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Criminal Law and Procedure: Adherence and Variances from Established Principles

James N. Gramenos

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CRIMINAL LAW AND PROCEDURE: ADHERENCE AND VARIANCES FROM ESTABLISHED PRINCIPLES

JAMES N. GRAMENOS*

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I. INTRODUCTION

During its 1981-1982 term, the Seventh Circuit confronted a large number of criminal law cases encompassing both substantive and procedural issues. Given this wide range of issues, it is imperative for the practitioner to be familiar with the Seventh Circuit’s activities throughout the broad spectrum of criminal law. Therefore, instead of focusing on a few major cases, this article is structured to give practitioner and scholar alike a thorough sense of the Circuit’s views on several different criminal law topics.

If any generalization can be made about the Seventh Circuit’s approach during this past term, it is the continued conservative bent of the Court when confronting issues in criminal law. While by and large adhering to the principles it has laid down in previous terms, the court has nevertheless been willing to confront conflicts with the other Circuits and to change as principles and precedents change.

II. PRETRIAL ISSUES

A. Federal grand jury matters

1. False statements

An interesting fact situation which many sporting fans may be able to identify with occurred in United States v. Martellano when an

1. 675 F.2d 940 (7th Cir. 1982).
undercover investigation by the Organized Crime Strike Force and the Federal Bureau of Investigation (FBI) placed a bureau agent in a restaurant. The agent bet $50 with the maitre d' on the outcome of the 1980 Super Bowl football game. The defendant won the bet and the undercover agent paid off. No other indications of criminal activity involving the maitre d' were known to the government. The maitre d' was called before a special grand jury and the one-count indictment was based upon the following declaration before the grand jury:

Q. Have you at any time—first of all, during the period you were employed at Snug's [restaurant], did you ever have occasion to accept wagers on sporting events?
A. No.

The government charged that these declarations were false and known by the defendant to be false when made “because on or about January 8, 1980, he accepted a wager in the amount of $50 on a professional football game.” He was convicted by a jury.

The tenor of the appellate litigation was set by the government labelling the defendant’s defense as merely “lexicological gymnastics.” The Seventh Circuit responded with an outright reversal, saying “If that characterization applies to anything, it may be to the government’s case.”

The defendant was charged with violation of section 1623(a) which requires only that the false statement be knowingly made. Prosecution under section 1621 requires a showing of willfulness. The court felt that instead of taking the defendant’s defense seriously, the government tried to “talk it away without evidence.” The defense at trial was, first, that the question on its face was ambiguous because it inquires about “wagers” on “sporting events”. Since the evidence presented by the government showed only one bet, appellant therefore claimed to have answered honestly. Second, the appellant said that he misunderstood the thrust of the question, and so explained in his trial testimony.

The defendant’s position was that by facing a federal grand jury probing racketeering and organized crime, appellant did not conceive that the question could be directed at his one “personal” $50 bet. Martellano testified that he was misled because of the plural aspects of

2. 18 U.S.C. § 1623(a)(1976) provides in pertinent part: “Whoever under oath . . . in any proceeding before . . . any . . . grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.”
3. 675 F.2d at 943.
the question and because prior questions concerned the use of the telephone at the restaurant. The court on review agreed, stating that perjury charges should be based upon precise, rather than vague questions. The court noted that there was only the one general question about the defendant accepting wagers on sporting events. The common practice of going from general questions to specific questions to form the predicate for perjury was not followed in this case. The court believed a fair and natural follow-up question before the grand jury would have been, "You mean you have never even accepted a bet on the Super Bowl?" A "yes" to that question would have given the government a solid foundation for its case, but a "no" would have destroyed it. It appears that the government had no other way to proceed against this defendant than to snag him on the one, ambiguous question. The court believed that the one question for which the defendant was convicted of answering falsely had some of the elements of a trap unless the witness was sophisticated enough to do a better job of answering the question than the government counsel did in asking it.

In United States v. Raineri, the defendant contended that his false statements before the grand jury were not material to its investigation and that he did not obstruct justice. The evidence showed that in his appearance before the grand jury the United States Attorney told him that he was a target of an investigation involving prostitution. The prosecutor questioned the defendant concerning his relationship with an employee of the Showbar, a club he and an employee named Gasbarri managed.

When asked before the grand jury about a trip he took to a judicial seminar in Reno, Nevada, the defendant said that he did not travel to and from Reno with Ms. Gasbarri; that she went there with her brother and sister. The defendant further advised the grand jury that while in Reno, Nevada, he either ran into the group by accident or that Gasbarri and her family looked him up. Raineri said that at the most he probably spent one day associating with Gasbarri in Reno.

In fact, the evidence showed the defendant had traveled to and from Reno with Gasbarri and they stayed together for the three weeks, except for a three or four day period. He paid for Gasbarri's travel expenses. The court in Raineri said the materiality of a false statement is an essential element of the crime and is a question of law for the trial

4. *Id.*, citing United States v. Laikin, 583 F.2d 968, 971 (7th Cir. 1978).
6. 670 F.2d 702 (7th Cir. 1982).
court to decide.\textsuperscript{7}

The court had previously defined materiality as a statement's "effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation."\textsuperscript{8} The court said that it believed the relationship between the defendant, a circuit judge in the state and a former district attorney, and Ms. Gasbarri, the person ostensibly in charge of the Showbar, was important to the grand jury's investigation of the defendant's involvement in the prostitution enterprise. The defendant's false statements had the tendency to impede the grand jury from discovering the nature and the depth of that relationship.

For those reasons, the court said the defendant's false statements were material, and any potential interference with a line of inquiry in a grand jury investigation suffices to establish materiality, regardless of whether the perjured testimony actually serves to impede the investigation.\textsuperscript{9}

In \textit{United States v. Picketts},\textsuperscript{10} the defendant was charged with engaging in a pattern of racketeering by soliciting and accepting money from electricians in return for his recommendation that they were qualified to receive full union membership status and with making false statements to a grand jury. He was successful in securing an acquittal as to the first count because of a defect in the indictment but was convicted of denying to a grand jury that he had solicited and accepted money. The various arguments on appeal included the defendant's contentions that no evidence existed of the materiality of the false declarations and that there was no proof of the defendant being sworn when he appeared before the grand jury.

The court disposed of the argument that the statements were not made under oath by a review of the grand jury transcript which noted that the defendant had been sworn, and relied upon \textit{United States v. DeVitt}\textsuperscript{11} for the proposition that the introduction of the grand jury transcript and the testimony of a Justice Department attorney who had been present at the grand jury proceedings is sufficient to show that


\textsuperscript{8} United States v. Picketts, 655 F.2d 837, 839 (7th Cir.), \textit{cert. denied}, 454 U.S. 1056 (1981); United States v. Parker, 244 F.2d 943, 950-51 (7th Cir.), \textit{cert. denied}, 355 U.S. 836 (1957). \textit{See} United States v. Shimpy, 531 F.2d 768, 770 (5th Cir. 1976) (anything that could influence or mislead); United States v. Percell, 526 F.2d 189, 190 (9th Cir. 1975) (relevant to any subsidiary issue under consideration); United States v. Koonce, 485 F.2d 374, 380 (8th Cir. 1973) (tending to influence, mislead, or hamper).

\textsuperscript{9} 670 F.2d at 718. \textit{See} United States v. Howard, 560 F.2d 281, 284 (7th Cir. 1977).

\textsuperscript{10} 655 F.2d 837 (7th Cir.), \textit{cert. denied}, 454 U.S. 1056 (1981).

\textsuperscript{11} 499 F.2d 135 (7th Cir. 1974), \textit{cert. denied}, 421 U.S. 975 (1975).
testimony was under oath. The court noted that in future cases, it would be better practice for someone present at the grand jury proceedings to testify to the giving of an oath, thereby proving the necessary element of the crime—that the false statements were made under oath.\textsuperscript{12}

The defendant argued that his fifth amendment rights were violated since the United States Attorney had already presented evidence to the grand jury which the prosecutor believed was sufficient to merit his recommendation that the defendant be indicted for illegal acts. Picketts argued that to call him before the grand jury to be asked if he committed those acts was improper. The court dismissed this theory, stating that there is nothing improper about a grand jury calling the target of its investigation to testify.\textsuperscript{13} The defendant could have properly invoked his fifth amendment right not to testify, but he chose not to do so. Once he waived his right against self-incrimination, the defendant was required to testify truthfully or to risk prosecution for not doing so. The court said that our legal system provides methods for challenging the government's right to ask questions but that lying is not one of them.\textsuperscript{14}

2. Tainted testimony

\textit{United States v. Udziela}\textsuperscript{15} is a case of first impression in the Seventh Circuit. The court exercised its supervisory power and held, prospectively, that where perjured testimony supporting an indictment is discovered before trial, the government has the option of either voluntarily withdrawing the tainted indictment and seeking a new one before the grand jury when it reconvenes, unless it is already sitting, or of appearing with defense counsel before the district court for an \textit{in camera} inspection of the grand jury transcripts for a determination whether other sufficient evidence exists to support the indictment.\textsuperscript{16} If other, sufficient evidence is present so that the grand jury may have indicted without giving any weight to the perjured testimony, the indictment cannot be challenged on the basis of perjury.

The court explored the historical development of the grand jury from the ancient English system through modern day developments

\begin{itemize}
\item \textsuperscript{12} United States v. Picketts, 655 F.2d at 840.
\item \textsuperscript{13} \textit{Id.} at 842, citing \textit{United States v. Mandujano}, 425 U.S. 564, 583-84 (1976).
\item \textsuperscript{15} 671 F.2d 995 (7th Cir.), \textit{cert. denied}, — U.S. —, 102 S. Ct. 2964 (1982).
\item \textsuperscript{16} \textit{Id.} at 1001.
\end{itemize}
which have made the grand jury a constitutional fixture, belonging to neither the executive nor the judicial branch. The court recognized the lofty position that the grand jury has assumed as an instrument of justice, but realized that, as a practical matter, the modern grand jury is greatly dependent on the United States Attorney "to present to it such evidence as it needs for performance of its function and to furnish it with controlling legal principles."

Recognizing the increasing dependency on the grand jury system, federal courts in recent years have become more sensitive to allegations of governmental misconduct before the grand jury and have demonstrated greater willingness to curb prosecutorial abuse of such proceedings. The court summarized the attitude of the Ninth Circuit that prosecutorial misconduct must be "flagrant" to violate due process. In the instant case, the day before trial, after the grand jury was no longer sitting, the government revealed that a grand jury witness reportedly had lied. The government, taken by surprise, immediately disclosed this new information to defense counsel. The case proceeded to trial, and on direct examination, the witness told a story greatly different from his grand jury testimony directly implicating the defendant in many respects. After three days at trial, the defendant moved to dismiss the indictment because he claims it was based, at least in part, on perjured testimony. The motion was denied. The defendant was convicted and the appeal followed. The court did not reverse the conviction in this case since their independent review of the grand jury transcript obviated the need for a hearing before the district court. The court held that there was ample evidence, apart from the witness' perjured testimony, to support the indictment.

3. Subpoenas duces tecum

In a case involving alleged forgery of United States Treasury checks, the district court suppressed the handwriting exemplars, fingerprints, and photographs of three defendants secured by postal inspect-
tors through the use of grand jury subpoenas *duces tecum*. At the time those items were obtained, each defendant made statements which were also suppressed. The government appealed, and in *United States v. Santucci*, the court found that the subpoenas were neither sought nor obtained from any grand jury, nor had the case been opened before a grand jury. The postal inspectors suspected the three defendants of criminality and thereafter obtained from the Assistant United States Attorney blank grand jury subpoenas *duces tecum* to be served on the defendants.

There was no dispute that the grand jury could, by subpoenas *duces tecum*, require handwriting exemplars, photographs, and fingerprints. Further, there was no controversy that the grand jury could provide in its subpoena that the witness be given an option to provide the identification evidence outside the actual presence of the grand jury. The issue in the trial court was whether or not the United States Attorney's office should be permitted to use evidence gathered by the use of a grand jury subpoena, not actually authorized by a grand jury, that also gives the witness an option to satisfy that subpoena outside the presence of the grand jury.

The trial court viewed the combination of permissible procedures to be constitutionally impermissible because of the absence of sufficient involvement by the grand jury. Therefore, all the identification items as well as the statements of each defendant were suppressed.

The Seventh Circuit had not ruled on this issue before. Other circuits had ruled on facets of the problem, and the trial court relied upon these rulings in the search for a fair resolution of the issue, but the court on review distinguished the cases from the instant fact situation. The government claimed good faith in all it did, even if what it did was wrongful. The trial judge found good faith not to be a controlling issue, but made his view clear as to the good faith standard which he would otherwise have applied by contrasting the decisions a United States Attorney makes in his office with the immediate decisions a police officer often must make in the street without an opportunity for

22. 674 F.2d 624 (7th Cir. 1982), cert. denied, — U.S. —, 103 S. Ct. 737 (1983).
25.  Id.
26.  Id. at 628.
27.  Id. distinguishing In re Melvin, 546 F.2d 1 (1st Cir. 1976); In re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973); Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954); United States v. O'Kane, 439 F. Supp. 211 (S.D. Fla. 1977).
research or reflection. The court on appeal agreed that the district court’s comparison crippled the government’s good faith argument. The court, however, reversed and remanded for further proceedings, saying that the defendants themselves are, in part, responsible for the absence of grand jury involvement since they elected to provide the exemplars, fingerprints, and photographs rather than appear before the grand jury for this purpose. In addition, the government would have been entitled to secure the identification items by the strict issuance and use of a grand jury subpoena duces tecum, or by other pretrial procedures. To exclude those identification items suppressed by the trial court would only delay the inevitable for the benefit of no one, but to the unnecessary detriment of expeditious law enforcement efforts.

The dissent in Santucci agreed with the district court’s view. The majority had felt there was no exploitation of the subpoenas and the statements provided by the defendants sufficiently qualified as the product of the exercise of free will. However, the majority cautioned that any “casual handling of subpoenas” by the government only creates delays and time-consuming legal argument in procedural hearings and appellate review of the issue. The court believed these problems could easily be avoided by the prosecution since they merely tend to legitimize the attacks upon the grand jury processes by its critics who claim the grand jury has “degenerated into an abusive tool of the United States Attorney.

4. Secrecy vs. Disclosure

In 1977, Congress added an exception to the general rule of secrecy of grand jury matters. In re Special February 1975 Grand Jury, concerned that exception, which permits disclosure of matters occurring before the grand jury, with court approval “preliminarily to or in connection with a judicial proceeding.” In addition, this case discussed the district court’s “general supervisory powers” which allows, in rare situations, district courts to slip entirely around Rule 6(e)

30. Santucci, 674 F.2d at 633 n.4.
31. Id.
32. FED. R. CRIM. P. 6(e)(3)(C)(i).
33. PUB. L. 95-78, §2, 91 STAT. 319.
35. FED. R. CRIM. P. 6(e).
and permit disclosure.\textsuperscript{36} In the instant litigation, the government desired disclosure of a taxpayer's admissions of wrongdoing before the grand jury. In addition, the government sought certain grand jury information of the taxpayer's net profit for the year 1975, records showing purchase and sales statements, and grand jury testimony surrounding the grand jury investigation of the taxpayer.

The district court denied the request of the government, reasoning that the subject-matter either was not activity occurring before the grand jury, and therefore not subject to Rule 6(e) secrecy limitations, or, were outside disclosure since the items were not "preliminarily to or in connection with a judicial proceeding."\textsuperscript{37} The court acknowledged that it is not always bound by the strict and literal interpretation of Rule 6(e) in the situation where there is some extraordinary and compelling need for disclosure in the interest of justice, and little traditional need for secrecy remains. Inasmuch as the government's request for disclosure concerned the civil aspects of the taxpayer's grand jury investigation, the court agreed that tax collection is important, but of insufficient priority to justify revealing grand jury matters. The alternative available to the IRS is sufficient, namely the statutory means\textsuperscript{38} to accomplish its present efforts at assessing civil liability.

The court refused to allow liberal disclosure of grand jury matters for IRS tax collection efforts, which would perhaps facilitate tax collection, at the expense of creating a temptation to abuse the grand jury process. The court ruled that documents subpoenaed by the IRS are subject to Rule 6(e) and if the documents reveal grand jury secrets then the documents acquire immunity and need not be revealed.\textsuperscript{39} Any third-party documents which do not breach grand jury secrecy may be released under the district court's supervisory power. The trial judge who is thoroughly familiar with the grand jury proceeding will be accorded wide discretion in making these determinations.\textsuperscript{40}

The court noted that the Seventh Circuit approach differs from the rule in other circuits. It was the court's belief that some courts have gone a degree further than the Seventh Circuit found necessary in the instant case, and have held that "matters occurring before the grand jury" include documents that may tend to reveal what transpired

\textsuperscript{36} Id.; In re Biaggi, 478 F.2d 489 (2nd Cir. 1973).
\textsuperscript{37} 662 F.2d at 1235.
\textsuperscript{38} 26 U.S.C. § 7602 (1976); See United States v. Continental Bank & Trust Co., 503 F.2d 45, 50 (10th Cir. 1974).
\textsuperscript{39} 662 F.2d at 1244.
\textsuperscript{40} Id. at 1243.
before the grand jury.\textsuperscript{41} Under that test, the documents in the instant litigation would "unquestionably be protected from disclosure."\textsuperscript{42}

The case of \textit{In re State of Illinois Petition to Inspect and Copy Grand Jury Materials},\textsuperscript{43} raised the question of whether a provision of the Antitrust Improvements Act\textsuperscript{44} authorizes the disclosure of grand jury materials to a state attorney general without the traditional showing of particularized need.\textsuperscript{45} The government did not oppose providing the grand jury materials but certain defendants, in the civil suits related to the grand jury inquiries, and others intervened to oppose the request of the State of Illinois.

The district court denied Illinois access to any of the requested grand jury materials, stating that the "investigative files and other materials" language of the Act did not refer to material acquired by and belonging to the grand jury.\textsuperscript{46} The district court concluded that the Federal Rules of Criminal Procedure\textsuperscript{47} determine the conditions under which disclosure of grand jury materials is permissible. The district judge denied disclosure of the grand jury materials because he found that the petitioners had failed to meet the particularized need standard required by Rule 6(e).

The Seventh Circuit declined to follow the thinking of the Fourth and Ninth Circuits, which have held that the provisions of the Antitrust Improvements Act were intended to include grand jury materials.\textsuperscript{48} Instead, the Seventh Circuit ruled that the law does not permit the Department of Justice to release grand jury materials to a state attorney general "upon request" as was urged by the State of Illinois' interpretation of the law. The court said the governing law as to the disclosure of grand jury minutes is Rule 6(e),\textsuperscript{49} and requires a showing of "particularized need."\textsuperscript{50}


\textsuperscript{42} In re Special February 1975 Grand Jury, 662 F.2d at 1244.


\textsuperscript{44} 15 U.S.C. § 15(b) (1976).

\textsuperscript{45} 659 F.2d at 801.

\textsuperscript{46} 659 F.2d at 802.

\textsuperscript{47} \textit{FED. R. CRIM. P.} 6(e).


\textsuperscript{49} 659 F.2d at 804.

\textsuperscript{50} \textit{Id.} at 804, 808.
A recalcitrant grand jury witness was adjudged by the district court to be in civil contempt and was ordered confined.\textsuperscript{51} In the appeal of this order, the court in \textit{In re DeMonte}\textsuperscript{52} was asked to consider allowing a change in the Seventh Circuit rule established in \textit{Matter of Special February 1977 Grand Jury (Pavone)},\textsuperscript{53} which denied "full discovery" when a grant of immunity is offered\textsuperscript{54} to a witness before the grand jury and the witness asserts that the inquiry, which he alleged was based on illegal electronic surveillance, was unlawful under federal law.\textsuperscript{55}

In \textit{DeMonte}, the defendant appeared before a special grand jury and asserted his fifth amendment privilege. Following that refusal to testify, the government presented to the district court a petition for an order granting the defendant immunity. At the hearing on the immunity petition, the defendant restated his claim that he had been the subject of illegal electronic surveillance and asked for limited access to government documents which purportedly authorized such surveillance.

The trial court had disallowed that argument as premature and granted the immunity order.\textsuperscript{56} The defendant was returned to the grand jury, and for the third time he refused to testify. Despite the grant of immunity, he continued to assert what he claimed was his fifth amendment privilege. He also repeated his claim that his subpoena was "based on illegal wire tapping." The government responded by filing a petition for contempt.

At the hearing in the district court the contempt order was entered. At this hearing, the government responded to the defendant's prior wiretap allegations by presenting an affidavit which admitted that the defendant had been the subject of electronic surveillance, but which stated that all electronic interceptions of defendant's communications had been lawful. The government filed a set of sealed documents in

\begin{itemize}
\item \textsuperscript{51} 28 U.S.C. § 1826 (1976).
\item \textsuperscript{52} 667 F.2d 590 (7th Cir. 1981).
\item \textsuperscript{53} 570 F.2d 674 (7th Cir.), \textit{cert. denied sub nom.} Pavone v. United States, 437 U.S. 904 (1978). The court evaluated the discovery request of a recalcitrant grand jury witness in a factual setting similar to the case at bar.
\item \textsuperscript{54} 18 U.S.C. §§ 6002, 6003 (1976); \textit{see} Kastigar v. United States, 406 U.S. 441, 454 (1972).
\item \textsuperscript{55} 18 U.S.C. § 2515 provides:
\begin{quote}
Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceedings in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this Chapter.
\end{quote}
\item \textsuperscript{56} 667 F.2d at 592.
\end{itemize}
support of this contention. The defendant moved for permission to ex-
amine the supporting materials. The trial court had denied the request
and, instead, made an in camera review of the documents. The issue
presented on review was whether the district court erred in denying the
appellant limited access to documents presented by the government to
support its claim that the electronic surveillance of the appellant was
lawful. The district court had relied upon Pavone. The reviewing
court noted that two other circuits, faced specifically with "limited
access" requests, had followed the lead of the First Circuit. These
circuits spoke of the need to balance three interests: effective grand
jury investigation, government secrecy, and a grand jury witness' right
not to answer questions based upon illegal surveillance. The cases em-
phasized that, in this sensitive area, the "limitation" as well as the "ac-
cess" are crucial to this balance.

