Criminal Procedure: Recent Developments in the Seventh Circuit

Candace J. Fabri

Steven H. Nardulli

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In recent years, the major portion of every appellate court docket consists of criminal appeals, and the Seventh Circuit is no exception. Between May 31, 1978 and May 31, 1979, the court issued over one hundred published criminal decisions dealing with a myriad of issues in substantive and procedural criminal law. A survey article such as this is necessarily cursory in its review of these numerous cases, however, it is our intent to examine, evaluate and compare the most significant of these decisions. This article is directed toward the federal criminal practitioner, and its purpose is to complement the practitioner’s familiarity with basic principles of criminal procedure.

The organization of the article follows the criminal justice process, from the acquisition of evidence through petitions for habeas corpus. Pre-trial issues, such as search and seizure, grand jury, discovery, the use of magistrates, and the Speedy Trial Act, have been examined initially. Those issues traditionally associated with trial, including the administration of jury trials, admissibility of specific evidence, jury instructions, closing arguments, and sentencing have been approached from the practitioner’s point of view. Lastly, post-trial issues such as prisoners’ rights and remedies have been considered.

SEARCH AND SEIZURE

During the past court term, the Seventh Circuit has interpreted the fourth amendment warrant requirement in several contexts. The court was faced with the threshold issue, the distinction between governmental and private searches and seizures, in United States v. Zipperstein.²

* Assistant Professor of Law, Loyola University of Chicago School of Law; J.D., Illinois Institute of Technology/Chicago-Kent College of Law.

** Staff Attorney, Federal Defender Program, Chicago, Illinois; J.D., Illinois Institute of Technology/Chicago-Kent College of Law.

1. Many criminal appeals are resolved each year by unpublished orders which lack precedential value and cannot be cited per Circuit Rule 35. These unpublished orders are not considered in this article except where reference to an unpublished order is helpful to an understanding of the court’s current position.

2. 601 F.2d 281 (7th Cir. 1979).
The search and seizure challenged in Ziperstein was performed by Harlan Eisentraut, an employee in one of Ziperstein's twenty-eight health care clinics. Ziperstein's medical clinics were under investigation for mail fraud in connection with Medicaid, and in late July, 1976, Eisentraut contacted the Federal Bureau of Investigation\(^3\) stating that he had evidence and knowledge of possible illegal activity at Ziperstein's clinic. Eisentraut told the FBI agent that there were documents in a storage room at the clinic, including prescriptions filled by Eisentraut personally, prescriptions filled by Ziperstein's employees prior to Eisentraut's employment, and pre-stamped prescription forms. The agent "expressed an interest in them," and two days later, Eisentraut brought the documents from Ziperstein's storage room to the FBI. Ziperstein moved to suppress the documents as unlawfully seized, however, the trial judge found that Eisentraut had obtained access to these materials legitimately, and thereafter surrendered them to the FBI without any inducement by the government. Finding that the seizure was a purely private act by Eisentraut, the court denied the motion to suppress.

On appeal, Ziperstein argued that the documents admitted at trial were stolen from him and that the government involvement with Eisentraut brought the seizure within the scope of the fourth amendment warrant requirement. The Seventh Circuit held that as no governmental participation in the removal of the documents had been established, and as Ziperstein had no reasonable expectation of privacy in the documents kept in the storage rooms, the fourth amendment warrant requirement was inapplicable.

The fourth amendment restricts only governmental acquisition of evidence; it has no impact on the acts of private citizens who obtain evidence of a crime. Thus, if a private citizen surrenders evidence in his possession to law enforcement officials, regardless of the manner in which the evidence was obtained, the fourth amendment does not apply.\(^4\) Conversely, if a law enforcement official causes a private citizen to obtain evidence on behalf of the government, the seizure must be measured against fourth amendment standards, as the agent cannot circumvent the restriction by inducing citizens to act on his behalf.\(^5\) The

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3. The Federal Bureau of Investigation is hereinafter referred to as the FBI.
4. See generally Burdeau v. McDowell, 256 U.S. 465 (1921) (unlawful seizure of the defendant's property by a private citizen which pre-dated by several months the surrender of the property to the government held not a government search); United States v. Harper, 458 F.2d 891 (7th Cir. 1971), cert. denied, 406 U.S. 930 (1972) (where witness unlawfully obtained records eight months prior to his first contact with government agents held not a government seizure).
5. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); see also United States v. Newton,
facts in Ziperstein do not fit comfortably into either category. The private citizen, Eisentraut, had access to evidence which was not physically in his custody. He contacted the FBI, and on learning they were "interested," Eisentraut unlawfully removed the documents from Ziperstein's clinic and brought them to the FBI. Although the agent did not specifically direct Eisentraut to seize the materials, it is noteworthy that the agent did not seek a search warrant based on the facts initially disclosed by Eisentraut, the citizen informant.

In holding that the evidence was properly admitted, the court of appeals noted that "[a]n identical result was reached in this circuit in United States v. Billingsley."\(^6\) The results in Ziperstein and Billingsley are identical, however, the facts are not. In Billingsley, one Gander was the acting secretary of the corporation under investigation, and in that capacity he was given the corporate books and records.\(^7\) After they had been transferred to his custody, Gander examined them, and several weeks later, he contacted the FBI and gave them the documents which evidenced criminal activity. The record established that no "law enforcement officer suggested to Gander that he obtain records [and] . . . neither the Federal Bureau of Investigation nor any state or local law enforcement officer directly or indirectly induced [Gander] . . . to obtain the records. At the time [Gander] . . . removed the records . . . he was not under investigation."\(^8\) On these facts, the Seventh Circuit specifically found that:

- the record does not support defendant's assertion that Gander acted either at government direction or for the purpose of assisting the investigation. His role as a corporate official and custodian of the corporate documents reasonably suggests that he obtained the items presently challenged for purposes quite independent of any assistance they might be to federal investigators.\(^9\)

Ziperstein argued that Gander's lawful acquisition of the records in question, well prior to his first contact with the FBI, distinguished Billingsley. Relying on Knoll Associates, Inc. v. FTC\(^10\) and United

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510 F.2d 1149 (7th Cir. 1975) (search of luggage by airline employees conducted in the presence of federal agents held to be a government search).
6. 601 F.2d at 289. See United States v. Billingsley, 440 F.2d 823 (7th Cir. 1971).
7. Gander took possession of the corporate records pursuant to his duties. Another corporate officer, who was subsequently indicted, helped Gander carry the records to his car. 440 F.2d at 826.
8. Id. at 825.
9. Id. at 826.
10. 397 F.2d 530 (7th Cir. 1968). In Knoll, an employee of Knoll Associates contacted the Federal Trade Commission (FTC) stating, "I have enough papers to hang them." Id. Afterwards, the employee brought the records to the FTC and the records were used as evidence against Knoll Associates in their hearing before the Commission. The Seventh Circuit concluded that the employee "stole the documents for the purpose of assisting the Commission . . . in the prosecution
States v. Stein, Ziperstein contended that Eisentraut's contact with the FBI prior to his seizure of the evidence was indicative of government encouragement and participation. The Seventh Circuit distinguished Knoll as "the documents obtained were apparently not related to the duties of the employee who took them."

The court distinguished Stein as the private citizen "never asserted that he had any legitimate access to the documents." While these distinctions have some arguable application to the prescriptions filled by Eisentraut personally and later stored in the storage room at Ziperstein's clinic, it is difficult to determine Eisentraut's relationship to the prescriptions filled by other pharmacists prior to his employment, or the pre-stamped prescription forms which he discovered.

Examination of the cases from this circuit indicates a test of association in fact, which focuses on the relationship between the governmental contact or inducement and the acquisition of evidence by the citizen. Billingsley, Knoll Associates, and Stein articulate a reasoned approach: where possession precedes government contact, the fourth amendment cannot be implicated, where possession follows government contact, the fourth amendment assures scrutiny of the citizen-government relationship.

By refusing to distinguish knowledge from physical custody, Ziperstein avoids that scrutiny.

A further part of the court's rationale in approving the search in Ziperstein was premised on Ziperstein's lessened expectation of privacy in the documents kept in the clinic storage room. The court noted that

... then pending," and held the order unenforceable because it was based on illegally obtained evidence. Id. at 533.

11. 322 F. Supp. 346 (N.D. Ill. 1971). In Stein, a co-tenant in Stein's office negotiated with the FBI and the United States Attorney to obtain assurance that he would not be indicted. The co-tenant thereafter turned some of Stein's documents over to the FBI. The district court found "no clear . . . evidence that [the co-tenant] was an agent of the government at this time . . . but there [was] . . . ample reason to believe that [the co-tenant] thought the government would reward him for turning over these records." Id. at 348. (It is noteworthy that Eisentraut was not among the four Ziperstein pharmacists indicted). In suppressing the evidence in Stein, the district court found that the government was not "totally divorced" from the acquisition of the evidence and that the fourth amendment protections were applicable. Id. In United States v. Bastone, 526 F.2d 971, 978 n.4 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976), the Seventh Circuit characterized the holding in Stein as one where "government encourage[ment] of a private individual's irregular acquisition of certain evidence render[ed] the exclusionary rule applicable."

12. 601 F.2d at 290.

13. Id.

14. In Ziperstein, the Seventh Circuit affirmed the district court's finding that Eisentraut gained possession of the documents before his contact with the FBI. The undisputed facts showed that Eisentraut had temporary possession of the prescription he personally filled, and knowledge of the other prescriptions which he removed from the storage room. Eisentraut did not have physical possession of any of the records at the time he first spoke with agents of the FBI. 601 F.2d at 289.
what employees "observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy," and the Seventh Circuit found that "employee disclosures . . . [are] beyond the purview of any fourth amendment restraints." In Marshall v. Barlow's, Inc., the Supreme Court held that an employee is free to report to the authorities evidence of non-compliance with Occupational Health and Safety Regulations which the employee observes on the job. Zipperstein equates disclosure with seizure. There is no doubt under Marshall that Eisentraut could have disclosed to the FBI the information he acquired on the job. That information could further have been used as the basis for a search warrant. Marshall, however, does not address the relationship between the lessened expectation of privacy with respect to employees, and the seizure of employer's documents by employees assisting a federal investigation.

This lessened expectation of privacy was also the basis for the affirmance by the court of appeals of two cases which arose from border searches, United States v. Carter and United States v. Washington. Relying on United States v. Ramsey, the Seventh Circuit held that border searches at any border are reasonable per se as they are related to the right of the sovereign to protect itself. The first point of entry into the United States is a functional border, thus the court in Carter affirmed a search of a passenger and his luggage at Chicago-O'Hare International Airport after arrival on a direct flight from Europe. The border search rationale applies equally to items which enter the United States from abroad by mail. In United States v. Washington, the court characterized mail sent from the Canal Zone to the United States as mail from a foreign country subject to warrantless search at the point of entry without regard to the fourth amendment requirements.

In addition to the border exception to the fourth amendment warrant requirement, during the past term the Seventh Circuit examined the circumstances under which a warrantless "plain view" seizure is permissible. The traditional formulation of the test is that if the seizing officers inadvertently discover evidence of a crime or contraband in a

16. 601 F.2d at 289.
17. 592 F.2d 402 (7th Cir.), cert. denied, 441 U.S. 908 (1979).
18. 586 F.2d 1147 (7th Cir. 1978).
20. 586 F.2d 1147, 1153 (7th Cir. 1978).
place where they have a right to be, the search is reasonable, despite the absence of a search warrant. Both plain view seizures considered by the court, United States v. Rizzo and United States v. Schire, were incidental to seizures with validly obtained warrants. Rizzo was a private detective under investigation for suspected illegal wiretapping. In connection with the investigation, the FBI obtained a search warrant for Rizzo’s car and wiretapping paraphernalia. The agents proceeded with the warrant to the home of the estranged wife of Rizzo’s client where they observed Rizzo’s car parked in the area. Prior to executing the warrant, the agents observed Rizzo walk from the home toward his car carrying a cassette for a tape recorder. Based on information in the warrant, the agents believed that the wiretapping method involved tape cassettes, and the agents seized the cassette from Rizzo’s hand on a plain view theory. In evaluating Rizzo’s claim that the tape was unlawfully seized and improperly admitted at trial, the Seventh Circuit properly concluded that the warrant could not justify the seizure. The court found, however, that the sight of Rizzo carrying a cassette which the agents had reason to believe was evidence of a crime was “unanticipated” and due to the risk of destruction of evidence the seizure fell within the plain view exception to the warrant requirement.

The assessment in Rizzo is consistent with the guidelines articulated by the Supreme Court in Coolidge v. New Hampshire that:

The limits on the doctrine are . . . that plain view alone is never enough to justify the warrantless seizure of evidence . . . absent exigent circumstances . . . . The second limitation is that the discovery of evidence in plain view must be inadvertent . . . . But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different.

The risk of destruction of evidence by Rizzo satisfied the exigent cir-

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24. 586 F.2d 15 (7th Cir. 1978).
25. Rizzo was not placed under arrest at this time, thus the search incident to arrest exception to the warrant requirement was inapplicable. 583 F.2d at 910. But see Cupp v. Murphy, 412 U.S. 291 (1973). For a discussion of the requirements for a search incident to arrest, see United States v. Mancillas, 580 F.2d 1301 (7th Cir. 1978), cert. denied, 439 U.S. 958 (1978). In Mancillas, the court of appeals also considered the effect of United States v. Chadwick, 433 U.S. 1 (1977) on the seizure and search, incident to arrest, of a package of heroin.
26. 583 F.2d at 910.
27. The plain view exception had not previously been applied to a seizure of evidence or contraband from the person which could not also be justified as a search and seizure incident to arrest.
29. Id. at 468-70.
cumstances limitation, and the Seventh Circuit found that the seizure of the tape cassette from Rizzo was "unanticipated" and thus inadvertent. The Seventh Circuit used the term unanticipated as synonymous with inadvertent, however, United States v. Schire,\(^3\) brings the distinction into focus.

In Schire, the court considered the plain view exception with respect to evidence discovered during the execution of a search warrant. The warrant was obtained as part of an investigation of an auto theft ring, and it described the area of a warehouse to be searched, unit 4, and the item to be seized, a silver Trans Am automobile. The agents were also armed with an arrest warrant for Schire, and when they arrived at unit 4, they found Schire working on a Grand Prix. Schire was arrested, the search warrant was executed, and the silver Trans Am was located in unit 3 of the warehouse. A tow truck was summoned for the Trans Am, and information obtained from the tow truck driver and portions of other cars in the warehouse caused agents to believe that the Grand Prix might also have been stolen.\(^3\) The agents seized the Grand Prix as evidence of a crime, and, along with the Trans Am, it was admitted against Schire at his trial on charges of receiving and concealing stolen automobiles.

It can certainly be anticipated or expected that officers with a warrant describing the activity of an auto theft ring will find stolen cars during its execution. The anticipation or expectation, however, can range from "a weak hunch to a strong suspicion,"\(^3\) without vitiating the applicability of the plain view exception. The term "inadvertent" in the plain view context means that police lack probable cause to believe that the evidence will be discovered until they actually observe it. The anticipation or expectation of the officer is not determinative, un-

30. 586 F.2d 15 (7th Cir. 1978).
31. On these facts, Schire argued that the seizure of the Grand Prix was an impermissible "second search" contending that when the agents located the Trans Am, the object of the search, the search should have terminated. Citing Michigan v. Tyler, 436 U.S. 499 (1978) (re-entry of burned building by arson investigators five hours after fire extinguished held continuation of first entry and not a second search), the Seventh Circuit summarily rejected Schire's claim. Schire also claimed that the incriminating nature of the Grand Prix was not immediately apparent, in contending that the plain view theory should be rejected. The court summarily rejected this argument, noting that the incriminating character of a luxury car in an auto theft ring can be immediately apparent. Compare United States v. Gray, 484 F.2d 352 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974) (incriminating nature of rifle not immediately apparent; improper to seize serial number of rifle for later check at the National Arms Information Center) with United States v. Griffin, 530 F.2d 739 (7th Cir. 1976) (incriminating nature of letters and mail immediately apparent during investigation for stolen mailbag).
less it amounts to probable cause with plain view used as a ploy or device to avoid the warrant requirement.

The scope of a warrantless automobile search in the course of a *Terry v. Ohio*-type stop was examined by the Seventh Circuit this term in *United States v. Rainone*. Rainone and his co-defendant, Circelli, were observed by police officers as they sat in their car in a restaurant parking lot at about 3:00 a.m. The restaurant was closed and the parking lot was dark. The officers approached the car and asked Rainone and Circelli to identify themselves and explain their presence in the parking lot. Circelli, seated in the driver's seat of the car, produced a driver's license, but Rainone was unable to produce any identification. Although the testimony was in dispute, Rainone and Circelli indicated they were related to the owner of the restaurant. One of the officers present had previous knowledge that the restaurant owner was involved in a violent intra-family feud, and the officers then ordered Rainone and Circelli out of the car. Rainone and Circelli were frisked or patted down but no weapons were found. Before permitting Rainone and Circelli to reenter their car, one officer conducted a brief search of the car. On the floor beneath the front seat, the officer found a stick of dynamite and a detonating device. Rainone and Circelli were charged with possession of that destructive device.

