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Criminal Procedure

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Criminal Procedure

*James P. Carey**
*and Kevin J. Feeley***

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I. INTRODUCTION

This *Survey* Article addresses the area of criminal procedure by examining some of the major decisions handed down by the Illinois Supreme Court this past year. Of special significance were cases decided in the areas of the defendant's rights under the fourth and fifth amendments and the death penalty. Additionally, this Article discusses some of the significant legislation passed in the *Survey* period. Of the many laws passed during the *Survey* period, none will likely have as large an impact as the statutory creation of a good faith exception to the exclusionary rule. This Article concludes with a discussion of the trends occurring in Illinois criminal procedure.

II. ARREST, SEARCH AND SEIZURE

A. *Payton Violation and Subsequent Confession*

In *People v. White*,[1] the State charged the defendant with the offense of murder after he had confessed.[2] At trial, the defendant moved to suppress his confession on the ground that it was obtained following an illegal arrest and, therefore, was the illegally obtained "fruit of the poisonous tree."[3] Specifically, the defendant claimed that he was arrested in his home without a warrant in violation of the rule established by the Supreme Court in *Payton v.*

1. 117 Ill. 2d 194, 512 N.E.2d 677 (1987), *cert. denied*, 108 S. Ct. 1469 (1988).
2. *Id.* at 201, 512 N.E.2d at 678.
3. *Id.* In Wong Sun v. United States, 371 U.S. 471, 486 (1963), the United States Supreme Court ruled that a confession following an illegal arrest must be suppressed unless the confession is "sufficiently an act of free-will to purge the primary taint of the unlawful invasion."

New York.[4]

The State argued that the defendant was not arrested in his home but in his brother's home and that under *Payton*, the defendant cannot claim this temporary residence as his home.[5] The State advanced three additional arguments: that exigent circumstances justified the warrantless arrest even if the *Payton* rule applied; that the police's entry to arrest was consensual; and that even if the defendant's arrest was unlawful, his later confession was not tainted by the arrest.[6] The trial court granted the defendant's motion and suppressed the confession as the product of an illegal arrest.[7]

On appeal, the Illinois Supreme Court first examined the question of whether a defendant may claim that a particular residential premises is his home under *Payton*.[8] The court, noting that *Payton* mandates a liberal construction of the definition of a suspect's home,[9] found that a residence is deemed to be a suspect's home if "the suspect's association with a particular place provides that suspect with a reasonable expectation of privacy such that he would be justified in believing that he can retreat there, secure against governmental intrusion."[10] The court listed several key criteria in determining the intentions of the host and the suspect:

> (1) whether the suspect is physically present at the host's residence for a substantial length of time prior to his arrest; (2) whether the suspect maintains a regular or continuous presence in the host's residence and particularly whether he sleeps

4. *White*, 117 Ill. 2d at 201, 512 N.E.2d at 678 (citing Payton v. New York, 445 U.S. 573 (1980)). In *Payton*, the Court held that police may not, absent exigent circumstances, enter a suspect's home to arrest a suspect without a warrant and reason to believe that the suspect is present. *Payton*, 445 U.S. at 589.

5. *White*, 117 Ill. 2d at 209, 512 N.E.2d at 681.

6. *Id.*

7. *Id.* at 201, 512 N.E.2d at 678. The appellate court reversed the trial court in an unpublished order, holding that exigent circumstances justified the warrantless arrest. *Id.* at 202, 512 N.E.2d at 678. The appellate court further found that even if exigent circumstances did not exist, the defendant could not claim his brother's home as his own. *Id.* (citing People v. White, 132 Ill. App. 3d 1162, 494 N.E.2d 959 (1st Dist. 1985)).

8. *Id.* at 209, 512 N.E.2d at 681-82. The court observed that *Payton* did not define a suspect's home and that this case presented an issue of first impression. *Id.*

9. The court, in mandating a liberal interpretation of a suspect's home, recognized the *Payton* Court's focus on the "constitutional guarantee that the right of the people to be secure in their . . . houses . . . shall not be violated." *Id.* at 210, 512 N.E.2d at 682 (citing U.S. CONST. amends. IV, VI). Further, the court noted the Supreme Court's holding in Steagald v. United States, 451 U.S. 204 (1981), which extended the warrant requirement to suspects who are arrested in the home of a third party. *White*, 117 Ill. 2d at 210, 512 N.E.2d at 682. The court found that these two decisions operate to protect the interests of a suspect in any dwelling. *Id.*

10. *White*, 117 Ill. 2d at 210, 512 N.E.2d at 682.

> there regularly; (3) whether the host grants the suspect exclusive use of a particular area of the host's residence; (4) whether the suspect stores his clothes or possessions in the host's residence; (5) whether the suspect receives mail at the host's residence or has his name on the door; (6) whether the suspect contributes to the upkeep of the host's household . . . ; and (7) whether the suspect and the host are related by blood or marriage.[11]

Applying these criteria to the instant case, the court concluded that the defendant had a sufficient expectation of privacy because he had no other home, he had been staying with his brother for seven days prior to the arrest, and there was no limit upon the length of the defendant's stay.[12]

The court next considered the State's claim that exigent circumstances justified the warrantless arrest.[13] It rejected the State's exigency claim because the police delayed the investigation for at least three days after obtaining probable cause to arrest.[14] The court also dismissed the State's contention that the police had the consent of a third party to enter the home.[15] The court upheld the trial court's finding that the purported consent was not voluntary because the evidence showed that the police pushed past the third party into the hallway of the apartment.[16]

Next, the court looked to *Brown v. Illinois*[17] to determine whether the defendant's confession was the fruit of his unlawful arrest.[18] Significant among the *Brown* criteria was the length of the defendant's detention after the arrest and before the confession — "24 or more hours."[19] The court found that the twenty-four hour detention, by itself, could induce the defendant to confess in the absence of intervening circumstances.[20]

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11. *Id.* at 212-13, 512 N.E.2d at 683.
12. *Id.* at 210-16, 512 N.E.2d at 682-85.
13. *Id.* at 216, 512 N.E.2d at 685.
14. *Id.* at 218-20, 512 N.E.2d at 686-87.
15. *Id.* at 221-22, 512 N.E.2d at 687.
16. *Id.*
17. 422 U.S. 590 (1975). The seminal case concerning the admissibility of statements made after an illegal arrest is *Brown*. The Supreme Court in *Brown* used the following factors to determine whether a confession was the fruit of an illegal arrest: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of official misconduct." *Id.* at 603-04.
18. *White*, 117 Ill. 2d at 223, 512 N.E.2d at 688.
19. *Id.*
20. *Id.* at 224, 512 N.E.2d at 688. The State argued, however, that two intervening circumstances offset this factor: the presence of a co-defendant in an adjoining room to the defendant, and questioning by officers different from those who had illegally arrested him. *Id.* at 225, 512 N.E.2d at 689. The court concluded that the proximity of the co-defendant to the defendant was insignificant in the absence of any evidence that he had

Finally, the court dismissed the State's argument that because a *Payton* violation involves a warrantless entry into a place where the suspect has a sufficient expectation of privacy, any subsequent confession made in a different location lacks a causal connection to the violation.[21] The court expressed reluctance to adopt such an interpretation of *Payton*, which would require the suppression of only physical evidence, not confessions.[22]

B. Probable Cause to Arrest

In *People v. James*,[23] a co-defendant was brought in for questioning concerning a murder.[24] During questioning, the co-defendant confessed and implicated the defendant in the murder.[25] Based on that confession, the police arrested the defendant.[26] During interrogation, the defendant also confessed to the murder.[27]

At trial, both defendants moved to suppress their confessions as the fruit of illegal arrests.[28] The defendant claimed that the police did not have probable cause to arrest him because the co-defendant's statement was too unreliable to establish probable cause.[29] Although the trial court denied the defendant's motion, the appellate court reversed the decision, holding that the co-defendant's uncorroborated statements failed to provide probable cause to arrest the defendant.[30]

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any contact with the defendant. *Id.* The court also dismissed the contention concerning different officers on the ground that to accord significance to such a change in personnel would permit the police to undermine the fruit of the poisonous tree doctrine merely by providing different officers for interrogation. *Id.* at 226, 512 N.E.2d at 689.

21. *Id.* at 228, 512 N.E.2d at 690.

22. *Id.* The court added: "[a]bsent some indication from the Supreme Court of the United States that this position is correct, we decline to adopt it." *Id.*

23. 118 Ill. 2d 214, 514 N.E.2d 998 (1987), *cert. denied*, 108 S. Ct. 780 (1988).

24. *Id.* at 217-19, 514 N.E.2d at 999-1000.

25. *Id.* at 219, 514 N.E.2d at 1000.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 220, 514 N.E.2d at 1000. An arrest is lawful when a peace officer "has reasonable grounds to believe that the person is committing or has committed an offense." ILL. REV. STAT. ch. 38, para. 107-2(c) (1987). "Reasonable grounds" is equivalent to "probable cause." People v. Tisler, 103 Ill. 2d 226, 236-37, 468 N.E.2d 147, 153 (1984).

Alternatively, the defendant claimed that even if his own arrest was lawful, the co-defendant's arrest was unlawful and, therefore, the defendant's statements should be suppressed as the illegal fruit of the co-defendant's arrest. *James*, 118 Ill. 2d at 220, 514 N.E.2d at 1000. Nevertheless, the court found that the defendant did not have standing to challenge the co-defendant's arrest. *Id.* at 226, 514 N.E.2d at 1003.

30. *James*, 118 Ill. 2d at 219-20, 514 N.E.2d at 1000. The appellate court relied on *Wong Sun* in reversing the trial court. People v. James, 149 Ill. App. 3d 214, 220, 500

On appeal, the Illinois Supreme Court addressed the issue of whether the police had probable cause to arrest the defendant based upon the co-defendant's statement implicating the defendant.[31] The court found that the co-defendant's statement was supported by some "indicia of reliability"[32] because he was not induced to confess and his statement was corroborated by the officer at the scene of the crime.[33] Accordingly, the court found that the statement did establish probable cause and, therefore, reversed the appellate court's decision.[34]

C. *Administrative Searches*

In *People v. Madison*,[35] two secretary-of-state police officers conducted an administrative search of the records of the defendant's licensed salvage yard.[36] The search was conducted pursuant to section 5-403 of the Illinois Vehicle Code[37] to determine the accuracy of the records required to be kept by the Secretary of State.[38] During the search, the officers discovered twenty-six vehicle certificates of title with incomplete assignments of title.[39] The officers then seized these titles without the permission of the defendant.[40]

Before trial, the defendant moved to suppress the evidence of the

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N.E.2d 474, 477 (1st Dist. 1986). *See supra* note 3. The supreme court rejected the appellate court's interpretation of *Wong Sun* as holding that "uncorroborated statements by an arrestee can never constitute probable cause for the arrest of a co-offender." *James*, 118 Ill. 2d at 222, 514 N.E.2d at 1001.

31. *James*, 118 Ill. 2d at 220-25, 514 N.E.2d at 1001-03.

32. The court employed a "totality of the circumstances" approach in the determination of probable cause, as established by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213 (1983). *James*, 118 Ill. 2d at 223, 514 N.E.2d at 1002. This approach takes into consideration "all the various indicia of reliability attendant upon the giving of the probable cause information." *Id.* The court recognized that a strong "indicia of reliability . . . is found in admissions against the penal interests of the party giving the information." *Id.*

33. *James*, 118 Ill. 2d at 224-25, 514 N.E.2d at 1002-03.

34. *Id.* at 224-25, 514 N.E.2d at 1003.

35. 121 Ill. 2d 195, 520 N.E.2d 374 (1988).

36. *Id.* at 199, 520 N.E.2d at 376.

37. ILL. REV. STAT. ch. 95 1/2, para. 5-403 (1987). "Section 5-403 permits authorized representatives of the Secretary of State, including police officers, to perform inspections of the records and premises of salvage yards for the purpose of determining the accuracy and completeness of the required records." *Madison*, 121 Ill. 2d at 199, 520 N.E.2d at 376.

38. *Madison*, 121 Ill. 2d at 199, 520 N.E.2d at 376.

39. *Id.*

40. *Id.* The State charged the defendant with possessing motor vehicle certificates of title with incomplete assignments of title, in violation of section 4-104 of the Illinois Vehicle Code, ILL. REV. STAT. ch. 95 1/2, para. 4-104 (1987). *Madison*, 121 Ill. 2d at 198, 520 N.E.2d at 376.

incomplete titles, arguing that section 5-403 did not give the police officers the authority to obtain evidence for a criminal prosecution without a search warrant.[41] The trial court granted the defendant's motion on the grounds that the evidence was the product of an illegal search and seizure.[42]

On appeal, the Illinois Supreme Court held that collecting evidence for criminal prosecutions is not within the statute's narrow scope of power given the State to conduct administrative searches.[43] Therefore, the court held that the evidence should have been excluded.[44]

III. SELF-INCRIMINATION

A. *Uncounseled Post-Arrest Statements*

In *People v. Foster*,[45] the defendant was charged with three counts of murder.[46] At an initial interrogation, the defendant invoked his right to remain silent pursuant to *Miranda v. Arizona*.[47] Three hours later, while the defendant was still in custody, the police told him that a witness had given a statement implicating him in the murders.[48] After the police rewarned the defendant of his *Miranda* rights, they re-initiated the questioning.[49] Subsequently, the defendant stated that he understood his rights and confessed to

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41. *Madison*, 121 Ill. 2d at 200, 520 N.E.2d at 377.

42. *Id.* at 198, 520 N.E.2d at 376.

43. *Id.* at 201, 520 N.E.2d at 377. The court also found that the plain language of section 5-403(6) of the Illinois Vehicle Code imposes a search warrant requirement. *Id.* Section 5-403(6) provides:

> In the event information comes to the attention of the individuals conducting an inspection that may give rise to the necessity of obtaining a search warrant . . . the individuals conducting such inspection may take all necessary steps to secure the premises under inspection until the warrant application is acted upon by a judicial officer.

ILL. REV. STAT. ch 95 1/2, para. 5-403(6) (1987).

44. *Madison*, 121 Ill. 2d at 201, 520 N.E.2d at 377. The court also rejected the State's claim that exigent circumstances existed to justify the warrantless search. *Id.* at 206, 520 N.E.2d at 379.

45. 119 Ill. 2d 69, 518 N.E.2d 82 (1987), *cert. denied*, 108 S. Ct. 2044 (1988).

46. *Id.* at 75, 518 N.E.2d at 84.

47. *Id.* at 86, 518 N.E.2d at 89 (citing Miranda v. Arizona, 384 U.S. 436 (1965)). In *Miranda*, the Supreme Court declared that if during custodial interrogation an "individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . [and] any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 473-74.

48. *Foster*, 119 Ill. 2d at 86, 518 N.E.2d at 89.

49. *Id.*

the murders.[50]

At trial, the defendant moved to suppress his confession on the grounds that his assertion of his right to remain silent was not "scrupulously honored."[51] The defendant contended that the interrogators did not "scrupulously honor" his right to remain silent in that he was questioned about the same crime that was the subject of the initial interrogation.[52] The trial court denied the defendant's motion and he was convicted.[53]

The Illinois Supreme Court held that because the defendant was given his *Miranda* rights prior to the second interrogation and he understood these rights, the trial court acted properly in admitting the defendant's confession.[54] The fact that the defendant was later questioned about the same offense was not, in itself, sufficient to establish that his right to remain silent was not "scrupulously honored."[55]

The supreme court in *People v. St. Pierre*[56] addressed another case involving a suspect's assertion of his right to remain silent. In *St. Pierre*, the defendant claimed that his conviction and death sentence should be overturned and a new trial ordered because the trial court erred in failing to suppress inculpatory statements that he made to the police following his arrest.[57] The defendant argued that he had effectively invoked his right to counsel during an interrogation; the statements he made after invoking his right to coun-

50. *Id.*

51. *Id.* at 84-85, 518 N.E.2d at 88-89. The defendant relied on Michigan v. Mosely, 423 U.S. 96, 104 (1975), in which the United States Supreme Court found that suspects have a constitutionally-protected interest in having their right to remain silent "scrupulously honored." The *Mosely* Court held that a statement made by a suspect, after he had earlier expressed a desire to remain silent, was admissible if the police scrupulously honored the suspect's right to remain silent. *Id.* In finding that a suspect's right to remain silent was scrupulously honored, the Court took into consideration the fact that the suspect was being questioned about a different crime in the second interrogation. *Id.* at 106.

52. *Foster*, 119 Ill. 2d at 86, 518 N.E.2d at 89.

53. *Id.* at 79, 518 N.E.2d at 86.

54. *Id.* at 86, 518 N.E.2d at 89.

55. *Id.* The court relied on several appellate court decisions holding that requestioning a defendant about the same crime does not preclude the finding that the State scrupulously honored the defendant's right to remain silent. *Id.* at 87, 518 N.E.2d at 89. *See, e.g.*, People v. Fleming, 103 Ill. App. 3d 194, 431 N.E.2d 16 (1st Dist. 1981) (*Miranda* rights were scrupously honored when defendant was re-questioned about the same crime one hour and forty-five minutes after the initial interrogation).

The court also found, notwithstanding the defendant's objections, that the police had probable cause to arrest the defendant. The defendant's statements, therefore, were not the fruit of an illegal arrest. *Foster*, 119 Ill. 2d at 84, 518 N.E.2d at 88.

56. 122 Ill. 2d 95, 522 N.E.2d 61 (1988).