The Seventh Circuit, in evaluating the context of this continuum,
and in light of the appellant's limited request, held that the better rule
would be to presumptively permit him some access. The court said
such a rule will not undermine the policy considerations noted in
Pavone. The delay in grand jury proceedings will not be appreciably
increased. Any secrecy concerns will be protected by the government's
ability to rebut the presumption of limited access. Should the govern-
ment object, the trial court's preliminary determination regarding the
effect of the presumption will itself be made in camera.

The court was convinced the new Seventh Circuit rule reflects a
recognition of the countervailing individual interest at stake. In addi-
tion, the rule will help to refine the exercise of judicial discretion which
is so vital in this area. By utilizing a presumption of limited disclosure,
but allowing the government to rebut that presumption, a court will be
better able to focus on the pivotal questions of an individual case.

The court set forth additional tips, stating that when total nondis-
closure is truly important, the government will indicate specific reasons
why the trial judge should preclude access. On the other hand, in a
case where there is an irregularity which is not patent, a witness may be
able to explain why the court, in its discretion, should disclose addi-
tional information. In adopting the "limited access" rule outlined by

57. 570 F.2d 674 (7th Cir. 1978).
58. In re Harkins, 624 F.2d 1160, 1166 (3d Cir. 1980); In re Grand Jury Proceedings (Kats-
souros), 613 F.2d 1171, 1174 (D.C. Cir. 1979).
59. 667 F.2d at 599. See In re Lochiatto, 497 F.2d 803 (1st Cir. 1974).
60. 667 F.2d at 599.
the First Circuit, the court in *DeMonte* vacated the district court order holding the defendant in contempt, since he was not given such access, and remanded the case for further proceedings.

5. *Use Immunity's Effect on Later Civil Deposition*

In the district court, defendant Conboy had been ordered to answer questions at a deposition concerning a civil antitrust action. The questions were either taken verbatim from or closely tracking the transcripts of his previous grand jury testimony, for which he had earlier received use immunity. Conboy asserted his fifth amendment privilege. The district judge held him in contempt of court and the appeal followed. The reviewing court, relying upon the Second and Eighth Circuit case law, affirmed the order of the district court ordering appellant to answer deposition questions. *In re Corrugated Container Antitrust Litigation (Conboy)* held that terms of the use immunity statute prohibit the use of Conboy's immunized grand jury testimony or any information "directly or indirectly derived from" it, in any criminal case except a perjury prosecution. Since the questions being asked in the deposition phase of the case were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, the court did not believe that any of Conboy's answers at the deposition would be "derived from" the prior immunized grand jury testimony and therefore unavailable for use in any subsequent criminal prosecution. The court believed Conboy's contention of possible criminal prosecution was not sufficient to invoke his fifth amendment privilege.

The Supreme Court granted certiorari in this case to resolve the conflict in the Courts of Appeals, and affirmed in *Pillsbury Co. v. Conboy*. The Court said that "Conboy acted properly in maintaining his silence in the face of the District Court's compulsion order and by testing the validity of his privilege on appeal." The Court held that a deponent's civil deposition testimony, closely tracking his prior immu-

61. 667 F.2d at 598-99 n.20, 22-25. See *In re Lochiatto*, 497 F.2d 803 (1st Cir. 1974).
63. The Chief Judge of the District Court for the Southern District of Texas expressly exercised the powers of the District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1407(b). The contempt hearing was conducted by telephone with his chambers in Houston.
64. *In re Corrugated Container Antitrust Litigation (Fleischacker)*, 644 F.2d 70 (2d Cir. 1980); *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979).
65. 655 F.2d 748 (7th Cir. 1981).
68. *Id.* — U.S. at —, 103 S. Ct. at 617.
nized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002, and therefore may not be compelled over a valid assertion of his fifth amendment privilege.69

B. Indictments

The court set forth the test for determining the sufficiency of an indictment in United States v. Garcia-Geronimo.70 The fifth amendment guarantee of the right to indictment by a grand jury and its bar to double jeopardy, and the sixth amendment guarantee that the defendant be informed of the charge against him require that for an indictment to be valid it must contain the elements of the offense. In addition, it must sufficiently apprise the defendant of what he must be prepared to meet. If any other proceedings are taken against the defendant for a similar offense, the record must show with accuracy to what extent he may plead a former acquittal or conviction. The indictment, the court said, must also show sufficient facts being alleged in the charge so that the court may decide whether such facts are sufficient in law to support a conviction.71 The court said the test for determining the sufficiency of the indictment is whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial.72

C. The Competency of the Defendant

The undesirable practice of lawyers engaging in unsworn colloquy with the judiciary over matters concerning substantial rights of their clients and former clients was highlighted in Stokes v. United States.73 The court had earlier decided an appeal in Stokes and remanded to the district court.74 The issue in the present appeal concerned the propriety of a hearing conducted by the trial court during defendant's motion to vacate sentence. Stokes claimed he was incompetent to stand trial, an issue not raised by his trial counsel. The court on appeal said that once

69. Id.
70. 663 F.2d 738 (7th Cir. 1981).
72. 663 F.2d at 743; accord, United States v. Jeffers, 532 F.2d 1101, 1112-13 (7th Cir. 1976), aff'd in part, vacated in part on other grounds, 432 U.S. 137 (1977); People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269 (1973).
73. 652 F.2d 1 (7th Cir. 1981).
a factual dispute has developed concerning the issue of incompetency, an adversary hearing must be held, with counsel. The district court had engaged in an unsworn colloquy with Stokes' trial counsel, who did not represent him for the section 2255 motion, to determine why counsel did not raise the competency issue. In his written memorandum, the district judge stated that he relied on "an extensive interview of the defendant's trial counsel" who "unequivocally thought his client to be competent." In an oral ruling, the district judge included the observation that he was "very impressed" with counsel's remark that "he did not feel that there was the slightest chance that there was an incompetency issue to be raised, so he didn't raise it." Stokes was not represented by counsel at the section 2255 hearing, nor was he allowed to cross examine his former counsel.

On appeal, the court felt this ex parte hearing did not satisfy Section 2255's requirement of an adversary judicial hearing. The court relied upon United States v. Underwood. In Underwood, the trial judge held an in-chambers conference with the prosecutor and Underwood's trial counsel. The First Circuit's appraisal in Underwood was that the unsworn representations of counsel are not a substitute for evidence. The court reversed and remanded the instant case for an evidentiary hearing, instructing that counsel be provided to Stokes. The court noted that since the district court had refused to appoint an independent psychiatrist to examine Stokes previously, and while this alone would not constitute an abuse of discretion, the court felt in the "interest of finality" the trial court may wish to "reconsider its decision." Perhaps this directive was designed to encourage district courts from prolonging litigation in cases involving incompetency issues, which could otherwise be handled with reasonable dispatch in the trial court without the certain intervention of appellate review.

D. Motion to Suppress

1. Court's Right to Reconsider

In United States v. Regilio, the court was faced with a question of first impression in this circuit as to whether or not it is permissible for a district court to admit evidence at a second trial which it had suppressed at the first trial. The only other decision on this issue was the

76. Id.
77. 577 F.2d 157 (1st Cir. 1978).
Fifth Circuit’s decision in United States v. Harris.\textsuperscript{79}

The Harris court held that it was not error for the district court to reconsider its pretrial suppression order after a mistrial and to reverse the original order. The Regilio court followed Harris and held that Regilio builds upon United States v. Jones,\textsuperscript{80} in which the Seventh Circuit held that if a district court denies a pretrial motion to suppress, and matters appearing at trial cast doubt on the pretrial ruling, the district court must reconsider the issue of suppression de novo. The court in Jones ruled that the defendant was entitled to have evidence suppressed only if it was obtained unconstitutionally. The Regilio court said if it later appears that no constitutional violation occurred, society’s interest in admitting all relevant evidence militates strongly in favor of permitting reconsideration of an earlier motion to suppress decision.\textsuperscript{81}

2. Warrantless Entry of the Home

In United States v. White,\textsuperscript{82} the defendants were convicted of possession of heroin with intent to distribute. On appeal, the defendant argued the infirmity of the search processes and the seizure of $42,194.00. The district court had granted a Rule 41(e)\textsuperscript{83} motion based upon the unconstitutionality of the seizure. The government returned the money in compliance with the ruling and then immediately reseized the money and brought a civil forfeiture action.\textsuperscript{84}

The district court granted summary judgment for White in the forfeiture action because of the collateral estoppel effect of its earlier determination that the money had been illegally seized.\textsuperscript{85} The motion was granted because the seized money was unrelated to the indictment in the instant case for possession of heroin. The court of appeals disagreed, distinguishing the defendant’s reliance on United States v. One Residence and Attached Garage (Accardo).\textsuperscript{86} In Accardo, the authorities seized a large sum of money found in the home of a suspected

\textsuperscript{79} 479 F.2d 508 (5th Cir. 1973).
\textsuperscript{80} 438 F.2d 461, 467 (7th Cir. 1971).
\textsuperscript{81} Regilio, 669 F.2d at 1177, citing United States v. Covello, 657 F.2d 151 (7th Cir. 1981); United States v. White, 607 F.2d 203, 205 (7th Cir. 1979), cert. denied, 449 U.S. 1114 (1980).
\textsuperscript{82} 660 F.2d 1178 (7th Cir. 1981).
\textsuperscript{83} FED. R. CRIM. P. 41(e) provides in part, that “a person aggrieved by an unlawful . . . seizure may move the district court . . . for the return of the property . . . which was illegally seized”.
\textsuperscript{85} 498 F. Supp. at 1326-27.
\textsuperscript{86} 603 F.2d 1231 (7th Cir. 1979).
underworld figure despite the absence of evidence linking the money to any specific criminal acts. In *White*, the court found *United States v. Jones*\(^8\) controlling. In *Jones*, officers during a valid search found a substantial quantity of cash in large bills, even though the actual identification of the pre-recorded funds did not occur until later. In the instant case the court noted that $3,800 in pre-recorded funds representing five previous heroin sales was identified among the $42,194 seized from White's apartment. In addition, the officers knew that at least one previous narcotics transaction had taken place in White's apartment where the money was found. The court reversed the district court's determination and held that the seizure was lawful, vacated the judgment for White in the civil forfeiture action, affirmed the heroin conviction and remanded to the district court for further proceedings.\(^8\)

Moreover, White attempted to show the entry into his home was violative of *Payton v. New York*,\(^8\) since his consent was obtained by deceit. The district court found the warrant requirement mandated in *Payton* inapplicable because the officers entered White's apartment with White's consent. White's argument was that allowing consent by deceit after probable cause sufficient to get an arrest warrant has arisen vitiates *Payton*’s arrest warrant requirement. The court agreed it would have been more receptive to White's theory if the entry into his home had been solely to effect his arrest. The court noted the deceitfully obtained consent in this case was part of an ongoing investigation into White's heroin activities. The court ruled, "[w]e do not believe that an arrest warrant need be obtained as soon as probable cause attaches."\(^9\)

The court found that since the entry into White's apartment served investigative purposes, the entry was permissible even though White's consent was obtained by a ruse.\(^9\) In affirming White's conviction the court rejected the argument that the requirement of an arrest warrant in the instant case would add to the protection accorded by *Payton*. The court said that the warrant requirements interpose the decision of a neutral and detached magistrate to protect individuals from unfounded

\(^8\) 518 F.2d 384, 389 (7th Cir.), cert. denied, 423 U.S. 997 (1975) ("when police found a substantial quantity of cash in large bills, they could reasonably believe that this was the fruit of criminal behavior, even though the actual identification of the pre-recorded funds did not occur until later".

\(^8\) 660 F.2d at 1185.

\(^8\) 445 U.S. 573, 576 (1980) ("the Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest").

\(^9\) 660 F.2d at 1183.

invasions of their privacy by preventing unwarranted intrusions.\textsuperscript{92}

The court reasoned that a magistrate's determination that probable cause for an arrest warrant was lacking, if such a determination had been made, would not have prevented the ultimate intrusion in the present case. The undercover officers would still have been admitted to White's home by posing as heroin purchasers, an entry condoned by the Supreme Court in \textit{Lewis v. United States},\textsuperscript{93} and the officers would have arrested White when they discovered the heroin. The court said it serves no purpose to require an arrest warrant where the same intrusion would occur whether or not the magistrate issued the warrant.\textsuperscript{94}

In \textit{United States v. Gillespie},\textsuperscript{95} the court considered a novel issue concerning the applicability of arrest warrants in searches. The court concluded the factual issue was the same as that confronted in \textit{Steagald v. United States},\textsuperscript{96} which held that the possession of an arrest warrant by law enforcement officers for a third party does not justify the search of a home not belonging to the person named in the arrest warrant. In light of \textit{Steagald}, the court reversed outright the defendant's conviction for possession of heroin with intent to distribute. The court reasoned that the circumstances surrounding the police and the FBI agents entry into the defendant's home indicated that consent could not have been freely and voluntarily given since law enforcement officers arrived with shotguns and revolvers drawn positioning themselves at the defendant's front and back doors. When the defendant opened the door he was told by the law enforcement officers they were making efforts to locate three fugitives. The court's opinion described how the facts showed the law enforcement officers had their weapons drawn in the "ready" position as the officers frisked the defendant, forced him to walk in front of them with their shotguns cocked, and searched through the house, room by room. The court remarked that "essentially free and unrestrained choice" is not possible under such circumstances.\textsuperscript{97}

The prosecution argued that the conviction should be affirmed inasmuch as a second and third search of the defendant's home, made with the defendant's consent, also yielded additional heroin charged in this case. The court maintained that all the police knowledge of the defendant's illegal activities was derived from their initial unconstitu-

\begin{itemize}
\item \textsuperscript{92} 660 F.2d at 1183.
\item \textsuperscript{93} 385 U.S. 206, 210-11.
\item \textsuperscript{94} 660 F.2d at 1183.
\item \textsuperscript{95} 650 F.2d 127 (7th Cir. 1981).
\item \textsuperscript{96} 451 U.S. 204 (1981).
\item \textsuperscript{97} 650 F.2d at 129.
\end{itemize}
tional search; therefore, none of the physical evidence against the defendant discovered on the day of the search may be introduced against him. The prosecution also argued that the testimonial evidence obtained suffered from the same taint as the physical evidence, because the exclusionary sanction applies to any “fruits” of a constitutional violation—whether the fruits consists of tangible evidence, confessions, or statements of the accused obtained during an illegal arrest and detention.

The court said that since the “probable cause” for the defendant’s arrest, during which period of time he made the confession, had resulted directly from the evidence seized during the illegal search, his detention was also illegal. Therefore, the court concluded, the testimonial evidence obtained from the defendant by law enforcement authorities, although voluntary under the fifth amendment standards, was inadmissible under the fourth amendment.

In United States v. Fleming, the defendants were tried jointly on federal drug charges and, after a bench trial, convicted. Fleming involved the warrantless entry into a home and the warrantless arrests of the appellants following the continuous seventy-day surveillance of Fleming and his acquaintances. DEA agents observed each of the appellants greet one another at the doorway of Fleming’s home in what they believed might be a narcotics transaction. Once when the door was ajar, the law enforcement agent saw Fleming with a small paper bag in his hand. The agent arrested the arriving guest. In addition, the agent put his foot in the doorway, preventing Fleming from shutting the door. Two other officers who had been assigned to the stake-out went in through the door and arrested Fleming. Fleming’s version of the events was substantially different, saying he was carrying nothing when he came to the door, and the police pushed past him, over his protest, explaining only that they needed to “secure the premises.”

The district court and the reviewing court approved the warrantless entry, holding that probable cause was established when the law enforcement agent had enough evidence to lead him to believe that defendants had committed or were committing a criminal act.

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101. 677 F.2d 602 (7th Cir. 1982).
102. Id. at 605 n.6.
103. See United States v. Gaston, 620 F.2d 635, 638 (7th Cir. 1980).
The appellants also argued in *Fleming* that inasmuch as the police had so much evidence of Fleming's possible involvement in drug trafficking, they should have obtained an arrest warrant for him and a search warrant for his home since no exigent circumstances existed to bypass the requirements of *Payton v. New York*. The district court found this action by the law enforcement agents was not a routine felony arrest, but an entry into the appellant's home only after they saw him standing with his front door ajar, engaging in what could reasonably be believed to be a drug sale. The court found that the police conduct of following Fleming into the house was governed, not by *Payton*, but by *United States v. Santana*. The court affirmed the convictions in *Fleming*, saying there was no constitutional defect in what the authorities did preliminarily to the arrest of the defendants. The court said it would not second-guess the officers' investigative strategy of foregoing the obtaining of a search and arrest warrant and continuing their stake-out in the hopes of catching Fleming and one of his customers "redhanded."

3. Administrative Searches and Warrants

In *Nechy v. United States*, the court had occasion to adopt the interpretation of other circuits when it considered the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970. In 1980, the Drug Enforcement Administration (DEA) sought and obtained a search warrant which authorized the agency to conduct an administrative inspection search of a pharmacy in Milwaukee, Wisconsin. The issue of the legality of the search was tested by the pharmacy by filing a motion in the district court pursuant to Rule 41(e) for the return of the seized property. The pharmacy requested an evidentiary hearing. The district court ruled that there was probable cause, as defined by Title 21, to support the issuance of the warrant. Accordingly, the court refused the pharmacy's request for an evidentiary

104. 445 U.S. 573 (1980) (fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest).
105. 427 U.S. 38 (1976). In *Santana*, the drug sale had been completed and the seller was standing in the doorway of her house, paper bag in hand, when the police announced themselves and moved to arrest her. She retreated inside. The court held that Santana was in a public place when the police sought to arrest her, and that a suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place.
106. 665 F.2d 775 (7th Cir. 1981).
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hearing, and denied the motion for suppression and return of the seized materials.

On appeal, the Seventh Circuit noted that "it is well-established that Congress may authorize searches of regulated industries conducted under authority of warrants issued on less than probable cause."111 The court said the issue has never been before the Seventh Circuit, but that those courts of appeals which have addressed the matter have held that there is probable cause to issue a warrant if the warrant affidavit alleges either that the regulated pharmacy has never previously been inspected,112 or that the pharmacy has recently purchased a large amount of a controlled drug.113 The court agreed with these opinions and held that a warrant affidavit averring either that a pharmacy has never been inspected, or that it has recently received an inordinately large supply of a controlled drug, is sufficient to establish probable cause to issue an administrative search warrant. No hearing was necessary to determine whether the warrant in this case was issued upon a showing of probable cause since the pharmacy admitted the warrant affidavit stated administrative probable cause.

In a concurring opinion, the possible limits on the use of these administrative warrants was explored. The opinion noted that since the DEA in this case used the Milwaukee police in the search of the pharmacy, it was questionable that the real purpose behind the issuance and use of the administrative warrant was to gather evidence of criminal activity. The concurring opinion said that employing administrative warrants for criminal investigations is illegal.114 The concurring opinion agreed that under the present circumstances there was no basis for an evidentiary hearing. However, should a criminal proceeding result from the search, the concurring opinion noted the appellant could then raise his objection about the improper use of the administrative warrant.115

4. Warrant for "Beeper" and Home Entry

In United States v. Ellery,116 the defendant was convicted of drug-related crimes, and on appeal attacked the government's use of an elec-

112. Id. citing United States v. Prendergast, 585 F.2d 69, 70 (3d Cir. 1978); United States v. Goldfine, 538 F.2d 815, 819 (9th Cir. 1976).
114. 665 F.2d at 777 (Swygert, J., concurring).
115. Id. at 777-78.
116. 678 F.2d 674 (7th Cir.), cert. denied, — U.S. —, 103 S. Ct. 150 (1982).
tronic beeper, a tracking device, which led agents to his apartment, and ultimately, to discovery of his clandestine drug laboratory. The court approved this investigative technique in Ellery, where the government alleged that a high risk of detection existed if normal surveillance procedures were employed. The basis for obtaining the warrant was information provided by a chemical company that a shipment of norephedrine hydrochloride (HCL) was requested for shipment to Chicago and that HCL had no common household use, but is an important ingredient in the manufacture of the controlled substance amphetamine. The first warrant was authorized and the United Parcel Service delivery was monitored. Eventually, the package was traced to a particular apartment unit by using the beeper device.

Another warrant was obtained for entry into the apartment. The second warrant outlined the occupant’s prior history of purchases of other chemicals used for the manufacturing of controlled substances and a conviction for possession of marijuana. The seizure included chemicals used in controlled drugs in addition to equipment used to produce the drugs. Ellery argued that neither the search warrant for his apartment nor the order authorizing installation of the beeper were supported by probable cause. In affirming the conviction, the court relied upon United States v. Anton,¹¹⁷ which contained a number of factors present in the instant litigation, including the use of a fictitious name in ordering the chemicals which could be used to produce controlled substance and sworn DEA statements that no legitimate commercial or industrial activity appeared to be occurring at the subject’s home.