The Seventh Circuit applied the rationale of *Terry*, the protection of police officers, in upholding the validity of the automobile search. Certainly, *Terry* justified the initial intrusion and pat down, as the officers could point to "specific and articulable facts which together with the rational inferences from those facts reasonably warrant[ed] the officers' belief that [they were] in danger." In extending the *Terry* frisk of the person rationale to permit a search of the area of the suspect's control, the Seventh Circuit read *Chimel v. California* into the *Terry* analysis. Thus, the court held that a search "limited to what is minimally necessary to uncover weapons to which the suspect will have easy access" is not unreasonable. This apparent extension of *Terry*,

33. 392 U.S. 1 (1968).
34. 586 F.2d 1132 (7th Cir. 1978).
35. "The sole justification of the search in the present situation is the protection of the police officers and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." *Terry v. Ohio*, 392 U.S. 1, 29 (1968).
36. *Id.* at 21.
38. 586 F.2d at 1135.
39. This concept of the *future* area of the suspect's control has been questioned by one court, which reasoned that "any weapon which might have been hidden in the car would have been
however, from a search of the person to a search of the area, may prove problematic in application.40

A somewhat unusual fourth amendment issue was presented to the court in United States v. Washington,41 where a beacon transmitting device or transponder was installed in a shipment of contraband drugs prior to delivery. The Seventh Circuit noted that the use of surreptitiously installed electronic tracking devices is an emerging issue in the area of search and seizure. However, the court declined to fully examine the fourth amendment ramifications as an order based on probable cause had been obtained in Washington. The Ninth Circuit in United States v. Dubrofsky42 has posited a bifurcated approach to the fourth amendment inquiry necessitated by use of these tracking devices. The first level of analysis examines the actual installation or attachment of the transponder for possible fourth amendment violations. The second level of analysis examines the fourth amendment implications of the use of the transponder once attached or installed. Although this analytical framework was not specifically used by the Seventh Circuit in Washington, the court implicitly resolved the first level of inquiry by holding that the transponder was implanted in an object containing contraband pursuant to a lawful border search; thus Washington had "no right to possess [it] and . . . no legitimate expectation of privacy."43 Other circuits have concurred in this approach to the installation of transponders in seized contraband,44 essentially rejecting any fourth amendment protection for illegal goods.

Because the transponder installation in Washington was accompanied by a court order in compliance with the warrant requirement, the

outside the reach of either suspect and could not have presented a danger to the officers while they were conducting their investigation." Canal Zone v. Bender, 573 F.2d 1329, 1332 (5th Cir. 1978) (mere presence of suspects in parked car in remote area insufficient to justify search of car for weapons, particularly as the suspects themselves were not patted down). But see United States v. Green, 465 F.2d 620 (D.C. Cir. 1972) (furtive gesture by occupant of car sufficient to justify search of car following pat down of occupants).

40. The Court in Terry declined to "develop at length . . . the limitation which the Fourth Amendment places upon a protective seizure and search for weapons . . . [recognizing that] these limitations will have to be developed in the concrete factual circumstances of individual cases." 392 U.S. at 29. The touchstone for resolving these individual cases must be the objective standard of Terry, requiring an articulable suspicion specifically relating to weapons or danger.

41. 586 F.2d 1147 (7th Cir. 1978).

42. 581 F.2d 208 (9th Cir. 1978). See also United States v. Miroyan, 577 F.2d 489 (9th Cir.), cert. denied, 439 U.S. 896 (1978).

43. 586 F.2d at 1154.

44. See, e.g., United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978); United States v. Pringle, 576 F.2d 1114 (5th Cir. 1978); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), cert. denied sub nom., Bobisink v. United States, 435 U.S. 926 (1978); United States v. Emery, 541 F.2d 887 (1st Cir. 1976).
Seventh Circuit did not consider whether the use of such a tracking device was a search within the meaning of the fourth amendment. The limits of governmental power to retain property after seizure without formal commencement of prosecution was considered by the court in *Mr. Lucky Messenger Service v. United States*. Pursuant to a search warrant, FBI agents seized approximately $65,000 in cash from the premises of the messenger service. After eighteen months, Mr. Lucky Messenger filed suit for return of the property, as no indictment had been returned against the corporation or any of its agents or employees. In seeking the return of the cash, Mr. Lucky Messenger invoked the general equity jurisdiction of the court, claiming that the retention of the funds for eighteen months without any accompanying criminal charges, amounted to a "callous disregard for . . . [the corporation's] constitutional rights." In remanding the case for a hearing in the district court, the Seventh Circuit framed the issue in terms of the need for the government to establish "adequate justification" for withholding the funds without bringing any criminal charges. The court further noted the applicability of the traditional principles which govern equitable relief, irreparable injury with no adequate remedy at law.

**THE FIFTH AMENDMENT PRIVILEGE AND THE EXCLUSIONARY RULE**

During the past court term, the Seventh Circuit had little difficulty in applying the exclusionary rule in the context of statements and ad-
missions. A single case, *United States v. Guerrero-Herrera*, addressed the issue of the validity of a defendant's waiver of rights. In *Guerrero-Herrera*, the defendant was given an advice or rights form printed in Spanish, as an agent read out loud from the form. Guerrero-Herrera indicated that he understood his rights and signed the waiver form, thereafter making inculpatory statements which were the subject of the motion to suppress. Guerrero-Herrera conceded that the waiver form complied with the requirements of *Miranda v. Arizona*, but claimed that he only understood Spanish in the Mexican dialect and that the rights were given in the Cuban dialect. The Seventh Circuit found that the government had met its burden of proof in that the preponderance of the evidence indicated that the statements were made voluntarily.

In a somewhat different context, the Seventh Circuit examined the use of pre-arrest silence as impeachment in *United States ex rel. Allen v. Rowe*. The evidence adduced at Allen's state trial indicated that after an argument with his estranged wife, Allen shot and killed her. The police were called to the scene, and prior to being arrested or advised of his *Miranda* rights, Allen volunteered that he had shot his wife and that she was badly hurt. Allen was then arrested and subsequently charged with murder. At trial, Allen testified that his estranged wife had a history of violence, and on the night of the shooting he acted in self-defense as she attacked him. During cross-examination, the prosecutor impeached Allen's self-defense claim, by emphasizing that Allen had not mentioned self-defense just prior to his arrest when he told the police he had shot his wife. In his closing argument, the prosecutor again referred to Allen's failure to offer his self-defense explanation prior to trial. Allen was convicted of murder, and the conviction was affirmed on appeal by an Illinois appellate court. Thereafter, Allen sought to

52. 590 F.2d 238 (7th Cir. 1978). The Seventh Circuit also addressed the issue of the voluntariness of a confession in a petition for habeas corpus in United States *ex rel.* Hall v. Director of the Illinois Dep't of Corrections, 578 F.2d 194 (7th Cir.), cert. denied, 439 U.S. 958 (1978). In *Hall*, the court approved the use of the totality of the circumstances test in upholding the voluntariness of a confession given after police officers misled Hall as to the nature of his accomplice's post-arrest statements.

53. No explicit waiver of rights is necessary and had Guerrero-Herrera refused to sign the waiver form, that would not preclude admissibility of the statement. North Carolina *v.* Butler, 441 U.S. 369 (1979) (defendant read advice of rights form but refused to sign it: confession admitted as circumstances indicated voluntariness). See also *United States v. Muscarella*, 585 F.2d 242 (7th Cir. 1978).


56. 591 F.2d 391 (7th Cir. 1979).

57. For further discussion of prosecutorial comment on exercise of the fifth amendment privilege, see notes 323-36 *infra* and accompanying text. See also *United States v. Muscarella*, 585 F.2d 242 (7th Cir. 1978).
collaterally attack the conviction by federal habeas corpus, claiming constitutional error in the state prosecutor’s conduct during trial.

In *Doyle v. Ohio*, the Supreme Court held that “use for impeachment purposes of [a defendant’s] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the due process clause of the fourteenth amendment.” In reversing the conviction, the court in *Doyle* reasoned that the *Miranda* warnings carry an implicit guarantee that no penalty will attach to the exercise of the privilege, and permitting impeachment by silence after being so advised would diminish the value of the privilege.

In applying *Doyle* to the facts in *Allen*, the Seventh Circuit held that *Doyle* precluded impeachment by pre-arrest, pre-*Miranda* warning, omissions from a confession. The court perceived no basis for distinction between the pre-*Miranda* warning context and post-*Miranda* warning context. The court did not find it significant that Allen had made a less than complete statement to the police rather than fully exercising his right to remain silent. Equating impeachment by omission in this case with impeachment by silence, the Seventh Circuit affirmed the district court order granting the writ of habeas corpus.

A related problem to the fifth amendment issues posed by use of a defendant’s own statements is the sixth amendment confrontation problem presented by the use of inculpatory statements of a non-testifying co-defendant during a joint trial. In *Bruton v. United States*, the Supreme Court reversed the conviction of a defendant who had been implicated in the crime by his co-defendant’s post-arrest confession. As Bruton’s co-defendant did not testify at trial and was not subject to cross-examination, the Court held that Bruton was denied his sixth amendment right of confrontation by the admission of the inculpatory

59. *Id.* at 619. Prior to the decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court had prohibited impeachment by post-arrest, post-*Miranda* warning silence as overly prejudicial while lacking in probative value, pursuant to its supervisory powers over the federal courts. *United States v. Hale*, 422 U.S. 171 (1975).
60. *Doyle v. Ohio*, 426 U.S. 610, 619 n.11 (1976), specifically notes that the fact of post-arrest silence may be used to impeach a testifying defendant who claims at trial to have given an exculpatory statement to the police at the time of his arrest. The Court commented that use of post-arrest silence in that circumstance was not impeaching of the exculpatory statement offered at trial, but rather impeaching of the defendant’s testimony as to his conduct following arrest.
62. A contrary result appears to have been reached in *Twyman v. Oklahoma*, 560 F.2d 422 (10th Cir. 1977), *cert. denied*, 434 U.S. 1071 (1978) (defendant’s detailed post-arrest statement omitting significant fact properly used to impeach defendant’s testimony at trial concerning that fact, as defendant had waived his right to remain silent).
In most instances, the portion of the co-defendant's statement which is inculpatory of the non-confessing defendant is simply deleted, and the jury is instructed to consider the statement only with respect to the person who actually made it.

A different question is presented when multiple co-defendants make inculpatory statements which interlock, and, either implicitly or explicitly, tie all the defendants to the crime. If the confessing defendants do not testify at trial, the Seventh Circuit has treated the admission of such interlocking statements as a *Bruton* violation.

In *United States v. Fleming*, the two brothers named Fleming made detailed interlocking admissions with respect to a bank robbery and murder with which they and another defendant were charged. The other defendant, Millender, on the other hand, made only a cryptic admission when presented with a copy of the indictment, stating "I'll tell you one thing, whoever told them all this had to be somebody that was there because they knew exactly how it took place." The Fleming brothers' statements did not inculpate Millender, and Millender's statement only inferentially inculpated the Flemings. None of the three defendants testified at trial.

In evaluating the claimed *Bruton* error with respect to each defendant, the court held that admission of the interlocking statements was a *Bruton* violation. However, after evaluating all the evidence, the court found that the admission of the interlocking admissions was harmless beyond a reasonable doubt with respect to the Fleming brothers' convictions.

With respect to Millender, however, it is interesting to note that neither of the Flemings' statements were directly inculpatory in the traditional sense. Neither of the Flemings referred to Millender as an accomplice or suggested that he was a participant in the charged offenses. As to Millender's own statement, its very ambiguity apparently troubled the court, as they noted that a "seemingly inconsequential statement by Millender could be interpreted by a jury to be an admis-

64. In overruling Delli Paoli v. United States, 352 U.S. 232 (1957), the Court recognized the danger presented in a *Bruton*-type situation. Although the jury in *Bruton* was instructed to consider the statements of the confessing non-testifying co-defendant only as evidence of that co-defendant's guilt, the Court noted that it was unlikely that a jury could entirely disregard the inculpatory aspect of the confession with respect to Bruton. 391 U.S. at 125.

65. The court has typically assessed this *Bruton* violation in the context of all the evidence and applied the harmless error analysis. See, e.g., United States ex rel. Wilson v. Warden, No. 78-1560 (7th Cir. Feb. 21, 1979) (unpublished opinion); United States v. Spinks, 470 F.2d 64 (7th Cir.), *cert. denied*, 409 U.S. 1011 (1972).

66. 594 F.2d 598 (7th Cir. 1979).

67. Id. at 601.
sion of guilt when coupled with the detailed admissions of his co-defendants." Mindful of the concern in Bruton that a jury will be unable to separate the evidence of guilt with respect to each defendant, the Seventh Circuit ordered a new trial for Millender despite the absence of inculpatory evidence in the Flemings' admissions.

The harmless error approach of Fleming was rejected by the Supreme Court in Parker v. Randolph, in which the court held that admission of interlocking confessions is not a Bruton violation. Nonetheless, the difficult question posed by Fleming survives: to what extent may statements of co-defendants, though not directly inculpatory, be viewed as interlocking?

GRAND JURY

The dual function of the grand jury, investigation and accusation, was brought into focus this term in two cases which examined conflicts of interest in the grand jury process. In In re the Special February 1977 Grand Jury, the court of appeals considered the implications of divided loyalty of the defense attorney; In re Perlin considered the implications of divided loyalty of the prosecutor.

The conflict of interest problem in Special February 1977 Grand Jury arose when a single defense attorney represented multiple witnesses in connection with a grand jury investigation. Fearing that representation by a single attorney would impede the investigation and compromise the interests of some of the witnesses, the government moved to disqualify the defense counsel. After an evidentiary hearing,

68. Id. at 605.
69. Such concern was recently voiced by the Supreme Court:
When as in Bruton, the confessing co-defendant has chosen not to take the stand and the implicated defendant has made no extra-judicial admission of guilt, limiting instructions cannot be accepted as adequate to safeguard the defendant's rights under the Confrontation Clause. Under such circumstances, the practical and human limitations of the jury system override the theoretically sound premise that a jury will follow the trial courts instructions. Parker v. Randolph, 99 S. Ct. 2132, 2140 (1979).
70. 99 S. Ct. 2132 (1979).
71. This problem was anticipated in Justice Blackmun's concurring opinion:
The fact that confessions may interlock to some degree does not ensure, as a per se matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative . . . . Instead of focusing on whether the error was harmless, defendants and courts will be forced, instead, to inquire whether the confessions were sufficiently interlocking so as to permit a conclusion that Bruton does not apply. Parker v. Randolph, 99 S. Ct. 2132, 2142 (1979) (Blackmun, J., concurring). The traditional formulation of "interlocking" has been whether the statements are substantially the same, although absolute identity is not required. See, e.g., United States ex rel. Ortiz v. Fitz, 476 F.2d 37 (2d Cir.), cert. denied, 414 U.S. 1075 (1973).
72. 581 F.2d 1262 (7th Cir. 1978).
73. 589 F.2d 260 (7th Cir. 1978).
the motion was denied by the district court, and the government appealed.

On appeal the government urged a *per se* rule: the existence of a potential conflict of interest requires disqualification to insure the effective administration of criminal justice at the grand jury level. The Seventh Circuit rejected this formulation, framing the test as one requiring "a clear showing of either an actual conflict . . . or a grave danger of such a conflict which would impede the proper functioning of the grand jury."75

The assessment of an actual conflict of interest, or the grave danger of one, is to be made from all the facts. For example, disqualification has been held appropriate due to actual conflicts when defense counsel was being paid by an organization dedicated to frustrating the very grand jury investigation in which the defense counsel was involved,76 and when defense counsel was himself the target of the grand jury investigation.77 Undoubtedly, one attorney may serve more than one client,78 but not at the expense of either client's interests.79 In Special February 1977 Grand Jury, the Seventh Circuit found no evidence of an actual conflict of interest nor any grave danger of one. All the witnesses had been advised on the record of the potential for conflict,
and all agreed to the joint representation. Although two of the witnesses had been granted immunity from prosecution in exchange for testimony, the court held that in the absence of evidence that the two immunized witnesses could incriminate the non-immunized jointly-represented witnesses, no conflict was presented.

In *In re Perlin*, the claimed conflict of interest arose from the dual loyalty of the prosecutor, an attorney with the investigating civil agency, who was specially appointed to assist in the criminal investigation. In 1975, the Commodities Futures Trading Commission began a civil investigation of suspected illegal transactions on the Chicago Board of Trade. A CFTC staff attorney prepared an administrative complaint charging violations of the Commodities Futures Trading Act, and contemporaneously he transmitted a report to the United States Attorney’s office in Chicago recommending criminal prosecution. Because of his expertise, the agency attorney was then appointed a Special Assistant United States Attorney to assist in the criminal investigation. During the grand jury investigation, Perlin, a trader at the Chicago Board of Trade, was granted immunity. He refused to testify, however, and was judged in contempt and ordered held in custody. In challenging the contempt and commitment, Perlin argued that the grand jury was tainted by the conflict of the CFTC agency lawyer who also acted as prosecutor. Perlin claimed that “the agency attorney’s interest naturally lies in justifying the agency’s recommendation that the case be referred for prosecution. That bias . . . conflicts with the . . . duty of the prosecutor to protect innocent citizens against unfounded criminal prosecution.”

In evaluating Perlin’s claim, the Seventh Circuit perceived no con-

80. The Seventh Circuit specifically noted that this was an “added precaution, but a fact not necessary to the instant determination.” 581 F.2d at 1265. The Second Circuit has found this agreement to proceed with multiple representation to be the critical inquiry in resolving the disqualification issue. In *In re Taylor*, 567 F.2d 1183, 1191 (2d Cir. 1977), the court noted that once the trial court has insured that the “client . . . is fully aware of the nature of the conflict and understands the potential threat to the protection of his interests, . . . [the court] is without power unilaterally to obstruct the choice of counsel.” See also *In re the Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009, 1011 (3d Cir. 1976).

81. 581 F.2d at 1265. The Third Circuit has suggested in *dicta* that immunity of some but not all of a group of jointly represented witnesses could give rise to a conflict of interest. In *In re the Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009, 1011 (3d Cir. 1976). The Second Circuit has suggested in *dicta* that an immunity grant to one witness does not create a conflict as to the other jointly represented witnesses, if all the witnesses agree to the continued joint representation. *In re Taylor*, 567 F.2d 1183, 1191 (2d Cir. 1977). The possibilities for conflict of interest would seem more likely in the case of negotiated rather than “blind” immunity, however, no court has made such a distinction.

