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Criminal Law and Procedure: Old Habits Linger On

R. Brent Daniel

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During the calendar year of 1980, 238 out of a total of 1,586 appeals commenced in the United States Court of Appeals for the Seventh Circuit were from judgments in criminal cases. There were forty-two related appeals taken from habeas corpus determinations. While the Seventh Circuit reversed judgments in approximately 28.4 percent of the civil appeals, it reversed only 9.3 percent of the criminal appeals. In the nine month period between January and September of 1980, 33.4 percent of the Seventh Circuit's dispositions were reported in published opinions; 36.3 percent were disposed of pursuant to circuit rule 35 as unpublished orders which may not be cited as precedent in other cases; and 30.4 percent were dismissed or disposed of pursuant to various other orders. In last year's survey of the Seventh Circuit's criminal law and procedure decisions, circuit rule 35 was examined with regard to the practice of reissuing "unpublished orders" as published opinions. While that practice remains an area of concern, it will not be addressed in this article since the issue is now pending on a petition for certiorari in the Supreme Court.

This article will survey a number of the Seventh Circuit's decisions

* B.S., Bradley University; J.D., University of Puget Sound; member of the California and Illinois Bars.

2. Id.
3. Id.
4. Id.
6. Goldberg v. Medtronic, Inc., No. 80-2291 (7th Cir. April 30, 1981) (unreported), petition for cert. filed, 50 U.S.L.W. 3176 (U.S. Sept. 22, 1981). In Goldberg, the trial court refused to submit special interrogatories to the jury regarding the "obviousness" issue in a patent infringement case. On appeal, the appellee, Medtronic, relied heavily upon another district court opinion, Hancock Laboratories, Inc. v. American Hospital Supply Corp., 199 U.S.P.Q. 279 (N.D. Ill. 1978), which presented what it characterized as a "uniquely similar fact situation." Brief for Appellee at 36, Goldberg v. Medtronic, Inc., No. 80-2291 (7th Cir. April 30, 1981). Medtronic was unaware, however, that the Hancock decision had been reversed by the Seventh Circuit in an unpublished order holding that the "obviousness" issue is one of fact. The appellant moved to have the Seventh Circuit's unpublished order reversing Hancock reissued as a published opinion or, in the alternative, for leave to rely upon the unpublished order at oral argument. The motion was denied, and the decision of the Goldberg trial court, although controverted by the Seventh Circuit's unpublished reversal of Hancock, was itself affirmed by unpublished order. In its petition for
regarding substantive federal criminal law and will examine the court's approach to certain criminal procedure issues during the 1980-81 term. Since these facets of the criminal justice system have a tendency to overlap, the substantive issues, although somewhat disparate, will be addressed in one section. The procedural issues will then be addressed in a separate section. This article is not intended to be an exhaustive exploration of the philosophical underpinnings of the Seventh Circuit's approach to criminal law and procedure issues, and it should be considered as more in the nature of a journalistic survey of the 1980-81 term. However, as will become apparent, even a cursory examination of the court's opinions reveals a strong disposition to remain tied to the highly conservative approach which is characteristic of the Seventh Circuit's prior terms.

**SUBSTANTIVE ISSUES**

This section will deal with the Seventh Circuit's task of construing and applying legislative enactments in a variety of situations. In two noteworthy decisions this term, the court explored the contours of federal conspiracy law. The court also had occasion to interpret sections of the federal conflict of interest law, the Real Estate Settlement Procedures Act, and the federal Gun Control Act. In addition, the court interpreted the "sanctions" provision of the Speedy Trial Act.

**Conspiracy**

In *United States v. Castro*, the court considered the double jeopardy bar against multiple prosecutions for the same offense in connection with multiple narcotics conspiracy charges. The court abandoned the traditional "same evidence" test that it had previously used in *United States v. Buonomo*, at least for purposes of narcotics conspiracy cases, and adopted an approach in which the court looks to "both the indictments and the evidence and consider[s] such factors as whether the conspiracies involve the same time period, alleged co-concertiorari, the petitioner argues that the Seventh Circuit has nullified the principle of stare decisis and denied the petitioner its right to trial by jury.

10. United States v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980).
11. United States v. Carreon, 626 F.2d 528 (7th Cir. 1980).
12. 441 F.2d 456 (7th Cir. 1980).
spirators and places, overt acts, and whether the conspiracies depend upon each other for success" in order to determine whether a conspiracy has been subdivided arbitrarily, resulting in multiple indictments for a single illegal agreement. This approach had previously been adopted by the Fifth Circuit.

In Castro, two undercover Puerto Rican police officers and an informant met with Castro at his bar in Las Hoyas, Puerto Rico. Castro was asked for help in locating a heroin connection in Chicago. Castro gave the officers the name and Chicago address of "Johnny El Loco."

The officers later met with Castro's stepson, Carlos Ramos. Ramos offered to take the officers to Chicago to purchase two kilos of heroin that were supposed to be available there. At the San Juan International Airport, the officers told Ramos that they would introduce their "money man" to him in Chicago, and Ramos agreed to introduce "El Loco" to the money man. Upon arrival in Chicago, Ramos was introduced to another Puerto Rican police officer who purported to be the money man. Ramos was unable to contact "El Loco" but was eventually able to provide a kilo of heroin from another source identified as "Alejo" in a deal set up by a man known as "Acapulco Joe." This transaction occurred on September 29, 1977. Two days later, the officers expressed to Ramos a desire to obtain an additional five or ten kilos of heroin. Ramos agreed, and it was arranged that he would contact the undercover officers in Puerto Rico when the connection had been made.

The officers then visited Castro at his bar and, complaining of Ramos' poor performance, urged Castro to travel to Chicago to arrange this transaction. Castro declined because of legal restrictions on his travel. However, on October 28, 1977, Castro told the officers that he would call Ramos and tell him to arrange a sale in Chicago. On November 1, 1977, the officers returned to Chicago. Ramos met the officers and took them to Aurora, Illinois, where he introduced them to a man named Perez. Perez sold five kilos of heroin to the officers.

Castro was among those subsequently arrested and was charged in two indictments, issued approximately three weeks apart, with conspiracy to distribute heroin and distribution of heroin. The first indictment on which he was tried had been issued on February 2, 1978, and
charged Castro with the Aurora distribution of five kilos and a conspiracy with Perez covering the period from September 1977 through February 1978. On July 28, 1978, following a jury trial, Castro was found not guilty on both counts.

The other indictment, issued on January 12, 1978, alleged that Castro had engaged in a conspiracy with Alejo, Ramos and Acapulco Joe beginning in the summer of 1977 and continuing until the November 1977 arrests. Castro moved to dismiss the charges against him on the grounds of double jeopardy and collateral estoppel. The motions were denied, and Castro was convicted.19

In considering the double jeopardy issue on appeal, the Seventh Circuit noted that the traditional Buonomo test—the "same evidence test"—is insufficient to prevent multiple prosecutions in narcotics conspiracy cases because the prosecution can shape the overt acts charged in each indictment "and thus, under the guise of prosecutorial discretion, advance the proposition of one conspiracy's being capable of proof in several prosecutions requiring different evidence for each conviction."20 Applying the principles utilized in United States v. Marable,21 the court found that both conspiracies involved the same "core conspirators," one collective agreement to distribute heroin, the same place of distribution, the same time period, and the same methods of operation.22 The only distinction was that the conspiracies involved different suppliers. This distinction was held to be insufficient to establish multiple conspiracies, and Castro's conspiracy conviction was reversed on double jeopardy grounds.23 This new approach by the court appears to be a sound step forward from the outmoded Buonomo rule.