In Ellery, the appellant claimed that the items seized from his home were not in violation of law but were simply unused medication prescribed by his doctor. The court disposed of this argument by showing that the evidence at trial resulted in appellant admitting he possessed more tablets than his doctor had prescribed and the government’s proof suggested that appellant was “nearer to a wholesale supplier of drug store chains than to a mere chemist tinkering with his toys.”¹¹⁸

5. Unreasonable Car Search

In United States v. Posey,¹¹⁹ the court stated that evidence ob-

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¹¹⁸. 678 F.2d at 679.
¹¹⁹. 663 F.2d 37 (7th Cir. 1981), cert. denied, 455 U.S. 959 (1982).
tained by the police was the product of an illegal search and seizure, but split on the issue of whether it was harmless error. The facts showed that Posey, while driving his wife's vehicle in the State of Alabama, was observed by a police officer who characterized Posey and the occupants of the vehicle as persons who were observing the officer and a banking establishment in a "suspicious manner." The police officer broadcast a radio message to all law enforcement officers in the county-wide area instructing anyone seeing the vehicle to "check out the passengers and see what they were up to." Fifteen minutes later, and fifteen miles from the small town bank, Posey was stopped. The police searched Posey's vehicle and a gun was recovered, which the district court allowed to be introduced into evidence as related to a bank robbery in the State of Indiana.

The government argued Posey had no standing to challenge the search of the vehicle owned by his wife. The court disposed of this argument by noting that whether an individual's fourth amendment rights are implicated by a government search or seizure turns upon the individual's legitimate expectations of privacy, rather than principles of property law. Posey plainly had an expectation of privacy in an automobile owned by his wife and over which he was exercising exclusive control pursuant to her permission at the time of the search. Therefore, the search and seizure challenged by Posey implicated his fourth amendment rights. The government further argued that the stop of Posey was justified under the probable cause exception carved out by Terry v. Ohio and its progeny. The court disagreed. The police officer's suspicions that Posey was preparing to rob a bank in the small town would be the justification for a Terry stop near the scene of the bank. However, once Posey was fifteen miles outside the town where the bank was located, the court did not believe that legal justification existed for the police to stop and search Posey's vehicle.

The court concluded that the stop of Posey was violative of his fourth amendment rights and that the subsequent introduction of the seized revolver in a bank robbery charge in another state was constitutional error, but did not contribute to Posey's conviction.

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121. 392 U.S. 1 (1968).
123. 663 F.2d at 42, citing Chapman v. California, 386 U.S. 18 (1967). The dissenters saw matters differently, believing that the handgun, the only piece of physical evidence introduced at
E. Plea Agreements

In *United States v. Cook*, the district court denied a motion to vacate a guilty plea. The defendant raised the issue of whether the government breached its promise to offer nothing in aggravation of the defendant's sentence by allowing information in its possession to be included in the probation officer's pre-sentence report to the court. The probation officer who prepared the report conceded at the hearing that this information had come primarily from the government's file. The defendant was charged with five counts centering around narcotics violations and originally pleaded not guilty to all of the charges. He later entered an *Alford* plea to one count of distributing cocaine, pursuant to a plea agreement with the prosecutor.

Unknown to the defendant, the government's file noted that the defendant was the owner of a lounge reputed to be a major distribution center for cocaine and marijuana. Furthermore, the defendant was reportedly the head of the organization which was distributing those drugs. The court on review concluded that whether the sentencing judge became aware of the damaging information through the probation officer's written report or via the United States Attorney's oral comments, the result was the same. The government accomplished indirectly what it had promised not to do directly.

The court held that the government breached its promise to the defendant that it would offer nothing in aggravation of his sentence when it permitted the probation officer assigned to the case to obtain information of an aggravating nature from the government's file for use in the pre-sentence report to the trial court. Plea agreements, the court stressed, need to be carefully drawn and understood by all parties to avoid the problem illustrated in *Cook*. Since the defendant requested that he be allowed to withdraw his plea, and considering the nature of the plea agreement, specific performance, even before a different sentencing judge, would seem neither practical nor desirable. The court decided that allowing the defendant to withdraw his plea would be the only appropriate remedy.

trial, not only contributed to the conviction, but that without the gun as evidence, the jury would not have convicted Posey. 663 F.2d at 42.

124. 668 F.2d 317 (7th Cir. 1982).

125. An *Alford* plea is one in which a defendant maintains his innocence but nevertheless decides to waive his right to a trial and accept a sentence in the belief that he would be found guilty anyway. See *North Carolina v. Alford*, 400 U.S. 25 (1970). The Department of Justice regards such pleas as "particularly undesirable when entered as part of an agreement with the government." *United States Department of Justice, Principles of Federal Prosecution* 30 (1980).
Santobello v. New York126 held that while a defendant has no absolute right to have a guilty plea accepted, a court must exercise sound discretion in determining whether or not to reject a plea. In United States v. Delegal,127 court-appointed counsel and the government reached a plea agreement, which was tendered to the district court. Its substantive terms were simple:

(a) The defendant will plead guilty to count one of the indictment.
(b) The United States will dismiss count two of the indictment at the time of sentencing.
(c) The United States will remain silent at the time of sentencing.

In addition, the agreement stated that “no promises have been made to the defendant other than those contained in this petition.” In accordance with Rule 11,128 the district court determined that (1) the defendant fully understood the plea and had made it voluntarily and (2) there was a sufficient factual basis for the plea. Accordingly, the district court accepted the plea as to count one and set the matter for sentencing. Several days later, defendant’s counsel wrote to the prosecutor about the possibility of defendant serving federal time concurrently with time due under a prior state court conviction in Florida. The prosecutor wrote a letter to defendant’s counsel advising him he assumed the defendant believed that his transfer to a state prison system in the State of Florida would be a condition to the defendant’s plea of guilty. On that assumption, the government then requested a further hearing on the defendant’s plea agreement. Prior to the hearing, counsel provided the prosecutor with a letter saying that the defendant did not consider the transfer to the state prison system as a part of the earlier plea agreement.

At the hearing the district court asked the defendant three times whether he thought any promise concerning the serving of time in the State of Florida was a part of the plea agreement. The defendant stated that he was hoping that he would serve his time in Florida, but that he thought it was essentially the district court’s judgment. The court vacated the guilty plea, and reset the case for trial. The court told both sides that the understandings expressed at the hearing would serve as the basis for a revised plea agreement, incorporating a reference to the possible serving of time in Florida, but making plain that this was not a condition of the plea.

The defendant’s case was then transferred to another district judge

127. 678 F.2d 47 (7th Cir. 1982).
128. FED. R. CRIM. P. 11.
who was unaware of what had transpired at the Rule 11 proceedings. Defendant’s counsel failed to pursue the recasting of the written plea agreement. The defendant was tried and convicted on counts one and two. On appeal, he urged that the first district judge improperly ordered his guilty plea withdrawn.

The court in Delegal ruled that the defendant was prejudiced by the withdrawal of the plea agreement, since he was eventually convicted on two counts, while he had only entered a plea of guilty to one, with the government committed to move for the dismissal of the other count. This case should resolve for many individuals whether or not Rule 11 requires the need for a written plea agreement. Rule 11(e) speaks of a “plea agreement.”¹²⁹ The court noted that they did not mean to imply that plea agreements should not ordinarily be reduced to written form. The court said that a written agreement eliminates the confusion which may result from the reviewing of a transcript of an oral hearing. In addition, the opportunity to consider substantive terms as they look on paper, in the studied environment of a pre-hearing conference between the defendant and counsel, is preferable to an attempt to evaluate newly negotiated terms in the context of a court appearance. The court said that if the parties have clearly reached an agreement, a plea should not be rejected simply because it is reflected in a transcript rather than a writing. The conviction was reversed and remanded to the district court with instructions to accept the defendant’s written plea agreement, as supplemented by the subsequent Rule 11 hearing. In addition, the defendant was to be sentenced only on count one and the district court was ordered to act on the government’s motion for dismissal of count two.

In United States v. Lyons,³ the appellant in a bid rigging prosecution alleged that evidence used against him was obtained as a result of leads received from his statement made during immunity negotiations. Ultimately, the prosecutor declined to seek a grant of immunity for appellant, feeling that he had not been candid during the discussion. The court agreed that any agreement made by the government must be scrupulously performed.¹³¹ No express promise was made that derivative testimony would not be used against Lyons.

The government’s recollection was that a proffer from the prospective candidate for immunity would indicate what the testimony would

¹²⁹.  FED. R. CRIM. P. 11(e).
¹³⁰.  670 F.2d 77 (1982).
¹³¹.  Id. at 80, citing Santobello v. New York, 404 U.S. 257, 262 (1971).
contain, so that the government would be able to determine the value of such testimony and whether it was worth obtaining at the price of immunity. In holding the hearing, the trial court heard testimony of government attorneys and defense attorneys who had different recollections of the terms of the immunity session.

The government attorneys said that the chief prosecutor from the Antitrust Division of the Justice Department made his standard speech regarding the "proffer policy." The usual explanation at the outset of a proffer conference was that the conference would be off the record in the sense that nothing the defendant said could be attributed to him or used against him, but that the government would be free to follow any leads provided by appellant against him. The defendant's attorneys did not remember any statement that derivative use would be permitted. Accordingly, in reliance on past practice in the local United States Attorney's Office, Lyons' attorneys assumed that derivative use was excluded. On the basis of the testimony of government counsel that the terms of the immunity conferences were adequately spelled out, and that no violation of the agreement occurred, the court affirmed Lyons' conviction.

It appears imperative, in light of Lyons, that lawyers who are involved in immunity negotiations in the future recognize that there may be derivative use. The terms of immunity conferences in which potentially incriminatory information is given by a person subject to investigation should be spelled out with particular clarity. In this fashion, counsel for the defendant can ensure that the prosecutorial promises and agreements will be kept.132

III. Trial Issues

A. Defenses

In United States v. Garza,133 the appellants were convicted of unlawful escape from a federal prison. They defended on the grounds of duress or necessity. The trial court refused to instruct the jury on their duress defense. The appellants claimed that the court erroneously replaced their duress instruction with a coercion instruction. On review, the court said that in order for Garza to make out a duress defense, United States v. Bailey134 would have required appellants to show:

132. See Santobello, 404 U.S. 257.
133. 664 F.2d 135 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982).
134. 444 U.S. 394, 409-10 (1980) (the Garza trial occurred before the Supreme Court decision in Bailey).
(1) that “an unlawful threat of imminent death or serious bodily injury . . . caused [appellants] to engage in conduct violating the literal terms of the criminal law;” (2) that no reasonable, legal alternative to violating the law existed; and (3) that appellants made “a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.”

Since Garza fired shots at the police following his escape effort, the court said there was no evidence to show any desire to report to authorities once safely beyond the prison walls. Therefore, the district court’s instruction, given before the Supreme Court decided Bailey, only required appellants to show that their escape was necessitated by a reasonable fear of present, immediate, serious harm or death if they remained in prison; it did not require any consideration of appellant’s intent to return. The court said that since the showing under the district court’s instruction required less proof than that required by Bailey, the jury instruction on coercion favored appellants.

The defendants at trial desired to introduce the defense of duress or necessity to the charge of conveying into any Federal prison “or from place to place therein, any firearm, weapon . . . or thing designed to kill, injure, or disable any officer, agent, employee, or inmate thereof.” United States v. Mauchlin raised the question of whether the conveyance of weapons used as part of an escape from a federal prison could be justified by a fear that one’s life would be in danger by continued confinement in the prison. The court ruled in Mauchlin that the appellants were not charged with escape, but rather with the conveyance of weapons. In affirming the conviction, the court said there plainly was no danger shown which required the taking of weapons from their prison cell to the prison tower and the escape attempt could have been made equally well without weapons.

United States v. Scott presented the review of a conviction for wilfully and knowingly preparing and filing a false individual income tax return. The government relied upon two types of proof, the net worth and expenditures method and the specific items approach. The opinion is particularly informative in outlining the methods used by the IRS in preparing this type of litigation. The principal defense was that the money received were gifts, rather than income subject to tax.

135. Garza, 664 F.2d at 141-42.
137. 670 F.2d 746 (7th Cir. 1982).
The government's theory was that the appellant acquired political contributions and then converted them to his own personal use, making these converted contributions taxable income.140

The court affirmed the conviction, saying that the jury could have decided that these payments of monies from many individuals to the appellant were either compensation for favors performed as a public official or the conversion of campaign funds, making the money taxable income.141 In addition, the court noted that defense counsel virtually conceded guilt during his closing argument by telling the jury that even if the defendant converted a particular campaign contribution to his own use, it was only $5,000, a sum too insubstantial to support a conviction. The reviewing court disagreed that the sum was insubstantial, finding that the single $5,000 converted campaign payment was sufficient evidence to support the appellant's conviction.142

B. Introduction of Prior Transcript

A firefighter, whose duties as a firefighter did not include individual inspections of residential units, was convicted of wrongfully using his position to extort $150 from an individual who owned several apartment buildings in Chicago. The first trial ended in a hung jury. The second trial culminated in a conviction for violation of the Hobbs Act.143 In United States v. Walker,144 appellant argued that the trial judge erred by allowing the government to introduce selected portions of the defendant's testimony from the first trial, while refusing to admit other relevant testimony, in violation of Rule 106 of the Federal Rules of Evidence.

At Walker's second trial, the government introduced fourteen pages of Walker's direct testimony and a short excerpt of his cross examination from the first trial. Defense counsel objected to this, and requested the contemporaneous admission of the entire twenty-eight pages of Walker's testimony, or at least the remaining five pages of his direct testimony.

The court held that most of Walker's excluded testimony qualified


142. 660 F.2d at 1175.


144. 652 F.2d 708 (7th Cir. 1981).
for admission under Rule 106, particularly in a criminal case where the defendant elects not to testify. If the government does not submit all relevant portions of prior testimony which the government desires offered into evidence, the excluded portions may never be admitted. This result penalizes a defendant in a criminal case for failing to testify at his second trial. Since the evidence in the instant case was close, the court reversed and remanded for a new trial.

In a second case, a witness to an extortion setting testified under oath before a grand jury. During the subsequent Hobbs Act prosecution, this witness, Chiampas, was subpoenaed to appear and did appear, but he refused to answer any questions, though ordered twice to do so by the judge. Chiampas explained that he feared for his life. He was then excused, and the government offered in evidence his grand jury transcript. The district court admitted it, and it was read to the jury. Chiampas' grand jury testimony was later corroborated by a tape recording and by the testimony of eyewitnesses to the extortion threats. On appeal, the appellants in United States v. Boulahanis argued that admission of the grand jury transcript into evidence violated both the sixth amendment and Rule 804 of the Federal Rules of Evidence, since a transcript cannot be cross examined. The court disagreed, saying that it would have been needlessly cruel to put Chiampas to a choice between going to jail and running the risk of being killed. The introduction of the grand jury transcript, in the opinion of the court, complied with the requirements of Rule 804, since all that is required is that the hearsay evidence is the most probative evidence reasonably available on a material issue in the case.

In this case, it was material for the government to show that the appellants had beaten up the victim the night before, as witnessed by Chiampas prior to the taped conversation. The beating was further evidence that the transaction discussed in the taped conversation was extortionate and not, as the appellants argued, a normal business transaction. When Chiampas' grand jury testimony was read into evidence, the government had no other direct evidence that the appellants were involved in beating up the victim. Moreover, the court concluded that introduction of the grand jury transcript did not violate the confrontation clause of the sixth amendment. The fact that Chiampas was not available for cross examination did not violate the sixth

145. 677 F.2d 624 (7th Cir. 1982).
146. See United States v. Carlson, 547 F.2d 1346, 1354-55 (8th Cir. 1976).
147. See Dutton v. Evans, 400 U.S. 74 (1970); accord, United States v. Regilio, 669 F.2d 1169, 1176 (7th Cir. 1982).
amendment. The admission of hearsay evidence is not a per se violation of the confrontation clause of the sixth amendment. The court reasoned that the grand jury transcript was admissible, since it was accurately reported and the accuracy was not challenged. Further, Chiampas' statement was made voluntarily and under oath at the grand jury proceedings and was corroborated at the trial by other highly probative evidence, including tape recording and eyewitness accounts.

C. Trial Exhibits

In a federal prosecution for the killing of a fellow inmate, the appellants argued in *United States v. Bruscino* that jurors' exposure to extraneous and prejudicial material during the trial tainted the verdicts against them. The court agreed, and reversed and remanded for a new trial. The first of two pieces of prejudicial information was a Bureau of Prisons letter indicating that one of the two appellants was being investigated for his suspected involvement in the Mexican Mafia. The second item was a newspaper article concerning the trial that one of the jurors carried into the jury room in her purse. The article said that a third defendant in the case plead guilty to conspiring to murder the prison inmate. The juror later advised the court that she carried the article to the courtroom for the other jurors to read.

The district court refused to order a new trial. The Bureau of Prisons letter was used during the trial to cross examine a government witness. The letter was left on the exhibit table, but not admitted into evidence. During a court recess, the court clerk took the exhibits to the jury room. At the conclusion of the trial, and shortly after the jury deliberations began, the jury asked to see the Bureau of Prisons letter, and was advised that it was not in evidence. The court's opinion criticized the district court for allowing exhibits to be taken out of the court room and into the jury room after admission but prior to deliberations:

Although we were informed during oral argument that it is "common practice" for exhibits to be taken to the jury room after admission but prior to deliberations, we question the wisdom of such practice, which we find quite irregular. Not only does it lead to mishaps such as that at issue here, but it could easily cause jurors to distort the import of certain exhibits prior to proper instructions at the conclusion of the case.

The court reversed and remanded, saying that there was a reason-

148. 662 F.2d 450 (7th Cir. 1981).
149. Id. at 457 n.6.
able possibility that this material may have affected the jury's verdict. ¹⁵⁰

D. Expert Witnesses

In a federal prosecution for perjury, the government introduced the testimony of an astronomer to show that a photograph alleged by appellant to have been taken on May 12 could not have been taken on that date, but could have been taken only on the morning of April 13 or August 31. The government's expert expounded the theory that if one knew the compass orientation of an object in a photograph, it would be possible to date that photograph by certain measurements of the shadow in the photograph as related to the sun. Certain measurements defining the "intersection point of the altitude and the azimuth, defining the sun's position in the sky, corresponds to the only two dates of the year on which the photograph in question could have been taken." ¹⁵¹ The expert opinion relied in part on a "sun chart," which the appellant claimed was in violation of his sixth amendment right to confront his accusers.

The court in United States v. Tranowski ¹⁵² reversed the conviction, believing that the astronomer predicated his opinion on unreliable premises and that the technology relied upon was not sufficiently established to have gained general acceptance in the particular field. ¹⁵³ Relying upon the Sixth Circuit's decision in United States v. Brown, ¹⁵⁴ the Seventh Circuit endorsed the conclusion reached by that court:

A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an 'aura of special reliability and truthworthiness,' although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field. ¹⁵⁵

United States v. Lawson ¹⁵⁶ raised the question of the admission of hearsay testimony by the government's expert psychiatrist, thereby restricting the appellant's ability to confront an adverse witness. In

¹⁵¹ United States v. Tranowski, 659 F.2d 750, 753 (7th Cir. 1981).
¹⁵² Id.
¹⁵³ Id. at 756; e.g., Frye v. United States, 393 F. 1013 (D.C. Cir. 1923); WALTZ, CRIMINAL EVIDENCE 321-22 (1975).
¹⁵⁴ 557 F.2d 541 (6th Cir. 1977).
¹⁵⁵ Tranowski, 659 F.2d at 757, citing Brown, 557 F.2d at 556.
¹⁵⁶ 653 F.2d 299 (7th Cir. 1981).
United States v. Bohle the court had held that a medical expert may not give his opinion if it is based on information obtained out of court from third persons, since such an opinion would depend on hearsay.

In Lawson, the court stated that the introduction of expert testimony based in large part on hearsay may raise serious constitutional problems if there is no adequate opportunity to cross examine the witness. Since the court believed that Lawson did have that opportunity, his right to confront witnesses was not violated. Since the adoption of the Federal Rules of Evidence in 1975, the scope of permissible expert testimony has been expanded. Rule 703 expressly permits experts to base their testimony on evidence that would otherwise be inadmissible, so long as it is "of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject."

The court said that in criminal cases, a court's inquiry under Rule 703 must go beyond finding that hearsay relied upon by an expert meets these standards. A criminal defendant must also have access to the hearsay information relied upon by the expert witness, because without such access, effective cross-examination is impossible. The court believed that Lawson had sufficient access to the information which the government's medical expert used to reach his opinion on the issue of sanity. Although the expert never interviewed Lawson in private, the court concluded that the doctor did have some contact with Lawson, and under these circumstances the government's expert testimony did not violate Lawson's right to confront witnesses.

E. Closing Argument

1. Waiver

In United States v. Spears, the trial judge did not offer defense counsel an opportunity to make closing argument, and defense counsel did not request such an opportunity. The Supreme Court in Herring v.

