CRIMINAL LAW AND PROCEDURE

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During its last term the Seventh Circuit Court of Appeals decided about four dozen criminal cases involving a broad range of issues of criminal law and procedure. The following treatment of those cases is designed to set out the issues in a manner useful to those who practice before the Seventh Circuit.

ARREST

In two cases the Seventh Circuit treated the issue of whether law enforcement agents had probable cause to stop a vehicle and effectuate an arrest. In United States v. Robinson,¹ a Wisconsin sheriff received an all-points bulletin that people in a specifically described vehicle were suspected of attempting to pass a stolen postal money order. The sheriff stopped an automobile of the same color and license number as indicated in the bulletin, saw a postal money order in the car in plain view, and arrested the occupants of the car. In United States v. Weatherford,² Indiana police officers knew that the defendants there were convicted felons, knew that at least one of the defendants had purchased firearms ammunition from a sporting goods store, and had information that defendants were going hunting in South Dakota. Police consequently stopped and arrested the defendants in Illinois one mile west of the Illinois-Indiana border and charged them with transporting firearms or ammunition in interstate commerce. In each of these two cases, the Seventh Circuit held that there was probable cause to effectuate the arrest, as in each case the police had information sufficient to warrant a reasonable belief that the defendants were committing or had committed a crime and that evidence of the crime was in the vehicle.

The Court also upheld the arrest of defendant in United States v. Lopez.³ Defendant contended that Government agents who arrested

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1. 470 F.2d 121 (7th Cir. 1972).
2. 471 F.2d 47 (7th Cir. 1972).
3. 475 F.2d 537 (7th Cir. 1973).
him did not comply with a statutory requirement\(^4\) that, prior to entering a dwelling, officers must make (1) an announcement of their authority to make the arrest, and (2) an announcement of their purpose to make an arrest. The agents had staked out defendant's hotel room and, from an adjoining room, overheard conversations indicating that narcotics were in defendant's room. The agents heard defendant say to someone else in the room, "Let's get out of here." When defendant opened the hotel room door, the agents entered the room and arrested him and the other occupants. The Seventh Circuit Court of Appeals held that, because defendant opened the door on his way out of the room, the arresting agents who then entered the opened door were not required to announce their authority or purpose.

In *United States v. Marlin*,\(^5\) the Court of Appeals reversed and remanded defendants' theft convictions after holding that the arrest of defendants was unlawful. Where the agents who arrested defendants had no knowledge at the time of the arrest that a specific crime had occurred or that defendants had been at the crime site, there was no probable cause to arrest them.

**SEARCH AND SEIZURE**

The Court of Appeals decided two cases involving consent to search. In *United States v. Hayward*,\(^6\) defendant's conviction for knowingly possessing goods stolen from interstate commerce was affirmed. On appeal he alleged that the police officer who searched his premises and seized evidence, did so without a search warrant and without defendant's consent. After informing defendant he had no search warrant, the officer again asked defendant whether he could search defendant's premises. Defendant responded, "Okay, I can't stop you." The Court of Appeals held that such language clearly indicated consent free from coercion. And in *United States v. Stone*,\(^7\) the Court of Appeals, affirming defendant's robbery conviction, upheld a search of defendant's home that was conducted by F.B.I. agents


\(^5\) 471 F.2d 764 (7th Cir. 1972).

\(^6\) 471 F.2d 388 (7th Cir. 1972).

\(^7\) 471 F.2d 170 (7th Cir. 1972).
after defendant's wife voluntarily consented to the search. In a strong dissenting opinion, however, Chief Judge Swygert challenged the blanket rule cited by the majority, that where two persons have equal rights to the occupation of premises, either may give consent to a search of the premises. The Chief Judge would qualify the rule to permit only reasonable searches, considering all attendant circumstances; and he would challenge the search here, even though defendant's wife voluntarily consented to it, where the search was conducted only minutes after defendant was arrested on the premises and removed by Government agents.

In United States v. Gamble, the Court of Appeals ruled on the application of Chimel v. California with respect to the scope of the warrantless search of defendant's residence at the time of his arrest by police at 12:30 A.M. Reversing defendant's conviction of possession of an unregistered firearm, the Court held that the police were not justified in conducting a "protective sweep" by searching the entire house simply because defendant had so-called "violent propensities" and because police heard "rustling noises" inside the residence after they announced their office and purpose.

The Court of Appeals upheld a search and affirmed a conviction for possession of unregistered firearms in United States v. Unger. The search there was conducted pursuant to a warrant based on a complaint alleging that a private citizen (with Army weapons experience) who was in the building subsequently searched, observed weapons stored in a locker, and reported and described the weapons to police. The Court held that the complaint was factually sufficient to form a probable cause basis for issuance of the warrant, and that the complaint was sufficient despite the omission of an allegation of reliability of the informant, as the informant was a private citizen.

In the two cases dealing with the arrest of vehicle occupants, supra, the Court upheld the search of the vehicles. In both United States v. Weatherford and United States v. Robinson, the Court relied on Coolidge v. New Hampshire which recognized the rule that con-tra-
band illegally transported in a vehicle may be searched for without a warrant, where the searching officer has probable cause for believing that the vehicle contains contraband that is being transported illegally.

**Voluntariness of Confession; Miranda**

In *United States v. Durham*, the Court of Appeals was divided on the question of whether defendant's 1961 confession was properly admitted at trial. The confession was obtained by an F.B.I. agent in defendant's jail cell after defendant's preliminary hearing and outside the presence of defendant's counsel. The interrogation occurred prior to the United States Supreme Court's ruling in *Miranda v. Arizona*; and the Seventh Circuit Court of Appeals held here that a retroactive application of *Massiah v. United States* was controlling in this case. Chief Judge Swygert was of the opinion that *Massiah*, involving a post-indictment statement, was nevertheless applicable to the post-arrest/preliminary hearing statement here, and that defendant should receive a new trial. Judge Pell believed that the proper remedy would be not a new trial, but a hearing to determine whether the statement was given voluntarily (i.e., whether defendant understandably waived the presence of his counsel); and that if the hearing determined the confession was voluntary, defendant's conviction should stand. Judge Castle was of the opinion that *Massiah* was not controlling here because defendant knowingly waived the right to have his counsel present at the interview when he gave his statement. Judge Castle also stated that defendant's confession, measured by the 1961 pre-*Miranda* standard, did not totally hinge on the fact that counsel was not present, as lack of representation by counsel under such standard would go only to the weight to be given other evidence of actual coercion.