In another case, the Seventh Circuit examined the scope of conspiracy prosecutions in connection with statute of limitations considerations. In United States v. Payne,25 the defendant was charged in only one count of a twelve count indictment involving several co-defendants. Payne was convicted under the general conspiracy statute26 of

19. 629 F.2d at 460.
20. See 441 F.2d 922 (7th Cir.), cert. denied, 404 U.S. 845 (1971).
21. 629 F.2d at 461.
22. 578 F.2d 151 (5th Cir. 1978).
23. 629 F.2d at 463.
24. Id. at 465. The court further found that since no evidence of the September 29, 1977, transaction was admitted at the first trial, the Government was not collaterally estopped from prosecuting the substantive count of the second indictment. However, since the conspiracy evidence was improperly before the jury, a remand on the substantive count was necessary. Id. at 466.
conspiring to cause the transportation of stolen motor vehicles from Kentucky to Indiana in violation of 18 U.S.C. § 2312 and to receive, conceal and sell such vehicles in violation of 18 U.S.C. § 2313. Payne's co-defendants all entered pleas of guilty before the case was submitted to the jury.

The conspiracy count against Payne alleged nineteen overt acts. Overt acts eleven through fifteen were withdrawn from jury consideration. The first ten overt acts were alleged to have occurred between January and May of 1974—outside the five year period before August 22, 1979, when the indictment was returned. Overt acts sixteen through nineteen were alleged to have occurred in May of 1978.

Payne contended that the 1978 overt acts constituted a separate conspiracy and could not be used to reactivate a conspiracy that had been nonexistent since 1974. But the court reasoned that since the parties had contemplated a continuing relationship based on the supply and demand of stolen cars, the conspiracy had continued despite the fact that no additional acts in furtherance of the original 1974 conspiracy were committed until after the statute of limitations had run. Relying on United States v. Nowak which held that the duration and identity of a conspiracy depends upon its terms, the court affirmed Payne's conviction. The Nowak decision, however, is distinguishable, and the court's conclusion in Payne is questionable.

Nowak involved a conspiracy to misapply federally insured funds and to make fraudulent statements to an agency of the United States. Unlike Payne, the Nowak conspiracy required the defendants to routinely give false answers to questions by federal regulatory examiners. It is fair to infer from the nature of the transaction involved that the Nowak conspirators contemplated the necessity of this ongoing pattern.

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.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

27. This apparently was because these acts involved only the co-defendants who were no longer on trial.
28. 18 U.S.C. § 3282 (1976) provides:
   Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.
29. 635 F.2d at 645.
30. 448 F.2d 134 (7th Cir. 1971).
31. Id. at 139.
of fictitious statements. Unlike the situation in Nowak, there is no apparent indication in Payne that the conspiracy existed or that acts in furtherance of it occurred from its termination in 1974 until 1978. Yet, the jury was presented with evidence dating back to 1974 to prove the alleged offense.

The Payne court has extended the rule in Nowak dangerously close to conflicting with the established rule that, once the object of a conspiracy has been attained, the conspiracy terminates and no subsidiary conspiracy to conceal the crime may be inferred from evidence showing merely that the conspirators took steps to avoid apprehension. Although the 1978 overt acts alleged in Payne do not relate to the attempted concealment of a previous conspiracy, it seems that the potential for abuse in the admission of evidence and the possibility of prosecutorial overreaching which may flow from Payne warrant a closer examination. Since a co-conspirator may engage in conduct arguably related to a long dormant conspiracy at any time without a defendant's knowledge—thus reactivating the dormant conspiracy according to Payne—conspiracy prosecutions conceivably might never be barred by the statute of limitations.

Federal Conflict of Interest Law

In United States v. Irons, the Seventh Circuit interpreted the federal conflict of interest law in a manner which also seems to leave the efficacy of the statute of limitations in some doubt.

In late 1973, Irons was employed as an Education Program Director for the Department of Health, Education and Welfare. As part of his duties, Irons had supervisory responsibility over several educational programs funded by HEW. Irons was authorized to recommend action to the directors of these educational programs, particularly in the for-

33. 640 F.2d 872 (7th Cir. 1981).
34. 18 U.S.C. § 208(a) (1976). The statute provides:

   Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

   Shall be fined not more than $10,000, or imprisoned not more than two years, or both.
In December of 1973, Irons met with the director of one of the programs he supervised to discuss the budget. The director had allocated a sum for audio-visual equipment in his proposed budget, and Irons recommended that this amount be increased. The budget was amended as suggested and, in April of 1974, the program received a grant from HEW which included $13,000 for audio-visual equipment. Irons then suggested to the program director that Advance Photo and Sounds (APS) be invited to bid on the contract for the audio-visual equipment.

APS did submit a bid, and the program director subsequently accepted the APS bid in September of 1974. Unknown to the program director was that APS had never done business as an audio-visual equipment supplier; that the man whom Irons had told him to deal with at APS was an assistant director of a funeral home who was a long-time friend of Irons, who owned no interest in APS, and who had never been involved in the audio-visual equipment business; and that Irons was associated with APS. The program director paid APS $12,855 for the audio-visual equipment and delivered a check for that amount, payable to APS, to Irons' home. Irons then purchased the equipment for APS from another supplier in September of 1974, and the program director picked up the equipment at Irons' home several weeks later.

In May of 1974, the director of another educational program supervised by Irons sought his advice regarding disposition of a budget surplus. Irons recommended the purchase of audio-visual equipment and suggested that APS could give a "good price." The program director purchased $3,120 worth of audio-visual equipment from APS on May 14, 1974. The equipment was delivered on August 28, 1974, and the director gave Irons a check for the purchase price the next day.

On August 29, 1979, Irons was indicted for violating the federal conflict of interest law. Irons moved to quash the indictment on the ground that the prosecution was barred by the statute of limitations. Count One of the indictment read:

From in or about September 1973, to in or about January 1975, Louis Irons... knowingly participated personally and substantially as a Government employee through recommendation, the rendering of advice, causing delivery to be made of equipment,

35. 640 F.2d at 873.
36. See note 34 supra.
37. See note 28 supra.
Irons contended that any actions proscribed by the statute had occurred prior to July 1, 1974. He also contended that the "causing delivery to be made" and "receiving payment" language had been inserted into the indictment merely to bring the case within the statute of limitations. The Government responded that Irons' later conduct fell within the "or otherwise" catchall language of the statute.