157. 445 F.2d 54 (7th Cir. 1971).
158. Lawson, 653 F.2d at 301.
159. FED. R. EVID. 703.
160. 653 F.2d at 302; see Baumbholser v. Amax Coal Co., 630 F.2d 550 (7th Cir. 1980).
161. Id. at 303, citing Davis v. Alaska, 415 U.S. 308, 316 (1974); see, e.g., Weinstein, Weinstein's Evidence § 703(03) 703-18 (1980) ("In a criminal case, even though Rule 703 warrants the use of hearsay as a basis for an opinion, the constitutional right of confrontation may require that the defendant have the opportunity to cross-examine the persons who prepared the underlying data on which the expert relies.").
162. 671 F.2d 991 (7th Cir. 1982).
New York, 163 held that it is reversible error for the trial court to deny the defendant an opportunity to present a closing argument. The Court reasoned that the opportunity to make a closing argument is an integral part of the sixth amendment right to counsel. The denial of this fundamental right must result in the reversal of the conviction, without regard to whether the defendant was prejudiced. 164

In Herring, the defendant requested the opportunity to make a closing argument, but his request was denied. In the present case, the government argued, the trial court did not actively deny closing argument because Spears never requested it. No other federal circuit had ruled on this exact issue. The Seventh Circuit, in a case of first impression, held that where, as in Spears, the record clearly demonstrates that the defendant had ample opportunity to request summation before the verdict was announced, but made no such request, and thereafter failed to bring the issue to the trial court's attention, the right of summation was waived.

Obviously, trial counsel must be alert to ensure that any opportunity desired for closing argument is brought to the attention of the district court. In the event that a judge should announce the verdict on the heels of the close of the evidence, it would be unrealistic to suggest that the failure to request constitutes a waiver. 165

2. Prejudicial

The court in United States v. Wilkins, 166 expressed concern with the prosecutor's closing argument in a bank robbery prosecution, and exclaimed, "[t]his court has repeatedly admonished prosecutors to avoid even subtle references to a defendant's failure to testify," most recently reversing a conviction when a blatantly improper reference was made in United States v. Rodriguez. 167 In the instant case, the court said that the prosecutor overstepped the bounds of propriety when he stated that the government theory of defendant's car being used as the alternative getaway car was the "only explanation" put before the jury, and that the defense should explain why the defendant

164. Id. at 863.
165. Spears, 671 F.2d at 994.
166. 659 F.2d 769 (7th Cir. 1981).
was found in the getaway car. The court said that these statements do not explicitly say that the defendant did not testify. Rather, these statements are more like statements that the prosecution theory is “uncontradicted” or “undisputed.”

The court nonetheless affirmed Wilkins’ conviction, saying that the prosecutor’s argument did not rise to the level of a Rodriguez comment, where a prosecutor said that a defendant “has been very quiet” during the trial, explicitly drawing to the jury’s attention the defendant’s silence. In addition, the evidence adduced at Wilkins’ trial included overwhelming evidence of guilt. However, the court noted that Wilkins’ trial occurred prior to Rodriguez, saying that the court’s conclusions in the instant case might well have been different if there was any indication that the prosecutor was attempting to skirt the limits of Rodriguez, ignoring the “spirit of that case.”

In a different case, the quest for a conviction following a four-day trial helped the federal prosecutor run afoul of the Seventh Circuit’s mandate expressed in United States v. Rodriguez by alluding to the failure of the defendants to deny their role in the alleged offenses. In United States v. Hastings, the court reversed the convictions and remanded for a new trial. The court stated that:

[d]irect reference by a prosecutor to a defendant’s election not to testify at trial is clearly proscribed. Griffin v. California, 380 U.S. 609 (1965). Indirect comments such as the prosecutor’s references in this case to “uncontradicted testimony” constitute error when the statements are “manifestly intended to be or [are] of such a character that the jury [will] naturally and necessarily take [them] to be comment on the defendant’s failure to testify.” United States v. Lyon, 397 F.2d 505, 509 (7th Cir.), cert. denied, 393 U.S. 846 (1968). This court has previously held that when a prosecutor refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony, such reference necessarily focuses the jury’s attention on the defendant’s failure to testify and constitutes error. United States v. Handman, 447 F.2d 853, 855 (7th Cir. 1971). See United States v. Poole, 379 F.2d 645, 649 (7th Cir. 1967).

168. See Buege, 578 F.2d at 188.
169. See Rodriguez, 627 F.2d at 111.
170. Wilkins was arrested in the getaway car a few blocks from the bank and the stolen money and two guns were found inside the car. 659 F.2d at 774.
171. Wilkins, 659 F.2d at 774 n.5.
172. 627 F.2d 110, 113 (7th Cir. 1980).
The court recognized that the serious nature of the crimes committed by the defendants and the clear evidence of guilt could raise the issue of harmless error. However, the court said that holding the prosecutor's remarks harmless would impermissibly compromise the defendants' fifth amendment rights. The court relied upon language from the Rodriguez decision as applicable to the instant litigation: "The remarks, harmless or not, infringing upon such a basic and elementary constitutional underpinning of our justice system, simply should not occur."175

F. Instructions to the Jury

The court was faced with the issue of whether it is reversible error to give an instruction defining "reasonable doubt." In United States v. Regilio,176 the court repeated its previous admonition that the district court should not give any instruction defining "reasonable doubt."177 However, the court refused to reverse the conviction, finding that there was no harm to the defendant. The court took the opportunity to advise district courts that "we will not hesitate to find reversible error in future cases in which a 'reasonable doubt' definition is given which is misleading or confusing."178

IV. Post-Trial

A. Sentencing

1. Imposing Sentence

In United States v. Mooney,179 the defendant received the maximum sentence for bank robbery. However, the trial judge specified that because the defendant was suffering from multiple sclerosis, the defendant would be sentenced under the provisions which make the defendant eligible for parole at such time as the Parole Commission may determine.180 The defendant argued that while sentencing under this provision might appear to benefit him, the court's remarks during

175. Hastings, 660 F.2d at 303, citing Rodriguez, 627 F.2d at 113. The Supreme Court disagreed with the Seventh Circuit, reversing Hastings because the error alleged was harmless. — 51 U.S.L.W. 4572.
176. 669 F.2d 1169 (7th Cir. 1981).
178. Regilio, 669 F.2d at 1178.
179. 654 F.2d 482 (7th Cir. 1981).
sentencing actually operated as a mandate to the Parole Commission not to release the defendant under any circumstances except for severe illness. The appellant contended that the district court's statement, "the healthier he remains, the longer he stays in prison," was intended by the judge to be an attempt to restrict the discretion of the Parole Commission. Appellant urged that the judge's remarks rose to the level of cruel and unusual punishment, and further denied him equal protection of the laws. The court affirmed, allowing the maximum sentence to remain. The court said that even if the district judge intended the Commission to be bound by his recommendation, sentencing judges do not have the authority to supervise, control, or second-guess the Parole Board.181

The court declined the defendant's invitation to adopt the principles of the ABA Standards Relating to Sentencing Alternatives and Procedures as mandatory factors for consideration by district courts in sentencing. The court believed that mandatory consideration of a list of factors would unnecessarily restrict the district court's broad discretion, and could easily lead to a very mechanistic analysis in the imposition of sentence.182

2. Motion to Reduce

A question of first impression for the Seventh Circuit was raised in United States v. Inendino,183 which concerned the extent of a district court's jurisdiction over a Rule 35 motion184 for reduction of sentence. The district court held that it did not have jurisdiction to consider new evidence offered in a motion to reconsider the denial of a Rule 35 motion filed beyond the 120-day limit in the rule. Rule 35 does not refer to any time period during which a defendant must make his motion to reduce sentence but it imposes instead a limit on the time during which the sentencing judge may act to reduce the sentence. This time limit is jurisdictional,185 and it may not be extended by the district court.186

182. 654 F.2d at 488 n.7.
183. 655 F.2d 108 (7th Cir. 1981).
184. FED. R. CRIM. P. 35 reads in relevant part:
   The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.
186. FED. R. APP. P. 45(b).
The court said that the purpose of the rule is to protect the district court from recurrent requests from defendants to reconsider their sentences, and to prevent the courts from becoming an alternative to the Parole Commission as a means of release from custody. 187

One of the purposes of Rule 35 is to permit defendants to present new evidence not available at sentencing. A defendant may do so by motion to reconsider the denial of a Rule 35 motion, but that evidence must be presented within the 120-day limit established in the rule. The court suggested that a defendant can easily avoid complications by filing his Rule 35 motion within the first sixty days after sentencing. The district court would then have adequate time to decide the motion before the expiration of its jurisdiction, and the defendant would probably have time to file a motion for reconsideration within the 120-day time period. 188

A repeater in the bank robbery field was again convicted for the offense, and received the maximum term of imprisonment. The trial judge denied the defendant's motion to reduce sentence. 189 In United States v. Mooney, 190 the defendant asked the court to exercise its supervisory power to rule that, in the absence of new factors, a prosecutor's promise to recommend a particular sentence forbids the government from thereafter opposing a defendant's Rule 35 motion to reduce a sentence imposed in excess of that recommended. The appellant urged that United States v. Ewing 191 controls his situation since the government in Ewing agreed not to oppose the defendant's request for probation if the defendant pled guilty, but on a Rule 35 motion the prosecutor vigorously opposed the probation. The Fifth Circuit in Ewing remanded the case to allow the Rule 35 motion to be heard by a different judge, without government opposition to probation. 192

However, the Seventh Circuit affirmed Mooney's conviction, believing that it would be inappropriate to prohibit the government from ever opposing a Rule 35 motion for sentences which exceed the recommendation agreed upon in the plea bargain. The court said that matters could occur in the interim which might make the earlier recommendation inappropriate. However, the court did not sanction government opposition in such cases. The court cautioned that a slight

187. United States v. Stollings, 516 F.2d 1287, 1289 (4th Cir. 1975); United States v. United States District Court, 509 F.2d 1352, 1356 (9th Cir. 1975).
188. Inendino, 655 F.2d at 110.
190. 654 F.2d 482 (7th Cir. 1981).
191. 480 F.2d 1141 (5th Cir. 1973).
192. Mooney, 654 F.2d at 485, citing Ewing, 480 F.2d at 1143.
change in facts could well mandate a different result. The Seventh Circuit opinion offered the following advice for prosecutors to consider:

Thus, in future cases of this nature, the government would proceed with a greater sense of propriety, and the defendant's interests would more certainly be protected, if the Government responded to such a defendant's Rule 35 motion by stating that it had previously recommended a particular sentence, that the court had declined to follow the recommendation, and that the Government does, or does not, have any reason to retract its previous recommendation. 193

3. Appellate Review

In United States v. Plisek,194 the issue was whether the sentencing court relied improperly on the defendant's previous acquittal in imposing sentence. The defendant claimed that the sentence was simply too harsh, in light of sentencing statistics, the nature of the drug involved, and the defendant's good character. A dispute developed in the district court as to whether an earlier jury verdict of not guilty was in fact a complete exoneration of the defendant. The court affirmed, relying heavily on a line of Seventh Circuit cases indicating that judicial discretion regarding sentencing "will not be disturbed on appeal except on a plain showing of gross abuse."195

In dissent, the issue was framed as whether a trial judge may properly rely upon his own evaluation of the merits of a defendant's prior acquittal in making a sentencing determination, an issue never expressly decided in the Seventh Circuit. Although other circuits have expressly held that a sentencing judge may properly rely upon defendant's prior acquittals,196 the dissent in Plisek stated that such a rule conflicts with well-established principles of due process.197

B. Parole Issue

Earlier in the term, the court ruled that the Illinois parole release

194. 657 F.2d 920 (7th Cir. 1981).
195. Id. at 924, citing United States v. Hedman, 630 F.2d 1184, 1201 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); United States v. Willard, 445 F.2d 814, 816 (7th Cir. 1971); cf. United States v. Shelton, 669 F.2d 446, 467 (7th Cir.), cert. denied, 456 U.S. 934 (1982) (a sentencing court should not, absent special circumstances not present in the case, assume the guilt of a defendant based upon events which are the subject of another ongoing prosecution).
196. See, e.g., United States v. Morgan, 595 F.2d 1134, 1137 (9th Cir. 1979); United States v. Bowdach, 561 F.2d 1160, 1175 (5th Cir. 1977); United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972).
statute provides an inmate with a legitimate expectation of parole which is entitled to constitutional protection. In Solomon v. Elsea, the court applied the authority of Greenholtz v. Inmates of Nebraska Penal and Correctional Complex in declaring that the federal parole statute provides an inmate with an expectation of parole worthy of due process protection. However, in Solomon the court ruled the excessive amount of hashish involved in his crime was "good cause" to deny parole, subject only to the abuse of discretion standard.

The appellant had urged the court to adopt a "sufficiency of the evidence" standard of review for factual situations such as presented in this case which showed favorable and positive information concerning Solomon which would have made him a much more favorable parole candidate. The court declined the invitation to adopt this broad standard of review, saying that a court of review need only determine whether the information relied on by the parole commission is sufficient to provide a factual basis for its reasons. Since there was no showing of abuse of discretion by the parole commission, the court affirmed the district court's ruling that Solomon was not improperly denied parole.

V. STATUTES CONSTRUED

A. Conspiracy

In an indictment charging the defendants with a scheme to artificially inflate year-end inventories and thus increase their reported profits, the jury returned verdicts of guilty to conspiracy, mail fraud, and securities fraud. One defendant claimed the jury instructions put the burden of proving withdrawal from the conspiracy on him and failed to put the burden of disproving withdrawal beyond a reasonable doubt on the government. In United States v. Read, the court agreed and reversed the conspiracy conviction and remanded for a new trial. The court said that due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In addition, the court cited various cases holding that the

198. ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1981).
199. United States ex rel. Scott v. Ill. Parole and Pardon Board, 668 F.2d 1185 (7th Cir. 1982).
200. 676 F.2d 282 (7th Cir. 1982).
204. 658 F.2d 1225 (7th Cir. 1981).
prosecution’s burden often includes disproving defenses because they bring into question facts necessary for conviction.\textsuperscript{206}

The court noted the conspiracy statute\textsuperscript{207} requires the prosecution to prove (1) that the alleged conspiracy existed; (2) that an overt act was committed in furtherance of the conspiracy; and (3) that the defendant knowingly and intentionally became a member of the conspiracy. The court said that the prosecution for this offense is also subject to a five-year statute of limitations which runs from the date of the last overt act.\textsuperscript{208} To convict a defendant, the prosecution must prove that the conspiracy existed and that each defendant was a member of the conspiracy at some point in the five years preceding the date of the indictment.\textsuperscript{209}

One defendant alleged he withdrew from the conspiracy. The court said that withdrawal is not a complete defense since a defendant is still liable for his previous agreement, and for the previous acts of his co-conspirators in pursuit of the conspiracy.\textsuperscript{210} The government insisted that the law requires the burden of proving withdrawal be on the defendant.\textsuperscript{211} The court agreed that the law appears to require the defendant to “prove” or “establish” withdrawal. The Seventh Circuit had previously held that it “is well-settled [that] this burden of establishing withdrawal lies on the defendant.”\textsuperscript{212} The court said the prosecutor’s reliance on \textit{Hyde v. United States} was misplaced since the court now believes \textit{Hyde} placed only the burden of going forward on the defendant.\textsuperscript{213} The court reviewed the split in the various federal circuits on this issue and decided to overrule \textit{United States v. Dorn}\textsuperscript{214} and those cases imposing the burden of proving withdrawal on the defendant.\textsuperscript{215}

The court ruled the circumstances in the case demonstrate that the erroneous instruction on withdrawal was prejudicial to one of the defendants (Spiegel) and a new trial on the conspiracy count would be required. The court noted that the new Seventh Circuit rule mandates


\textsuperscript{211} \textit{See Hyde v. United States}, 225 U.S. 347 (1912).

\textsuperscript{212} \textit{United States v. Dorn}, 561 F.2d 1252, 1256 (7th Cir. 1977).


\textsuperscript{214} 561 F.2d 1252 (7th Cir. 1977).

\textsuperscript{215} \textit{Read}, 658 F.2d at 1236 n.7.
that the burden of going forward with evidence of withdrawal, and with evidence that he withdrew prior to the statute of limitations, remains on the defendant. However, once the defendant advances sufficient evidence, the burden of persuasion is on the prosecution to disprove the defense of withdrawal beyond a reasonable doubt. As in the cases of other defenses, the court said that once the jury has been instructed on the withdrawal defense, the jury should be instructed that the government bears the burden of disproving withdrawal beyond a reasonable doubt. The court noted that the type of evidence necessary to create a jury question on withdrawal is not at all affected by the new ruling. To avoid all liability, the defendant must come forward with evidence that he withdrew prior to the statute of limitations. The court noted that the import of the decision is that the showing is only one of production, not persuasion.

B. Impersonation of a federal officer.

Before this term the Seventh Circuit had not yet been required to address the issue of whether an indictment charging the false impersonation of a federal officer is defective if it does not allege that the defendant acted with "intent to defraud." In United States v. Cord, the defendant had filed a motion to dismiss, contending that intent to defraud is an essential element of the crime of impersonating a federal officer and, therefore, its omission rendered the indictment defective. The evidence showed the defendant, pretending to be an agent of the FBI, obtained money from a woman by using that guise. He was convicted and appealed. On appeal, the defendant relied upon cases decided by the Fifth Circuit which held that intent to defraud remains an essential element for prosecution under 912.

The reviewing court acknowledged there was a split in the circuits. It examined the Fifth Circuit reasoning in light of the reasoning of other circuits and decided to "join ranks with the other circuit courts that have held that intent to defraud need not be alleged in the indictment."
C. Assault with a dangerous weapon.

The court disposed of another attack on an indictment in the case of United States v. Phillippi\textsuperscript{222} by adopting the Ninth Circuit rule which decided that it was not necessary to recite, in an indictment charging assault with a dangerous weapon, that the assault was "without just cause or excuse."\textsuperscript{223}

D. Racketeer Influenced and Corrupt Organizations Act [RICO].

In United States v. Forszt,\textsuperscript{224} a member of the board of commissioners was indicted on one count for violating a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO)\textsuperscript{225} in that he solicited and received periodic payments of money to influence him in the discharge of his official duties in violation of the Indiana bribery statute and the Hobbs Act, § 1951, covering interference with commerce through extortion.\textsuperscript{226} According to the indictment, defendant solicited 8% of the gross receipts that a local office equipment company received from the county contracts during a twenty-five year period. The defendant claimed the evidence at trial showed the payments received were political contributions, not bribes. A conviction followed and the Seventh Circuit affirmed.

In Forszt, the appellant also argued that the statute of limitations of five years had run before the indictment was filed. The indictment was filed on March 25, 1980, and charged \textit{inter alia}, that on or about March 26, 1975, defendant received $6,000 from the office equipment company in violation of the Indiana bribery statute and the Hobbs Act. The evidence at trial proved that said payment occurred in early April 1975 thereby dismissing the defendant's argument in part. But the defendant argued that since his term of office as a county commissioner ended on December 31, 1974, there could be no act of bribery under Indiana law or the Hobbs Act when he received the payment in April 1975, so that there was no violation of RICO within the five years preceding the filing of the indictment. The court disposed of this theory by interpreting Indiana case law as holding that Indiana bribery is a con-

\textsuperscript{222} 655 F.2d 101 (7th Cir. 1981).
\textsuperscript{223} 18 U.S.C. § 113(c) (1976); Hockenberry v. United States, 442 F.2d 171, 173 (9th Cir. 1970).
\textsuperscript{224} 655 F.2d 792 (7th Cir.), cert. denied, 409 U.S. 863 (1972); United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967), cert. denied, 392 U.S. 927 (1968).
continuing offense. The court said that payments made as part of an arrangement to influence a public official in the discharge of his duties are violations of Indiana law regardless of whether the money is paid before or after the bargained-for acts are performed.

The court added that Hobbs Act extortion is also a continuing offense so that no statute of limitations problem exists where, as here, there is a single continuous plan of extortion embracing multiple payments over a period of years. The evidence showed that payments were made with the intent to influence the defendant in the discharge of his duties and that defendant knew it, thus constituting bribes under Indiana law, and not political contributions as the defendant contended. The Seventh Circuit had earlier held that it was a violation of the Hobbs Act for a public official to sell his public trust before being installed in office. In this case, the court extended the coverage by holding that it is unlawful for a public official to sell his public trust while in office even though the last installment for the services rendered is to come after he leaves office.

In a second case, an enterprising sheriff in Illinois, shortly after his inauguration as sheriff, discussed with various individuals his knowledge that deputies were receiving kickbacks from automobile towing companies and houses of prostitution within the county and he wanted the payoffs to the deputies stopped. The sheriff's instructions were that any money should go to him and not the deputies. Various establishments were visited by persons on behalf of the sheriff, and in each case the operators were informed that the sheriff wanted all further payments made to him. Negotiations with the owners regarding the price per prostitute or per automobile tow were firmed up in many instances.

In addition to the towing and prostitution payoffs, a second aspect of the corruption by the sheriff and his deputy, involved the county deputy sheriff’s association. This association had been formed as a bargaining unit for the deputies and later became merely a social and charitable organization. An agreement was reached that would allow the sheriff to secure 10% of the gross money collected by the association. In 1978, a federal grand jury indicted the sheriff and others for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Statute [RICO].

229. The statute, 18 U.S.C. §§ 1961-1968 (1976), was enacted as Title IX of the Organized
A conviction resulted on the RICO conspiracy charge and various other charges. The appeal followed. In *United States v. Lee Stoller Enterprises, Inc.*, the case presented issues arising from the prosecutions under RICO, particularly whether a public entity, such as here the office of county sheriff, can be a RICO "enterprise." The defendants' principal contention was that the RICO statute may not properly be applied to them because the county sheriff's office was not an "enterprise" within the meaning of the statute.