In several cases the Seventh Circuit considered the ramifications—

13. 475 F.2d 208 (7th Cir. 1973).
14. 384 U.S. 436 (1966), holding that statements taken from an accused during custodial police interrogation in absence of procedural requirements are inadmissible.
15. 377 U.S. 201 (1964), holding that Massiah had been denied his Sixth Amendment right to counsel by the introduction at his trial of an inculpatory statement elicited from him by Government agents after his indictment and in the absence of his counsel. The Seventh Circuit here held that retroactive application of Massiah is required by *McLeod v. Ohio*, 381 U.S. 356 (1965).
16. Procunier v. Atchley, 400 U.S. 446 (1971) held that the crucial determination controlling the admissibility of a pre-*Miranda* confession is whether defendant's will had been overborne to the extent that his confession was not a voluntary act, 400 U.S. at 453.
tions of *Miranda v. Arizona* in relation to Fourth, Fifth and Sixth Amendment rights.

In *United States v. Lomprez*, the Court affirmed defendants' robbery convictions. One of the defendants, approached at his home by F.B.I. agents, was fully advised of his rights under *Miranda v. Arizona*; he then gave an exculpatory statement. The Court of Appeals held that the statement was voluntary and admissible into evidence where elicited after the *Miranda* warnings had been given, regardless of whether or not defendant was in custody at the time. Further, the exculpatory statement was admissible into evidence even though defendant did not testify, as it had independent probative value as evidence of a consciousness of guilt.

*United States v. Krilich*, involved the admission into evidence of a conversation between defendant and I.R.S. Special Agents. The Court of Appeals held that where defendant was given the warnings prescribed by *Miranda*, he was sufficiently alerted that he might be suspected of violating criminal statutes. Consequently there was no requirement to suppress defendant's conversation with the Special Agents.

The Court of Appeals ruled on cases involving the application of its earlier decision in *United States v. Dickerson* to seizure of evidence. In *Dickerson* the Court had held that once a taxpayer is under criminal investigation, he must be warned of his constitutional rights as prescribed by *Miranda v. Arizona* before any further interrogation can take place. In *United States v. Habig*, the Court refused to apply the *Dickerson* rule to corporate records and leads obtained by I.R.S. agents for use as evidence in a criminal prosecution. The Court held that even though a corporate officer is a prospective criminal defendant, he is not entitled to *Miranda* warnings when requested to produce corporate records. Defendant in *United States v. Sicilia*, also attempted to rely on the *Dickerson* rule. Four F.B.I. agents went to Sicilia's place of business pursuant to an informant's tip, found stolen property, and interrogated Sicilia on the premises about the property. The Court of Appeals noted that the underlying rationale for the *Dickerson* rule was limited to the facts in that case: that when a taxpayer is being investigated by Internal Revenue agents,

17. 472 F.2d 860 (7th Cir. 1972).
18. 470 F.2d 341 (7th Cir. 1972).
19. 413 F.2d 1111 (7th Cir. 1969).
20. 474 F.2d 57 (7th Cir. 1973).
21. 475 F.2d 308 (7th Cir. 1973).
he should be advised, by way of *Miranda* warnings, when the nature of
the investigation shifts from a general type to one criminal in nature.
But in *Sicilia*, the presence of F.B.I. agents on defendant's property in
no way misled defendant from the fact that the agents' investigation
was of criminal nature. The Court thus refused to apply *Dickerson*
to the non-custody situation of *Sicilia*.

In both *Habig* and *Sicilia*, as well as in *United States v. Hay-
ward*, the Court of Appeals reiterated its rule articulated in *United
States v. Young*, that the warnings required by the Fifth and Sixth
Amendments under *Miranda* are not a *sine qua non* to a valid consen-
sual search under the Fourth Amendment. In *Young*, after defendant
had invited police into his home to "look around," they had found and
seized incriminating evidence in his personal possession. The Court
of Appeals held that no *Miranda* warnings were required by the Fourth
Amendment in advance of the search.

**RIGHT TO COUNSEL**

The Court of Appeals considered the question of test of indi-
gency with respect to appointing counsel, in *United States v. Kelly*. In
refusing to appoint counsel for defendant, the trial judge found that
defendant's motion for appointed counsel was not made in good faith,
but was made for purposes of delay. The Court of Appeals found
no error in refusal to appoint counsel, noting that the proper test of eligi-
ibility was defendant's financial inability. In view of the judge's credibil-
ity finding, the Court of Appeals held there was substantial
evidence to support the trial judge's inference that defendant was not
financially unable to obtain an attorney. In view of the able manner
in which defendant (an attorney) defended himself at trial, the
Court of Appeals found that defendant was not prejudiced by denial
of appointed counsel, nor denied a fair trial.

Two cases concerned the right to counsel and identification pro-
cedures. In *United States v. Pigg*, the Court of Appeals held it
was not error to admit identification testimony in evidence where the
witness observed defendant at an identification procedure at which
counsel was not present, because the witness's identification of defend-
ant was based on an independent source that was shown to be reli-

22. 471 F.2d 388 (7th Cir. 1972).
23. 471 F.2d 109 (7th Cir. 1972).
24. 467 F.2d 262 (7th Cir. 1972).
25. 471 F.2d 843 (7th Cir. 1973).
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able. Defendant also contended that a photographic identification procedure was impermissibly suggestive; but the Court of Appeals rejected this argument on the basis that, on cross-examination of the eyewitness, defense counsel elicited testimony showing only that there was no impropriety in the photographic identification procedure. United States v. Smith,26 involved a voice identification of defendant from tapes of defendant's voice. Neither defendant nor his counsel was present at the identification procedure. The Court of Appeals refused to apply the counsel requirement of Gilbert v. California27 and Wade v. United States28 to a recorded voice identification procedure under the facts in this case, where the identification of defendant as the one who made the recordings was never in issue. Further, any actual identification of the voice as that of defendant took place prior to indictment29 and independent of the recorded voice identification procedure objected to.