57. *Id.* at 107, 522 N.E.2d at 65.

sel were the product of further police interrogation.[58] Thus, under the test set forth by the United States Supreme Court in *Edwards v. Arizona*,[59] his confession was inadmissible.[60]

In contrast, the State argued that the defendant never effectively invoked his right to counsel; rather, he was ambiguous about whether he wished to have counsel present during the interrogation.[61] Alternatively, the State argued that even if the defendant had invoked this right, he waived it by answering further questions.[62]

On direct appeal, the Illinois Supreme Court held that the defendant clearly invoked his right to counsel.[63] Furthermore, the court held that the defendant did not later waive this right by responding to further interrogation; his continued conversation with the state's attorney did not evince a desire to discuss the criminal investigation with the police.[64] The court explained that under the *Edwards* test, an unequivocal request for counsel cannot be overcome solely by an accused's post-request response to further inter-

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58. *See id.*

59. In Edwards v. Arizona, 451 U.S. 477, 485-86 n.9 (1981), the Supreme Court established a two-pronged test to determine whether the defendant had waived his previously invoked right to counsel. The *Edwards* test requires a showing "that (1) the suspect initiated further communication with the police that demonstrates a desire to discuss the criminal investigation, and (2) as a separate matter and under the particular facts and circumstances of the case, that his purported waiver was knowing and intelligent." *St. Pierre*, 122 Ill. 2d at 112, 522 N.E.2d at 68.

60. *St. Pierre*, 122 Ill. 2d at 109-10, 522 N.E.2d at 67.

61. *Id.* at 111, 522 N.E.2d at 67.

62. *Id.*

63. *Id.* The following dialogue occurred between the defendant and the state's attorney prior to the interrogation:

> Q. Do you understand that if you cannot afford to hire a lawyer, one will be appointed by the court to represent you before any questioning?
> A. Yes.
> Q. Do you wish one?
> A. Yes.
> Q. Would you like to speak to a lawyer now?
> A. No, no, after, that comes after, right?
> Q. You could have a lawyer if you want one.
> A. No, that's okay . . . .

Id. at 108, 522 N.E.2d at 66.

The court also looked at the decision in Smith v. Illinois, 469 U.S. 91, 98 (1984), in which the United States Supreme Court held that post-request responses are relevant only to the question of waiver and cannot be used to cast doubt on the question of whether the defendant ever invoked his right to counsel in the first place. *St. Pierre*, 122 Ill. 2d at 112, 522 N.E.2d at 68.

64. *St. Pierre*, 122 Ill. 2d at 113, 522 N.E.2d at 68. The Supreme Court clearly stated that as an express precondition for a finding of waiver, it must be shown that the suspect, rather than the police, re-opened the dialogue. *Edwards*, 451 U.S. at 485.

rogation or his willingness to make a statement without an attorney present.[65] The court, therefore, reversed the decision of the trial court and remanded the case for a new trial.[66]

B. *Waiver of the Right to Remain Silent*

In *People v. Holland,*[67] the defendant was convicted of numerous serious crimes.[68] The defendant appealed, contending that an inculpatory statement that he made during a post-arrest interrogation should have been suppressed due to a violation of his *Miranda* rights.[69] The appellate court agreed with the defendant, finding the waiver of his *Miranda* rights not valid because he was not notified that an attorney was attempting to see him.[70]

In addressing whether the defendant had validly waived his *Miranda* rights, the Illinois Supreme Court looked to the United States Supreme Court decision in *Moran v. Burbine*[71] for guidance and distinguished its own holding in *People v. Smith.*[72] In *Smith,* the court had held that there could be no valid waiver under *Miranda* when an accused was not told that an attorney was attempting to see him.[73] Whereas, in *Burbine,* the Supreme Court held that a defendant's knowing and intelligent waiver of his *Miranda* rights did not require knowledge that an attorney had been attempting to see him.[74] The court found that Holland, like the defendant in *Burbine,* was unaware that his relative was securing counsel for him.[75] In contrast, the defendant in *Smith* had already met with and personally retained the attorney.[76] Therefore, the court held that the defendant had validly waived his *Miranda* rights.[77]

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65. *St. Pierre,* 122 Ill. 2d at 113, 522 N.E.2d at 68. The court also noticed the defendant's obvious confusion would bar a finding that his waiver was made knowingly and intelligently. *Id.*

66. *Id.* at 116, 522 N.E.2d at 69.

67. 121 Ill. 2d 136, 520 N.E.2d 270 (1987), *cert. granted,* 57 U.S.L.W. 3570 (1989). The defendant was convicted of aggravated kidnapping, rape, deviate sexual assault, armed robbery, and aggravated battery. *Id.*

68. *Id.* at 140, 520 N.E.2d at 272.

69. *Id.* The defendant argued that any claimed waiver of his *Miranda* rights was not valid because the waiver was not made knowingly. *Id.* at 141-42, 520 N.E.2d at 272.

70. *See* People v. Holland, 147 Ill. App. 3d 323, 332, 497 N.E.2d 1230, 1236-37 (1st Dist. 1986).

71. 475 U.S. 412 (1986).

72. *Holland,* 121 Ill. 2d at 151-53, 520 N.E.2d at 277.

73. People v. Smith, 93 Ill. 2d 179, 189, 442 N.E.2d 1325, 1329 (1982).

74. *Burbine,* 475 U.S. at 422-23.

75. *Holland,* 121 Ill. 2d at 153, 520 N.E.2d at 277.

76. *Smith,* 93 Ill. 2d at 184, 442 N.E.2d at 1327.

77. *Holland,* 121 Ill. 2d at 153, 520 N.E.2d at 277-78. Although the Court in

C. Plea Agreement

In *People v. Navarroli*,[78] the defendant was charged with unlawful possession of cocaine and unlawful possession of cocaine with intent to deliver.[79] The state's attorney and the defendant entered into plea negotiations.[80] The defendant claimed that as a result of these negotiations an agreement was reached whereby he would act as an informant in exchange for a reduction of charges, a sentence of probation, and a fine.[81] After the State denied the existence of this agreement, the defendant moved to compel the State to carry out the plea agreement.[82] The trial court found that the evidence supported the existence of the agreement, and thereby ordered specific performance of the agreement.[83] The appellate court, however, reversed the order of the trial court.[84]

On appeal, the Illinois Supreme Court held that the defendant was not entitled to specific performance of the agreement because the State's repudiation of the claimed bargain did not deprive him of any constitutionally-protected interest.[85] The court relied on its prior decision in *People v. Boyt*.[86] In *Boyt*, the court held that a defendant did not have a constitutional right under the due process clause to have an agreement enforced unless the State's repudiation of the agreement would deprive the defendant of some constitu-

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Burbine had stated that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law," the court in *Holland* declined to adopt a more stringent standard for a waiver of a suspect's *Miranda* rights. *Id.* at 152-53, 520 N.E.2d at 277 (quoting *Burbine*, 475 U.S. at 428). The court also held that a Caucasian defendant does not have standing to object to the State's use of the peremptory challenges to exclude blacks from the petit jury. *Id.* at 157, 520 N.E.2d at 279 (citing Batson v. Kentucky, 476 U.S. 79 (1986)). The Supreme Court granted certiorari to decide this issue. 57 U.S.L.W. 3570 (1989).

78. 121 Ill. 2d 516, 521 N.E.2d 891 (1988).

79. *Id.* at 519, 521 N.E.2d at 891-92.

80. *Id.* at 519, 521 N.E.2d at 892.

81. *Id.*

82. *Id.*

83. *Id.* The trial court found that the plea agreement must be specifically enforced "[t]o preserve the sanctity of justice." *Id.* at 520, 521 N.E.2d at 892.

84. *See* People v. Navarroli, 146 Ill. App. 3d 466, 497 N.E.2d 128 (3d Dist. 1986).

85. *Navarroli*, 121 Ill. 2d at 524, 521 N.E.2d at 894. The court followed the approach set forth by the Supreme Court in Mabry v. Johnson, 467 U.S. 504 (1984). *Navarroli*, 121 Ill. 2d at 522-24, 521 N.E.2d at 893-94. The *Mabry* Court explained that:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

Mabry, 467 U.S. at 507-08.

86. *Navarroli*, 121 Ill. 2d at 524, 521 N.E.2d at 894 (citing People v. Boyt, 109 Ill. 2d 403, 488 N.E.2d at 264 (1985), *cert. denied*, 476 U.S. 1143 (1986)).

tionally-protected interest.[87] The *Navarroli* court reasoned that because the defendant did not plead guilty in reliance on the agreement, the defendant was still free to plead not guilty; therefore, he had not been deprived of any right.[88]

IV. Double Jeopardy

A. *Lesser Included Offense*

In *People v. Jackson*,[89] the court addressed the issue of whether the double jeopardy clause barred a reckless homicide prosecution because of a prior conviction for driving under the influence of alcohol ("D.U.I.").[90] In *Jackson*, the defendant pleaded guilty to a D.U.I.[91] charge involving an automobile crash which killed a passenger in the defendant's car.[92] Three weeks later, the State moved to enter an order of *nolle prosequi* to the charges.[93] After another two weeks, the defendant was indicted for reckless homicide.[94] The indictment alleged that the defendant's reckless act was driving under the influence of alcohol.[95] The defendant moved to dismiss count two on double jeopardy grounds, claiming that his prior D.U.I. conviction automatically established one or more of the essential elements of reckless homicide.[96] Thus, the defendant contended that the two offenses were the same under the analysis set forth by the United States Supreme Court in *Brown v. Ohio*.[97] In *Brown*, the Supreme Court held that if a first lesser offense is a necessary element of a second greater offense, then the two offenses are the same and the double jeopardy clause bars a subsequent prosecution of the greater offense.[98] The trial court in *Jackson*

87. *Boyt*, 109 Ill. 2d at 414-15, 488 N.E.2d at 270.

88. *Navarroli*, 121 Ill. 2d at 524, 521 N.E.2d at 894. The court also rejected the defendant's claim that he was deprived of his first, fourth, fifth, and sixth amendment rights in reliance on the plea agreement. *Id.* at 524-27, 521 N.E.2d at 894-95.

89. 118 Ill. 2d 179, 514 N.E.2d 983 (1987).

90. *Id.* at 183, 514 N.E.2d at 984.

91. Ill. Rev. Stat. ch. 95 1/2, para. 11-501 (1987).

92. *Jackson*, 118 Ill. 2d at 183, 516 N.E.2d at 984.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 187, 514 N.E.2d at 986 (citing Brown v. Ohio, 432 U.S. 161 (1987)).

98. *Brown*, 432 U.S. at 168. The opposite also will result in a double jeopardy violation. Thus, "[if] a person is convicted of the more serious offense, he may not be subsequently prosecuted for an offense consisting solely of one or more elements of the crime for which he has already been prosecuted." *Jackson*, 118 Ill. 2d at 187, 514 N.E.2d at 986 (citing Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977)).

granted the defendant's motion and the appellate court affirmed.[99]

In determining whether the two offenses were the same for purposes of double jeopardy, the court recognized United States Supreme Court decisions requiring courts to apply the double jeopardy test by "focus[ing] on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial."[100] Based on these decisions, the court overruled its earlier decision in *People v. Zegart*.[101] The *Zegart* court, in applying the "same offense" analysis, focused on the evidence used to prove the two offenses, rather than on the statutory elements of each offense.[102] The *Jackson* court conceded that its decision in *Zegart* was wrong in light of the United State's Supreme Court's holding in *Illinois v. Vitale*,[103] which reaffirmed the holding in *Blockburger v. United States*.[104]

The *Jackson* court then held that the D.U.I. conviction did not conclusively establish the "reckless act" element in reckless homicide.[105] Rather, a D.U.I. conviction is merely some evidence of a reckless act.[106] The court based its decision on the language of the reckless homicide statute,[107] which provides that "being under the influence of alcohol at the time of the alleged violation shall be prima facie evidence of a reckless act."[108] Therefore, the court

99. *Jackson*, 118 Ill. 2d at 183, 514 N.E.2d at 984. *See* People v. Jackson, 144 Ill. App. 3d 131, 494 N.E.2d 511 (3d Dist. 1986).

100. *Jackson*, 118 Ill. 2d at 186, 514 N.E.2d at 988 (citing Illinois v. Vitale, 447 U.S. 410, 416 (1980)).

101. *Id.*

102. People v. Zegart, 83 Ill. 2d 440, 445, 415 N.E.2d 341, 343 (1980).

103. 447 U.S. 410 (1980).

104. *Jackson*, 118 Ill. 2d at 188, 514 N.E.2d at 985 (citing Blockburger v. United States, 284 U.S. 299 (1932)). The *Blockburger* Court held that the "same offense" test should focus on the proof necessary to prove the elements of the offense rather than on the actual evidence presented at trial. *Blockburger*, 284 U.S. at 166. The *Zegart* court barred a prosecution for reckless homicide because the State conceded that in proving reckless homicide, it would rely on the fact that the defendant had driven across a median strip — the basis of a prior traffic conviction. *Zegart*, 83 Ill. 2d at 445, 415 N.E.2d at 341. In focusing on the evidence of the offenses to determine if the two offenses were the same, rather than on the statutory elements, the *Zegart* court relied on dicta from the decision in Illinois v. Vitale, 447 U.S. 410 (1980). *Jackson*, 118 Ill. 2d at 184, 514 N.E.2d at 985. In *Vitale*, the United States Supreme Court seemed to qualify the holding of *Blockburger*: "[I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy . . . ." *Vitale*, 447 U.S. at 421.

105. *Jackson*, 118 Ill. 2d at 190, 514 N.E.2d at 988.

106. *Id.* at 190-91, 514 N.E.2d at 988.

107. ILL. REV. STAT. ch. 38, para. 9-3(b) (1987).

108. *Jackson*, 115 Ill. 2d at 190, 514 N.E.2d at 988 (quoting ILL. REV. STAT. ch. 38, para. 9-3(b) (1987)).

concluded that the defendant was not put in jeopardy twice.[109]

B. *The Death Penalty Sentencing Stage*

In *People ex rel. Daley v. Strayhorn*,[110] the defendant was convicted of murder.[111] At the beginning of the sentencing hearing, the defendant moved to preclude the imposition of the death penalty.[112] Judge Strayhorn granted the defendant's motion and sentenced the defendant to forty years of imprisonment.[113] Subsequently, the State sought a writ of mandamus and prohibition or, in the alternative, a supervisory order to compel Judge Strayhorn to vacate the sentence and remand the case for a death sentencing hearing.[114]

The defendant contended that the trial judge already held a death penalty hearing and that remanding the case for a second death penalty hearing would constitute double jeopardy.[115] The Illinois Supreme Court held, however, that the defendant was never put in jeopardy because the trial judge did not hold the first phase of the statutory bifurcated capital sentencing hearing.[116] Rather, the trial judge was merely acting in response to the defendant's motion to preclude the imposition of the death penalty.[117]

V. THE RIGHT TO COUNSEL

A. *Conflict of Interest*

In *People v. Jones*,[118] the Illinois Supreme Court consolidated

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109. *Id.* at 193, 514 N.E.2d at 989.

110. 121 Ill. 2d 470, 521 N.E.2d 864 (1988).

111. *Id.* at 472, 521 N.E.2d at 865.

112. *Id.* at 473, 521 N.E.2d at 865.

113. *Id.* at 473-74, 521 N.E.2d at 865-66. The trial judge ruled that the defendant was ineligible to be sentenced to death because a previous Rhode Island murder would not constitute an aggravating factor under the Illinois death penalty statute. *Id. See infra* notes 313-25 and accompanying text.

114. *Strayhorn* 121 Ill. 2d at 475, 521 N.E.2d at 866.

115. *Id.*, at 476, 521 N.E.2d at 866-67. The defendant relied on the United States Supreme Court decision in Arizona v. Rumsey, 467 U.S. 203, 209-10 (1984), in which the Court held that following a reversal and retrial of a conviction, the double jeopardy clause prohibits states from sentencing defendants to death at the second sentencing proceeding.

116. *Strayhorn*, 121 Ill. 2d at 479, 521 N.E.2d at 868. *See* ILL. REV. STAT. ch. 38, para. 9-1(g) (1987).

117. *Strayhorn*, 121 Ill. 2d at 479, 521 N.E.2d at 868. The court reasoned that the proceeding involving the defendant's motion to preclude the death penalty resembled routine preliminary motion proceedings, which are not sufficient to place one in jeopardy. *Id.* (citing People v. Shields, 76 Ill. 2d 543, 394 N.E.2d 1161 (1979), *cert. denied*, 445 U.S. 917 (1980)).

118. 121 Ill. 2d 21, 520 N.E.2d 325 (1988).

two cases to address a conflict of interest issue.[119] Specifically, the court determined whether the joint representation of two defendants violates the sixth amendment right to effective assistance of counsel when it is alleged that the admission at trial of inculpatory and inconsistent pretrial statements from each defendant created a conflict of interest.[120]

In the first case, defendants Harris and Jones were represented jointly at trial and both were convicted and sentenced to nine years of imprisonment.[121] Following their arrests, both defendants made exculpatory statements to a state's attorney.[122] Jones told the state's attorney that he was present when Harris robbed the victim.[123] Harris told the state's attorney that there had been no robbery, but rather that a fight broke out with the victim when a drug deal went sour.[124] These statements were admitted into evidence by the testimony of an assistant state's attorney.[125] At trial, Jones testified; he denied the statement attributed to him and adopted Harris's version of the events.[126]

On appeal, Harris contended that this joint representation created a per se conflict of interest.[127] The court concluded that no actual conflict of interest existed because Harris's statement exculpated Jones and Jones's testimony repudiated his prior statement that had incriminated Harris.[128] By virtue of the repudiation, the court reasoned that Jones, in effect, became a witness for Harris.[129] Therefore, the court found that Harris's defense was not adversely

119. *Id.* at 24, 520 N.E.2d at 327.