The Seventh Circuit had in the previous term ruled in a case involving a city police department, holding that "enterprise" encompasses public bodies and entities as well as private entities. Soon thereafter, the Supreme Court decided *United States v. Turkette* and after examining the legislative history and the language of the statute, the Court emphatically rejected any narrow definition of the term "enterprise", holding that an "enterprise" within the meaning of RICO includes illegal enterprises as well as legitimate ones. In light of the Supreme Court's conclusion and in addition to the Circuit's earlier holding in *United States v. Grzywacz*, and related precedent, the court concluded that the office of Madison County Sheriff is such a RICO enterprise and affirmed the conviction.

E. Real Estate Settlement Procedures Act (RESPA)

A counterman in the Torrens section of the Cook County Recorder of Deeds office was charged with 29 counts of violating The Real Estate Settlement Procedures Act (RESPA) by accepting payments for Torrens filings which were in excess of those authorized by state law. Each extra payment was the basis of a separate count of the indictment. It was uncontested that such extra payments were accepted. At trial a number of bank employees testified that they were told by their bank superiors, usually during training sessions, that they should regularly make these additional payments to the countermen. This activity resulted in a conviction. On appeal in *United States v.
Gannon, the claim was that RESPA does not apply to these payments because they were "gratuities," not "portions of the charges" made for settlement services "other than for services actually performed." A panel of the Seventh Circuit initially agreed with appellant’s interpretation and reversed his conviction.

The instant opinion followed an en banc rehearing. The majority affirmed the conviction, expressing the belief that a single individual can violate RESPA by receiving in his official capacity a "charge" for the rendering of settlement services, but personally keeping a portion of the charge in fact for something other than the performance of those services. Although there was no testimony offered that appellant requested or solicited these extra payments, one of the bank employees testified that after she ceased making the payments for her bank, appellant told her that she worked for a "cheap bank" and if "something were not done," the bank’s "work would not get done."

The appellant charged on appeal that the statute was unconstitutionally vague, but the court quickly disposed of this argument finding it sufficient to pass constitutional muster. The court said it is well established that in light of the strong validity that attaches to Acts of Congress, the fact that individuals may differ regarding whether or not certain marginal offenses fall within a specific statute’s terms does not by itself render the statute unconstitutional. Congress’ intent was to make illegal any abusive practice that unreasonably inflated the cost of real estate settlement services to the public.

Two judges dissented, believing the defendant to be guilty of accepting bribes or perhaps of committing acts of extortion but the prosecution by the government on a theory of violation of RESPA was in the eyes of the dissent "irrational."

Their reasoning included a belief that Section 2607 of RESPA makes eminently good sense and will work well in the context of the evils it was designed to address. Its application to a set of facts, as in the instant case, is not the design of the statute, where a gratuity or bribe is being paid to a public official to properly perform his assigned duty and where he is in no position to do any other favor. In light of the position of the Seventh Circuit one might project the United States Attorney’s Offices may in the future

236. 684 F.2d 433 (7th Cir. 1981).
239. 684 F.2d at 438.
240. Id. at 441 (Cudahy, J., and Swygert, J., dissenting).
ensnare some more interesting specimens in such prosecutions than a counter-man in the Torrens section of a county recorder of deeds.

F. Hobbs Act

In *United States v. Kendall*, the principal issue on appeal was whether the trial court committed prejudicial error when it admitted evidence concerning conversations among members of the Indiana Surety Agents Association (ISAA) pursuant to rule 801(d)(2)(E) of the Federal Rules of Evidence. The appellant was convicted following a jury trial on three counts of violating the Hobbs Act. The first count alleged a conspiracy to obstruct interstate commerce by extortion. Counts two and three alleged extortions on two dates in 1979 from the ISAA.

The ISAA was an organization of bail bondsmen in the State of Indiana. Its principal purpose was to lobby for legislation favorable to the bail bond industry. Certain legislation of interest to ISAA was pending before the Indiana House and Senate. The ISAA arranged with appellant, doing business as a corporation, to act as "legislative director" for a fee. The appellant's associates eventually made an arrangement with the President Pro Tempore of the Indiana Senate to provide the payments the senator wanted for favorable treatment on the pending legislation. The Officers of ISAA met and agreed to raise funds and to make contributions for the purpose of paying off the President Pro Tempore. The meeting was tape-recorded by the ISAA President and was the subject-matter of appellant's objections at trial and on appeal.

The appellant argued it was prejudicial error to admit as substantive evidence of the conspiracy testimony about conversations among ISAA members—in particular, the tape recording. The appellant argued that it was legally impossible for the ISAA members to be co-conspirators under the Hobbs Act, and therefore, it was error for the court to admit the testimony pursuant to Rule 801(d)(2)(E). The appellant further reasoned that because the ISAA was the victim to the extortion, its members could not have been charged as Hobbs Act co-conspirators; therefore, it argued, conversations among ISAA members should not have been admitted as substantive evidence pursuant to

242. FED. R. EVID. 801(d)(2)(E) provides in part: (d) Statements which are not hearsay. 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.
Rule 801(d)(2)(E). Kendall further relied for support on cases decided under statutes other than the Hobbs Act which have held that the victim of the crime charged cannot be deemed a co-conspirator under the pertinent statute.\textsuperscript{244}

The reviewing court disagreed, distinguishing the appellant's argument by saying "conspiracy" as an evidentiary concept, embodied in Rule 801(d)(2)(E), and "conspiracy" as a concept of substantive criminal law are not coterminous.\textsuperscript{245} To distinguish the two concepts, courts have referred to the evidentiary principle as a "joint venture" exception,\textsuperscript{246} or a "concert of action" exception.\textsuperscript{247} The court said even if the appellant's theory that a Hobbs Act victim cannot be a co-conspirator as to his own extortion is correct, it does not appear from the record that the district court relied on such a theory.

The court affirmed the conviction by saying an out-of-court statement is admissible pursuant to Rule 801(d)(2)(E) if the judge finds by a preponderance of the evidence "that the declarant and defendant were members of a conspiracy at the time the hearsay statement was made, and that the statement was in furtherance of the conspiracy."\textsuperscript{248}

The court held that this general rule requires only that the conspiracy introduced into evidence by the government be "factually intertwined" with the offense for which the defendant is being tried.\textsuperscript{249} It was the conclusion of the court that the district court made the required findings and only then admitted the challenged testimony pursuant to Rule 801(d)(2)(E).

In a different case, the chief electrician for Playboy Enterprises was asked by his superiors to obtain a supervising electrician's license. Playboy was initiating an austerity program at that time, and it was thought that money could be saved if some of the major electrical renovation and repairs in the Playboy Building were performed internally, rather than hiring their outside electrical contractor to do the work.

In order for Playboy to do electrical work internally, it was necessary for someone on Playboy's staff to be licensed to apply for work

\textsuperscript{244} Gebardi v. United States, 287 U.S. 112 (1932); United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973); Nigro v. United States, 117 F.2d 624 (8th Cir. 1941).
\textsuperscript{245} See United States v. Gil, 604 F.2d 546, 549-550 (7th Cir. 1979).
\textsuperscript{248} United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978); accord, United States v. Medina-Herrera, 606 F.2d 770, 773 (7th Cir. 1979), cert. denied, 446 U.S. 964 (1980).
\textsuperscript{249} United States v. Lyles, 593 F.2d 182, 194 (2d Cir. 1979), cert. denied, 444 U.S. 847 (1980).
permits issued by the City of Chicago, and this was the reason for the request of Anderson, the employee. Anderson took the licensing examination but was fearful his application would not be successful. The basic reason for his anxiety was that the city electrical inspector in whose district the Playboy Building was located, might try to block the application process. Anderson picked up some leads indicating that certain precinct captains would be of assistance. One such precinct captain told him "he had some connections at City Hall" and he would see what he could do to "help." Eventually, this precinct captain, Mattson, told Anderson that it would cost $3,000 to ensure that he would get his license. Mattson split this money with another precinct captain named Greene. Anderson never received his license, and despite his request to both Mattson and Greene to return the $3,000 he had paid, that money was never returned to him. Both Greene and Mattson were indicted and convicted for conspiracy to violate the Hobbs Act.

The major issue resolving the appeal was the Seventh Circuit's application of the "direct" and "indirect" effect on interstate commerce test. The line of cases comprising the "direct" connection between extortion and interstate commerce or articles moving in interstate commerce in the Seventh Circuit consist of fact situations either threatening or having potential adverse effects which never materialize because extortionate demands are met.

The second line of cases in the Seventh Circuit has established another ground for the assertion of Hobbs Act jurisdiction, namely the depletion-of-assets indirect effect on interstate commerce. Under the depletion of assets theory, commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through

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252. United States v. Rindone, 631 F.2d 491 (7th Cir. 1980); United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); United States v. Glynn, 627 F.2d 39 (7th Cir. 1980); United States v. Price, 617 F.2d 455 (7th Cir. 1979); United States v. Blakey, 607 F.2d 779 (7th Cir. 1979); United States v. Elders, 569 F.2d 1020 (7th Cir. 1978); United States v. Craig, 573 F.2d 513 (7th Cir.), cert. denied, 439 U.S. 820 (1978); United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), cert. denied, 416 U.S. 969 (1974).
extortion, thereby curtailing the victim's potential as a purchaser of such goods.

The trial judge found that both Playboy and their outside electrical contractor were engaged in interstate commerce. On appeal in *United States v. Mattson*, the court agreed that one of the essential elements of proof required to establish a violation of the Hobbs Act is the effect on interstate commerce. The court reversed the conviction outright, ruling the Hobbs Act requires that interstate commerce be affected by extortion, not by a result of extortion. In this case there was no sufficient nexus between the extortion perpetrated and interstate commerce for federal jurisdiction to attach.

The court said the evidence clearly established that Playboy never reimbursed Anderson for the extorted sum, saying, "[w]e would have a different case if Playboy, a business, had been the victim of the extortion instead of Anderson." The victim in this case was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce. Therefore, the court said, there was no possibility of a direct effect on interstate commerce by Anderson's payment of $3,000 in efforts to secure an electrician's license. As for the depletion-of-assets theory to bring the case within the Hobbs Act, the $3,000 was not from Playboy, it was only Anderson's personal assets which were depleted by the payment. Anderson himself was not conducting a business engaged in, or purchasing items from, interstate commerce.

In light of this *Mattson* case it is evident that the extortion of money from any individual in our society could arguably affect interstate commerce eventually. But to have federal jurisdiction within the Hobbs Act there must be a nexus. In the instant case, any effect the extortion had beyond the personal effect on the Playboy Enterprises employee was too attenuated and was removed one step too far to come within the Hobbs Act.

**G. Re-entry of a Deported Alien**

In *United States v. Anton*, the court reversed the district court conviction of the defendant for the reentry of a deported alien offense. The Seventh Circuit opinion created a conflict with the Ninth
Circuit on the question of criminal intent under Sec. 1326. Two other circuits have recognized the issue but have not had occasion to resolve it.

At trial the defendant introduced evidence indicating that he reasonably believed he had obtained the necessary permission prior to his reentry. However, at the close of the testimony the district court adopted an instruction which included:

"... you are not to take into consideration any evidence as to consent claimed by the defendant to have been obtained from any Government official who was not acting under the authority of the Attorney General, or any evidence as to consent claimed by the defendant to have been obtained after he had left a place outside the United States."

The statute does not mention intent. The court considered the relevant legislative history but that history was silent on the question. The court analyzed the Ninth Circuit rule and agreed that common-law principles of statutory construction are the appropriate tools for ascertaining the legislative intent of this reentry statute but could not accept the Ninth Circuit’s conclusion that criminal intent is totally irrelevant. The court felt strict liability is generally inappropriate when the offense is punishable by imprisonment or other severe sanctions.

The court concluded by ruling that proof of intent was relevant and if the defendant reasonably believed that he had the consent of the Attorney General to reenter the United States, it would certainly be unjust to subject him to criminal sanctions as imposed in this case. The court ruled that a limited mistake of law defense is legally viable against a Section 1326 charge. The court said that since the defendant presented some evidence to support that defense in this case, he was entitled to develop his argument and to have the jury instructed on that theory.

**H. Mail Fraud**

The case of *United States v. Galloway* involves the application of the federal mail fraud statute to a scheme to defraud automobile

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258. See *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968).
259. United States v. DiSanbillo, 615 F.2d 128, 132 n.6 (3rd Cir. 1980) (indicating that the question remains open); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (suggesting in dictum that the Ninth Circuit's statutory construction is correct).
262. *Cf. United States v. Snow*, 670 F.2d 749, 752-753 (7th Cir. 1982).
purchasers by “rolling back” automobile odometers. Following a jury verdict of guilty, the district court directed a verdict for defendant. The district court agreed the evidence showed sufficient proof to find Galloway had formulated and carried out a scheme to defraud and related elements of the offense. However, the district court held that the jury did not have sufficient evidence from which to find that the use of the mails was “for the purpose of executing” the scheme to defraud. The mailings, in the opinion of the trial court, occurred “chronologically after the scheme had reached fruition. . . .”

In the court’s opinion the starting point for analysis of a conviction under the mail fraud statute was to determine the scope of the alleged scheme. While the statute requires that the mailing occur for the purpose of executing the scheme, the various circuit court opinions have given a broad interpretation to this phrase, and have held that mailings “in furtherance” of the scheme meet the statute’s jurisdictional requirement. Since the evidence in this case demonstrated the mailings were necessary to complete the retail sale which was the final object of the scheme, as well as to ensure the ongoing success of the scheme, the court found Galloway’s scheme to defraud fell within the prohibitions of the statute. Therefore, the court reversed the district court’s judgment and remanded the case with directions that the district court reinstate the jury verdict of guilty.

The concurring opinion believed the present case was the “outer limits” of the mail fraud statute, which was characterized as “this far-ranging statute.” The dissent felt the mailings were not “sufficiently closely related to respondent’s scheme to bring his conduct within the statute.”

I. Meaning of the term “explosive” [18 U.S.C. Section 371]

A case worth noting for its expansive treatment of the meaning of the word “explosive” in an activity affecting interstate commerce is United States v. Agrillo-Ladlad. The defendants were convicted of the substantive offense, and on appeal contended that the statute

265. See Pereira v. United States, 347 U.S. 1, 8 (1954).
267. 664 F.2d at 166 (Cudahy, J., concurring).
268. Id. at 169 (Swygert, J., dissenting); accord, United States v. Maze, 414 U.S. 395 (1974).
270. 675 F.2d 905 (7th Cir. 1982).
272. Id.
is not applicable to the facts of the instant case. The evidence showed
the defendants conspired together to destroy the business owned by one
of the defendants, a commercial printing company, and to collect the
proceeds of the fire and casualty insurance covering the business. The
technique consisted of laying layers of newspapers in a row and con-
necting the major pieces of shop equipment to a central ignition point.
Thereafter, the defendant poured naphtha on the newspapers, using a
bucket and the contents of a large drum of naphtha. In the defendant's
efforts to assemble an electronic ignition unit which, connected with a
timing device, would pass a flame through the newspapers and ignite
the naphtha, he had to strip the insulation from some wires. Using a
match to burn the insulation off the wires, the defendant unintention-
ally set fire to his clothing, frustrating his efforts to further develop this
electronic ignition unit. After he extinguished the flames on his cloth-
ing, the defendant returned to the pressroom and ignited a piece of
newspaper, and then placed the burning paper on the newspapers he
had spread in various rows. He left the premises, locking the doors
behind him. The vapors apparently burned and an "explosive-type fire
resulted," from the igniting of the liquid accelerant.

At trial, a government expert testified that both naphtha and gaso-
line are potential explosives. It was this expert's opinion the printing
company damage resulted from the simultaneous ignition of vapor
which formed above the naphtha-soaked newspapers resulting in an
explosion. The question on appeal was whether naphtha soaked news-
papers strategically spread across the floor of a building for the purpose
of directing a fire and ignited by a burning newspaper is an "explosive"
or "incendiary device" as defined in the statute.273

The court examined the legislative history and concluded that
Congress intended to define broadly the term "explosive" even if state
and federal jurisdiction would overlap in certain instances, such as ar-
son cases. The various circuits were split over the issue of whether
naphtha soaked newspapers, when ignited by fire, would be an explo-
sive for purposes of federal prosecution or if federal jurisdiction should
not be broadened to reach arson cases.274


274. United States v. Poulos, 667 F.2d 939 (10th Cir. 1982) (the court held that a mixture of
gasoline and air was an explosive within the meaning of 18 U.S.C. § 844(j)); United States v. Gere,
662 F.2d 1291 (9th Cir. 1981) (reversed the conviction under 18 U.S.C. § 844(i) in connection with
arson by use of photocopier fluid and ignition system and held that federal jurisdiction should not
be broadened to reach such arson cases); United States v. Hepp, 656 F.2d 350 (8th Cir. 1981) (a
random mixture of air and methane gas was held to be an explosive within the meaning of 18
U.S.C. § 844(j)); United States v. Hewitt, 663 F.2d 1381 (11th Cir. 1981) (gasoline poured into a
The Seventh Circuit ruled consistent with the rationale of the Eighth, Tenth, and Eleventh Circuits and affirmed the conviction holding that naphtha soaked newspapers when ignited by fire are an explosive. This broadens the scope of federal prosecution for offenses which previously may have been presumed as acts of arson to be prosecuted by state authorities in Illinois, Indiana, and Wisconsin.

J. Issue of "Intent" in a False-Entry Case

The court reversed and remanded a case on the issue of jury instructions including the "reckless disregard" instruction. In United States v. McAnally,275 the defendant was convicted of a false-entry offense276 where the statute provides that any "officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank" who "makes any false entry in any book, report, or statement of such bank with intent to injure or defraud" the bank shall be guilty of a felony. On appeal the court said the jury was not correctly instructed on a crucial element of the false-entry offense, namely intent to injure or defraud. The government tendered, and the court gave, the following instruction: "A reckless disregard by a bank official of his bank's interest is sufficient to establish the requisite intent to defraud." Defendant's counsel objected and the court declined to give a clarifying instruction. The reviewing court said Congress did not intend that the statute was to go so far in protecting banks and their customers from the misconduct of bank employees. The court held that the false-entry offense is one of intent and not of carelessness. The first element of the Section 1005 offense is simply the making of a false entry, a very common and relatively innocuous act. The court said if doing it with gross negligence completed the crime, the net of criminal liability would be cast farther than Congress intended. The court believed the question of defendant's guilt was close enough to make the error in the instruction seriously prejudicial to him. McAnaly was not shown to have personally benefited from the false entries.277 The court said the defendant was entitled to an instruction that unequivocally, without confusing reference to recklessness, required that the jury,

closed room through a chimney was held to be an explosive within the meaning of 18 U.S.C. § 844(i); United States v. Birchfield, 486 F. Supp. 137 (N.D. Tenn. 1980) (§ 844(i) does not apply to a case in which a flaming piece of paper is thrown into a building which had been soaked with gasoline).

275. 666 F.2d 1116 (7th Cir. 1981).
before it could convict him, would have to find that defendant intended
to injure or defraud the bank.

K. Solicitation of Money in a Comprehensive Employment and
Training Program Act [CETA]

In United States v. Mosley, the appellant was employed by the
State of Illinois, which was acting as the prime sponsor for the federally
funded Comprehensive Employment and Training Programs Act
(CETA). In his position, defendant solicited applicants for CETA jobs
to pay him money for preferential treatment. The costs for the CETA
program, as well as the appellant’s salary, was paid for entirely by the
federal government. The appellant appealed his conviction for soliciting
money through threats and receiving money in exchange for giving
preferential treatment to certain individuals seeking jobs. Mosley’s
primary issue on appeal was his claim he was not a “public official” as
that term is defined in the statute, relying upon the Second Circuit’s
rulings. The Second Circuit ruled that employees of the City of New
York were not “public officials” in their employment under the federal
government “Model Cities” programs. Because the city employees
were entirely under state supervision and authority pursuant to the
Model Cities program, the Second Circuit held that they were not
“public officials” subject to federal prosecution under the federal en-
f orcement statute. The Seventh Circuit disagreed in comparing the
Model Cities program with CETA as urged by appellant. The court
affirmed the conviction believing the federal government involvement
in the CETA program was sufficient to warrant considering Mosley a
“public official” acting for or on behalf of the United States. By this
action the court overruled the Northern District of Illinois case of
United States v. Hoskins.

VI. Petitions for a Writ of Habeas Corpus

A. Fifth Amendment Issues

1. Constitutional Right to Testify Unaffected by the “Alibi Statute”

A conflict between the Seventh and Tenth Circuits was created by

278. 659 F.2d 812 (7th Cir. 1981).
279. 18 U.S.C. §§ 201(g), 665(b) (1976).
280. United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976); United States v. Del Toro, 513
F.2d 656 (2d Cir. 1975), cert. denied, 423 U.S. 826 (1976).
the court’s decision in Alicea v. Gagnon,283 holding that a criminal defendant has a constitutional right to testify in his own behalf under the fifth, sixth, and fourteenth amendments.

The defendant’s principal argument was a constitutional challenge to the state trial court’s application of Wisconsin’s notice-of-alibi statute.284 Alicea claimed that the trial court violated his constitutional right to testify and to present a defense when it excluded his alibi testimony simply because he failed to notify the prosecution that he intended to raise such a defense.