SUFFICIENCY OF INDICTMENT

The test of sufficiency is whether the indictment sufficiently apprised defendant of the nature of the offense(s) with which he was charged and makes an adequate record so that, if necessary, he could plead the conviction(s) in bar of future prosecution(s) for the same offense(s).30 In United States v. Grizaffi,31 an indictment charging conspiracy to misapply funds of federally insured savings and loan association was held to sufficiently allege the essential facts constituting the offense charged. In United States v. Green,32 the Court of Appeals ruled as sufficient an indictment charging defendant with making a false statement to a firearms dealer with respect to a material fact concerning the lawfulness of the sale of a firearm to him. The indictment did not allege that defendant had acquired a firearm which had been shipped in interstate or foreign commerce. This omission was not a fatal defect,

26. 467 F.2d 1126 (7th Cir. 1972).
27. 388 U.S. 263 (1967), applying to the states the requirement of presence of counsel at post-indictment pre-trial lineups.
28. 388 U.S. 218 (1967), holding that a post-indictment lineup was a critical stage of the criminal proceedings at which the presence of counsel was required.
29. In Kirby v. Illinois, 406 U.S. 682 (1972), the United States Supreme Court refused to apply the Wade-Gilbert rule to a pre-indictment case where the identification occurred before the initiation of adversary judicial criminal procedures.
30. United States v. Henderson, 471 F.2d 204 (7th Cir. 1972) (indictment charging embezzlement and interstate transportation of stolen bond held sufficient.).
31. 471 F.2d 69 (7th Cir. 1972).
32. 471 F.2d 775 (7th Cir. 1972).
because in a prosecution for this charge the Government need not al-
lege nor prove at trial that the firearm in question passed through
interstate commerce.

**DISCLOSURE OF EVIDENCE BY PROSECUTION**

In *United States v. Crovedi*, defendants appealed from their
convictions of theft and conspiracy to steal, on the ground that the
trial court refused to require the prosecution to disclose the present
names, addresses and employment of the key Government witnesses
(admitted participants in the offenses who had earlier pleaded guilty).
The Court of Appeals found no abuse of discretion in the trial court's
determination that the witnesses had reason to fear that disclosure of
their present identities would endanger themselves and their families.
The Court thus held that the rule of *Smith v. Illinois* is not an
absolute and is subject to discretionary exception where the personal
safety of the witness would be endangered.

Defendant in *United States v. Hauff*, argued that delay by the
prosecution in disclosing to defendant a handwriting comparison re-
port until its use at trial, constituted error where defendant had filed a
pretrial discovery motion. The report was introduced when a Govern-
ment handwriting expert was called to rebuff the testimony of a de-
fense expert who had testified that one of two disputed signatures was
not that of defendant. The Court of Appeals affirmed defendant's
conviction and held that error in introducing the report, if any, was
harmless, where the Government witness testified only that the evi-
dence as to the author of the signatures was inconclusive.

In *United States v. Lomprez*, defendant's contended that the
prosecution suppressed evidence favorable to the defense in violation of
*Brady v. Maryland*, in that the Government failed to disclose
statements of two witnesses who could not positively identify the de-
defendants. In rejecting this contention and affirming the convictions,

33. 467 F.2d 1032 (7th Cir. 1972).
34. 390 U.S. 129 (1968), holding that petitioner was deprived of his Sixth and
Fourteenth Amendment right to confront the witness against him, when he was de-
nied the right to ask the principal prosecution witness either his correct name or his
address.
35. 473 F.2d 1350 (7th Cir. 1973).
36. 472 F.2d 860 (7th Cir. 1972).
37. 373 U.S. 83 (1963). The United States Supreme Court stated that "the
suppression by the prosecution of evidence favorable to an accused upon request vi-
lates due process where the evidence is material either to guilt or to punishment ir-
respective of the good faith or bad faith of the prosecution."
the Court of Appeals noted that all eyewitnesses testified at trial, two of them making positive in-court identifications of defendants and that the Government had furnished the defense with the name and address of an alibi witness interviewed by the Government whose testimony was favorable to the defense.

United States v. Stone, also involved the contention by defendant of a violation of Brady v. Maryland. Defendant based his contention on the fact that the prosecution had pretrial knowledge that two of the bank employees could not identify defendant as the bank robber. Noting that the Government produced both witnesses at trial, at which time they testified they could not identify defendant, the Court of Appeals held that defendant was not prejudiced by the Government's failure to disclose the testimony to defendant at an earlier time.

In United States v. Kaplan, defendant contended that the Government failed to disclose that a fact, critical for impeachment purposes, was misrepresented by a Government witness. The witness testified that he had received no promise of leniency from the Government in testifying against defendant on one of five counts of mail fraud for which defendant was convicted. (The witness was himself a defendant in the case and was serving a prison sentence on another charge at the time of his testimony.) Noting that this came within the rule of Napue v. Illinois, which also involved failure of a prosecutor to contradict the false testimony of a prosecution witness that he had not been promised leniency, the Court of Appeals here reversed the mail fraud conviction that had been tainted by the Government witness's testimony. But the Court of Appeals affirmed the other convictions, holding that they were not tainted by the testimony.

In United States v. Krilich, defendant's convictions of income tax offenses were affirmed, the Court of Appeals rejecting defendant's assignment of error as to denial of his request for documentary production. The grand jury testimony of a Government witness was not disclosed to defendant because the trial judge, after inspecting the testimony, concluded that it did not relate to the subject matter of the witness's trial testimony. The Court of Appeals affirmed the trial

38. 471 F.2d 170 (7th Cir. 1972).
39. 470 F.2d 100 (7th Cir. 1972).
40. 360 U.S. 264 (1959). Though the false testimony of the state's key witness concerning a promise of leniency related only to his credibility, the United States Supreme Court concluded that the failure of the prosecutor to correct what he knew was false testimony invalidated the trial.
41. 470 F.2d 341 (7th Cir. 1972).
judge's ruling. Other documents that defendant sought to be disclosed were properly withheld because they were not statements within the meaning of Rule 16(a)(1) of the Federal Rules of Criminal Procedure.

