979).
412. *Walsh*, 733 F.2d at 475-76.
413. *Id.* at 476.

"reign of terror."[414] Since the district court's opinion did not discuss whether this unconstitutionally high risk of harm prevailed, the decision was reversed for further consideration.[415]

The appeals court directed the lower court to formulate its conclusion after considering whether 1) assaults occurred so frequently that they were "pervasive" or 2) whether Walsh belonged to "an identifiable group of prisoners for whom assault was a serious problem of substantial dimensions." Absent proof of these factors, Walsh's claim would fail.[416]

In *Heirens v. Mizell*,[417] the court held that application of a provision of an Illinois parole statute to prisoners who had committed crimes prior to the statute's effective date would not violate the *ex post facto* clause of the United States constitution.[418] The court thereby reversed its decision in *Welsh v. Mizell*[419] where it previously held that application of the same provision was unconstitutional. The parole statute[420] was enacted in 1972. The provision in question directed the Illinois parole board to deny a prisoner parole if "his release at that time would deprecate the seriousness of his offense or promote disrespect for the law."[421] The *Welsh* court held that the statute directed the parole board, for the first time, to consider principles of "general deterence" and "retributive justice"[422] when making parole decisions. Therefore, the court found that application of the provision to prisoners who had committed their crimes prior to the statute's effective date violated the *ex post facto* clause.

In *Heirens*, the court re-examined its decision in *Welsh* while reviewing a magistrate's order for the release of Heirens who was then on parole. After a lengthy review of parole board practices, statutes, regula-

414. *Id.*; *See also* Jones v. Diamond, 636 F.2d 1364, 1373-74, (*en banc*), (5th Cir.), *cert. denied*, 453 U.S. 950 (1981); Withers v. Levine, 615 F.2d 158 (4th Cir.), *cert. denied* 449 U.S. 849 (1980).

415. *Walsh*, 733 F.2d at 476.

416. *Id.*

417. 729 F.2d 449 (7th Cir.) *cert. denied*, 105 S. Ct. 147 (1984). The *Heirens* court noted that the opinion was circulated to all the active district court judges. The panel found that "no judge favored a rehearing *en banc* on the question of overruling" the 1982 decision.

418. U.S. CONST. art. I, § 10, cl. 1 provides, "No state shall . . . pass any . . . *ex post facto* law."

419. 668 F.2d 328 (7th Cir.), *cert. denied*, 459 U.S. 923 (1982).

420. ILL. REV. STAT. ch. 38 § 1003-3-5(c) provides:

> (c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

421. ILL. REV. STAT. ch. 38 § 1003-3-5(c)(2).

422. *Heirens*, 729 F.2d at 457 *citing Welsh*, 668 F.2d at 331.

tions and case law[423] prior to 1973, the court reached a conclusion contrary to that reached by the *Welsh* court. Specifically, the *Heirens* court found that the parole board could and did consider principles of retributive justice and general deterence in making parole decisions prior to 1973. The *Heirens* court found that the 1973 law "merely codified prior law"[424] and disagreed with the *Welsh* court that pre-1973 parole decisions focused on the prisoner himself, particularly on whether the prisoner was rehabilitated.[425] Accordingly, the court held that because principles of general deterrence and retributive justice had always been considered, application of the provision to prisoners who had committed their crimes prior to 1973 would not be disadvantageous to them and would not violate the *ex post facto* clause.

In *United States ex rel. George v. Lane*,[426] the seventh circuit held that the Constitution does not guarantee the right of access to a law library to a defendant who is confined prior to trial and who elects to defend himself. The court consequently reversed the district court's finding that a defendant who elects to proceed *pro se* must be given access to a law library.[427]

In *George*, the petitioner was charged initially with burglary and forgery. After changing his plea and choice of counsel on numerous occasions, George finally decided to proceed *pro se* to trial on a forgery charge. He elected to represent himself even though the trial judge, on numerous occasions, had warned him of the inherent problems in proceeding *pro se* and had recommended that he exercise his right to appointed counsel.

When George later motioned for access to a law library, the judge refused his request. However, the judge did provide George with access to materials through the public defender's office. The judge had already assured George access to an assistant public defender who would represent him if George changed his mind.

