The Court of Appeals for the Seventh Circuit was called upon to decide a number of novel issues in the past year. Although the court did not consider issues or reach decisions as dramatic in impact as the United States Supreme Court decisions of the last term,¹ it has continued to reach significant decisions of high quality based on sound policy considerations conforming with generally well-settled principles.

The purpose of this article is to offer an overview of issues in federal criminal procedure cases decided in this circuit for the criminal lawyer in active litigation. It is designed to be more informative than analytical. Although the focus of the article is to provide a sound research tool for the practicing attorney, an attempt has been made to examine the decisions to determine if they conform with past experience, general policy considerations and the requirements of reason. Some of the issues are novel. In the author's view they require more attention than can be given here. Nonetheless, a beginning has been made which will hopefully be followed by more extensive commentary.

A brief explanation of the format may be appropriate. The article is structured to discuss issues as they occur during litigation of a criminal case, beginning with eye-witness identification and concluding with sentencing. The author has offered comments at the beginning of each section concerning certain fundamental principles which are doubtless well understood by the active criminal lawyer. It is the author's belief that a short restatement of these basic principles will aid in the discussion of the issues which the court was called upon to decide.

EYE-WITNESS IDENTIFICATION

The two significant opinions concerning the eye-witness identification area were United States v. Kimbrough and United States v. Grose. The cases applied the Neil v. Biggers standard to eye-witness identifications in federal prosecutions. By so doing, they foreclosed the possibility that the Seventh Circuit might adopt a per se supervisory rule of exclusion, at least as to out-of-court identifications, in federal prosecutions where law enforcement officials have used unnecessarily suggestive procedures.

The significance of these cases stems from the dispute over the effect of Biggers on the exclusionary principles first enunciated in the Wade-Gilbert-Stovall trilogy. In Stovall, the United States Supreme Court condemned eye-witness testimony that was "so unnecessarily suggestive and conducive to irreparable misidentification" as to violate defendant's right to due process of law. Biggers, relying in part on an earlier decision, stated that the test for exclusion was whether under the "totality of the circumstances" the identification was unreliable. Mr. Justice Powell, however, noted the possibility of a different result in a rather cryptic passage of the opinion. He referred to a stricter rule which would bar an unnecessarily suggestive procedure when a more reliable one is available. Several commentators have argued that the Court did not apply this stricter rule only because Biggers involved a pre-Stovall confrontation and trial. Whether a stricter

2. Another Seventh Circuit case, United States ex rel. Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), decided this past year, will not be discussed herein. The case applied United States ex rel. Pierce v. Cannon, 508 F.2d 197, 200 (7th Cir. 1974), and represents a restatement of prior law.
3. 528 F.2d 1242 (7th Cir. 1976).
4. 525 F.2d 1115 (7th Cir. 1975), cert. denied, 424 U.S. 973 (1976).
5. 409 U.S. 188 (1972).
8. 388 U.S. at 302.
10. 409 U.S. at 196 (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).
11. Id. at 198-99: What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process. Such a rule would have no place in the present case, since both the confrontation and the trial preceded Stovall v. Denno, supra, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury (citations omitted).
standard would be applied in a post-Stovall confrontation and trial has yet to be determined by the Court.\textsuperscript{13}

The stricter test, apparently followed in the Fourth and Second Circuits,\textsuperscript{14} excludes any evidence, reliable or not, obtained through improper police practices in order to prevent those practices. The rationale in support of the stricter test is that due process is concerned with procedural fairness, irrespective of guilt or innocence. Further, the \textit{Wade} trilogy was concerned with police abuse of the identification process. The stricter rule would encourage police to use the least suggestive methods of identification.\textsuperscript{15}

The Seventh Circuit has adopted a more permissive interpretation. It has held that the constitutional right recognized in \textit{Stovall} is violated only where, following an unnecessarily suggestive police practice, the identification evidence which is in fact unreliable is admitted at trial. The focus is on the reliability of the identification, not the suggestive police practice. This approach seems to be the most consistent with \textit{Biggers} since there the Court was most troubled by the district court's conclusion that "unnecessary suggestiveness alone requires the exclusion of evidence."\textsuperscript{16} Under the permissive approach, the responsibility lies with the prosecutor to assure that the identifications were ascertained by reliable procedures.\textsuperscript{17}

Prior to \textit{Kimbrough} and \textit{Grose}, the Seventh Circuit, relying on \textit{Biggers}, had adopted the more permissive approach in habeas corpus proceedings. In \textit{United States ex rel. Kirby v. Sturges},\textsuperscript{18} (then) Judge Stevens stated the essentials of the "totality of the circumstances" test under \textit{Biggers}. The court must first determine if the method of identification was suggestive. If so, it must inquire as to whether it was justified by an exigent circumstance. If it was unjustified, the court must determine if it was otherwise reliable under the standard set forth in \textit{Biggers}. A mere showing of a suggestive procedure coupled with a lack of an exigent circumstance does not violate due process.\textsuperscript{19}


\textsuperscript{13} \textit{But see} Pulaski, \textit{supra} note 12, at 1116: "The Court in \textit{Neil} clearly opted for a permissive interpretation of the due process test . . . ."


\textsuperscript{15} \textit{Neil v. Biggers}, 409 U.S. 188, 199 (1972); Pulaski, \textit{supra} note 12, at 1114; Grano, \textit{supra} note 12, at 782.

\textsuperscript{16} 409 U.S. at 198-99.

\textsuperscript{17} \textit{See} Pulaski, \textit{supra} note 12, at 1117. For the analogous area of post-indictment photographic displays, \textit{see} United States v. Ash, 413 U.S. 300, 320 (1973): "The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often been said, may 'strike hard blows' but not 'foul ones.'"

\textsuperscript{18} 510 F.2d 397 (7th Cir.), cert. denied, 421 U.S. 1016 (1975).

\textsuperscript{19} \textit{Id.} at 404 n.21.
Upon such a showing, the issue becomes whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. "[T]he constitutional error that the rule is intended to avoid is an unfair trial, rather than merely an unfair identification \ldots ."\footnote{20}

In \textit{Kimbrough}, the court applied the permissive approach to a federal prosecution. The case involved the suggestive display of a photograph of the defendant to a mail carrier who had been assaulted. Judge Bauer held that under \textit{Biggers}, the sole area of inquiry was whether the identification was reliable.\footnote{21} The court found that the victim of the assault had ample opportunity to attentively observe the defendant. Further, the victim gave an accurate description of the defendant and displayed a "total certainty" in his identification. Finally, the photographic identification took place one and one half hours after the assault. While finding the procedure showed "poor law enforcement practice," the court nevertheless affirmed the defendant's conviction.\footnote{22}

The court dealt with a related issue in \textit{Grose}. The defendant's picture was published in the Milwaukee papers shortly after his arrest for a bank robbery. The publicity, he argued, created a substantial risk of misidentification and thus post-indictment identification of him should have been suppressed. Defense counsel was permitted at trial to elicit testimony that the witnesses had observed the pictures in the newspaper. Citing \textit{United States v. Broadhead},\footnote{23} the court held that the fact that the witnesses had observed the pictures went to the weight, not the admissibility, of the evidence. The court found no substantial likelihood of misidentification. The witnesses "had ample opportunity, at close range and under adequate lighting, to observe the perpetrator at the time of the robbery."\footnote{24} The totality of the circumstances clearly revealed an opportunity to identify the witnesses.

The Second Circuit has recently indicated an inclination to adhere to the stricter rule. In \textit{Brathwaite v. Manson},\footnote{25} the court expressed the view that \textit{Biggers} involved a pre-\textit{Stovall} confrontation and trial and that since both the photographic identification and the in-court identification were subsequent to \textit{Stovall}, the identification should be excluded: "No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification."\footnote{26}

\begin{footnotes}
\item[20] \textit{Id.} at 408.
\item[21] 528 F.2d at 1242.
\item[22] \textit{Id.} at 1247.
\item[23] 413 F.2d 1351 (7th Cir. 1969), \textit{cert. denied}, 396 U.S. 1017 (1970).
\item[24] 525 F.2d at 1118.
\item[26] \textit{Id.} at 371.
\end{footnotes}
This interpretation of Biggers was not urged in Kimbrough and Grose. The court did not consider the more restrictive approach. The Seventh Circuit’s approach is more sensible. Due process protects against the admission of unreliable evidence. It does not necessarily bar an unreliable procedure. A reliable witness will not impermissibly prejudice a defendant. The focus, therefore, is properly limited only to the witness’ ability to observe.27 The stringent test promulgated in Biggers assures this ability. A per se rule of exclusion would unnecessarily foreclose a witness who was well acquainted with the defendant and had ample opportunity to observe him commit an act.28 The Seventh Circuit’s approach is clearly consistent with the limits of due process.29

STATEMENTS, ADMISSIONS AND CONFESSIONS

Voluntariness

The fifth amendment right against self-incrimination comes into play when law enforcement officers take a suspect into custody or otherwise restrict his freedom of action in any “significant way.”30 After receiving proper Miranda warnings, the suspect can waive his rights.31 He may also rescind the waiver at any time prior to or during interrogation.32 The existence of the warnings is merely one factor in determining voluntariness.33 In order to determine if a statement is voluntary, one must examine whether under the totality of the circumstances, the suspect’s statement resulted from a rational and free decision to waive his rights.34

27. This evaluation of the witness’ ability to observe is similar to the “independent basis test” under Wade and Gilbert. However, there is one fundamental distinction between the due process inquiry and the independent basis test. In the former, the defendant must carry the burden of proof. See Simmons v. United States, 390 U.S. 377, 384 (1968); Stovall v. Denno, 388 U.S. 293, 302 (1967); N. SOBEL, EYE-WITNESS IDENTIFICATION 67 (1972). Under Wade, the government is required to prove “by clear and convincing evidence,” the independent basis for the identification. 388 U.S. at 240.


29. For other recent opinions which have followed the Seventh Circuit, see Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976) (“This rule, unlike the exclusionary rule of the Fourth Amendment, is aimed not at deterring unfair police practices but at the reliability vel non of the truth-finding process”); United States v. Russell, 532 F.2d 1063 (6th Cir. 1976). See also United States v. Young, 529 F.2d 193 (4th Cir. 1975) (independent basis for in-court identification).


31. Id. The accused may not be threatened, tricked or cajoled into waiver. Id. at 476. See United States v. Duvall, 537 F.2d 15, 24 (2d Cir.), cert. denied, 96 S. Ct. 3173 (1976).


33. United States ex rel. Hayward v. Johnson, 508 F.2d 322, 326 (3d Cir. 1975); United States v. Guaydacan, 470 F.2d 1173 (9th Cir. 1972) (per curiam) (confession not voluntary in spite of the fact that warnings were given).

The opinions of the Seventh Circuit concerning voluntariness were brief. In *United States v. Buchanan*, the defendant received warnings on two occasions. He admitted at trial he had been advised of his rights and had been under no physical coercion. In holding that the defendant’s will had not been overborne by the arresting officers, the court noted that a trial court’s finding on the question of the defendant’s confession must be sustained unless clearly erroneous. The defendant in *United States v. Reynolds* maintained that although he had voluntarily signed his name to a confession, he had done so only as a result of promises made by the government. Relying on *Bram v. United States*, he argued that the confession should have been suppressed. Prior to the confession, the government agent told the defendant “there was probably a possibility that if he [the defendant] cooperates and if he was involved, that it would be more lenient on him.” The court upheld the confession. The statement was made in response to the defendant’s inquiry and was posed as a mere “possibility.” Rejecting a “wooden” application of *Bram*, the court found the confession to be voluntary.

The court also briefly considered the effect of the trial court’s failure to articulate correct standards for a motion to suppress a confession. In *United States v. Davis*, the defendant claimed that the court failed to state the correct standards in denying his motion to suppress. The court held that the denial of the motion found adequate support in the record and met the requirements of *Lego v. Twomey*. Although the trial court did articulate

35. 529 F.2d 1148 (7th Cir. 1975) (per curiam), cert. denied, 96 S. Ct. 1725 (1976).
36. Id. at 1151-52.
37. 532 F.2d 1150 (7th Cir. 1976).
38. 168 U.S. 532, 542-43 (1897). See also *United States v. Barfield*, 507 F.2d 53, 55-57 (5th Cir.), cert. denied, 421 U.S. 950 (1975) (16-year-old who was told by FBI agent he might get off with probation if he told the “real story” and that he might be left “holding the bag” if he did not, voluntarily confessed); *United States v. Springer*, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873 (1972) (promise by agent insufficient to establish involuntariness). *But see Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347-49 (1963) (confession a result of a direct governmental promise of immunity).
39. 532 F.2d at 1157.
40. 532 F.2d 22 (7th Cir. 1976). Defendant also alleged that he had been improperly advised of his rights. He was orally given warnings twice and read them once. Although he initially refused to sign a waiver form, he later signed this and a full confession. The initial declination to sign the form was “only one factor among others to be considered in determining the voluntariness of the statements.” *Id.* at 26. He also contended that he did not understand that he had a right to immediate appointment of a federal defender. The court rejected the claim, noting that, to its knowledge, no court has held the standard *Miranda* warnings concerning the appointment of an attorney inaccurate. *Id.*
41. The trial court stated: “So, I do not believe you... have supported the motion by clear and convincing evidence, or even by the weight of the evidence.” 532 F.2d at 26.
42. 404 U.S. 477, 489 (1972):
   [W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake.
incorrect standards, it did consider the *Miranda* requirements in ruling.\(^{43}\) By so holding, the Seventh Circuit apparently focused on the trial court's actual reliance on the *Miranda* requirements and the definitiveness of its ruling.

**Construction of Miranda**

In the past year the United States Supreme Court rejected the Seventh Circuit's rule that *Miranda* warnings must be given during non-custodial interrogations by Internal Revenue Service intelligence agents. In *United States v. Dickerson*,\(^{44}\) the circuit had enunciated its view that the warnings must be given to suspects before such non-custodial interrogations. The court reasoned that the transfer of the case to the Intelligence Division indicated that the investigation had focused on the suspect and hence the warnings were required.

In *Beckwith v. United States*,\(^{45}\) the Court rejected this minority position.\(^{46}\) Accordingly, statements made to such agents and records obtained during the course of the interview are now admissible, even though no warnings are given. The taxpayer in *Beckwith* had argued for the Seventh Circuit's approach, contending that *Miranda* was applicable because he was the "focus" of the investigation. Therefore, he was in the functional and legal equivalent of the classic *Miranda* situation.

As the Court noted, such a proposition ignores the central point on which *Miranda* turned: the coercive aspect of custodial interrogation.\(^{47}\)


\(^{44}\) 413 F.2d 1111 (7th Cir. 1969). United States v. Oliver, 505 F.2d 301 (7th Cir. 1974) affirmed the role announced in *Dickerson*. See Haddad, supra note 6, at 297.


\(^{47}\) The Court stated: An interview with government agents in a situation such as the one shown by this record simply does not present the elements which the *Miranda* Court found so inherently coercive as to require its holding. Although the "focus" of an investigation may have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding. *Miranda* specifically defined "focus," for its purposes, as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." . . . It may well be true, as petitioner contends that the "starting point" for the criminal prosecution was the information obtained from petitioner and the records exhibited by him. But this amounts to no more than saying that a tax return signed by a taxpayer can be the "starting point" for a prosecution.
Brennan, dissenting, viewed the interrogation at issue as having the "practical consequence" of compelling the taxpayer to make disclosures and was thus fully comparable to the formal custodial situation involved in *Miranda*. The majority pointed out that "custodial interrogation" as specifically defined in *Miranda*, means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." Since such situations did not amount to custody, then the circuit's rule clearly did not conform with the requirements of *Miranda*. Thus, as a result of *Beckwith*, the sole case decided by the circuit in this area is of little consequence.

