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Evidence

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I. INTRODUCTION

The law of evidence in Illinois has developed from the common law, from statutory evidentiary rules, and from selective adoption of the Federal Rules of Evidence. The purpose of this Article is to update practitioners on changes and refinements in Illinois' unique law of evidence that occurred during the *Survey* year.

II. WITNESSES

A. *Expert Witnesses*

In *Trower v. Jones*,[1] the Illinois Supreme Court overturned eighty years of precedent[2] by holding that a trial judge has the dis-

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1. 121 Ill. 2d 211, 520 N.E.2d 297 (1988).

2. *See* McMahon v. Chicago City Ry. Co., 239 Ill. 334, 88 N.E. 223 (1909) (impeachment limited solely to the number of times the physician expert testified for the defendant); Chicago City Ry. Co. v. Smith, 226 Ill. 178, 80 N.E. 716 (1907) (no cross-examination about whether the principal part of a physician expert's work was consulting

cretion to permit cross-examination of an expert concerning both the frequency with which he testifies for one category of party and the annual income derived from serving as an expert.[3] Traditionally, Illinois courts have held that such evidence is only admissible upon an affirmative showing of bias.[4]

In *Trower*, the plaintiffs hired a medical expert to review the plaintiffs' medical malpractice claim and to testify about the treating physician's conduct.[5] The trial judge permitted the defense counsel to cross-examine the expert on whether he usually testified for "people suing doctors."[6] The Illinois Appellate Court for the Fourth District held that the defense counsel's cross-examination of the expert constituted reversible error because there was no direct connection between the expert's pecuniary interest and his testimony.[7]

The Illinois Supreme Court reversed the appellate court's decision, holding that cross-examination on the frequency of an expert's testimony for one party and on the annual income from such testimony is admissible.[8] The court reasoned that its earlier decisions[9] held only that a trial judge did not abuse his discretion in excluding such evidence.[10] The supreme court also cited the following changes in expert witness testimony as supporting its con-

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with attorneys); Chicago & E. Ill. R.R. v. Schmitz, 211 Ill. 446, 71 N.E. 1050 (1904) (no cross-examination of physician expert about his opinion in other suits).

3. *Trower*, 121 Ill. 2d at 217-18, 520 N.E.2d at 302.

4. *See* E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 705.2 (4th ed. 1984).

5. *Trower*, 121 Ill. 2d at 213, 520 N.E.2d at 298. The expert was hired through an expert locator service. *Id.*

6. *Id.* at 214, 520 N.E.2d at 298.

7. Trower v. Jones, 149 Ill. App. 3d 705, 721-22, 500 N.E.2d 1134, 1145 (4th Dist. 1986). The appellate court stated that an expert witness could only be questioned on the number, frequency, and income of referrals from the plaintiffs' attorney. *Id.* at 722-23, 500 N.E.2d at 1145. The appellate court relied on Schoolfield v. Witkowski, 54 Ill. App. 2d 111, 203 N.E.2d 460 (1st Dist. 1964), which held that an expert witness cannot be cross-examined about testifying only for plaintiffs during the preceding year. *Trower*, 149 Ill. App. 3d at 721, 500 N.E.2d at 1144. The appellate court also stated that cross-examination regarding compensation for expert testimony in unrelated cases is not relevant to show that the expert was not a full-time practicing clinician. *Id.* at 723, 500 N.E.2d at 1146. The appellate court declined to extend the holding in Sears v. Rutishauser, 102 Ill. 2d 402, 466 N.E.2d 210 (1984), which permitted cross-examination on how often the plaintiff's expert received referrals from the plaintiff's attorney and how much income he received from the referrals. *Trower*, 149 Ill. App. 3d at 722, 500 N.E.2d at 1145.

8. *Trower*, 121 Ill. 2d at 215, 520 N.E.2d at 299.

9. *See, e.g.*, Chicago City Ry. Co. v. Smith, 226 Ill. 178, 80 N.E. 716 (1907); Chicago & E. Ill. R.R. v. Schmitz, 211 Ill. 446, 71 N.E. 1050 (1904).