82. 589 F.2d 260 (7th Cir. 1978).

83. The Commodities Futures Trading Commission is hereinafter referred to as the CFTC.
Conflict in the special appointment of the agency attorney to assist in the grand jury investigation, since the agency lawyer who recommended prosecution was no different from any other zealous prosecutor. Recognizing that a factual showing of bias by any prosecutor may invalidate a resulting indictment, the court held that no bias is established simply by the agency relationship.

The holding in Perlin is a narrow one, giving qualified approval to the dual function of agency investigation and criminal prosecution by the same attorney. The court explicitly found that there were no improper disclosures of grand jury material or breaches of grand jury secrecy to the civil agency. While the agency attorney-prosecutor role is not a per se conflict of interest, the use of agency attorneys as Special Assistant United States Attorneys presents unique problems in grand jury proceedings.

The complexity of grand jury investigations and the attendant need for administrative expertise, illustrated by Perlin, have created unanticipated risks of improper grand jury disclosures. Prior to August 1, 1978, the secrecy provisions of rule 6(e) of the Federal Rules of Criminal Procedure governing grand jury disclosures specifically authorized disclosure of "matters occurring before the grand jury" to "attorneys for the government for use in the performance of their duties." Implicitly, disclosures to persons other than the government

84. United States v. Dondich, 460 F. Supp. 849 (N.D. Calif. 1978). But see In re April 1977 Grand Jury Subpoenas: General Motors Corp. v. United States, 573 F.2d 936 (6th Cir.), rev'd en banc, 584 F.2d 1366 (6th Cir. 1978), cert. denied, 440 U.S. 934 (1979) (The original panel decision held that the dual function of an IRS staff attorney appointed to assist in a grand jury investigation initiated pursuant to his recommendation created a conflict of interest. In reversing, the court did not reach this conflict issue, holding that denial of the disqualification motion was not appealable.).

85. Perlin argued that the CFTC attorney had communicated grand jury material to his supervisor in the CFTC. The Seventh Circuit noted that these disclosures were made pursuant to a rule 6(e) disclosure order, and, consequently, the CFTC supervisor was equally bound by the grand jury secrecy provisions. FED. R. CRIM. PRO. 6(e)(2)(B). Certainly, a criminal grand jury investigation cannot be used as a ploy to "elicit evidence [for] a civil case" and grand jury material cannot be used by the civil agency in connection with the civil proceedings. United States v. Procter & Gamble, 356 U.S. 677, 683 (1958). In re Special March 1974 Grand Jury, 541 F.2d 166 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977).

86. In United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979), these problems were underscored when the agency attorney/prosecutor testified before the investigating grand jury. In dismissing the indictment for grand jury abuse by the agency attorney/prosecutor, the court noted that despite the complexity of many criminal investigations, the risks of unauthorized grand jury disclosures cautions against the use of agency attorneys as Special Assistant United States Attorneys.

87. Federal Rule of Criminal Procedure 6(e)(2)(A) provided:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose
attorney required an order of court. Rule 6(e) was amended, effective August 1, 1978, to permit the attorney for the government to avail himself of the expertise of various governmental agents in the course of the grand jury investigation, authorizing disclosures to “such government personnel as are deemed necessary . . . to assist . . . [in the enforcement] of federal criminal law.” The amended rule, however, requires that a record of the government personnel who have been given access to the grand jury materials be filed with the court.

In United States v. Stanford, the Seventh Circuit examined the former rule 6(e) secrecy provisions as they governed the disposition of the issues in the case. Stanford was one of more than ninety defendants indicted separately after a massive investigation of welfare fraud. Because of the complex nature of the employment and welfare documents gathered, personnel from the Illinois Department of Public Aid were used to determine the scope of the fraud. The personnel were made special agents of the investigating grand jury, and appropriate disclosure orders were entered by the court in conformity with the former rule 6(e). Federal Bureau of Investigation personnel, including accounting technicians and agents, were also made special agents of the grand jury and advised of the secrecy requirements for purposes of the investigation. No disclosure orders were obtained to permit these FBI personnel access to the “matters occurring before the grand jury” and the defendants claimed on appeal that the disclosures were in violation of former rule 6(e). The Seventh Circuit, noting that the new rule 6(e)

matters [occurring before the grand jury] only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

88. The amended Federal Rule of Criminal Procedure 6(e)(2)(A) provides, in pertinent part:
Disclosure otherwise prohibited by this rule of matters occurring before the grand jury . . . may be made to—
(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney’s duty to enforce Federal Criminal Law.
89. The amended rule 6(e)(2)(B) provides in pertinent part:
An attorney for the government shall promptly provide the district court before which was empaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.
90. 589 F.2d 285 (7th Cir. 1978).
91. The Stanford defendants also challenged the scope of the disclosure orders obtained to permit disclosure to the personnel. Although the court noted that disclosure orders should state with particularity the appropriate persons to whom disclosure will be made, the challenged disclosure orders were not held improper by the court. Id. at 291.
specifically permits such disclosures without court order, determined that the disclosures were also proper under the prior rule 6(e). The court reasoned that the term "attorney for the government"92 in the former rule was broad enough to encompass FBI personnel. In light of the specific language of the new rule, this reading of the old provision is questionable. Implicit in the court's resolution of this issue, however, was a recognition that the FBI personnel, as grand jury agents, were aware of the secrecy requirements of the grand jury, and failure to obtain a court order in conformity with a now abandoned rule did not taint the investigation.

The Stanford defendants claimed another rule 6(e) secrecy breach in that employment and welfare documents subpoenaed by the grand jury were shown to the defendants. During interviews with the defendants, each defendant was shown his own employment file and welfare records. No rule 6(e) disclosure order had been obtained. This disclosure of subpoenaed documents to the defendants, without the authority of a disclosure order, presented an interesting issue not addressed in the present rule 6(e), which governs disclosure to government personnel. In evaluating the claim, the Seventh Circuit found that "matters occurring before the grand jury" were not disclosed, as the documents shown to the individual defendants did not reveal the grand jury investigation. The documents had a significance totally apart from their status as subpoenaed grand jury material, thus the grand jury secrecy shield did not adhere to them in contexts outside the grand jury investigation. As each defendant had a legitimate interest in documents which had independent significance,94 and as the disclosures "revealed nothing of the grand jury investigation,"95 the disclosures were not subject to the strictures of rule 6(e).96

The unlimited scope of the investigatory and accusatory power of

92. The court relied on Federal Rule of Criminal Procedure 54(c) to interpret "attorney for the government":

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other persons as may be authorized by the laws of Guam to act therein.

FED. R. CRIM. PRO. 54(c).


95. 589 F.2d at 291.

96. Where documents are significant simply because of their grand jury status, and disclosure of the documents would amount to disclosure of the grand jury investigation, they are "matters occurring before the grand jury" for disclosure purposes. See Corona Constr. Co. v. Ampress Brick Co., 376 F. Supp. 598 (N.D. Ill. 1974).
the grand jury may prompt some re-evaluation of the traditional concepts which give the prosecutor unfettered control. While such developments may well be desirable, they may arise from legislative rather than judicial sources. The only evidence of a shift in review of grand jury issues in the Seventh Circuit this term is found in decisions permitting appeal of grand jury matters.

THE GOVERNMENT’S OBLIGATIONS IN THE CRIMINAL DISCOVERY PROCESS

In most respects, criminal pre-trial discovery is a well codified area of the law. The need to specifically define the statutory terms occasionally arises, but the focal point of criminal discovery is the obligation of the prosecution with respect to evidence which is favorable to the defendant. The due process formulation of that prosecutorial responsibility is set forth in Brady v. Maryland. However, the precept that favorable evidence bearing on guilt or punishment must be disclosed to the defense is not susceptible to easy resolution. The critical

97. For example, the Supreme Court has declined to hold that Miranda warnings must be given to grand jury subjects. United States v. Washington, 431 U.S. 181 (1977); United States v. Edelson, 581 F. 2d 1290 (7th Cir. 1978), cert. denied, 440 U.S. 908 (1979). These warnings are required by Justice Department guidelines. However, a violation of these guidelines does not per se render the grand jury statements inadmissible. Compare United States v. Caceres, 440 U.S. 741 (1979) with United States v. Stanford, 589 F. 2d 285 (7th Cir. 1978).

98. This term, the Seventh Circuit disapproved the selective recordation of testimony before the grand jury, however, the court refused to reverse based on the failure to record the FBI agents’ statements to the grand jury. United States v. D’Andrea, 585 F. 2d 1351 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). This has been changed by recent legislation requiring recordation of all grand jury testimony. Fed. R. Crim. P. 6(e)(1) (amended August 1, 1979).


100. For example, United States District Court for the Northern District of Illinois Local Rule 2.04, which parallels the discovery required by rule 16 of the Federal Rules of Criminal Procedure, specifically outlines those matters which must be produced for the defendant promptly after arraignment.

101. For example, during the past term the court has examined two aspects of the Jencks Act, 18 U.S.C. § 3500 (1979), which requires production of statements by government witnesses prior to cross-examination. In United States v. Batchelder, 581 F. 2d 626 (7th Cir. 1978), rev’d on other grounds, 439 U.S. 1066 (1979), the court adhered to its holding in United States v. Harris, 542 F. 2d 1283 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977), that a government agent’s destruction of rough notes which have been incorporated into a written report is not a Jencks Act violation requiring that the agent’s testimony be stricken. But see United States v. Harris, 543 F. 2d 1247 (9th Cir. 1976) (destruction of agent’s handwritten notes Jencks Act violation). In United States v. Fears, 589 F. 2d 1316 (7th Cir. 1978), the court adhered to its earlier holding in United States v. Callahan, 534 F. 2d 763 (7th Cir.), cert. denied, 429 U.S. 830 (1976), that statements of government witnesses which also incorporate oral statements of the defendant are exempted from rule 16 pre-trial discovery by the Jencks Act. See also United States v. Feinberg, 502 F. 2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 926 (1975).

question in evaluating the applicability of *Brady* principles is often framed in terms of prejudice. Where that prejudice cannot be ascertained from the appellate record, as, for example, where government concealment that a co-defendant was also a government informer may have compromised the defense, a hearing is required to gauge the possible prejudice from government nondisclosure.\(^{103}\) *Brady* is an after-the-fact evaluation of concealed evidence which has no applicability to newly discovered evidence not known to the prosecutor prior to or during trial.\(^{104}\) Typically, it is an analysis which must be made without regard to the intentions of the prosecutor.\(^{105}\)

In *United States v. McPartlin*,\(^ {106}\) the Seventh Circuit unequivocally stated that *Brady* is a test of concealment which does not apply to the disclosure of evidence favorable to the defense during the course of trial. *Brady* tests the constitutionality of a conviction obtained by nondisclosure of favorable evidence; disclosure of favorable evidence prior to conviction renders *Brady* inapplicable. The government in *McPartlin* had provided the defense with detailed financial information with respect to the chief government witness prior to trial. In the opening statement for the government, it was disclosed that the chief government witness had retained a share of the money given him by one group of defendants to pay bribes to the other defendants. Thereafter, that witness' grand jury testimony and reports of interviews in which he admitted the embezzlement rather than bribery, were given to the defense. The court held *Brady* inapplicable to the early trial disclosures in *McPartlin*, noting that "[d]ue process, albeit requiring eventual disclosure, does not require that in all instances this disclosure must occur before trial."\(^ {107}\) The court posited the analysis as one testing

\(^{103}\) United States v. Disston, 582 F.2d 1108 (7th Cir. 1978) (reversing district court denial of motion for new trial without evidentiary hearing).

\(^{104}\) United States v. Gabriel, 597 F.2d 95 (7th Cir. 1979).

\(^{105}\) "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See* *United States v. Disston*, 582 F.2d 1108 (7th Cir. 1978), suggesting that the good or bad faith of the prosecutor may bear on the determination of the materiality of the nondisclosed evidence. The court of appeals in *Disston* further noted that the standard for determining materiality differs depending on whether a specific or non-specific discovery request was made. *United States v. Agurs*, 427 U.S. 97, 106, 112 (1976).

\(^{106}\) 595 F.2d 1321 (7th Cir. 1979).

\(^{107}\) *Id.* at 1346. "It seems clear that the essential unfairness found by the court in the *Brady* setting is directly bound up with the fact of suppression—that is some act or failure to act on the part of the prosecution which renders material exculpatory evidence unavailable to the accused. Indeed in this element of suppression lies the constitutional basis for distinguishing *Brady* material from all other kinds of newly discovered evidence." *United States v. Weidman*, 572 F.2d 1199, 1206 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978).
whether the disclosure came “so late as to prevent defendant from receiving a fair trial.”108 Despite the due process framework in which the court evaluated the defendant's claim, the underlying determination was premised on the fact that the defendants “barely developed before this court any specific ways in which they were prejudiced by this delay . . . and their . . . failure to request additional time for . . . investigation . . . thoroughly discredits their assertion that they were prejudiced by the timing of the disclosure.”109

The defendants in *McPartlin* had urged in briefs and arguments that regardless of the *Brady* implications of the late disclosure, the government's failure to obey a specific order of the district judge to produce that favorable material required reversal. The Seventh Circuit did not address this issue in the *McPartlin* opinion, presumably deferring to the discretion of the district judge for the imposition of sanctions for failure to comply with discovery orders.110

The issue of late disclosure of arguably favorable evidence was examined by the court this term in the context of civil litigation in *Hampton v. Hanrahan*.111 In *Hampton*, the survivors of the so-called “Black Panther Raid” of 1969 sought damages for alleged violations of civil rights by local and federal officials. The civil discovery was protracted, and considerable evidence from files of the federal defendants first came to light during the course of the trial. In evaluating the charges of untimely disclosure, the court of appeals noted that “[t]he delay of the federal defendants in meeting their obligations to produce relevant documentary material would supply a basis for an inference that plaintiffs were unable to present all the available evidence and thus were denied the opportunity to prove their case.”112

108. 595 F.2d at 1346. In United States v. Ziperstein, 601 F.2d at 281 (7th Cir. 1979), a similar issue was presented and the court again “reiterat[ed] that *Brady* does not require pretrial disclosure. As long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of the evidence, due process is satisfied.” *Id.* at 291.

109. 595 F.2d at 1346-47. The *McPartlin* defendants suggested that the delayed disclosure of the evidence limited their ability to investigate and find other derivative evidence favorable to the defense. Characterizing the claims as non-specific and conclusory, the court rejected the argument. See also United States v. Hooper, 596 F.2d 219 (7th Cir. 1979) (the court evaluated a *Brady* claim in the context of availability of the information at trial and defense counsel's failure to maximize the favorable information).

110. Although the district judge found that a technical violation of the pretrial discovery order had occurred, the court ruled that in the absence of any demonstrable prejudice to the defendants, no sanctions were appropriate.

111. 600 F.2d 600 (7th Cir. 1979).

112. *Id.* at 642. The court also found that the late disclosure was in violation of the pretrial discovery orders, and suggested that sanctions were appropriate. The district court had made no specific finding on this issue of violation of the pretrial discovery orders, and the district judge had not imposed sanctions on the federal defendants.
The documents produced in Hampton were also the subject of a Brady claim in United States v. Robinson.\(^{113}\) Robinson was convicted in 1973 of criminal civil rights violations and kidnapping resulting in murder. Documents produced in Hampton included sixteen bound volumes (over 10,000 pages) of FBI reports regarding William O'Neill, a member of the Black Panther Party, and the chief government witness against Robinson at trial. The Hampton documents came to light after Robinson’s conviction, and in his motion for a new trial,\(^{114}\) Robinson asserted that the prosecutor had withheld the O’Neill volumes in violation of section 3500 and the Brady mandate. The district court found that the claim was “mere speculation” and refused to review the O’Neill documents in camera. On appeal, Robinson urged that the district judge’s finding that the documents were irrelevant, without reviewing the documents in issue, was error which entitled Robinson to a hearing on his motion for a new trial. The Seventh Circuit affirmed the district court finding, stating that it is:

simply impossible for a court to rule on an alleged Brady violation unless a defendant identifies with reasonable particularity the evidence to be considered. Furthermore, to allow rummaging through government files under the authority of Brady would be to defeat the stated legislative intent of the Jencks Act and therefore cannot be allowed.\(^{115}\)

In United States v. Calzada,\(^{116}\) the court examined the obligations of the government with respect to preserving evidence of a crime, and although the case is of limited precedential value, it is nonetheless a significant departure from the cases previously discussed. Calzada is of limited precedential value as it addresses an uncommon factual circumstance in holding that deportation of material witnesses prior to affording the defense an opportunity to interview them requires dismissal of the indictment. Calzada is significant in that it reaches this conclusion without regard for the intentions of the prosecutor or the prejudice to the defendant.

Calzada and seven others were charged with violations of United States immigration laws, including illegal transportation of aliens from Arizona to Illinois. The defendants and thirteen illegally transported aliens were arrested\(^{117}\) in late April and early May 1977. Shortly there-
after, two of the arrested aliens were released and permitted to return to Mexico as they were juveniles.\textsuperscript{118} On May 29, 1977, the government deported three of the arrested aliens, and thereafter released two more arrested aliens who then left the United States. Calzada and the other defendants were indicted on June 30, 1977, and charged with transporting and concealing the six arrested aliens who were still in the United States. Calzada and the other defendants filed motions to dismiss contending that the government action in deporting witnesses to the charged offense violated their right to compulsory process. The district court concurred, and dismissed the indictment without holding an evidentiary hearing.