In the 1975 term, the Court, in a plurality opinion in *United States v. Mandujano*, held that *Miranda* warnings need not be given to a grand jury witness who is in the position of a "virtual" or "putative" defendant. As in *Beckwith*, the Court stressed the lack of custodial coercion envisioned in *Miranda*. In the Court's view, *Miranda* "simply did not perceive judicial inquiries and custodial interrogations as equivalents."

The defendant in the Seventh Circuit case of *United States v. Smith* argued that his conviction for perjury before a grand jury should be reversed since he was the "virtual" or "putative" defendant at the time he testified. The court sustained the conviction on two grounds: (1) he was not a virtual

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425 U.S. at 347 (citation omitted). The court went on to admit that in special instances, a non-custodial interrogation may involve some form of coercion or overbearing by law enforcement officials, but noted that in this case, the court of appeals had determined that the interview was entirely free from coercion. *Id.* at 347-48.

50. In *United States v. Dreske*, 536 F.2d 188 (7th Cir. 1976), the defendant urged the court to extend the *Oliver-Dickerson* rule to interrogations by a Collection Division agent. Such interrogations are normally conducted prior to formal referral to the Intelligence Division for possible criminal violations. Indicating that it would not have extended the doctrine to such cases, the court recognized that *Beckwith* assured the admissibility of such statements. *Id.* at 195.

51. 96 S. Ct. 1768 (1976).
52. *Id.* In *Mandujano*, the defendant was being prosecuted for perjury for making false statements before a grand jury. He moved to suppress his grand jury testimony on the grounds that he was a putative defendant at the time and had not been given proper *Miranda* warnings. Although the Court denied the motion to suppress, there was no clear majority opinion. Justices Burger, White, Powell and Rehnquist held that a putative defendant is not entitled to *Miranda* warnings prior to testifying before a grand jury. *Id.* at 1778-80. Justices Brennan and Marshall concurred, but emphasized that in the absence of a knowing waiver of the right against self-incrimination, the testimony should be unavailable in a subsequent prosecution for the investigated crime. *Id.* at 1788. In addition, they indicated that a putative defendant should be warned of the possibility of self-incrimination and also informed of the right to consult with counsel and, if necessary, to have one appointed. *Id.* at 1788, 1791. Justices Stewart and Blackmun also concurred on the grounds that the fifth amendment does not protect the commission of perjury. Since the testimony was not introduced in the prosecution for the investigated crime, they declined to consider the self-incrimination issue. *Id.* at 1792-93.
53. *Id.* at 1778.
54. 538 F.2d 159 (7th Cir. 1976).
defendant at the time of questioning and, (2) under Mandujano, the government was not required to give such warnings.\textsuperscript{55} At the time of his testimony, the grand jury was investigating the tax fraud of a third party. The Internal Revenue Service had not opened a case file on the defendant, nor had the prosecutor or the foreman formed an opinion that he had performed an illegal action. Hence, he was not a putative or virtual defendant.\textsuperscript{56} Mandujano, as well as a prior Seventh Circuit opinion,\textsuperscript{57} dictated that the statement need not be suppressed.

**Bruton Problems**

In Bruton v. United States,\textsuperscript{58} the admission of a defendant's post-conspiracy confession implicating a codefendant was held to be reversible error if the confessing defendant did not testify. To admit such statements, the Court held, denies the accused his sixth amendment right of confrontation.\textsuperscript{59} Where the defendant has an opportunity to cross-examine the codefendant, the confession is admissible against him in a joint trial.\textsuperscript{60} It is self-evident that to be excluded, the confession must clearly inculpate the codefendant.\textsuperscript{61}

The issue of two Seventh Circuit cases decided last year involving a Bruton problem was whether a codefendant was sufficiently identified by another codefendant in his admission. The two cases appeared to turn on the existence of other substantial evidence connecting the defendant to the crime. In United States v. Cook,\textsuperscript{62} two brothers, Laurell and Bobby Cook, were convicted of bank robbery. Shortly after an arrest on another charge, Bobby Cook made a statement implicating his brother. While testifying to the statement, the government witness stated Bobby had said "[t]hat after the

\textsuperscript{55} Id. at 161.
\textsuperscript{56} In view of Mandujano, the court deemed it unnecessary to distinguish the cases which held that a witness before a grand jury was a virtual defendant.
\textsuperscript{57} United States v. DiGiovanni, 397 F.2d 409, 412 (7th Cir. 1968). See also United States v. Nickels, 502 F.2d 1173, 1176 (7th Cir. 1974).
\textsuperscript{58} 391 U.S. 123 (1968).
\textsuperscript{59} By so holding, the Court overruled United States v. Delli Paoli, 352 U.S. 232 (1957). In Delli Paoli, the Court held that a limiting instruction ordering the jury to consider the confession solely against the declarant was sufficient.
\textsuperscript{60} Nelson v. O'Neil, 402 U.S. 622 (1971). See also United States v. Everett, 457 F.2d 813 (9th Cir. 1972). The key to Bruton is the existence of an opportunity to cross-examine the person making the statement.
\textsuperscript{62} 530 F.2d 145 (7th Cir. 1976). For a discussion of the search issue raised in Cook, see note 107 infra and accompanying text.
bank robbery, when cars were switched, that his brother Larry. . . ."63 The witness was then cut off by counsel's objections.

The district court refused to grant a motion for mistrial. It held the statement was not prejudicial since it was not clear that "his brother Larry" referred to the defendant. Additionally, the court ruled the statement was not prejudicial because it was not intelligible and because the court had given a curative instruction. The Seventh Circuit disagreed. It stated that the reference to "Larry" and to Bobby Cook's brother left little room for an alternative inference by the jury. Further, the timing and the contents of the testimony of the government witness dictated that "Larry" would be connected to the defendant Laurell Cook.64 While the statement clearly referred to Laurell Cook, it was the strongest evidence in the case against him, and hence its admission required reversal.

In United States v. Rajewski,65 a codefendant stated to a government witness that "the kid did the job himself." The other defendant alleged that "the kid" was a direct reference to him. The trial court held the statement was ambiguous and that the testimony immediately prior to the statement referred to the other defendant. Since the statement was a "minor, off-hand comment" and there was other substantial evidence of the defendant's guilt, the circuit court held that the trial court had correctly refused to grant a mistrial.

**Derivative Evidence of a Compelled Confession**

In perhaps the most significant case of the year in the confession area, the Seventh Circuit intimated that it would only exclude third party testimony obtained in violation of *Miranda* in exceptional circumstances. By so doing, the court suggested resolution of a question which the United States Supreme Court had refused to resolve in *Michigan v. Tucker*.66 *Tucker* held that third party testimonial evidence would not be excluded if the arrest had taken place before the *Miranda* decision.67 In *Tucker*, the Court ruled that since the *Miranda* rules were "prophylactic standards" and not constitutional rights of themselves, the fruits of the failure to give the appropriate warning68 were not required to be excluded where the confession was otherwise voluntary and

63. 530 F.2d at 150 (quoting transcript at 405-06).
64. 530 F.2d at 150. Citing *Bruton*, the court also held that the curative instruction was insufficient to prevent the prejudice.
65. 526 F.2d 149, 156 (7th Cir. 1975).
68. In *Tucker*, the sole warning the defendant was not given was his right to appointed counsel. 417 U.S. at 438.
elicited in conformance with then good faith police practice. In other words, the Court held that, although the safeguard of the fifth amendment had been breached, the actual right against self incrimination had not been violated.\(^6\) Hence, the third party evidence was properly admitted.

In contrast to *Tucker*, the facts in *United States ex rel. Hudson v. Cannon*\(^7\) indicate gross police misbehavior. When the defendant was arrested for murder on May 22, 1967, he was not given any warnings. He was interrogated by several policemen for a five-and-one-half hour period without food, water, cigarettes or rest. Several requests to phone an attorney were denied. He was told that he could make a call after he told police what \"they wanted to hear.\"\(^7\)

The court's approach, as in *Tucker* was divided into two inquiries: did the police activity violate a constitutional right and if so, should the derivative testimony be excluded. Chief Judge Fairchild found that the facts of *Hudson* indicated not only a failure to give *Miranda* warnings, but also a denial of his sixth amendment right to counsel under *Escobedo v. Illinois*.\(^7\) The facts of the case indicated an involuntary confession under traditional standards as well.\(^7\) Since the confession was involuntary, unlike *Tucker*, the defendant's fifth amendment right had been violated. The court further found that *Escobedo* defined a constitutional right and not a mere \"prophylactic standard.\" Therefore, failure to allow the defendant the opportunity to contact an attorney constituted a violation of his rights under the sixth amendment.\(^7\)

Under *Wong Sun v. United States*\(^7\) the fruits of the involuntary confession and the sixth amendment violation must be excluded. \"Nothing in *Tucker* suggests that there need not be exclusion of evidence where a state court defendant can show that such testimony is the product of a coerced or involuntary statement.\"\(^7\) Since the court found a fifth amendment violation under traditional voluntariness standards and a violation of the sixth amendment under *Escobedo*, it was not required to reach the narrow question of whether third party testimony should be excluded upon a showing of a

\(^6\) Since there was no constitutional infringement, *Wong Sun v. United States*, 371 U.S. 471 (1963), did not require the exclusion of the derivative evidence. 417 U.S. at 445. The Court went on to consider whether the evidence should have been excluded on some alternative ground. *See The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 201 (1974).
\(^7\) 529 F.2d 890 (7th Cir. 1976).
\(^7\) Id. at 891. During questioning, Hudson implicated an accomplice who implicated a third party. Both testified against him at trial.
\(^7\) 378 U.S. 478 (1964).
\(^7\) 529 F.2d at 894.
\(^7\) 371 U.S. 471 (1963).
\(^7\) 529 F.2d at 892.
Miranda violation alone. Dicta in the case indicates that the members of the court are undecided on the issue.

The court was divided on the issue of whether the fruits of a post-Miranda failure to give warnings should be admitted. The majority concluded that regardless of the fact that the interrogation occurred after the decision, the deterrent effect of excluding such fruits is insufficient to justify exclusion of otherwise reliable evidence. To the extent that the case rested on the Miranda violation, the majority would have extended Tucker to a post-Miranda arrest. Implicit in the majority’s opinion is an expression of concurrence with the view voiced by Justice White in Tucker that any benefits of exclusion are far outweighed by the benefits of making relevant and reliable testimony available to the finder of fact. 77

Although there was no discussion of its position, the majority’s approach can be easily justified. First, it is doubtful that the exclusion of fruits of such violations would tend to deter improper police practice. This is a fundamental consideration in determining the scope of the exclusionary rule. “Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.” 78 When an investigator interrogates a suspect, the principal deterrent for a Miranda violation is the fact that the accused’s statements will be excluded. The exclusion of derivative evidence “adds little” 79 to the deterrence factor. Hence the exclusion serves no “valid and useful purpose.” Furthermore, in the fifth amendment area, exclusion of evidence has traditionally been justified by the additional concern that a compelled confession is unreliable. Although the facts of Hudson unquestionably indicate that the confession was compelled, there was clearly no reason to believe that the third party testimony would be untrustworthy simply because the defendant was not advised of his rights. 80 Another consideration is that the fifth amendment is limited to “the use of physical or moral compulsion to extort communications from” 81 the lips of the defendant. The

77. 417 U.S. at 461:

Miranda having been applied in this Court only to the exclusion of the defendant’s own statements, I would not extend its prophylactic scope to bar the testimony of third persons even though they have been identified by means of admissions that are themselves inadmissible under Miranda. The arguable benefits from excluding such testimony by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth. The same results would not necessarily obtain with respect to the fruits of involuntary confessions.

78. Id. at 446.

79. 529 F.2d at 895.

80. Id. at 894.

81. Holt v. United States, 218 U.S. 245, 252-53 (1910) (Holmes, J.). Assuming that Miranda outlines mere prophylactic safeguards and a confession is otherwise voluntary, it is at best arguable that such third party testimony would be deemed a result of compulsion because the statement leading to the witness has been voluntarily given and the testimony is not coming from the lips of the defendant.
testimony of a third party is clearly not proof of a communication of the defendant.

Chief Judge Fairchild suggested a different approach. He was more inclined to "heed Tucker's emphasis on the 'good faith' of the police officers involved and bar the admission of the third party testimonial fruits." He did not expressly articulate his reason for this view. However, his approach is, in one sense, arguably consistent with Tucker. The exclusionary rule focuses on negligent or wilful conduct which results in deprivation of a right. By refusing to admit the fruits of such conduct, the courts are endeavoring to instill in law enforcement a greater degree of concern for the accused's rights to the greatest extent possible. Good faith in a post-Miranda situation would demand the giving of all the warnings. In Tucker, the court held that the interest in deterring unlawful police practice would not be furthered where the police were acting in good faith under then known constitutional standards. In Hudson, however, there was no such showing of good faith since the interrogation occurred after Miranda when an officer would have been on notice of proper procedures. Hence, under Fairchild's approach, the evidence would have been excluded.

In sum, the differences between the two approaches are apparent. The majority would find such evidence admissible presumably because it is reliable and because the deterrent value of the exclusion is questionable. Chief Judge Fairchild relies on the good faith of the officers. This requirement, which would be applied to all post-Miranda arrests, would arguably result in the exclusion of all fruits of such violations. In the author's view, the majority's approach is more sound because of the questionable effect of the exclusionary rule on third party testimonial fruits in deterring such conduct.

In Hudson, however, since a sufficient causal connection between the third party testimony and the coercion, amounting to a fifth amendment violation as well as the sixth amendment violation, had been pleaded, the defendant was entitled to a hearing to show that the testimony was the fruit of the violations. The narrower issue, unfortunately, was not expressly decided. Nevertheless, the ultimate significance of the case is the majority's suggestion that the probative value of the fruits of a post-Miranda violation outweighs the deterrent effect of excluding such evidence and hence the fruits should be admitted.

82. 529 F.2d at 895.
83. This is so presumably because no police officer ten years after the Miranda decision could be unaware of the requirements of the decision. See The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 199 (1974).
84. Under Wong Sun v. United States, 371 U.S. 471, 487-88, 491 (1963), the state could show that there was in fact no taint or circumstance which would purge or dissipate it. Alternatively, it could show that it learned of the witnesses through an independent source.
85. 529 F.2d at 890.
The fourth amendment principles governing arrest, search and seizure situations are well-known. One's reasonable expectation of privacy in his person or property is protected from unreasonable governmental intrusion under the fourth amendment.86 Whether an intrusion is reasonable is determined by weighing the government's need to search and seize against the individual's privacy interest.87 When the balance swings toward permitting the government to search, the individual's interests are still protected. First, the government's need must be demonstrated by a showing of probable cause.88 Second, the scope of the search or seizure is limited by the need for the intrusion.89

Despite the recognition of these basic principles, fourth amendment decisions reflect a degree of confusion which is probably inevitable because of the necessity of making case-by-case determinations as to how the principles will be applied.90 In the Seventh Circuit this year, arrest, search and seizure decisions continued to provide fertile ground for discussion. No single decision is of overwhelming import, but when taken together, the decisions reveal both new insights and continuing lack of clarity. For example, a new policy concern was expressed by the court and helpful discussions of third party consent searches were articulated.