10. *Trower*, 121 Ill. 2d at 215, 520 N.E.2d at 299.

clusion: Experts now give opinions without stating the factual basis;[11] experts have increased latitude in giving their opinions;[12] expert locator services have increased the availability of experts;[13] and experienced expert witnesses are better able to handle cross-examination.[14]

Regarding the admissibility of testimony on the frequency with which an expert witness appears for one party, the court reasoned that testifying for only one side may indicate a "predisposition to exculpate or find fault,"[15] a factor "of some value" to jury deliberation.[16] The court also rejected the suggestion that secondary experts would be needed to rehabilitate the expert's testimony because the expert can explain the reason for testifying for one side.[17]

In *Witherell v. Weimer*,[18] the Illinois Supreme Court redefined its requirement[19] that only an expert licensed in the same "school of medicine" as the defendant can establish the standard of medical

11. *See* Wilson v. Clark, 84 Ill. 2d 186, 417 N.E.2d 1322, *cert. denied*, 454 U.S. 836 (1981) (adopting Rules 703 and 705 of the Federal Rules of Evidence, which permit expert witnesses to give opinions without prior disclosure of the facts or data underlying the opinions); FED. R. EVID. 703, 705.

12. *Trower*, 121 Ill. 2d at 215, 520 N.E.2d at 299 (citing Wilson v. Clark, 84 Ill. 2d 186, 417 N.E.2d 1322, *cert. denied*, 454 U.S. 836 (1981) (allowing medical expert to render an opinion without disclosing underlying facts including hospital records)).

13. *Id.* at 216, 520 N.E.2d at 299.

14. *Id.* The increased witness latitude and expertise make it more difficult for the cross-examining attorney to probe for bias, partisanship, or financial interest. *Id.* at 217, 520 N.E.2d at 300. The court also recognized that some experts turn favorable verdicts into higher fees and more invitations to become a witness. *Id.* at 218, 520 N.E.2d at 300. The court rejected the argument that questioning about past fees and the frequency of testimony would require prolonged rehabilitation because high income would not necessarily mean that an opinion was biased. *Id.* at 219, 520 N.E.2d at 301. Counsel, however, should limit rehabilitation to brief testimony on how the witness determines fees and how the witness's fees compare with those charged by other expert witnesses in the same field. *Id. See also* Graham, *Impeaching the Professional Expert Witness by Showing of Financial Interest*, 53 IND. L.J. 35, 40 (1977).

15. *Trower*, 121 Ill. 2d at 220, 520 N.E.2d at 301.

16. *Id.* For example, a physician may choose to testify only for medical malpractice defendants and not for malpractice plaintiffs to avoid colleagues' displeasure. *Id.*

17. *Id.* at 221, 520 N.E. at 301-02. The extent of explanation is properly left to the circuit court's discretion. *Id.*

18. 118 Ill. 2d 321, 515 N.E.2d 68 (1987).

19. *See* Dolan v. Galluzzo, 77 Ill. 2d 279, 396 N.E.2d 13 (1979) (licensed orthopedic surgeon not permitted to testify on standard of care for defendant podiatrist, even though the surgeon performed the same procedure). *See also* Purtill v. Hess, 111 Ill. 2d 229, 489 N.E.2d 867 (1986) (physician permitted to testify on standard of care for defendant physician); Greenberg v. Michael Reese Hosp., 83 Ill. 2d 282, 415 N.E.2d 390 (1980) (health physicist, an expert in radiation treatment, permitted to testify on standard of care of the hospital's x-ray treatment).

care in a medical malpractice trial.[20] In *Witherell*, both the defendant physician and the plaintiff's expert were from the same school of medicine, but the expert was not licensed.[21] The court stated that the absence of a license did not prejudice the defendant.[22] On the other hand, the testimony of an expert educated in a different school of medicine would unfairly prejudice the defendant.[23]

B. Cross-Examination

In *People v. Gacho*,[24] the Illinois Supreme Court reiterated its position that the scope of cross-examination rests within the discretion of the trial judge whose ruling will be overturned only on a showing of manifest prejudice to the defendant.[25] The defendant in *Gacho* argued that the State's cross-examination of him concerning evidence of other crimes was improper and inadmissible.[26] The supreme court, however, determined that the State may ask questions on cross-examination to explain, qualify, discredit, or destroy a criminal defendant's direct examination.[27] The court also found

20. *Witherell*, 118 Ill. 2d at 334, 515 N.E.2d at 74. In *Witherell*, the defendant physician continued to give the plaintiff estrogen therapy in spite of a condition that contraindicated such therapy and that resulted in further harm to the plaintiff. *Id.* at 324-32, 515 N.E.2d at 70-73. Because the defendant warned the plaintiff that car trips also would aggravate the condition, the plaintiff's repeated prolonged auto trips were adjudged to be comparatively negligent. *Id.* at 339, 515 N.E.2d at 77. The *Witherell* court also affirmed the use of the Physician's Desk Reference ("PDR") as a basis for expert testimony. *Id.* at 334, 515 N.E.2d at 75 (citing Ohligschlager v. Proctor Community Hosp., 55 Ill. 2d 411, 303 N.E.2d 392 (1973)).