The court examined the Seventh Circuit cases which raised questions concerning similar statutes enacted by the states of Illinois, Wisconsin and Indiana.285 But neither the Seventh Circuit decisions nor those of the Supreme Court had resolved the precise issue raised by Alicea regarding the constitutionality of applying an exclusion sanction against the testimony of the defendant himself for failure to provide proper alibi notice.286

The court’s research showed the Supreme Court had never expressly held that a defendant in a criminal trial has a constitutional right to testify in his own behalf. The absence of Supreme Court precedent directly on point appeared surprising to the Seventh Circuit. Historically, the court said, a criminal defendant was incompetent to testify in his own behalf. Since this common law incompetency has been abrogated by federal and state statutes in every jurisdiction in the United States287 the defendant’s right to testify has rarely been questioned.

In the opinion, the court reviewed many of the Supreme Court cases which suggested the defendant had the privilege of testifying in his own defense or to refuse to do so. The court said although cast in terms of a “privilege,” it appears clearly that the constitutional underpinnings for this privilege are contained within the Supreme Court opinions within the past twelve years.288 The lower federal courts have couched the right to testify in constitutional terms while the Ninth Cir-

283. 675 F.2d 913 (7th Cir. 1982).
The court affirmed the defendant's conviction since he had managed to introduce his alibi testimony despite the trial judge's preclusive ruling. This, combined with overwhelming evidence the defendant was guilty of armed robbery, allowed the court to conclude that the trial court error was harmless beyond a reasonable doubt. The court said the rule of the Tenth Circuit was in conflict with the new Seventh Circuit position. The court said the Tenth Circuit's sole explanation for conditioning a defendant right to present a defense upon notice was that such alibi-notice laws generally had been upheld in the past. The new rule now mandates that a defendant has a constitutional right to testify in his own defense which cannot be affected by his failure to provide notice to the court or prosecutor.

2. Commenting on Defendant's Silence

In a state conviction raising the issue of the prosecutor's attempt to impeach the defendant's testimony by his prior silence the court, in United States ex rel. Allen v. Franzen, relied upon Doyle v. Ohio and distinguished Jenkins v. Anderson in affirming the district court's granting the writ of habeas corpus. During trial, the prosecutor endeavored to show the jury the defendant never notified the police of the purported self-defense theory of the case. Over objection, the prosecutor persisted in framing questions to the defendant on this issue of not having informed the police of any self-defense overtones to the killing of his wife. Having succeeded at trial with this disclosure, the prosecutor continued this attack during closing argument.

In Allen the reviewing court agreed with the district court that the prosecutor's questions during the cross examination and remarks in closing arguments violated petitioner's due process rights. The petitioner's silence, the court said, during police confrontation on the issue of self-defense was not necessarily inconsistent with his claim of self-


290. Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966).

291. Id.


defense at trial. The Supreme Court remanded the case to the Seventh Circuit to reconsider the granting of a writ of habeas corpus in light of Jenkins v. Anderson. The district court, in granting the writ, ruled that a prosecutor's attempt to impeach petitioner by his post-arrest silence amounted to a violation of the right to fundamental fairness guaranteed by the due process clause. In the state trial for robbery, the prosecutor commented in closing argument about the failure of petitioner and his witness to come forward with his alibi prior to trial. On remand from the Supreme Court, the Seventh Circuit requested the parties to submit additional briefs pursuant to the Seventh Circuit Rule 19. In United States ex rel. Smith v. Franzen, the court ruled that Doyle v. Ohio controls this case and distinguished Jenkins which did not consider the question of post-arrest silence and therefore was not analogous to the instant case. The decision in Doyle dealt with the impeachment by silence at the time of arrest, just after Miranda warnings were given and while the arrestee was in custody. The court said in Smith that the decision in Doyle did not consider the question whether the prosecutor's reference to petitioner's failure to tell the exculpatory story at any time prior to trial was unconstitutional. Doyle, the court said, left open the very question presented in the instant case.

In a case of first impression, the Seventh Circuit ruled in Smith that the right to remain silent operates from the time of interrogation or arrest through the trial, absent a valid waiver. The court applied the reasoning in Doyle and ruled that the prosecutor's comments in closing argument, about the failure of petitioner and his witness to come forward with his alibi prior to trial, violated petitioner's due process rights.

3. Introduction of Confession

In United States ex rel. Gorham v. Franzen, Gorham filed a successful habeas corpus petition in the district court alleging that his fifth amendment privilege against self-incrimination had been violated by the introduction of a confession in his state trial. In the earlier state
proceedings, the crucial police activity concerning the taking of the statement included testimony from law enforcement personnel that Gorham when first asked if he would like to make a statement said no. Gorham reportedly told the officer he did not want to make a formal statement since "... there were plenty of people at Menard [prison] who were there only because they did give statements ..." The state presented other witnesses in the motion to suppress proceedings who agreed that the defendant did not make a statement when first asked. A second team of police officers approached the defendant later and a forty-two page confession was obtained. The defendant was accused, along with the wife of the deceased, of killing the victim.

The district court, in granting the writ and ordering another trial, believed it was clear that Gorham had refused to relinquish his fifth amendment right to remain silent and further interrogation should have ceased immediately. Compounding the problem, according to the district court, was the presentation of the victim's wife to the petitioner during the interrogation in an effort to confront Gorham and thereby persuade him to "abandon his immediately prior assertion of rights," aggravated the fifth amendment violation. The state had opposed Gorham's district court proceedings by filing a motion for summary judgment, which was denied.

On appeal the case was reversed and remanded to the district court to allow the state an opportunity for an evidentiary hearing. The court opposed the state's efforts to reverse the district court and to premise the decision on "harmless error." The court agreed there was substantial evidence apart from the defendant's confession implicating him in the murder. The court said perhaps the state would have had a sounder case by not offering the confession. The court held that the prominence of the confession at the trial makes it appropriate to remand the case for an evidentiary hearing.

The dissenting opinion disagreed with this course, believing the order of the district court should be affirmed. The reasoning in the dissenting opinion was that the record established beyond doubt that Gorham exercised his right to remain silent and this right was not "scrupulously honored." The dissent said *Miranda* does not compel a prisoner to convince everyone present that he will remain silent. The dissenting opinion said the evidentiary hearing, mandated by the

majority, which was not requested by the prosecution, will not make
the case any clearer since the defendant’s statements were taken in vi-
olation of *Miranda*.305

In *United States ex rel. Riley v. Franzen*,306 a juvenile was interro-
gated by police and he requested to speak to his father. The father was
at the police station. However, the police did not allow father and son
to communicate. Two hours later, his request denied, appellant con-
fessed to the homicides charged. In the state court proceedings and
again in the writ of habeas corpus, appellant maintained that he
wanted his father to obtain an attorney. During the interrogation pro-
cess with the police Riley did not indicate why he wanted to see his
father.

On appeal of the denial of the writ of habeas corpus, Riley as-
serted that by requesting to speak with his father during the interroga-
tion he invoked his rights to silence and to the assistance of counsel, as
delineated in *Miranda v. Arizona*.307 Riley said that in failing to honor
his request the police violated those rights.

The reviewing court disagreed, finding that nothing in the circum-
stances of the case warrants construing Riley’s request for his father as
an invocation of his right to silence. In addition, the court said Riley’s
request for his father did not constitute a request for an attorney nor
the functional equivalent of a request for counsel. The court ruled that
Riley’s father was not trained in the law and consequently, was not in a
position to advise his son as to his legal rights.308 In addition, the State
of Illinois does not recognize a parent-child privilege so any remarks
made by Riley to his father would not be privileged.

The court believed that because of the special problems associated
with uncounseled confessions by juveniles309 it would probably be a
desirable matter of policy for police to consent to a juvenile suspect’s
request for his parents or guardian during an interrogation. However,
the court’s ruling in affirming the denial of the writ as to this appellant
will not likely make for compelling reasons to adopt such a philosophy
in police rules and regulations.

305. *Id.* at 473-474 states in pertinent part:
If the individual indicates in any manner, at any time prior to or during questioning,
that he wishes to remain silent, the interrogation must cease. At this point he has shown
that he intends to exercise his Fifth Amendment privilege; any statements taken after the
person invokes his privilege cannot be other than the product of compulsion . . .
In a state prosecution for the killing of his wife the jury was allowed to hear a tape recorded conversation in which the defendant advised the police he desired to talk to a lawyer before proceeding further with responding to police questions. At trial the defense theory was insanity and a conviction followed. In _Jacks v. Duckworth_, the defendant claimed the denial of his writ of habeas corpus was error; that his fifth amendment privilege against self-incrimination and his sixth amendment right to counsel were violated when the jury was permitted to hear, over his objection, the following single statement to the police: "As regards what happened this evening, I want to talk to my attorney." The court ruled that his right to counsel had not attached during the police colloquy because no adversary judicial proceedings had been initiated. The introduction of the above statement of the defendant expressing his desire to talk to his lawyer was not reversible error in the opinion of the majority. The dissent believed allowing the jury to hear the defendant making a request to see an attorney is extremely prejudicial in a case involving, as here, an insanity defense.

4. Double Jeopardy Issues

_Under States ex rel. Stevens v. Circuit Court of Milwaukee County_ was a bold attempt by a defendant in a state criminal case to present circumstances which, hopefully, through federal habeas corpus proceedings, would result in an injunction against his forthcoming state criminal trial. The petition alleged violation of double jeopardy. Stevens was charged in a Wisconsin state court with four counts of violating a state narcotics statute. He entered a plea of guilty on two of the counts which charged him with misdemeanors. In addition, he moved to dismiss the other two felony counts on the ground that they charged the same offense, so that a trial on them would place him in double jeopardy. The trial court denied his motion as did the Wisconsin Supreme Court. Having thus exhausted his pretrial remedies in the state court system, Stevens filed a petition for habeas corpus in the federal district court which denied the petition on the merits.

Since Stevens was on bail the threshold issue was resolved when the court ruled he was technically "in custody" within the meaning of the habeas corpus statute because the terms of his bond limit his free-

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310. 651 F.2d 480 (7th Cir. 1981).
312. 651 F.2d at 493-94; _see_ United States v. Matos, 444 F.2d 1071 (7th Cir. 1971).
313. 675 F.2d 946 (7th Cir. 1982).

The court was sympathetic with the effort put forth by Stevens, acknowledging that to put a man to the time, expense, embarrassment, and anxiety of being tried repeatedly for the same offense is a violation of the double jeopardy clause that is not cured by acquitting him every time. Since the relevant state remedies were exhausted and the petitioner had nowhere else to turn in the state judicial system to get the charges against him dismissed before trial, then it appeared that an injunction against the trial was a remedy for that restraint. The court said that this was consistent with the traditional function of habeas corpus to relieve against unlawful custody. The court cautioned that such power does exist but it should be exercised sparingly, since it is a grave matter for a federal judge to enjoin a state criminal trial.

The court reviewed the cases on this issue and found that in all but a handful of cases in which a state criminal defendant has petitioned for pretrial habeas corpus based on double jeopardy claims the petitioner had actually been tried, rather then a plea of guilty as in Steven's case.\footnote{315}{See, e.g., Drayton v. Hayes, 589 F.2d 117 (2d Cir. 1979).} The court found only four appellate cases in which there was no previous trial, the defendant having pled guilty.\footnote{316}{Klobuchir v. Pennsylvania, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979); Drayton v. Hayes, 589 F.2d 117 (2d Cir. 1979); United States ex rel. Betts v. County Ct. for La Crosse County, 496 F.2d 1156 (7th Cir. 1974); Rivers v. Lucas, 477 F.2d 199 (6th Cir. 1973), vacated on other grounds, 414 U.S. 896 (1976).}

The court decided this fact situation requires a balancing of interests. Since to try Stevens for the same offense to which he pled guilty would in fact violate the double jeopardy clause it would not flout the policy of avoiding multiple trials, since he was never tried the first time but entered a plea of guilty. The court cited United States v. Wilson,\footnote{317}{420 U.S. 332, 343 (1975).} for the principle that avoiding multiple trials is the only objective of the double jeopardy clause that cannot be adequately protected by appeal from [or collateral attack on] a judgment of conviction in the second prosecution. Although the right of a criminal defendant to complain about being put in double jeopardy is not affected by the fact that there was no trial the first time, the issue in the instant case was not "rights" but remedies.

The court reasoned the resolution of this case requires a comparison of inconveniences to the defendant and the state. Following the

\footnote{314}{See 28 U.S.C. § 2254(b) (1976); Hensley v. Municipal Court, 411 U.S. 345 (1973).}
\footnote{315}{See, e.g., Drayton v. Hayes, 589 F.2d 117 (2d Cir. 1979).}
\footnote{316}{Klobuchir v. Pennsylvania, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979); Drayton v. Hayes, 589 F.2d 117 (2d Cir. 1979); United States ex rel. Betts v. County Ct. for La Crosse County, 496 F.2d 1156 (7th Cir. 1974); Rivers v. Lucas, 477 F.2d 199 (6th Cir. 1973), vacated on other grounds, 414 U.S. 896 (1976).}
\footnote{317}{420 U.S. 332, 343 (1975).}
dictates of Younger v. Harris,\textsuperscript{318} the Seventh Circuit felt the Younger policy is the weightier when the defendant is not being asked to undergo a second trial. Since the petitioner was facing his first trial the court rejected his double jeopardy argument and dismissed his petition for habeas corpus relief.

A double jeopardy issue developed in Wilson v. Meyer,\textsuperscript{319} when the state conviction was presented to a federal district court in a writ of habeas corpus petition stating the defendant was again prosecuted for felony murder after the state had secured its initial conviction for felony murder, and intent to murder. Prior to sentencing in the initial conviction, the prosecutor's motion to \textit{nolle prosequi} the felony murder was granted, leaving only the intent to murder conviction. Following his sentence in the state court the defendant filed a writ of habeas corpus. Upon appeal, after the district court denied the relief, the Seventh Circuit found the state had knowingly used perjured testimony, and therefore remanded the proceeding for retrial.\textsuperscript{320}

The state promptly tried him again, but instead of charging the defendant with intent to murder, the charge was felony murder, the offense the state had \textit{nolle prosequi} in the initial conviction. A conviction followed and this time in a writ of habeas corpus the defendant argued double jeopardy. The Seventh Circuit agreed and reversed the conviction and remanded the proceeding for retrial within a reasonable time. The opinion noted that the intent to murder count continues to be viable, having remained so through the Seventh Circuit's reversal in 1976.

The court noted its disagreement with the conclusion of the Illinois court that no double jeopardy violation existed because the two verdicts on the two counts of intent to murder and felony murder, in effect merged into a single judgment of murder.\textsuperscript{321} The court said this ignores what actually occurred. Wilson was indicted on two theories of murder under two counts and was adjudged guilty on each. Only then did the State \textit{nolle prosequi} the felony murder count. All that remained was the intent to murder count. The court ruled that it could not be

\textsuperscript{318} 401 U.S. 37 (1971) (which construed 28 U.S.C. § 2283 of the federal habeas corpus legislation and held federal courts do not lightly enjoin state criminal proceedings).

\textsuperscript{319} 665 F.2d 118 (7th Cir. 1981), \textit{cert. denied}, 455 U.S. 933 (1982).

\textsuperscript{320} See United States ex rel. Wilson v. Warden Cannon, Stateville Penitentiary, 538 F.2d 1272 (7th Cir. 1976).

said that the two verdicts merged into a single judgment, as only one verdict remained, with nothing whatsoever to merge with.


Following remand by the Supreme Court, the case of **White v. Finkbeiner**\(^3\) was again before the Seventh Circuit Court of Appeals. The Supreme Court declared the defendant's continuing request for counsel was not honored by the police and the persistent interrogation by the police, not initiated by the defendant, was perhaps in violation of **Edwards v. Arizona**.\(^2\) On remand the Seventh Circuit agreed and was now faced with the issue of whether to extend the rationale of **Stone v. Powell**\(^4\) to bar the appellant from obtaining federal habeas relief on the basis of a **Miranda**\(^5\) claim which White had a full and fair opportunity to litigate in the state court proceedings.

On its face, the holding in **Stone**\(^6\) applies only to claims based upon **Mapp v. Ohio**.\(^7\) The Supreme Court has not yet explored the implications of extending **Stone** to **Miranda** claims. The court in the instant litigation said federal habeas review as to fourth amendment issues now being limited has resulted in state courts to be less likely to follow fourth amendment decisions of their respective federal circuits, causing increasing inconsistencies to develop in the "Fourth Amendment law." The court believed the Supreme Court would eventually harmonize the inconsistencies which do arise by granting **certiorari** in more cases raising fourth amendment claims on direct review. The Seventh Circuit did not want to extend **Stone** for various reasons, including their belief that unlike **Mapp**, **Miranda** has beneficial effects in providing police with concrete guidelines which promote self-regulation and reasonably ensure the admissibility of confessions when its dictates are followed. The court said it doubted if it had the power for extending **Stone** to **Miranda** claims and that the Supreme Court itself should decide initially whether to so extend **Stone**. The court reversed

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322. 687 F.2d 885 (7th Cir. 1982).
326. 428 U.S. at 494 (where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial).
and remanded to the district court with instructions to grant the writ unless White is retried by the state within ninety days.

B. Sixth Amendment Issues

1. Effective Assistance of Counsel

Some of the federal circuit courts hold that the harmless error doctrine never applies in an ineffective assistance of counsel cases. The majority reject this position. The Supreme Court has not ruled on this issue nor has the Seventh Circuit. In the Appeal of Wade v. Fransen, the court reviewed the denial of a petition for habeas corpus in the district court without a hearing in which the appellant raised two issues. The first was whether Jackson v. Denno entitled him to a separate hearing, outside the presence of the jury, on the voluntariness of his confession. The second was whether he was denied the right to effective assistance of counsel.

The reviewing court found that Wade was represented at trial by the lawyer for the building’s owner, the location of the crime, where Wade worked as a janitor. This lawyer specialized in real estate law and had never tried a felony case before this homicide trial. The lawyer made various blunders, including refusing to file a motion to suppress the confession in spite of circumstances which should warrant a pretrial hearing on the issue. The lawyer was afraid that attestation on the motion to suppress required by the local court rule would be treated as a waiver of his client’s right not to be forced to incriminate himself. It would not have been. The reviewing court said this was plain error on the lawyer’s part and that no conceivable tactical motive could be attributed to his action. The court itemized various other “silly motions” made by counsel in addition to buttressing the state’s case in the cross-examination of witnesses. The court believed the conduct of counsel raised grave doubts concerning the competence of Wade’s lawyer.

Although the Illinois Appellate Court found that Wade had not been denied effective assistance of counsel, the Seventh Circuit standard was not applied as mandated by United States ex rel. Williams v.

329. See, e.g., Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980); United States v. DeCoster, 624 F.2d 196, 208 and n.74 (D.C. Cir. 1976) (en banc).
330. 678 F.2d 56 (7th Cir. 1982).
Twomey. Instead, the Illinois reviewing court applied their standard holding, "... the court will not reverse a conviction because of the incompetency of counsel unless the representation is of such a low caliber as to amount to no representation at all or reduces the court proceedings to a farce or sham." The Seventh Circuit said the Illinois Appellate Court hedged its bets by also stating, "... we would reach the same result if the standard of legal representation by private counsel was fixed at a lower point than above indicated, such as the need to meet a minimum professional standard." Since the Illinois court did not explain the application of this standard to the facts of the instant case the Seventh Circuit's response was, "[a] bare conclusion does not invite deference."

The court reversed and remanded the case to the district court, ruling the state was not entitled to summary judgement, and inviting the district judge to examine the state trial record and perhaps hold an evidentiary hearing at which Wade's lawyer could be asked to testify. The court did not decide whether or not the harmless error doctrine as applied by the minority or majority of the circuits would be adopted in the Seventh Circuit. The court did say it found itself of the belief that the minority view holding that harmless error may never be used in an ineffective assistance of counsel case perhaps extreme.

In United States ex rel. Heral v. Franzen, the petitioner raised two issues from the district court's denial of her petition for habeas corpus. First, that the failure of her counsel to notify the trial court that she had attempted suicide three days before she entered a guilty plea constituted ineffective assistance of counsel. Second, that a determination of her competence to enter a guilty plea required a specific

333. 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975) (the standard is "minimum professional competence," not "farce or sham.").
334. People v. Wade, 71 Ill. App. 3d 1013, 389 N.E.2d 1230 (1979); accord People v. Murphy, 72 Ill. 2d 421, 436, 381 N.E.2d 677 (1978) (the accepted view in Illinois was that where counsel is privately retained, counsel's conduct of the case would support reversal only if the level of representation amounted to no representation at all or if the proceedings had been reduced to a farce or sham.); cf. Cuyler v. Sullivan, 446 U.S. 335, 344-345 (1980); People v. Talley, 97 Ill. App. 3d 439, 443, 422 N.E.2d 1084 (1981) (the defendant must now show actual incompetence on the part of trial counsel which results in such substantial prejudice that the outcome of the trial would likely have been different had the defendant been more adequately represented.)
335. Wade, 71 Ill. App. 3d at 1020, 389 N.E.2d at 1236.
336. Compare United States v. King, 664 F.2d 1171 (10th Cir. 1981) (when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel) with United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982) (The showing of inexperience of a real estate lawyer in criminal law is sufficient for finding of ineffectiveness in complicated mail fraud prosecution; a showing of specific errors committed by counsel is unnecessary).
337. 667 F.2d 633 (7th Cir. 1981).
ruling, separate from the determination that she was competent to stand trial. In the state court, defense counsel attempted to have her declared incompetent to stand trial. When this failed, he arranged a plea-bargain whereby the defendant would serve the statutory minimum for murder. The court said counsel's decision not to revive the competency issue and thereby endanger the plea-bargain, when court psychiatrists had repeatedly found that defendant's suicidal tendencies did not render her incompetent, was a legitimate, albeit undesirable, tactical decision, but in this case did not constitute ineffective assistance of counsel.