An example of the type of case-by-case analysis required to determine probable cause to arrest without a warrant is found in United States ex rel. Burbank v. Warden.91 In reversing the district court's grant of a habeas corpus writ, the Seventh Circuit found that the lower court had ignored the arresting officer's knowledge of the petitioner in making its probable cause determination.92 This failure resulted in the "police officer's development of a detailed familiarity with the people and places on their beat [being] overly discounted."93 The court articulated its own policy with respect to such knowledge:

The courts should encourage police officers to become involved in the communities in which they work and permit them to use the

91. 535 F.2d 361 (7th Cir. 1976).
92. Id. at 365.
93. Id. at 366. The police officer, Fitzgerald, had lived and worked in the neighborhood where the shooting took place for several years. He had seen the petitioner 40 to 50 times and also knew petitioner's mother. Fitzgerald was familiar with the way petitioner dressed and was aware of other specific things about him.
knowledge so acquired in detecting criminal activity. In our view, the third-party information conveyed to Detectives Fitzgerald and Luth, together with Fitzgerald's own knowledge, gave them probable cause to arrest him under the test of *Beck v. Ohio.*

The court did not advocate that the policeman's knowledge alone should be adequate for a finding of probable cause. It did indicate that where an officer's decision to arrest is not based merely on speculation or suspicion of criminal conduct or on subjective factors, probable cause may be established in part by specific knowledge of a suspect's characteristics. The thoughtful opinion by Judge Cummings on this point voices the court's support for conscientious, concerned police work which deserves commendation.

The question raised in a second warrantless arrest case, *United States v. Fairchild,* was whether warrantless arrests, like warrantless searches, should be treated as presumptively invalid. The court declined to discuss the subject at length in light of the fact that the United States Supreme Court had granted certiorari to the only case which had held such arrests to be presumptively invalid. This fact, combined with earlier Seventh Circuit opinions which, although not addressing the issue squarely, were consistent with the majority view, led the court to conclude that the arrest was valid. This judgment was vindicated by the Court's decision in *United States v. Watson.*

94. *Id.* (citation omitted).
95. The other information conveyed to the officers followed an initial investigation by the policemen who were called to the scene of the shooting. That investigation produced fifteen witnesses, including three who saw the petitioner enter and leave the place of the shooting. Those three described him in detail. Other witnesses described the path the petitioner took after leaving the store. The area to which the suspects were seen to flee was near where petitioner's mother lived. *Id.* at 364-65.
96. The opinion was not unanimous. Judge Fairchild's dissent indicated that he believed that the description of petitioner given by witnesses was not specific enough even when combined with the arresting officer's knowledge for a finding of probable cause. *Id.* at 367.
98. 526 F.2d at 188.
99. Judge Stevens noted that there were arguments in favor of imposing the same warrant requirement for arrests as for searches. *Id.* at 188 n.6.
100. United States v. Watson, 504 F.2d 849 (9th Cir. 1974), *rev'd,* 96 S. Ct. 820 (1976); see note 103 infra.
101. The cases cited by the court were United States v. Cantu, 519 F.2d 494 (7th Cir.), *cert. denied,* 423 U.S. 1035 (1975), and United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974).
102. 526 F.2d at 188.
103. 96 S. Ct. 820 (1976). Watson claimed that his arrest and the subsequent search of his car were in violation of his fourth amendment rights because the postal inspector who made the arrest had failed to obtain an arrest warrant despite the fact that there was time to do so. The Court noted that statutory provisions (18 U.S.C. § 3601(a) (1970)) and regulations (39 C.F.R. § 232.5(a)
Criminal Procedure

Two cases this year gave the Seventh Circuit an opportunity to consider the standards it had previously approved for determining the validity of third party consent searches in United States v. Matlock. In Matlock, the court had approved the trial court's holding that a defendant's fourth amendment rights could be waived by a third party's consent to a search only "if it was proved that the reasonable appearance of authority to consent existed and that just prior to the search, facts existed showing actual authority to consent." In United States v. Cook, the defendant argued that neither requirement of Matlock had been met. Judge Bauer had no difficulty in finding that there was a reasonable appearance of authority for the third party, the owner of the premises, to consent to the search despite the defendant's contention that the investigating agents should have made an actual inquiry as to her authority.

Whether the government had met its burden as to the second part of the Matlock test required a subtle interpretation of language in the Court's opinion. The Court had noted that when the government seeks to justify a warrantless search pursuant to a third party's consent, the consent to the search may be shown to have been given by a third party if that person has "common authority over or other sufficient relationship to the premises or effects sought to be inspected." The Court further elaborated on the common authority concept. The necessary common authority rests, not on property concepts, but on mutual use of the property by persons generally having joint access for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit inspection...
the others have assumed the risk that one of their number might permit the common areas to be searched.\(^\text{110}\)

Cook argued that the language of the Court's opinion must be read as requiring *actual use* of the premises by the consenting party or joint access *for most purposes*. Neither of these standards was met here because the facts indicated that the owner-consentor neither used the shed searched nor had access to it for most purposes. The owners merely stored things in one corner of the shed and admittedly had not been in the shed or used it for any other purpose while Cook used it.\(^\text{111}\) On its own motion the court noted that one decision had urged an actual use emphasis in the analysis of the *Matlock* standards, but it distinguished that case because it was clear that there the consenter had had *no* access to the searched premises for any purpose and thus the detailed *Matlock* analysis was not required.\(^\text{112}\)

The Seventh Circuit accepted the analysis of the government that the Court's common authority definition emphasized the assumption of risk aspect of third party consent search situations.\(^\text{113}\) Cook had assumed the risk, the court concluded, because he knew the storage space he was allotted could be preempted at any time by the owners and since he knew that they actually used some of the space. This resulted in a finding that there was actual authority for the owner to consent to a search of the premises.\(^\text{114}\)

In *United States v. Harris*\(^\text{115}\) the consent of a third party to search the defendant's apartment was found invalid. Neither part of the *Matlock* test had been met in the court's opinion. The decision focused on the absence of any facts supporting the conclusion that the defendant and the party who consented to the search were mutual users of the property with joint access and control for most purposes.\(^\text{116}\) The consenting party was not a joint lessee, had no key, had only been alone in the apartment once, and had known the defendant only three weeks. There was no actual authority on these facts and since the arresting officers knew these facts when they conducted the search, they had no reasonable basis to believe that there was such authority.\(^\text{117}\)

Although the *Harris* opinion made no reference to *Cook*, the use of the assumption of risk standard can be inferred from the statement that "it can hardly be surmised that he [the defendant] expected Edwardsen [the

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110. *Id.*
111. 530 F.2d at 148.
112. 530 F.2d at 149. The court cited *United States v. Heisman*, 503 F.2d 1284 (8th Cir. 1974).
113. 530 F.2d at 149. The court's acceptance of this analysis of the Supreme Court's language was based on its conclusion that the assumption of risk concept has predominated in recent fourth amendment cases.
114. *Id.*
115. 534 F.2d 95 (7th Cir. 1976).
116. *Id.* at 96-97.
117. *Id.* at 97.
The standard is imprecise in that it must be determined on a case-by-case basis, but it is a reasonable one, consistent with earlier decisions in this circuit and in the Supreme Court. Whether the requisite common authority exists ultimately rests on the reasonable expectations of the parties as to the access each has to the property.

The assumption of risk theme introduced in Cook was evident in another case involving an unlawful search issue, United States v. Ressler. Judge Bauer's opinion analyzed the defendants' contentions that evidence seized pursuant to a warrant should have been suppressed because the warrant had been issued based on information gained during an illegal search. The investigating agents had entered the home by the ruse of asking for one defendant by a nickname. During the ensuing visit, discussions about the sale of firearms took place and weapons were displayed. Based on the information obtained during this visit, a search warrant was secured for the premises of one defendant.

The case was governed by the standards delineated in Lewis v. United States. The court interpreted Lewis to be based on the rationale "that an entry by an undercover agent is not illegal if he entered for the 'very purposes contemplated by the occupant.'" Where an agent is not present for the purposes contemplated by the occupant who admits him, the suspect does not voluntarily consent to the exposure of information. He exposes it in response to an affirmative representation. Thus the suspect does not assume the risk that the exposed information may be reported to government authorities.

Although the use of the defendant's nickname in Ressler could be perceived as a misrepresentation that the agents and the defendants were acquaintances, the entry was permissible for two reasons. The first reason is well-articulated by the court: "A person is expected to recognize his acquaintances and any information revealed to one who claims to be an acquaintance, but who is in fact not one, must be viewed as exposed at the suspect's risk." In addition, once the defendants acquiesced in the pres-

118. Id.
120. 536 F.2d 208 (7th Cir. 1974).
121. Id. at 210.
123. 536 F.2d at 211 (quoting Lewis v. United States, 385 U.S. 206, 211 (1966)).
124. 536 F.2d at 211-12.
125. Id. at 212.
ence of the agents for the purpose of dealing in firearms, the defendants "converted their home into a 'commercial center' not protected by the Fourth Amendment."\textsuperscript{126}

The majority opinion in \textit{Ressler} indicated approval of the reasoning in the only other case found to be on point, \textit{Whiting v. United States}.\textsuperscript{127} The central theme of that analysis was that if identity misrepresentation such as occurred in \textit{Ressler} were to be outlawed, any law enforcement effort involving decoys would collapse.\textsuperscript{128} Because certain types of crime are all but impossible to attack without such techniques, it would be unreasonable to eliminate them altogether. Within the guidelines of this reading of \textit{Lewis}, the government can pursue its investigations and the person engaged in such crimes transacts with unknown people at his risk. The suspect's interests are protected by the requirement that an agent's pose be used for the purpose contemplated by the suspect when their encounter takes place.

The "'search incident to arrest'" doctrine has developed into a troublesome concept for many courts.\textsuperscript{129} However, in a clear, concise opinion written by Judge Tone, discussion and application of the basic principles of \textit{Chimel v. California}\textsuperscript{130} resulted in the reversal of the defendant's conviction in \textit{United States v. Griffith}.\textsuperscript{131}

Griffith had been arrested in his motel room, which had been entered by the searching officers with a pass-key. A search of the room had ensued.\textsuperscript{132} The court found that the search of the bathroom and other closed areas was clearly prohibited by \textit{Chimel}. The focus of the discussion was whether the search of an open paper bag was validly made incident to the arrest.\textsuperscript{133} The validity of the search under that theory was dependent on whether the bag was within an area from which the defendant might gain access to a weapon or to destructible evidence. Because the defendant was under the control of the officers at the time the search occurred the permissible area of search was

\textsuperscript{126} Id.
\textsuperscript{127} 321 F.2d 72 (1st Cir.), cert. denied, 375 U.S. 884 (1963).
\textsuperscript{128} 321 F.2d at 77.
\textsuperscript{129} For a discussion of the evolution of the "'search incident'" doctrine, the problems which now exist with such cases and proposals designed to resolve the difficulties, see Aaronsen & Wallace, \textit{A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest}, 64 GEO. L.J. 53 (1975).
\textsuperscript{130} 395 U.S. 752 (1969).
\textsuperscript{131} 537 F.2d 900 (7th Cir. 1976).
\textsuperscript{132} One officer observed, walked to and opened a brown paper bag which held clear glassine bags containing white tablets. The bathroom was searched which revealed money hidden in a towel. A suitcase was found and opened which held more pills. In preparation for the trip to the police station, all defendant's belongings were gathered and additional items seized by the officers. \textit{Id.} at 902-03.
\textsuperscript{133} The government also argued that the search of the paper bag was permissible because it was in plain view. The court rejected that analysis because the policeman's inspection of the bag was not inadvertent. \textit{Id.} at 903.
narrowed. At the time of the arrest the defendant was not in the immediate area of the bag. If it had come within the area of his immediate control it would have occurred through the actions of the officers in permitting it. Thus the search was unlawful.

In passing, the court gave recognition to the fact that in this case the defendant was not handcuffed and that other cases have recognized this as an important factor in the determination of the permissible scope of a search incident to arrest. This court discounted that factor. The reason for the limited search permitted under Chimel is the protection of law enforcement officers and evidence. Whether a danger to either exists must be decided on the facts of each case. The failure of the officers to handcuff the arrestee was an indication of their lack of concern for danger to either themselves or the evidence and could not be used as justification for a wider scope of search.

The cases discussed above contribute to an understanding of the law construing the fourth amendment and cases decided under it. Two other cases decided this term provide a sharp contrast to the clarity of reasoning and enunciation of policy demonstrated in those cases.

At the police station following her arrest on an unrelated charge, the defendant in United States v. Jeffers requested one of the arresting officers to get her nerve pills from a coin purse in her handbag. One of the officers obliged. While looking for the pills, apparently in the coin purse, he found a note which, when unfolded, revealed a small quantity of heroin. Further search of the handbag turned up a second packet of heroin. The admission of both quantities of heroin in evidence at defendant’s trial was upheld.

The court correctly concluded that the validity of the second search depended on the validity of the first one. It also correctly noted, almost in passing, that the search could be justified as one pursuant to a custodial arrest according to United States v. Edwards. Inexplicably, however, the court analogized Jeffers to United States v. Robinson because the officers conducted the search out of a “sense of duty or curiosity to examine the contents of a suspicious object.” In addition to the fact that this motive for conducting a search is violative of the basic premise that suspicion is not a sufficient basis for initiating a search, it appears that the search could have

134. Id. at 904.
135. Id.
136. Id.
137. 524 F.2d 253 (7th Cir. 1975).
138. Id. at 254.
141. 524 F.2d at 255.
142. See, e.g., United States ex rel. Burbank v. Warden, 535 F.2d 361 (7th Cir. 1976), discussed in the text accompanying notes 91-96 supra.
been fully justified on the basis of consent. The defendant requested the officers to search for her pills and the discovery of the first quantity of heroin was made in the course of a search clearly within the scope of that consent.\textsuperscript{143} By her request Jeffers gave up any reasonable expectation of privacy she might have had and waived her right to fourth amendment protection.\textsuperscript{144}

A final case, \textit{United States v. Bertucci},\textsuperscript{145} involving a warrantless vehicle search, presents some of the same analytical problems. A van was stopped by state police officers after it was observed weaving down the road. Initial inquiry revealed no evidence of alcohol and no other violation of the law.\textsuperscript{146} Nevertheless the officers conducted a routine search for alcohol and weapons which ultimately resulted in the discovery that the van contained cartons of stolen merchandise.

Judge Hoffman’s majority opinion held that there had been no violation of defendants’ fourth amendment rights. He concluded that the officers had probable cause to search the entire van for alcohol and weapons. The fact that the van had been weaving, combined with the “furtive” attempts of the defendants to stop the police from viewing the interior of the van, made it reasonable for the officers to expect to find the sought items, despite the fact that nothing else indicated the defendants had been drinking. These limited, initial intrusions were acceptable on “grounds of inspections for weapons and intoxicants, ‘plain view,’ ‘consent,’ and ‘automobile’ exceptions to the warrant rule.”\textsuperscript{147} The same inspections produced sufficient information to establish reasonable grounds for a full search of the shipping cartons.

Judge Swygert’s dissenting opinion\textsuperscript{148} posed the issue simply: “[W]as there probable cause for a search without a warrant?”\textsuperscript{149} He disagreed with the majority opinion on every point. Because no traffic citations were issued, no arrests made and no weapons found, there was no reason for the defendants to be detained.\textsuperscript{150} The conditions necessary for the application of the vehicle exception to the warrant requirement were not met.\textsuperscript{151} The cartons in the van

\textsuperscript{143} A consent search is confined to the scope of the consent given. \textit{United States v. Jeffers}, 524 F.2d 253 (7th Cir. 1975). For another opinion which thoughtfully analyzes a consent search situation, see \textit{United States v. Griffin}, 530 F.2d 739 (7th Cir. 1976).