The issue, therefore, was how to properly interpret the phrase "or otherwise" in the statute. The court rejected Irons' argument that the doctrine of *ejusdem generis* should be applied and proceeded to examine the predecessor statutes and the legislative history of the conflict of interest statute. For almost one hundred years, said the court, the predecessor conflict of interest statutes had proscribed participation by a government employee in the "transaction of business" with any entity in which he had a personal financial interest. Examining the legislative history, including the House and Senate reports, the Seventh Circuit concluded that the congressional intent in enacting the present law had been to broaden the scope of the prior conflict of interest provision. As a result, Irons' participation in the delivery of the equipment and the receipt of payments for it as an agent of APS was considered part of the offense, and his conviction was affirmed.

While it is clear from the congressional reports that Congress did intend to broaden the scope of the federal conflict of interest statute, a close reading of those reports indicates that only "significant participation in government action" or "participating on behalf of the Government" was intended to be encompassed. It appears that Irons'
conduct in "causing delivery" and "receiving payment" did not occur in his capacity as a government employee, but rather in his capacity as an agent of APS.

In his incisive dissent, Judge Dumbauld of the District Court for the Western District of Pennsylvania, sitting by designation on the Seventh Circuit, concluded that the crime was complete when Irons recommended the purchase of equipment from his firm. This appears to be the better view. Like the Payne decision, Irons will impose constant unease and fear upon potential indictees, perhaps rehabilitated and repentant, by attenuating the relief which is supposed to be assured by the statute of limitations.

**Real Estate Settlement Procedures Act**

The Seventh Circuit's statutory interpretation took an interesting turn in *United States v. Gannon.* Gannon involved one of the first pecuniarily interested in business entities from transacting business with such entity on behalf of the Government. Section 208(a) would prohibit not merely 'transacting business' with a business entity in which the government employee is interested but would bar any significant participation in government action in the consequences of which to his knowledge the employee has a financial interest.

H.R. REP. No. 748, 87th Cong., 1st Sess. 24 (1961). The portion of the Senate report quoted by the court reads:

[S]ubsection (a) improves upon the present law [§ 4341] by abandoning the limiting concept of the 'transaction of business.' The disqualification of the subsection embraces any participation on behalf of the Government in a matter in which the employee has an outside financial interest, even though his participation does not involve the transaction of business.


46. 640 F.2d at 879 (Dumbauld, J., dissenting). As Judge Dumbauld stated:

It is plain that [Irons] violated 15 U.S.C. 208 . . . .

However, in my opinion, his criminal conduct was perpetrated more than five years before the indictment was returned on August 29, 1979, and prosecution is thus precluded by the statute of limitations (18 U.S.C. 3282).

The crime was completed when [Irons] recommended the purchase of equipment from his firm. He would have been guilty even if his subordinate had rejected his suggestion and had purchased from a competitor. His subsequent actions in delivering merchandise or collecting payment (which the Government relies on to avoid the statute of limitations) might perhaps be regarded as acting (under the other hat of his conflicting capacities) as agent of the seller rather than "as a Government officer or employee" on behalf of the buyer. In any event such action is not an element of the crime as defined by Congress. If the equipment broke down ten years later, and appellant repaired it, such conduct would hardly be thought adequate to serve as a basis for prosecution at that late date; but the reasoning of the majority of the panel would lead to that result.

The words "or otherwise" should be interpreted under the rule of ejusdem generis. They obviously refer to other modes of exerting influence or pressure upon the government agency to favor the seller in which appellant has a financial interest. They do not include within the crime mere ministerial conduct on the part of the seller in performing a contract. The majority opinion places on those two words a burden heavier than they can support.


At the time of his indictment, Gannon was employed as a counterman in the Torrens office of the Cook County Recorder of Deeds. His function was to receive documents for Torrens registration along with a statutory fee, which would be given to a cashier in return for a stamped receipt which would then be given to the customer. Employees of various banks and savings and loan associations would customarily give two or three dollars in addition to the statutory fees to the defendant because they believed they received prompt service in return for the gratuities. Gannon was found guilty on twenty-eight counts of violating RESPA by accepting the extra payments. On appeal, he contended

49. 12 U.S.C. § 2607(b) (1976) provides:

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

RESPA also prohibits kickbacks in connection with certain real estate settlement services:

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

Id. § 2607(a). And the penalties for violations of these provisions can be severe:

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) In addition to the penalties provided by paragraph (1) of this subsection, any person or persons who violate the provisions of subsection (a) of this section shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) of this section shall be jointly and severally liable to the person or persons charged for the settlement services involved in an amount equal to three times the amount of the portion, split, or percentage. In any successful action to enforce the liability under this paragraph, the court may award the court costs of the action together with a reasonable attorney’s fee as determined by the court.

Id. § 2607(d). However, the statute clearly sets out several broad classes of payments which are outside its prohibitions:

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, or (3) payments pursuant to co-operative brokerage and referral arrangements or agreements between real estate agents and brokers, or (4) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Administrator of Veterans’ Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture.

Id. § 2607(c).
that although he accepted the gratuities, he did not violate section 2607(b) because the gratuities were not a portion of what he received for rendering the services. The Seventh Circuit agreed. The court noted that both the indictment and the Government's trial memorandum stated that the payments Gannon had received were other than for services he actually performed. Since the gratuities received were not for the rendering of real estate services, they could not be considered a portion of the charges for unperformed real estate service. The court apparently assumed that, although the gratuities were a customary part of doing business, the institutions involved altruistically shouldered the burden of paying an extra two or three dollars per transaction and ignored these costs in determining their "charges." The court concluded that the rule of statutory construction requiring criminal statutes to be strictly construed mandated this conclusion. The court observed that the legislative history of RESPA indicated that it was aimed at abusive practices in the conveyancing industry, primarily at kickback and referral fee arrangements, and not at local government employees who accept gratuities.

This construction of a statute which was obviously intended to expand federal jurisdiction over local corruption, stands in stark contrast to the Seventh Circuit's broad interpretations of the Hobbs Act, particularly the notion of finding federal jurisdiction based on nothing more than a remote potentiality that a particular act will affect interstate commerce. In Gannon, it could easily be argued that since the gratuities were customary in the industry, they were ultimately passed on to consumers when institutions set their fees and thus became a "portion" of an institution's "charges."

Federal Gun Control Act

In the case of United States v. One Heckler-Koch Rifle, the Seventh Circuit strictly construed section 922(e) of the federal Gun Control Act. The appeal arose from the district court's granting of the Government's motion for summary judgment in a forfeiture action.

52. See United States v. Glynn, 627 F.2d 39 (7th Cir. 1980); United States v. Staszcuk, 517 F.2d 53 (7th Cir. 1975) (en banc), modifying 502 F.2d 875 (7th Cir. 1974). See generally Flaxman, supra note 5, at 146-48.
53. 629 F.2d 1250 (7th Cir. 1980).
55. 629 F.2d at 1251. The forfeiture action was based on section 924(d) of the Gun Control Act which provides in pertinent part:
The Government had relied on alleged violations of two provisions of the Gun Control Act in making two motions for summary judgment in the district court.

On July 18, 1976, Don McBain landed at Chicago's O'Hare Airport on board a Delta Airlines flight from Florida. While in Florida, McBain had been "loaned" the defendant rifle by Sam Puleo, a convicted felon. Before boarding the flight, McBain had delivered the weapon to "agents" of the airline and had informed them of its nature. After disembarking, McBain failed to recover the rifle from Delta, and it was subsequently seized by federal officials at the airport. McBain at that time did not possess an Illinois Firearms Owner's Identification Card. Nor was McBain a federally licensed importer, manufacturer, dealer, or collector of firearms.