120. *Id.* The right to effective assistance of counsel is a fundamental right and entitles the person to undivided loyalty of counsel. People v. Stoval, 40 Ill. 2d 109, 111, 239 N.E.2d 441, 443. The defendants did not raise the potential conflict of interest at trial. *Jones*, 121 Ill. 2d at 25-26, 520 N.E.2d at 327. Under Hollaway v. Arkansas, 435 U.S. 475, 487 (1978), once a potential or possible conflict is brought to the attention of the trial court, the court must address it. When a possible conflict is not brought to the attention of the trial court, the defendant has the burden of demonstrating that an actual conflict of interest affected his representation, although he need not show prejudice. Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980).

121. *Jones*, 121 Ill. 2d at 24, 520 N.E.2d at 326.

122. *Id.* at 25, 520 N.E.2d at 327.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 26, 520 N.E.2d at 327-28.

127. *Id.* at 30, 520 N.E.2d at 329-30.

128. *Id.* at 31, 520 N.E.2d at 330. The court overruled People v. Cade, 97 Ill. App. 3d 354, 422 N.E.2d 1002 (1st Dist. 1981), which stood for the proposition that the introduction of mutually inculpatory, inconsistent statements created a per se conflict of interest when the two defendants are represented by the same attorney. *Jones*, 121 Ill. 2d at 31, 521 N.E.2d at 330.

129. *Jones*, 121 Ill. 2d at 31, 521 N.E.2d at 330.

affected by his counsel's inability to cross-examine Jones.[130]

In the second case, defendants Mosely and Ross were jointly represented at trial after being charged with three counts of murder and one count of armed robbery.[131] The principal evidence at trial consisted of the defendants' pretrial inculpatory statements, which differed in that each defendant claimed to have participated only as a lookout.[132] At trial, Mosely testified that his statement was coerced and that neither of them had anything to do with the crimes.[133] Ross, on the other hand, did not testify.[134]

The supreme court held that a clear conflict of interest existed only in Mosely's case.[135] Because Ross declined to testify, the admission of his pretrial statement implicating Mosely violated Mosely's right to confrontation.[136] The court reasoned that counsel acting for Mosely could not effectively respond to Ross's inculpatory statement absent an opportunity to cross-examine Ross.[137] As to Ross, however, defense counsel had no conflict of interest because Mosely had testified and repudiated his confession as a product of coercion.[138] Thus, Ross occupied the same position as that occupied by Harris in the first case; Mosely in effect became a witness for Ross.[139]

In *People v. Spreitzer*,[140] the Illinois Supreme Court addressed

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130. *Id.* at 30, 520 N.E.2d at 329.

131. *Id.* at 26, 520 N.E.2d at 328.

132. *Id.*

133. *Id.* at 31, 520 N.E.2d at 330.

134. *Id.* The appellate court held that the admission of the inculpatory statements created a conflict of interest; each defendant became a witness against the other, and the defense counsel could not cross-examine either of them. People v. Ross, 138 Ill. App. 3d 1089, 1098, 487 N.E.2d 68, 74 (1st Dist. 1985).

135. *Jones*, 121 Ill. 2d at 32, 520 N.E.2d at 330.

136. *Id.* at 34, 520 N.E.2d at 331. A defendant's sixth amendment right to confrontation is violated when a trial court admits an out-of-court hearsay statement made by a declarant who is not available for a "full and effective" cross-examination. Bruton v. United States, 391 U.S. 123, 126 (1968). For a discussion of *Bruton* and the right to confrontation, see *supra* note 238 and accompanying text.

137. *Jones*, 121 Ill. 2d at 33-34, 520 N.E.2d at 331.

138. *Id.* at 33, 520 N.E.2d at 331.

139. *Id.* In finding that Ross was not denied effective assistance of counsel due to a conflict of interest, the court relied on Nelson v. O'Neil, 402 U.S. 622 (1971). *Jones*, 121 Ill. 2d at 34, 520 N.E.2d at 331. In *Nelson*, the United States Supreme Court held that no denial of a defendant's sixth amendment rights occurs when "his codefendant takes the stand, denies making the alleged out-of-court statement implicating the defendant, and testifies favorably to the defendant concerning the underlying facts." *Nelson*, 402 U.S. at 629. Because Mosely's repudiation of the statement inculpating Ross removed any hostility between Ross and Mosely, Ross had no need to impeach Mosely. *Jones*, 121 Ill. 2d at 33-34, 520 N.E.2d at 331.

140. 123 Ill. 2d 1, 525 N.E.2d 30 (1988).

another case concerning an alleged conflict of interest.[141] In *Spreitzer*, the assistant state's attorney who initially brought charges against the defendant was appointed Public Defender for DuPage County prior to the defendant's trial.[142] At the same time, the defendant was being represented at trial by an assistant public defender.[143] The defendant argued that his counsel did not render effective assistance because she was reluctant to question the case brought by her new employer.[144]

The court determined that the defendant failed to demonstrate any specific defect in his counsel's strategy, decision-making, or tactics that could have resulted from a conflict of interest.[145] Therefore, no actual or per se conflict of interest existed.[146]

In *People v. Hillenbrand*,[147] the defendant was convicted of two counts of murder.[148] On appeal, the defendant contended that he was denied effective assistance of counsel because his attorney previously had rendered legal assistance to the murder victim's parents, thereby creating a per se conflict of interest.[149]

The court observed that under its previous decisions, the defendant must demonstrate that his attorney had a "contemporaneous

141. *Id.* at 12-13, 525 N.E.2d at 33.

142. *Id.* at 12, 525 N.E.2d at 33.

143. *Id.*

144. *Id.* at 13, 525 N.E.2d at 34.

145. *Id.* at 18, 23, 525 N.E.2d at 36, 38. The court noted that the defendant had the burden of demonstrating that the alleged conflict of interest actually affected his counsel's performance because the trial court was not apprised of the potential conflict. *Id.* at 19, 525 N.E.2d at 36. *See supra* note 120.

146. *Spreitzer*, 123 Ill. 2d at 23, 525 N.E.2d at 38. The court also refused to apply one of the ABA's Standards for Criminal Justice to find a per se conflict of interest. *Id.* at 20, 525 N.E.2d at 37. The standard at issue provided that "[i]t is unprofessional conduct for a lawyer to defend a criminal case in which the lawyer's partner or other professional associate is or has been the prosecutor." ABA STANDARDS FOR CRIMINAL JUSTICE, 4-3.5(d) (2d ed. 1986).

The court also concluded that the defendant was not prejudiced by improper statements made by the prosecutor during the sentencing hearing. *Spreitzer*, 123 Ill. 2d at 35-39, 525 N.E.2d at 44-46. Finally, the court concluded that the defendant was sentenced improperly to an extended term of 60 years of imprisonment for aggravated kidnapping. *Id.* at 48, 525 N.E.2d at 50.

147. 121 Ill. 2d 537, 521 N.E.2d 900 (1988). The defendant pled guilty to both counts of murder. *Id.* The trial court denied the defendant's motion to withdraw his guilty plea and the appellate court affirmed. *Id.* at 541-42, 521 N.E.2d at 901 (citing People v. Hillenbrand, 146 Ill. App. 3d 1075, 497 N.E.2d 798 (3d Dist. 1986)).

148. *Id.* at 541, 521 N.E.2d at 901.

149. *Id.* at 543, 521 N.E.2d at 902. The defendant claimed that the trial court erred in denying his motion to withdraw his guilty plea, because at the time the defendant entered his guilty plea, his attorney had a per se conflict of interest. *Id.*

conflicting professional commitment to another,"[150] although the defendant need not prove actual prejudice.[151] The court held that the defendant's attorney was not operating under a conflict of interest because he had ceased to provide legal service to the victim's family before representing the defendant and the attorney was not held on a retainer basis by the victim's family.[152]

B. *When Right to Counsel Attaches*

In *People v. Thompkins*,[153] the defendant made an inculpatory statement when questioned by police in a lock-up adjacent to the courtroom while awaiting his initial court appearance.[154] This statement was admitted into evidence and the defendant was convicted.[155] The defendant argued that the police obtained this statement after his sixth amendment right to counsel had attached, without counsel being present.[156] In contrast, the State argued that the defendant's sixth amendment rights had not attached because when the statement was taken, only a complaint for preliminary examination charging defendant with murder had been issued.[157]

In determining whether the defendant's sixth amendment rights had attached, the court relied on the United States Supreme Court's decision in *Kirby v. Illinois*.[158] The Court in *Kirby* held that the sixth amendment right to counsel attaches after the "initi-

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150. *Id.* at 544-45, 521 N.E.2d at 903 (citing People v. Free, 112 Ill. 2d 154, 492 N.E.2d 1269, *cert. denied*, 479 U.S. 871 (1986)).

151. *Id.* at 544, 521 N.E.2d at 903 (citing People v. Lewis, 88 Ill. 2d 429, 430 N.E.2d 994 (1981), *cert. denied*, 460 U.S. 1053 (1983)). The court stated "that allegations and proof of prejudice are unnecessary in cases where defense counsel, without the knowledgeable assent of the defendant, might not have an undivided loyalty to his client because of his commitments to others." *Id.* at 544, 521 N.E.2d at 902 (citing People v. Stoval, 40 Ill. 2d 109, 239 N.E.2d 441 (1968)).

152. *Id.* at 545, 521 N.E.2d at 903. Additionally, the defendant argued that although his attorney was no longer representing any of the victim's family, he still had a financial interest in maintaining good relations with them. *Id.* at 545-46, 521 N.E.2d at 903. The court, however, dismissed this argument as "speculative at best." *Id.* at 547, 521 N.E.2d at 904.

153. 121 Ill. 2d 401, 521 N.E.2d 38 (1988).

154. *Id.* at 430, 521 N.E.2d at 50.

155. *Id.* at 413, 521 N.E.2d at 42.

156. *Id.* at 430, 521 N.E.2d at 50. Alternatively, the defendant argued that he gave the statement after he had invoked his fifth amendment right to counsel. *Id.* at 433, 521 N.E.2d at 51. The court found that the defendant voluntarily, knowingly, and intelligently waived this right. *Id.* at 433-34, 521 N.E.2d at 51-52. The right to counsel provided by the sixth amendment exists independently of those rights under the fifth amendment. *See* People v. Owens, 102 Ill. 2d 88, 464 N.E.2d 261 (1984).

157. *Thompkins*, 121 Ill. 2d at 433, 521 N.E.2d at 51.

158. *Id.* (citing Kirby v. Illinois, 406 U.S. 682 (1972)).

ation of adversarial judicial criminal proceedings."[159] The *Thompkins* court found that the State had not initiated adversary judicial criminal proceedings prior to obtaining the statement; a complaint for preliminary examination, without more, does not automatically commence the prosecution.[160]

C. *Waiver of Right to Counsel*

In *People v. Johnson*,[161] the trial court failed to advise the defendant that he faced a mandatory minimum sentence of life imprisonment because of a previous murder sentence.[162] The defendant contended that the trial court violated Supreme Court Rule 401(a)[163] by not adequately admonishing him of the minimum and maximum sentences to which he could be subjected to, before allowing his waiver of counsel.[164] The defendant claimed that, due to the trial court's improper admonishment, his waiver was not made knowingly and intelligently.[165]

The court held that although the defendant was not specifically advised of the potential sentences he faced, substantial compliance with rule 401(a) was sufficient to support a valid waiver of counsel.[166] The court found that the trial court substantially complied with rule 401(a) because it advised the defendant of his right to be represented, explained the phases of the death penalty hearing and the right to a jury during those phases, and because the record

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159. *Kirby*, 406 U.S. at 689-90. The Court in *Kirby* stated that "judicial criminal proceedings are initiated when the State has committed itself to prosecute and . . . the adverse positions of government and defendant have solidified." *Id.*

160. *Thompkins*, 121 Ill. 2d at 433, 521 N.E.2d at 51. An indictment, information, preliminary hearing, or arraignment typically commences the prosecution. *Kirby*, 406 U.S. at 689.

161. 119 Ill. 2d 119, 518 N.E.2d 100 (1987). The defendant was convicted of four counts of murder and four counts of felony-murder and sentenced to death on each count of felony-murder. *Id.* at 122-23, 518 N.E.2d at 102.

162. *Id.* at 129, 518 N.E.2d at 105.

163. ILL. S. CT. R. 401(a), ILL. REV. STAT. ch. 110A, para. 401(a) (1987). Supreme Court Rule 401(a) provides:

> Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

Id.

164. *Johnson*, 119 Ill. 2d at 130, 518 N.E.2d at 105.

165. *Id.*

166. *Id.* at 132, 518 N.E.2d at 106.

revealed that the defendant was aware of the minimum sentence to which he would be subject.[167]

D. *Effective Assistance of Counsel*

In *People v. Banks*,[168] the court consolidated three cases to decide whether a defendant is entitled to appointment of counsel from outside of the public defender's office when the defendant challenges the effectiveness of counsel rendered by an attorney from the same public defender's office.[169] In each case, the defendant argued that according to *People v. Smith*,[170] a per se conflict of interest results when a public defender asserts that another public defender from the same office rendered the defendant ineffective assistance of counsel.[171] The defendants claimed that under these circumstances, the public defender has conflicting loyalties between his client and his office.[172]

The court overruled the per se rule of *Smith*, adopting instead a case-by-case approach to determine whether an actual conflict of interest existed.[173] The court then found that none of the defendants put forth any evidence that demonstrated an actual conflict of interest.[174]

In *People v. Wilk*,[175] the Illinois Supreme Court consolidated four unrelated cases to determine whether a defendant had received effective assistance of counsel[176] when his attorney failed to

167. *Id.* at 132-34, 518 N.E.2d at 106-07. The court further stated that any departure from a strict compliance with rule 401(a) did not prejudice the defendant. *Id.* at 132, 518 N.E.2d at 106.

168. 121 Ill. 2d 36, 520 N.E.2d 617 (1987). The cases consolidated with *Banks* were *People v. Blakes* and *People v. DuQuaine*. *Id.* at 38-39, 520 N.E.2d at 618.

169. *Id.* at 39, 520 N.E.2d at 619.

170. 37 Ill. 2d 622, 230 N.E.2d 169 (1967).

171. *Banks*, 121 Ill. 2d at 40, 520 N.E.2d at 619.

172. *Id.*

173. *Id.* at 44, 520 N.E.2d at 621. The court recognized that a conflict of interest among members of a law firm will disqualify the entire firm. *Id.* at 41, 520 N.E.2d at 619. The court, however, distinguished the public defender's office from a private law firm, recognizing that the loyalty one may have towards the public defender's office is too remote to justify a per se rule. *Id.* (citing People v. Robinson 79 Ill. 2d 147, 402 N.E.2d 157 (1979)).

174. *Id.*

175. 124 Ill. 2d 93, 529 N.E.2d 218 (1988). *See also* ILL. S. CT. R. 604(d), ILL. REV. STAT. ch. 110A, para. 604(d) (1987). The cases consolidated with *Wilk* for purposes of this appeal were *People v. Erickson*, *People v. Wright*, and *People v. Brown*. *Wilk*, 124 Ill. 2d at 93, 529 N.E.2d at 218.

176. The decision in Strickland v. Washington, 466 U.S. 668 (1984) requires that a defendant make two showings for an ineffective assistance of counsel claim: first, the defendant must show that his counsel's performance fell below accepted professional

comply with Supreme Court Rule 604(d).[177] Rule 604(d) allows a defendant who pleads guilty to appeal if he files a motion to withdraw his guilty plea within thirty days from entry of judgment.[178]

In each of the four consolidated cases, the attorney for the defendant failed to file a motion to withdraw the defendant's guilty plea.[179] Accordingly, the appellate court dismissed the defendant's appeal.[180] The defendants claimed that their attorneys' failure to comply with rule 604(d) amounted to ineffective assistance of counsel.[181]

The *Wilk* court found that Supreme Court Rule 604(d) is a clear rule of procedure and not merely a "suggestion" to courts and attorneys.[182] Therefore, the supreme court held that the appellate court correctly dismissed the appeals.[183] The court went on to state, however, that the defendants had an appropriate remedy other than an appeal.[184] The appropriate remedy for the defendants is the Post-Conviction Hearing Act,[185] which gives protection to those petitioners whose constitutional rights have been violated.[186] This protection extends to the sixth amendment right to effective assistance of counsel.[187] Furthermore, the court indicated that if the defendants prevail in their post-conviction hearings, they

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norms; second, the defendant must show that, in the absence of his counsel's errors, the result of the trial would have been different. *Id.* at 687.

177. *Wilk*, 124 Ill. 2d at 99, 529 N.E.2d at 220-21.

178. ILL. S. CT. R. 604(d), ILL. REV. STAT. ch. 110A, para. 604(d) (1987). Rule 604(d) provides in pertinent part:

> No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to withdraw his plea of guilty and vacate the judgment. The motion shall be in writing and shall state the grounds therefor.

Id.

179. *Wilk*, 124 Ill. 2d at 99, 529 N.E.2d. at 220.

180. *Id.*

181. *Id.*

182. *Id.* at 103, 529 N.E.2d at 221.

183. *Id.* at 107, 529 N.E.2d at 223. The court stated that the purpose of rule 604(d) is:

> [T]o ensure that before a criminal appeal can be taken from a guilty plea, the trial judge who accepted the plea and imposed the sentence be given the opportunity to hear the allegations of improprieties that took place outside the official proceedings and *dehors* the record, but nevertheless were unwittingly given sanction in the courtroom.

Id. at 104, 529 N.E.2d at 221-22 (emphasis in original).

184. *Id.* at 107, 529 N.E.2d at 223.