\textsuperscript{144} The majority opinion argues that Jeffers gave up any reasonable expectation of privacy when she asked for her pills. There is no quarrel with that conclusion. It is the context within which the conclusion is reached that causes problems.

\textsuperscript{145} 532 F.2d 1144 (7th Cir. 1976).

\textsuperscript{146} The driver of the van produced a valid Illinois driver’s license.

\textsuperscript{147} \textit{Id.} at 1147.

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.} at 1148.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} To validate a warrantless search of a vehicle, probable cause must exist to believe that the vehicle contains contraband or instrumentalities of a crime and exigent circumstances must be shown to exist. See Coolidge v. New Hampshire, 403 U.S. 443 (1970), and Circuit Note: Criminal, 64 GEO. L.J. 167, 208 (1975).
CRIMINAL PROCEDURE

aroused the suspicion of the officers, but that was not sufficient probable cause for a warrantless search. Because no exigent circumstances were evident, neither requirement to justify a warrantless vehicle search was met. 152

Continuing his criticism of the majority's approach, Judge Swygert found that the inadvertence requirement of the plain view exception was not met. 153 Considering the totality of the circumstances, 154 the government had failed to meet its burden of showing that any consent to the search was freely and voluntarily given. 155 Clearly, the differing interpretation of the facts played a key role in the conflicting conclusions of the two opinions. The real difficulty with the majority opinion, however, is its failure to analyze and articulate the basis of its conclusion that the exceptions to the warrant requirement were met. 156

Because the fourth amendment provides the basis for such fundamental protections, decisions which analyze whether rights developed pursuant to that amendment have been fully recognized must be clear. The confusing state of fourth amendment law has been recognized by the United States Supreme Court, which has made conscientious attempts to clarify areas of difficulty. Recent criticism of the direction in which the Court may be going in this area makes it all the more important for the lower courts to carefully consider the cases which are presented to them. This year the Seventh Circuit appeared to recognize this need in most respects. In those cases where the need is ignored, guidelines for law enforcement officials become less clear and the position of those subject to the actions of such officials is tenuous. This is an unacceptable situation for either the government or the potential defendant.

WIRETAPPING AND ELECTRONIC EAVESDROPPING

The most significant case in the wiretapping and electronic surveillance area in the Seventh Circuit in the past year was United States v. Illinois Bell Telephone Co. 157 The case did not fall within Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 158 but rather, turned on the authority of a district court to order private communications carriers to aid in the

152. 532 F.2d at 1148, 1150.
155. 532 F.2d at 1149.
156. 532 F.2d 1144 (7th Cir. 1976).
157. 531 F.2d 809 (7th Cir. 1976). Another case decided in the Seventh Circuit in the past year involving the federal wiretap laws was United States v. Freeman, 524 F.2d 337 (7th Cir.), cert. denied, 96 S. Ct. 1126 (1975). Freeman held that monitoring of a defendant's telephone by the communications carrier was both necessary and in line with the wiretap statutes. The fruits of such monitoring were not required to be suppressed.
installation of a pen register device for surveillance purposes.\textsuperscript{159}

The factual situation in \textit{Illinois Bell} is not complicated. In an ex parte proceeding, Chief Judge James B. Parsons of the District Court for the Northern District of Illinois issued a two-part order. It first authorized the installation of a pen register device on a phone. Second, it affirmatively required the Illinois Bell Telephone Company to provide "facilities . . . information . . . and technical assistance necessary to accomplish the interception."\textsuperscript{160} The order was issued upon a finding of probable cause to believe that evidence of commission of two misdemeanor violations of the Internal Revenue Code\textsuperscript{161} would be obtained through the use of the pen register. Illinois Bell appealed the issuance of the order on the grounds that the district court had neither inherent nor statutory authority to compel the company to provide such assistance.

The circuit court initially held that pen registers are not controlled by the provisions of title III. Legislative history\textsuperscript{162} and case law,\textsuperscript{163} as well as the act itself, clearly indicate that such a device was outside the intended scope of title III.\textsuperscript{164} It was clearly unnecessary to consider whether there had been proper compliance with this section. Whether or not the issuance of the order

\begin{footnotesize}
\begin{enumerate}
\item[159.] For a definition of a pen register device, see United States v. Giordano, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part and dissenting in part):

A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court. 340 F. Supp. 1033, 1038-41 (D. Md. 1972).

See also In re Joyce, 506 F.2d 373, 377 n.4 (5th Cir. 1975).

\item[160.] 531 F.2d at 811.


\item[162.] See S. REP. No. 1097, 90th Cong., 2d Sess. 90 (1968):

Paragraph (4) defines "intercept" to include the aural acquisition of the contents of any wire or oral communication by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an "interception." The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register," for example, would be permissible. The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication (citations omitted).

See also Blakely & Hancock, \textit{A Proposed Electronic Surveillance Control Act}, 43 \textit{Notre Dame Law.} 657 (1968). The author, who was credited with primary authorship of the title, see United States v. Giordano, 416 U.S. 505, 517 n.7, 526 n.16 (1974), stated that the title was not intended to prevent the tracing of phone calls by the use of a pen register.


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was proper would be determined "entirely on compliance with the constitutional requirements of the Fourth Amendment." Since the court issued the order for the pen register on the basis of probable cause following a procedure designed to comply with the fourth amendment, it had validly exercised its authority.

Illinois Bell argued, however, that the court had neither statutory nor inherent authority to compel a private communications carrier to implement such a device. Illinois Bell relied chiefly on Application of the United States in support of its theory. Application I held that under title III, the court had no inherent or statutory authority to order a communications carrier to implement a wire tap. Though title III was subsequently amended, Illinois Bell argued by analogy that outside title III the court had no authority to issue such an order. The immediate amendment indicated congressional recognition that the district court lacked authority to issue such orders. It was for this reason that Congress was motivated to amend this title.

The Seventh Circuit rejected this argument. It was unlikely, the court held, that Congress' initial failure to include such a provision was purposeful if it had amended the Act so quickly: "We are of the opinion that Congress originally presumed that either the communications carriers would voluntarily cooperate to effectuate the purposes of the Act or that power existed in the courts to compel compliance with otherwise valid orders authorizing electronic surveillance." The swift enactment of the amendment provided "strong and persuasive authority, by analogy" that the district court could compel compliance with their validly issued orders. Since the district court had authority to issue the order allowing law enforcement officers to employ a


166. Illinois Bell was apparently motivated to object by fear of resulting civil and criminal liability when the subscriber learned of the company's assistance. 531 F.2d at 814. The company feared liability would be grounded on the Federal Communications Act, 47 U.S.C. §§ 501, 605 (1970). The court held that such a disclosure would be "on demand of lawful authority" within § 605(6). See United States v. Finn, 502 F.2d 938, 943 (7th Cir. 1974). Further, the cases have held that § 605 does not prohibit the use of a pen register. See, e.g., United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975). See generally Note, The Legal Constraints Upon the Use of a Pen Register as a Law Enforcement Tool, 60 CORNELL L. REV. 1038 (1975).

167. 427 F.2d 639 (9th Cir. 1970) [hereinafter cited as Application I].


169. 531 F.2d at 814.


171. 531 F.2d at 814.
pen register, the All Writs Act further granted such authority.\(^{172}\) The telephone company could not be held criminally or civilly liable since it was acting "on demand of a lawful authority."\(^{173}\)

The Second Circuit has held that assuming a district court has the authority to issue such orders, it is an abuse of the court's discretion to do so. The court considered the issue in the second Application of the United States.\(^{174}\) Resolution of the question turned on two problems: (1) whether the district court erred in authorizing the use of the pen register, and (2) whether it erred in ordering the communications carrier to provide assistance.

Agreeing with the Seventh Circuit, the court found that a district court is vested with the power to authorize the use of such a device. Although pen registers were not covered by title III, the court's inherent authority or power which was a "logical derivative" of Rule 41 of the Federal Rules of Criminal Procedure were ample sources of such power.\(^{175}\) This power, of course, was subject to the constraints of the fourth amendment.

The court did not expressly decide the issue of whether there was authority to order a private communications carrier to furnish technical assistance. The government argued that the All Writs Act\(^{176}\) provided sufficient grounds for such authorization, citing Illinois Bell. The exercise of inherent judicial authority or powers under the All Writs Act was entirely permissive in nature. Assuming (without expressly deciding) that the court had such discretionary power, the Second Circuit found that it was an abuse of discretion to issue the order.\(^{177}\)

The court balanced the policy considerations. Aside from the immediate impact on the telephone company, the court was concerned with the "broader implications regarding the power of a federal court to mandate law enforcement assistance by private citizens and corporations under the threat of the contempt sanction."\(^{178}\) Absent technical aid from such bodies, an order authorizing use of a pen register would be worthless. Further, the implementation of such a device requires no extraordinary effort or time. Nor was there

\(^{172}\) 28 U.S.C. § 1651(a) (1970) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."


\(^{174}\) 538 F.2d 956 (2d Cir. 1976), rehearing granted, (August 31, 1976) [hereinafter cited as Application II].

\(^{175}\) Id. at 960. See Fed. R. Crim. P. 41. "While the electronic impulses recorded by pen registers are not 'property' in the strict sense of that term as it is used in Rule 41(b), we concur in the Seventh Circuit's suggestion that there exists a power akin to that lodged in Rule 41 to order the seizure of non-tangible property." 538 F.2d at 959.


\(^{177}\) 538 F.2d at 961.

\(^{178}\) 538 F.2d at 960.
any risk of civil or criminal liability in complying with such an order. \footnote{179} Failure to issue such an order could severely hamper law enforcement.

The Second Circuit disagreed with the Seventh Circuit's interpretation that Congress' swift action after \textit{Application I} in amending title III indicated its belief that the court had inherent authority to issue such orders. It was more likely that Congress' action was due to a doubt that such authority existed. Regardless of the inference drawn, a reasonable conclusion was that similar authorization should be required in connection with pen registers. One of the most important factors in considering the issue was the possibility that the order would establish authority for "federal courts to impress unwilling aid on private third parties," \footnote{180} absent any mandate from Congress. The court was required to consider the privacy rights of third parties so that they might be protected from overzealous governmental activity. On the balance, policy considerations weighed in favor of preventing such orders in the absence of congressional authority.

Judge Mansfield, in his concurring and dissenting opinion in \textit{Application II}, offered the most cogent analysis of the problem. He agreed with the majority's holding that the district court had the power to issue such an order, but disagreed that it was an abuse of the court's discretion to order the telephone company to assist in its installation. The All Writs Act, though it does not establish jurisdiction, authorizes issuance of auxiliary orders consistent with existent jurisdiction. \footnote{181} The use of the Act was no more novel in this area than in any other. \footnote{182}

It was not an abuse of discretion to direct that such assistance be rendered. It would be difficult, if not impossible, to effectuate the court's order without the cooperation of the phone company. Such cooperation was neither burdensome nor expensive.

Judge Mansfield pointed out what this author feels is the most important consideration which was not discussed in the other opinions concerned with this issue: "[T]he intrusion into the privacy of the targets of the surveillance and their communications was less than would have occurred had the government sought authorization of a Title III wiretap; only the destination, not the content, of telephone messages was to be monitored." \footnote{183} As he noted, the paradoxical result of the court's holding will be to increase the number of wiretaps and maximize governmental intrusion of privacy. \footnote{184}

\footnote{179} \textit{Id.}
\footnote{180} \textit{Id.} at 962.
\footnote{181} \textit{Id.} at 963. \textit{See, e.g.}, Covington & Cincinnati Bridge Co. v. Hager, 203 U.S. 109 (1906).
\footnote{183} 538 F.2d at 964.
\footnote{184} \textit{Id.} at n.1.
The majority opinion is weak on a number of grounds. Its belief in the purpose of the rapid amendment to title III in 1970 is unfounded. "The Supreme Court has long cautioned against drawing the inference that an express Congressional grant of authority to an agency necessarily implies that the agency previously lacked such authority." Thus, the need for congressional approval in the pen register area does not necessarily follow. The majority’s fear of establishing a dangerous precedent for law enforcement personnel to progressively demand more assistance from third parties to aid in investigation was not a reasonable one. All Writs’ powers are limited to cases of clear necessity. District court judges have traditionally had broad powers to issue temporary restraining orders and preliminary injunctions. Thus, they are fully capable of employing sensible standards in deciding whether other forms of relief should be granted under the Act.

Nor could Judge Manfield agree that Congress was in a better position, as opposed to the district courts, to define under what circumstances aid can be mandated. The Congress did not do so in title III. Further, there was no basis to believe that federal law enforcement would make such demands outside such areas. In any case, a court is in a much better position to determine whether such orders should issue since it is able to consider the circumstances of the individual case.

The Seventh Circuit and Judge Mansfield have adopted the better view. In such cases, there is a clear necessity for assistance from the private communications carrier. There are minimal burdens on the communications carrier and no risk of civil or criminal liability. Since there is a real risk that the government might be compelled to intrude to a greater extent into privacy by applying wiretaps (the installation of which can be compelled by title III), a district court will clearly be within its discretion in issuing such an order. The government has applied for a rehearing in Application II. Whether or not there is an actual need for congressional enactment to clarify the issue is yet to be determined.

185. 538 F.2d at 964; see Wong Yang Sun v. McGrath, 339 U.S. 33, 47 (1950): "we will not draw the inference . . . that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask for legislation which will terminate or avoid adverse contentions and litigations."


187. The majority in Application II states specifically, however, that the Congress must decide the issue by some form of legislation. 538 F.2d at 963.

188. In Application of the United States, 407 F. Supp. 398 (W.D. Mo. 1976), the court held that it did not have jurisdiction to authorize the use of a pen register absent a proper application under title III. The court held that title III is broad enough to encompass a pen register. Contending that both the legislative history and the commentators were unclear or inaccurate, the court held "it is clear that the language of Title III comprehends all forms of electronic surveillance, and the orders which the government seeks cannot be obtained independent of procedures contained therein." Id. at 407.
Two cases involving title III which deserve comment were decided in the last year. The cases elucidate some of the enunciated policies for the title's adoption. Before embarking on a discussion of them, a few general remarks should be made about the wiretap statute.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 contains a comprehensive scheme regulating wiretapping as well as prohibitions against other forms of electronic surveillance. Evidence obtained in violation of the title is inadmissible in any state or federal proceeding. There are two exceptions to its broad strictures. Interceptions procured following proper application to the Attorney General or his designated assistant and pursuant to a court order are admissible. Any interception obtained with the consent of one party is also excepted.

In order to intercept an oral or wire communication without the consent of one of the parties, a two-step procedure must be followed under the title. Authorization must be obtained from the Attorney General or "any assistant Attorney General specially designated by the Attorney General." Following authorization by the Attorney General or his assistant, a court of competent jurisdiction must approve the wiretap. The application to the court must specifically state the nature of the offense being investigated and the investigative need justifying the use of the surveillance, as well as sufficient information for making a probable cause determination.