The Government's first motion for summary judgment was grounded on McBain's alleged violation of section 922(e) of the Gun Control Act.\footnote{56} It was uncontested that McBain had not provided Delta Airlines with written notice that he was giving them a firearm for transport. The question was whether McBain had complied with the proviso permitting a passenger to avoid a violation of the law by delivering a firearm into the custody of the pilot, captain, conductor, or operator of a common or contract carrier for the duration of the trip. The district court denied the motion, despite the Government's argument that McBain had failed to specifically allege delivery of the rifle to the pilot or other individual named in the proviso, holding that while McBain's pleadings lacked clarity, his conduct at least arguably fell within the scope of the statutory language, thus leaving a genuine issue of material fact to be determined.

The Government's second motion for summary judgment was based on section 922(a)(3) of the Gun Control Act.\footnote{57} The district court

\footnote{56} 18 U.S.C. § 922(e) (1976) provides:

It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

\footnote{57} 18 U.S.C. § 922(a)(3) (1976) provides that it is unlawful for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or
accepted the Government's argument that no genuine issue of material fact existed with regard to McBain's alleged violation of this section and granted the motion.

On McBain's appeal, despite the fact that the district court had denied the Government's motion based on section 922(e), the Seventh Circuit began by addressing the issue of McBain's compliance with section 922(e). The court assumed that a statement by McBain's attorney in the district court that "[McBain] does not yet know the name of the baggage clerk who was told that the weapon was being presented for transport" constituted an admission that the rifle had not been delivered into the hands of the airline's pilot, as would be required by a strict interpretation of the statute. Accordingly, the court framed the first issue as "whether delivery of the firearm to an airline baggage clerk, instead of a pilot, is insufficient as a matter of law to constitute compliance" with section 922(e).

The court reasoned that since the statute is penal, it should be strictly construed against the Government. The court then reviewed the Act's legislative history and concluded that the purpose of section 922(e) is to permit the lawful transportation of a firearm while insuring that the weapon is placed under the control of the person in charge of the trip. The Seventh Circuit held that "as long as a passenger delivers the firearm to a responsible agent of the airline for delivery to the pilot with notice that it is a firearm that is being transferred, the passenger has complied with the requirements of 18 U.S.C. § 922(e)." Applying that principle, the court stated:

[although the district court denied the government's motion for summary judgment as to this issue, the government has argued this theory on appeal and we may consider whether it would constitute a basis for affirming the judgment. See, e.g., Harper Plastics, Inc. v. Amoco Chemicals Corp., 617 F.2d 468, 472 n.11 (7th Cir. 1980); Miller v. Gateway Transportation Co., 616 F.2d 272, 275 n.7 (7th Cir. 1980).]

58. 629 F.2d at 1252. The court reasoned that
59. Id. at 1253.
60. Id.
61. Id. at 1254.
62. Id.
Whether, as appears to be the case here, a baggage clerk is necessarily such a responsible agent of a carrier need not be decided now. That determination may very well depend on the facts of the particular case. It is sufficient for present purposes to note that on the record before us we cannot say that there is no genuine issue of material fact as to the identity and responsibility of the person to whom the respondent claims to have delivered the firearm and the circumstances and understandings accompanying that delivery. The court, therefore, found that section 922(e) did not furnish a basis for affirming the district court's granting of summary judgment.

Turning to the granting of summary judgment based on McBain's alleged violation of section 922(a)(3), the Seventh Circuit found that the legislative history of the section established that the section was not intended to apply to transportation of a firearm between two states by a person with residences in both states. Since a genuine issue of material fact existed as to whether McBain was a resident of Florida as well as Illinois, the judgment of the district court was reversed.

**Speedy Trial Act**

The Seventh Circuit rendered a significant decision this term regarding the sanctions provision of the Speedy Trial Act. In *United States v. Carreon*, the Seventh Circuit assumed for purposes of its decision that sanctions were applicable under 18 U.S.C. § 3162(a)(2) for a violation of either subsection 3161(e) or 3161(i) of the Speedy Trial Act.

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63. *Id.*
64. *Id.* at 1256-57.
65. *Id.* at 1257. In his response to the Government's second motion for summary judgment, McBain asserted that he was a resident of Florida as well as Illinois because "he owns a three flat building in Miami Beach, Florida that he visits often and where he has an apartment set aside for his use as a residence." *Id.* at 1256. The court also noted that, in any event, the Government, as the movant in the motion for summary judgment, had the burden of establishing that McBain was not a resident of Florida when he obtained the rifle. The Government had failed to introduce into the record anything tending to establish this. *Id.* n.6.
67. 626 F.2d 528 (7th Cir. 1980).
68. 18 U.S.C. § 3162(a)(2) (1976) provides:

   If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. 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.
69. 18 U.S.C. § 3161(e) (1976) provides:

   If the defendant is to be tried again following a declaration by the trial judge of a
The issue then became whether the trial court had erred in applying the sanctions provision by dismissing an indictment without prejudice rather than with prejudice.

The facts surrounding this case are complicated and somewhat bizarre. The original indictment against Carreon was filed on April 10, 1975. When he failed to appear at a scheduled hearing, the case was placed on the fugitive calendar where it remained for over a year. When Carreon reappeared, his case was assigned to Judge Kirkland and was set for September 2, 1976, at which time the entry of a guilty plea was anticipated. On September 2, Judge Kirkland was unavailable, and Carreon's guilty plea hearing was held before Judge Grady. Judge Grady refused to accept a guilty plea because the facts elicited from Carreon showed a possible entrapment defense. On the very next day, Carreon retendered his guilty plea to Judge Kirkland, who accepted it without detailed questioning. Carreon was sentenced to two concurrent four year prison terms and a three year parole period.

On March 10, 1977, Carreon filed a petition for habeas corpus, claiming that his guilty plea had not been voluntarily made. Summary judgment was granted to the Government, and Carreon appealed to the Seventh Circuit. On May 2, 1978, while his appeal was still pending, Carreon was released on parole after serving twenty-six months in prison. On June 14, 1978, the Seventh Circuit reversed the district court and found Carreon's guilty plea defective. The mandate of the Seventh Circuit was extended until July 28, 1978 on the Government's motion. The Government then elected not to petition for rehearing. Because of a clerical oversight, the Seventh Circuit's mandate did not reach the district court until four and a half months later, on December

mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

70. 18 U.S.C. § 3161(i) (1976) provides:

If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.


72. 626 F.2d at 530.

73. Carreon v. United States, 578 F.2d 176 (7th Cir. 1978).
On May 1, 1979, five and a half months later, Judge Bua vacated Carreon's conviction and sentence. On June 15, 1979, Chief Judge Parsons granted the Government's motion to reopen the case against Carreon and assigned it to Judge Flaum. Arraignment was set for June 26, but was continued until July 9, 1979 because the defendant was unavailable. Trial was set for August 27, 1979, and on July 23, 1979, Carreon moved to dismiss the indictment with prejudice on speedy trial grounds. While this motion was pending, a superseding indictment was filed on August 21, 1979. On the date of trial, August 27, 1979, Judge Flaum denied Carreon's motion for dismissal of the original indictment with prejudice, ruling instead that the original indictment should be dismissed without prejudice. Carreon proceeded immediately to a bench trial and was found guilty on all counts alleged in the superseding indictment.