On appeal, the government argued that in the absence of evidence of bad faith or evidence that the testimony of the deported witnesses would be favorable to the defense, the dismissal was improper. The government suggested that the case was analogous to \textit{United States v. Perlman},\textsuperscript{119} in which a co-conspirator in the sale of narcotics was deported prior to the defendant's trial. The defendant was tried and found guilty. On review of that conviction, the Seventh Circuit declined to reverse since the defendant could show neither prejudice nor prosecutorial bad faith.\textsuperscript{120} In \textit{Calzada}, the court noted that the \textit{Perlman} panel had disapproved the deportation procedure but found that the error was harmless. \textit{Calzada} distinguished \textit{Perlman} by suggesting that, prior to 1970, the government had no warning that deportation of witnesses would be judicially disapproved, thus no sanctions were appropriate. The court reasoned that since the \textit{Perlman} decision, the government has "been on notice that this court does not approve the practice of deporting material witnesses prior to giving a defendant an opportunity to interview them,"\textsuperscript{121} thus dismissal of Calzada's indictment was proper.

As there was no bad faith, \textit{Calzada} was not dismissed on the basis of government misconduct; as there was no exculpatory material, \textit{Calzada} was not dismissed on the basis of \textit{Brady} violations. Rather, the court premised its decision on the right to compulsory process: "[T]he right to offer the testimony of witnesses and compel their attendance if necessary . . . in plain terms the right to present a defense, the

\textsuperscript{118} The court found no impropriety in the release of the juvenile alien witnesses, citing \textit{United States v. Carrillo-Frausto}, 500 F.2d 234, 235 (7th Cir. 1974).
\textsuperscript{119} 430 F.2d 22 (7th Cir.), \textit{cert. denied}, 400 U.S. 832 (1970).
\textsuperscript{120} 579 F.2d at 1362.
\textsuperscript{121} \textit{Id}.
right to present the defendant's version of the facts as well as the prosecution's... so that the [jury] may decide where the truth lies. 122 Relying on Washington v. Texas,123 the court held that deportation of these alien witnesses violated the sixth amendment guarantee to produce witnesses on one's own behalf.124

The dissent in Calzada urged that any evaluation of missing evidence is essentially an inquiry for prejudice. As the defendants could not in any way suggest that the deported aliens would testify favorably or furnish exculpatory evidence, dismissal was inappropriate.125 Without any evidence of prejudice or even due diligence in attempting to preserve their rights, the defendants won "fortuitous freedom from prosecution... [by] the government's inadvertent error."126

In a related area, the court examined the conduct of the prosecution in generating prejudicial pre-trial publicity in United States v. Stanford.127 Stanford was charged with welfare fraud contemporaneously with ninety-one other defendants, and substantial pre-trial publicity was generated by the United States Attorney's office. In evaluating Stanford's claim, the Seventh Circuit noted that misconduct does not "exist in a vacuum,"128 and as none of the defendants had requested jury trials to gauge the extent of the prejudice from the publicity, the publicity alone could not be a basis for reversal. The court disapproved the extensive publicity, finding it violative of the Department of Justice regulations. However, the court correctly noted that violation of an internal regulation does not give rise to a constitutional claim.129

123. Washington invalidated a Texas statute which prohibited an accomplice from testifying on behalf of the defendant but not on behalf of the prosecution. The court also relied on United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974), and United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971), in which witnesses were deported before the defendants were made aware of the investigations. The dissent factually distinguished Calzada from these two Ninth Circuit cases, as the Calzada defendants had one month to investigate the charges after their arrests but before the deportation. The first request to interview aliens was made several weeks after the return of the indictment. 579 F.2d at 1363.
124. See United States v. Micklus, 581 F.2d 612, 616 (7th Cir. 1978) (no error in denial of defendant's rule 17(b) request to subpoena witness at government expense where said witness' testimony was arguably cumulative).
125. See also the dissenting opinion in United States v. Mendez-Rodriguez, 450 F.2d 1, 6 (9th Cir. 1971) (Kilkenny, J., dissenting).
126. 579 F.2d at 1364.
128. 589 F.2d at 299.
129. This holding that violation of internal regulations is not a violation of due process has since been confirmed by the Supreme Court in United States v. Caceres, 440 U.S. 741 (1979).
THE USE OF MAGISTRATES IN CRIMINAL PROCEEDINGS

In *United States v. Guerrero-Herrera*, the Seventh Circuit examined the due process implications of separating the observation of witnesses and the decision making process. In *Guerrero-Herrera*, evidence on a motion to suppress a post-arrest statement was heard by the district judge to whom the case was then assigned. Prior to ruling on the pending motion, the judge who had heard the evidence and observed that the witnesses had died. The case was reassigned to another district court judge who proposed making his decision on the transcript of the hearing and the briefs filed by the parties. Guerrero-Herrera’s attorney did not object to that procedure at the time it was proposed by the judge, but later, in one of the briefs, suggested that the transcript “may be insufficient” as the judge then deciding the case had not observed the demeanor of the witnesses. The Seventh Circuit found no due process violation in this procedure and concluded that Guerrero-Herrera was bound by his failure to raise a timely objection. In evaluating the due process claim, the court noted that “waiver of his claim to a rehearing is implicit in his stipulation, even assuming that the right to such a rehearing exists. Nor can it be said that the procedure adversely affected substantial rights of the defendant and thereby undermined the integrity of the judicial process.”

Six weeks after the decision in *Guerrero-Herrera*, the Seventh Circuit held in *United States v. Raddatz*, that due process requires that “the responsibility for the hearing and the decision must be vested in the same judge in a criminal case where credibility is essential.” In *Raddatz*, the court considered the constitutionality of the procedure whereby hearings on motions to suppress are referred to magistrates pursuant to the Magistrate’s Act. The Act provides that a magistrate shall submit written findings and conclusions to the district judge, and if objections to the findings are made by the parties in a timely manner, the district judge must make a de novo determination of the contested facts. Raddatz’ motion to suppress his pre-indictment statements was referred to a magistrate for a hearing and, after evaluating the credibil-

130. 590 F.2d 238 (7th Cir. 1978).
131. 592 F.2d 239, 976 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 44 (1979).
132. 590 F.2d at 239.
133. *Id.* at 241.
134. 592 F.2d at 984.
CRIMINAL PROCEDURE

ity of the witnesses, the magistrate submitted findings to the district judge that the statements were made voluntarily. Raddatz filed objections to these proposed findings, and the district judge made a *de novo* determination of the contested facts based on the written transcript of the hearing, the findings of the magistrate, the objections to the findings, and the written briefs of the parties. The district judge heard no live testimony, and denied the motion to suppress, finding that the statements had been made by Raddatz voluntarily. The Seventh Circuit held that the failure of the district judge to conduct a *de novo* hearing, receiving testimony and evaluating the credibility of witnesses, violated Raddatz' right to due process.

*Raddatz* holds that due process includes the right to require rehearing of evidence by the factfinder where credibility is an issue, a position somewhat inconsistent with the equivocal language of *Guerrero-Herrera*. Guerrero-Herrera had implicitly consented to the written record procedure while Raddatz had filed objections to the magistrate's findings. If evaluation of the credibility of the witnesses by the decision maker is a component of due process, subject, as are all rights, to waiver by the defendant, the issue which remains to be resolved is the extent to which a defendant must be advised of that due process right for the waiver to be valid.

**RIGHT TO A SPEEDY TRIAL**

Defendants currently enjoy a three-pronged claim to a speedy trial under the sixth amendment, the due process clause of the fifth amendment, and the Speedy Trial Act of 1974. The Act departs slightly from its constitutional predecessors in characterizing the right to a speedy trial as being in "the best interest of the public and the defendant . . . ," explicitly asserting a balancing of interests that was previ-

136. It is unclear whether Raddatz had specifically requested rehearing of evidence by the district judge after the magistrate's findings were submitted, or had simply objected to the magistrate's findings.

137. The court was also presented with the argument that the referral procedure violated article III of the Constitution, but declined to premise its decision on that basis. 592 F.2d at 982.

138. It is arguable that credibility of witnesses is an issue in nearly all motions to suppress. For example, the court in *Guerrero-Herrera* evaluated the relative credibility of the witnesses. 590 F.2d at 242.

139. The court in *Raddatz* specifically noted that, "[a] number of courts have upheld references to a magistrate when done with the consent of the parties." 592 F.2d at 983 n.9. The authorities cited in support of this premise were not criminal cases.


ously only inferred.\textsuperscript{142}

The leading sixth amendment case is \textit{Barker v. Wingo}.\textsuperscript{143} \textit{Barker} held that four factors must be considered in determining whether a defendant's right to a speedy trial has been violated: (1) length of delay; (2) reasons for delay; (3) whether defendant asserted that right; and, (4) whether defendant suffered any prejudice from the delay.\textsuperscript{144} The Court noted that the right to a speedy trial is not violated by the passage of any specific period of time, mandating consideration of these factors on a case-by-case basis. Failure to pass the \textit{Barker} balancing test warrants dismissal of the indictment.

The mechanics of applying \textit{Barker} are illustrated in \textit{Jones v. Morris}.\textsuperscript{145} Consideration of the first three factors of the \textit{Barker} test resulted in an even balance in \textit{Jones}. The court looked first to the length of delay\textsuperscript{146} and found that the twenty-three month period was not so "inordinately lengthy" as to weigh heavily against the state.\textsuperscript{147} As to the reason for the delay, the court noted that while defendant failed to allege any tactical delay or bad faith on the part of the prosecution, the "absence of any reason for the delay should weigh heavily against the State."\textsuperscript{148}

In examining the third factor, whether the defendant asserted the right to a speedy trial, the court considered the manner in which that right was asserted.\textsuperscript{149} Since the defendant had obtained a continuance one month before filing his motion to dismiss, and trial was held less than ten days after he asserted his sixth amendment right, the court noted that "although Jones did not waive his speedy trial right, he was not overly anxious to assert it and did not pursue it vigorously."\textsuperscript{150}

Because the lack of inordinate delay, the lack of proof of bad faith

\textsuperscript{143} 407 U.S. 514 (1972).
\textsuperscript{144} \textit{Id} at 531-32.
\textsuperscript{145} 590 F.2d 684 (7th Cir.), \textit{cert. denied}, 440 U.S. 965 (1979). Defendant petitioned for federal habeas corpus while serving a state murder sentence, alleging \textit{inter alia} that the twenty-three month delay between his arrest and trial constituted a violation of his sixth amendment right to a speedy trial. Part of this delay resulted from the dismissal and subsequent reinstatement of the murder indictment.
\textsuperscript{146} United States v. Wentland, 582 F.2d 1022 (5th Cir. 1978), \textit{cert. denied}, 439 U.S. 1133 (1979), held that a court must first consider whether the length of delay is "presumptively prejudicial" before considering the other \textit{Barker} factors. If the delay is not so found, dismissal of the indictment is not required. \textit{See also} United States v. Kilrain, 566 F.2d 979 (5th Cir.), \textit{cert. denied}, 439 U.S. 819 (1978).
\textsuperscript{147} \textit{See also} Morris v. Wyrick, 516 F.2d 1387 (8th Cir.), \textit{cert. denied}, 423 U.S. 925 (1975).
\textsuperscript{148} 590 F.2d at 686.
\textsuperscript{149} \textit{Id}, \textit{quoting} Morris v. Wyrick, 516 F.2d 1387, 1391 (8th Cir.), \textit{cert. denied}, 423 U.S. 925 (1975).
\textsuperscript{150} 590 F.2d at 686.
and the weak assertion of the right to a speedy trial, the burden of proving a sufficient causal relationship between the delay and any prejudice suffered thereby rested on the defendant.\textsuperscript{151} The court found defendant's argument that the delay had caused him to misplace the address of a witness unpersuasive.\textsuperscript{152}

The essence of a speedy trial claim under the due process clause of the fifth amendment is (1) a delay, (2) resulting in actual prejudice to the defendant, (3) where such delay was intentionally caused by the prosecution in bad faith, recklessly, or in order to gain tactical delay.\textsuperscript{153} The approach was refined in \textit{United States v. King}.\textsuperscript{154}

Under \textit{United States v. Marion},\textsuperscript{155} a defendant must prove \textit{actual} prejudice resulting from the delay. The Court distinguished actual prejudice from possible prejudice, the latter being guarded against by any applicable statute of limitations. In \textit{Marion}, the Supreme Court held that in order to invoke the sixth amendment's protection, an individual must be arrested, indicted, or otherwise charged with an offense; its protection does not extend prior to the time of accusation.

A showing of actual prejudice, however, does not automatically validate a defendant's claim. As the Supreme Court pointed out in \textit{United States v. Lovasco}: "\textit{Marion} makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."\textsuperscript{156} This determination is to be made on a case-by-case basis.\textsuperscript{157} Moreover, a certain amount of prejudice to the defendant (resulting from the delay) may be acceptable.\textsuperscript{158}

In \textit{United States v. D'Andrea},\textsuperscript{159} the defendants claimed that a pre-indictment delay prejudiced their defense by causing the unavailability of some witnesses and the inability of others (due to fading recollection...
tion) to testify competently. The court of appeals held that the defendants, in failing to "identify any substantial way in which this unavailable testimony would have aided their cause," did not meet their burden of proving actual prejudice.\footnote{160} Neither was there a showing of any intentional tactical delay on the part of the government. The court thus concluded that the period of delay was not so "unreasonable and prejudicial" as to require dismissal.\footnote{161}

In \textit{United States v. King},\footnote{162} the Seventh Circuit refined the due process inquiry. The court stated that after a showing by the defendant of actual prejudice resulting from delay, the burden of proof shifts to the government to show why the delay was necessary. It is then "up to the court to balance the reasons asserted by the Government against the prejudice asserted by the defendant."\footnote{163} This balance is to be made on a case-by-case basis, in accordance with \textit{Marion} and \textit{Lovasco}.\footnote{164}

This constitutes a substantial expansion of the prior policy of requiring the defendant to demonstrate some sort of bad faith or tactical delay on the part of the government. \textit{King} places an affirmative duty on the government to provide justification for delay, at least at the pre-indictment stage.

Congress has recently addressed the question of the time within which a criminal prosecution must be brought. The Speedy Trial Act of 1974 attempts to combine substantive judicial flexibility with strict procedural time limits, in order to ensure the prompt disposition of criminal cases.\footnote{165} In so doing, it may have generated as many time consuming problems as it purports to have cured. The Act disavows any claim of being a conclusive interpretation of the sixth amendment right to a speedy trial,\footnote{166} creating independent grounds for a speedy trial claim for both the defendant and the public.\footnote{167} The Act applies to all federal criminal offenses, with the exception of petty offenses, offenses triable by military tribunal, and (in the Northern District of Illi-
Subsections (b), (c), (f) and (g) contain the basic timetable for processing a criminal case from arrest through trial. Subsections (f) and (g) contain a pre-July 1, 1979 "phase-in" timetable, which was subject to modification by individual district courts. Dismissal of the indictment for violations of the Act, prior to July 1, 1979, was neither authorized nor recommended. Subsections (b) and (c) provide that where there has been an arrest, after July 1, 1979, the return of an indictment or information must follow within 30 days.

The Speedy Trial Act of 1979, effective August 2, 1979, provides that trial shall commence within seventy days of the filing date and publication of the indictment. Unless the defendant consents in writing, the trial shall not commence less than thirty days from the date the defendant first appears through counsel or waives counsel.

Subsection 3161(h)(1)(B) sets forth proceedings concerning the defendant which are not to be considered in determining whether there has been compliance with subsections (b) and (c). These categories, also amended by the Speedy Trial Act of 1979, are known as "excludable time" and include examination of the defendant for mental incompetency or physical incapacity; trials with respect to other charges against defendant; and periods, not to exceed thirty days, when the court has any motion concerning defendant under advisement, and others.

Subsection 3161(h)(8) provides for the exclusion of delay resulting from the court's granting of a continuance, on the court's or counsel's motion. This is a device which Congress intended to be used sparingly. In considering whether to grant such a continuance, the court

168. Id. § 3161(a); Northern District Plan for the Prompt Disposition of Criminal Cases § 1(a) [hereinafter cited as the Northern District Plan] (a copy of the Northern District Plan is on file at the Office of the Clerk of the United States District Court for the Northern District of Illinois).

169. Prior to July 1, 1979, under section 3164, a distinction existed between priority and non-priority defendants. Priority defendants were either those in custody or those not in custody who have been designated by the government as high risk. Priority defendants were required to be brought to trial no later than ninety days following detention or high risk designation. Under section 3164(c), no detainee could be held in custody after the ninetieth day.

170. For example, the Northern District of Illinois promulgated an interim plan which shortened the (f) and (g) requirements.

171. See United States v. Gandara, 586 F.2d 1156, 1161 (7th Cir. 1978).

172. The Northern District of Illinois has applied for and been granted a suspension of the time limits of subsections (b) and (c), as set forth in section 3174. This suspension is effective until June 30, 1980. See text accompanying notes 183-87 infra.


174. Id. § 3161(h)(1)(D).

175. Id. § 3161(h)(1)(G).

must employ a balancing test to determine if "the ends of justice . . . outweigh the best interest of the public and the defendant in a speedy trial." Four factors must be considered "among others" in weighing this balance. They are: (1) the impact of not granting a continuance upon the proceedings or upon justice; (2) the nature of the case in relation to the amount of time needed for adequate preparation; (3) the complexity of the grand jury's fact-finding task, including the impact of events which are beyond the court's or the government's control; and, (4) in cases that do not meet the criteria of (2), but in which additional time is needed to insure effective preparation. "General congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government . . ." are statutorily unacceptable reasons for granting this "ends of justice" continuance.

Under the 1979 amendment, the dismissal sanctions of section 3162 take effect on July 1, 1980. Under this section, dismissal may be invoked in two ways. Subsection (a)(1) provides for the dismissal of charges for which no indictment is filed within thirty days (plus any applicable exclusions) of arrest. Dismissal under subsection (a)(1) is mandatory and automatic, i.e., defendant is not required to file a motion to dismiss.