The court said the standard for determining ineffective assistance of counsel is whether counsel's performance "meets a minimum professional standard."338 This in turn, requires an examination of "the totality of circumstances in the particular case."339 Where an action can fairly be construed as a "trial tactic," the court said they will not find the action to constitute ineffective assistance simply because in hindsight it seems inadvisable.340 The court said the burden of proving ineffective assistance rests with the defendant.341

The defendant's second claim was that the trial court erred in accepting her guilty plea without making a separate and specific determination that she was competent to plead guilty. Although the trial judge had already adjudged defendant competent to stand trial, defendant argued that a more stringent standard must be applied in examining a defendant's competence to enter a guilty plea citing Ninth Circuit authority342 wherein the court ruled that a higher level of competence was required whenever constitutional rights are waived. The court acknowledged the Ninth Circuit rule does impose a higher standard of competence to enter a guilty plea than to stand trial.343 However, the court said the First Circuit was critical of this Ninth Circuit rule.344 The Seventh Circuit decided to adopt a rule contrary to the Ninth Circuit by holding that the degree of competence required to plead guilty

342. Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973).
343. Id. at 214-15.
is the same as that required to stand trial, a standard in accord with at least six other circuits.\textsuperscript{345}

\textit{Davis v. Franzen}\textsuperscript{346} presented the question of whether a violation of the sixth amendment occurred because Davis and the co-defendant were represented at their trial by lawyers from the same public defender's office. The petition for habeas corpus relief contained no suggestion that Davis's counsel "actively represented conflicting interests," the constitutional predicate for a claim of ineffective assistance of counsel set forth in \textit{Cuyler}.\textsuperscript{347} The petition prepared by Davis merely suggested there was a potential of a conflict of interest. The court said this was not enough since there is always a potential conflict of interest when co-defendants are represented by a single lawyer. In the instant case the co-defendants' lawyer was from the same public defender's office. The evidence against both defendants was the same; one could not have been exculpated without exculpation of the other. The court said this distinguishes the instant case from \textit{Ross v. Heyne}\textsuperscript{348} where the Seventh Circuit sustained a claim that representation of co-defendants by partners in the same law firm deprived the defendant of effective assistance of counsel, because the co-defendants testified for the prosecution. This meant that the defendant could prevail only if his co-defendants were disbelieved. That situation was the opposite of the instant case and the court affirmed the denial of the petition for a writ of habeas corpus.

In \textit{Dently v. Lane},\textsuperscript{349} Dently filed a petition in federal district court for a writ of habeas corpus claiming that he was denied his right to the effective assistance of counsel because his attorney had a conflict of interest and performed incompetently. The district court denied the petition without holding an evidentiary hearing.

The Supreme Court had decided two cases recently, \textit{Holloway v. Arkansas}\textsuperscript{350} and \textit{Cuyler v. Sullivan},\textsuperscript{351} which provide guidelines for re-

\begin{itemize}
\item \textsuperscript{345} Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3d Cir. 1975); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974); United States v. Harlan, 480 F.2d 515 (6th Cir.), \textit{cert. denied}, 414 U.S. 1006 (1973); Wolf v. United States, 430 F.2d 443 (10th Cir. 1970); United States v. Valentino, 283 F.2d 634 (2nd Cir. 1960).
\item \textsuperscript{346} 671 F.2d 1056 (7th Cir. 1982).
\item \textsuperscript{347} 446 U.S. at 350.
\item \textsuperscript{348} 638 F.2d 979, 982-985 (7th Cir. 1980).
\item \textsuperscript{349} 665 F.2d 113 (7th Cir. 1981).
\item \textsuperscript{350} 435 U.S. 475 (1978) (counsel objected that his continued representation of the three co-defendants was inappropriate because of inherent conflicts in their defenses. The Court held that, in the face of a timely objection, the judge's failure to appoint separate counsel, or to ascertain that the risk was too remote to warrant separate counsel, deprived the defendants of their Sixth Amendment rights).
\item \textsuperscript{351} 446 U.S. 335 (1980) (the trial court has no affirmative duty to inquire into the propriety of
viewing claims that jointly represented defendants, as in the instant case, were denied the effective assistance of counsel because of conflicts of interest.

In Dently the appellant at trial advised the judge he did not want the public defender since he had refused to cooperate with Dently. The trial judge did not inquire further and later appointed another public defender, without advising Dently the new counsel was also associated with the co-defendant’s counsel, a public defender. Although the initial counsel’s formal representation had ceased, that same counsel continued to file papers on Dently’s behalf in addition to other in-court activities. The thrust of Dently’s claim in the instant appeal was that he and his co-defendant, despite their conflicting defenses, were jointly represented by members of the same public defender’s office. Dently argued that such joint representation denied him his sixth amendment right to the effective assistance of counsel. Dently also maintained that, even if there were no joint representation or conflict of interest, his attorney’s performance failed to meet the minimum professional standard required by the sixth amendment.352

The court agreed that Dently was entitled to an evidentiary hearing on his claim that he was denied effective assistance of counsel. The court said there were factual questions presented in the petitioner’s writ of habeas corpus that could be resolved only by a hearing. The court instructed the district court to determine if there was an actual conflict of interest, and whether the alleged conflict affected the adequacy of the legal representation received by Dently.

In the remand order the district court was advised that apart from the questions outlined in Holloway and Cuyler, the court also must consider whether counsel’s performance on behalf of Dently met the minimum professional standard required to satisfy the sixth amendment.353

2. Right to Counsel at Lineups

In a state court proceeding the investigating officer testified that he arranged the line-up identification in order to provide probable cause for the formal charging. The state court conviction was challenged by multiple representation. However, a defendant who shows that a conflict of interest affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. 352. See United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975) (“The criminal defendant, whether represented by his chosen counsel, or a public agency, or a court-appointed lawyer, has the constitutional right to an advocate whose performance meets a minimum professional standard.”).

353. See Twomey, 510 F.2d at 640.
way of a writ of habeas corpus. The district court denied the relief. The opinion in *Bruce v. Duckworth*354 noted the state court transcript did show that, in addition to the police officer's testimony, the issue of probable cause was corroborated by the affidavit accompanying the charging information that relied in part on the line-up evidence. In affirming this matter the court noted, "[w]e therefore need not address the issue of whether *Kirby v. Illinois*355 applies if police defer formal charging in order to evade the requirement of presence of counsel."356

3. *When Required in Pro se Petitions*

In *United States ex rel. Jones v. Franzen*,357 the court dealt with the continuing problem of when a district court judge should appoint counsel for the applicant of a pro se petition for writ of habeas corpus and motion for the appointment of counsel. In *Jones*, the district court judge summarily dismissed Jones' petition without ordering a response from the state and reviewing only the submissions of the petitioner.

The court said that although it is undisputed that the findings of state courts are presumed correct on habeas corpus review,358 a petitioner who should assert that he was denied his due process rights because the state convicted him through creation of false evidence and suppression of truthful evidence. If that allegation be proven true and material, the use of perjured testimony would alone entitle Jones to the issuance of the writ.359

The court noted that one of the glaring deficiencies in the case was the decision of the district court not to order a response from the named respondents. As a result, the district court and the reviewing court were denied an opportunity to review such parts of the trial record as the answering party would deem relevant. The court noted that had this been done on such review, it may well be found that Jones' petition is indeed frivolous. However, the court noted a continuing line of Seventh Circuit cases in which it had stated "where a prisoner's habeas petition is dismissed without requiring the respondent to answer, the allegations must be deemed true for the present purposes."360

Jones made additional allegations respecting withheld evidence, the

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354. 659 F.2d 776 (7th Cir. 1981).
356. 659 F.2d at 783.
357. 676 F.2d 261 (7th Cir. 1982).
admission of co-defendant's statements, and improper jury sequestration.

The court on review reversed the summary dismissal of the petition for habeas corpus and remanded the matter to the district court with directions to appoint counsel for petitioner, to order a response from the state respondents, to review all relevant portions of the state trial record, and, if deemed necessary to conduct an evidentiary hearing. As guidance to district court judges the court noted that when, as here, the petition cannot be said to be frivolous per se, a failure to determine all record portions relevant to the issues raised by the petition should not be charged against an indigent prisoner when the district court has denied a request for the appointment of counsel. 361

In a concurring opinion, Congress was urged to reexamine the habeas statute; specifically, that it should consider amending it to provide that federal courts in habeas corpus proceedings may not reexamine state-court factfindings based, as in the present case, on a full and fair evidentiary hearing. 362 Whether this sentiment is pervasive in the Seventh Circuit is not apparent from other opinions but was expressed by one of the newest members on the Seventh Circuit, who applauded the recent Supreme Court opinions which reflect a much greater receptivity to the arguments against an expansive right of federal habeas corpus for state prisoners than the Townsend v. Sain decision did.

4. Introduction of Out-of-Court Statements, Hearsay, and Preliminary Hearing Testimony at Trial

A state court murder conviction was reviewed by way of federal habeas corpus. The district court granted the petition, holding that the state's introduction of the complaining witness' preliminary hearing testimony into evidence deprived defendant of his right to confront the witnesses against him as guaranteed by the sixth and fourteenth amendments. Since the complaining witness had died from causes unrelated to the proceedings, a retrial of the defendant was probably an unlikely occurrence. On appeal in United States ex rel. Haywood v.

361. 676 F.2d at 266 n.8.
the court reversed the district court. The court applied the test adopted in *Ohio v. Roberts*, a case also involving the introduction of the preliminary hearing testimony of an unavailable witness. The Supreme Court described a two-step approach to be used in making a determination of the admissibility of such preliminary hearing transcripts. The first was the rule of necessity whereby the prosecution must demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. The second aspect countenances the use of such hearsay only if the prior testimony has trustworthiness.

In this instant case the district court found that counsel was not afforded an adequate opportunity to cross examine the witness at the preliminary hearing. Because of the limited scope of preliminary hearings under Illinois law, and the presiding judge's strict application of that law in this case, the district court concluded that petitioner was prevented from adequately testing the witness' recollection and sifting his conscience to satisfy the demands of the confrontation clause. The court of appeals said the district court erred in this determination.

The district court reasoned that the introduction of the witness' preliminary hearing testimony violated petitioner's confrontation rights since it was clear counsel was prohibited from asking the witness his present address, an issue the Supreme Court has found is violative of the accused's constitutional right of cross examination. Similarly, application of state rules of evidence which prevented a defendant from cross examining a witness as to prior inconsistent statements was held to be a denial of due process. Related restrictions on the petitioner's right of cross examination occurred at the preliminary hearing in the instant case. The court of appeals said this reasoning by the district court was a misunderstanding of the law.

The court of appeals said the Supreme Court holdings have never required that the opportunity for cross examination afforded at the preliminary hearing must be identical with that required at trial. Although the Supreme Court has found that there was in fact full and complete cross examination at the preliminary hearing in those cases in

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367. United States ex rel. Bonner v. Pate, 430 F.2d 639, 641 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971) (the general purposes of a preliminary hearing is to determine whether the crime charged has been committed and, if so, whether there is probable cause to believe that it was committed by the accused).
which it has upheld the admission of such evidence at trial,\textsuperscript{370} it has never said that either the opportunity to cross examine, or the actual cross examination conducted at the preliminary hearing, must be as full and complete as allowed at trial in order for testimony from such a proceeding to be admissible in the event the witness subsequently becomes unavailable. \textit{Pointer v. Texas}\textsuperscript{371} is the only occasion the Supreme Court has found confrontation at the preliminary hearing constitutionally insufficient to permit the previous testimony of an unavailable witness to be used at trial. In that case the accused had been without counsel at the time of the hearing and had made no attempt to cross examine the witness on his own. The court of appeals felt that perhaps the significant element in \textit{Pointer}, though not mentioned in the Supreme Court opinion, was the fact that the witness whose preliminary hearing testimony was introduced had simply moved to another state. In the instant case the need for the prior testimony was much greater since the witness had not merely changed his place of living, but had ceased living altogether.

The court set forth the test for determining whether preliminary hearing testimony is admissible under the confrontation clause. The court said, as with all hearsay, it is not whether there was an opportunity for full and complete cross examination, but whether there are adequate indicia of reliability to justify its placement before the jury, even though there is no contemporaneous confrontation of the declarant.\textsuperscript{372}

The dissent was critical of the majority's conclusion that the witness' statement bore sufficient indicia of reliability to be introduced at trial without any cross examination. The dissent said that since the government's entire case rested upon this witness' testimony, there were certain indicia of unreliability which the majority failed to consider, including the critical issues that indicate the witness' preliminary hearing testimony was too unreliable to be admitted without any cross examination. One indicia of unreliability was the fact that three other men whom the witness identified as co-perpetrators, with the defendant, of the murders were not convicted of the crimes. One was acquitted, and the two others were not prosecuted because police investigation showed that they were not involved in the crimes. Even though the witness testified that three men committed the murders, he

\begin{itemize}
\item \textsuperscript{370} Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970).
\item \textsuperscript{371} 380 U.S. 400 (1965).
\end{itemize}
had identified four different men. Evidence existed that the witness was under the influence of narcotics at the time of the crime. However, at the preliminary hearing, counsel was not permitted to question the witness on his physical condition. For these and similar reasons the dissent did not feel the majority was correct in finding the existence of indicia of reliability.

Since the defendant did not have the opportunity to expose falsehood in front of the trier of fact, especially in light of the witness' unquestionably poor past record of veracity, and his intoxication from heroin on the evening of the crime, the dissenting judge found it grossly unfair for the defendant to be convicted solely on this preliminary hearing transcript.

A witness to an extortion setting appeared before a grand jury and testified under oath. During the trial of the Hobbs Act proceedings this witness, Chiampas, was subpoenaed to appear and did appear, but refused to answer any questions though ordered twice to do so by the judge. He explained that he was afraid for his life. He was then excused and the government offered in evidence his grand jury transcript. The district court admitted it, and it was read to the jury. Chiampas' testimony was later corroborated at every point by the tape of the conversation recorded describing the fight and appellants involvement with the victim of the extortion threat. Other points of his grand jury transcript were corroborated by the testimony of eyewitnesses to the event. A conviction followed. In United States v. Boulahanis, the appellants argued that the admission of the grand jury transcript into evidence violated both the Federal Rules of Evidence and the sixth amendment since a transcript cannot be cross-examined. The court disagreed, saying it would have been needless cruelty for the court to have put Chiampas to a choice between going to jail and running the risk of being killed, so there was no reason for the district court to threaten him with contempt. The introduction of the grand jury transcript, in the opinion of the court, complied with the requirements of Rule 804 of the Federal Rules of Evidence, since all that is required is that the hearsay evidence is the most probative evidence reasonably available on a material issue in the case.

In this case it was material though not essential for the government to show that the appellants had beaten up the victim the night before,

374. 677 F.2d 624 (7th Cir. 1982).
375. FED. R. EVID. 804.
376. United States v. Carlson, 547 F.2d 1346, 1354-1355 (8th Cir. 1976).
as witnessed by Chiampas prior to the taped conversation; it was further evidence that the transaction discussed in the taped conversation was extortionate and not, as the appellants tried to show at the trial, a normal business transaction. At the time that Chiampas' grand jury testimony was read into evidence the government had no other direct evidence that it was the appellants who were involved in beating up the victim.

In addition, the court concluded that the introduction of the grand jury transcript did not violate the confrontation clause of the sixth amendment. The fact that Chiampas was not available for cross examination did not violate the sixth amendment. The Seventh Circuit said it believes the "influential" plurality opinion in *Dutton v. Evans*\(^{377}\) has convinced this Circuit it is "... unwilling to hold that the admission of hearsay evidence is a per se violation of the confrontation clause of the Sixth Amendment." In the instant litigation the court reasoned that the grand jury transcript was admissible, since it was accurately reported and the accuracy was not challenged; that Chiampas' statement was made voluntarily and under oath at the grand jury proceedings and was corroborated at the trial by other highly probative evidence, including tape recording and eyewitness accounts.

In *Davis v. Franzen*,\(^{378}\) the petitioner complained that his sixth amendment right to confront the witnesses against him was denied by the admission in evidence of the statement by a witness named Tensley who said Davis' companion in a robbery/murder had remarked following the stickup, "I sure liked the way you popped that dude." Tensley was the driver of the get-a-way vehicle. The court said the evidence at trial was sufficient to show Davis and his companion acted in concert in the robbery and that this foundation was all that was necessary to make the companion's statement admissible against Davis.

The court ruled that the admission of evidence in violation of the hearsay rule is not a per se violation of the sixth amendment.\(^{379}\) The court said the Seventh Circuit follows the *Dutton v. Evans*\(^{380}\) plurality opinion, and has extracted from *Dutton* the proposition that the admission of hearsay evidence does not violate the constitutional right of confrontation if the witness offering the hearsay testimony is cross ex-

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378. 671 F.2d 1056 (1982).
379. See United States v. Cogwell, 486 F.2d 823, 832 n.5 (7th Cir. 1973).
380. 400 U.S. 74 (1970); United States v. Regilio, 669 F.2d 1169, 1176 (7th Cir. 1981); Cogwell, 486 F.2d at 834.
amined and "the circumstances under which the statement was made indicated the content of the statement was true." 381

Under the due process clause of the fourteenth amendment, a state criminal defendant is entitled to be confronted by opposing witnesses as guaranteed by the sixth amendment. 382 For reasons not apparent from the record, in a state trial for murder, the prosecutor was permitted to admit into evidence, and to read from, transcripts of the six prosecution witnesses' out-of-court statements. Before each transcript was admitted the declarant examined it and verified its accuracy. Three kinds of challenged statements were admitted into evidence: grand jury testimony; statements to police investigators given shortly after the crime; and a statement to the coroner. Except for the coroner's statement, the challenged statements were in question and answer format.

In *Flawallen v. Faulkner* 383 the court reviewed the denial of a petition for a writ of habeas corpus raising one ground for relief: that, at his trial the petitioner was denied the right "to be confronted with the witnesses against him . . ." as guaranteed by the sixth amendment. Specifically, the challenge was to the admission into evidence in the state prosecution, over objections, of six prosecution witnesses' out-of-court statements as part of the state's case-in-chief. All agreed on appeal that defendant was not present when the out-of-court declarations were made and that, neither personally nor through counsel, did defendant have a contemporaneous opportunity to cross examine the declarants. However, defendant fully cross examined all six of the declarants at trial.

The court affirmed, citing *California v. Green* 384 and saying that although the need for the use of the recalcitrant witness' prior testimony clearly was present in *Green*, in terms of accuracy and reliability the instant case is not materially different. The court said the defendant's ability to cross examine the declarants in the instant case was probably greater than that of the defendant in *Green* because the witnesses in the instant case neither professed uncertainty nor expressed hostility. The court said that although necessity may have been absent, there was no error of constitutional magnitude in the instant case. To the extent that the sixth amendment secures the right to have the trier of fact observe the witnesses' demeanor, the opportunity for the jury in

381. Cogwell, 486 F.2d at 834.
the instant case to do so during cross examination was considered sufficient. The court said that although a greater opportunity to observe demeanor may have been preferable, its absence does not render defendant's conviction constitutionally infirm. The court noted in conclusion that it did not condone or encourage the use of the procedure challenged in this case, but in the absence of any demonstrated or apparent prejudice to defendant occasioned by its use, his sixth amendment rights were not abridged.

This holding may encourage state and federal prosecutors to enhance the credibility of its witnesses by first funnelling them through the police format of question and answer responses prior to trial.

C. Matters Involving the Jury

1. Failure to Provide the Not Guilty Verdict Form

The failure to include a not guilty verdict form in a state prosecution resulted in the overturning of a murder conviction. In United States ex rel. Ross v. Franzen, the court divided on the issue where the petitioner sought a writ of habeas corpus from the district court alleging that the state trial court had abridged his constitutional rights by refusing to include a plain "not guilty" form among the verdict forms given to the jury. The district court dismissed the petition. The court on appeal remanded the case with directions to order the release of the petitioner unless he is again brought to trial within 90 days.

In the trial court, defense counsel said he wanted the not guilty verdict form included with the other three verdict forms which included guilty; not guilty by reason of insanity and in need of further mental treatment; and not guilty by reason of insanity and not in need of further mental treatment. The court noted at the outset that petitioner's failure to make a more formal objection to the alleged error at trial does not bar the federal court from now addressing that issue, since the state appellate court decided the merits of petitioner's constitutional claim notwithstanding the lack of preservation.

The court concluded that the state appellate court's determination that petitioner never questioned at trial the doing of the criminal acts was without support in the record, and provided examples of the record data supporting a challenge to the state's case. The court cited Braley v.

385. 668 F.2d 933 (1982).
Gladden,\(^{388}\) where the Ninth Circuit remanded for a new trial when there was merely an inadvertent failure to submit the not guilty form to the jury. The Braley court had reasoned the oversight in not furnishing the not guilty verdict form along with the opposite form constituted, in effect, a severely adverse comment by the trial judge, an impermissibly grave insinuation of judicial attitude toward the ultimate issue of guilt or innocence.\(^{389}\) The court noted it has long been the law of the Seventh Circuit that counsel may not stipulate to facts establishing the guilt of the accused without the defendant's consent.\(^{390}\)

In reversing the conviction the court noted that the waiver of a constitutional right must be "an intentional relinquishment or abandonment of a known right."\(^{391}\) The court said the facts of the instant appeal did not establish a waiver of the petitioner's right to a jury decision as to whether he committed the crime. Consequently, the court held it was error for the trial court to submit only the three verdict forms to the jury, since that action, together with its instruction to choose among the three forms, effectively foreclosed any realistic possibility of a not guilty verdict.