On appeal, the Seventh Circuit based its analysis of the propriety of the dismissal without prejudice to the superseding indictment upon the three factors noted in section 3162(a)(2): the seriousness of the offense, the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice, and the facts and circumstances of the case which led to the dismissal. The court stated that the defendant's crimes were serious, adding that the "sanction of dismissal with prejudice should therefore be imposed only for a correspondingly severe delay."

Although it is unclear what constitutes a "severe delay" or how a delay can correspond to the seriousness of an alleged offender's conduct, it is implicit in the court's opinion that it considers dismissal with prejudice to be the exception, while dismissal without prejudice is the normal relief for a violation of section 3161. The Seventh Circuit in Carreon found twenty-six months of imprisonment and approximately one additional year of jeopardy for offenses alleged to have been committed more than four years earlier an insufficient reason to invoke the "drastic" remedy of dismissal with prejudice.

With regard to the second consideration—the impact of reprosecu-

74. 626 F.2d at 530.
75. Id. at 531.
76. Id. at 533.
78. 626 F.2d at 533.
79. Id.
tion on the administration of the Speedy Trial Act and the administration of justice—the court concluded that any adverse impact would be "slight." This conclusion was based in part on the fact that the Government's neglect was never alleged to be intentional. Hence, it appears that mere negligent violations of the Act do not merit dismissal with prejudice. The court also noted that because the "unusual circumstances of the case" were unlikely to recur, the prosecution would not adversely impact the administration of either justice or the Speedy Trial Act. This appears to be a non sequitur.

The court found that under the third factor, the facts and circumstances leading to the dismissal did not warrant the extraordinary relief of dismissal with prejudice. The court reasoned that since it, rather than the Government, was responsible for failing to issue the mandate until December 5, 1978 and since Carreon had not moved for issuance of the mandate, he had no cause to complain. The court stated that the delay between December 5, 1978, and May 30, 1979, was de minimis because Carreon had not actively pursued his own prosecution.

By characterizing the dismissal with prejudice sanction as the exception rather than the rule, the Seventh Circuit has effectively rendered the sanctions provisions of the Speedy Trial Act a nullity. With a skillful choreography of superseding indictments, the prosecution apparently can avoid the mandates of the Act with impunity.

The legislative history of the Speedy Trial Act does not support the approach taken by the Seventh Circuit. Both the House and Senate reports indicate that dismissals without prejudice are rarely to be granted.

For example, the House report states:

Section 3162 provides that, in the event the time limits of the bill, subject to the various exclusions, are not met, the court on mo-

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80. Id.
81. Id.
82. The court's reference to the defendant's failure to claim prejudice due to the delay seems irrelevant to any language in the Speedy Trial Act. It is, however, a well settled consideration in determining whether a constitutional violation has occurred. See Barker v. Wingo, 407 U.S. 514 (1972).
83. 626 F.2d at 533.
84. Id. at 534.
85. As a practical matter, except perhaps in prosecutions involving an incarcerated defendant, the structure of the Speedy Trial Act rarely inures to the benefit of a defendant. The prosecution decides who and when to indict, frequently on the basis of investigations that last for months or years and which utilize all of the vast resources of the Government. The defendant is then given seventy days in which to prepare a defense to the Government's evidence. This can be particularly disadvantageous in conspiracy situations, which can often involve as many as fifteen or twenty co-defendants.
tion of the defendant may dismiss the complaint, information or indictment against the individual. This sanction applies to both the period between indictment and trial. The effect of a dismissal would be to bar any future prosecution against the defendant on the same conduct. Dismissal with prejudice would apply to those offenses which were known or reasonably should have been known at the time of dismissal. A defendant must move to dismiss the case on grounds that his Sixth Amendment right to speedy trial has been denied under the provisions of this legislation prior to trial or entry of a plea of guilty or nolo contendere, or he waives the right. The dismissal sanction would become effective in the fifth year after enactment of the bill.

The dismissal sanction contained in S. 754 would permit the reprosecution of a defendant if the attorney for the Government can demonstrate the existence of exceptional circumstances. The Senate report cites as an example of an exceptional circumstance the case where “a defendant or his counsel perjured himself in alleging circumstances which lead a judge to dismiss charges for failing to meet the speedy trial time limits." The report also states that exceptional circumstances are those which the Government and the courts could not have foreseen or avoided. [S. Rept. No. 93-1021. p.43.] The Committee believes that permitting the reprosecution of a defendant whose case has been dismissed for failing to meet the speedy trial time limits could result in unnecessary expenses and may have a detrimental impact on the grand jury system, particularly in districts where criminal case filings are high. This danger was highlighted by Judge Feikens in his remarks to the Subcommittee:

Another area of doubt is that engendered by a consideration of the technique of the bill's (S.754) dismissal "without prejudice”. I would think if I were you, of the impact on the grand jury system of re-indictments and the time requirements of re-indictments. [Hearings, page 239.]

Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists. In addition, two witnesses—Mr. Charles Morgan, Washington Director of the American Civil Liberties Union, and Mr. Barris—added that as they read the decision, the Supreme Court's holding in Strunk v. United States, 412 U.S. 434 (1973), requires dismissal as the only appropriate remedy in cases where the right to a speedy trial is abridged, despite the extreme nature of the remedy. With respect to the propriety of requiring a permanent bar to future prosecution, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee on their Commentary on Standards Relating to Speedy Trial:

The position taken here is that the only effective remedy for the denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy
trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay. [Standards, Approved Draft, 1968. pp. 40-41.]

Pursuant to questions that arose during discussion of the dismissal sanction, several points with respect to H.R. 17409 deserve clarification: first, as already indicated above, dismissal is mandatory but not automatic, since the defendant is expressly required under section 3162(a)(2) to move for dismissal if not brought to trial within the prescribed time; second, it should be clear that the attorney for the Government is free to contest the granting of a motion to dismiss on the basis of error by noting his exceptions and taking appeal in the proper manner; third, if this bill is enacted into law, it is contemplated that every defendant arraigned in Federal court be properly advised of his right to speedy trial under this legislation, along with the balance of his Sixth Amendment rights, prior to entry of plea. This latter point is especially crucial in the unlikely but plausible event the defendant is represented pro se at this juncture of the proceedings.86

The Carreon decision is clearly at odds with the legislative intent. There is, as yet, little case law construing the Speedy Trial Act sanctions. If the other circuits elect to follow the approach of Carreon, legislative response from Congress may be forthcoming.