Following his trial, George was convicted of forgery. On appeal, the Illinois Appellate Court rejected his argument that he should have been

423. *See* People v. Nowak, 387 Ill. 11, 55 N.E.2d 63, 65 *cert. denied*, 323 U.S. 745 (1944) (Executive pardons and parole board decisions are made "in the interests of society and his discipline, education and reformation of the one convicted." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (Parole decisions are based on what is best for the individual and the community. Considerations include whether the "inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice.")

424. *Heirens*, 729 F.2d at 463.

425. *Id.* at 458 citing *Welsh*, 668 F.2d at 330.

426. 718 F.2d 226 (7th Cir. 1983).

427. No. 81 C 2085 (N.D. Ill. 1983).

prisoners have a constitutional right of access to the courts. In addition, prison authorities must help convicted prisoners prepare and file legal papers by "providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[433] In *Faretta*, the Court recognized that the sixth amendment provides a "right of self representation" which allows a defendant to refuse representation by counsel and to conduct his own defense instead.[434]

The Seventh Circuit, however, found that neither case supported the petitioners' argument that the sixth amendment guarantees a defendant, who elects to proceed *pro se*, the right of access to a law library. In distinguishing *Bounds*, the court adopted the reasoning of *United States v. Chartman*.[435] In *Chartman*, the Fourth Circuit held that to the extent that *Bounds* is applicable, the sixth amendment is satisfied when the government offers a defendant the assistance of counsel even though it is declined. The Seventh Circuit also found no basis in *Faretta* to support the petitioner's argument. Here, the court quoted from *United States v. Wilson*.[436] In *Wilson*, the Ninth Circuit found that *Faretta* provided no support for the proposition that, once a defendant elects to defend himself, the sixth amendment "implies further rights to materials, facilities, or investigative or educational resources that might aid self-representation."[437]

Thus while observing that the trial court judge "did everything in her power to protect and balance the rights of all parties involved,"[438] the court held that "the offer of court-appointed counsel to represent a defendant satisfies the constitutional obligation of a state under the sixth and fourteenth Amendments"[439] and fulfilled the guidelines set forth in *Bounds*.[440]

VII. CONCLUSION

The conclusion of the 1983-84 term of the Seventh Circuit Court of Appeals brought many criminal law developments worth noting. In analyzing several federal statutes, the court extended the concepts of federal jurisdiction in cases involving U.S. funds and property. The meanings of "possession" and "intent" were also expanded, but the court's construc-

433. *Rounds*, 430 U.S. at 828.
434. *Faretta*, 422 U.S. at 832.
435. 584 F.2d 1358 (4th Cir. 1978) cert. denied, 104 S. Ct. 205 (1983).
436. 690 F.2d 1267 (9th Cir. 1982).
437. *Id.* at 1271.
438. *George*, 718 F.2d at 232.
439. *Id.* at 231.
440. *Id.* at 233.

and fourteenth Amendments"[439] and fulfilled the guidelines set forth in *Bounds*.[440]

VII. CONCLUSION

The conclusion of the 1983-84 term of the Seventh Circuit Court of Appeals brought many criminal law developments worth noting. In analyzing several federal statutes, the court extended the concepts of federal jurisdiction in cases involving U.S. funds and property. The meanings of "possession" and "intent" were also expanded, but the court's construction of intent arose in a poorly reasoned opinion and its continued validity is questionable. In fourth amendment cases, the court's position on warrantless searches was, in general, to expand government powers in automobile searches and under the plain view exception, but its philosophy on when an airport search becomes an unreasonable seizure is inconclusive, as the four major airport search cases were decided narrowly on the facts of the individual cases.

Relatively little was added to the body of case law under the fifth, sixth, and eighth amendments. Although both double jeopardy and entrapment defenses were considered, no new developments resulted. In sixth amendment related cases, defendants advanced many novel arguments, but apart from a clarification of the Speedy Trial Act, no new ground was broken. Similarly, in several prisoners' rights cases, the court denied attempts to expand eighth amendment rights.

439. *Id.* at 231.
440. *Id.* at 233.