21. *Id.* at 334, 515 N.E.2d at 74.

22. *Id.* Both the supreme court and the appellate court seemed to ignore ILL. REV. STAT. ch. 110, para. 8-2501 (1987), which requires the trial court to evaluate the "relationship of the medical specialties of the witness to the medical problem and the type of treatment administered in the case." Neither court evaluated whether the witness's special expertise in the drug field prevented him from properly evaluating the standard of care.

23. *See Dolan*, 77 Ill. 2d at 285, 396 N.E.2d at 16.

24. 122 Ill. 2d 221, 522 N.E.2d 1146, *cert. denied*, 109 S. Ct. 264 (1988).

25. *Id.* at 246, 522 N.E.2d at 1157-58 (citing People v. Wright, 111 Ill. 2d 128, 149, 490 N.E.2d 640, 647 (1985), *cert. denied*, 479 U.S. 1101 (1987)).

26. *Id.* at 245, 522 N.E.2d at 1157. During a trial for a drug-related robbery-murder, the State cross-examined the defendant about his use of cocaine and about a letter that he sent to his girlfriend. *Id.* The letter stated: "I still believe I can escape from here one way or the other." *Id.* The letter also cautioned his girlfriend that it would help his case if she stayed in Arkansas and did not testify. *Id.* This letter was admissible under the party-opponent hearsay exception because it showed the defendant's consciousness of guilt. *Id.* at 246, 522 N.E.2d at 1158.

27. *Id.* at 247, 522 N.E.2d at 1158 (citing People v. Williams, 66 Ill. 2d 478, 486-87, 363 N.E.2d 801, 805 (1977) (the trial court's admission of testimony regarding defendant's involvement in a prior burglary when defendant was on trial for murder was not an abuse of discretion)).

that the defendant waived his objection to the admission of prior cocaine dealing by his failure to object at trial.[28] Furthermore, the court stated that the admission of evidence of other crimes was not prejudicial under the facts of the case.[29]

Further, the court upheld witness impeachment by a prior inconsistent statement when the prosecutor reminds the witness of the time, place, substance, and circumstances of the prior statement.[30] In *Gacho*, the prosecutor impeached the defendant's wife with a prior inconsistent statement that she made to the police on the night of her husband's arrest.[31] The supreme court rejected the defendant's contention that the trial court erred in failing to give a limiting instruction regarding the prior inconsistent statement.[32] The supreme court concluded that the defendant waived this argument by neither requesting the instruction nor objecting at trial.[33]

In *People v. Thompkins*,[34] the Illinois Supreme Court held that the trial court did not abuse its discretion by limiting cross-examination into a State witness's bias.[35] The trial court restricted cross-examination of the State's chief witness concerning a pending cocaine charge because the witness had already testified about the plea agreement on that charge.[36] The supreme court stated that

28. *Id.* at 245, 522 N.E.2d at 1157.

29. *Id.* at 246, 522 N.E.2d at 1158. The court also agreed that it was proper to admit a letter stating defendant's intent to escape and to influence his girlfriend improperly because it was evidence of guilt. *Id.*

30. *Id.* at 252, 522 N.E.2d at 1161 (citing People v. Cobb, 97 Ill. 2d 465, 479, 455 N.E.2d 31, 37 (1985) (proper foundation for impeachment existed because the cross-examination questions properly warned the witness of her prior inconsistent statement)).

31. *Id.* at 250-51, 522 N.E.2d at 1160. On direct examination, the witness stated that on the night of the murder her husband was home with her and the children and that she did not know if anyone came to her apartment because she was asleep. *Id.* at 251, 522 N.E.2d at 1160. On cross-examination, she denied telling a police officer on the night of her husband's arrest that she heard her husband planning to rob and kill two drug dealers and that she had cleaned the cocaine pipes the dealers used at their apartment. *Id.* at 251-52, 522 N.E.2d at 1160. Later, on rebuttal, a police officer testified regarding this earlier statement. *Id.*

32. *Id.* at 252-53, 522 N.E.2d at 1160-61.