PROCEDURAL ISSUES

Jury Instruction on Entrapment Defense

In United States v. Nicosia87 the Seventh Circuit was requested to overrule the principle established in United States v. Johnston88 that an entrapment instruction may not be given to the jury unless the defendant has admitted to the offense.89 Nicosia, a former mayor of East Chicago, Indiana, was under grand jury investigation for accepting kickbacks while in office. On the basis of certain conversations covertly recorded by a government informer, Nicosia was ultimately indicted for obstruction of justice in violation of 18 U.S.C. § 1503.90 At trial,

87. 638 F.2d 970 (7th Cir. 1980).
88. 426 F.2d 112 (7th Cir. 1970).
89. Id. at 114.
90. 18 U.S.C. § 1503 (1976) provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or
Nicosia took the witness stand and identified the voice on the tapes as his but denied that he had been trying to influence the informer.\textsuperscript{91} Nicosia's request for an entrapment instruction was denied. He was convicted and appealed to the Seventh Circuit.

Noting that at least four other circuits had abandoned the Johnston rule, and taking specific note of the Ninth Circuit's decision in \textit{United States v. Demma},\textsuperscript{92} the Seventh Circuit admitted that Nicosia "tempts a reconsideration of Johnston by [this] court."\textsuperscript{93} However, the court found the evidence insufficient to support an entrapment instruction.\textsuperscript{94}

In dissent, Judge Swygert pointed out that the trial judge had found that there was sufficient evidence to support an entrapment instruction and had only refused the instruction on the basis of the Johnston rule.\textsuperscript{95} Judge Swygert noted that the Demma court had changed its rule in order to align itself more closely with the pertinent Supreme Court decisions.\textsuperscript{96} He also urged the court to consider the significance of the District of Columbia Circuit's unanimous decision in \textit{Hansford v. United States},\textsuperscript{97} which recognized that the alternative defenses of innocence and entrapment are not inconsistent.\textsuperscript{98} It is unfortunate that the Seventh Circuit did not take advantage of this opportunity to do away with the outdated Johnston rule.

\textit{Admonishment of Courts and Prosecutors}

In two cases this past term, the Seventh Circuit issued strong admonitions to the district courts and federal prosecutors regarding matters of trial procedure. The opening words of \textit{United States v. Rodriguez}\textsuperscript{99} are illustrative of the court's attitude. Speaking through Circuit Judge Wood, the court stated, "A federal prosecutor in final

on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

\textsuperscript{91} 638 F.2d at 972.
\textsuperscript{92} 523 F.2d 981 (9th Cir. 1975) (en banc).
\textsuperscript{93} 638 F.2d at 972.
\textsuperscript{94} \textit{id.} at 973.
\textsuperscript{95} \textit{id.} at 976 (Swygert, J., dissenting).
\textsuperscript{96} \textit{id.}
\textsuperscript{97} 303 F.2d 219 (D.C. Cir. 1962).
\textsuperscript{98} 638 F.2d at 979.
\textsuperscript{99} 627 F.2d 110 (7th Cir. 1980).
argument has done it again." During his summation in *Rodriguez*, the prosecutor stated to the jury that one of the defendants "has been very quiet." On appeal, the Seventh Circuit construed this remark as an impermissible comment on the defendant's failure to testify and the defendant's conviction was reversed.

In *United States v. Delgado*, the defendant's conviction was reversed because the trial court had failed to ascertain whether the defendant had knowingly and intelligently waived his right to a jury trial. The trial court had merely inquired if it was the defendant's signature on the jury waiver, if he had voluntarily given up his right to a jury, and if he had acted on advice of counsel. In reversing, the Seventh Circuit "advised" the district courts that they must explain to defendants that a jury is composed of twelve members of the community, that the defendant may participate in the selection of jurors, that a jury verdict must be unanimous, and that if the defendant waives a jury the judge alone will decide guilt or innocence.

**Fourth Amendment**

In the 1980-81 term, the Seventh Circuit had a number of opportunities to anticipate or apply several recent Supreme Court interpretations of the fourth amendment. In *United States v. Cortina*, the Seventh Circuit used its supervisory power to quash a search warrant, despite the fact that certain defendants' legitimate expectations of privacy had not been violated, finding that the Supreme Court's decision in *United States v. Payner* was inapplicable. In *United States v. Acevedo*, the Seventh Circuit addressed the question of the degree of exigency that is sufficient to override the warrant requirement for entering a residence to make an arrest. This question had been left unanswered by the Supreme Court in *Payton v. New York*. In *United States v. Jimenez*, the Seventh Circuit applied the so-called "unwor-

100. Id. at 110.
101. Id. at 111.
102. Id. at 112.
103. 635 F.2d 889 (7th Cir. 1981).
104. Id.
105. Id. at 890.
106. Id.
108. 630 F.2d 1207 (7th Cir. 1980).
110. 627 F.2d 68 (7th Cir. 1980).
thy container" rule to affirm a conviction based on the search of a paper bag. This approach to the requirement for a warrant in the search of movable containers was rejected by the Supreme Court in Robbins v. California almost a year later, and the Supreme Court subsequently vacated the conviction in Jimenez.

United States v. Cortina involved an appeal by the Government from an order suppressing evidence. As part of an investigation of two race track messenger services, FBI Agent William Brown arranged for Pamela Bridges, a former employee of Mr. Lucky's Messenger Service, to become a paid FBI informer. Bridges met with Brown on several occasions, and Brown kept a written record of the substance of their conversations. In April of 1977, FBI Agent Linda Stewart presented an affidavit for a warrant to search Mr. Lucky's, Finish Line Messenger Service, and two individuals for evidence of an illegal bookmaking operation. The affidavit recited "facts" which Agent Brown had allegedly obtained from an informer known as "Source Number One." The affidavit alleged that "Source Number One," who was later identified as Pamela Bridges, had been told by certain of the defendants that seventy-five percent of both messenger services' business was handicapped by the messenger services themselves and was never sent to the race tracks for placement in the pari-mutuel wagering system. The affidavit also alleged that certain of the defendants had told "Source Number One" that they were in charge of handicapping and booking the wagers that were not sent to the race tracks. On the basis of this affidavit, a federal magistrate issued the requested search warrants. The warrants were executed on April 22, 1977 and a large quantity of evidence was obtained.

The two corporate and twelve individual defendants were subsequently charged in a fifteen count indictment with racketeering, extortion, and illegal gambling. The defendants then filed a motion to suppress the evidence which had been seized pursuant to the warrants. This motion was accompanied by affidavits of several of the defendants swearing that they had never said any of the things attributed to them by "Source Number One" in the affidavit used by the Government to obtain the search warrants. The defendants requested a hearing under Franks v. Delaware to determine whether government agents had misrepresented information in the affidavit used to obtain the search war-

114. 630 F.2d 1207 (7th Cir. 1980).
The defendants’ motion to suppress was denied on the ground that the defendants had established only that “Source Number One” might have lied or exaggerated when providing the information to the FBI and not that the FBI had never received the information from the informer at all.