**SEVERANCE**

Defendants in *United States v. Lomprez*,^{42} claimed that the district court erred in refusing to grant a severance. Defendants relied on *Bruton v. United States*^{43} in arguing that a false exculpatory statement of one co-defendant prejudiced another co-defendant. In rejecting this contention, the Court of Appeals noted that, unlike *Bruton*, this case did not charge a conspiracy between the defendants; and the statement related only to the co-defendant's activities at the time in question and could not have prejudiced defendant.

In *United States v. Henderson*,^{44} defendant contended that failure of the trial court to grant severance from her co-defendant father prevented her from calling him as a witness on her behalf. The Court of Appeals rejected this argument, stating that the mere possibility he might have testified on her behalf did not establish prejudice by failure to sever. Further, separate trials would not have guaranteed to defendant that her father would waive his right against self-incrimination to testify at her trial. A similar claim was presented in *United States v. Stevison*,^{45} where defendant alleged it was error to deny her motion to sever her trial from that of her daughter. Defendant claimed that her defense (that her daughter coerced her into performing criminal acts by threatening suicide if she did not do so) was prejudiced because her daughter's defense was insanity. The Court of Appeals found no error in the denial of the motion for severance as the defenses did not necessarily conflict and that, in fact, testimony concerning the daughter's eccentric conduct tended to aid rather than to oppose defendant's coercion defense.

**SPEEDY TRIAL**

In *United States v. DeTienne*,^{46} defendants DeTienne and Askins were convicted of having attempted to rob a bank on September 25,

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42. 472 F.2d 860 (7th Cir. 1972).
43. 391 U.S. 123 (1968), protecting a defendant's right to confront witnesses in situations involving trial use of a co-defendant's statement incriminating the defendant.
44. 471 F.2d 204 (7th Cir. 1972).
45. 471 F.2d 143 (7th Cir. 1972).
46. 468 F.2d 151 (7th Cir. 1972).
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1968. They were indicted on December 5, 1969; their joint trial commenced on July 13, 1971, and the jury returned guilty verdicts two days after that. Defendants contended on appeal that they were denied their right to speedy trial in that the delay between the date of the offense (September 25, 1968) and the date of trial (July 13, 1971) was excessive. Noting that defendants were arrested by state and federal officers days after the bank robbery attempt for other offenses unrelated to the federal attempted bank robbery charge, the Court of Appeals noted that the arrests on unrelated charges did not trigger the Sixth Amendment's speedy trial protection as to prosecutions for any other chargeable offenses. The Court held that the date on which defendants became accused for the purpose of computing pretrial delay was the date of indictment—December 5, 1969—and that defendants failed to show how the pre-indictment delay prejudiced their rights to a fair trial. As to post-indictment pretrial delay, the Court of Appeals referred to the factors delineated by the United States Supreme Court in Barker v. Wingo\textsuperscript{47} to be considered in determining whether a defendant has been deprived of his right to a speedy trial. The factors are: length of delay, reason for the delay, defendant's assertion of his right to speedy trial, and prejudice to defendant. As to defendant Askins, the Court found that he waived his right to speedy trial after being paroled from a state prison by fleeing the jurisdiction prior to trial on the charge at bar. He was arrested by Government agents in Florida on the instant charge six months before trial, but asserted denial of his right to speedy trial only the day before trial. Defendant DeTienne was in custody the entire nineteen months between indictment and trial. But the Court of Appeals found no denial of right to speedy trial where delay in bringing him to trial did not result in prejudice and where he did not demand speedy trial until his counsel moved to dismiss the indictment about ten days before trial. The convictions of both men were affirmed.

In United States v. White,\textsuperscript{48} defendant's conviction of selling heroin was affirmed. The offense was committed in March, 1970; defendant was arrested in April, 1971; a potential defense witness died one week after his arrest; he was indicted in June, 1971. He asserts that he was prejudiced by the 15-month delay between the crime

\textsuperscript{47} 407 U.S. 514 (1972). The United States Supreme Court affirmed the conviction of the petitioner who was brought to trial five years after indictment and after 16 continuances were granted to the prosecution. The Supreme Court held that the delay did not constitute reversible error because the record indicated the petitioner did not want a speedy trial and because the delay did not prejudice him.

\textsuperscript{48} 470 F.2d 170 (7th Cir. 1972).
and indictment, during which period a defense witness died. The Court of Appeals rejected this claim because there was no showing as to how defendant was prejudiced by the delay and the death of the witness; and because the Sixth Amendment protection of the right to speedy trial is limited to post-arrest situations.49

JURY SELECTION

The Court of Appeals affirmed convictions of willful damage to Government property in *Chase v. United States,*50 after finding no basis in the record for defendants' contention that there was systematic and intentional discrimination against young adults in either the grand jury or the petit jury. The Court also held that the trial judge did not abuse his broad discretion in the conduct of the *voir dire* by failing to ask the prospective jurors about their reactions to courtroom security procedures (specifically, the search of persons entering the courtroom); and that if his failure to conduct such inquiry was error, it was harmless in view of the overwhelming evidence of guilt. But in *United States v. Lewin* and *United States v. Connon,*51 the Court of Appeals reversed and remanded convictions for conspiring to pay and offer to pay persons for registering to vote. The trial judge who conducted the examination of prospective jurors committed reversible error in failing to ask the veniremen about contributions to or employment by certain associations that had conducted voter registration investigations and that employed the chief prosecution witnesses. The Court of Appeals held that the right of defendants to be tried by an impartial jury included the right to an examination of prospective jurors designed to ascertain possible prejudices of the veniremen.