Two cases, United States v. Brodson and United States ex rel. Machi v. United States Department of Probation, which were decided last year by the Seventh Circuit, involve procedural aspects of the federal wiretap laws. In Machi, the petitioner sought habeas corpus relief on the ground that the wiretap evidence had not been obtained with the proper authorization of the

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190. Title III was enacted to conform with principles laid down in Katz v. United States, 389 U.S. 347 (1967), which held that the fourth amendment protects a person's reasonable expectation of privacy. The focus therefore is not on whether the invasion amounted to a physical trespass. See S. REP. NO. 1097, 90th Cong., 1st Sess. 2 (1968); Blakely & Hancock, A Proposed Electronic Surveillance Control Act, 43 NOTRE DAME LAW. 657-658 (1968). As a result the title has been upheld on constitutional grounds. United States v. Tortorello, 480 F.2d 764, 771-75 (2d Cir.), cert. denied, United States v. Cox, 449 F.2d 679, 687 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972).
192. Id. § 2517(3).
193. Id. §§ 2511(2)(c), (d). For a recent case in the Seventh Circuit involving consensual interception, see United States v. Bastone, 526 F.2d 971 (7th Cir. 1975). In Bastone, the defendant moved to suppress five phone conversations he had with the chief prosecution witness which were recorded. The fact that the witness was motivated to consent to the recordings by the desire to make a better deal with the government did not vitiate the consent.
195. Id. § 2518.
196. Id. § 2518(1).
197. 528 F.2d 214 (7th Cir. 1975).
198. 536 F.2d 179 (7th Cir. 1976).
Attorney General or his specially-designated assistant. The government
troduced evidence that the executive assistant to the Attorney General had a
telephone conversation with him in which he approved the application. The
petitioner alleged that the Attorney General needed more "basic information
and unscreened data in order for him to make an independent judgment
concerning the wisdom of seeking a wiretap order." 199

After finding the petitioner could proceed under the federal habeas
corpus statute, 200 the court considered the only other issue: the validity of the
wiretap authorization. The court noted that guidelines for what constituted
proper authorization were set out in United States v. Giordano 201 and United
States v. Chavez. 202 Giordano held that evidence obtained through wiretap
authorizations where the application was approved by the Attorney General's
executive assistant without approval by the Attorney General himself must be
suppressed. Chavez held that misidentification of the officer giving the
authorization on the court order was insufficient to justify suppression (when
in fact the Attorney General had given his approval).

In Machi the court held the affidavit to be sufficient proof of personal
participation of the Attorney General in the approval process. The court noted
that "in all cases considering the problem, the basic inquiry has been whether
the Attorney General or his designated Assistant Attorney General actually
approved the application or whether someone not authorized to issue an
approval made the final decision." 203

Machi reflects judicial recognition of the purposes for which the
procedural aspects of the title were adopted. Implicit in Machi is the
continuing expression of a judicial desire to assure a responsible executive
determination of the need for each interception. 204 The scope of the inquiry
should therefore be limited to a determination of whether in fact the Attorney
General or his designated assistant approved the order. Further, the case
reflects the judicial recognition of Congress' desire to limit the authority to
make such approvals. 205 This limitation centralizes power and prevents the
possibility of divergent application and avoidance of responsibility. 206

203. 536 F.2d at 184. The court noted that neither the statute nor the cases have required the
Attorney General to make a totally independent probable cause determination in order to
conform with the requirements of the act. See United States v. Quintana, 508 F.2d 867 (7th Cir.
1975).
205. Id. at 516-23.
206. See S. REP. No. 1097, 90th Cong., 2d Sess. 97 (1968):
Paragraph (1) provides that the Attorney General, or any Assistant Attorney
General of the Department of Justice specifically designated by him, may authorize an
it is impracticable to obtain such approval, Congress clearly anticipated that such evidence would be lost.207

United States v. Brodson208 involved a government failure to seek court authorization for a wiretap. The government initially applied for and received authorization for a wiretap on an alleged operation of an illegal gambling business in interstate commerce.209 On the basis of wiretap information, the defendant was subsequently charged with the transmission of wagers and wagering information in interstate commerce, a distinct and separate offense.210 Under title III, the government is required to immediately file a renewed application if investigators have cause to believe that another designated crime is being committed.211 In Brodson, the government did not file its application until eight months after the indictment was returned, shortly before trial. The district court dismissed the indictment. The Seventh Circuit affirmed and held that a second application was required. The court emphasized governmental compliance with the strictures of the statute in rebutting the government’s argument that the intercepted conversations which related to section 1955 also related to section 1084 and that therefore it was not necessary to renew the application.212 ""The controlling factor here, however, is not the dissimilarity of the offenses, but the fact that the Government itself has violated the key provision of the legislative scheme of Section 2515, in that it did not comply with the mandate of Section 2517(5).""213

application for an order authorizing the interception of wire or oral communications. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen.

207. See Hearings on Anti-Crime Program before Subcomm. No. 5 of the House Comm. on the Judiciary, 90th Cong., 1st Sess. 1379 (1967) (Remarks of Professor Blakely, the bill’s drafter).
208. 528 F.2d 214 (7th Cir. 1975).
210. Id. § 1084.
211. Id. § 2517(5).
212. 528 F.2d at 216.
213. Id. See also S. REP. No. 1097, 90th Cong., 1st Sess. 100 (1968):

Paragraph (5) provides that if an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized in the chapter, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section, discussed above. Such contents and any evidence derived therefrom may be introduced in evidence under subsection (3) of this section only when authorized or approved by a judge of competent jurisdiction as defined in section 2510(9) where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. They need not be designated "offenses." Such subsequent application would include a showing that the original order was lawfully obtained, that it was sought in good faith and not as subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order.
The Seventh Circuit Court of Appeals this year reiterated its support for the "restrictive" interpretation of discovery rules in criminal cases. In *United States v. Callahan*, the court considered whether oral statements in the nature of confessions or admissions, made by a defendant to a prospective government witness, first memorialized in the recollection of that witness and later transcribed are discoverable prior to trial. The decision turned on the interplay between the federal discovery rule, rule 16, and the Jencks Act. The court applied the rationale previously articulated in *United States v. Feinberg* and rejected the defendant's argument that *Feinberg* was not controlling because *Feinberg* was concerned with mere statements of a defendant rather than statements in the nature of confessions or admissions.

Both *Feinberg* and *Callahan* express sympathy for the general principle of broader discovery in criminal cases. However, they find that the interpretation of the interplay between rule 16 and the Jencks Act urged by the defendants would require legislation "by judicial fiat." The divergence of opinion on this issue turns on whether the statements

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215. FED. R. CRIM. P. 16.
218. United States v. Callahan, 74 CR 512 (N.D. Ill., filed June 30, 1975). The argument was set forth by the court as follows:

It should be noted that *Feinberg* does not deal with confessions as such, but with statements of the defendant. Given the significance, as hereinafter discussed, of confessions or acknowledgements of guilt, we do not believe that the Seventh Circuit intended per curiam to hold that any such confession or acknowledgment of guilt made orally to a prospective government witness, whether government agent or not, is not discoverable by a defendant until after the witness has testified even though the confession is specifically set forth in a written statement of the prospective government witness made after conferring with the defendant.

Such a holding would mean that no confession or acknowledgement of guilt would ever be discoverable before trial by a defendant unless it was in a separate document signed or acknowledged by the defendant and not incorporated in any statement of a possible government witness. There is nothing in the language or history of Rule 16 to indicate that only confessions written or signed by the defendant are discoverable and that any confession made orally and incorporated in a statement of a government agent or other prospective witness may be hidden by the prosecution until after the witness has testified. Yet this is what the government would have us read *Feinberg* to hold.

This may be a slight over-statement since the government apparently concedes that a confession or acknowledgment of guilt made to a government agent who is a prospective witness is discoverable under Rule 16 if incorporated in the agent's written report. *Feinberg*, on the other hand, makes no distinction between prospective witnesses who are government agents and those who are not. If *Feinberg* is applicable to confessions, they are not discoverable if contained in a prospective witness' written statement whether or not such witness is a government agent.

219. 502 F.2d at 1182.
220. 534 F.2d at 765.
221. 534 F.2d at 766. See also 502 F.2d at 1183.
sought to be discovered are statements of the defendant as described in rule 16(a)(1) or statements of the witness as described in the Jencks Act. The Seventh Circuit's view is that a defendant's statements are discoverable if they are written or recorded at the time they were made, or if a written account was contemplated, when the statement was made and it is later committed to writing. However, if the statement is first memorialized only in a witness' recollection, it is not discoverable. In the latter case, pretrial discovery is precluded by the Jencks Act because it is impossible to reveal the contents and circumstances of a defendant's statement without revealing the contents of the prospective witness' statement.

The arguments in favor of discovery of such statements were most eloquently and persuasively propounded by a district judge in the Northern District of Illinois. In a lengthy opinion Judge Marshall set forth his opinion that rule 16 "contemplates discretionary pretrial disclosure of a defendant's statements to third parties who are not government agents regardless of how the statement has been recorded." The probative value of the statement is that it comes from the defendant. The fact that a third party is interposed between the defendant and the government should not affect the right of the defendant to discover the statement. The Seventh Circuit, however, does not agree.

   Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

223. 18 U.S.C. § 3500 (1970) provides:
   (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

224. 502 F.2d at 1183.
225. Id.
227. 502 F.2d at 1183. This same approach has been taken by other courts. See United States v. Walk, 533 F.2d 417 (9th Cir. 1975) (but see the dissenting opinion in Walk, 533 F.2d at 420, which finds the district court decision in Feinberg, 371 F. Supp. 1205 (N.D. Ill. 1974) persuasive); United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972); United States v. Wilkerson, 456 F.2d 57 (6th Cir.), cert. denied, 470 F.2d 246 (2d Cir. 1972).
229. Id. at 1212.
230. Id. at 1212-13. In the district court opinion in Callahan, Judge Will distinguished Feinberg, as noted in note 218, supra. In addition to generally approving the broad criminal discovery advocated by Judge Marshall in Feinberg, Judge Will set forth in detail an additional reason why special sensitivity should be shown towards the needs of defendants to obtain confessions or admissions. He argued that one result of the production of such statements would be an increased number of guilty pleas, stating:

   Examination of Rule 16, we believe, makes clear that the draftsmen were...
The amendments to rule 16 make the *Feinberg-Callahan* rule one of limited applicability because the statement is not discoverable if the defendant does not know that the person he is making a statement to is a government agent. The rule of the Seventh Circuit is clear, despite the dissatisfaction with it expressed by district court judges.

The court decided two other cases which summarily rejected claims by defendants for discovery. In *United States v. Cook*, the district court denied a defense request for case reports of a governmental agency, summaries of an investigation and a list of government witnesses. The Seventh Circuit upheld the denial as being within the trial court's discretion since the disclosure was not required by statute or by rule. United States v.

cognizant of the importance to defendants and their counsel of knowledge that the government possessed information which constitutes a confession of guilt and that disclosure in advance of trial would frequently be necessary to enable defense counsel to investigate the matter and determine what action to take under the circumstances. Such action may not only involve preparing to meet the purported confession at trial, but, more frequently, to consider whether the client's best interests may not be better served by a guilty plea rather than a trial.


231. FED. R. CRIM. P. 16(a)(1)(A), as amended, reads:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent....

232. See Haddad, *supra* note 6, at 303-04; United States v. Callahan, 534 F.2d 763, 765 n.2 (7th Cir. 1976).

233. This new provision was viewed by the court in *United States v. Walk*, 533 F.2d 417 (9th Cir. 1975), as support for its refusal to require production of defendants' statements to third party non-government agents. Because the rules were designed to broaden criminal discovery, the addition of the provision for production of oral statements to government agents indicates that Congress did not believe such statements were covered previously. Thus the provision was necessary. Had Congress intended that all oral statements of defendants be producible, the provision would have included such statements. This would seem to be the rationale behind the court's statements that if "the defendant's view of the current Rule 16(a)(1) were proper, the Amendment would be either unnecessary or, if necessary, too narrowly drawn." *Id.* at 418 n.8.

The *Walk* court further noted its belief that the amendments to Rule 16 would have no material effect on the result of that case. 533 F.2d at 418 n.1.

The author wishes to point out that despite the fact that the trial court ruling in *Callahan* was based on the old version of rule 16 (a)(1), the petition for certiorari filed by the defendants in *Callahan* states the issue presented in the case as whether 18 U.S.C. § 3500 operates as a limitation on rule 16 (a)(1)(A), the new rule 16, under the circumstances presented in *Callahan*. Petitioner's Brief for Certiorari at 2, United States v. Callahan, 534 F.2d 763 (7th Cir. 1976). This apparent interchange of the new rule's language for the old would indicate that it is not seen as material whether the Court's ruling is based on the old or the new rule.

234. 530 F.2d 145 (7th Cir. 1976).

235. *Id.* at 151.

236. *Id.* at 152. This ruling is consistent with that in United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975). Unfortunately, this decision did not provide any additional insight into the view of
Williams rejected a "frivolous" defense claim of prejudice because of the refusal of the trial judge to grant a continuance so that section 3500 material could be examined.

OTHER PRETRIAL PROCEEDINGS

Two statutes provide for possible ways for a party to obtain a change of an assigned trial judge. The first statute outlines a procedure by which the party can file an affidavit alleging personal bias or prejudice of a judge. The second statute requires mandatory disqualification on the judge's initiative

237. 536 F.2d 1202 (7th Cir. 1976).
238. Id. at 1204-05. Although this article is confined primarily to a discussion of Seventh Circuit decisions, it must be pointed out that the United States Supreme Court decision in Goldberg v. United States, 425 U.S. 94 (1976), is an important one for any attorney working in the federal criminal courts. The Court, in a unanimous decision, held that

a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been "signed or otherwise approved" by the Government witness is producible under the Jencks Act, and is not rendered non-producible because a Government lawyer interviews the witness and writes the statement.

Id. at 98.
239. 28 U.S.C. § 144 (1970) provides:
Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.
(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
   (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
   (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
   (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
   (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
   (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
      (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
      (ii) Is acting as a lawyer in the proceeding;
      (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
under given circumstances. This latter provision was recently amended\textsuperscript{241} to broaden its applicability and more specifically define the circumstances under which the judge must recuse himself.

The Seventh Circuit decided several cases last year concerning both statutes. \textit{United States v. Jeffers}\textsuperscript{242} carefully considered a motion for change of judge under \textit{28 U.S.C. § 144}.\textsuperscript{242.1} \textit{Jeffers} was one in a series of cases heard by the Seventh Circuit\textsuperscript{243} involving a large narcotics ring. The same trial judge heard all the cases, which involved many of the same defendants. In this unusual situation the Seventh Circuit refused to require a change of judge where no personal, as opposed to judicial, bias was shown.\textsuperscript{244} All that was

\begin{itemize}
\item[(iv)] Is to the judge's knowledge likely to be a material witness in the proceeding.
\end{itemize}

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

1. "proceeding" includes pretrial, trial, appellate review, or other states of litigation;
2. the degree of relationship is calculated according to the civil law system;
3. "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
4. "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

- (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
- (ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
- (iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
- (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the record of the basis for disqualification.


\textsuperscript{241} The previous section read simply:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.


\textsuperscript{242} 532 F.2d 1101 (7th Cir.), \textit{cert. granted}, 97 S. Ct. 55 (1976).