On September 11, 1979, the day before trial, the Government delivered to the defendants Agent Brown’s records of his conversations with Bridges, a portion of an FBI administrative file, and a transcript of Bridges’ grand jury testimony. Examining this material, the defendants realized that it was largely inconsistent with the facts attributed to “Source Number One” in the affidavit used to obtain the warrants. The defendants informed the trial judge and an evidentiary hearing was held. Agent Stewart testified that she had drafted the affidavit relying on Agent Brown’s records and other information supplied by him. Agent Brown then made admissions indicating that at least some of the information he had supplied to Agent Stewart had not come from his informer, Bridges, but had been fabricated by him. Bridges’ testimony confirmed Brown’s admissions. She denied giving him much of the crucial information he had attributed to her in helping Agent Stewart prepare the affidavit. At the conclusion of this testimony, the judge ruled that much of the information supplied by Brown was false. Without this information, the Government conceded, the affidavit did not demonstrate the probable cause required for the issuance of the search warrants. However the Government argued that only the defendant corporations and not the individual defendants had standing to object to the search. The defendants responded that standing to object to the search existed for all of the defendants under the supervisory power of the federal courts. Without making any specific finding regarding standing to object, the district court granted the motion to suppress the evidence as to all the defendants.

On appeal to the Seventh Circuit, the issue was whether the scope of the court’s supervisory power is circumscribed by the scope of available fourth amendment relief. Thus, the court had to decide whether a defendant is required to show that his legitimate expectations of privacy were violated before he can avail himself of the court’s supervisory power. This issue was complicated somewhat by the Supreme Court’s recent decision in United States v. Payner.116

116. 447 U.S. 727 (1980). In Payner, agents working for the Internal Revenue Service had broken into a hotel room and stolen documents from a subject’s locked briefcase. These documents were subsequently introduced into evidence during the trial of Payner. Since the evidence
In *Cortina*, the Seventh Circuit ruled that since all the persons benefitting from the suppression order were defendants, they were all entitled to the court's supervisory relief. The court interpreted *Payner* as holding that no violation of a legitimate expectation of privacy must be established by a particular defendant seeking to invoke the court's supervisory power if the evidence is seized from another defendant.

However, this distinction between *Payner* and *Cortina* appears somewhat strained when it is realized that Payner ultimately was no less aggrieved by the Government's lawlessness than those defendants in *Cortina* who had suffered no violation of their personal expectations of privacy by the execution of the search warrants. Yet Payner, unlike the defendants in *Cortina*, was afforded no relief. The Seventh Circuit did, however, note that in *Cortina* a fraud had been perpetrated upon the court and stated that that fact must be taken into consideration in the exclusionary weighing process. Since Agent Brown's offense was committed within the sanctity of the court itself, the Seventh Circuit said the need for deterrence of illegal conduct was greater than in *Payner*.

In *United States v. Acevedo*, the Seventh Circuit was called upon to determine what constitutes exigent circumstances within the ambit of *Payton v. New York*, in which the Supreme Court held that warrantless, nonconsensual entries into a suspect's dwelling in order to arrest him violated the fourth amendment unless made under exigent circumstances. The contested entry of Acevedo's apartment was the culmination of an investigation that included a series of heroin sales between agents of the Drug Enforcement Administration and a man named Luis Ramos, an associate of Acevedo. On February 13, 1979, DEA agents Adams and Collins met Ramos and drove him to a parking lot on the north side of Chicago. Ramos left the car and walked towards two adjacent row-type buildings. One of the buildings housed a tavern. Ten minutes later, Ramos returned and sold the agents an ounce of heroin for $840. On February 22, the agents met with Ramos again. The agents expressed a desire to purchase a pound of heroin. Ramos said he could not get such a large quantity until the next day but that his source could supply an ounce of heroin for immediate sale. The

had been seized from someone other than defendant Payner, the Supreme Court ruled that Payner could not assert that the illegal search violated any of his personal rights under the fourth amendment. Accordingly, the Court reversed the lower court's decision to suppress the stolen documents under its supervisory power.

117. 627 F.2d 68 (7th Cir. 1980).
agents drove Ramos back to the same parking lot and Ramos again left the car and walked towards the buildings. He returned shortly and sold the agents a second ounce of heroin, this time for $825. Another agent was nearby and had seen Ramos come out of the building immediately adjacent to the tavern.

The next day, Ramos met with the agents yet again. He told the agents that his source had only ten ounces of heroin available, and the agents agreed to purchase that amount. Once again they all drove to the parking lot next to the tavern. Ramos went into the tavern and returned a short time later to inform the agents that his source was not at home. Twenty minutes later, Ramos went into the tavern again, this time accompanied by the agents. Ramos was then able to contact his source by telephone. Acevedo soon arrived at the building adjacent to the tavern. Ramos told the agents to wait in their car while he went into the apartment to meet with Acevedo. After speaking briefly with Acevedo, Ramos came out to the parking lot and told the agents that his source had only three or four ounces of heroin available at the moment but expected to obtain an additional six ounces within two hours. The agents agreed to an immediate purchase of four ounces, and Ramos went back into the apartment. An agent looking through a window saw Acevedo take a small package from a table and hand it to Ramos. Ramos then returned to the parking lot where he sold four ounces of heroin to the waiting agents for $3,200. The agents then arrested Ramos. Ramos immediately informed the agents that his source was in the first floor apartment of the building adjacent to the tavern. Ramos then accompanied six agents to that apartment. After the agents knocked on the door and announced their office, they received no response. They forcibly entered the apartment and saw that the lights were on and a video tape machine was playing, but Acevedo was not in the apartment. Ramos then suggested that Acevedo might be upstairs in the second floor apartment from which he had recently moved. Receiving no response after knocking on the door of that apartment and announcing their office, the agents made another forcible entry. Acevedo was found hiding in a closet and was arrested.

Acevedo was charged with distribution of four ounces of a mixture containing heroin in violation of 21 U.S.C. § 841(a)(1). He was convicted and was sentenced to three years in prison and three additional years of parole. The district court found that Acevedo’s arrest, though executed after a forcible entry into his home without a warrant, was lawful under Payton v. New York as a response to exigent circumstances.
On appeal, the Seventh Circuit affirmed Acevedo's conviction. The court began by noting that the District of Columbia Circuit had anticipated the Payton result by a decade in Dorman v. United States.\(^{119}\) Dorman had enumerated a number of factors relevant to a determination of whether exigent circumstances justify a warrantless entry into a suspect's home to arrest him for a felony.\(^{120}\) However, while conceding that some or all of the factors listed in Dorman may be relevant to a particular case, the Seventh Circuit rejected a "checklist-type" approach because of the limitless array of factual settings that may arise. Instead, the court said that Dorman is better used as a guide in determining whether those asserting the propriety of the warrantless entry of a home have met their heavy burden in showing the need for such an entry.\(^{121}\) The court concluded that the Government had met that heavy burden in Acevedo's case.