JUDICIAL MISCONDUCT

In *United States ex rel. Wilson v. Coughlin,*52 four juveniles filed a habeas corpus petition seeking release from a certain institution. The district court denied the relief, but ordered the juveniles transferred to another institution. Respondent urged on appeal that a new trial be ordered because of alleged flagrant misconduct by the district court

49. The Court relied on *United States v. Marion,* 404 U.S. 307 (1971), wherein the United States Supreme Court declared that the right to speedy trial under the Sixth Amendment of the United States Constitution and rule 48(b) of the Federal Rules of Criminal Procedure is limited to post-arrest situations.
50. 468 F.2d 141 (7th Cir. 1972).
51. 467 F.2d 1132 (7th Cir. 1972).
52. 472 F.2d 100 (7th Cir. 1973).
judge. The Court of Appeals rejected respondent's claim that the trial judge prejudged the merits of the case, as the record and the judge's ruling belied this assertion. However, the Court of Appeals agreed with respondent that the district court judge assumed the role of advocate and exhibited unprovoked hostility toward counsel. As the propriety of the relief granted by the trial judge was not in question on appeal, the Court of Appeals declined to order a new trial. But the Court held that if any further proceedings would become necessary in the case, they should be conducted by a different judge.

**Admission of Evidence**

The Court of Appeals decided two cases involving the relevancy of evidence. In *United States v. Malasanos*, defendant was convicted of attempted bank robbery. He contended on appeal that it was error to have admitted into evidence the fact that he succeeded in robbing the bank, because it was not relevant to the charge of attempt and thus so prejudicial as to require reversal. In affirming his conviction, the Court applied the rule that it is proper to admit into evidence a crime other than the one charged in the indictment where the other crime explains or helps to establish an element of the crime charged. The Court also noted that the success of defendant in robbing the bank was no defense to the attempt charge. In *United States v. Marlin*, defendants were convicted of breaking the seals of a railway car and stealing cases of beer. They claimed that the trial court erred in admitting into evidence a bottle of detection fluid painted on railway car handles, because the bottle bore a label suggesting its use to trap "sneak thieves." The Court of Appeals held that there was sufficient probative value to justify the admissibility of the bottle, noting that a trial judge has wide latitude in ruling on relevancy and materiality.

Defendant's convictions of fraud by interstate wire communication were affirmed in *United States v. Zweig*. Defendant objected to the introduction into evidence of certain telephone conversations in the absence of authentification of the calls and evidence identifying defendant as one of the parties. The Court of Appeals rejected this claim, noting that the Government did subsequently prove a sufficient connection between the calls and the defendant and that the ultimate question of authenticity was for the jury to decide.

53. 472 F.2d 642 (7th Cir. 1973).
54. 471 F.2d 764 (7th Cir. 1972).
55. 467 F.2d 1217 (1972).
In United States v. Powers, defendant's mail fraud conviction was affirmed. Defendant's attorney had attempted at trial to ask a Government witness whether a check allegedly received by defendant as part of the mail fraud scheme had actually been attributed as income to a co-defendant in a successful prosecution of the co-defendant for tax evasion. The Government's objection to the question was sustained. On appeal defendant contended that evidence of the claimed governmental inconsistent position about the check should have gone before the jury. The Court of Appeals held, however, that the defense's cross-examination of the witness on that point was objectionable because of its duplicitous nature and was immaterial to the issue of whether the prosecution was estopped from prosecuting defendant for receiving the same item of income.

Defendant's bank robbery conviction was affirmed in United States v. Stone. The Court of Appeals held that introduction of a gun taken from defendant's home at the time of his arrest did not violate his right to a fair trial under the due process clause, even though the gun was not one used in the bank robbery. Noting that the trial judge has wide discretion in the admission of collateral evidence, the Court held that in this case the gun had probative value in substantiating the statements of key Government witnesses who testified that defendant had threatened them with a pistol.

In United States v. Grizaffi, defendants were convicted, inter alia, of conspiracy to make false entries in books and records with intent to deceive the Federal Savings and Loan Insurance Corporation and others. The Court of Appeals held that it is a proper exercise of discretion for a court to exclude expert testimony concerning matters clearly within the realm of the jury's comprehension; and that in this case the testimony of an accounting expert was properly excluded when it became evident that the expert would do no more than make basic computations of arithmetic with figures supplied to him by counsel.

In United States v. Stevison, defendant was convicted of misapplying funds in a federally insured bank. The Court of Appeals held

56. 467 F.2d 1089 (7th Cir. 1972).
57. 471 F.2d 170 (7th Cir. 1972).
58. The Court of Appeals cited Moore v. Illinois, 408 U.S. 786 (1972), wherein the United States Supreme Court held that the introduction of a 16-gauge shotgun into evidence in a murder trial in which the victim had been killed by a 12-gauge shotgun, was permissible under the due process clause.
59. 471 F.2d 69 (7th Cir. 1972).
60. 471 F.2d 143 (7th Cir. 1972).
that the district court did not err in permitting a witness to testify that he called defendant concerning the worth of a check drawn by defendant's daughter, and that defendant told him the check would be honored. The Court held that the testimony was properly admitted as bearing on intent.

In *United States v. Henderson*, defendant objected to the admission into evidence of various exhibits under the Federal Business Records Act. In each case in which a witness was unable to account for any mark on an exhibit, the trial court had diligently insisted that the unidentified marks be masked, that the exhibit be photocopied, and that only the expurgated photocopy be shown to the jury. The Court of Appeals held that this was a correct application by the district court of the Federal Business Records Act.