33. *Id.* at 253, 522 N.E.2d at 1160-61.

34. 121 Ill. 2d 401, 521 N.E.2d 38 (1988).

35. *Id.* at 441, 521 N.E.2d at 55-56. In *Thompkins*, the supreme court upheld a trial court's exercise of discretion on the relevancy of evidence. *Id.* at 455, 521 N.E.2d at 61-62. The supreme court refused to overturn the trial judge's decision that mitigating letters from family and acquaintances were largely irrelevant. *Id.* at 454-55, 521 N.E.2d at 62. The trial judge found that most of the letters were from family or people only slightly familiar with the defendant. *Id.*

36. *Id.* at 441-42, 521 N.E.2d at 55-56. Bias can be shown by evidence that the witness testified in the hopes of a dismissal of a pending charge. *See, e.g.*, People v. Owens, 102 Ill. 2d 88, 464 N.E.2d 261, *cert. denied*, 469 U.S. 963 (1984) (jury was aware of pending burglary charge and witness believed that testimony would help him in his case);

the error, if any, in refusing to permit further inquiry into the witness's cocaine charge was harmless.[37]

In addition, the supreme court upheld the trial court's admission of testimony regarding a witness's fear of the defendant.[38] After cross-examination concerning the witness's motives, the State rehabilitated the witness by eliciting testimony that the witness feared the defendant.[39] The supreme court distinguished cases that disallowed a witness's testimony regarding a defendant's threats or intimidation.[40] In *Thompkins*, the court found that the witness merely expressed fear of the defendant. This testimony was admitted for the limited purpose of explaining his relocation request,[41] which had been introduced during cross-examination.[42]

In *People v. Orange*,[43] the Illinois Supreme Court held that to qualify as a prior inconsistent statement, a statement must be inconsistent with trial testimony, not earlier statements.[44] In *Or-*

People v. Steel, 52 Ill. 2d 442, 447, 288 N.E.2d 355, 359 (1972) (jury knew witness was in protective custody and had received no promise about his pending charge).

37. *Thompkins*, 121 Ill. 2d at 442, 521 N.E.2d at 56. The supreme court also upheld the admission of evidence that a murder victim left a spouse and child after the witness established the identity of the decedent. *Id.* at 446, 521 N.E.2d at 58. At trial, the witness testified that she was the victim's common-law wife and that she had a child by the deceased. *Id.* Although evidence of a surviving spouse and children is generally inadmissible because it is irrelevant and unduly inflames the jury, the court reasoned that a jury is not unfairly prejudiced when the reference is isolated and not presented to the jury as bearing on defendant's guilt. *Id.* at 446-47, 521 N.E.2d at 58. *See also* People v. Ramirez, 98 Ill. 2d 439, 452-54, 457 N.E.2d 31, 37-38 (1983), *cert. denied*, 107 S. Ct. 2189 (1987) (calling the victim's widow during the sentencing hearing to testify merely to her marriage was error); People v. Davis, 97 Ill. 2d 1, 27-28, 452 N.E.2d 525, 537-38 (1983) (evidence that victim's wife had delivered a baby on the day after the murder was unduly prejudicial); People v. Jordan, 38 Ill. 2d 83, 91-92, 230 N.E.2d 161, 165-66 (1967) (victim's mother testifying that victim had a wife and child was harmless error).

38. *Thompkins*, 121 Ill. 2d at 442-44, 521 N.E.2d at 56.

39. *Id.* On redirect, the witness affirmed that he had requested relocation because he was afraid the defendant would harm him. *Id.*

40. *Id.* at 442-45, 521 N.E.2d at 56 (distinguishing People v. Herbert, 361 Ill. 64, 196 N.E. 821 (1935) (witness's admission that police were detailed to her home gave the jury the impression that she feared the defendant, even though she had not requested a police guard)). *See also* People v. Dace, 114 Ill. App. 3d 908, 449 N.E.2d 1031 (3d Dist. 1983) (prosecutor implied that the defendant made threats against the witness by repeatedly asking if a witness was afraid to testify); People v. Mostafa, 5 Ill. App. 3d 158, 274 N.E.2d 846 (1st Dist. 1971) (prosecutor's questioning implied that the accused would kill a 16-year-old pregnant witness).

41. *Thompkins*, 121 Ill. 2d at 444, 521 N.E.2d at 56.