\textsuperscript{244} 532 F.2d at 1112.
alleged in *Jeffers* was prior judicial action by the trial judge from which no personal bias could be inferred.245

*Barry v. United States*246 rejected a claim that the trial judge should have recused himself under 28 U.S.C. § 455.247 Because the opinion is primarily concerned with the construction of language in the prior version of the statute, its applicability is limited. However, the careful analysis of the basic principles involved in such a case and the extensive research noted in the opinion do provide a useful tool.248

One other case dealing with pretrial proceedings requires brief mention here.249 The defendant in *United States v. Cowsen*250 alleged that the four-and-one-half-month delay between his arrest and indictment on a narcotics offense was unreasonable. He relied on a series of cases from the District of Columbia Circuit which have required a “detailed judicial exploration of the underlying reasons” for delays in excess of four months between detection of a narcotics offense and notice to the accused.251 The Seventh Circuit delimited to follow the

245. *Id.* The court stated:

All the defendant alleged in this case was prior judicial actions on the part of Judge Sharp. If from these we infer that Judge Sharp developed personal bias towards the defendant, we are overlooking the basic presumption that a judge approaches each new case with impartiality and conducts the case on its own merits from the evidence there presented quite apart from any other case he might have heard. If the rule were otherwise, the Family [the name of the narcotics ring of which defendant was a member] would long ago have run through the judges in Indiana and possibly in all of the Seventh Circuit.

246. 528 F.2d 1094 (7th Cir. 1976).


248. The court also rejected the contention that defendant had waived his § 455 objections, thereby adopting the view that a waiver of such objection was precluded by an earlier amendment to the statute. This had been the view of only one other court. *See United States v. Amerine, 411 F.2d 1130, 1134 (6th Cir. 1969).* The Seventh Circuit found this the more informed view. 538 F.2d at 1097-98 n.7. The waiver issue has also been settled by the new statute, 28 U.S.C. § 455(e) (Supp. IV 1974) (amending 28 U.S.C. § 455 (1970)). *See the text of the statute quoted at note 240, supra.*

249. Four additional cases involving other pretrial proceedings were considered. Two of them, *United States v. Grose, 525 F.2d 1115, 1119 (7th Cir. 1975), cert. denied, 96 S. Ct. 1477 (1976),* and *United States v. Buchanan, 529 F.2d 1148, 1151 (7th Cir. 1975), cert. denied, 96 S. Ct. 1725 (1976),* rejected challenges to jury arrays on constitutional grounds. In neither case was there an allegation of a purposeful, deliberate or systematic exclusion of a particular group of people. Thus, under *Apodaca v. Oregon, 406 U.S. 404, 413 (1972),* and *Swain v. Alabama, 380 U.S. 202, 203-04 (1965),* no proper grounds were alleged for a successful attack on the jury venire or jury array.

In *United States v. Gilpin, 542 F.2d 38 (7th Cir. 1976),* the enforcement of an Internal Revenue Service summons was upheld on the factual finding that the issuance of the summons was part of an ongoing investigation and was therefore not prohibited by 26 U.S.C. § 7605(b) (1970).

*United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975), cert. denied, 96 S. Ct. 1682 (1976),* held that a 27 month delay between defendant’s arrest and trial required a consideration of the factors set out in *Barker v. Wingo, 407 U.S. 514 (1972);* namely, the length of the delay, the reason for the delay, the assertion of the right to speedy trial and prejudice to the defendant. 526 F.2d at 187 n.2. On the facts, the court found that the reasons were sufficient.

250. 530 F.2d 734 (7th Cir.), *cert. denied, 96 S. Ct. 2227 (1976).*

lead of the District of Columbia Circuit in establishing a different rule in narcotics cases than in other delay cases. On the facts of *Cowsen*, the court found no evidence that the government intentionally delayed charging the defendant either for tactical advantage or purposes of harassment. On the contrary, because the investigation was ongoing, an indictment might have adversely affected its progress and jeopardized the safety of law enforcement officers. Therefore, the delay was justified.

**JOINDER AND SEVERANCE**

Joinder and severance of defendants and offenses are governed by two rules. The criteria for joinder of offenses against a single defendant is stated in rule 8(a) of the Federal Rules of Criminal Procedure. Rule 8(b) details the circumstances under which two or more defendants may be jointly charged in a single indictment. Allegations that joinder is improper under rule 8 must ordinarily be raised by way of a pre-trial motion under rule 12. Where joinder is proper under rule 8 but the contention is that trial of the case so joined will be prejudicial, rule 14 allows for relief as may be required to protect the parties.

To justify severance under rule 14, the defendant must make a strong showing that actual prejudice will result from a joint trial with the

252. 530 F.2d at 737.
253. *Id.*
254. *Fed. R. Crim. P.* 8(a): *Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.*
255. *Fed. R. Crim. P.* 8(b): *Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.*
256. *Fed. R. Crim. P.* 12(b)(2): *Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.*
257. *Fed. R. Crim. P.* 14: *If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.*
258. United States v. Rajewski, 526 F.2d 149, 153 (7th Cir. 1975).
codefendants or on the multiple counts challenged. A defendant makes a showing of actual prejudice when he demonstrates that without a severance a fair trial cannot be obtained. The most frequent claims of prejudice are that if joinder is allowed codefendants will refuse to testify at trial, a codefendant's confession will inculpate the defendant, and that a codefendant will assert an inconsistent defense.

Although the issue of prejudicial joinder of defendants is raised in almost every criminal trial involving multiple defendants or multiple counts, the challenge is rarely successful. The Seventh Circuit's observation that reversals for failure to sever are almost non-existent remains an accurate statement. Challenges to joinder in the past year were based on allegations that a joint trial would deny defendants the opportunity to call codefendants as witnesses, on the apprehension that testimony as to one count would have a prejudicial influence on the jury's consideration of a second count, and on the theory that because the defendant would be forced to choose between testifying on both counts of an indictment or not at all, his fifth amendment rights would be abridged. All of these challenges were rejected.

In construing questions of joinder and severance this past term, the Seventh Circuit relied on its decisions in two prior cases. In the first case, United States v. Echeles, where the sole codefendant could give a "dramatic and convincing exculpation" of the defendant, the court ruled that a single joint trial of several defendants could not be had at the expense of one defendant's right to a fundamentally fair trial. United States v. Pacente held that joinder of an extortion count and a perjury count arising out of the defendant's grand jury testimony concerning the substantive count was not so prejudicial that jury instructions would be ineffective in protecting the defendant.

259. United States v. Serlin, 538 F.2d 737, 743 n.5 (7th Cir. 1976).
260. United States v. Bastone, 526 F.2d 971 (7th Cir. 1975); United States v. Blue, 440 F.2d 300, 302 (7th Cir. 1971); United States v. Kahn, 381 F.2d 824, 838 (7th Cir. 1967).
261. United States v. Abraham, 541 F.2d 1234 (7th Cir. 1976).
263. See Circuit Courts Note: Criminal, 64 GEO. L.J. 167, 276 (1975).
264. See Haddad, supra note 6, at 306.
265. See United States v. Barrett, 505 F.2d 1091, 1106 (7th Cir. 1975). In most cases the denial of the motion for severance based on prejudice is so routine that almost no discussion is engaged in by the court. See, e.g., United States v. Serlin, 538 F.2d 737, 743 n.5 (7th Cir. 1976); United States v. Cortwright, 528 F.2d 168, 176 (7th Cir. 1976); United States v. Crouch, 528 F.2d 625, 632 (7th Cir. 1976).
266. United States v. Abraham, 541 F.2d 1234 (7th Cir. 1976).
267. United States v. Rajewski, 526 F.2d 149 (7th Cir. 1976).
268. Holmes v. Gray, 526 F.2d 622 (7th Cir. 1975). See also United States v. Abraham, 541 F.2d 1234 (7th Cir. 1976), where one defendant filed an affidavit to the effect that he would be willing to testify for all defendants that particular transactions never took place if the trials were held separately, but not in the event of a joint trial.
269. 352 F.2d 892 (7th Cir. 1965).
270. Id. at 898.
In *United States v. Rajewski*,272 decided this past term, the court rejected the defendant’s claim that he was prejudiced by the denial of separate trials on an obstruction of justice count and a count of submitting false documents to a government agency. At Rajewski’s trial, two witnesses admitted that testimony they had given to the grand jury favorable to the defendant was untrue. Defendant reasoned that because the witnesses admitted lying to the grand jury, the petit jurors were predisposed to believe them and reject his defense because the grand jury had rejected the witness’ testimony by returning an indictment.273 Therefore, two reasons for substantial prejudice were alleged. First, it was argued that the testimony on the obstruction of justice charge would taint the consideration of the substantive count. Second, the joinder caused actual confusion for the jury which was not remedied by the judge’s instructions.274

A careful analysis of the cases relied on by Rajewski275 and consideration of the facts of the case led the court to reject the claim of prejudice. Here, unlike *Pacente*, the defendant’s credibility was not in issue. The fact that the two witnesses for the government admitted lying to the grand jury offered the defense the opportunity to attack their veracity.276 These facts, combined with the court’s opinion that the challenged testimony was admissible on all counts, resulted in its finding that any ‘‘spillover’’ effect was minimal.277 Therefore, the defendant had not met his burden of demonstrating the existence of prejudice affecting substantial rights.

In *Holmes v. Gray*,278 a state prisoner brought a habeas corpus action alleging violation of his fifth amendment rights in the consolidation of armed robbery and attempted murder offenses.279 Holmes stated that he had desired to testify about the attempted murder charge but to remain silent on the armed robbery charge. Forcing him to choose between testifying to both charges or

272. 526 F.2d 149 (7th Cir. 1975).
273. *Id.* at 152.
274. *Id.*
275. Rajewski argued that *United States v. Quinn*, 365 F.2d 256 (7th Cir. 1966), *Flores v. United States*, 379 F.2d 905 (5th Cir. 1967), and the en banc opinion in *United States v. Pacente*, 503 F.2d 543 (7th Cir.), *cert. denied*, 419 U.S. 1048 (1974), presented support for his theory. The court easily distinguished the first two cases on factual distinctions. The analysis of *Pacente* concluded that

it was conceivable that ‘‘a trial juror may be influenced in deciding to believe a witness’ testimony by the fact that the grand jurors heard the same testimony and did not believe it’’ . . . [but] it was an unwarranted over-refinement to speculate that trial jurors would fail to decide the issues of fact according to their own proper evaluation of the evidence.

526 F.2d at 154.
276. 526 F.2d at 154.
277. *Id.* at 155.
278. 526 F.2d 622 (7th Cir. 1975).
279. The Wisconsin statute regarding joinder and severance, *Wis. Stat.* § 971.12(1),(3) (1969) (reproduced in the opinion, 526 F.2d at 624), was so similar to the federal statute, *Fed. R. Crim. P.* 8(a) and 14, that the court applied federal standards in analyzing the case.
not at all was an impermissible burden on his fifth amendment right against self-incrimination.

The court first held that the joinder of the two offenses was proper because they arose from two closely connected transactions.\textsuperscript{280} The more difficult question was whether the joinder was sufficiently prejudicial to require severance. In rejecting the claim of prejudice the court impliedly applied a standard adopted by the Court of Appeals for the District of Columbia Circuit: "Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence."\textsuperscript{281} The Seventh Circuit interpreted this statement as requiring that the different offenses be distinct as to the three factors—time, place and evidence.\textsuperscript{282} These standards were not met in *Holmes* because the events involved took place within a twenty minute time period.\textsuperscript{283}

The real difficulty with defendant's position was that evidence of each of the crimes charged would have been admissible at separate trials for the individual offenses.\textsuperscript{284} In such cases "the possibility of 'criminal propensity' prejudice would be in no way enlarged by the fact of joinder."\textsuperscript{285} The claim of substantial prejudice in such instances is meritless. Thus, where joinder is proper and no substantial prejudicial effect is present, the fifth amendment is not violated because an election must be made to testify to both charges or none at all.\textsuperscript{286}

In *United States v. Abraham*,\textsuperscript{287} a motion for severance was supported by an affidavit from one of the defendants, stating that he would testify on behalf of all the defendants that certain crucial meetings did not occur as described by the chief government witness. At the time the defendant made his desire to testify known, the court ruled that the government would be permitted to cross-examine the witness concerning prior acts of misconduct to demonstrate his intent and state of mind. The court distinguished *Echeles* on the grounds that the testimony of the defendant in *Abraham* would merely counter details of the government's proof and would not completely exculpate

\begin{enumerate}
\item \textsuperscript{280} 526 F.2d at 625.
\item \textsuperscript{281} Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964). Cross was criticized because the standards set forth there are difficult to apply before trial. Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 560 (1965).
\item \textsuperscript{282} 526 F.2d at 626.
\item \textsuperscript{283} Id.
\item \textsuperscript{284} Id.
\item \textsuperscript{285} Id. at 625 (quoting Drew v. United States, 331 F.2d 85, 90 (9th Cir. 1954)).
\item \textsuperscript{286} Id. at 626. The court cited the logic of Williams v. Florida, 399 U.S. 78, 83-84 (1970), as being applicable to this situation:

\begin{quote}
The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction . . . . That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.
\end{quote}
\item \textsuperscript{287} 541 F.2d 1234 (7th Cir. 1976).
\end{enumerate}
the other defendants. Because the offered testimony would only cast doubt on part of the government’s proof, no substantial prejudice was shown.

**Effective Assistance of Counsel**

In the past year, the Seventh Circuit continued to follow the standard for effective assistance of counsel announced in *United States ex rel. Williams v. Twomey*. In *Williams*, the court held that a defendant had been denied such assistance where counsel had not met “a minimal standard of professional representation.” The cases dealing with such issues were dealt with summarily by the court.

The most significant case in the conflict of interest area was *United States v. Gaines*. Gaines focused on the burden of disclosure of a conflict of interest adopted in *United States v. Mandell*. Mandell held that a trial court was under no duty to admonish a defendant of the dangers of multiple representation when they appear in court represented by a single attorney. The trial court, however, does have an obligation to be alert for conflicts at all stages of the proceedings. When a possibility of such conflict appears, the trial court is obliged to investigate it and advise the defendant. This obligation to investigate and advise is incumbent on the court only when it observes “indicia of conflict.” The primary responsibility for ascertainment and avoidance of such conflict situations lies with the defendant’s lawyer.

In *Gaines*, three defendants were charged with robbing an armored truck and murdering the driver. Upon arrest, defendant Gaines confessed, implicat-

288. 510 F.2d 634 (7th Cir. 1975).
289. Id. at 640.
290. See *United States v. Chausee*, 536 F.2d 637 (7th Cir. 1976) (nothing in record to suggest lack of experience or ability of trial counsel sufficient to meet *Williams* test); *Faulisi v. Daggett*, 527 F.2d 305 (7th Cir. 1975) (inadequacy of counsel allegation not supported by the record).
A case which deserves some note, however, is *United States v. Merritt*, 528 F.2d 650 (7th Cir. 1976) (per curiam), in which the court held that “[u]nder all the circumstances of the case,” the *Williams* standard had not been met. *Id.* at 651. Counsel had failed the Indiana bar examination three times and had no previous experience trying cases. He was a member of the Iowa bar. Judge Sharp, the trial judge, deemed counsel’s performance adequate. The Seventh Circuit held, however, that the effect of counsel’s inexperience and exam failures “compounded by the cumulative effect of several incidents which provide reasonable grounds for questioning counsel’s professional judgment and skill” created an appearance of inadequacy. *Id.* at 651.
291. 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 774 (1976). In *Mandell*, the court refused to adopt the District of Columbia Circuit rule that requires the trial court judge to investigate and admonish defendants concerning the dangers of multiple representation. See *Lollar v. United States*, 376 F.2d 243, 245-46 (D.C. Cir. 1967). The *Mandell* court held that neither the sixth amendment, *Glasser v. United States*, 315 U.S. 60 (1942), nor any other United States Supreme Court case mandated the District of Columbia Circuit’s requirement.
293. This “pretrial cross examination” of defense counsel is objectionable in two senses: (1) nothing justifies the presumption that counsel will not be loyal to the defendant’s interest; and (2) the defendant will be prejudiced on appeal if the trial court has made a finding of no prejudice. See *United States v. Paz-Sierra*, 367 F.2d 930, 932-33 (2d Cir.) (Moore, J.), *cert. denied*, 386 U.S. 935 (1966).
ing two other men, who later became his codefendants. At his first trial, Gaines was represented by the attorney who had initially represented his codefendants in the case and who had also represented them on unrelated felony charges in other jurisdictions. The codefendants were represented by counsel who had initially represented all three defendants. During the trial, Gaines repudiated his confession, a condensed version of which had been introduced during the government's case in chief. The first trial ended in a mistrial. At the second trial, Gaines did not testify and therefore, was deprived of the opportunity to retract his statement. Even though Gaines' attorney had withdrawn from representation of the other two defendants, Judge Tone held that this was a clear case of conflict of interest. When counsel initially undertook to represent Gaines, he was also defending the other two in that case as well as other proceedings. The subsequent withdrawal did not remove the conflict, since it continued to be counsel's duty to refrain from taking action adverse to the defendants' interests.