In two cases the Court of Appeals dealt with the admission of character evidence. In *United States v. Lewin* and *United States v. Connon*, defendants' convictions were reversed and remanded. The Court of Appeals held that the district court's treatment of defense

61. 471 F.2d 204 (7th Cir. 1972).
§ 1732. *Record made in regular course of business; photographic copies*
(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. June 25, 1948, c. 646, 62 Stat. 945; Aug. 28, 1951, c. 351, §§ 1, 3, 65 Stat. 206; Aug. 30, 1961, Pub. L. 87-183, 75 Stat. 413.
63. 467 F.2d 1132 (7th Cir. 1972).
counsel's efforts to lay a foundation for character evidence was unduly restrictive. An accused has the right to offer evidence of his good character to show he was unlikely to have acted in the manner and with the intent charged in the indictment. In *United States v. Bambulas*, defense counsel asked each of five reputation witnesses whether he knew about defendant's reputation in the community for honesty, integrity and truthfulness; each replied that he did and that defendant's reputation was very good. Defense counsel was precluded from asking all the witnesses, and received no answer from any, as to whether each witness would believe defendant on oath. The Court of Appeals held that, though the question was precluded, defendant was not prejudiced by its exclusion when considering the testimony concerning his reputation in the community that was allowed into evidence. Any error in precluding the question was therefore harmless.

Three cases on impeachment evidence were considered by the Court of Appeals. In *United States v. Jansen*, affirming defendant's conviction, the Court stated the rule that a defendant's general credibility as a witness can be impeached only by a felony conviction. At trial defense counsel asked defendant on direct examination whether he had ever been convicted of a crime, defendant replied that he had not. On cross-examination the prosecutor was allowed to question defendant concerning a prior conviction for a misdemeanor. The Court of Appeals said that the district court did not abuse its discretion in not striking the exchange between defendant and defense counsel, and in permitting the impeachment of defendant by his prior misdemeanor conviction. In *United States v. Crovedi*, one of the defendants assigned error in that the district court judge refused to allow him to impeach an identification witness by reading to the jury the record of the witness's attempts at identification at defendant's first trial. The Court of Appeals found no error because there was no real inconsistency between the witness's inability to identify defendant as demonstrated in the first trial and his testimony in the second trial that he did not know whether the guilty person was in the courtroom or not. The Court noted that prior statements may be used to impeach the credibility of a witness only if the judge is satisfied that the prior statements are in fact inconsistent. In *United States v. Kaplan*, defendant claimed that the trial judge erred in permitting impeachment

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64. 471 F.2d 501 (7th Cir. 1972).
65. 475 F.2d 312 (7th Cir. 1973).
66. 467 F.2d 1032 (7th Cir. 1972).
67. 470 F.2d 100 (7th Cir. 1972).
CRIMINAL PROCEDURE

of a defense character witness through questions dealing with a previous suspension of the defendant by the county medical association. The Court of Appeals rejected the claim, holding that the prejudicial effect of the cross-examination was neutralized by the testimony of the same witness in response to the defense counsel's questions on redirect examination. The witness stated that defendant had since been reinstated by the county medical association.

SUFFICIENCY OF THE EVIDENCE

When the Court of Appeals is confronted with the claim that the evidence is insufficient to sustain a conviction, the Court must review the evidence presented to the factfinder and view such evidence in the light most favorable to the Government. United States v. Smith, United States v. Zweig, United States v. Grizaffi. Consequently, the Court of Appeals found the evidence sufficient to sustain defendant's convictions of embezzlement and interstate transportation of a stolen bond in United States v. Henderson. In United States v. Krilich, defendant's convictions of income tax offenses were affirmed after the Court of Appeals held that the evidence supported the findings that the defendant willfully overstated the basis of land that he sold. And in United States v. Robinson, the Court held that the evidence clearly established a conspiracy where the Government showed that defendant and his pals came to a mutual understanding to accomplish unlawful acts (retaining and converting stolen postal money orders); no formal agreement was required.

In United States v. Kelly, defendant's conviction of using the mails to defraud by unauthorized use of a credit card belonging to another was affirmed. The Court of Appeals noted that the Government was required to prove the essential allegation that part of the defendant's fraudulent scheme was to cause the airlines from which he purchased tickets with the credit card to mail transportation receipts to their accounting offices and to cause those offices to mail the receipts to the credit card company (the air travel card had been issued by United Airlines). The Court concluded, however, that defendant must have anticipated that his fraudulent scheme necessarily in-

68. 467 F.2d 1126, 1130 (7th Cir. 1972).
69. 467 F.2d 1217, 1220 (7th Cir. 1972).
70. 471 F.2d 69, 73 (7th Cir. 1972).
71. 471 F.2d 204 (7th Cir. 1972).
72. 470 F.2d 341 (7th Cir. 1972).
73. 470 F.2d 121 (7th Cir. 1972).
74. 467 F.2d 262 (7th Cir. 1972).
volved the mailing by the airlines defrauded into extending credit to the ultimate victim, United. Noting that recent cases have expanded on the notion that credit card schemes to defraud involve use of the mails, the Court here held that there was ample evidence that use of the mails was an integral part of defendant's fraudulent credit card scheme.

In United States v. Maenza, defendant was convicted of making false statements for the purpose of obtaining FHA loan insurance. The Court of Appeals held that the statute defendant was convicted of violating did not require the Government to show that defendant knew that the loan would be offered to the FHA for insurance; but that it was sufficient to show that defendant knowingly made false statements with the intent that the loan he sought would be submitted to the FHA for some purpose.

In United States v. Stevison, defendant's conviction of misapplying funds in a federally insured bank was affirmed. The Court of Appeals stated that although there was no direct evidence that defendant specifically intended to defraud the bank, there was uncontroverted evidence that she received worthless checks, authorized their payment, failed to return the checks after promising a bank official she would do so, and persuaded the bank board to delay action by promising restoration when she knew she would be financially unable to do so. The Court of Appeals concluded the jury could infer from such evidence that the essential element of intent or "reckless disregard" of the bank's interest was proven. Stevison's co-defendant/daughter


76. 475 F.2d 251 (7th Cir. 1973).


78. 471 F.2d 143 (7th Cir. 1972).
was found guilty of aiding and abetting in misapplication of the funds and her conviction was affirmed in *United States v. Velasco*. Her defense at trial was insanity; and expert testimony was presented at trial on her behalf which rebutted the presumption of sanity. The issue on appeal was whether the Government then met its burden of going forward with its evidence to prove beyond a reasonable doubt that defendant was sane and capable of forming the requisite intent. Two expert witnesses for the Government testified that a person such as defendant could distinguish between right and wrong and conform her conduct to the requirements of the law. Taking the evidence in the aspect most favorable to the Government, the Court of Appeals held that the district court did not err in denying defendant's motions for acquittal.