185. ILL. REV. STAT. ch. 38, para. 122-1 to 122-8 (1987). A hearing under this act is appropriate if the petition makes a substantial showing of a violation of the petitioner's constitutional rights. People v. Rose, 43 Ill. 2d 273, 279, 253 N.E.2d 456, 463 (1969).

186. *Wilk*, 124 Ill. 2d at 107, 529 N.E.2d at 223.

187. *Id.*

will then be allowed to move to withdraw their guilty pleas under rule 604(d).[188]

VI. TRIAL PRACTICE

A. *The Right to a Speedy Trial*

In *People v. Goins*,[189] the court interpreted the jurisdictional requirement of section 103-5 of the Code of Criminal Procedure (the "speedy-trial" statute).[190] That statute provides that a defendant must be tried by a court having jurisdiction within one hundred and twenty days after being taken into custody.[191] In *Goins*, the defendant was taken into custody on July 7, 1983, in Kane County, and charged with residential burglary.[192] Subsequently, a Kane County grand jury indicted the defendant.[193] The ensuing investigation revealed that the burglary actually took place in DuPage County.[194] While the defendant remained in custody in Kane County, an indictment was returned against him in DuPage County on November 22, 1983, based on the same offense as that charged in the Kane County indictment.[195] After the Kane County indictment was dismissed, the defendant was transferred to the custody of the DuPage County Sheriff on November 30.[196] On February 23, 1984, the defendant moved to be discharged from custody pursuant to section 103-5(a), claiming that he had not been tried within the 120-day limit.[197] He argued that the 120-day limit commenced when he was taken into custody in Kane County.[198] The trial court denied the defendant's motion and the appellate court affirmed.[199]

On appeal, the State contended that because the Circuit Court of Kane County did not have jurisdiction to try the offense, the 120-day statutory period did not begin to run until the defendant was

188. *Id.* at 108, 529 N.E.2d at 224.
189. 119 Ill. 2d 259, 518 N.E.2d 1014 (1988).
190. *Id.* at 262, 518 N.E.2d at 1015.
191. ILL. REV. STAT. ch. 38, para. 103-5 (1987). Section 103-5(a) provides: "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant . . . ." *Id.*
192. *Goins*, 119 Ill. 2d at 261, 518 N.E.2d at 1014.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 261, 518 N.E.2d at 1015.
197. *Id.*
198. *Id.* at 262, 518 N.E.2d at 1015.
199. *Id. See* People v. Goins, 136 Ill. App. 3d 582, 483 N.E.2d 702 (2d Dist. 1985).

transferred to the Circuit Court of DuPage County.[200] The State asserted, in essence, that the legislature intended to equate jurisdiction with venue for the purposes of the speedy-trial statute.[201]

The Illinois Supreme Court recognized that since 1961, the Code of Criminal Procedure has drawn "a sharp distinction between jurisdiction and venue."[202] Further, the legislature intended this distinction between jurisdiction and venue to apply to the speedy-trial statute.[203] The court explained that the Circuit Court of Kane County had jurisdiction over the defendant, but venue was improper.[204] Therefore, the court held that the 120-day limitation imposed by section 103-5 commenced the day the defendant was taken into custody in Kane County.[205]

B. *Substitution of Judge*

In *People v. Emerson*,[206] the Illinois Supreme Court addressed a case in which it had earlier reversed the defendant's murder conviction and remanded to the same judge who presided at the original trial.[207] Upon remand, the defendant filed a motion for automatic substitution of judge pursuant to section 114-5(a) of the Code of Criminal Procedure.[208] The judge denied the defendant's motion and the defendant was again convicted and sentenced to

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200. *Goins*, 119 Ill. 2d at 262, 518 N.E.2d at 1015. The State relied on People v. Rogers, 415 Ill. 343, 347, 114 N.E.2d 398, 400 (1953), which held that "the court having jurisdiction" for purposes of the then existing speedy trial statute meant court with venue to try the case. *Goins*, 119 Ill. 2d at 262, 518 N.E.2d at 1015.

201. *Goins*, 119 Ill. 2d at 263, 518 N.E.2d at 1015.

202. *Id.* at 264-65, 518 N.E.2d at 1016 (citing ILL. ANN. STAT. ch. 38, para. 1-6 (Smith-Hurd 1972) (committee comments, at 23)). The court noted that the decision in *Rogers* was justified because the court was interpreting the speedy-trial statute at a time when the legislature did not differentiate between venue and jurisdiction. *Id.* at 264, 518 N.E.2d at 1016. The court also noted that the "place of trial is not jurisdictional." *Id.* at 264-65, 518 N.E.2d at 1016 (citing People v. Ondrey, 65 Ill. 2d 360, 363, 357 N.E.2d 1160, 1162 (1976)).

203. *Id.* at 265, 518 N.E.2d at 1016.

204. *Id.*

205. *Id.* at 267, 518 N.E.2d at 1017-18.

206. 122 Ill. 2d 411, 417, 522 N.E.2d 1109, 1110 (1987).

207. *See* People v. Emerson, 97 Ill. 2d 487, 502, 455 N.E.2d 41, 47 (1983).

208. *Emerson*, 122 Ill. 2d at 421, 522 N.E.2d at 1112. Section 114-5(a) provides in pertinent part:

> Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion.

ILL. REV. STAT. ch. 38, para. 114-5(a) (1987).

death for the same offense.[209] In the second appeal, the defendant contended that the trial judge erroneously denied the defendant's motion for automatic substitution of judge.[210]

In response, the State argued that the trial court was correct in denying the defendant's motion because the defendant failed to file the motion within ten days from the day that the cause was put on the trial judge's call, as required by section 114-5(a).[211] The State reasoned that the case on remand was a continuation of the original proceeding and, therefore, the defendant could not make a timely motion on remand.[212]

On appeal, the issue was whether the cause on remand was a new proceeding for purposes of section 114-5(a).[213] The supreme court indicated that a defendant must file a section 114-5(a) motion before the trial judge makes a substantive ruling in the case and not in response to an adverse ruling.[214] From this perspective, the remand at issue constituted a continuation of the original proceedings.[215] Thus, the court affirmed the trial judge's denial of the defendant's automatic substitution of judge motion.[216]

Similarly in *People v. Jones*,[217] the Illinois Supreme Court had reversed the defendant's murder conviction and remanded the case for a retrial to the same judge who presided at the defendant's first trial.[218] Subsequently, the defendant filed a motion for automatic substitution of judge and the motion was granted.[219] Two days after the case was assigned to another trial judge, the defendant filed another motion for automatic substitution of judge.[220] The new trial judge denied the defendant's motion and the defendant was

209. *Emerson*, 122 Ill. 2d at 421, 522 N.E.2d at 1112.

210. *Id.*

211. *Id.* at 423-24, 522 N.E.2d at 1113.

212. *Id.*

213. *Id.* at 424, 522 N.E.2d at 1113.

214. *Id.* (citing People v. Norcutt, 44 Ill. 2d 256, 255 N.E.2d 442 (1970)).

215. *Id.* Moreover, the second trial in this case was based on the same indictment as the first trial. *Id.*

216. *Id.*

217. 123 Ill. 2d 387, 528 N.E.2d 648 (1988).

218. *See* People v. Jones, 104 Ill. 2d 342, 475 N.E.2d 832 (1985).

219. *Jones*, 123 Ill. 2d at 400, 528 N.E.2d at 654. The trial judge initially denied the defendant's motion. *Id.* at 399, 528 N.E.2d at 654. The trial judge found that the case on remand was not a new case; therefore, the motion was filed untimely. *Id.* Then the defendant filed a complaint for a writ of mandamus in the Illinois Supreme Court, seeking to overturn the trial judge's denial of the section 114-5(a) motion. *Jones*, 123 Ill. 2d at 399, 528 N.E.2d at 654. The supreme court directed the trial judge to vacate the order and to allow the defendant's motion. *Id.* at 399-400, 528 N.E.2d at 654. *Cf. supra* note 215 and accompanying text.

220. *Jones*, 123 Ill. 2d at 400, 528 N.E.2d at 654.

again convicted of murder.[221]

On appeal, the defendant contended that section 114-5(a) gives an accused the right to make two successive motions for automatic substitution of judge.[222] The defendant reasoned that he could not have meaningfully used the two-judge option without knowing in advance the identity of the first two judges to whom the case would be assigned.[223] Nevertheless, the Illinois Supreme Court affirmed the defendant's conviction.[224] The *Jones* court held that the plain language of section 114-5(a)[225] contemplates the making of only one motion, in which the defendant disclosed the identities of all judges for whom the defendant sought substitution.[226]

In *People v. Walker*,[227] the State challenged the constitutionality of the automatic substitution of judge provision.[228] In *Walker*, after the defendant filed a motion for automatic substitution of judge pursuant to section 114-5(a), the State filed an objection and a counter-motion requesting that section 114-5(a) be declared unconstitutional.[229] The state's attorney contended that section 114-5(a) infringes upon "the duty of a trial court 'to abide [by] its assignments' and 'exercise its power to adjudicate a controversy before it' " because substitution is automatic and does not require any proof of prejudice.[230] Therefore, the state's attorney argued that section 114-5(a) infringes upon the inherent powers of the judiciary and violates the separation of powers provision in the Illinois Constitution.[231] The trial judge found section 114-5(a) to be unconsti-

221. *Id.* at 393, 528 N.E.2d at 651.

222. *Id.* at 400, 528 N.E.2d at 654. The defendant relied on the portion of section 114-5(a) which states: "The defendant may name only one judge as prejudiced, pursuant to this section; provided, however, that in a case in which the offense charged is a Class X felony or may be punished by death or life imprisonment, the defendant may name two judges as prejudiced." *Id.* (quoting ILL. REV. STAT. ch. 38, para. 114-5(a) (1987)).

223. *Id.* at 400, 528 N.E.2d at 654.

224. *Id.* at 428, 528 N.E.2d at 667.

225. The court focused on that portion of section 114-5(a), which states: "Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another court or judge not named in the motion." ILL. REV. STAT. ch. 38, para. 114-5(a) (1987).

226. *Jones*, 123 Ill. 2d at 401, 528 N.E.2d at 654. The court took notice of a committee comment to the former version of section 114-5(a) which stated: "This section allows one motion, but the one motion may contain the names of two judges." ILL. ANN. STAT. ch. 38, par. 114-5(a) (Smith-Hurd 1977) (committee comments, at 253).

227. 119 Ill. 2d 465, 519 N.E.2d 890 (1988).

228. *Id.* at 471, 519 N.E.2d at 891.

229. *Id.* at 472, 519 N.E.2d at 892.

230. *Id.* at 478, 519 N.E.2d at 894-95.

231. *Id.* at 473, 519 N.E.2d at 892. The separation of powers provision provides: "The legislative, executive and judicial branches are separate. No branch shall exercise power belonging to another." ILL. CONST. art. II, § 1. The court stated that "the legisla-

tutional and the Illinois Supreme Court granted the defendant's motion to appeal as of right.[232]

The Illinois Supreme Court recognized that a judge possesses no express or inherent power to preside over a case in which that judge's impartiality has been questioned.[233] Thus, section 114-5(a) is not an unconstitutional encroachment upon the inherent powers of the judiciary.[234]

C. *The Right to Confront the Witness*

In *People v. Hernandez*,[235] the defendant, Hernandez, and two co-defendants, Craig and Buckley, were charged with murder and numerous other crimes, and were convicted in a joint trial.[236] Prior to trial, the defendant moved for severance on the grounds that the prosecution intended to introduce incriminating statements made by Cruz, a non-testifying co-defendant.[237] The defendant relied on *Bruton v. United States*,[238] in which the Supreme Court held that the admission of this type of evidence violates the

ture has the power to enact laws concerning judicial practice which 'do not unduly infringe upon the inherent powers of the judiciary.'" *Walker*, 119 Ill. 2d at 474, 519 N.E.2d at 892-93 (quoting People v. Taylor, 102 Ill. 2d 201, 207, 464 N.E.2d 1059, 1063 (1984)).

232. *Walker*, 119 Ill. 2d at 472, 519 N.E.2d at 892. The trial judge took judicial notice that in his personal experience, section 114-5(a) had become a motion for substitution of judge "not for *prejudice*, but for *preference*." *Id.* (emphasis in original).

233. *Id.* at 478, 519 N.E.2d at 895. The court stated that "[t]o hold otherwise would be to extinguish the very 'spirit of our law, which demands that every case shall be fairly and impartially tried, and that where any serious question exists as to prejudice on the part of the judge he should not preside therein.'" *Id.* (quoting People v. Dieckman, 404 Ill. 161, 164, 88 N.E.2d 433, 434 (1949)).

234. *Id.* The *Walker* court also held that section 114-5 does not conflict with Supreme Court Rule 21(b). *Id.* at 477, 519 N.E.2d at 894. Rule 21(b) provides in relevant part: "The chief judge of each circuit may enter general orders in the exercise of his general administrative authority, including orders providing for assignment of judges." ILL. S. CT. R. 21(b), ILL. REV. STAT. ch. 110A, para. 21(b) (1987). The court explained that the Chief Judge of the Sixth Judicial Circuit did not rely on rule 21(b) to promulgate court rules for assignment of cases. *Walker*, 119 Ill. 2d at 476, 519 N.E.2d at 894. Rather, the rules of the Sixth Judicial Circuit were established by a majority of the circuit's judges pursuant to section 1-104(b) of the Code of Civil Procedure. *Id.* (citing ILL. REV. STAT. ch. 110, para. 1-104(b) (1987)). Therefore, section 114-5(a) could not conflict with rule 21(b). *Id.* Moreover, the court found that section 114-5(a) does not conflict with any other circuit rule. *Id.* at 477-78, 519 N.E.2d at 894-95.

235. 121 Ill. 2d 293, 521 N.E.2d 25 (1988). The defendants were each charged with murder, residential burglary, aggravated kidnapping, aggravated indecent liberties, deviate sexual assault, and rape. *Id.*

236. *Id.* at 295, 521 N.E.2d at 26.

237. *Id.* at 309, 521 N.E.2d at 32.

238. 391 U.S. 123 (1968).

defendant's right to confront the witness against him.[239] The trial court denied the motion on the ground that the statement could be redacted to remove reference to the defendant and, thus, remove the prejudice to him.[240] Cruz's statement was redacted to read that "some friends of his asked him if he wanted to be involved in a burglary."[241] The word "friends" was substituted for the names of the defendant and another co-defendant.[242]

Following his conviction and death sentence, the defendant appealed to the supreme court, arguing that the trial court erred in denying the motion for severance.[243] The supreme court agreed and reversed the defendant's conviction.[244] The court found that the redaction of Cruz's statement substituting "friends" for the defendant's name failed to solve the *Bruton* problem.[245] The court analyzed the impact of the redaction in light of the State's other evidence and the prosecutor's comments before the jury.[246] From this perspective, the court determined that the prosecution clearly implied to the jury that the defendant was one of the "friends" whom Cruz referred to in his statement.[247]

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239. *Hernandez*, 121 Ill. 2d at 309, 521 N.E.2d at 33 (citing Bruton v. United States, 391 U.S. 123 (1968)). The *Bruton* Court held that the out-of-court statements of a co-defendant who does not testify are inadmissible at a joint trial unless all references to the nondeclaring defendants have been redacted. *Bruton*, 391 U.S. at 126.

240. *Hernandez*, 121 Ill. 2d at 309-10, 521 N.E.2d at 32-33.

241. *Id.* at 311, 521 N.E.2d at 33.

242. *Id.*

243. *Id.* at 309, 521 N.E.2d at 32.

244. *Id.* at 318, 521 N.E.2d at 37.

245. *Id.* at 315, 521 N.E.2d at 35.

246. *Id.* at 314-17, 521 N.E.2d at 34-45.

247. *Id.* at 313, 521 N.E.2d at 34. The State argued that the use of the word "friends" sufficiently protected the defendant's rights because Cruz's redacted statements contained no direct reference to the defendant. *Id.* at 314, 521 N.E.2d at 35. The court, however, stated that " '[a] codefendant's confession or admission does not have to expressly state that a defendant was involved in an offense; it is enough if incriminating implications clearly point to the defendant's guilt.' " *Id.* at 312, 521 N.E.2d at 34 (quoting People v. Duncan, 115 Ill. 2d 429, 443, 505 N.E.2d 307, 313 (1987)).

The court pointed out that *Hernandez* did not involve "contextual implication," which the United States Supreme Court recently considered in Richardson v. Marsh, 107 S. Ct. 1702 (1987). *Hernandez*, 121 Ill. 2d at 312, 521 N.E.2d at 34. In *Richardson*, the defendant contended that her co-defendant's statement, when considered in the context of the defendant's testimony, improperly implicated the defendant in violation of *Bruton*. *Richardson*, 107 S. Ct. at 1707. The *Richardson* Court held that no *Bruton* violation arose in these circumstances because "the confession [had been] redacted to eliminate not only the defendant's name, but any reference to her existence." *Id.* at 1709.

In People v. Cruz, 121 Ill. 2d 321, 331, 521 N.E.2d 18, 22 (1988), a companion case to *Hernandez*, the court similarly held that Cruz's right to confrontation was violated by the admission of Hernandez's confession which incriminated Cruz.