The court based this conclusion on two factors. First, the court stated that the final transaction, in which one agent had seen Acevedo hand Ramos a package, followed immediately by Ramos' delivery of that heroin-containing package to other agents, was the first occasion on which the agents had probable cause to believe that Acevedo was dealing in heroin, and thus was the first occasion on which they could have obtained a warrant. According to the court, the earlier transactions had revealed only the apartment building from which Ramos was probably securing the heroin he was selling to the agents. This being the case, the other prong of the court's reasoning was that after taking Ramos into custody, the agents faced a serious risk that Acevedo would escape during time necessary to obtain a warrant. The court reasoned that the agents' activities outside the apartment building had likely alerted Acevedo that he might be arrested but that the agents' incomplete knowledge of the building's layout made it improbable that they could be sure of securing all of the exits while a warrant was obtained. The court also observed that Ramos' failure to return to the apartment with the proceeds of the sale after he had been arrested by the agents to whom he had delivered the four ounces of heroin "might have tipped

120. The following factors were listed in Dorman:
(1) Whether the suspect was accused of a "grave offense," particularly a crime of violence; (2) whether the arresting officer reasonably believed the suspect was armed; (3) whether there was a "clear showing" of probable cause; (4) whether the arresting officer had a strong reason to believe the suspect was on the premises; (5) whether the suspect was likely to escape if not immediately apprehended; (6) whether the entry was peaceful; and (7) whether the entry was made during daylight hours.
435 F.2d at 392-93.
121. 627 F.2d at 70.
Acevedo that Ramos had been arrested and that his arrest was imminent."122 "Under these circumstances," said the court, "the agents faced the choice, through no fault of their own, of acting immediately to enter and arrest Acevedo without a warrant or risk not being in a position again to arrest him."123

The court's opinion leaves unanswered the question whether Ramos had departed with the agents or returned to the building with the proceeds following the first two sales of heroin. This, in turn, leaves open to question the applicability of the considerations in United States v. Kulcsar,124 cited in the court's opinion. If Ramos had not been expected to return immediately, it is considerably less likely than the court implies that Acevedo would have been "tipped" and attempted to escape. Had Ramos left the agents and gone into the apartment with the money immediately after the first two sales, the Acevedo case would fit within the reasoning expressed in Kulcsar. However, if Ramos, who had been driven to the apartment building by the agents on both prior occasions, had left with them on those occasions after procuring the heroin, the Acevedo reasoning is considerably weakened.

It is not difficult to speculate, in this case at least, that the court's finding of sufficient exigency to override the warrant requirement was colored to some degree by the nature of the contraband being sold by the suspect and its potential harm to society. Such a position has found some support in several circuits.125 The most disquieting aspect of such an approach is its potential expansion. For example, should warrantless entry be approved under the exigency rubric if there is a mere remote possibility of some harm to an informer whom the police have conveniently placed in a dwelling occupied by a suspect whom they wish to arrest?126

In United States v. Jimenez,127 the Seventh Circuit adopted a form of the so-called "unworthy container" rule which would permit the po-

122. Id. at 71.
123. Id. (footnote omitted).
124. 586 F.2d 1283 (8th Cir. 1978).
126. In United States v. Williams, 633 F.2d 742 (8th Cir. 1980), the Eighth Circuit upheld a warrantless police entry to "extricate" an informer who had negotiated a sale by undercover DEA agents to a group of conspirators of a substance purported to be cocaine (but which was actually an inert substance resembling cocaine). There was no expectation that any actual controlled substances were on the premises, and the court's finding of exigent circumstances was predicated on the possibility that the conspirators might decide to harm the informer if they happened to discover that the cocaine was bogus. A universal adoption of such a ruling would potentially open the door for warrantless police intrusions into almost any dwelling in which the police could infiltrate an informer.
lice to dispense with a warrant to open and search "unworthy" containers such as paper bags.\textsuperscript{128}

The defendant in \textit{Jimenez} had been placed under surveillance by the DEA on the basis of information connecting her with large scale drug transactions in the Chicago area. While watching the defendant, DEA agents saw her park in the parking lot of a restaurant known to be frequented by drug traffickers. Another car drove through the lot three times and finally parked next to the defendant's car. The driver of the second car handed a brown paper bag to the defendant. The defendant locked this bag in the trunk of her car and drove away. The DEA agents then stopped the defendant's car. One of the agents approached the defendant and asked her what was in the bag she had placed in the trunk. The defendant replied, "You know what it is." The agent then opened the trunk and searched the paper bag, finding 40 one-ounce packets of heroin. The district court refused to suppress the evidence, and the defendant was convicted of unlawful possession with intent to distribute over 1,000 grams of a substance containing heroin in violation of 21 U.S.C. § 841(a)(1). In an earlier opinion, the Seventh Circuit determined that the DEA agent had probable cause to search the trunk of the defendant's car.\textsuperscript{129}

In a second opinion, the court held that the agent's search of the paper bag found in the trunk of the defendant's car was proper. The defendant argued that the Supreme Court's decision in \textit{Arkansas v. Sanders}\textsuperscript{130} mandated suppression of the bag and its contents. However, \textit{Sanders} involved a warrantless search of a suitcase seized from the trunk of an automobile, and the Seventh Circuit found that the Supreme Court's decision to bar such a search was not dispositive in a case where the container was a paper bag. The court acknowledged that "a set of facts certainly may exist where an individual has a high expectation of privacy in the contents of a box or perhaps a paper bag."\textsuperscript{131} But the court found no such expectation of privacy in Jimenez's case. Relying on the Eighth Circuit's decision in \textit{United States v. Neumann},\textsuperscript{132} which had permitted a search of a cardboard box


\textsuperscript{129} United States v. Jimenez, 602 F.2d 139 (7th Cir. 1979).

\textsuperscript{130} 442 U.S. 753 (1979).

\textsuperscript{131} 626 F.2d at 41.

\textsuperscript{132} 585 F.2d 355 (8th Cir. 1978). In \textit{Neumann}, the defendant was seen placing a cardboard box into his car. The defendant's car was later stopped and seized, and the officers lifted the cover of the box and saw illegal drugs. The court found that the defendant had an insufficient expectation of privacy in the contents of "an unsecured cardboard box sitting in plain view in the passen-
under somewhat similar circumstances, the Seventh Circuit upheld the *Jimenez* search and affirmed the defendant’s conviction.

Subsequent decisions by the Fifth and the District of Columbia Circuits reached contrary results.133 And, in *Robbins v. California*,134 the Supreme Court attempted to establish a “bright line” rule when it said that a closed opaque container found in the trunk of a car may not be searched without a warrant unless the shape or other characteristics of the container were such that the contents could be said to be in plain view. Shortly after the *Robbins* decision, the Supreme Court granted certiorari in *Jimenez*, vacating the judgment and remanding the case to the Seventh Circuit for further consideration in light of *Robbins.*135

It would be easy to criticize the Seventh Circuit’s failure to anticipate the Supreme Court’s action in *Robbins*. But such criticism might be premature at this time. The Supreme Court will hear argument this spring in the District of Columbia’s Circuit’s *Ross* case,136 and the Court has indicated that it may use *Ross* as a vehicle for reexamining its decision in *Robbins*.137 Given that only four justices joined in the lead opinion in *Robbins* and that the Court’s membership has changed since that decision was handed down, it may very well be that *Robbins*’ demise is in the offing. If this proves to be the case, the Seventh Circuit’s approach in *Jimenez* may be vindicated.

**Conclusion**

With a few notable exceptions, the Seventh Circuit’s criminal law and procedure decisions during the 1980-81 term were generally quite routine. Little new ground was broken, and the only trend that seems apparent is a continuation of the court’s pattern of highly conservative...
decisions. In the criminal law and procedure area at least, the Seventh Circuit has not yet become one of the nation's leading courts.