Subsection (a)(2) provides for dismissal of the indictment if defendant is not brought to trial within sixty days (plus any applicable exclusions) from the date of arraignment. Dismissal under (a)(2) is mandatory but not automatic; defendant must file a motion to dismiss. Subsection (a)(2) specifically provides that "failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." Thus, the burden of proof is placed on the defendant in a motion to dismiss for lack of timely trial. At the same time, there is no need to show that the delay was prejudicial, as is necessary for a dismissal on sixth amendment and due process grounds. The government then has the burden of proving excludable time.

Under either subsection, the court has discretion to dismiss the case with or without prejudice. The essential criteria under each subsection are the same: (1) seriousness of the offense; (2) facts and circumstances leading to dismissal; and, (3) impact of reprosecution on

178. Id. § 3161(h)(8)(B)(i)-(iv).
179. Id. § 3161(h)(8)(C).
administration of both the Act and justice. These factors are to be considered "among others" under both subsections. Significantly, the House Judiciary Committee purposefully refused to include "actual prejudice to defendant" in its list of essential factors to be considered. Actual prejudice is relevant but is not a determinative factor.\footnote{181}

Attorney misconduct can also be penalized under the Act, pursuant to the Federal Rules of Criminal Procedure, with sanctions ranging from fines to disciplinary action.\footnote{182} Section 3174 allows any district court, in the event of a judicial emergency, to extend the period between arraignment and trial\footnote{183} to a maximum length of 180 days, with requisite approval of the appropriate circuit judicial council and the Judicial Council of the United States. The time limits between arrest and indictment\footnote{184} and the dismissal sanctions\footnote{185} are not suspendable, nor are the time limits for detainees being held solely for the purpose of awaiting trial. In addition, the Act’s legislative history\footnote{186} supports the conclusion that section 3174 applies only to indictments filed \textit{after} the emergency has been declared, and not to indictments pending at the time of declaration.

A state of judicial emergency has in fact been declared for the Northern District of Illinois.\footnote{187} As of June 20, 1979, the sixty-day time limit from arraignment to trial is extended to a maximum of 180 days. The extension applies only to indictments filed on or after June 20, and lasts for one year.

Neither the Act nor the Northern District Plan expressly prohibits or provides for the defendant's waiver of his statutory right to a speedy trial, with the exception that any defendant may choose not to move for a dismissal under section 3161(a)(2). Waivers have been accepted from defendants,\footnote{188} even over defendant’s later verbal recantations.\footnote{189} The common standard of acceptability seems to be a defendant’s free, voluntary, and knowing entry into the waiver agreement.

\footnote{181. 120 Cong. Rec. 41722 (1974).}  
\footnote{182. 18 U.S.C. § 3162(b) (1979).}  
\footnote{183. Id. § 3161(c).}  
\footnote{184. Id. § 3161(b).}  
\footnote{185. Id. § 3162.}  
\footnote{188. United States v. Didier, 542 F.2d 1182 (2d Cir. 1976).}  
\footnote{189. United States v. Spaulding, 588 F.2d 669 (9th Cir. 1978).}
GUilty PLEAS

The United States Supreme Court, in Santobello v. New York,\textsuperscript{190} recognized that plea bargains and resulting guilty pleas are a necessary and desirable component of the criminal justice system. Santobello, together with Boykin v. Alabama,\textsuperscript{191} recognizes on a constitutional level that the benefits derived from plea agreements and guilty pleas presupposes fairness in securing an agreement between an accused and a prosecutor, and that the waiver of certain constitutional rights through the entry of a guilty plea is not to be lightly presumed.

Rule 11 of the Federal Rules of Criminal Procedure, reflects the Supreme Court's recognition of the necessity for plea bargaining and guilty pleas.\textsuperscript{192} The rule reflects Santobello's premise that considera-

\textsuperscript{190} 404 U.S. 257 (1971).
\textsuperscript{191} 395 U.S. 238 (1969).
\textsuperscript{192} Rule 11(e) provides:

Plea Agreement Procedure.
(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or
(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.
tions of expediency and finality are dependent upon fairness in the
process of plea agreements, and sets forth procedures that are designed
to insure that guilty pleas are, in substance, knowingly and voluntarily
entered. It also recognizes plea agreement procedures and sets out
the guidelines to be followed in reaching and memorializing a plea
agreement.

Recent Seventh Circuit cases reflect the distinction between the
constitutional and rule 11 standards to be applied in determining the
efficacy of a guilty plea, applying rule 11 standards to cases brought on
direct appeal and constitutional principles to cases in which the pleas
were collaterally attacked.

United States v. Wetterlin and United States v. Fels both in-
volve direct appeal challenges to guilty pleas based upon violations of
rule 11(c), which requires that the district court address the defendant
personally and determine that he understands the nature of the charge
to which the plea is offered. Wetterlin also addressed the requirements,
based on rule 11(g) and (f), that a court not enter a judgment upon a
guilty plea without making an inquiry into the factual basis for the
plea.

Wetterlin involved a complex conspiracy charge concerning use of
the mails. At the time of the entry of the guilty plea, the court did not
describe the charge generally or explain the law of conspiracy to the
defendant. Nor did the court inquire and determine that the defendant
understood the nature of the charges. The Seventh Circuit held that,
given the complex nature of the charges, rule 11 had been violated and
the plea to the conspiracy count should be vacated.

The court of appeals also found that the trial court had violated
rule 11(f) and (g) in failing to determine, at the time of the plea,
whether there was a factual basis for the plea. In so doing, it rejected
the government's argument that the factual basis could be established
at any time prior to entry of judgment, and specifically rejected the
government's argument that an intervening trial against other defend-

194. See note 192 supra.
195. Recently, in United States v. Timmreck, 441 U.S. 780 (1979), the Supreme Court reversed
the Sixth Circuit and held that a conviction based on a guilty plea is not subject to collateral attack
when all that can be shown is a formal violation of rule 11. Timmreck had not been told of a
mandatory parole term.
196. 583 F.2d 346 (7th Cir.), cert. denied, 439 U.S. 1127 (1978).
197. 599 F.2d 142 (7th Cir. 1979).
defendant is entitled to re-plead where a court did not fully adhere to rule 11).
199. 583 F.2d at 351-53.
ants could serve as a factual basis.\textsuperscript{200}

On a second count of knowingly making material false declarations, the court refused to require strict formal compliance with rule 11. Instead it looked to the total circumstances, including the defendant's intelligence, the fact that he was represented by counsel, and the relatively uncomplicated nature of the charge.

In \textit{United States v. Fels},\textsuperscript{201} three defendants charged with narcotics violations, pled guilty to two counts, were sentenced, and directly appealed. At the plea, the trial court had addressed the three defendants together in advising them of the rights being waived. While this was held an acceptable but not preferred method of satisfying the requirement of rule 11(c) that the defendants be personally addressed, the trial court had also neglected to question two of the defendants individually as to waiver of rights. Nor were they questioned as to whether the plea agreement was the result of force or threats, in violation of rule 11(a). While the government argued that there had been substantial compliance, the court of appeals took the position that the several steps omitted fell far short of what is minimally required by the rule. Consequently, they "reluctantly" concluded that the 11(d) violations and the failure to question the third defendant as to force or coercion, resulted in the failure to assure the voluntariness of the plea, a violation that goes to the very heart of the rule.\textsuperscript{202} All three defendants’ convictions were overturned and they were allowed to replead. The court read \textit{Wetterlin}\textsuperscript{203} as implicitly adopting the rule that on direct appeal, a finding of noncompliance with a single provision of rule 11 mandates a defendant to replead.

\textit{United States v. Carreon},\textsuperscript{204} is the third rule 11 case decided by the Seventh Circuit this year. Unlike the two preceeding cases, \textit{Carreon} came to the court by way of collateral attack under 28 U.S.C. § 2255.\textsuperscript{205}

\begin{itemize}
  \item \textsuperscript{200} Id. at 352.
  \item \textsuperscript{201} 599 F.2d 142 (7th Cir. 1979).
  \item \textsuperscript{202} Id. at 149.
  \item \textsuperscript{203} \textit{See} text accompanying notes 198-200 supra.
  \item \textsuperscript{204} 578 F.2d 176 (7th Cir. 1978).
  \item \textsuperscript{205} 28 U.S.C. § 2255 (1979) provides:

  A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

  A motion for such relief may be made at any time.

  Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make
Presaging *Timmreck*, which at that time was unreported, the court applied standards appropriate when a plea is collaterally challenged. That is, relief is available only for error which is jurisdictional, constitutional, or which represents a "fundamental defect which inherently results in a complete miscarriage of justice."207

*Carreon* arose from a unique situation. Pursuant to a plea agreement, the defendant sought to change his plea to guilty of distribution of heroin. The motion for change of plea was presented to a judge other than the one who was originally assigned the case. The second judge concluded after questioning Carreon that there was at least a factual question as to whether the defendant was not guilty by reason of entrapment. He declined to accept the plea and continued the matter for a hearing before the judge who had been assigned the case.

On a renewal of the guilty plea before the original judge, defendant’s counsel stated that he had explained all possible defenses and Carreon still wished to plead guilty. Nothing was said about entrapment. The court read the counts to Carreon and asked if he had committed "those crimes." No questions were asked about the underlying facts before the plea was accepted.

The Seventh Circuit held that the judge was chargeable with knowledge of what had occurred the previous day and that it was the duty of the prosecutor and defense counsel to make sure he was fully advised. In these circumstances, the factual basis requirement of rule 11(f) was not satisfied. *McCarthy v. United States* was held to be controlling in its insistence that the record show that the defendant understood not only the nature of the charge, but also the law in relation

findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. An appeal may be taken in the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.


to the facts of his case. Although *McCarthy* was a direct appeal, the Seventh Circuit considered the reasoning to be equally applicable to collateral attack where failure to establish a factual basis on the record left open the question of voluntariness.

Aside from the rule 11 challenges, the Seventh Circuit ruled on two cases within the past year in which it was alleged that the government failed to honor plea agreements. In *United States v. Bowler*, the plea agreement provided as follows: "The government recommendations as to incarceration . . . may be reduced based upon the extent of defendant's truthful cooperation, . . . the condition of his health and other personal factors, and Antitrust Division guidelines which indicate that fines may be substituted for incarceration in appropriate circumstances." The court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, . . . such promise must be fulfilled." Since the government may always recommend a lesser sentence, it was decided that there would be no purpose to an agreement referring to specific factors if the agreement was not construed to contain an explicit promise to consider the factors with an eye to reducing the sentence. It was further held to be necessary that the government's evaluation of such mitigating factors be set forth in the sentencing record. Since the only consideration set forth in the record was the defendant's cooperation, the sentence was vacated and the case remanded for specific performance of the government's promise and resentencing.

**Administration of Jury Trials**

The right to a trial by jury, as guaranteed by the sixth amendment, occasionally presents problems in administration. Although the handling of a criminal jury is largely left to the discretion of the district judge, several Seventh Circuit cases this term have focused on issues which arise with respect to conducting a jury trial.

In *United States v. Scott*, the court reviewed the procedure for

209. In United States v. Brown, 583 F.2d 915 (7th Cir. 1978), the defendant had pled guilty pursuant to a plea agreement in which the defendant would be permitted to withdraw his plea if not placed on probation. In a novel argument, the defendant claimed that the government had failed to honor its agreement when it subsequently moved to revoke his probation for failure to live up to its conditions. The court held that he was not entitled to irrevocable probation under the agreement.

210. 585 F.2d 851 (7th Cir. 1978).

211. *Id.* at 853.


213. 583 F.2d 362 (7th Cir. 1978).
waiving trial by jury. The defendant's counsel, in his presence, indicated that the defendant wished to proceed by bench trial. Thereafter, the defendant and his attorney both signed the printed jury waiver form. No personal interrogation of the defendant appeared on the record. The defendant contended on appeal that the record did not indicate that he knowingly and voluntarily waived his right to trial by jury. Relying on previous Seventh Circuit authority, the court of appeals affirmed the conviction, but specifically noted that "the better practice is to interrogate defendants on the subject of their understanding of the right to a jury trial and waiver [of that right]." The court, pursuant to its supervisory powers, implemented a rule of procedure analogous to rule 11 guilty pleas, requiring personal inquiry into a defendant's understanding of the right to trial by jury and waiver of that right.

The sixth amendment assurance of trial by an impartial jury, necessarily implies the right to voir dire prospective jurors on their fairness and qualifications. While certain cases may require special inquiry (for example, racial prejudice or pretrial publicity), the defendant has no right to demand that specific questions be asked in a specific manner. Similarly, despite requests from the parties, the district judge need not make specific inquiry into prior jury service. Once the jury has been empaneled, the judge may exercise sound discretion in excusing a juror for tardiness or in permitting the jury to separate during deliberations.

In two cases during the past term, the court considered allegations of jury misconduct and the procedures utilized by the district courts in investigating the claimed impropriety. The procedures used by the dis-

215. 583 F.2d at 364. In referring to personal interrogation as the better practice, the court specifically noted that personal interrogation is not required by the sixth amendment or rule 23 of the Federal Rules of Criminal Procedure.
216. The court prospectively announced that failure to comply with the new procedure will result in reversal. 583 F.2d at 364.
219. United States v. Makres, 598 F.2d 1092 (7th Cir. 1978) (defendant had stipulated that "after trial has commenced, a maximum of . . . two jurors may . . . be excused . . . by reason of good cause").
strict judges in Winters v. United States\textsuperscript{221} and United States v. Batchelder\textsuperscript{222} were not similar; however, the Seventh Circuit approved both procedures and affirmed the convictions. After the return of a guilty verdict in Winters, a juror contacted the presiding judge and suggested that extraneous material (three pages outlining the evidence against the defendant) had been used by the jury during its deliberations. The judge arranged to have the complaining juror interviewed by a United States Marshal, and thereafter the judge reported the results of that interview to the defense and the prosecution. Winters moved for a new trial and a modified adversary hearing was conducted by the court, with defendant and defense counsel present. During the hearing, the court personally interrogated the jurors and propounded questions to the jurors which had been submitted by counsel.\textsuperscript{223} The Seventh Circuit approved of this procedure and suggested that the case was governed by Remmer v. United States,\textsuperscript{224} in which a mid-trial complaint of jury tampering was investigated by the FBI during the course of the trial, but not revealed to the defense. Remmer condemned ex parte investigation of claims of juror misconduct. In Winters, the Seventh Circuit approved the adversary approach for a post verdict inquiry.

The claim of juror misconduct in Batchelder was not resolved by adversary proceeding, although the court of appeals suggested that this was the "better practice."\textsuperscript{225} In contrast to Winters, the claim in Batchelder was resolved through an ex parte evaluation by the district judge. After the verdict was returned in Batchelder, two jurors told the presiding judge that a third juror had told them, prior to jury deliberations, about a newspaper article concerning the case. The district judge held in camera interviews of the jurors, who stated that there had been no discussion of the news account during jury deliberations. No further evidentiary inquiry was held. On appeal, the defendant argued that

\textsuperscript{221} 582 F.2d 1152 (7th Cir.), cert. denied, 439 U.S. 936 (1978).
\textsuperscript{222} 581 F.2d 626 (7th Cir. 1978), rev'd in part on other grounds, 439 U.S. 1066 (1979).
\textsuperscript{223} The district judge's caution was likely motivated by cases suggesting that a jury cannot impeach its own verdict on the basis of erroneous perceptions of law or fact. United States v. DiCarlo, 575 F.2d 952 (1st Cir.), cert. denied, 439 U.S. 834 (1978). "But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. . . . [and] testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." Mattox v. United States, 146 U.S. 140, 148-49 (1892), quoting Weidman v. Leavitt, 107 U.S. 453 (1888).
\textsuperscript{224} 347 U.S. 227, 229-30 (1954). In Remmer, the Court found that the trial court "should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."
\textsuperscript{225} United States v. Batchelder, 581 F.2d 626, 634 (7th Cir. 1978), rev'd in part on other grounds, 439 U.S. 1066 (1979).
these ex parte interviews violated his due process rights, claiming that presence of his counsel would have insured vigorous inquiry. The court held that because the defendant's counsel did not "even seek a hearing to try to show prejudice," and because the evidence was overwhelming, any error resulting from the ex parte procedure was harmless.

It is interesting to note that in affirming the ex parte procedure in Batchelder, the court relied on Margoles v. United States, without citing Remmer. In Margoles, the Seventh Circuit approved general questioning of jurors during the course of the trial concerning possible exposure to pre-trial publicity. The inquiry in Margoles was conducted in the presence of defendant and his counsel. Unlike Winters and Batchelder, Margoles was not a post-verdict attack on jury deliberations. Nor was the inquiry ex parte, although the questions were propounded by the judge rather than counsel. To the extent that the defendant in Batchelder claimed that extraneous influences might have tainted the jury verdict, the ex parte inquiry approved by the court is difficult to reconcile with Remmer and Winters. All three cases suggested extraneous influence on jury deliberations. Both Winters and Batchelder were post-verdict attacks premised on information acquired after deliberation and judgment. The court in Batchelder, however, emphasized that the defendant's counsel did not request an adversary hearing or move for a new trial, and in some respects that may distinguish the two cases.