D. Juror Misconduct

In *People v. Harris*,[248] three defendants were charged with the murder of one of their fellow inmates at Stateville Correctional Facility.[249] Voir dire examination revealed that one of the prospective jurors, Beverly Nilo, had a brother-in-law, Ronald Fleming, who was a counselor at Stateville.[250] Despite this relationship, the trial court swore Nilo in as a juror.[251]

When the prosecutor subsequently learned that two of the defendants had approached Fleming, the prosecutor notified the court, which questioned Fleming *in camera* about his relationship with Nilo.[252] During this examination, Fleming stated that Nilo called him the day after she was sworn as a juror and questioned him about the murder.[253] Fleming told Nilo that "five guys with a baseball bat" committed the killing.[254] All three defendants moved for a mistrial.[255] The prosecution resisted, and instead requested Nilo's dismissal from the jury.[256] Defense counsel, however, opposed the dismissal of Nilo and moved to re-voir dire the remaining jurors to learn whether they were aware of or had been affected by the Nilo/Fleming communication.[257] The trial court denied the motion for mistrial and the motion for further voir dire.[258] Nilo was permitted to serve on the jury, and the defendants were convicted of murder.[259]

The defendants appealed on the basis that the communication between Nilo and Fleming was "presumptively prejudicial."[260] The defendants argued that they were denied a fair trial because the trial court only conducted an inquiry of Fleming and not the other jurors or Nilo.[261]

The supreme court held that the trial court's failure to conduct further voir dire of the jury was not an abuse of discretion because

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248. 123 Ill. 2d 113, 526 N.E.2d 335 (1987).
249. *Id.* at 124, 526 N.E.2d at 338.
250. *Id.* at 130, 526 N.E.2d at 342.
251. *Id.*
252. *Id.* at 131, 526 N.E.2d at 342.
253. *Id.*
254. *Id.*
255. *Id.* at 132, 526 N.E.2d at 342.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*

no prejudice resulted from the communication.[262] The court reasoned that Nilo did not learn anything from Fleming that was not in the indictment.[263] Furthermore, the court indicated that because defense counsel argued against dismissal of Nilo at trial, the court would not find on appeal an abuse of discretion in the trial court's refusal to dismiss Nilo.[264]

E. Venue

In *People v. Caruso*,[265] the defendant was charged with child abduction and unlawful restraint after he harbored his two daughters outside of Illinois, in violation of an Illinois court order.[266] The defendant filed a motion to dismiss the indictment, asserting that the Illinois court lacked subject matter jurisdiction.[267] The defendant argued that any alleged criminal conduct took place outside of Illinois; therefore, he was not subject to the jurisdiction of Illinois criminal courts.[268] The trial court granted the defendant's motion on other grounds and the appellate court reversed.[269]

The supreme court found that the defendant failed to comply with a valid Illinois court order.[270] According to the court, this crime could be regarded as having been committed in Illinois because the offense charged was based upon an omission to perform a duty imposed by law, as set forth in section 1-5(c) of the Illinois Criminal Code.[271] Therefore, the court concluded that the circuit

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262. *Id.* at 133, 526 N.E.2d at 343. The court observed that "[a] verdict will not be set aside where it is obvious that no prejudice resulted from a communication to the jury, either by the court or by third persons outside the presence of the defendant." *Id.* at 132, 526 N.E.2d at 342 (citing People v. Mills 40 Ill. 2d 4, 9, 277 N.E.2d 697, 700 (1968)).

263. *Id.* at 134, 526 N.E.2d at 343.

264. *Id.* at 133, 526 N.E.2d at 343. The court stated that the defendants "cannot be permitted to assume positions on appeal wholly inconsistent with their strategy at trial." *Id.*

265. 119 Ill. 2d 376, 519 N.E.2d 440 (1987).

266. *Id.* at 379, 519 N.E.2d at 441.

267. *Id.*

268. *Id.* at 380, 519 N.E.2d at 442. The defendant reasoned that the essential element of the offense of child abduction was the "taking, concealing, or detaining of [the] child." *Id.* The defendant contended that he did not commit any criminal act while in Illinois because these acts took place in Ohio, where the defendant lived with his children for seven years prior to the entry of the court order. *Id.*

269. *Id.* at 379, 519 N.E.2d at 441. The circuit court dismissed the child abduction counts, finding them to be an unconstitutional ex post facto application of the law. *Id.* The appellate court reversed, holding that the law was not ex post facto and that the circuit court had subject matter jurisdiction. *See* People v. Caruso, 152 Ill. App. 3d 1074, 504 N.E.2d 1339 (2d Dist. 1987).

270. *Caruso*, 119 Ill. 2d at 380, 519 N.E.2d at 441-42.

271. *Id.* at 381, 519 N.E.2d at 442. Section 1-5(c) provides in pertinent part: "(c) An offense which is based on an omission to perform a duty imposed by the law of this State

court had subject matter jurisdiction over the offense.[272]

VII. SENTENCING

A. Admissible Evidence

In *People v. Martin*,[273] the Illinois Supreme Court held that when sentencing the defendant for involuntary manslaughter, the trial court committed plain error in considering as an aggravating factor the fact that the defendant's conduct caused serious bodily harm resulting in death.[274] In vacating the defendant's sentence, the supreme court found that the victim's death is not one of the specified aggravating factors that a court may consider under section 5-5-3.2 of the Unified Code of Corrections.[275] The court reasoned that the legislature accounted for the victim's death when setting the range of permissible penalties for involuntary manslaughter.[276] The court held that the trial court's consideration of this factor in aggravation "clearly affected the defendant's fundamental right to liberty and impinged on her right not to be sentenced based on improper factors."[277] Therefore, the court

is committed within the State, regardless of the location of the offender at the time of the omission." ILL. REV. STAT. ch. 38, para. 1-5(c) (1987). The court noted that section 1-5(c) reflected the concerns expressed in Strassheim v. Daily, 221 U.S. 280 (1911): "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." *Caruso*, 119 Ill. 2d at 382, 519 N.E.2d at 442 (quoting *Strassheim*, 221 U.S. at 285)).

272. *Caruso*, 119 Ill. 2d at 391, 519 N.E.2d at 446.

273. 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

274. *Id.* at 461, 519 N.E.2d at 888. In imposing the maximum statutory sentence for involuntary manslaughter, five years of imprisonment, the trial judge stated that "in committing the felony the defendant inflicted serious bodily injury to another resulting in death, and that a sentence [was] necessary to deter others from committing the same crime." *Id.* at 457, 519 N.E.2d at 886. The appellate court, in an unpublished order, affirmed the defendant's conviction and sentence. *See* People v. Martin, 142 Ill. App. 3d 1178, 504 N.E.2d 551 (5th Dist. 1986).

275. *Martin*, 119 Ill. 2d at 459-60, 519 N.E.2d at 887 (citing ILL. REV. STAT. ch. 38, para. 1005-5-3.2 (1987)).

276. *Id.* at 459-60, 519 N.E.2d at 887. *See also* People v. Saldivar, 113 Ill. 2d 256, 497 N.E.2d 1138 (1986) (trial court erred in considering victim's harm when sentencing defendant for the offense of voluntary manslaughter). The court reasoned that the legislature would have clealy indicated its intent to have the victim's death considered a second time because the death is implicit in the offense. *Martin*, 119 Ill. 2d at 460, 519 N.E.2d at 887.

277. *Martin*, 119 Ill. 2d at 458, 519 N.E.2d at 886 (citations omitted). The State argued that the defendant had waived this issue on appeal by not raising it before the trial court or the appellate court. *Id.* The court, however, invoked the plain error doctrine to decide the issue, finding that the evidence "strongly favored leniency for the defendant." *Id.*

remanded the case for resentencing.[278]

B. *Presiding Judge*

In *People v. Easley*,[279] the defendant pled guilty to reckless conduct, aggravated assault, and unlawful use of weapons. He was sentenced to sixty days of imprisonment and twelve months of probation.[280] Subsequently, the defendant's probation was revoked.[281] A judge, who did not preside at the defendant's trial, sentenced him to twelve months of probation and twelve months of periodic imprisonment.[282]

On appeal, the defendant contended that his sentence should be vacated because the original trial judge, who was still sitting in the circuit where the defendant was tried, was required to preside at the defendant's sentencing hearing pursuant to section 5-4-1(b) of the Illinois Criminal Code.[283] The supreme court held that section 5-4-1(b) required the trial judge to preside at the revocation hearing only if the judge remained in the same division and county in which the trial was held.[284] Thus, the trial judge was not required to preside at the sentencing hearing because he was sitting in another county at the time the defendant was sentenced.[285]

C. *Probation*

In *People v. Williams*,[286] the circuit court sentenced the defend-

278. *Id.* at 463, 519 N.E.2d at 889. The court found that the degree of force used by the defendant did not justify the increased sentence. *Id.* at 461, 519 N.E.2d at 888. The court also found the sentencing judge's deterrence justification in giving a severe sentence inherently illogical because the killing was unintentional. *Id.* at 459, 519 N.E.2d at 887.

279. 119 Ill. 2d 535, 519 N.E.2d 914 (1988).

280. *Id.* at 537, 519 N.E.2d at 915.

281. *Id.* at 537-38, 519 N.E.2d at 915.

282. *Id.* at 538, 519 N.E.2d at 915.

283. *Id.* at 538, 519 N.E.2d at 915. Section 5-4-1(b) provides in relevant part: "The judge who presided at the trial or the judge who accepted the plea of guilty shall impose the sentence unless he is no longer sitting as a judge in that court." ILL. REV. STAT. ch. 38, para. 1005-4-1(b) (1987).

284. *Easley*, 119 Ill. 2d at 541, 519 N.E.2d at 916.

285. *Id.* at 539, 519 N.E.2d at 915. The appellate court found section 5-4-1(b) unconstitutional on the ground that it violated the separation-of-powers provision of the Illinois Constitution. People v. Easley, 152 Ill. App. 3d 839, 842, 505 N.E.2d 11, 12 (5th Dist. 1987). Specifically, the statutory provision placed an unconstitutional restriction on the trial court. *Id.* The supreme court, however, refused to address the constitutionality of the statute, finding that the issue became moot because section 1005-4-1(b) did not require the trial judge to preside at the sentencing hearing. *Easley*, 119 Ill. 2d at 538, 519 N.E.2d at 915.

286. 119 Ill. 2d 24, 518 N.E.2d 136 (1987).

ant to probation for thirty months.[287] On July 15, 1985, with three months remaining on the defendant's sentence, the State filed a petition to revoke his probation.[288] On March 6, 1986, the trial judge denied the State's petition and the defendant asserted that the judge should have declared his probation expired.[289] The trial court noted that even though the petition was dismissed, section 5-6-4(a)(3) of the Unified Code of Corrections[290] appeared to preclude the defendant from receiving credit for time served on probation during the pendency of the revocation proceeding.[291] The statute provided that notice of a revocation hearing tolls the period of probation until the disposition of the revocation proceeding.[292] The trial court found, however, that the statute was "completely unfair" and declared it to be unconstituional.[293] Accordingly, the trial court ruled that the defendant's probation had expired.[294]

On the State's direct appeal to the supreme court, the court concluded that the trial court incorrectly interpreted section 5-6-4(a)(3).[295] The court relied on its prior decision in *People v. Goodman*,[296] in which the court found that the purpose of the tolling provision was to ensure that jurisdiction was retained over the probationer and that the probation did not expire before a hearing on the petition to revoke.[297] In addition to preserving jurisdiction, the statute maintained the defendant's probationary status.[298] In light of this purpose, the *Goodman* court concluded that credit for time spent during the pendency of the revocation proceeding must be allowed.[299] To hold otherwise would create the anomaly of requiring the defendant to live up to the terms of his probation, while denying him credit for doing so.[300] Therefore, the court held that

287. *Id.* at 25, 518 N.E.2d at 136. The defendant pled guilty to retail theft. *Id.*

288. *Id.*

289. *Id.*

290. ILL. REV. STAT. ch. 38, para. 1005-6-4(a)(3) (1987).

291. *Williams*, 119 Ill. 2d at 25, 518 N.E.2d at 136.

292. ILL. REV. STAT. ch. 38, para. 1005-6-4(a)(3) (1987). The trial court did not articulate the basis for the statute's unconstitutionality.

293. *Williams*, 119 Ill. 2d at 25, 518 N.E.2d at 136.

294. *Id.*

295. *Id.* at 26, 518 N.E.2d at 137.

296. 102 Ill. 2d 18, 464 N.E.2d at 250 (1984).

297. *Williams*, 119 Ill. 2d at 26, 518 N.E.2d at 137 (citing *Goodman*, 102 Ill. 2d at 21-22, 464 N.E.2d at 252). The State argued that *Goodman* was distinguishable because the petition for revocation of Williams's probation was dismissed, whereas Goodman's probation was, in fact, revoked. *Id.* The court held, however, that the *Goodman* reasoning applied to Williams *a fortiori* because the petition in *Williams* had been dismissed. *Id.*

298. *Id.*

299. *Id.* at 27, 518 N.E.2d at 137.

300. *Id.*

section 5-6-4(a)(3) did not preclude the defendant from receiving credit for time served during the pendency of the State's revocation petition.[301]

D. Death Penalty Issues

1. Factors in Aggravation

In *People v. Orange*,[302] the supreme court addressed the issue of whether juvenile adjudications are admissible in a capital sentencing hearing as aggravating factors.[303] At the defendant's capital sentencing hearing, the State introduced as aggravating factors juvenile adjudications for theft and burglary.[304] The defense did not submit any evidence in mitigation and the defendant was sentenced to death.[305]

On appeal, the defendant contended that under section 2-10(1) of the Juvenile Court Act,[306] evidence of juvenile adjudications is admissible only in sentencing proceedings conducted under the Unified Code of Corrections.[307] The defendant claimed that juvenile adjudications are inadmissible in a capital sentencing hearing because the capital sentencing provisions[308] are contained in the Illinois Criminal Code and not the Unified Code of Corrections.[309]

The supreme court found that by enacting section 2-10(1) of the Juvenile Court Act, the legislature did not intend to prevent the consideration of juvenile adjudications at a capital sentencing hearing.[310] Further, the court interpreted the reference in section 2-10(1) to "sentencing under the Unified Code of Corrections" to

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301. *Id.*

302. 121 Ill. 2d 364, 521 N.E.2d 69 (1988).

303. *Id.* at 387, 521 N.E.2d at 79.

304. *Id.* at 386, 521 N.E.2d at 79. The defendant was convicted of murder, concealment of a homicidal death, and aggravated arson. *Id.* at 369, 521 N.E.2d at 71.

305. *Id.* at 387, 521 N.E.2d at 79.

306. ILL. REV. STAT. ch. 37, para. 801-10(1) (1987). Section 1-10(1) provides: "Evidence and adjudications in proceedings under this Act shall be admissible . . . (b) in criminal proceedings when the court is to determine the amount of bail, fitness of the defendant or in sentencing under the Unified Code of Corrections." *Id.* The Juvenile Court Act of 1987 renumbered paragraph 702-10(1) as paragraph 801-10(a), but left the substance of the provision unchanged.

307. *Orange*, 121 Ill. 2d at 387, 521 N.E.2d at 80. *See* Unified Code of Corrections, ILL. REV. STAT. ch. 38, para. 1001-1-1 to 1008-6-1 (1987).

308. ILL. REV. STAT. ch. 38, para. 9-1 (1987).

309. *Orange*, 121 Ill. 2d at 388, 521 N.E.2d at 80.

310. *Id.* The court recognized that it had held previously that juvenile adjudications are admissible as aggravating evidence at a capital sentencing hearing, but none of those cases dealt with the statutory provision that the defendant asserted in the case at bar. *Id.* (citing People v. Owens, 102 Ill. 2d 88, 112-13, 464 N.E.2d 261, 267 (1984)).

incorporate by reference the death penalty provision found in the Criminal Code.[311] Accordingly, the court upheld the defendant's death sentence.[312]

The defendant in *People ex rel. Daley v. Strayhorn*[313] killed a man in Chicago on August 31, 1980.[314] On January 2, 1982, he killed another man in Rhode Island.[315] A Rhode Island court convicted the defendant for the Rhode Island murder and sentenced him to forty years of imprisonment.[316] After the Rhode Island conviction, the defendant was extradited to Illinois where the Illinois trial court convicted him for the Illinois murder.[317]

At the sentencing hearing, the defendant moved to preclude the imposition of the death penalty.[318] The trial judge, the respondent on appeal, granted the defendant's motion on the ground that the defendant was ineligible to be sentenced to death under section 9-1(b)(3) of the Criminal Code, which sets forth the multiple-murder aggravating factor provision.[319] The trial judge reasoned that the Illinois murder preceded the Rhode Island murder and murder conviction.[320] Thus, if Illnois had tried the defendant for the Illinois murder first, then the multiple murder aggravating factor would not have made the defendant eligible for the death penalty.[321] Therefore, the trial court found that the Rhode Island murder conviction could not serve as an aggravating factor under section 9-1(b)(3).[322]

In reversing the trial court, the supreme court held that the Rhode Island murder conviction could serve as an aggravating factor under section 9-1(b)(3), notwithstanding the sequence of the defendant's acts.[323] According to the court, the sequence of con-

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311. *Id.* at 388, 521 N.E.2d at 80.
312. *Id.* at 393, 521 N.E.2d at 82.
313. 121 Ill. 2d 470, 521 N.E.2d 864 (1988).
314. *Id.* at 473, 521 N.E.2d at 865.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.* at 474, 521 N.E.2d at 866.
319. *Id.* at 473, 521 N.E.2d at 865. Section 9-1(b) provides in relevant part:

> (b) Aggravating Factors. A defendant . . . may be sentenced to death if . . . (3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section . . . .