42. *Id.* at 444, 521 N.E.2d at 57. The supreme court reasoned that the State is given wide latitude to overcome the negative impact of a cross-examination revealing a witness's bias and motive to lie. *Id.*

43. 121 Ill. 2d 364, 521 N.E.2d 69, *cert. denied*, 109 S. Ct. 247 (1988).

44. *Id.* at 381, 521 N.E.2d at 77. *See* ILL. REV. STAT. ch. 38, para. 115-10.1(a) (1987).

ange, a witness made a statement to the police immediately after the crime that inculpated the defendant.[45] Later, in a pretrial letter and at trial, the same witness confessed to the crimes with which the defendant had been charged.[46] The State impeached the witness's confession by using the prior inconsistent statement that he made to the police.[47] To rehabilitate the witness, the defendant sought to admit the witness's pretrial confession letter as a prior statement that was inconsistent with the police statement.[48] The supreme court upheld the trial court ruling that because the letter was consistent with trial testimony, the letter could not be admitted as a prior inconsistent statement.[49]

In *Orange*, the court also reaffirmed that records of juvenile adjudications are admissible as aggravating evidence at a capital sentencing hearing.[50] The defendant argued that the Juvenile Court Act[51] only allows the use of juvenile adjudications in sentencing under the Unified Code of Corrections[52] which does not contain the capital sentencing provisions.[53] The supreme court relied on legislative intent, noting that the Unified Code of Corrections incorporates the capital sentencing provision by reference.[54] Therefore, the court held that juvenile adjudications may properly be introduced at capital sentencing hearings.[55]

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45. *Orange*, 121 Ill. 2d at 371, 521 N.E.2d at 72.

46. *Id.* at 379, 521 N.E.2d at 76.

47. *Id.* at 380, 521 N.E.2d at 76.

48. *Id.* at 381, 521 N.E.2d at 77.

49. *Id.*

50. *Id.* at 388, 521 N.E.2d at 80 (citing People v. Owens, 102 Ill. 2d 88, 112-13, 464 N.E.2d 261, 272 (1984); People v. Stewart, 101 Ill. 2d 470, 494, 463 N.E.2d 677, 689, *cert. denied*, 469 U.S. 920 (1984)).

51. ILL. REV. STAT. ch. 37, para. 801-10 (1987). The Juvenile Court Act provides: "Evidence and adjudications in proceedings under this Act shall be admissible: . . . 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.

52. ILL. REV. STAT. ch. 38, paras. 1001-1-1 to 1008-6-1 (1987).

53. *Orange*, 121 Ill. 2d at 388, 521 N.E.2d at 80. The capital sentencing provisions are codified in the Criminal Code of 1961, ILL. REV. STAT. ch. 38, para. 9-1 (1987).

54. *Orange*, 121 Ill. 2d at 388, 521 N.E.2d at 80. Paragraph 1005-5-3(c)(1) of the Unified Code of Corrections states in pertinent part: "When a defendant is found guilty of murder, the State may either seek a sentence of imprisonment under § 5-8-1 of this Code, or where appropriate seek a sentence of death under § 9-1 of the Criminal Code of 1961." ILL. REV. STAT. ch. 38, para. 1005-5-3(c)(1) (1987).

55. *Orange*, 121 Ill. 2d at 388-89, 521 N.E.2d at 80. In *Orange*, the court also reviewed the application of the marital privilege to criminal proceedings. *Id.* at 384, 521 N.E.2d at 78 (citing People v. Sanders, 99 Ill. 2d 262, 457 N.E.2d 1241 (1983)). Exercise of the marital privilege requires a confidential communication shared only by the husband and wife, and the invocation of the privilege before the spouse's testimony. ILL. REV. STAT. ch. 38, para. 155-1 (1987). Following the defendant's testimony that he had not asked his girlfriend to "come into court" for him, his estranged wife testified that the

C. *Videotaped Deposition*

In *People v. Johnson*,[56] the Illinois Supreme Court held that the admission of an improperly made videotape resulted in reversible error in a sexual abuse trial.[57] In *Johnson*, the five-year-old victim was unable to testify coherently with the jury and defendant in the courtroom.[58] The trial court sustained the State's motion to videotape crucial parts of the victim's testimony with the jury absent and with the defendant watching a video monitor in another room.[59] The trial court relied on Supreme Court Rule 414, which authorizes the videotaping of depositions,[60] but only under the