**INTRODUCTION OF SPECIFIC EVIDENCE**

Rules 402 and 403 of the Federal Rules of Evidence, provide the parameters within which recent Seventh Circuit decisions concerning the admissibility of specific evidence must be analyzed. Rule 402 provides that all relevant evidence is admissible except as otherwise provided, while rule 403 provides that evidence, although otherwise admissible, may be excluded if its probative value is substantially out-

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226. 581 F.2d at 636.  
227. 407 F.2d 727 (7th Cir. 1969).  
228. See also United States v. Fleming, 594 F.2d 598 (7th Cir. 1979) (two jurors received inappropriate communications prior to deliberations, and they related the incident to other jurors). Citing Remmer v. United States, 347 U.S. 227 (1954), the court noted that "[a]ll counsel agreed to permit the court to question the jurors involved" during a hearing in chambers. 594 F.2d at 608. Other than this brief notation with respect to the agreement of counsel, the Fleming opinion is silent as to the adversary nature of the proceedings or the presence of defense counsel.  
weighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. These rules, read in conjunction with the “substantial right” test of rule 103(a) of the Federal Rules of Evidence expressly or implicitly serve as the basis for the affirmance of virtually every evidentiary question presented by defendant-appellants to the Seventh Circuit. Cases in which rule 403 served as the express basis for a decision include United States v. Hooper, United States v. Mancillas, and United States v. Frankenthal. The type of prejudice asserted was wide-ranging and the court’s treatment of the problem was equally expansive.

Part of the difficulty in undertaking a rule 403-type analysis is that each proffer of evidence rises and falls upon the context in which it is raised and the role the evidence plays in the totality of the trial. Consequently, each analysis is extremely subjective. The major part of the difficulty lies in quantifying the probative value of a particular piece of evidence and “weighing” it against the prejudicial effect. The aspect of the test relating to confusion of the issues or misleading the jury is almost as elusive.

United States v. Hooper provides an example of the difficulty of setting out a meaningful rule 403 analysis. The defendant was the associate director of a federally-funded program administered through the University of Wisconsin. A university audit relating to the defendant’s area of responsibility disclosed $1010 in unaccounted for funds. One of his superiors demanded that he repay the money because of “mismanagement,” and the defendant complied. There was no accusation at that time of theft or intentional misconduct. At trial, evidence of the

231. FED. R. EVID. 103(a) provides:
   Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
   (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
   (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

232. 596 F.2d 219 (7th Cir. 1979). Hooper involved admission of evidence of repayment of unaccounted for money in a government funded program, introduced as a pre-trial admission against interest.

233. 580 F.2d 1301 (7th Cir. 1978), cert. denied, 439 U.S. 958 (1978). Mancillas involved testimony by a government agent that he had received a tip that a defendant was going to receive some heroin. The government introduced the statement for foundation purposes to explain the surveillance that was subsequently undertaken.

234. 582 F.2d 1102 (7th Cir. 1978). Frankenthal involved the rebuttal testimony of a district court judge concerning an encounter he had with a defense witness that tended to indicate bias and a motive to lie on the part of the defense witness. The court ruled that the mere fact of having a district court judge testify against a defendant did not create such a prejudicial effect that the probative value of the evidence was substantially outweighed.
The court first addressed the question of whether the evidence was excludable under some other rule, specifically rule 408. The court of appeals concluded that as this matter was not an asserted claim then in civil litigation it was not a compromise but rather was an admission of asserted liability. The court then addressed the rule 403 question by examining the advisability of offering proof of restitution where there was ample independent evidence of guilt. Simultaneously, the court noted that the evidence was "part and parcel of the charges and of highly probative value." The only analysis offered as to prejudice was the observation that the evidence did not involve separate and unrelated acts such as proof of prior crimes "in which the possibility of great danger of unfair prejudice lurks."

In dissent, Judge Swygert also utilized a rule 403 analysis. He concluded, however, that in light of the other evidence offered the probative value of the restitution was slight and the danger of unfair prejudice was substantial. His analysis adhered closely to the analysis of the majority, differing only as to the outcome.

In United States v. Mancillas, the court concluded that the probative value of the proffered evidence, a foundational statement that an agent had received a tip from an informer that the defendant was going to receive contraband, was outweighed by the prejudicial effect of the statement. The court then determined that when one viewed the statement in the context of the totality of the trial, it could not be said that the statement had an impact on the jury. In Mancillas, the court was more precise in its analysis, narrowing the question to (1) an analysis of

235. See Fed. R. Evid. 408.
236. 596 F.2d at 225. Rule 408 of the Federal Rules of Evidence relates to evidence that defendant furnished valuable consideration attempting to compromise a claim which was disputed as to validity or amount. The Advisory Committee's Note elaborates that exclusion may be based on the ground that the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The defendant in Hooper was told that even though there was no assertion that he had engaged in any wrongdoing, he was required to make the repayment. To turn the tables and conclude that the payment was an admission against interest ignores the fact that the predicate for the payment was mismanagement and not intentional wrongdoing. Moreover, the public policy considerations underlying rule 408 dictate encouragement of such repayment.
237. 596 F.2d at 226.
238. Id.
239. Id. at 226-27 (Swygert, J., dissenting).
241. Id. at 1311.
what was added to the government case by the introduction of the evidence, and (2) how the jury would construe the import of the statement. After addressing the precise issue on appeal, the *Mancillas* court analyzed the impact of the evidence on the totality of the jury's deliberations.

*United States v. McPartlin*\(^{242}\) and *United States v. Weatherspoon*\(^{243}\) both dealt, in substantially different situations, with the introduction of documentary records where some question existed as to their reliability. *McPartlin* involved personal diaries maintained in the course of the defendant's employment activities; *Weatherspoon* involved foundation requirements for the introduction of computer printouts.

In *McPartlin*, Benton, an employee of the Ingram Corporation, dealt with representatives of the Chicago Metropolitan Sanitary District while preparing the corporation's bid for a sludge hauling contract. Specifically, Benton was designated to provide the Sanitary District officials with "political contributions" to ensure that the corporation would receive the contract. During the course of his meetings, Benton maintained a desk calendar-appointment diary which documented in some detail his dealings with the Sanitary District representatives. Adopting the district court's formulation, the court of appeals held that these diaries were admissible as business records because they were kept as part of a regular business activity; made with regularity at or near the time of the described event; needed to be reliable in order for Benton to rely on them; and, because there would be little reason for him to distort or falsify the records.\(^{244}\)

In *Weatherspoon*, the Seventh Circuit adopted the standards applied by the Third Circuit\(^{245}\) and Sixth Circuit\(^{246}\) for determining the reliability of computer printouts. That is, the individual making the proffer of evidence must establish, to the satisfaction of the trial court: (1) what the input procedures were; (2) that the input procedures were accurate; (3) that the computer was tested for internal programming errors on a monthly basis; and, (4) that the printouts were made, maintained, and relied upon by the recordkeeper in the ordinary course of its business activities.

*United States v. Guevara*\(^{247}\) and *United States v. McPartlin*\(^{248}\) both

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242. 595 F.2d 1321 (7th Cir. 1979).
243. 581 F.2d 595 (7th Cir. 1978).
244. 595 F.2d at 1347.
247. 598 F.2d 1094 (7th Cir. 1979).
248. 595 F.2d 1321 (7th Cir. 1979).
addressed the substance of rule 801(d)(1)(B) of the Federal Rules of Evidence—prior consistent statements of a witness which are not considered hearsay. The rule provides that a statement is not hearsay if: (1) the declarant testifies; (2) the declarant is subject to cross-examination; (3) the statement is consistent with the subsequent testimony; and, (4) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication. In *Guevara*, the court held that it was error, although harmless, to introduce prior consistent statements to rebut the implication that the declarant had an improper motive to testify when that same improper motive existed at the time of the original statement. Similarly, in *McPartlin*, the court affirmed the exclusion of prior consistent statements where there was a different, improper motive to lie at the time of the earlier statement.

Finally, in *United States v. Rose*, the government, through negligence, lost a tape of a telephone conversation between a defendant and the government informer. The court ruled that once the trial court determined that the loss of the tape was the result of negligence, it was within the court's discretion to permit testimony concerning the conversation, based upon whether the defense was so greatly prejudiced by the absence of the recording as to require sanction.

**Rule 404(b)—Evidence of Prior Similar Acts**

Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongdoing, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with that character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Three cases decided by the Seventh Circuit with regard to this rule are significant in that they affirmatively follow the "traditional," pre-Federal Rules of Evidence interpretation.

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249. Fed. R. Evid. 801(d)(1)(B) provides, in pertinent part:

A statement is not hearsay if—

(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

250. 598 F.2d at 1100.

251. 595 F.2d at 1351-52.

252. 590 F.2d 232 (7th Cir. 1978).

253. Id. at 237.


Evidence standard that such acts must be proved by "clear and convincing" evidence in order to justify their admission.

The three Seventh Circuit cases, *United States v. McPartlin*, \(^{256}\) *United States v. Dixon*, \(^{257}\) and *United States v. Dolliole*, \(^{258}\) stand in sharp contrast to *United States v. Beechum*, \(^{259}\) a recent Fifth Circuit opinion. In *Beechum*, a 10-5 *en banc* decision, the Fifth Circuit overruled *United States v. Broadway*, \(^{260}\) a pre-Federal Rules of Evidence decision that ratified the clear and convincing standard. \(^{261}\) The opinion in *Beechum* was based on an analysis derived from rule 104(b) of the Federal Rules of Evidence. That is, the court held that the standard for the introduction of evidence of prior acts was that "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist." \(^{262}\) This analysis led the Fifth Circuit to the conclusion that it was not necessary for the trial court to require the government to come forward with clear and convincing proof when it propounds prior act evidence.

*Beechum*, an *en banc* decision, was specifically referred to in a footnote in *McPartlin*, \(^{263}\) the first of the Seventh Circuit’s three rule 404(b) cases. While the *McPartlin* court did not itself criticize *Beechum*, the footnote drew special reference to the dissent in *Beechum*, which sharply criticized the majority’s reasoning. Moreover, the *McPartlin* court expressly stated that the appropriate test was the clear and convincing standard. \(^{264}\)

Two other aspects of the court’s ruling in *McPartlin* are significant. \(^{265}\) First, the court observed that there is no need under rule 404(b) for the acts to be identical. Second, the court stated that when challenging on appeal, the introduction of the evidence on the grounds that the prejudicial effect outweighs the probative value, the defendant

\(^{256}\) 595 F.2d 1321 (7th Cir. 1979).

\(^{257}\) 596 F.2d 178 (7th Cir. 1979).

\(^{258}\) 597 F.2d 102 (7th Cir. 1979).


\(^{260}\) 477 F.2d 991 (5th Cir. 1973).

\(^{261}\) FED. R. EVID. 104(b).


\(^{263}\) 595 F.2d 1321, 1344 n.30.

\(^{264}\) *Id.* at 1344.

\(^{265}\) *McPartlin* involved a prosecution for bribery and bid-rigging in which the defendant claimed that he was the victim of extortion. The government was permitted to introduce evidence that the defendant had previously made surreptitious payments to an employee of a semi-public Brazilian corporation. The defendant challenged this evidence based upon the dissimilarities between the moral climate in Brazil and the United States and further on the basis that the prejudicial effect outweighed the probative value. *Id.* at 1344-45.
must show that admission of the challenged evidence constituted an abuse of the court's discretion, because the balancing of those two considerations is "uniquely appropriate to the informed discretion of the trial judge." 266

Although the Seventh Circuit did not mention Beechum in either Dixon 267 or Dolliole, 268 the court in both cases, while affirming the introduction of the 404(b) evidence, drew special reference to the continued vitality of the clear and convincing standard. Moreover, in Dolliole, the court cited Eighth and Ninth Circuit cases that had recently reaffirmed the clear and convincing standard. 269

Dolliole also states that the rule 404(b) evidence must be essential to the government's case. 270 The court notes that the Advisory Committee Notes to rules 403 and 404(b) envision that the need for the evidence is an appropriate consideration in the balancing of probity against prejudice.

CONSPIRACY

During the past year, the Seventh Circuit decided several cases involving the admission of testimony pursuant to rule 801(d)(2)(E) of the Federal Rules of Evidence, the co-conspirator exception to the hearsay rule. 271 In the most significant of these decisions, United States v. Santiago, 272 the court clarified the state of the law in the circuit concerning the procedure to be followed and the test to be used in introducing such testimony.

Rule 801(d)(2)(E) provides that a statement made by a co-conspirator during the course of and in furtherance of a conspiracy is not hearsay. Thus, when a statement that otherwise would be considered hearsay is proffered as a co-conspirator's statement, preliminary questions arise as to whether a conspiracy has been sufficiently established and whether the declaration was made during the course of and in fur-

266. Id. at 1345.
268. United States v. Dolliole, 597 F.2d 102 (7th Cir. 1979).
269. Id. at 106, citing United States v. Drury, 582 F.2d 1181 (7th Cir. 1978); United States v. Herrell, 588 F.2d 711 (9th Cir. 1978), cert. denied, 440 U.S. 964 (1979); United States v. Goehring, 585 F.2d 371 (8th Cir. 1978).
270. In Dolliole, the defendant was charged with driving the get-away car in a bank robbery. The defense was lack of knowledge. The government's 404(b) evidence consisted of the testimony that the defendant had acted similarly in other bank robberies. 597 F.2d at 104, 106.
271. Fed. R. Evid. 801(d)(2)(E) provides:
A statement is not hearsay if—
(2) The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.
272. 582 F.2d 1128 (7th Cir. 1978).
therance of the conspiracy. The procedures for determining such questions are governed by rule 104 of the Federal Rules of Evidence.\textsuperscript{273} Prior to \textit{Santiago}, the admissibility of such statements was considered to be governed by rule 104(b). The court would admit the testimony and instruct the jury that the acts and declarations of one of the alleged co-conspirators made during and in furtherance of the conspiracy could not be used against another alleged co-conspirator until it had been established by independent evidence beyond a reasonable doubt that a conspiracy existed and that the other alleged co-conspirator was a member of that conspiracy.\textsuperscript{274} The jury was then expected to sort through the evidence, disregarding often extremely prejudicial statements, and reach a conclusion as to the conspiracy. Then, if conspiratorial guilt had been concluded beyond a reasonable doubt, the jury was to consider the statements as additional evidence.

\textit{Santiago} concluded that the preliminary determination as to admissibility of the statements is a matter of competency under rule 104(a) and not of conditional relevancy under rule 104(b). That is, the court must determine whether or not the conspiracy has been established by sufficient, independent evidence so as to allow admission of co-conspirator declarations. Counsel is no longer permitted to argue to the jury that the jury is to make a determination as to whether to consider the statements.

Additionally, the \textit{Santiago} court addressed the question of the degree of proof necessary to permit the introduction of co-conspirator's statements, specifically directing that trial courts should use the civil preponderance of the evidence test to determine admissibility.\textsuperscript{275} \textit{Santiago} placed the Seventh Circuit in agreement with the First, Second, Third, Fourth, Fifth, and Eighth Circuits.\textsuperscript{276} The Sixth and Ninth Cir-

\begin{footnotesize}
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\item Fed. R. Evid. 104 (a and b) provides:
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\item Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
\item Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
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\item United States v. Santos, 385 F.2d 43 (7th Cir. 1967), \textit{cert. denied}, 390 U.S. 954 (1968).
\item United States v. James, 590 F.2d 575 (5th Cir. 1979); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977); United States v. Trowery, 542 F.2d 623 (3d Cir.), \textit{cert. denied}, 429 U.S. 1104 (1976); United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976).
\end{footnotesize}
circuits use a prima facie standard,\textsuperscript{277} which \textit{Santiago} specifically rejected.\textsuperscript{278}

\textit{Santiago} left to the trial court the decision of whether to permit the introduction of the statements conditionally, dependent upon a later showing of conspiracy, or whether to require an independent showing prior to the introduction of the statements.\textsuperscript{279} It did not reach the issue of whether the trial court could use the statements in determining whether there was a conspiracy.\textsuperscript{280}

In \textit{United States v. Ziperstein},\textsuperscript{281} unindicted co-conspirators were permitted to testify as to conversations among themselves conducted outside the presence of the defendants. The court saw no difficulty in permitting this testimony as long as the statements were made during the course of and in furtherance of the conspiracy.\textsuperscript{282}

Finally, note should be taken of three cases that dealt with the question of when a statement is made in furtherance of a conspiracy. In \textit{United States v. McPartlin},\textsuperscript{283} the court addressed the question of the admissibility of the business diaries of a government witness who had been a briber in a bid-rigging scheme. While the court held the diaries admissible as business records,\textsuperscript{284} it stated in dictum that these diaries also fell within the scope of rule 801(d)(2)(E).\textsuperscript{285} The court specifically noted that the diaries were kept in furtherance of the conspiracy because Benton had relied on them in carrying out his bribery and bid-rigging scheme.