ILL. REV. STAT. ch. 38, para. 9-1(b) (1987).

320. *Strayhorn*, 121 Ill. 2d at 473-74, 521 N.E.2d at 865-66.
321. *Id.*
322. *Id.* at 474, 521 N.E.2d at 866.
323. *Id.* at 483, 521 N.E.2d at 870.

victions, not the sequence of acts, determined whether section 9-1(b)(3) applied.[324] Because the Rhode Island conviction preceded the Illinois murder conviction, the court determined that the trial judge should have considered the Rhode Island conviction under section 9-1(b)(3).[325]

2. Constitutional Issues

In *People v. Davis*,[326] the defendant filed a post-conviction petition pursuant to section 122-1 of the Code of Criminal Procedure,[327] contending that the death penalty statute was being applied in a racially discriminatory manner.[328] The defendant proffered a statistical study known as the Gross Study,[329] which purportedly showed that a defendant convicted of murdering a white victim was four times as likely to be sentenced to death as a defendant convicted of murdering a black victim.[330] The defendant argued that this racial disparity violated his constitutional rights.[331] Nonetheless, the trial court dismissed the petition without a hearing.[332]

In affirming the trial court's dismissal of the defendant's post-

324. *Id.* The court relied on People v. Guest, 115 Ill. 2d 72, 104-05, 503 N.E.2d 255, 270 (1986), wherein it previously held that the sequence of convictions is controlling when applying section 9-1(b)(3).

325. *Strayhorn*, 121 Ill. 2d at 483, 521 N.E.2d at 870. The court also addressed the defendant's argument that the Rhode Island murder conviction could not be used as an aggravating factor because the Rhode Island murder statute was not substantially similar to the Illinois murder statute, as required by section 9-1(b)(3). *Id.* at 484, 521 N.E.2d at 870. The defendant contended that the two statutes significantly differed in their definitions of murder: mere recklessness is sufficient to support a conviction of murder in Rhode Island, but the higher mens rea of gross recklessness is needed to support a murder conviction in Illinois. *Id.* The court found that the Rhode Island murder statute was "substantially similar" to Illinois' murder statute because, contrary to the defendant's contention, both statutes at least required wanton recklessness to support a murder conviction. *Id.* at 487-88, 521 N.E.2d at 872. The court noted the Rhode Island Supreme Court's holding in State v. Iovino, 524 A.2d 556, 558 (R.I. 1987), that wanton recklessness is sufficient to supply the mens rea for common law murder. The *Strayhorn* court found that wanton recklessness is equivalent to the mens rea requirement in section 9-1(a)(2) of the Illinois murder statute. *Strayhorn*, 121 Ill. 2d at 488, 521 N.E.2d at 872. For a further discussion of *Strayhorn*, see *supra* notes 110-17 and accompanying text.

326. 119 Ill. 2d 61, 518 N.E.2d 78 (1987).

327. ILL. REV. STAT. ch. 38, para. 122-1 (1987).

328. *Davis*, 119 Ill. 2d at 64-65, 518 N.E.2d at 80.

329. Gross & Marro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

330. *Davis*, 119 Ill. 2d at 65, 518 N.E.2d at 80. The study also demonstrated that a black defendant convicted of killing a white victim is more likely to receive the death penalty than a white defendant convicted of killing a white victim. *Id.*

331. *Id.*

332. *Id.* at 63, 518 N.E.2d at 79.

conviction petition, the court relied on the decision of the United States Supreme Court in *McClesky v. Kemp*.[333] In *McClesky*, the defendant relied on a similar statistical study know as the Baldus Study.[334] The *McCleskey* Court, assuming the validity of the Baldus Study, held that the study did not establish "a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."[335] Based on *McClesky*, the *Davis* court concluded that regardless of the methodology of the Gross Study, which was less comprehensive than the Baldus study, the Gross Study was not sufficient to establish a violation of the federal or state constitutions.[336]

Another case in which the defendant challenged the constitutionality of Illinois' death penalty statute was *People v. Stewart*.[337] In *Stewart*, the defendant argued in his petition for post-conviction relief that death by lethal injection violated the eighth amendment's prohibition against cruel and unusual punishment.[338] The defendant contended that there were no guidelines for administering the sentence to "protect against a torturous death."[339] The trial court dismissed the defendant's petition without an evidentiary hearing.[340]

On appeal, the supreme court held that section 119-5 of the Code of Criminal Procedure[341] contained general guidelines relating to the method and manner of death by lethal injection.[342] The court noted the defendant's failure to offer any alternative guidelines or to offer authoritative support for his constitutional objec-

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333. *Id.* at 66-67, 518 N.E.2d at 80-81 (citing McClesky v. Kemp, 107 S. Ct. 1756 (1987)).

334. *McClesky*, 107 S. Ct. at 1763. The Baldus Study was a complex statistical study of 2,000 Georgia murder cases. *Id.*

335. *Id.* at 1778. The *McClesky* Court further held that the defendant must prove that the decision makers in his case acted with a discriminatory purpose. *Id.* at 1769.

336. *Davis*, 119 Ill. 2d at 68, 518 N.E.2d at 81.

337. 121 Ill. 2d 93, 520 N.E.2d 348, *cert. denied*, 109 S. Ct. 246 (1988).

338. *Id.* at 112-13, 520 N.E.2d at 357.

339. *Id.*

340. *Id.* at 96-97, 520 N.E.2d at 350.

341. ILL. REV. STAT. ch. 38, para. 119-5 (1987). Section 119-5 provides in pertinent part:

> A defendant sentenced to death shall be executed by a continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice . . . . The warden of the penitentiary shall supervise such execution which shall be conducted in the presence of 2 physicians and 6 other witnesses . . . .

Id.

342. *Stewart*, 121 Ill. 2d at 113, 520 N.E.2d at 358.

tion to the lack of these alleged unspecified guidelines.[343] Therefore, the court affirmed the trial court's denial of the defendant's post-conviction petition.[344]

3. Eligibility for Death Penalty

In *People v. Crews*,[345] the court held that the statute concerning the sentencing and treatment of defendants found guilty but mentally ill did not preclude the defendant from being sentenced to death.[346] On appeal, the defendant argued that the legislature did not intend the death penalty to be imposed on those defendants found guilty but mentally ill.[347] For instance, section 5-2-6(b) of the Unified Code of Corrections directs the Department of Corrections to "cause periodic inquiry and examination to be made concerning the nature, extent, continuance, and treatment of the defendant's mental illness. The Department of Corrections shall provide such psychiatric, psychological, or other counseling . . . as it determines necessary."[348] The defendant argued that sentencing a guilty-but-mentally-ill offender to death was contrary to this statutory scheme.[349] Nevertheless, the supreme court held that the plain language of section 5-2-6(a) manifests the intention of the legislature that the death penalty could be sought against a guilty-but-mentally-ill defendant.[350]

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343. *Id.* at 114, 520 N.E.2d at 358. The defendant relied on Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983), to support his argument that death by lethal injection constituted cruel and unusual punishment. *Stewart*, 121 Ill. 2d at 114, 520 N.E.2d at 358. In *Chaney*, the defendant argued that the Food and Drug Administration ("F.D.A.") should be required "to investigate and to regulate the unapproved use of approved drugs in human execution systems." *Chaney*, 718 F.2d at 1178. The court held that the F.D.A. could be compelled to develop these guidelines because its refusal to do so "may . . . implicate the Eighth Amemdment's prohibition of cruel and unusual punishment." *Id.* at 1191. The United States Supreme Court, however, reversed the court of appeals' decision and held that the F.D.A.'s refusal to take enforcement action was not subject to judicial review. Heckler v. Chaney, 470 U.S. 821, 837-38 (1985). The Supreme Court also stated that "[n]o colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents." *Id.* at 838.

344. *Stewart*, 121 Ill. 2d at 115, 520 N.E.2d at 358.

345. 122 Ill. 2d 266, 522 N.E.2d 1167 (1988).

346. *Id.* at 279-80, 522 N.E.2d at 1173.

347. *Id.* at 274, 522 N.E.2d at 1171.

348. ILL. REV. STAT. ch. 38, para. 1005-2-6(b) (1987).

349. *Crews*, 122 Ill. 2d at 276, 522 N.E.2d at 1172. The defendant also argued that section 5-2-6 reserved the sentencing function to the court, which is contrary to the role that a jury plays in a capital sentencing hearing pursuant to ILL. REV. STAT. ch. 38, para. 9-1(g) (1987). *Crews*, 122 Ill. 2d at 276, 522 N.E.2d at 1172.

350. *Crews*, 122 Ill. 2d at 277, 522 N.E.2d at 1172. The court quoted section 1005-2-6(a), which provides in pertinent part: "The court may impose any sentence upon the defendant which could be imposed pursuant to law upon a defendant who had been con-

4. Prosecutorial Misconduct

In *People v. Gacho*,[351] the court held that the prosecutor's comments during the sentencing hearing, which concerned the possibility of defendant's parole absent a sentence of death, deprived the defendant of a fair sentencing hearing.[352] The court found that these statements diverted the jury's attention from the mitigating factors.[353] Moreover, the court reasoned that these statements made such a strong impact on the jury that striking the statements from the record did not cure the prejudice in the minds of the jurors.[354] Therefore, the court vacated the defendant's sentence of death and remanded the case for a new sentencing hearing.[355]

5. Admissible Evidence

In *People v. Rogers*,[356] the State introduced tape recorded confessions of two co-defedendants during the second phase of the defendant's sentencing hearing.[357] Both of the confessions suggested

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victed of the same offense without a finding of mental illness." *Id.* (citing ILL. REV. STAT. ch. 38, para. 1005-2-6(a) (1987)). The court observed the distinction between the legislature's definitions of "insanity" and "mental illness." *Id.* at 277-78, 522 N.E.2d at 1172-73. This distinction is demonstrated in section 6-2 of the Criminal Code, which provides: "A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill." ILL. REV. STAT. ch. 38, para. 6-2(c) (1987). The court concluded from this provision that a guilty-but-mentally-ill offender is no less guilty than an offender who is guilty but not mentally ill. *Crews*, 122 Ill. 2d at 278, 522 N.E.2d at 1173.

351. 122 Ill. 2d 221, 522 N.E.2d 1146, *cert. denied*, 57 U.S.L.W. 3281 (1988).

352. *Id.* at 259, 522 N.E.2d at 1163. The defendant was convicted of two counts of murder, aggravated kidnapping, and armed robbery, and was sentenced to death by a jury. *Id.* at 229, 522 N.E.2d at 1150. The prosecutor's remarks at issue were as follows:

> Mr. McDonnell [defense attorney] has thrown about some very famous names — Gacy, Speck. Well, you know that Richard Speck was originally sentenced to death, and he comes up for parole every two years, and one day he is going to be out on parole . . . . Finally, ladies and gentlemen, on behalf of all of the People, I ask you to consider the opportunity that this man will someday have to hurt somebody else. That's one of the things you can consider . . . . [A]nd consider that some day he may have that opportunity again.

Id. at 256, 522 N.E.2d at 1162-63.

353. *Id.* at 257, 522 N.E.2d at 1163.

354. *Id.* at 257, 259-60, 522 N.E.2d at 1163, 1164 (citing People v. Szabo, 94 Ill. 2d 327, 447 N.E.2d 193 (1983)). The *Szabo* court stated that "[a] penalty of death that could have been imposed under the influence of passion or prejudice cannot stand." *Szabo*, 94 Ill. 2d at 367, 447 N.E.2d at 212. Furthermore, the *Gacho* court stated that "the review of a death penalty case 'demands strict scrutiny of such remarks and their possible effect upon the sentencing jury.' " *Gacho*, 122 Ill. 2d at 259, 522 N.E.2d at 1164 (quoting People v. Walker, 91 Ill. 2d 502, 515, 440 N.E.2d 83, 90 (1982)).

355. *Gacho*, 122 Ill. 2d at 264, 522 N.E.2d at 1166.

356. 123 Ill. 2d 487, 528 N.E.2d 667 (1988).

357. *Id.* at 519-20, 528 N.E.2d at 682. The defendant was found guilty of murder,

that the defendant was the "real motivating party" of the crimes.[358] The defendant contended, however, that the two co-defendants were the instigators of the crimes.[359]

The supreme court found that the co-defendants' confessions were suspect, unreliable, and highly prejudicial.[360] The court emphasized that although section 9-1 of the Criminal Code[361] permits the admission of evidence during the second phase of a sentencing hearing, regardless of whether it would be admissible at trial, the evidence must be reliable.[362] The court considered a co-defendant's statement incriminating a defendant to be "presumptively unreliable" because a co-defendant only stands to gain by incriminating another defendant.[363] Therefore, the court remanded the case for another sentencing hearing.[364]

In *People v. Simms*,[365] victim impact statements[366] from the victim's family were introduced into evidence over the defense counsel's objections at the sentencing hearing.[367] On appeal, the defendant contended that the admission of this evidence violated the eighth amendment prohibition against cruel and unusual punishment.[368] The State argued, however, that the defendant waived

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attempted murder, two counts of conspiracy to commit murder, conspiracy to commit armed robbery, and armed violence. *Id.* at 492-93, 528 N.E.2d at 670.

358. *Id.* at 520, 528 N.E.2d at 683.

359. *Id.*

360. *Id.* at 521-22, 528 N.E.2d at 684.

361. ILL. REV. STAT. ch. 38, para. 9-1(e) (1987).

362. *Rogers*, 123 Ill. 2d at 521, 528 N.E.2d at 683. Section 9-1(e) provides in relevant part: "Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials." ILL. REV. STAT. ch. 38, para. 9-1(e) (1987). The factors controlling the admission of evidence at a sentencing hearing, which evidence is inadmissible at trial, are "relevance and reliability." *Rogers*, 123 Ill. 2d at 521, 528 N.E.2d at 683 (citing People v. Lyles, 106 Ill. 2d 373, 478 N.E.2d 291 (1985)).

363. *Rogers*, 123 Ill. 2d at 521, 528 N.E.2d at 683 (quoting Lee v. Illinois, 476 U.S. 530, 541 (1986)). Although the United States Supreme Court decided the *Lee* case on the issue of whether this type of testimony is admissible for purposes of determining guilt, the *Rogers* court found that this principle also applies to evidence that is admissible during a sentencing hearing. *Id.* at 521, 528 N.E.2d at 683.

364. *Id.* at 523, 528 N.E.2d at 684.

365. 121 Ill. 2d 259, 520 N.E.2d 308 (1988).

366. Victim impact evidence is evidence concerning the victim's personal traits and the impact of the crime on the victim's family. *Id.* at 271, 520 N.E.2d at 313. During the sentencing hearing in this case, the court admitted the testimony of four of the victim's family members regarding their grief and sense of loss. *Id.* at 272, 520 N.E.2d at 313.

367. *Id.* at 271, 520 N.E.2d at 313.

368. *Id.* at 271, 520 N.E.2d at 313. In Booth v. Maryland, 107 S. Ct. 2529, 2534 (1987), the United States Supreme Court held that introduction of victim impact statements "creates an impermissible risk that the capital sentencing decision will be made in

this issue on appeal because he failed to raise the issue in a post-trial motion.[369]

The supreme court first recognized that notwithstanding a waiver, the court had authority to review plain errors by the trial court — especially those errors involving fundamental constitutional rights.[370] The court found that the victim impact evidence was so powerful in this case that introduction of the evidence was plain error in violation of the defendant's eighth amendment rights.[371] Accordingly, the court reversed the death sentence and ordered a new sentencing hearing.[372]

VIII. APPELLATE ISSUES

In *People v. Enoch*,[373] the defendant claimed that he did not knowingly and intelligently waive his right to a jury for sentencing.[374] The State argued that the defendant had waived this issue on appeal because he had failed to raise it in a post-trial motion as requires by section 116-1 of the Code of Criminal Procedure.[375] The defendant responded that the Illinois Constitution requires the supreme court to review all sentences of death.[376] Therefore, the court has a constitutional duty to review all alleged errors even if certain errors have not been preserved in a post-trial motion.[377]

The court held that the constitutional duty to review all

an arbitrary manner." The Court concluded, therefore, that the "the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence." *Id.*

369. *Simms*, 121 Ill. 2d at 272, 520 N.E.2d at 313. The Illinois Supreme Court held in People v. Szabo, 113 Ill. 2d 83, 93, 497 N.E.2d 995, 999 (1986), that a trial objection and a post-conviction motion raising the issue are required to preserve an alleged issue for appellate review. Alternatively, the State argued that the admission of this evidence constituted harmless error. *Simms*, 121 Ill. 2d at 272, 520 N.E.2d at 313.

370. *Simms*, 121 Ill. 2d at 272, 520 N.E.2d at 313 (citing ILL. S. CT. R. 615(a), ILL. REV. STAT. ch. 110A, para. 615(a) (1987)). *See also* People v. Adams, 109 Ill. 2d 102, 128, 485 N.E.2d 339, 346 (1985), *cert. denied*, 475 U.S. 1088 (1986) (consideration of improper aggravating factor in capital sentencing hearing was plain error).

371. *Simms*, 121 Ill. 2d at 272-73, 521 N.E.2d at 313-14. The court noted that the United States Supreme Court has never applied the "harmless error" doctrine to affirm a death sentence that had been challenged on the basis of a violation of the defendant's constitutional rights during the sentencing hearing. *Id.* at 274, 521 N.E.2d at 314.

372. *Id.* at 276, 521 N.E.2d at 315.

373. 122 Ill. 2d 176, 522 N.E.2d 1124, *cert. denied*, 109 S. Ct. 274 (1988).

374. *Id.* at 185, 522 N.E.2d at 1129.

375. *Id.* at 186, 522 N.E.2d at 1129 (citing ILL. REV. STAT. ch. 38, para. 116-1 (1987)). *See also supra* note 369.

376. *Enoch*, 122 Ill. 2d at 190, 522 N.E.2d at 1131. The Illinois Constitution provides that "[a]ppeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right. The Supreme Court shall provide by rule for direct appeal in other cases." ILL. CONST. art. VI, § 4(b).