The Seventh Circuit reversed. In so doing, the court stated that the trial court must be alert for "indicia of conflict" during all stages of the proceeding. When the possibility of conflict appears, the court must investigate relevant facts and determine whether, absent waiver, continued representation would violate defendant's sixth amendment rights. The court then must inform the defendant so that he can make an informed judgment as to whether he wishes to continue with counsel. Though Mandell declined to adopt a rule which would reverse because the trial court judge did not investigate and warn at the outset, the trial court judge must still be alert for such conflict and must inform a defendant as soon as possible. Though the attorney has primary responsibility to warn his client of possible conflict, the trial court shares this responsibility. Moreover, this responsibility begins before trial: "While the court's failure to initially warn the defendants is not itself error, it is apparent that the administration of criminal justice will be better served if possible conflicts can be discovered and dealt with before trial to avoid the risk of a mistrial." 

Gaines is significant since it clearly states the role of the trial court judge. Though responsibility lies with defense counsel to discover and inform the client of such conflicts, the trial court has a clear and immediate responsibility where a possibility of prejudice occurs.


In Mandell, the conflict was only potential or speculative but in Gaines, the court found that it existed in fact.

295. 529 F.2d at 1045.

296. Another conflict of interest case was United States ex rel. Robinson v. Housewright, 525 F.2d 988 (7th Cir. 1975). The defendant alleged that counsel was motivated to persuade the defendant to enter a plea of guilty because it would have been more helpful to his other clients.
In *Massiah v. United States*, the United States Supreme Court held that the post-indictment admissions of a defendant to a government informant in the absence of his retained counsel violated his rights under the sixth amendment. The Court viewed the taking of such a statement as equivalent to an interrogation by law enforcement officers. In the last year, the Seventh Circuit was asked in *United States v. Merrit* to delimit the scope of the right announced in *Massiah*.

The issue in *Merritt* was whether an admission, which independently constituted a crime, made following a premature and faulty indictment would be barred under a subsequent indictment for the same offense. The defendant was initially indicted for causing the use of a facility in interstate commerce to commit a crime of violence to further an unlawful bribery scheme. In its first indictment, the government failed to allege that an act in furtherance of the scheme had been committed after the use of the interstate facility. Shortly after his first indictment, the defendant attempted to solicit a bribe from a government informant. During the conversation with the informant, he made admissions concerning the crime for which he was then charged. The government then superseded its indictment by alleging that the act "thereafter" was the attempted bribery.

The court initially noted that *Massiah* dealt with admissions of past wrongdoings which themselves did not amount to criminal acts. Furthermore, it was well settled that post-indictment utterances which amount to attempted bribery or obstruction of justice would not be excluded under *Massiah*. The difference in *Merritt* was that the utterance was part of an incomplete and prematurely charged crime as well as an independent offense.

Reversing as to the solicitation of the bribe, the court clearly stated that the right announced in *Massiah* did not extend to the commission of new crimes or the completion of an old one. Where incriminating statements about
past acts are obtained after indictment by some form of police interrogation, the evidence should be excluded. Judge Tone held, however, that Massiah "does not confer immunity for utterances such as Merritts' solicitation of a bribe, which are not statements of past conduct but constitutes criminal acts in themselves." As the commentators have noted, the Massiah right is analogous to the fifth amendment privilege against self-incrimination. Since the statement was totally voluntary, Judge Tone's ruling was clearly correct. The court should always be wary of limiting highly probative, reliable and relevant evidence in the absence of some specific articulable prejudice to the defendant. The result in Merritts reflects this concern and for that reason, the opinion is extremely sound.

JURY INSTRUCTIONS

In the last year, the Seventh Circuit issued a series of opinions clarifying its position on instructions for reasonable doubt as enunciated in United States v. Lawson. In Lawson, the Seventh Circuit had held that a trial court judge does not commit plain error in refusing to define "reasonable doubt" even when a fair instruction had been tendered on that subject. The cases clarifying this decision revolved around an instruction, LaBuy 6.01-3, which defines reasonable doubt as "substantial rather than speculative." In United States v. Bridges the court held that the equation of reasonable doubt with substantial doubt was erroneous. A similar chal-

302. See Enker & Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 MINN. L. REV. 47, 57 (1965) [hereinafter cited as Enker & Elsen]; Note, The Supreme Court, 1963 Term, 78 HARV. L. REV. 143, 217-23 (1964) [hereinafter cited as 1963 Term Note]. In Massiah, the fact that the government was interrogating the defendant was crucial. The Court equated the deliberate eliciting of a confession to coercive interrogation.

The district court found that since the second indictment did not charge an offense separate and distinct from the offense charged in the first indictment, the sixth amendment right demanded exclusion. 387 F. Supp. 807, 812 (E.D. Ill.), rev'd, 527 F.2d 713 (7th Cir. 1975).


303. 527 F.2d at 716.

304. See Enker & Elsen, supra note 302, at 57; 1963 Term Note, supra note 302, at 219.

305. See Massiah v. United States, 377 U.S. 201, 208 (White, J., dissenting).


307. LABUY, MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, 33 F.R.D. 523, 567 § 6.01-3 (1963): "A 'reasonable doubt' means a doubt based on reason and it must be substantial rather than speculative, it must be sufficient to cause you as a reasonably prudent person to hesitate to act in the more important affairs of your life."

308. 499 F.2d 179 (7th Cir.), cert. denied, 419 U.S. 1010 (1974).

309. As noted in United States v. Atkins, 487 F.2d 257, 260 (8th Cir. 1973): "Proof of guilt beyond a reasonable doubt would seem to require a greater evidentiary showing by the government than proof beyond a substantial doubt." See also United States v. Alvero, 470 F.2d 981 (5th Cir. 1972).

In United States v. Fallen, 498 F.2d 172 (8th Cir. 1974), the court held that equating "substantial doubt" with "reasonable doubt" was harmless error where the "proper concept of reasonable doubt" had been conveyed to the jury and the evidence of guilt was overwhelming. In
The court noted that although such an instruction was objectionable, in the absence of rule 30 objection, such an instruction was not plain error. In United States v. Crouch, the defendant had made a timely objection to the use of the LaBuy instruction. The court affirmed the giving of the instruction, however, adhering to "the general proposition that reviewing courts will not reverse when the instruction considered as a whole is not prejudicially erroneous." The court noted, however, that if the Gratton decision and the reasoning contained therein had been available to the trial court, the court would have exercised its supervisory power and reversed the lower court.

The issue was raised most recently in United States v. Wright. There, the defendant had not objected to the instruction at trial. The Seventh Circuit affirmed the admission of the instruction, relying on Gratton. There was no indication in the record that the trial court was aware of that decision. The court stated that, in view of Gratton and Crouch, it should now be clear "that a district court giving a reasonable doubt instruction containing the challenged equation notwithstanding a rule 30 challenge can reasonably expect a reversal." The court also stated that it expected district courts to sua sponte remove the phrase from the standard instructions even in the absence of an objection.

In United States v. Schaffner, the jury had been instructed that the government was not required to prove the defendant guilty beyond all possible doubt, because if that were the case "few men, however guilty they might be, would be convicted." Although the instruction favored the government, the court affirmed since, considering it as a whole, the instruc-

Fallen, the defendant made a timely exception on the specific grounds enunciated in Atkins. In light of the Seventh Circuit's pronouncement in United States v. Wright, 542 F.2d 975 (7th Cir. 1976) (see note 315 and accompanying text infra), that a district court can expect reversal where such an equation is made, the reasoning of Fallen should not be persuasive where such an instruction is used after the date of the Wright opinion. To that extent Wright constitutes a conflict with the Eighth Circuit.

In Bridges, the trial judge also stated that "reasonable doubt" was "not for the purpose of letting guilty men escape." 499 F.2d at 186.

311. FED. R. CRIM. P. 30. The court noted that
The mere offer of the instruction does not preserve the error for appeal. If the party whose tendered instruction is refused fails to object to the refusal, stating distinctly the grounds of his objection, the Court of Appeals may review the refusal to instruct only to determine whether it constitutes plain error within the meaning of Fed. R. Crim. P. 52(b).

525 F.2d at 1162.
312. 528 F.2d 625 (7th Cir. 1976).
313. Id. at 631.
314. Id. at 631 n.2.
315. 542 F.2d 975 (7th Cir. 1976).
316. Id. at 988.
317. 524 F.2d 1021 (7th Cir. 1975), cert. denied, 96 S. Ct. 1126 (1976).
318. Id. at 1023.
tion was less prejudicial than that considered in *Bridges*. However, the court suggested it not be used in future cases.

In *United States v. Rajewski* and *United States v. Marzano*, the Seventh Circuit reviewed the proper instruction to be given with respect to accomplice testimony. In *Rajewski*, the defendant was charged in part with obstruction of justice by procuring perjured grand jury testimony. The perjurer testified against him at trial. The defendant argued that improper presentation of the case by the government masked the witness' participation in the scheme as a perjurer and that therefore, the standard credibility, accomplice and informer instructions were insufficient. The informant instruction offered by the defendant related closely to the uniform informer's instruction. The court upheld the given instruction, noting that instructions must be considered as a whole and that the trial judge has wide discretion as to the words used in an instruction.

The defendant further contended that the accomplice instruction in *United States v. Echeles* was much more direct than the one given at trial. The court held that, given the trial court's broad discretion in formulating exact language to convey the content of the instruction, *Echeles* merely established one acceptable, but not exclusive, formulation. With regard to the instruction for an admitted perjurer, the court's instruction was deemed sufficient since it told the jury that they could disregard his entire testimony because of that fact.

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319. 526 F.2d 149 (7th Cir. 1975).
320. 537 F.2d 257 (7th Cir. 1976).
321. LABUY, MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, §§ 6.05, 6.07, 6.08; 33 F.R.D. 523, 573-80 (1963).
322. When the trial court omits giving an accomplice instruction and the accomplice is the sole occurrence witness or much of his testimony is uncorroborated, the court will reverse. United States v. Wasko, 473 F.2d 1282 (7th Cir. 1973); United States v. Davis, 439 F.2d 1105 (9th Cir. 1971). See also Tillery v. United States, 411 F.2d 644 (5th Cir. 1969) (where the defendant did not request accomplice instruction and accomplice supplied sole evidence against defendant, trial judge was obliged to admonish jury). For an exhaustive treatment of accomplice instructions in federal criminal cases, see Annot., 17 A.L.R. Fed. 249 (1973).
323. 222 F.2d 144 (7th Cir.), cert. denied, 350 U.S. 828 (1955). The trial court had given the following instruction:

> If you believe that any witness who testified in this case actually took part in the commission of a crime, if in fact you believe from all the evidence that a crime or crimes were committed, then that witness is considered an accomplice and his testimony should be received with care and caution and scrutinized carefully. However, the mere fact that a witness may be an accomplice does not mean that he cannot tell the truth. It only means that you are to examine his testimony with care, and if, having done so, you believe it is the truth, then you are to give it the same credence as the testimony of other witnesses.

*Id.* at 160. It had also followed the instruction with a charge to the jury:

> The weight and credit to be given to the testimony of a person who has admitted his part in the commission of a crime, if any person had made such admission, and if in fact you do find that a crime has been committed and that the witness took part in its commission, is for you to decide.

*Id.*
In *United States v. Marzano*, the court gave the standard LaBuy accomplice testimony instruction with a slight grammatical variation. The defendant offered an instruction that the testimony of an accomplice witness should be received with great care. Citing *Rajewski*, the Seventh Circuit noted that the trial court had broad latitude in choosing the exact language of an instruction. The defendant also argued that part of the instruction improperly advised the jury that it could convict on the accomplice’s testimony alone even though he had not testified to all the elements of the crime. The court rejected this argument, holding that in the “context of complete instructions,” it was inconceivable that the jury could not have understood the instruction to mean that if it believed him on the points to which he testified, his testimony would be sufficient *on those points*. Marzano finally argued that since the purpose of the instruction was to protect him, he had a right to have no instructions given on the accomplice issue. Since he did not make this objection at trial, the court held that the giving of the instruction did not constitute error.

The court also decided cases dealing with the proper instructions to be given on the issues of witness identification, presumption of guilt and statutory defense.

**PLEAS AND PLEA NEGOTIATIONS**

Only one case decided in the past year dealt directly with rule 11 which sets forth the requirements for guilty pleas. *Faulisi v. Daggett* involved an appeal from a district court denial of a motion for the vacation of a guilty plea. The basis of the appeal was the defendant’s contention that the court had failed to advise him that the sentence in the federal charge could run consecutively to that of a state sentence he was already serving. The issue presented to the court was whether the possibility of consecutive sentences was a consequence which the defendant should have been advised of prior to

324. 537 F.2d 257 (7th Cir. 1976).
325. Id. at 274.
326. United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976) (United States v. Hodges, 515 F.2d 650 (7th Cir. 1975), which held that an instruction on identification would be required does not mandate a specific instruction). See United States v. Cowser, 530 F.2d 734 (7th Cir. 1976) (where no actual issue of identification and tendered instruction inaccurate, trial court properly refused tendered instruction).
327. United States v. Bailey, 526 F.2d 139 (7th Cir. 1975) (not erroneous to give instruction, over defendant’s objection, that a presumption of guilt may not be drawn from his failure to testify).
328. United States v. Tritton, 535 F.2d 359 (7th Cir. 1976) (per curiam) (in prosecution for distributing cocaine in violation of statute, since testimony did not contain an evidentiary basis for defendant’s theory that the substance in question was not included in the statutory definition, an instruction tendered on the statutory definition of cocaine was properly refused).
329. FED. R. CRIM. P. 11.
330. 527 F.2d 305 (7th Cir. 1976).
acceptance of a guilty plea. The court held that the requirements of rule 11 were met since the district court had advised the defendant of the maximum sentences on both charges. 331

Although rule 11 requires that the district court find a factual basis for a guilty plea, the Seventh Circuit, in United States v. Gratton, 332 held that there is no similar requirement for a plea of nolo contendere. 333 In that case, the court considered whether a policy of refusal to accept nolo contendere pleas without an expression of guilt by the defendant was reversible error. 334 The holding in Gratton was limited to the facts of the case. No plea bargain had been made, 335 the conviction would have been for the same offense had the nolo contendere plea been accepted, 336 and no civil liability was likely to develop from the transaction involved. 337 Since the defendant had made no showing that the nolo contendere plea would be appropriate and that no prejudice would follow as a result of the conviction after trial rather than on the plea, the court rejected the defendant's argument that the plea should have been accepted.