**ENTRAPMENT**

In *United States v. McGrath*, defendant was convicted of unlawful possession of counterfeit bills and of conspiracy to produce and pass counterfeit obligations. The conspiracy count was affirmed but the substantive offense of unlawful possession was reversed. Secret Service agents infiltrated defendant's conspiracy and not only arranged for and supervised the printing of the counterfeit bills, but also determined how and when they would be delivered to defendant. The Court of Appeals held that this constituted entrapment as a matter of law. The Court noted that where a complicated criminal scheme is involved (as in this counterfeiting case), defendant must have done more than merely set the scheme in motion in order to justify police solicitation of the kind here.

**CLOSING ARGUMENT**

In *United States v. Masko*, defendant's conviction for the sale of LSD was reversed and remanded. One ground for reversal was that the prosecutor's closing argument statement, that he knew defendant had made the sale, was reversible error where the evidence consisted of the testimony of a buyer who had pled guilty earlier to the sale of narcotics, and of the testimony of two officers, neither of whom witnessed the sale by defendant to the buyer.

In *United States v. Maenza*, the prosecutor misstated a fact in the

79. 471 F.2d 112 (7th Cir. 1972).
80. 468 F.2d 1027 (7th Cir. 1972).
81. 473 F.2d 1282 (7th Cir. 1973).
82. 475 F.2d 251 (7th Cir. 1973).
closing argument. The Court of Appeals held that this was not reversible error where the misstatement did not affect the central issue in the prosecution, defense counsel strenuously objected to the statement before the jury, and the judge supported defense counsel's objections by saying he did not recall such testimony and that he relied on the jury to remember what had actually been said.

JURY INSTRUCTIONS

In *United States v. Smith*,\(^8^3\) defendant's conviction for making an obscene or indecent or profane radio communication was reversed and remanded. The Court of Appeals held that *sciente* was a necessary element for conviction and that the district court judge committed reversible error in refusing to instruct the jury as to that element.

Defendant's attempted bank robbery conviction was affirmed in *United States v. Malasanos*.\(^8^4\) The Court of Appeals held that it was not reversible error to give an instruction on impeachment by prior conviction where the testimony of defendant in question was part of his direct testimony, and the instruction merely reflected on his credibility. It was also not improper to give the jury an instruction that, in weighing defendant's testimony, the jury should consider that defendant had a vital interest in the outcome of the trial. See also *United States v. Crovedi*.\(^8^5\)

The Court of Appeals reversed and remanded the narcotic sales conviction in *United States v. Wasko*,\(^8^6\) holding that refusal to give an accomplice instruction was reversible error where the accomplice witness had participated in the criminal activity and had the same motive of currying favor with police as if he had been a principal. And inasmuch as much of the witness's testimony was uncorroborated, the district court's refusal to give the jury a cautionary instruction on the weight to be given an accomplice's testimony was reversible error.

In *United States v. Ditata*,\(^8^7\) defendant was convicted of possessing stock certificates stolen from interstate commerce. The district judge gave an instruction on the value as "in excess of $100" as charged in the indictment and submitted the question of value of the stock certificates to the jury in the form of a special verdict. On

\(^8^3\) 467 F.2d 1126 (7th Cir. 1972).
\(^8^4\) 472 F.2d 642 (7th Cir. 1973).
\(^8^5\) 467 F.2d 1032, 1035-36 (7th Cir. 1972).
\(^8^6\) 473 F.2d 1282 (7th Cir. 1973).
\(^8^7\) 469 F.2d 1270 (7th Cir. 1972).
appeal defendant contended that giving the instruction as to value was reversible error. The Court of Appeals pointed out that while the value of each stock certificate in blank form when stolen was only about nine cents, defendant was indicted for and convicted of the possession, not the theft, of the certificates. The time of theft is thus not controlling in determining the value of the property as to defendant, and the Court therefore held that the instruction was not erroneous.

The Court also rejected the claims of the defendant on appeal in *United States v. Bambulas*, with respect to instructions. First, defendant claimed that the instruction regarding promise of immunity to the Government’s witnesses was not explicit or substantial. The Court noted that there was no indication that immunity or leniency promises had been offered by Government authorities. Second, defendant argued that the judge did not use an instruction detailing impeachment of the Government witnesses by previous felony convictions. The Court held that, from their trial testimony, the fact that the Government witnesses had been previously convicted as felons was already known to the jury and therefore the trial court’s general instruction on credibility of witnesses was sufficient.

Defendant in *United States v. Grizaffi*, assigned error with respect to several jury instructions. The Court of Appeals held no error was shown in the district court’s refusal to give a missing Government witness instruction where there was no showing the witness was within the control of the Government. It was not error to refuse to give defendant’s instruction that the jury must find defendant not guilty if they found he was unaware of the actual method of recording transactions in the books of the bank whose funds he conspired to misapply; proof of knowledge of the method of making accounting entries was not required for conviction. Failure to give an instruction concerning the weight to be given to the testimony of an expert witness was not error where the witness in question was not presented as an expert. Defendant also objected to the giving of an instruction that included the language, “No person can intentionally avoid knowledge by closing his eyes to facts which prompt him to investigate.” Defendant claimed the instruction is allowable only when qualified with instructions informing the jury that guilt cannot be based on negligence. The Court of Appeals rejected this argument, as the instruction specifically states knowledge cannot be intentionally avoided.

88. 471 F.2d 501 (7th Cir. 1972).
89. 471 F.2d 69 (7th Cir. 1972).
JURY DELIBERATION

In *United States v. Marlin*, the Court affirmed the rule that permitting the jury to deliberate in the early hours of the morning was a matter within the discretion of the trial court. In *United States v. Bambulas*, defendant asserted that the trial judge's instruction as to further deliberation, given on the judge's own motion after the jury had deliberated nearly six hours, was improperly given. The Court of Appeals found no error where the language of the instruction was non-prejudicial and where the fact that the jury resumed deliberations for an additional four hours indicated lack of coercion.