377. *Enoch*, 122 Ill. 2d at 190, 522 N.E.2d at 1131.

sentences of death does not relieve the defendant of his obligation to comply with section 116-1; that section ensures that appellate review is limited to issues of significance.[378] The court then defined the scope of its constitutional duty to review death sentences when the defendant fails to file a post-trial motion.[379] Within this scope are constitutional issues raised at trial and issues that can be brought later in a post-conviction hearing petition, sufficiency of the evidence questions, and plain errors.[380] Accordingly, the court addressed the issues asserted by the defendant that fell within these categories.[381]

In *People ex rel. Foreman v. Nash*,[382] the defendant was found guilty-but-mentally-ill on charges of murder and armed violence.[383] The appellate court reversed, finding the defendant not guilty by reason of insanity.[384] After exhausting its appellate remedies, the State asked the supreme court for leave to file a complaint for an original writ of mandamus directing the appellate court to vacate its judgment.[385] The State also sought to have the defendant's conviction reinstated or to have the matter set for retrial.[386] Finally,

378. *Id.* at 190, 522 N.E.2d at 1131-32. The *Enoch* court explained the necessity for the waiver rule:

> Failure to raise issues in the trial court denies that court the opportunity to grant a new trial, if warranted. This casts a needless burden of preparing and processing appeals upon appellate counsel for the defense, the prosecution, and upon the court of review. Without a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended. Appellate counsel may comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance.

Id. at 186, 522 N.E.2d at 1130 (quoting People v. Caballero, 102 Ill. 2d 23, 31-32, 464 N.E.2d 223, 227 (1984)).

379. *Id.* at 190, 522 N.E.2d at 1136.

380. *Id.*

381. *Id.* at 192, 522 N.E.2d at 1136. The defendant claimed that statements he made after receiving his *Miranda* warnings were not voluntary, that his conviction for aggravated kidnapping was not supported by the evidence, that the admission of testimony regarding other crimes allegedly committed by him constituted plain error, that he was deprived of effective assistance of counsel because his counsel failed to file a post-trial motion, and that the Illinois death penalty statute was unconstitutional. *Id.* at 192-202, 522 N.E.2d at 1132-37. The court rejected each of these arguments and upheld the death sentence. *Id.* at 203, 522 N.E.2d at 1138.

382. 118 Ill. 2d 90, 514 N.E.2d 180 (1987).

383. *Id.* at 92, 514 N.E.2d at 181.

384. People v. Palmer, 139 Ill. App. 3d 966, 487 N.E.2d 1154 (2d Dist. 1985). The appellate court noted that the defendant had an extensive history of severe mental illness and was being treated with an antipsychotic drug at the time of the offense. *Id.* at 973, 487 N.E.2d at 1158. Because there was no evidentiary conflict for the jury to resolve, the appellate court found that the State failed to refute the evidence of the defendant's sanity. *Id.* at 973-74, 487 N.E.2d at 1159.

385. *Nash*, 118 Ill. 2d at 92, 514 N.E.2d at 181.

386. *Id.*

the state sought a writ of prohibition restraining the circuit court from entering a judgment of not guilty by reason of insanity.[387] The State claimed that the appellate court exceeded its jurisdiction.[388] Specifically, it argued that the appellate court improperly ruled on the credibility of the witnesses and the weight of the evidence, matters generally reserved for the jury.[389]

The supreme court held that neither a writ of mandamus, a writ of prohibition, nor a supervisory order would be appropriate.[390] The court recognized that a writ of mandamus and a writ of prohibition are extraordinary remedies only to be used to compel as a matter of public right a lower court to perform essentially ministerial tasks.[391] Additionally, the court recognized that a writ of prohibition is proper to prevent a judge from acting where he lacks jurisdiction.[392] The court pointed out an exception to these general rules; namely, that the supreme court may exercise its supervisory authority in a case that presents a question " 'of sufficient importance to the administration of justice.' "[393] The court found that the requirements for mandamus, prohibition, or a supervisory order were not satisfied in this case.[394] Moreover, the court declined to exercise its supervisory powers, indicating that the questions presented were not of sufficient importance to the administration of justice.[395]

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387. *Id.* Article VI, section 4(a) of the Illinois Constitution gives the Illinois Supreme Court "original jurisdiction in cases relating to . . . mandamus, [and] prohibition . . . and as may be necessary to the complete determination of any case on review." ILL. CONST. art VI, § 4(a).

388. *Nash*, 118 Ill. 2d at 95, 514 N.E.2d at 182.

389. *Id.*

390. *Id.* at 98, 514 N.E.2d at 184.

391. *Id.* at 96, 514 N.E.2d at 183. The court described its authority to grant a writ of mandamus:

> It is not the office of the writ of *mandamus* to review the orders, judgments on decrees of courts for error in their rendition or to correct, direct or control the action of a judge in any matter which he has jurisdiction to decide. For mere error, however gross or manifest, the remedy is an appeal or writ of error, and the writ of *mandamus* will not lie for its correction if the court has jurisdiction of the subject matter and the parties.

Id. at 96-97, 514 N.E.2d at 183 (quoting People *ex rel.* Barrett v. Shurtleff, 353 Ill. 248, 259-60, 187 N.E. 271, 276 (1933)).

392. *Id.* at 97, 514 N.E.2d at 183 (citing People *ex rel.* Daley v. Hett, 113 Ill. 2d 75, 80, 495 N.E.2d 513, 515-16 (1986)).

393. *Id.* at 98, 514 N.E.2d at 184 (quoting People *ex rel.* Bier v. Scholz, 77 Ill. 2d 12, 16-17, 394 N.E.2d at 1157, 1159 (1979)).

394. *Id.*

395. *Id.* Furthermore, the court noted that the State presented its arguments to higher courts three times. *Id.* Therefore, in pursuing writs of mandamus and prohibi-

IX. POST-CONVICTION PETITION ISSUES

In *People v. Free*,[396] the court addressed the issue of whether a defendant may be permitted to raise a claim in a second post-conviction petition if it was not raised in any of the prior proceedings.[397] In his second post-conviction petition, the defendant challenged the admission of victim impact evidence at his sentencing hearing.[398] The defendant, however, had not objected to the admission of this evidence and had not raised this issue in his first post-conviction petition.[399]

Although the supreme court recognized that the admission of victim impact evidence would now entitle a defendant to a reversal of his sentence under the recent United States Supreme Court decision in *Booth v. Maryland*,[400] it held that the defendant waived this claim because the proceedings on the first post-conviction petition were not fundamentally deficient.[401] The court found that the defendant was already fully afforded one occasion to demonstrate a substantial violation of his constitutional rights in his first post-conviction petition.[402] Furthermore, the court refused to consider

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tion, the State was attempting to use these extraordinary remedies as substitutes for another appeal. *Id.*

396. 122 Ill. 2d 367, 522 N.E.2d 1184, *cert. denied*, 109 S. Ct. 190 (1988).

397. *Id.* at 375-76, 522 N.E.2d at 1188.

398. *Id.* at 371, 522 N.E.2d at 1185. After the supreme court affirmed the defendant's conviction, People v. Free, 94 Ill. 2d 378, 447 N.E.2d 218 (1983), the defendant filed a petition for post-conviction relief. *Free*, 122 Ill. 2d at 370, 522 N.E.2d at 1185. The trial court dismissed the petition and the supreme court affirmed that decision. *Id. See* People v. Free, 112 Ill. 2d 154, 492 N.E.2d 1269 (1986). In 1986, the defendant filed a second post-conviction petition, which the trial court also dismissed. *Free*, 122 Ill. 2d at 370, 522 N.E.2d at 1185.

399. *Free*, 122 Ill. 2d at 373, 522 N.E.2d at 1186.

400. 107 S. Ct. 2529 (1987). The *Free* court noted that after the court heard oral arguments, the Supreme Court decided *Booth*. *Free*, 122 Ill. 2d at 374, 522 N.E.2d at 1187. For a discussion of *Booth*, see *supra* note 367.

401. *Free*, 122 Ill. 2d at 376, 522 N.E.2d at 1188. The court noted that section 122-3 of the Post-Conviction Hearing Act, ILL. REV. STAT. ch. 38, par. 122-3 (1987), "contemplates the filing of only one post-conviction petition." *Free*, 122 Ill. 2d at 375, 522 N.E.2d at 1188. Section 122-3 provides: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." ILL. REV. STAT. ch. 38, para. 122-3 (1987). Moreover, according to People v. Richeson, 50 Ill. 2d 46, 48, 277 N.E.2d 134, 136 (1971), "a ruling on a post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *Free*, 122 Ill. 2d at 376, 522 N.E.2d at 1188. The *Free* court acknowledged, however, that a defendant may be entitled to multiple post-conviction petitions when the proceedings on the original petitions were fundamentally deficient. *Id.* (citing People v. Nichols, 51 Ill. 2d 244, 281 N.E.2d 873 (1972)).

402. *Free*, 122 Ill. 2d at 376-77, 522 N.E.2d at 1188 (citing People v. Logan, 72 Ill. 2d 358, 370, 381 N.E.2d 264, 270 (1978)).

the defendant's claim by applying the plain error rule.[403] The court reasoned that to apply the plain error standard to the defendant's procedurally defaulted claims in a post-conviction proceeding would "deny the State's legitimate interest in the finality of the defendant's convictions, which this court affirmed in 1983 on direct appeal."[404]

After filing a post-conviction petition in *People ex rel. Daley v. Fitzgerald*,[405] the defendant filed subpoenas for the taking of discovery depositions of persons involved in the defendant's trial.[406] The State moved to squash these subpoenas.[407] The State argued that a court may order the taking of evidence depositions, but not discovery depositions in a post-conviction proceeding.[408]

The trial court denied the State's motion to quash three of the subpoenas.[409] Subsequently, the State filed a motion in the Illinois Supreme Court for leave to file a complaint for writ of mandamus or prohibition, or for a supervisory order compelling the trial judge to vacate the orders allowing the subpoenas.[410]

The supreme court recognized that the Post-Conviction Hearing Act is silent on the availability of discovery depositions and that the rules governing civil discovery and criminal discovery do not pertain to proceedings under the Post-Conviction Hearing Act.[411]

403. *Id.* at 378, 522 N.E.2d at 1189 (citing ILL. S. CT. R. 615(a), ILL. REV. STAT. ch. 110A, para. 615(a) (1987)).

404. *Id.* The court observed that the nature of a post-conviction proceeding is collateral to a judgment of conviction and is not designed to provide another appeal. *Id.* at 377, 52 N.E.2d at 1188. For support, the court looked to the Supreme Court's holding in United States v. Frady, 456 U.S. 152, 164 (1982), that the plain error standard was "out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." In separate dissents, Justices Simon and Clark argued that because admission of victim impact evidence violates a defendant's substantive rights under *Booth*, it is fundamentally unfair to sustain the defendant's sentence on a doctrine of waiver. *Free*, 122 Ill. 2d at 381-91, 522 N.E.2d at 332-36 (Simon and Clark, JJ., dissenting).

405. 123 Ill. 2d 175, 526 N.E.2d 131 (1988).

406. *Id.* at 177-78, 526 N.E.2d at 132.

407. *Id.* at 178, 527 N.E.2d at 132.

408. *Id.* at 178, 526 N.E.2d at 133. The State contended that the supreme court's decision in People v. Rose, 48 Ill. 2d 300, 268 N.E.2d 700 (1971), interpreted section 122-6 of the Post-Conviction Hearing Act, ILL. REV. STAT. ch. 38, para. 122-6 (1987), to preclude the taking of discovery depositions in post-conviction petition proceedings. *Fitzgerald*, 123 Ill. 2d at 180, 526 N.E.2d at 133. In *Rose*, the supreme court affirmed the trial judge's refusal to compel the witnesses to attend the discovery depositions sought by a post-conviction petitioner. *Rose*, 48 Ill. 2d at 302, 268 N.E.2d at 702.

409. *Fitzgerald*, 123 Ill. 2d at 178, 526 N.E.2d at 132.

410. *Id.*

411. *Id.* at 180-81, 526 N.E.2d at 133-34. The court found that the rules governing civil discovery do not apply to post-conviction petitions because such application would

Finding no rules that govern discovery during a post-conviction proceeding, the court held that a trial judge has the inherent authority to allow the taking of discovery depositions after conducting a hearing.[412] The court found that Judge Fitzgerald was acting within his inherent authority to permit these depositions.[413]

In *People v. Bates*,[414] the court held that a shortened limitation period for bringing a post-conviction petition could be applied retroactively to a conviction occurring prior to the provision's enactment.[415] On December 13, 1972, the defendant was convicted of murder and faced a sentence of up to seventy-five years of imprisonment.[416] In 1972, the statute of limitation for a post-conviction petition was twenty years.[417] On January 1, 1984, an amendment to the Post-Conviction Hearing Act took effect which shortened the limitation period to ten years.[418] Then on February 6, 1984, five weeks after the effective date of the amendment and eleven years after the defendant's conviction, the defendant filed a pro se petition for post-conviction relief.[419] The trial court dismissed the defendant's petition because it was untimely and the appellate court reversed.[420]

On appeal, the defendant argued that the amendment should not

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"invite, at least in the discovery stages, the relitigation of matters that were conclusively determined in the original proceedings in the trial court and on appeal." *Id.* at 182, 526 N.E.2d at 134. Likewise, the court found that criminal discovery rules should not apply because Supreme Court Rule 411, ILL. S. CT. R. 411, ILL. REV. STAT. ch. 110A, para 411 (1987), restricts the rules to felony prosecutions. *Fitzgerald*, 123 Ill. 2d at 182, 526 N.E.2d at 134. The court concluded that because the remedy provided by the Post-Conviction Petition Hearing Act does not fall into either a strictly criminal or civil category, the Post-Conviction Hearing Act is *sui generis*. *Id.* at 181, 526 N.E.2d at 134 (citing People v. Clements, 38 Ill. 2d 213, 230 N.E.2d 185 (1967)).

412. *Fitzgerald*, 123 Ill. 2d at 183, 526 N.E.2d at 135. The supreme court found that *Rose* did not bar the taking of discovery depositions in a post-conviction proceeding. *Id.* at 180, 526 N.E.2d at 133. Rather, the court in *Rose* merely "held that the reference to depositions in section 122-6 . . . pertained only to evidence depositions." *Id.*

413. *Id.* at 183-84, 526 N.E.2d at 135.

414. 124 Ill. 2d 81, 529 N.E.2d 227 (1988).

415. *Id.* at 84, 529 N.E.2d at 228.

416. *Id.* at 83, 529 N.E.2d at 228.

417. *Id.* (citing ILL. REV. STAT. ch. 38, para. 122-1 (1971)).

418. *Id.* (citing ILL. REV. STAT. ch. 38, para. 122-1 (Supp. 1984)). Section 122-1 as amended states: "No proceedings under this Article shall be commenced more than 10 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence." ILL. REV. STAT. ch. 38, para. 122-1 (1987).

419. *Bates*, 124 Ill. 2d at 84, 529 N.E.2d at 228.

420. *Id. See* People v. Bates, 152 Ill. App. 3d 1163, 515 N.E.2d 1066 (1st Dist. 1987). The appellate court held that when limitations are shortened so as to instantaneously bar petitions that fall outside the new limitation period, those defendants affected must be given a reasonable time to file. *Bates*, 124 Ill. 2d at 84, 529 N.E.2d at 228.

be applied retroactively.[421] In the alternative, the defendant contended that he should have been entitled to file his petition within a reasonable time after the amendment's effective date, arguing that the court should create a safety valve for those petitions that were instantaneously barred by this enactment.[422]

The supreme court concluded, however, that the shortened limitation period should be applied retroactively.[423] The court then rejected the defendant's safety valve argument.[424] It found that the legislature included a safety valve in section 122-1 by qualifying the ten-year limitation period with an exception for "culpable negligence."[425] The defendant's petition failed to allege a lack of "culpable negligence," and the court, therefore, reversed the appellate court and dismissed the defendant's petition.[426]

In *People v. Porter*,[427] the court consolidated three cases to address the issue of whether section 122-2.1 of the Post-Conviction Hearing Act[428] is unconstitutional.[429] In *Porter*, the defendants

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421. *Bates*, 124 Ill. 2d at 85, 529 N.E.2d at 229.

422. *Id.* at 86, 529 N.E.2d at 229. In Meegan v. Village of Tinley Park, 52 Ill. 2d 354, 359, 288 N.E.2d 423, 426 (1972), the supreme court held that the legislature may validly shorten the time to bring a pre-existing cause of action if "a reasonable time exists for the presentation of a claim after enactment of [the] statute."

423. *Bates*, 124 Ill. 2d at 86, 529 N.E.2d at 229. In People v. Orlicki, 4 Ill. 2d 342, 354, 122 N.E.2d 513, 519 (1954), the court retroactively applied a reduced limitation period for bringing a claim under the Dram Shop Act. The *Orlicki* court reasoned that because the legislature created the rights under the Dram Shop Act, the legislature had the corresponding power to repeal those rights. *Id.* at 353, 122 N.E.2d at 518. Moreover, the power to repeal statutory enactments includes the lesser power to modify time limitations for bringing actions under them. *Id.* The *Orlicki* court also noted that statutes of limitations are procedural in character and that procedural amendments are generally applied retroactively. *Id.*

The defendant in *Bates* contended that *Orlicki* should not apply to the Post-Conviction Hearing Act. *Bates*, 124 Ill. 2d at 85, 529 N.E.2d at 229. The defendant relied on People v. Lansing, 35 Ill. 2d 247, 220 N.E.2d 218 (1966), in which the court refused to apply rectroactively an amendment to the Post-Conviction Hearing Act that lengthened the limitation period. *Bates*, 124 Ill. 2d at 86, 529 N.E.2d at 229. The *Bates* court, however, distinguished *Lansing* by recognizing the distinction between cutting off a cause of action by applying a shortened statute of limitation period, and reviving a cause of action by lengthening the statute of limitation. *Id.* The court stated: "In most jurisdictions the general rule is laid down, without exception or qualification, that, after an action has become barred by an existing Statute of Limitations, no subsequent legislation will remove the bar or revive the cause of action." *Id.* (quoting *Lansing*, 35 Ill. 2d at 250, 220 N.E.2d at 220).