In \textit{United States v. Gandara},\textsuperscript{286} the defendant was convicted, on the basis of entirely circumstantial evidence of distributing heroin. Some time prior to the transaction the co-defendant, in negotiating with the agents, told the agents he could get "enough of it" (heroin).\textsuperscript{287} This statement was made after the parties had reached their agreement as to the terms of the sale. The court of appeals ruled that, while harmless, this statement should not have been admitted under rule

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\item \textsuperscript{277} United States v. Mitchell, 556 F.2d 371 (6th Cir.), \textit{cert. denied}, 434 U.S. 925 (1977);
\item United States v. Calaway, 524 F.2d 609 (9th Cir. 1975), \textit{cert. denied}, 424 U.S. 967 (1976).
\item \textsuperscript{278} 582 F.2d at 1135.
\item \textsuperscript{279} \textit{Id.} at 1131. A pre-trial, independent showing of conspiracy, often the only way to ensure against a mistrial under \textit{Santiago} principles, can be effectively used to obtain pre-trial discovery.
\item \textsuperscript{280} \textit{Id.}
\item \textsuperscript{281} 601 F.2d 281 (7th Cir. 1979).
\item \textsuperscript{282} \textit{Id.} at 294.
\item \textsuperscript{283} 595 F.2d 1321 (7th Cir. 1979).
\item \textsuperscript{284} See text accompanying notes 242-44 supra.
\item \textsuperscript{285} 595 F.2d at 1351.
\item \textsuperscript{286} 586 F.2d 1156 (7th Cir. 1978).
\item \textsuperscript{287} \textit{Id.} at 1159.
\end{itemize}
801(d)(2)(E), as it did nothing to further the conspiracy. The court observed that once an agreement had been reached as to the sale of heroin, the statement that the co-defendant had a source was mere surplusage.\textsuperscript{288}

\textit{Gandara} appears to conflict with \textit{United States v. Fitzgerald}.\textsuperscript{289} In \textit{Fitzgerald}, the indictment charged a conspiracy to commit mail fraud through a bid-rigging scheme, in which one defendant, an official of an Indiana Sanitary District, was bribed in order to influence the approval of a sewer project. It also charged a conspiracy to defraud the IRS by obstructing the computation, assessment, and collection of taxes. This was done through the formation of a Swiss Corporation by five of the seven co-defendants. The Swiss Corporation charged consulting fees for non-existent services which were then deducted as a business expense. The corporation was dissolved in early 1972. Later that year, one of the co-defendants made statements in response to the queries of an independent auditor which appeared to cover up the function of the Swiss Corporation. The court summarily concluded that it was not error to permit the testimony of the auditors, as there appeared to be a sufficient basis for the jury to conclude that the statements had been made in furtherance of the conspiracy.\textsuperscript{290}

\textit{Fitzgerald} also raised issues as to whether a multiple conspiracy had been prejudicially charged\textsuperscript{291} and whether the statute of limitations had run as to the primary objectives of the conspiracy.\textsuperscript{292} The court dealt with these questions in the same manner that it dealt with the question of the admissibility of the co-conspirators' statements. That is, that there was one conspiracy with several minor or subsidiary agree-

\textsuperscript{288} \textit{Id.}
\textsuperscript{289} 579 F.2d 1014 (7th Cir.), cert. denied, 439 U.S. 1002 (1978).
\textsuperscript{290} 579 F.2d at 1020. \textit{Fitzgerald} was decided prior to \textit{United States v. Santiago}, 582 F.2d 1128 (7th Cir. 1978). Arguably, under \textit{Santiago} this determination should be made by the trial court pursuant to rule 104(a) of the Federal Rules of Evidence.
\textsuperscript{291} 579 F.2d at 1018. This type of argument is based upon the Supreme Court's holding in \textit{Kotteakos v. United States}, 328 U.S. 750 (1946). \textit{Kotteakos} involved a situation in which one individual would submit loan applications for several individuals pursuant to a federal housing program, in which the true purpose of the loan was not within the purposes of the program. The individuals whose names were used did not know or know of each other. The Court likened this scheme to a wheel with spokes but no connecting rim, and held that charging such a conspiracy in a single indictment prejudiced each of the individual defendants.
\textsuperscript{292} 579 F.2d at 1019. This argument is based on \textit{Grunewald v. United States}, 353 U.S. 391 (1957). \textit{Grunewald} recognized that every conspiracy is designed to be carried out in secrecy and refused to toll the statute of limitations because of acts to conceal the conspiracy after it had been discovered. The Court made special note that there was no evidence to indicate an original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission. \textit{Id.} at 404.
ments, each of which involved some but not all of the conspirators.\textsuperscript{293} Citing \textit{Blumenthal v. United States},\textsuperscript{294} the court stated that the co-conspirators are bound so long as the results fall within the common purpose of the conspiracy and they knowingly contribute to its furtherance. Certain overt acts were committed by a few of the co-conspirators in order to conceal the conspiracy. Each co-conspirator was held to be responsible for the acts of other co-conspirators that were committed as part of and in furtherance of the conspiracy. It is the final acts of concealment here, for which all co-conspirators are responsible, that fall within the statute of limitations.\textsuperscript{295} It is only necessary that those acts further the main purpose of the conspiracy within the meaning of \textit{Grunewald}.\textsuperscript{296}

\textit{United States v. D'Andrea}\textsuperscript{297} and \textit{United States v. Rose}\textsuperscript{298} also dealt with the substantive nature of conspiracy. In \textit{D'Andrea}, undercapitalized individuals sought to construct low-income housing, applying to the Federal Housing Authority for mortgage insurance. Because of cash-flow difficulties created by federal regulations that control the release of funds, certain false statements were made to the housing authority in order to obtain the release of the funds. The project was eventually discontinued. The defendants argued that the project did not fail because of the false statements but rather because of unforeseen difficulties encountered in the course of construction. They further argued that there was no evidence that any federal money was paid out for work that was not done or that any of the alleged co-conspirators were unjustly enriched through their participation in the project.

In affirming the convictions, the court did not seem to take issue with the defendants’ factual arguments. The court of appeals pointed

\textsuperscript{293} 579 F.2d at 1018.

\textsuperscript{294} 332 U.S. 539 (1947). \textit{Blumenthal} involved the unlawful sale of whiskey at over-ceiling prices during the period of price controls in World War II. The Court there held that even though proof at trial failed to establish a link between two sets of salesmen selling the same whiskey through the same distributor, the proof was such that the salesmen all constituted small parts of the same large conspiracy, a conspiracy which was designed to illegally distribute the whiskey.

\textsuperscript{295} 579 F.2d at 1019.

\textsuperscript{296} See note \textsuperscript{292} supra.

\textsuperscript{297} 585 F.2d 1351 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979).

\textsuperscript{298} 590 F.2d 232 (7th Cir. 1978). \textit{Rose} held that a conviction for conspiracy will be supported even though the substantive crime was never committed because the defendants unknowingly hired federal agents to commit the substantive crime.

In \textit{United States v. Page}, 580 F.2d 916 (7th Cir. 1978), and \textit{United States v. Washington}, 586 F.2d 1147 (7th Cir. 1978), the court dealt with challenges to conspiracy convictions based on the sufficiency of the evidence. In each case, the court pointed out that only slight evidence is needed to support a conviction for conspiracy as conspiracies by their nature are carried out in secret and direct evidence of agreement is rarely available.
out that 18 U.S.C. § 371,299 under which the defendants were charged, embraces much more than common law fraud.300 Rather, it reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government,301 and it is not necessary that the conspirators receive a pecuniary advantage, or that the government suffer a pecuniary loss.302

**Jury Instructions**

Considerations of due process303 require that a jury determine guilt or innocence on the basis of correct instructions of law which properly define the elements of the charge and the burdens of proof.304 The instructions must be read to the jury, and, at the judge's discretion, the written instructions may be given to the jury during their deliberations.305 The Seventh Circuit unequivocally places the burden on counsel to submit appropriate instructions to the court306 and to make specific objections to instructions on the record to preserve appellate review.307

In evaluating and reviewing the accuracy of jury instructions a focal point of inquiry this term has been the distinction between specific

299. 18 U.S.C. § 371 (1979) provides, in pertinent part:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

300. 585 F.2d at 1354.


302. 585 F.2d at 1354. See Hammerschmidt v. United States, 265 U.S. 182 (1924); United States v. Bradford, 148 F. Supp. 413 (E.D. La. 1905). Judge Swygert filed a lengthy dissent vigorously condemning the government prosecution in D'Andrea. A substantial portion of his dissent deals with the evidence elicited at trial and concludes that the actions of the defendants did not constitute criminal intent to defraud. Finally, he points out that the case represents an archetype of prosecutorial abuse of the conspiracy statute. 585 F.2d at 1358 (Swygert, J., dissenting).


304. See, e.g., United States v. Johnson, 590 F.2d 250 (7th Cir. 1979) (reversible error to omit from instruction that government must prove beyond a reasonable doubt that defendant was not entrapped).


306. Id. at 1110. Compare United States v. Fitzgerald, 579 F.2d 1014 (7th Cir.), cert. denied, 439 U.S. 1002 (1978) (ex parte modification of instructions by judge after instruction conference and closing arguments not error) with United States v. Hollinger, 553 F.2d 535 (7th Cir. 1977) (counsel entitled to know instructions prior to closing argument and charge to the jury). See also United States v. Nerone, 563 F.2d 836 (7th Cir. 1977).

307. If giving a particular instruction or failure to give a tendered instruction amounts to plain error, the record need not be preserved by timely objection. See United States v. Burnett, 495 F.2d 943 (D.C. Cir. 1974).
and general intent. In *United States v. Arambasich*, the court of appeals noted the "variety, . . . disparity . . . [and] confusion of judicial definitions of the requisite but elusive mental element." Although standard instructions on specific and general intent have been approved in numerous cases, the Seventh Circuit observed that the distinctions are both confusing and misleading. In *Arambasich*, the defendant was charged with Hobbs Act extortion affecting interstate commerce. The district court rejected the pro forma specific intent instructions tendered by the defendant's counsel and drafted its own instruction which defined the elements of the offense without reference to the term "intent." In approving the district court's instruction, the Seventh Circuit suggested that "more specific and therefore more comprehensible information is conveyed by stating the precise mental state required for the particular crime," rather than relying on rhetoric embodied in the standardized instructions.

Similarly, in *United States v. Allen* and *United States v. Larson*, the Seventh Circuit again discouraged the use of standardized or pattern jury instructions which attempt to define reasonable doubt. The court noted that although it is not error to give such an instruction when tendered by the defense, "[r]easonable doubt may be better left to speak for itself."

One further aspect of the court's consideration of pattern jury instructions deserves brief comment. In *United States v. Muscarella*

308. 597 F.2d 609 (7th Cir. 1979).
309. Id. at 612, quoting Morissette v. United States, 342 U.S. 246, 252 (1952).
310. 597 F.2d at 612-13. See E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 14.01, 14.03 (3d ed. 1977); L. LABUY, JURY INSTRUCTION IN FEDERAL CRIMINAL CASES § 4.04, (7th ed. 1965) [hereinafter referred to as LABUY].
311. Specifically, the court framed the analysis in terms of the defendant's knowledge that he was not entitled to payments and knowledge that the payments were made to him out of fear of economic harm. The court further defined knowingly as acting voluntarily and purposefully, not by mistake or accident, in light of all the facts and circumstances. 597 F.2d at 612.
312. Id. at 611.
313. The court reviewed specific and general intent instructions in the following cases decided this term: United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979) (Sherman Act violations); United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979) (bribery as defense to Hobbs Act extortion); United States v. Waronek, 582 F.2d 1158 (7th Cir. 1978) (theft from interstate shipment); United States v. Larson, 581 F.2d 664 (7th Cir. 1978) (bank fraud and embezzlement); United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978) (solicitation of bribery).
314. 596 F.2d 227 (7th Cir. 1979).
315. 581 F.2d 664 (7th Cir. 1978).
316. See also United States v. Loman, 551 F.2d 164 (7th Cir.), cert. denied, 433 U.S. 912 (1977).
317. 596 F.2d at 230.
318. During the past year, a committee composed of judges and local practitioners has begun the task of revising the pattern federal jury instructions to remove confusing verbiage and focus on understandable legal principles and elements of offenses.
and *United States v. Gabriel,* the court of appeals specifically approved challenged language in the standardized LaBuy "knowledge" instruction which charges that "[n]o person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate." *Muscarella* suggested that this language implicitly presumed knowledge by the defendant, however, the court adhered to its earlier decision in *United States v. Prewitt,* in approving the use of the pattern instruction.

**Closing Arguments**

The United States Supreme Court has held that the prosecutor may "strike hard blows, [but] he is not at liberty to strike foul ones." This principle is scrupulously applied in the area of misconduct in prosecutorial closing arguments. The prosecutor may argue every reasonable inference supported by the record, and may even argue that the defense is a concocted story and that defense witnesses are lying. The prosecutor may not, however, refer to uncharged crimes or the defendant's exercise of the fifth amendment privilege. In the context of comment on the fifth amendment privilege, the Seventh Circuit this term, in *United States v. Buege,* held that a prosecutor cannot argue that the evidence is "uncontradicted," or "unrefuted" in cases where the defendant has exercised the fifth amendment privilege and remained silent. The court's decision was premised on *Griffin v. California,* in which direct comment on the failure of the defendant to testify was held to be reversible error. To the extent that direct comment on the failure to testify is a burden on the fifth amendment guarantee, "it cuts down on the privilege by making its assertion costly."

In implementing the rationale of *Griffin,* numerous circuits have

319. 585 F.2d 242 (7th Cir. 1978).
320. 597 F.2d 95 (7th Cir. 1979).
321. LABUY, supra note 310, at §4.05.
322. 553 F.2d 1082 (7th Cir.), cert. denied, 434 U.S. 840 (1977).
324. See United States v. Micklus, 581 F.2d 612 (7th Cir. 1978).
325. Compare United States v. Vargas, 583 F.2d 380 (7th Cir. 1978) (prosecutor's suggestion of uncharged crime not supported by record held reversible error) with United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979) (prosecutor's suggestion of uncharged crime supported by circumstantial evidence held not error).
327. Where such a comment is followed by a curative instruction by the judge, it may be considered harmless error. United States v. Buege, 578 F.2d 187 (7th Cir. 1978); United States v. Muscarella, 585 F.2d 242 (7th Cir. 1978); United States v. Hansen, 583 F.2d 325 (7th Cir. 1978).
329. Id. at 614.
disapproved the use of the terms, "uncontroverted" or "uncontradicted" evidence in those cases where the non-testifying defendant is the only person able to controvert or contradict the government's evidence. The First Circuit adopted a per se rule requiring summary reversal where those terms are invoked by the prosecutor. In United States v. Buege, the Seventh Circuit took a more reasoned approach, recognizing that Griffin condemned direct comment on the exercise of the right, and only those statements which are "manifestly intended to be or [are] of such a character that the jury [may take them] to be comment on the defendant's failure to testify" should warrant reversal. Although the court in Buege declined to adopt the per se rule, a later unpublished order prospectively indicated that indirect comment on the fifth amendment privilege will result in summary reversal.

Pursuant to its supervisory powers, the court has the authority to adopt such a per se rule, however, such a rule would be difficult to reconcile with the Supreme Court's case-by-case evaluation of the indirect comment on the privilege.

**SENTENCING**

The contention that consecutive sentences were improperly imposed for the commission of essentially the same act raises two questions: whether Congress intended that the crimes should be prosecuted and punished cumulatively, and, if so, whether the double jeopardy clause of the fifth amendment is violated by the cumulative punishment. Under Blockburger v. United States, the Supreme Court

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330. United States v. Cornfeld, 563 F.2d 967 (9th Cir. 1977); United States v. Johnson, 563 F.2d 936 (8th Cir. 1977); United States v. Ward 552 F.2d 1080 (5th Cir. 1977).
334. A more interesting question with respect to indirect comment on failure to testify is presented in multiple defendant cases where less than all defendants testify and defense counsel emphasize that fact for the jury. United States v. Ziperstein, 601 F.2d 281, 286 (7th Cir. 1979) (where counsel for testifying defendant told the jury that "an innocent man almost invariably is eager to take the witness stand," held not error or basis for severance). But see De Luna v. United States, 308 F.2d 140 (5th Cir. 1962).
335. Circuit Rule 35 precludes use of unpublished orders as precedent, however, in United States v. Moody, No. 78-1981 (7th Cir. Feb. 27, 1979) (unpublished opinion), the court clearly served notice that "continued failure to heed [the] admonition will ... call for summary reversal."
336. Cf. Lockett v. Ohio, 436 U.S. 586, 595 (1978) (comment by prosecutor that evidence remained uncontradicted not error when defense attorney had told jury that defendant would testify when in fact defendant did not take the stand).
338. 284 U.S. 299 (1932). While double jeopardy is not referred to in Blockburger, in Brown.
held that the determination of whether there has been a double jeopardy violation depends upon "whether each provision requires proof of a fact which the other does not."339

This analysis was applied by the court in United States v. Mathis,340 United States v. Stavros,341 and United States v. Makres.342 In Mathis, consecutive sentences were imposed for theft of government property343 and assaulting a federal officer by use of a deadly weapon.344 The assault occurred during the course of the theft. In Makres, consecutive sentences were imposed for possession of stolen mail345 and uttering United States Treasury checks with forged endorsements.346 The checks were enclosed in the stolen mail that the

v. Ohio, 432 U.S. 161 (1977) it was recognized that the double jeopardy clause prohibits cumulative punishment.

339. 284 U.S. at 304.
340. 579 F.2d 415 (7th Cir. 1978).
341. 597 F.2d 108 (7th Cir. 1979).
342. 598 F.2d 1072 (7th Cir. 1979).
343. 18 U.S.C. § 2112 (1979) provides:
   Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.

344. 18 U.S.C. § 111 (1979) provides, in pertinent part:
   Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

345. 18 U.S.C. § 1708 (1979) provides:
   Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or
   Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or
   Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—
   Such be fined not more than $2,000 or imprisoned not more than five years, or both.

346. 18 U.S.C. § 495 (1979) provides:
   Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or
   Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or
   Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—
   Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.
defendant possessed. In both *Mathis*\(^{347}\) and *Makres*,\(^{348}\) the court had little difficulty in affirming the judgments as, in each case, the elements of one offense involved proof that is not contained in the other offense, and Congress intended to deal with separate and distinct policy considerations in enacting each statute.

In *Stavros*, the analysis is more complicated as the separate statutes could be violated in a variety of ways. The defendant was charged with accepting wages and willfully failing to pay the 26 U.S.C. § 4411 wager tax and failing to register as required by 26 U.S.C. § 4412, all in violation of 26 U.S.C. § 7203.\(^{349}\) In separate counts relating to the same acts, the defendant was charged with having engaged in the business of accepting wagers without having paid the section 4411 tax, in violation of 26 U.S.C. § 7262.\(^{350}\) In *United States v. Shaffer*,\(^{351}\) the Seventh Circuit had ruled that under the facts of that case, it was possible to violate section 7203 without violating section 7262. Proceeding on a case-by-case analysis, the court found that, under the facts of *Stavros*, the government could not prove the section 7203 violations without also proving the section 7262 violations. Consequently, the defendant's double jeopardy protections had been violated and the cumulative sentences were vacated.