2. Asking Jurors Their Numerical Division is not Violative of the Constitution

In an appeal from the denial of a state prisoner's petition for habeas corpus, the court in United States ex rel. Kirk v. Director, Dept. of Corrections,\(^{392}\) was called upon to decide whether the rule forbidding trial judges from inquiring as to the jury's numerical division, enunciated by the Supreme Court in Brasfield v. United States,\(^{393}\) is binding on the states through the Fourteenth Amendment, or whether it is merely an exercise of the Supreme Court's supervisory jurisdiction over federal courts.

In the state court proceedings the reviewing court agreed the trial judge committed error but held it was not reversible error and affirmed the conviction.\(^{394}\) The Seventh Circuit adopted the reasoning of the

388. 403 F.2d 858 (9th Cir. 1968).
389. 403 F.2d at 860.
390. See Achtien v. Dowd, 117 F.2d 989, 993-994 (7th Cir. 1941).
392. 678 F.2d 723 (1982).
393. 272 U.S. 448 (1926).
Fourth and Eighth Circuits holding that the rule of Brasfield is based not on the Constitution but on the Supreme Court's supervisory jurisdiction over federal courts. As such, it is not binding on the states, and the state trial judge's failure to follow that rule in the instant case does not by itself entitle petitioner to federal habeas corpus relief. The court left open the possibility there may well be cases where a review of the entire record leaves one with the overwhelming impression that the trial judge's inquiry as to the jury's numerical division pending deliberations would entitle a defendant to relief. Inasmuch as the petitioner in the instant case did not make an attempt to show actual coercion, combined with the fact that the verdict was not obtained until some eighteen hours after the challenged inquiry, the court said no constitutional error occurred.

3. Presumption Language not Endorsed in the Instructions When Intent is an Element of the Crime

In the appeal of the denial of federal habeas corpus relief the court in Pigee v. Israel was split on the question of a jury instruction. In this case intent was an element of the crime charged. The jury instruction read: "When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all the natural probable and usual consequences of his deliberate act". The issue raised was whether the giving of this instruction risks a violation of the fourteenth amendment's requirement that a state prove every element of a criminal offense beyond a reasonable doubt.

The appellant contended that the instruction could have been interpreted by the jury to require the appellant to prove he lacked intent to kill, thus shifting the burden of persuasion to him on the element of intent. If this was true it would violate the due process principle that the burden is on the state to prove every element of the crime charged beyond a reasonable doubt. The majority felt a reasonable jury could not have interpreted the instruction in an unconstitutional manner and affirmed the denial of the petition by the district court. Before reaching this conclusion, the court had the following advice for trial judges:

396. 670 F.2d 690 (7th Cir.), cert. denied, — U.S. —, 103 S.Ct. 103 (1982).
Trial judges, both state and federal, would be wise in the future to avoid 'presumption' language in this area, in favor of language pointing out inferences which can permissibly be drawn from conduct and emphasis on the prosecution's burden at all times to prove guilt beyond a reasonable doubt. 399

The dissenting opinion proposed the most rational method of disposing of the case. The dissent showed how the instruction in the instant case was virtually the same as the instruction condemned in Sandstrom v. Montana. 400 The dissenting opinion believed the majority decision was in "collision" with Sandstrom and that giving the jury instruction in this case deprived the appellant of his right to due process of law. 401 The fact that the Supreme Court of Wisconsin was divided on the question raised in this case 402 as were the appellate courts of Wisconsin, in addition to the district court judges of the Eastern District of Wisconsin, 403 the dissent raised the question, "How then will twelve lay persons, most if not all of whom are having their initial experience with the law, arrive at a unanimous and constitutionally acceptable interpretation of the instruction?" The dissenting opinion believed there was a rational foundation to the possibility that due process had been denied to the appellant.

4. Alternate Jurors in the Deliberation Process

In a case of first impression, Johnson v. Duckworth 404 presented the question as to whether a state court may constitutionally require an alternate juror to observe the jury's deliberations, over the defendant's objection. The defendant contended that any person who is not permitted to participate in the jury's discussion and vote must be considered a stranger to the deliberations, and that allowing any stranger to observe deliberations violates the "cardinal principle" that jury deliberations must be secret and private in every case. The defendant relied on other federal circuits which held the presence of the alternate juror

399. 670 F.2d at 696.
401. 670 F.2d at 697 (Baker, J., dissenting).
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during deliberations to be *per se* reversible error in federal criminal
trials.\textsuperscript{405}

The court noted that the necessity for privacy and secrecy in jury
deliberations lies in the danger that ". . . freedom of debate might be
stifled and independence of thought checked if jurors were made to feel
that their arguments and ballots were to be freely published to the
world."\textsuperscript{406}

Since this issue was raised by a state prisoner in his petition for
writ of habeas corpus in the federal district court, the court on appeal
concluded that jury privacy is not a constitutional end in itself; it is,
rather, a means of ensuring the integrity of the jury trial. Therefore,
since any jury system is composed of many discrete features which may
vary from forum to forum without running afoul of sixth amendment
guarantees,\textsuperscript{407} the procedure adopted by the State of Indiana in al-
lowing alternate jurors to observe the jury’s deliberations may not be
perfect, but, the court held that it cannot be said to have deprived John-
son of his constitutional right to trial by jury.

D. District Judges Authority and Obligations in Reviewing Habeas
Corpus Petitions

1. *May not Issue the Writ for Violation of State Constitutional Law*

In *United States ex rel. Hoover v. Franzen*,\textsuperscript{408} the court was faced
with a district court order granting relief to eight state prisoners who
were to be transferred to federal prisons outside Illinois. In their writ
for habeas corpus relief against both federal and state custodians they
alleged violations of their rights to due process and the fifth and four-
teenth amendments, their statutory rights under federal law,\textsuperscript{409} in addi-
tion to violation of the Illinois Constitution,\textsuperscript{410} which provides, "[n]o
person shall be transported out of the state for an offense committed
within the state."

The district court, in affording relief, relied on the state constitu-

\textsuperscript{405} United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978); United States v. Beasley, 464
F.2d 468 (10th Cir. 1972); United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964).
\textsuperscript{406} 650 F.2d at 124 citing Clark v. United States, 289 U.S. 1, 13 (1933).
\textsuperscript{407} Williams v. Florida, 399 U.S. 78, 103 (1970) (the states are not constitutionally bound to
employ twelve-member juries in serious criminal cases); Apodaca v. Oregon. 406 U.S. 404, 411
(1972) (twelve-member juries need not reach unanimous verdicts). See generally Kelsie v. Trigg,
657 F.2d 155 (7th Cir. 1981).
\textsuperscript{408} 669 F.2d 433 (7th Cir. 1982).
\textsuperscript{409} 18 U.S.C. §§ 4001(a), 5003 (1976); Lono v. Fenton, 581 F.2d 645 (7th Cir. 1978) (en
banc).
\textsuperscript{410} ILL. CONST. art. I, § 11.
tional claim asserted by petitioners, reasoning that under the doctrine of pendent jurisdiction it could entertain the state constitutional claims before reaching the federal constitutional claims. The district court had concluded that the plain language of the Illinois Constitution prohibits the transfer of the petitioners to prisons outside of Illinois.

The Seventh Circuit, in a case of first impression, said the district court erred in concluding that it had pendent jurisdiction over the state constitutional claim alleging the provisions of the Illinois Constitution were violated. Although the parties on appeal focused on the propriety of the exercise of pendent jurisdiction in a habeas corpus proceeding, the court decided the more fundamental question was whether the district court had the power to issue a writ of habeas corpus for violation of state law. The court said that merely because the state law claim is in federal court does not lead to the application of federal law. The reviewing court reversed the district court’s order granting the writ, saying it lacked jurisdiction since Congress has limited habeas relief to violations of the Constitution or law or treaties of the United States. The court said that by granting the writ the district court ignored this principle in issuing a writ of habeas corpus for a state law violation.

Rather than remand the case for a determination of whether a state law remedy exists for the violation of state law and, if so, to impose the state remedy as allowed under the doctrine of pendent jurisdiction the Seventh Circuit said implicit in this litigation is the “exhaustion doctrine” that potential habeas claims first be litigated in a state court before recourse is had to a federal district court. In examining Congress’ preference for initial state court litigation of federal claims, combined with the limits of the scope of the issues cognizable in habeas corpus proceedings, the Seventh Circuit held “we think it fair to conclude that Congress preferred that state courts be the sole forum for litigating state claims which might otherwise be pended to habeas claims.” The court eliminated any thoughts that the exhaustion principle governs the instant case.

The rationale for the court’s decision was to avoid duplicate litigation, believing the economy of judicial resources achieved by trying the underlying pendent jurisdictional claims in federal courts over state

416. 669 F.2d at 445.
courts is inapplicable in habeas corpus proceedings. The mechanics of attaching state claims to habeas corpus claims in federal court makes no sense, in the opinion of the Seventh Circuit, since the habeas claim first require exhaustion in state court. For these reasons the court held that, "in general, state law claims may not be appended to federal habeas corpus claims, and federal courts in habeas corpus proceedings have no jurisdiction over such state law claims."417

2. The Court has Power to Issue Default Judgment Against the State

A state attorney general failed to comply with a district court order requiring that copies of the state court transcript of petitioner’s trial be filed within twenty days. In Ruiz v. Cady,418 the appeal raised the question of whether the district court abused its discretion in granting the petitioner’s writ of habeas, without a determination of the merits, since the attorney general failed to comply with the court order.

The district court’s opinion419 related that the respondent’s explanation for the attorney general’s office delay fell far short of demonstrating excusable neglect, stating, “I consider this conduct to constitute bureaucratic paralysis rather than excusable neglect. This disregard for the court’s orders and for the petitioner’s right to a swift resolution of his habeas claims poses a threat to the orderly administration of justice.”420

The reviewing court said that it was in complete sympathy with the district court’s concern that the attorney general’s staff did not live up to its obligations in prisoner cases, and in addition agreed that the respondent offered an inadequate explanation for the delay in this case. However, the court felt there were several alternatives the distinct court might have employed, rather than using the default judgment remedy, as a more appropriate sanction:421 (1) It could have notified the attorney general that in the future, requests for extension would be routinely denied. (2) It could have shortened the normal briefing schedule and otherwise sought a speedier determination, in order to make up to Ruiz for the state’s tardiness. (3) It could have disciplined counsel or instituted contempt proceedings against counsel for the state, the attorney general’s legal services administrator or the attorney general himself.422

417. Id.
418. 660 F.2d 337 (7th Cir. 1981).
420. Id. at 52.
421. 660 F.2d at 341.
422. Id.; see United States ex rel. Mattox v. Scott, 570 F.2d 919, 924 (7th Cir. 1974).
The court said the availability of these alternative sanctions, does not mean, however, that there might not come a time when entry of default would be appropriate. The court noted that a default judgment, without full inquiry into the merits, is especially rare when entered against a custodian in a habeas corpus proceedings. The court reversed and remanded for further proceedings, cautioning that although a default remedy is extreme, and may well conflict with the public’s right to protection, the remedy should be preserved as a sanction against a respondent’s unwarranted delay. In such circumstances, the court said a default judgment for the petitioner may then be the necessary remedy for the respondent’s delay.423

3. Delay in State Remedies Will Justify District Court Hearing to Determine if Delay is Justifiable

In Lowe v. Duckworth,424 the district court dismissed a petition for a writ of habeas corpus for failure to exhaust state remedies. When Lowe filed his petition in district court, his post-conviction relief motion was pending in the Indiana state court. Lowe argued to the district court that, notwithstanding the pendency of the state court proceeding, his federal petition should not be dismissed on exhaustion grounds because his state remedy was ineffective.425 Lowe’s state motion had lain dormant for nearly three and one-half years despite his attempts, by writing to the state court judge, to obtain a ruling on his motion. The Seventh Circuit agreed with the appellant, ruling the district court’s dismissal of the petition filed by Lowe was clearly erroneous. The court said where the state court delay is inordinate, the district court must hold a hearing to determine whether the delay is justifiable.426

4. Standard to Employ in Reviewing Petitions

One of the cases before the Seventh Circuit this term should serve as a guide to lawyers filing on behalf of clients or persons filing pro se as to the contents of the petition for a writ of habeas corpus. In United

424. 663 F.2d 42 (7th Cir. 1981).
425. 28 U.S.C. § 2254(b) (1976) provides:
An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
426. 663 F.2d at 43, citing Dozie v. Cady, 430 F.2d 637 (7th Cir. 1970).
States ex rel. Green v. Greer, a pro se habeas corpus petition filed in the federal district court alleged that the evidence adduced in his state court murder trial was insufficient to support his conviction. Nowhere in the petition was there any challenge to the accuracy or completeness of the facts as summarized by the state appellate court, but only whether the conclusions drawn from those facts were permissible. The issue before the reviewing court was whether the district court erred in dismissing the petition without first ordering and examining the trial record.

The court concluded that the district court need not examine the full trial record where a habeas corpus petitioner alleges insufficiency of evidence without identifying inaccuracies or incompleteness in the factual summaries before the court. The court said neither case law nor the habeas corpus statute compels such a time-consuming and superfluous procedure. In Sumner v. Mata the court emphasized that the 1966 amendment to the habeas corpus statute which added Section 2254(d), represented an attempt by Congress to “alleviate” the friction between state and federal courts resulting from the ability of the federal courts to overturn state court opinions under the habeas statute. Toward this end, Section 2254(d) bestows a “presumption of correctness” upon state court fact finding. The Sumner Court held that this presumption “applies to factual determinations by state courts, whether the court be a trial or an appellate court.”

Litigants should understand this development in drafting their petitions for district court review. Where a state appellate court makes a finding of fact, this finding can only be overturned by convincing evidence that the finding was erroneous. The petitioner’s burden under the Seventh Circuit rulings must ensure there are allegations sufficient to show inaccuracies or incompleteness in the state appellate court’s findings.

5. Extradition Treaty and Statute of Limitations

While his appeal was pending, following the denial of petitioner’s writ of habeas corpus concerning an issue of extradition to Sweden, the statute of limitations expired and the initial appeal affirmed the order directing a Mr. Assarsson be surrendered to the Swedish authorities.

427. 667 F.2d 585 (7th Cir. 1981).
429. Id.
Assarsson then filed the second petition for a writ of habeas corpus, which was the subject of the appeal In the Matter of Assarsson.\textsuperscript{432} In the district court Assarsson claimed that he could not be extradited because the condition set forth in the Extradition Treaty had not been satisfied.\textsuperscript{433} The district court denied the petition holding that the stay of commitment entered at Assarsson's request, allowing him to appeal the initial denial of the writ of habeas corpus, tolled the running of the statute of limitations.

The Seventh Circuit, in a case of first impression, said to interpret Article V, \textsection 2 of the Extradition Treaty as Assarsson requests would result in an anomaly that neither the United States nor Sweden could have intended. The procedures for conducting extradition hearings pursuant to a treaty or convention for extradition, is statutory.\textsuperscript{434} The court said Assarsson was provided a hearing and the order to take Assarsson into custody for surrender to the Swedish authorities was within the statutory period of the statute of limitations. The court ruled it would not permit Assarsson to use the delay which he himself created to defeat extradition. By permitting individuals to challenge extradition orders pursuant to petitions for writs of habeas corpus is a means to ensure that "all persons on our soil receive due process under our laws."\textsuperscript{435} The court said that since this process, in addition to appeals, may take years, the appellant cannot complain.

\textbf{E. Exhaustion Doctrine Requires All State Issues to be Exhausted Before Filing Federal Habeas Corpus}

The Supreme Court in March 1982 decided the case of Rose v. Lundy,\textsuperscript{436} holding that when a habeas petition contains both exhausted and unexhausted claims, the district court must dismiss the claim \textit{in toto}. Several months earlier the Seventh Circuit decided the case of Ware v. Gagnon,\textsuperscript{437} and adopted the rule of the majority of the federal circuit courts holding that mixed petitions should not be dismissed \textit{in toto}; rather, the district courts should reach the merits of the exhausted claims where the unexhausted claims are unrelated to them or are frivolous. Later in the term, a similar issue developed in United States ex

\textsuperscript{432} 670 F.2d 722 (7th Cir. 1982).
\textsuperscript{433} Art. V, \textsection 2 (provides in part that extradition shall not be granted in those circumstances when barred by a statute of limitations); 18 U.S.C. \textsection 3282 (1976).
\textsuperscript{434} 18 U.S.C. \textsections 3184, 3186 (1976).
\textsuperscript{435} 635 F.2d at 1244.
\textsuperscript{436} 455 U.S. 509 (1982).
\textsuperscript{437} 659 F.2d 809 (7th Cir. 1981).
rel. Clauer v. Shadid,438 and the court applied the new Supreme Court mandate and ruled that because of the petitioner’s failure to exhaust his state remedies in regard to his incompetence of counsel claims, the district court would be precluded from taking cognizance of his double jeopardy claim.

F. State Parole Matters

In the case of Welsh v. Mizell,439 a state prisoner in Illinois had served his minimum sentence on a prison term of sixty to one hundred years and was denied parole nine times. He filed a pro se petition for a writ of habeas corpus contending that Illinois’ statutory and regulatory parole criteria had changed significantly between 1962, when he committed the crime, and 1973, when new legislation affecting parole standards took effect. In 1962 the emphasis had been on preventing further crimes by the particular candidate for parole. The 1973 criteria reflected instead a philosophy of general deterrence—that a prisoner should not be paroled so long as his incarceration might deter other potential offenders.440 The application of the new parole criteria to him, Welsh argued, contravened the ex post facto clause of the Constitution of the United States.441 The district court dismissed the petition, reasoning that the changes in parole criteria were procedural and that procedural changes do not violate the ex post facto clause when they operate only in a limited and unsubstantial manner to the petitioner’s disadvantage.442

In Welsh v. Mizell the state urged the court to deny relief since Welsh had not exhausted his state remedy. The court ruled this would be a futile effort since the Illinois Appellate Court had just recently rejected a challenge identical to Welsh’s.

The court reasoned that the change in law has worked a substantial harm to Welsh. At the time of his offense, exemplary conduct during his imprisonment might well have resulted in parole. Under the 1973 enactment, no evidence of satisfactory rehabilitation can over-

438. 677 F.2d 591 (7th Cir. 1982).
439. 668 F.2d 328 (1982).
440. ILL. REV. STAT. ch. 38 § 1003-3-5(c) (1979) (the new parole criteria provide for the denial of parole if: (1) there is substantial risk that the prisoner will not conform to reasonable conditions of parole; or (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or (3) his release would have a substantially adverse effect on institutional discipline).
come a finding that the nature of his crime makes him a socially undesirable candidate for parole. The court found support in *Weaver v. Graham*443 for its decision that the change from special deterrence criteria to general deterrence criteria is substantial and that the retrospective application of the general deterrence criteria violates the *ex post facto* clause. In light of *Graham* a prisoner does not have to show that he had a vested right to be paroled. The court held that the constraint on the Parole Board’s discretion in Welsh’s case must be those contained in the statute and regulations that were in effect in 1962, not those subsequently enacted. The court remanded the case to the Prisoner Review Board of Illinois for reconsideration under the relevant guidelines, cautioning that should the Board deny parole again, it must give its reasons in order to satisfy the due process requirements of *Greenholtz v. Nebraska Penal Inmates*.444

The court reversed the district court’s denial of a petition for a writ of habeas corpus in *United States ex rel. Scott v. Brewer*,445 holding *Greenholtz v. Nebraska Penal and Correctional Complex*446 is applicable to the instant litigation, and concluding that the Illinois parole release statute447 does create a constitutional liberty interest. The court said inmates still under the State of Illinois parole system have a constitutionally protected liberty interest. This being so, due process requires at a minimum that an inmate whose request for parole is denied be provided with a statement of reasons for the denial.

The court distinguished the instant case from the earlier Seventh Circuit decision in *Averhart v. Tutsie*,448 where the court was bound by the Indiana Supreme Court’s decision holding the Indiana parole release statute created no expectancy of release and therefore no constitutional liberty interest.

The court remanded the case to the district court to allow it to determine what the practice of the Illinois parole system is as it concerns granting parole to persons whose commitment offense is murder. If the district court should find that the Board does grant parole to persons whose commitment offense is murder, it should order the Board to reconsider the appellant’s request for parole and either grant

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443. 450 U.S. 24 (1981) (two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it).
445. 668 F.2d 1185 (7th Cir. 1982).
446. 442 U.S. 1 (1979).
447. ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1979).
448. 618 F.2d 479 (7th Cir. 1980).
that request or provide him with a sufficient statement of reasons for its denial. The court held that the Illinois statute concerning parole provides an inmate with a legitimate expectation of parole which is entitled to constitutional protection. Later in the term the court ruled *Greenholtz* applicable to the federal parole statute\(^ {449}\) holding that a federal inmate also has an expectation of parole worthy of due process protection.\(^ {450}\)

### VII. Conclusion

The Seventh Circuit has confronted its large volume of criminal appeals with a sense of the principles upon which it has decided such cases in the past, as well as an awareness of the conflicting positions taken by other circuits on the same issues. While maintaining its conservative bent, the Seventh Circuit has shown a willingness to reexamine those principles. The changes that such reexaminations produce must be continually examined if scholar and practitioner desire to understand the Seventh Circuit's positions on criminal law and procedure.


\(^{450}\) Solomon v. Elsea, 676 F.2d 282 (7th Cir. 1982).