424. *Bates*, 124 Ill. 2d at 88-89, 529 N.E.2d at 230-31.

425. *Id.* at 88, 529 N.E.2d at 230. The court noted that it is very possible that the "culpable negligence" exception could be "a more expansive right to post-conviction relief than a 'reasonable time' rule." *Id.*

426. *Id.* at 90, 520 N.E.2d at 231.

427. 122 Ill. 2d 64, 521 N.E.2d 1158 (1988).

428. ILL. REV. STAT. ch. 38, para. 122-2.1 (1987). Section 122-2.1 provided:

filed pro se post-conviction petitions.[430] The trial court found these petitions to be patently without merit and dismissed them pursuant to section 122-2.1.[431]

On appeal, the defendants contended that section 122-2.1 unconstitutionally conflicts with Supreme Court Rule 651(c),[432] in violation of the doctrine of separation of powers.[433] The Illinois Supreme Court found the defendants' argument to be without merit because rule 651(c) deals specifically with appeals from post-conviction proceedings.[434] Section 122-2.1, on the other hand, pertains to an indigent petitioner's right at the trial level.[435] Thus, no conflict can exist between provisions that address the appointment of counsel at different levels in the post-conviction process.[436] Holding that section 122-2.1 does not violate the doctrine of separation of powers,[437] the court affirmed the circuit court's dismissal

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> (a) Within 30 days after the filing and docketing of each petition the court shall examine such petition, and enter an order thereon pursuant to this Section. If the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the finding of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry.

Id.

429. *Porter*, 122 Ill. 2d at 70, 521 N.E.2d at 1159. The court consolidated *People v. Singleton* and *People v. Mason* with *Porter*.

430. *Id.* at 69, 521 N.E.2d at 1159.

431. *Id.*

432. ILL. S. CT. R. 651(c), ILL. REV. STAT. ch. 110A, para. 651(c) (1987). Rule 651 provides in pertinent part: "Record for Indigents; Appointment of Counsel. Upon the timely filing of notice of appeal in a post-conviction proceeding, . . . the trial court . . . shall appoint counsel on appeal . . . ." *Id.*

433. *Porter*, 122 Ill. 2d at 71, 521 N.E.2d at 1160. The defendants claimed that the record on appeal following a dismissal of a pro se petition without appointment of counsel does not satisfy the requirements of Supreme Court Rule 651(c). *Id.* at 72, 521 N.E.2d at 1160. The defendants reasoned that Rule 651(c) required the appellate record of a post-conviction proceeding to show that the appointed counsel of the petitioner has met certain procedural requirements at the trial level. *Id.* According to the defendants, the appellate record must show that the appointed counsel at the *trial level* has: "(1) consulted with petitioner to ascertain his contention of deprivations of constitutional rights, (2) examined the record of the proceedings at the trial, and (3) has made any necessary amendments to the *pro se* petition for an adequate presentation of the petitioner's contention." *Id.* The defendants argued that these requirements of Rule 651(c) cannot be squared with section 122-2.1. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. The court indicated that section 122-2.1 gave rise to no separation of powers violation because "appointment of counsel at the hearing stage of the post-conviction proceeding [is] a legislative matter." *Id.* at 72-73, 521 N.E.2d at 1160 (citing People v. Ward, 124 Ill. App. 3d 974, 464 N.E.2d 1144 (4th Dist. 1984)).

of the defendants' post-conviction petitions.[438]

X. LEGISLATION

A. *Sentencing*

Public Act 85-349 added a new paragraph to Section 5-5-3.2 of the Unified Code of Corrections.[439] The amendment permits a court to impose an extended term for the first degree murder of a peace officer or a fireman acting in the course of his official duties.[440] The State must establish that the defendant knew or should have known that the victim killed was a peace officer or fireman.[441]

A defendant convicted of committing a felony while on pre-trial release now is subject to a consecutive sentence.[442] Public Act 85-258 provides that the sentence imposed for that felony shall be served consecutive to any sentence imposed for the previous felony convictions.[443] The sentences are to be served consecutively, regardless of the order in which the judgments of conviction are entered.[444]

The Illinois Legislature, by enacting Public Act 85-1003, removed a sentencing court's discretion regarding another consecutive sentence provision in the Unified Code of Corrections.[445] Pursuant to Public Act 85-1003, a sentencing court now must impose a consecutive sentence if the defendant is convicted of a class X or class 1 felony involving severe bodily injury or is convicted of criminal sexual assault.[446]

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438. *Id.* at 86, 521 N.E.2d at 1167. The court also found that section 122-2.1 does not violate the due process clauses of the federal and state constitutions and does not violate the doctrine of equal protection. *Id.* at 73-78, 521 N.E.2d at 1161-63.

Finally, the defendant contended that section 122-2.1 is not severable from section 122-8, which was held to be unconstitutional in People v. Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1986), and, therefore, is void. *Porter*, 122 Ill. 2d at 78, 521 N.E.2d at 1163. Section 122-8 required that a judge other than the trial judge hear a post-conviction petition. ILL. REV. STAT. ch. 38, para. 122-8 (1987). The court found these provisions to be severable because they were distinct and operated independently of each other. *Porter*, 122 Ill. 2d at 80, 521 N.E.2d at 1164.

439. ILL. ANN. STAT. ch. 38, para. 1005-5-3.2 (Smith-Hurd Supp. 1988).

440. *Id.* This amendment does not apply to a defendant sentenced to death or to a term of natural life imprisonment. *Id.*

441. *Id.*

442. ILL. REV. STAT. ch. 38, para. 1005-8-4 (1987).

443. *Id.*

444. *Id.*

445. ILL. REV. STAT. ch. 38, para. 1005-8-4(a) (1987).

446. *Id.*

B. *Sex Offenses*

Public Act 85-688 amended section 12-18 of the Criminal Code to increase compensation to sexually-abused victims.[447] Pursuant to this amendment, a court may order the sex offender to pay all or a portion of the victim's expenses for medical or psychiatric treatment.[448]

Public Act 85-872 amended the habitual criminal statute.[449] The amendment added a conviction for criminal sexual assault under paragraph 12-13[450] as an offense that will qualify the defendant as an habitual criminal.[451]

C. *Arrest and Trial Procedure*

Public Act 85-388 amended section 114-12 of the Code of Criminal Procedure[452] to provide for a "good faith" exception to the Illinois exclusionary rule. At a hearing on a defendant's motion to suppress evidence, the State may now submit evidence of a peace officer's objective and reasonable good faith belief that his conduct was proper.[453] The court may deny the defendant's motion if it finds that the peace officer acted in good faith in seizing the evidence.[454]

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447. ILL. REV. STAT. ch. 38, para. 12-18(d) (1987).

448. *Id.* The crimes subject to this provision are defined in sections 12-13 through 12-16 of the Criminal Code. *Id.*

449. ILL. REV. STAT. ch. 38, para. 33B-1 (1987).

450. ILL. REV. STAT. ch. 38, para. 12-13 (1987).

451. ILL. REV. STAT. ch. 38, para. 33B-1 (1987). A conviction for a class X felony or for first degree murder will also qualify a defendant as an habitual criminal. *Id.*

452. ILL. REV. STAT. ch. 38, para. 114-12 (1987).

453. ILL. REV. STAT. ch. 38, para. 114-12(b)(1) (1987). In establishing this "good faith" exception, the Illinois Legislature essentially tracked two recent United States Supreme Court decisions. In United States v. Leon, 484 U.S. 897, 913 (1984), the Court held that the fourth amendment exclusionary rule does not apply to evidence obtained by a police officer acting in "good faith" pursuant to a warrant that is ultimately found to lack probable cause. Similarly, the Court recently held that the exclusionary rule does not apply to evidence obtained during a warrantless search, which is conducted pursuant to a statute that is later declared to be unconstitutional. Illinois v. Krull, 107 S. Ct. 1160, 1167-68 (1987).

454. ILL. REV. STAT. ch. 38, para. 114-12(b)(1) (1987). The legislature defined good faith to mean whenever evidence is obtained by a police officer:

> (i) pursuant to a search or an arrest warrant obtained from a neutral and detached judge, which warrant is free from obvious defects other than non-deliberate errors in preparation and contains no material misrepresentation by any agent of the State, and the officer reasonably believed the warrant to be valid; or
> (ii) pursuant to a warrantless search incident to an arrest for violation of a statute or local ordinance which is later declared unconstitutional or otherwise invalidated.

Id.

Public Act 85-463 amended the statute regarding the method of trial.[455] In a criminal prosecution, in which the only offense charged is first degree murder, a class X felony, or criminal sexual abuse, a jury trial is mandatory unless both the State and the defendant submit a waiver in writing.[456] Before this amendment, the defendant alone could waive a jury for any of those offenses.[457]

According to Public Act 85-236, a person arrested pursuant to a warrant must now be taken to the nearest and most accessible judge in the county where the arrest took place.[458] No longer must the arrestee be brought before the judge who issued the warrant.

XI. CONCLUSION

The length of this *Survey* Article illustrates the great weight of criminal procedure issues on the Illinois Supreme Court's docket. Out of this multiplicity of issues arise two areas that deserve special emphasis: the rights of the accused under the fourth and fifth amendments, and the death penalty. In analyzing the rights of the accused, the court continued to follow the lead of the United States Supreme Court, rather than to explore the possibility of different, perhaps broader, interpretations under the Illinois Constitution. Yet, the court generally interpreted Supreme Court tenets to the defendant's advantage.

Justice Clark in *People v. White*[459] wrote a veritable primer on the application of the *Payton* rule and the "fruit of the poisonous tree." He knocked down one prosecution argument after another, finding that the defendant possessed "standing" to contest the warrantless entry of the police into his brother's home to arrest him;[460] that no exigent circumstances existed;[461] and finally, that there was no attenuation of the "taint" of his arrest,[462] so that his later confession had to be excluded. Justice Clark further emphasized that although a *Payton* violation occurs when the warrantless entry occurs, a confession given later at the police station is the fruit of that violation even though the confession is not elicited in the home

455. ILL. REV. STAT. ch. 38, para. 115-1 (1987).
456. *Id.*
457. ILL. REV. STAT. ch. 38, para. 115-1 (1985).
458. ILL. REV. STAT. ch. 38, para. 109-1 (1987).
459. 117 Ill. 2d 194, 512 N.E.2d 677 (1988). *See supra* notes 1-22 and accompanying text.
460. *White*, 117 Ill. 2d at 210-16, 512 N.E.2d at 682-85.
461. *Id.* at 318-20, 512 N.E.2d at 686-87.
462. *Id.* at 223, 512 N.E.2d at 688.

itself.[463] The prosecution had tried to limit that application of *Payton* to in-home confessions.[464]

In the application of *Miranda* principles, defendants won some and lost some. The court seemed to back away from its earlier decision in *People v. Smith*.[465] The court in *Smith* held that there can be no waiver under *Miranda* if the police do not inform an accused in custody that his lawyer had tried to see him.[466] After *Smith*, the United States Supreme Court concluded that waiver was possible in a similar situation in *Moran v. Burbine*,[467] on the theory that what the suspect does not know (*i.e.*, his lawyer is trying to see him) cannot affect whether his waiver is knowing and voluntary.[468]

The court in *People v. Holland*[469] upheld a finding of waiver in circumstances where *Smith* seemed to dictate that no waiver was possible. The court distinguished *Holland* from *Smith* on the ground that the defendant in *Smith* had retained counsel, who attempted to see him, whereas Holland was unaware that a relative had retained counsel for him.[470] Thus, the holding in *Burbine* governed.[471]

In analyzing problems posed when a defendant asserts his rights under *Miranda*, the court strictly applied *Miranda*'s requirements to the prosecution's benefit in one case and to the defendant's in another. For instance, in *People v. Foster*,[472] police confronted the defendant, who had exercised his right to remain silent some time earlier, with the news that a witness had implicated him in the crime.[473] The defendant then confessed.[474] The court concluded that in this sequence of events, the police had "scrupulously honored" the defendant's right to cut off questioning.[475]

463. *Id.* at 228, 512 N.E.2d at 690.

464. *Id.*

465. 93 Ill. 2d 179, 442 N.E.2d 1325 (1982).

466. *Id.* at 189, 442 N.E.2d at 1329.

467. 476 U.S. 412 (1986).

468. *Id.* at 422-23.

469. 121 Ill. 2d 136, 520 N.E.2d 270 (1987). *See supra* notes 67-77 and accompaning text.

470. *Holland*, 121 Ill. 2d at 151-53, 520 N.E.2d at 277.

471. *Id.*

472. 119 Ill. 2d 69, 518 N.E.2d 82 (1987). *See supra* notes 45-55 and accompanying text.

473. *Foster*, 119 Ill. 2d at 86, 518 N.E.2d at 89.

474. *Id.*

475. *Id.*

In contrast, the court in *People v. St. Pierre*[476] examined a confused dialogue between a suspect and the police during a custodial interrogation and concluded that the defendant had asserted his right to counsel under *Miranda*.[477] The court turned a deaf ear to the prosecution's argument that the defendant's further response to interrogation was an initiation by him of a conversation about the crime and, therefore, a waiver under *Edwards v. Arizona*.[478]

Finally, during the *Survey* period there were several opinions addressing a congeries of issues involving the death penalty. The death penalty withstood attack on numerous constitutional grounds. For instance, the court found that the death penalty was not being imposed in a racially discriminatory manner,[479] and that death by lethal injection is not cruel and unusual punishment.[480] This year, as last year, the court showed its reluctance to declare any part of the Illinois death penalty statute unconstitutional.

The court reaffirmed that the touchstone for admissibility of evidence in the penalty phase of a death penalty sentencing hearing (as contrasted with the eligibility phase) is reliability. The court reversed a death sentence in *People v. Rogers*[481] on the ground that admitting a co-defendant's confession was error given the inherent unreliability of such statements.[482] In *People v. Simms*,[483] the court reversed a death sentence on the ground that admission of "victim impact" evidence constituted plain error.[484] The court, closely following the United States Supreme Court decision in *Booth v. Maryland*,[485] found that the emotional impact of such evidence undermines the reliability of the death penalty determination.[486]

With respect to eligibility factors for the death penalty, the court found that a person who is found guilty-but-mentally-ill of a quali-

476. 122 Ill. 2d 95, 522 N.E.2d 61 (1988). *See supra* notes 56-66 and accompanying text.

477. *St. Pierre*, 122 Ill. 2d at 111, 522 N.E.2d at 68.

478. *Id.* at 113, 522 N.E.2d at 68.

479. People v. Davis, 119 Ill. 2d 61, 518 N.E.2d 78 (1987). *See supra* notes 326-36 and accompanying text.

480. People v. Stewart, 121 Ill. 2d 93, 520 N.E.2d 348 (1988). *See supra* notes 337-44 and accompanying text.

481. 123 Ill. 2d 487, 528 N.E.2d 667 (1988). *See supra* notes 356-64 and accompanying text.

482. *Rogers*, 123 Ill. 2d at 521-22, 528 N.E.2d at 684.

483. 121 Ill. 2d 259, 520 N.E.2d 308 (1988). *See supra* notes 365-72 and accompanying notes.

484. *Simms*, 121 Ill. 2d at 272-73, 520 N.E.2d at 313-14.

485. 107 S. Ct. 2529 (1987).

486. *Simms*, 121 Ill. 2d at 272-72, 520 N.E.2d at 313-14.

fying homicide is eligible for the death penalty.[487] The court found as well that for purposes of using multiple murders as the eligibility factor, it is the sequence of convictions for murder which governs, not the sequence of the homicides themselves.[488]

Perhaps the most significant development in criminal procedure during the *Survey* period occurred not in the supreme court, but in the Illinois General Assembly where the legislature enacted a "good faith exception" to the exclusionary rule in certain circumstances.[489] This exception essentially follows recent United States Supreme Court opinions that provide for such an exception. For instance, the United States Supreme Court held that the fourth amendment exclusionary rule does not apply to evidence seized by police officers pursuant to a warrant that is later found to lack probable cause.[490] Similarly, the Supreme Court recently held that the exclusionary rule does not apply to evidence obtained during a warrantless search, which was conducted pursuant to a statute that is later declared unconstitutional.[491]

The Illinois Supreme Court has previously implied that it would follow United States Supreme Court interpretations of search and seizure principles.[492] This new statute will undoubtedly be challenged and will provide the court in the near future with the opportunity further to explore the relationship between the Illinois Constitution and the Constitution of the United States in the area of criminal procedure.

487. People v. Crews, 122 Ill. 2d 266, 522 N.E.2d 1167 (1988). *See supra* notes 345-50 and accompanying text.

488. People *ex rel.* Daley v. Strayhorn, 121 Ill. 2d 470, 521 N.E.2d 864 (1988). *See supra* notes 313-25 and accompanying text.

489. ILL. REV. STAT. ch. 38, para. 114-12 (1987). *See supra* notes 452-54 and accompanying text.

490. United States v. Leon, 484 U.S. 897, 913 (1984).

491. Illinois v. Krull, 107 S. Ct. 1160, 1167-68 (1987).

492. *See* People v. Tisler, 103 Ill. 2d 226, 245, 469 N.E.2d 147, 157 (1984).