Both *Mathis*\(^{352}\) and *United States v. Tucker*\(^{353}\) dealt with the prohibition of an increased sentence following remand. This prohibition is based upon the premise that it is a violation of due process to impart the appearance of vindictiveness for the exercise of the statutory right to appeal.\(^{354}\) Consequently, if a trial court is to impose a more severe sentence upon remand, the reasons for doing so must appear on the

347. 579 F.2d at 418-19. See also text accompanying notes 352-357 infra.
348. 598 F.2d at 1072.
349. 26 U.S.C. § 7203 (1979) provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

350. 597 F.2d at 110. 26 U.S.C. § 7262 (1979) provides:

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

351. 291 F.2d 689 (7th Cir. 1961).
352. 579 F.2d at 415.
353. 581 F.2d 602 (7th Cir. 1978).
In *Mathis*, the defendant was originally sentenced to concurrent sentences of eight years and three years. On remand, he was sentenced to six years and a consecutive term of five years probation. The court refused to view this sentence as a whole and modified the sentences to run concurrently.\(^{356}\) In so doing, the court of appeals adopted the Second Circuit's approach, in which the "maximum which the appellant might be required to serve under the terms of the judgment" is considered.\(^{357}\)

In *Tucker*, an enhanced sentence was imposed after retrial. Although the trial court did not state that it relied on evidence introduced at the second trial that had not been introduced at the first trial, the government attempted to argue that such evidence justified the enhanced sentence. The court rejected this argument on two grounds. First, the court pointed out that as the policy is designed to avoid the appearance of vindictiveness, it is implicit that the trial court itself must articulate, on the record, the basis for the enhanced sentence.\(^{358}\) Second, additional testimony as to facts that pre-dated the first conviction do not satisfy the "intervening detrimental deportment" requirement.\(^{359}\)

The argument that the trial court had penalized defendants for asserting fifth and sixth amendment rights was raised in *United States v. Allen*,\(^{360}\) *United States v. Washington*,\(^{361}\) and *United States v. Santiago*.\(^{362}\) In *Allen*, the trial court had stated that, in part, its sentence was based on the fact that the defendant did not testify at trial despite no prior convictions that could have served as the basis for impeachment, on the fact that he was obviously guilty, and finally on the fact that he showed no remorse.\(^{363}\) In *Washington*, the court considered the defendants' prior convictions under a possession of marijuana statute that was later declared unconstitutional and viewed the defendants' involvement in the offense solely on the basis of the government's evidence in light of the fact that the defendants did not testify and would

\(^{355}\) Id. at 726.


\(^{358}\) 581 F.2d at 605-06.

\(^{359}\) Id. at 606. See *Wood v. Ross*, 434 F.2d 297, 299 (4th Cir. 1970).

\(^{360}\) 596 F.2d 227 (7th Cir. 1979).

\(^{361}\) 586 F.2d 1147 (7th Cir. 1978).

\(^{362}\) 582 F.2d 1128 (7th Cir. 1978).

\(^{363}\) 596 F.2d at 231 n.3.
not talk to a probation officer preparing a pre-sentencing report. Finally, in *Santiago*, the district court, at sentencing, commented that the defendant had been involved in the transaction yet continued to deny his guilt, which was "another strike against him, as far as I am concerned."365

In each case, the sentence was affirmed based upon principles spelled out by the United States Supreme Court in *United States v. Grayson*.366 That is, modern sentencing concepts require that the sentencing court evaluate the convicted defendant's potential for rehabilitation, and that such a determination requires an examination of the "defendant's whole person and personality."367

Finally, in *United States v. Cooper*,368 the defendant was convicted of two robberies of individuals possessing postal service funds.369 The robberies were committed on successive days. The trial court sentenced the defendant to 10 years and 25 years concurrent under a provision of 18 U.S.C. § 2114 that states the maximum period of imprisonment is ten years and that for a subsequent offense the period of imprisonment shall be twenty-five years. The court examined the legislative history and concluded that the term "subsequent arrest and conviction therefore" should be read into the mandatory twenty-five year section of the statute.370 Therefore, the twenty-five year mandatory provision of section 2114 only applies to a robbery committed at a time when the defendant has a prior section 2114 robbery conviction on his record.

**Motions for New Trial**

In *United States v. Robinson*,371 the defendant was charged with conspiracy, civil rights violations, and kidnapping resulting in murder in connection with the shooting of one Jeff Beard. The chief government witness at trial, O'Neal, testified that he received the murder weapon from Robinson and thereafter O'Neal gave the gun to his fa-

364. 586 F.2d at 1155-56.
365. 582 F.2d at 1136.
366. 438 U.S. 41 (1978). In *Grayson*, the Supreme Court approved the sentencing court's consideration that a defendant had committed perjury in testifying at trial.
367. *Id.* at 55. Cf. *United States v. Gandara*, 586 F.2d 1156 (7th Cir. 1978), in which the presentencing report required by rule 32(c) of the Federal Rules of Criminal Procedure was waived by the defendant just prior to the imposition of the maximum sentence permitted. The court of appeals refused to hold that this waiver constituted per se ineffective assistance of counsel, especially in light of rule 32(c)(1), which specifically contemplates the possibility of waiver. 586 F.2d at 1160.
368. 580 F.2d 259 (7th Cir. 1978).
370. 580 F.2d at 261, 263.
O'Neal's father testified at trial that he cleaned the gun by boiling it, and he then used a cloth and coathanger with light machine oil to clean the barrel. He further testified that the cloth may have separated from the coathanger in the cleaning process, and scratches may have been made inside the barrel. The government ballistics expert was unable to conclude that the weapon cleaned by O'Neal's father was in fact the weapon used to kill Beard because of barrel riflings. The expert further testified that the cleaning procedure could have altered the barrel and could explain the inability to make a positive ballistics identification. Six months after Robinson's conviction, Robinson sought production of the gun for scientific examination to verify the cleaning technique testified to by O'Neal's father at trial. After Robinson's original appeal was affirmed, the district court granted Robinson's motion for production of the weapon. The test results indicated that the weapon had not been cleaned in the manner in which O'Neal's father had testified at trial. On this basis, Robinson sought habeas corpus relief and a new trial.

Robinson argued that this evidence entitled him to a new trial because critical testimony was false, or alternatively, the new evidence, though not establishing perjured testimony, would probably lead to an acquittal. The district judge rejected both theories, finding that defense counsel had failed to exercise due diligence during trial. The Seventh Circuit posited the standard of review as "whether the district court's denial of Robinson's motion for a new trial on the basis of lack of due diligence was 'wholly unsupported by evidence.'" The court concluded that as the government expert's report and testimony with respect to the possible consequences of the cleaning method were available to defense counsel at trial, his lack of diligence foreclosed appellate consideration.

The new trial standard, as well as the concepts of plain error and

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373. See Larrison v. United States, 24 F.2d 82 (7th Cir. 1928). Larrison requires granting a new trial when the court is satisfied that testimony given by a material witness was false, and further that the jury might have reached a different conclusion given that knowledge of its falsity. Moreover, Larrison requires that the movant for the new trial be taken by surprise when the false testimony was given, or learn of its falsity after trial. 24 F.2d at 87-88.
374. In the new trial evaluation under rule 33, if the basis for the claim is other than perjured testimony (as governed by Larrison), the test is whether the evidence came to the defendant's knowledge after trial and could not have been discovered sooner with due diligence. The newly discovered evidence must be material, not merely impeaching or cumulative, such that the evidence would probably lead to acquittal in the event of retrial. United States v. Johnson, 142 F.2d 588 (7th Cir.), appeal dismissed, 323 U.S. 806 (1944).
harmless error, exemplify the shifting judicial perspectives.376 Certainly the emphasis on a just process rather than a just result is an appropriate appellate posture, but it is one that values finality over the "satisfaction that the search for the truth has been pursued as far as may reasonably be possible."377

PRISONERS' RIGHTS AND POST-CONVICTION REMEDIES

The law of prisoners' rights and remedies has been significantly affected during the past several years by the United States Supreme Court's interpretation of the scope of habeas corpus relief. In Stone v. Powell,378 the Court held that a state prisoner may not be granted federal habeas corpus relief on the ground that unconstitutionally obtained evidence was admitted at trial, if the state has provided an opportunity for full and fair consideration of the claim.379 The Court reached this conclusion "by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims,"380 noting that "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."381 In Wainwright v. Sykes,382 the Court held that failure to comply with a state procedural requirement for objecting to the admission of a confession at trial precluded federal habeas corpus review of the defendant's constitutional claim. The Court recognized that a habeas corpus petitioner is entitled to an independent federal court examination of a constitutional claim despite the adverse resolution in the state court proceeding.383 Wainwright, however, involved "contentions of federal law which were not resolved . . . due to . . . failure to raise them there as required by state procedure."384

The Seventh Circuit has implemented the rationale of Stone v. Powell and Wainwright v. Sykes in several cases during the past term, focusing on the opportunity of the petitioner to litigate the claim in the state court proceedings. For example, Stone v. Powell was held to be

376. See, e.g., United States v. Disston, 582 F.2d 1108 (7th Cir. 1978).
377. 585 F.2d at 283. (Wood, J., dissenting). It remains to be seen whether this focus on the quality and diligence of defense counsel will be accompanied by a reassessment of standards of competency of counsel. See United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 876 (1975).
379. Id.
380. Id. at 489.
381. Id. at 493 n.35.
384. 433 U.S. at 87 (emphasis in original).
dispositive in *United States ex rel. Barksdale v. Sielaff.* The defendant in *Barksdale* had argued unsuccessfully to suppress evidence at trial, however, on direct appeal he did not raise the fourth amendment issue. Finding that the opportunity to fully and fairly litigate the fourth amendment claim had been available to the defendant, but that he had failed to avail himself of it, the Seventh Circuit foreclosed habeas corpus relief.

In *United States ex rel. Maxey v. Morris,* a habeas petitioner alleged that a state search warrant was constitutionally defective because it was based on an affidavit signed with a fictitious signature. Although the Seventh Circuit, in *United States ex rel. Pugh v. Pate,* held that such “John Doe” affidavits are insufficient to establish probable cause in federal proceedings, the court did not reach the merits of the *Maxey* defendant’s identical constitutional claim. The defendant in *Maxey* had failed to raise the constitutional issue at trial, by post-trial motions, or on direct appeal. The Seventh Circuit emphasized that the defendant’s failure to raise the issue was not relevant because the state had provided an opportunity to fully and fairly litigate the claim. The defendant argued that unlike the federal courts, Illinois courts upheld warrants based on “John Doe” affidavits and that, consequently, the opportunity to litigate his claim in state court was meaningless. In rejecting this argument, the Seventh Circuit specifically noted that collateral federal review of state constitutional holdings was what *Stone* sought to avoid.

A cognizable claim for habeas corpus relief was presented in *United States ex rel. Hairston v. Warden.* During the course of his

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386. The defendant’s pro se notice of appeal in the state court alleged various constitutional violations, but his “court-appointed attorney did not pursue the fourth amendment claim.” 585 F.2d at 292.
388. 591 F.2d 386 (7th Cir. 1979).
389. 401 F.2d 6 (7th Cir.), cert. denied, 395 U.S. 965 (1968).
390. In *People v. Stansberry,* 47 Ill. 2d 541, 268 N.E.2d 431, cert. denied, 404 U.S. 873 (1971), the Illinois Supreme Court rejected *Pugh,* holding that a search warrant based on an affidavit signed with a fictitious name was not invalid as a matter of law. Maxey argued that *Stansberry* made his situation analogous to *Gamble v. Oklahoma,* 583 F.2d 1161 (10th Cir. 1978), wherein the Tenth Circuit affirmed habeas relief when the Supreme Court of Oklahoma refused to follow *Brown v. Illinois,* 422 U.S. 590 (1975), in evaluating the admissibility of a confession. The Seventh Circuit concluded that *Gamble* was distinguishable because *Stansberry* does not “flagrantly disregard” Supreme Court precedent. 591 F.2d at 389-90.
391. Alternatively, the court concluded that failure to raise the objection waived it under Illinois procedural law and thus habeas corpus review was precluded under *Wainwright.* Id. at 391.
392. 597 F.2d 604 (7th Cir. 1979).
state court trial, the defendant had challenged the constitutionality of the Illinois alibi-notice statute. In upholding the constitutionality of the provision, the state trial judge forced the defendant to abandon his alibi defense. While the conviction was being affirmed on appeal, the United States Supreme Court, in *Wardius v. Oregon*, invalidated an alibi-notice statute similar to that of Illinois. Because the inability to raise an alibi defense undermined the integrity of the factfinding process, *Wardius* was given retroactive effect in examining Hairston’s claim.

In appealing the district court’s issuance of the writ, the state respondents argued that *Wardius* ought to be construed in the context of the holdings in *Stone* and *Sykes*, suggesting that “*Wardius* cannot be violated unless the defendant offers an alibi defense at trial and the defense is excluded.” The court in *Hairston* rejected this implied analogy, finding that the state trial judge had effectively precluded use of the alibi defense, thus the defendant’s conviction was constitutionally defective.

The exhaustion of state remedies requirement of the federal habeas corpus statute complements the principles of *Stone* and *Sykes*, in satisfying the interests of comity in federal review of state convictions. For example, in *Moore v. Duckworth*, the Seventh Circuit examined the post-conviction remedies available to an Indiana prisoner. Finding that there was “ample opportunity to present claims for relief in state courts,” the court of appeals held that the habeas petition was premature. Conversely, in considering the exhaustion requirement for a speedy trial claim raised in *United States ex rel. Barksdale v. Sielaff*, the court found that where exhaustion of Illinois post-conviction remedies would be futile, habeas relief was available.

In two cases this term, the court addressed the issue of the nature of the liberty interest required to implicate due process. In *Durso v. Rowe*, the court held that a plaintiff in a section 1983 action must be given the opportunity to prove that an official practice existed which conditioned revocation of work-release status on proof of misconduct. Such a practice, if shown, could give rise to a justifiable expectation in

394. 597 F.2d at 608.
396. 581 F.2d 639 (7th Cir. 1978). The defendant in *Moore* asserted constitutional error in that he had been unable to assist his counsel and he had been denied a speedy trial.
397. Id. at 644-45, quoting Langley v. State, 256 Ind. 199, 267 N.E.2d 538, 541 (1971).
398. 585 F.2d 288 (7th Cir. 1978). The court noted that the Illinois “waiver” doctrine precluded meaningful post-conviction relief. See also United States ex rel. Williams v. Morris, 594 F.2d 614 (7th Cir. 1979).
399. 579 F.2d 1365 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979).
a liberty interest which would require procedural due process in revocation of work release status. In *Christopher v. Board of Parole*, the court relied on the rationale of *Meachum v. Fano* in holding that even prior to the effective date of parole, a parolee had a justifiable expectation that adverse action would not be taken except for misbehavior or upon the occurrence of specific events. That justifiable expectation in the liberty interest is the basis for the requirement of procedural due process. In *Christopher*, the court defined the components of procedural due process which are necessary in the context of revocation of a grant of parole. During his hearing before the parole board, the petitioner was allowed to present affidavits and other documentary evidence on his behalf. Also, he was represented by retained counsel. The petitioner claimed a due process violation in that he did not have the right to confront and cross-examine adverse witnesses by compelling their appearance. The petitioner contended that he was "virtually" a parolee, and was entitled to a full *Morrissey*-type hearing including confrontation of witnesses. In rejecting this argument, the Seventh Circuit balanced the substantial governmental interest in whether parole would be rescinded for a prisoner still in custody, against the parolee's justifiable liberty expectation, and found that "something less than a full panoply of due process rights" was required. The court noted that the hearing satisfied the petitioner's due process rights in the context of prison disciplinary proceedings, as outlined in *Wolff v. McDonnell*. Recognizing the risk to prison security inherent in a full adversary hearing involving prisoner witnesses,

400. 589 F.2d 924 (7th Cir. 1978).
401. 427 U.S. 215 (1976). In *Meachum*, the Court held that transfer of a prisoner from one penal institution to another did not trigger the protections of procedural due process. Although the Court noted that the transfer adversely affected the prisoner, the Court held that discretionary transfer did not involve a liberty interest, so long as the transfer was administrative and not punitive or conditioned on prisoner misconduct.
402. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court established minimum due process requirements for a parole revocation hearing: (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body such as a traditional parole board; and, (6) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.
403. 589 F.2d at 930.
404. The court summarized the requirements set forth in *Wolff v. McDonnell*, 418 U.S. 539 (1974), as:
(1) advance notice of the information to be considered at the hearing; (2) a written statement of the evidence relied on and reasons for the decision; (3) the right of the prisoner to be present; (4) the right to present documentary evidence in his behalf; (5) a qualified right to have a representative present to aid the prisoner in presenting his case; and, (6) a qualified right to call witnesses and present documentary evidence in his behalf. 589 F.2d at 928.
the Court in Wolff held that confrontation of witnesses was not an essential element of due process. The petitioner argued that as the witnesses he sought to confront were not prisoners, this danger was not present, and therefore Wolff was not dispositive. Balancing the governmental interest against the interests of a parole grantee, the Seventh Circuit held that the petitioner’s due process rights were not violated by his inability to confront the witnesses against him.

CONCLUSION

In an overview of the work of the United State Court of Appeals for the Seventh Circuit, it is difficult to discern any one approach or developing trend. The decisions of the court of appeals have been thoughtful and wide-ranging, conscientiously examining a variety of criminal law issues. While no single thread binds these cases together, to a limited extent an identifiable pattern is emerging. Adhering to the implicit mandate of Stone v. Powell, the Seventh Circuit has truly become a court of review. The appellate focus has shifted, testing only the opportunity for a fair trial, not the fairness of the trial itself. As a corollary, the defense counsel is the primary guardian of the defendant’s rights and lack of diligence in protecting or pursuing those rights at trial will foreclose further consideration.