The plea negotiation process was also the subject of United States ex rel. Robinson v. Housewright. 338 For the first time in this circuit the court directly held that it is not constitutionally impermissible for the trial judge to enter into plea negotiations prior to a tentative agreement being reached between the prosecutor and the defense attorney. 339 The opinion in Moody v. United States, 340 had recognized that plea bargaining is an essential component of the administration of justice. 341 That decision also recommended that all district judges make an expanded rule 11 inquiry. 342

In Robinson, the court did not have any supervisory power over the Illinois state courts. Thus, the court had to determine whether the inquiry recommended in Moody was founded on the protection of constitutional rights. It determined that it was not. The Seventh Circuit accepted the

331. Accord, Villareal v. United States, 508 F.2d 1132 (9th Cir. 1974); Williams v. United States, 500 F.2d 42 (10th Cir. 1974); Tindall v. United States, 469 F.2d 92 (5th Cir. 1972); Johnson v. United States, 460 F.2d 1203 (9th Cir. 1972); Hinds v. United States, 429 F.2d 1322 (9th Cir. 1970); Anderson v. United States, 302 F. Supp. 387 (W.D. Okla.), aff'd on other grounds, 405 F.2d 492 (10th Cir.), cert. denied, 394 U.S. 965 (1969).
332. 525 F.2d 1161 (7th Cir. 1975).
333. Id. at 1163.
334. Id.
336. Id.
338. 525 F.2d 988 (7th Cir. 1975).
339. Id. at 990-91.
340. 497 F.2d 359 (7th Cir. 1974).
341. Id. at 362-65.
342. Id. at 365. This inquiry recommended by the court was viewed as an interim measure until rule 11 amendments were made. These amendments have since taken effect in rule 11(e) and (g). Act of July 31, 1975, Pub. L. No. 94-64, § 3(5)-(10), 89 Stat. 371, 372.
argument that the Illinois courts would not hold all judicial participation in plea bargaining to be unconstitutional and improper, ultimately resolving Robinson on the basis that the defendant's plea was voluntary.

SENTENCING

The court considered three cases last year which presented nearly identical issues: the defendant who chose to stand trial received a longer sentence than codefendants who had pleaded guilty. The defendant argued that his longer term indicated that he had been penalized for exercising his right to stand trial. The Seventh Circuit dismissed this argument in all three cases, reiterating that mere disparity between a sentence given a defendant who pleads guilty and to another convicted after trial does not, by itself, prove that the latter was penalized for exercising his constitutional right to stand trial. In another opinion the court rejected a businessman's claim that his sentence should be reduced to a fine alone because of the stigma which attaches to a businessman sentenced to prison. Two other cases involving sentencing problems presented issues which merit discussion.

United States v. Chausee involved a discussion of the Assimilative Crimes Act in the context of sentencing. The defendant alleged that he should have been charged and sentenced under a federal statute instead of under the Illinois statute employed in the indictment. His post-trial motion for reduction of sentence was denied on the ground that the federal and state statutes did not prohibit the same conduct. The defendant relied on a Second Circuit case which held that the federal statute described an assault, while the state statute described a battery. This distinction was rejected by the Seventh Circuit, based on its analysis that a reading of the full federal statute indicates that the crime described therein is broader than a classical assault and includes battery. The defendant's conviction was affirmed, but the case was remanded for resentencing pursuant to the federal statutory provisions.

Faye v. Gray presented a sentencing issue not previously considered

343. United States v. Marzano, 537 F.2d 257 (7th Cir. 1976); United States v. Peskin, 527 F.2d 71 (7th Cir. 1975); United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975).
344. United States v. Dreske, 536 F.2d 188 (7th Cir. 1976). See also Cook v. Gray, 530 F.2d 133 (7th Cir.), cert. denied, 96 S. Ct. 2187 (1976), and United States v. Donner, 528 F.2d 276 (7th Cir. 1976), for two cases where arguments were unsuccessfully made that sentences should be reduced.
345. 536 F.2d 637 (7th Cir. 1976).
347. Id. § 113(c).
349. Fields v. United States, 438 F.2d 205 (2d Cir. 1971).
350. 536 F.2d at 644. See also United States v. Anderson, 425 F.2d 330 (7th Cir. 1970).
351. 536 F.2d at 645.
352. 541 F.2d 665 (7th Cir. 1976).
by the Seventh Circuit. The petitioner in a habeas corpus action argued that the equal protection clause of the fourteenth amendment required that the presentence jail time he had served be credited against the sentence imposed by the trial judge because that confinement was due to his inability to post bond. In deciding the question presented, the Seventh Circuit had to choose between two positions which the courts have taken in light of the United States Supreme Court decisions on this question. Some courts have held that a failure to credit pre-sentence confinement which results from the inability to post bond is a denial of equal protection if that period of confinement combined with the imposed sentence exceeds the statutory maximum penalty allowed for the offense. Other courts have held that the constitution requires the crediting of pre-sentence time served due to defendant's indigency, regardless of whether or not the combined time exceeds the statutory maximum. A further refinement of this latter interpretation holds that where the total time of incarceration is less than the statutory maximum penalty, a presumption exists that the sentencing court credited the presentence time in imposing sentence on the defendant.

The Seventh Circuit had previously adopted the presumption analysis in a case involving the construction of the federal sentencing statute. The

353. Faye also made an argument based on the fifth amendment guarantee against double jeopardy, relying on North Carolina v. Pearce, 395 U.S. 711 (1969). The court found the argument unpersuasive because "[c]ourts . . . have only taken the teaching of Pearce so far as to hold that a failure to credit violates the guarantee against double jeopardy when the pre-sentence time together with the sentence imposed is greater than the statutory maximum penalty for the offense." 541 F.2d at 667. Since Faye's imposed sentence combined with the pre-sentence time served was less than the statutory maximum, the double jeopardy argument failed.

354. The United States Supreme Court decisions are Tate v. Short, 401 U.S. 395 (1971) (which held that it was a denial of equal protection to limit punishment to payment of a fine for those financially able to pay but to convert the fine to imprisonment for the indigent), and Williams v. Illinois, 399 U.S. 235 (1970) (which struck down the practice in Illinois of incarcerating beyond the maximum term those individuals unable to pay a fine, stating "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense to be the same for all individuals irrespective of their economic status." 399 U.S. at 244).

355. E.g., Jackson v. Alabama, 530 F.2d 1231 (5th Cir. 1976); Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974); Hook v. Arizona, 496 F.2d 1172 (9th Cir. 1974); Hill v. Wright, 465 F.2d 414 (5th Cir. 1971).


The case which originated the concept of such a presumption of credit for pre-sentence time was Stapf v. United States, 367 F.2d 326 (D.C. Cir. 1966), which construed the federal sentencing statute, 18 U.S.C. § 3568 (1970).

358. Holt v. United States, 422 F.2d 822 (7th Cir. 1970).

359. 18 U.S.C. § 3568 (1970). Two other circuits have followed the District of Columbia and Seventh Circuits in this analysis. See United States v. Downey, 469 F.2d 1030 (8th Cir. 1972); Swift v. United States, 436 F.2d 390 (8th Cir. 1970), cert. denied, 403 U.S. 920 (1971); Brotherton
court left open the question of whether it was appropriate to invoke a presumption in a case such as *Faye*, which presented a constitutional claim rather than a statutory claim. Noting that other decisions have questioned the validity of this approach, the Seventh Circuit found it unnecessary to decide the issue since, on the facts it was clear that the judge had not allowed credit for time served. Thus, even if a presumption had arisen it was clearly rebutted. The dissenting judge indicated that he would have reached the constitutionality of such a presumption, stating that a *rebuttable* presumption may be constitutionally invoked. Further, he argued that the presumption may be rebutted only by a clear showing that no credit was given for the time served.

While the opinion in *Faye* does not decide the issue, an examination of the majority and dissenting opinions may be of assistance to counsel who desire to raise the pre-sentence time credit issue.

In *United States v. Dorszynski*, the Seventh Circuit further interpreted the Youth Corrections Act, the statutory sentencing provisions for youth and young adult offenders. The court held that its previous decision in *United States v. Neve*, that offenders subject to sentencing under the YCA be prosecuted by indictment, is not retroactive. It also pointed out that a recent United States Supreme Court decision, while requiring a specific "no benefit" finding for youth offenders prior to adult sentencing, does not require that the finding be accompanied by reasons.

### PAROLE REVOCATION AND PAROLE RELEASE

In *United States ex rel. Richerson v. Wolff*, the Seventh Circuit held that due process requires that reasons be given for the denial of parole release in considering the denial of a state prisoner's habeas corpus petition. Although the court had held earlier that the Administrative Procedure Act required that reasons be given for denial of parole in a federal parole release hearing, the issue of whether due process required the giving of

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361. 541 F.2d 665, 669 (Campbell, J., dissenting).
362. 524 F.2d 190 (7th Cir. 1975).
364. 492 F.2d 465 (7th Cir. 1974).
365. 524 F.2d at 194.
reasons had not been squarely faced by the court. Other circuits, however, had confronted the issue and had concluded that due process does require the giving of reasons for denial of parole release. The Seventh Circuit, relying on these other decisions and analyzing relevant United States Supreme Court opinions, concluded that "due process includes as a minimum requirement that reasons be given for the denial of parole release."

Richerson also involved the question of whether the reasons set forth in the Illinois parole release statute adequately apprised the defendant of the reason for denial so as not to violate due process. The court found that the comparable provisions of the federal regulations were substantially similar so that interpretative federal case law could serve as a guide in assessing the adequacy of the Illinois provision. The court held that the reasons given to Richerson, namely, that early release under the circumstances of his offense would "deprecate the seriousness of such an offense," combined with suggestions to him for future conduct were sufficient to satisfy due process requirements. In assessing this sufficiency, the court adopted the test of the Second Circuit in United States ex rel. Johnson v. Chairman of New York Board of Parole. This test requires that the reasons given should be adequate enough to enable a reviewing body to determine whether the denial of release was permissible. Detailed findings are not necessary if all relevant factors are considered by the board. The court did not reach the issue of whether merely meeting the statutory requirements, without more, would satisfy due process since the board in Richerson had considered other factors.


373. 525 F.2d at 800.

374. ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1975).


376. 525 F.2d at 801.

377. Id.

378. 500 F.2d 925 (2d Cir.), vacated as moot, 419 U.S. 1015 (1974).

379. The test, as formulated by the Second Circuit is:

To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision and the essential facts upon which the Board's inferences are based.

500 F.2d at 934.

The Seventh Circuit found this test consistent with the United States Supreme Court's analysis of minimum due process requirements for revocation of good time credit as stated in Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974). 525 F.2d at 804.
In other cases, the court held that *Richerson* and *King v. United States* would not be applied retroactively. *McGee v. Aaron,* decided prior to *Richerson,* however, held that due process does not require that the board conduct what would amount to a rehearing once written reasons have been given for denial of parole. Finally, the Seventh Circuit recommended to lower courts that, even though the federal rules do not require a right of allocution at re-sentencing following revocation of probation, it would be the "better practice" to personally address the defendant and allow him to speak.

An interesting jurisdictional question was raised in *Napoles v. United States.* The petitioner had been sentenced in Illinois. While he was serving a period of probation, he moved to Texas and jurisdiction over him was transferred there pursuant to 18 U.S.C. § 3653. A Texas court entered an order revoking his probation because of a violation of certain probation provisions. Napoles subsequently filed in Illinois a motion under 28 U.S.C. § 2255 to vacate or modify the original sentence because his guilty plea had been accepted without compliance with rule 11. The district court denied the motion for lack of jurisdiction, having found that jurisdiction had lodged with the Texas court. The Seventh Circuit reversed the district court, holding that a section 2255 motion must be brought before the court whose proceedings are being challenged. The decision centered on whether probation should be construed to be a sentence within the meaning of the two statutory sections involved. Although the court noted that the courts are split on this issue, it chose to follow the example of the Fifth Circuit which held that

380. 492 F.2d 1337 (7th Cir. 1974) (a failure to give reasons for denial of parole to a federal prisoner violates the Administrative Procedure Act, 5 U.S.C. § 555(e) (1970)).
381. Bailey v. Holley, 503 F.2d 169 (7th Cir. 1976); Berkeley v. Benson, 531 F.2d 837 (7th Cir. 1976). Berkeley involved a defendant who had originally been part of the group which initiated Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974). Berkeley’s petition was dismissed, however, because he had had a second parole release hearing at the point at which approximately one-third of his sentence had been served.
382. 523 F.2d 825 (7th Cir. 1975).
383. The petitioner in *McGee* did not receive a hearing following his sentence under 18 U.S.C. § 4208(a)(2) (1970) until 20 months of his four year sentence had been served. According to the court, this delay was improper under the holding of Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974). However, this contention was not raised by the petitioner.
384. FED. R. CRIM. P. 32(a)(1).
385. United States v. Core, 532 F.2d 40 (7th Cir. 1976).
386. 536 F.2d 722 (7th Cir. 1976).
389. FED. R. CRIM. P. 11.
390. This holding was in accord with the other two decided cases on this issue. Martin v. United States, 248 F.2d 554 (8th Cir. 1957); Woods v. Rogus, 275 F. Supp. 559 (D.D.C. 1957).
391. The cases which hold that probation is not a sentence, United States v. Fultz, 482 F.2d 1 (8th Cir. 1973); Zaroogian v. United States, 367 F.2d 959 (1st Cir. 1966); and Bartlett v. United States, 166 F.2d 928 (10th Cir. 1948), did so in other contexts.
392. In contrast to those cases cited at note 391 *supra,* the Fifth Circuit case of Smith v.
probation is a sentence for the purposes of section 3563. 393

CONCLUSION

The Court of Appeals for the Seventh Circuit is constantly presented with opportunities to decide issues of importance relating to criminal procedure. Because the development of the law in this area is so comprehensive, it is unusual for the court to be faced with a truly novel issue. This is demonstrated by the fact that only in the wiretap decisions is significant law developing. Some degree of inconsistency is reflected in the opinions, largely due to the fact that many decisions are written, not by permanent members of the court, but by judges sitting by designation. This in itself is an indication of the heavy burden borne by the court. The quality of the opinions is extremely high, however, and is to be commended.

It seems appropriate to mention here two important issues which the author believes may be presented to the Seventh Circuit during the coming year. The first issue, in the fourth amendment area, is whether, absent exigent circumstances, law enforcement personnel may enter a private dwelling to arrest an individual whom they have probable cause to arrest but no warrant. Such arrests occur almost daily, but the United States Supreme Court has not yet addressed the problem and it may well arise in this circuit in the next year.

The second issue which may be litigated here arises from the increased frequency with which the Racketeer Influenced and Corrupt Organizations Act 394 is being used as a basis for indictments relating to cases involving fraud against the government. Although the constitutionality of the statute itself has been upheld on numerous occasions, 395 the manner in which it is now being used will require further construction of the statute. Government fraud cases have increased dramatically in both number and complexity in the past year. The RICO statute provides a useful tool for attacking some of the problems raised by those cases, but its use has been and will continue to be challenged. No doubt, the opportunity to resolve some of these challenges will soon be provided to the Seventh Circuit.

Criminal litigation in this circuit provides challenges to the government,

393. In United States v. Scuito, 531 F.2d 842 (7th Cir. 1976), the court held that where a probationer is not in custody pending a probation revocation hearing, the preliminary hearing mandated by Gagnon v. Scarpelli, 411 U.S. 778 (1973), is not required.
to defense attorneys, and to the courts. The Court of Appeals for the Seventh Circuit has in the past, and will undoubtedly continue in the future, to provide the steadying force and guidance that all participants in such litigation require.