GUilty Plea

In *United States ex rel. Montgomery v. Illinois*, the Court ruled that a defendant who pleaded guilty in a state court to charges of murder, rape on two occasions, and attempted rape, was properly and sufficiently admonished of the possible consequences of his plea when he was advised prior to his plea that he was subject to the death penalty or to imprisonment for "any number of years"; and the court's failure to explain to him the difference between concurrent and consecutive sentencing did not deprive him of due process of law. The Court of Appeals noted that there is nothing to compel the states to utilize all of the procedures required by Federal Rule of Criminal Procedure 11 prescribing the procedure for acceptance of guilty pleas.

SENTENCING

Imposition of sentences is a matter within the discretion of the trial court. *United States v. Marlin*. Discretion is not unlimited, however; a defendant is at least entitled to have the trial judge consider his application for probation. But in *United States v. Hayward*, the Court of Appeals ruled that refusal to grant probation to defendant was not an abuse of discretion where defendant declined to cooperate with the Government in apprehending other offenders.

In *United States v. Lopez*, the Court ruled that where a narcotics offense carried a mandatory minimum sentence of five years at the time defendant was tried for that offense, and the sentence could

90. 471 F.2d 764 (7th Cir. 1972).
91. 471 F.2d 501 (7th Cir. 1972).
92. 473 F.2d 1382 (7th Cir. 1973).
93. 471 F.2d 764, 766-767 (7th Cir. 1972).
94. 471 F.2d 388 (7th Cir. 1972).
95. 475 F.2d 537 (7th Cir. 1973).
not be suspended nor probation granted, the Court would not remand the matter to the district court to determine whether the sentence should be suspended and defendant placed on probation.

In *United States v. Solomon*, defendant sought reduction of his sentence for several convictions. The Court of Appeals held that where the original sentence was internally contradictory, the sentence was illegal and the district court had the power to correct the sentence.

In *Caifano v. United States*, defendant was under a California district court sentence. After an appeal from a conviction in an Illinois district court, he was resentenced to two years, the sentence to run consecutive to the California sentence. The Court of Appeals held that where the resentencing judgment order did not reflect reference to credit for time served on the original Illinois sentence and at that time was in excess of two years, defendant was not required to serve further time on the Illinois conviction.

**CRUEL AND UNUSUAL PUNISHMENT**

In *Wheeler v. Glass*, two mentally retarded youths in a state institution brought a class action seeking declaratory, injunctive and pecuniary relief for alleged violations of their rights under the Eighth and Fourteenth Amendments. The complaint alleged that defendants, by binding plaintiffs to their beds in a public area for over 77 hours and by forcing them to scrub walls for over ten consecutive hours, subjected plaintiffs to cruel and unusual punishment. The Court of Appeals held that plaintiffs' allegations, if proved, stated punishment which is cruel and unusual under the Eighth Amendment as applied to the states through the Fourteenth Amendment.

**PROBATION REVOCATION**

In *United States v. Martin*, defendant was placed on six months' probation after his plea of guilty to making a false statement in his passport application. Probation was conditioned on defendant leaving the country within 60 days of the order. Defendant did leave the country, but returned shortly thereafter. His probation was revoked and a sentence was imposed. On appeal the Court held that where the probation order was ambiguous as to whether defendant was

96. 468 F.2d 848 (7th Cir. 1972).
97. 471 F.2d 763 (7th Cir. 1972).
98. 473 F.2d 983 (7th Cir. 1973).
99. 467 F.2d 1366 (7th Cir. 1972).
required to remain out of the country for the entire six-month period of probation, the sentencing for violation of the order could not stand.

**DOUBLE JEOPARDY**

In *United States v. Kwitek*,\(^{100}\) a mistrial was declared after defendant's prior criminal record was mistakenly sent into the jury deliberation room and it was ascertained that the jury considered the document in their deliberations. The Court of Appeals held that the first trial became nugatory and without legal effect, and defendant's second and third trials were not barred by the double jeopardy clause of the Fifth Amendment. Defendant argued that *United States v. Jorn*\(^{101}\) dictated that prosecutions subsequent to the first trial were barred; but the Court of Appeals rejected the application of *Jorn* here where the district judge carefully ascertained that the jury did in fact know the content of the document inadvertently sent to them.

In *United States v. McCreery*,\(^{102}\) an indictment charging defendant with failure to report for induction was dismissed when the Government was unable to produce records it had been ordered to produce because the records had been destroyed according to then existing Selective Service regulations. The order of dismissal in this case was a ruling on the merits of the defense and thus in the nature of an acquittal. The Court of Appeals held that jeopardy thus attached and the Government could not appeal from such an order.

**HABEAS CORPUS**

In *United States ex rel. Johnson v. Illinois*,\(^{103}\) the Court of Appeals held that where a defendant was tried in a state court and his privately retained attorney did not move prior to or during trial to suppress certain evidence, did not object to admission of the evidence, and did not raise admission of the evidence as error on direct appeal in state courts, defendant waived any right to object to admission of the evidence on petition for habeas corpus. And a federal habeas corpus proceeding is not the proper place for review of a state conviction on grounds of sufficiency of the evidence, unless the conviction is so devoid of evidentiary support as to raise an issue of due process.

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\(^{100}\) 467 F.2d 1222 (7th Cir. 1972).

\(^{101}\) 400 U.S. 470 (1971). The United States Supreme Court affirmed the dismissal of a second prosecution under the theory that, following a mistrial declared *sua sponte* by the trial judge without defendant's consent and not solely in defendant's interest, re-prosecution of that defendant would violate the Fifth Amendment's double jeopardy proscription.

\(^{102}\) 473 F.2d 1381 (7th Cir. 1973).

\(^{103}\) 469 F.2d 1297 (7th Cir. 1972).