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defendant told her that the girlfriend would provide him with a false alibi. *Orange*, 121 Ill. 2d at 384, 521 N.E.2d at 78. The court held that there was no error in admitting the wife's testimony because the defendant failed to invoke the privilege before his wife testified, and also because a third party was present during their conversation. *Id.* The court also stated that contrary to the defendant's assertions, the wife's testimony did properly rebut the defendant's testimony. *Id.* The defendant stated that the girlfriend had not agreed to testify for him. *Id.* In rebuttal, the wife testified that the defendant told her that the girlfriend would provide a false alibi. *Id.* Given the disparity between the two stories, the court held that the defendant's testimony had been rebutted properly. *Id.*

In *Orange*, the court also held that the trial judge properly invoked the attorney-client privilege on behalf of a defense witness. *Id.* at 378, 521 N.E.2d at 75. When he was initially picked up for questioning shortly after the murders, Kidd (who later became the defendant's chief witness) said that the defendant committed an arson and multiple homicide. *Id.* at 371, 521 N.E.2d at 72. At that time, Kidd was represented by the defendant's attorney. *Id.* at 373, 521 N.E.2d at 73. Later, the attorney withdrew from representing Kidd because of a conflict of interest. *Id.* at 377, 521 N.E.2d at 75. At trial Kidd was questioned and admitted committing the arson and murders. *Id.* at 371, 521 N.E.2d at 72. The State cross-examined Kidd and used the prior statement and shared attorney to impeach him. *Id.* at 373, 521 N.E.2d at 73. The State pointed out that after discussions with defendant's attorney, Orange and Kidd suddenly reversed their stories, which they could do again at Kidd's trial (a "frick and frack defense"). *Id.* During Kidd's rehabilitation, the defendant's attorney began to inquire into conversations between himself and Kidd, upon which the judge sustained the State's objection on the grounds of the attorney-client privilege, which Kidd had not waived. *Id.* at 377-78, 521 N.E.2d at 75. The defendant's counsel overstepped the bounds of the privilege by asking the witness to state why the defendant's counsel discontinued representing the witness. *Id.* The defendant's counsel was permitted to bring out only the fact that he had not represented the witness for more than a year. *Id.*

56. 118 Ill. 2d 501, 517 N.E.2d 1070 (1987).

57. *Id.* at 512, 517 N.E.2d at 1075.

58. *Id.* at 505, 517 N.E.2d at 1072.

59. *Id.*

60. *Id.* at 507, 517 N.E.2d at 1073 (citing People v. Zehr, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984) (videotaped testimony may be used instead of transcribed testimony)). *See also* Supreme Court Rule 414, which provides in pertinent part: "[I]f . . . the deposition . . . is necessary for the preservation of relevant testimony because of the substantial possibility it would be unavailable at the time of hearing or trial, the court may . . . order [it] . . . in accordance with rules providing for the taking of depositions in civil cases . . . ." ILL. S. CT. R. 414, ILL. REV. STAT. ch. 110A, para. 414 (1987).

same circumstances in which transcribed depositions are allowed.[61] In allowing the videotaped deposition, the appellate court determined that the witness was "unavailable" to testify.[62] The supreme court analyzed Federal Rule of Evidence 804 to determine if the victim was unavailable.[63] The supreme court concluded that an unwilling child is not unavailable to testify for purposes of Supreme Court Rule 414.[64] While a court may exclude disinterested persons from a child-abuse proceeding,[65] the new state law on videotaped testimony still requires that the defendant be permitted to be present at the recording.[66]

III. RELEVANCE

In *People v. Richardson*,[67] the Illinois Supreme Court held that crimes committed *after* a charged offense are admissible as evidence of other crimes.[68] The supreme court rejected the defendant's argument that the dissimilarity of the second crime committed three days after the murder prevented its use in proving the defendant's identity[69] because the other crimes need not be

61. *Johnson*, 118 Ill. 2d at 508, 517 N.E.2d at 1073. The court stated that although the trial judge has discretion to permit the use of videotaped depositions, this discretion presupposes that the standards for using any deposition have been satisfied. *Id.* at 507-08, 517 N.E.2d at 1073.

62. *Id.* at 508-09, 517 N.E.2d at 1073. Rule 804 of the Federal Rules of Evidence defines "unavailability" for use with respect to a hearsay exception if the declarant of the statement is unavailable as a witness. FED. R. EVID. 804. The *Johnson* court declined to adopt all of the definitions listed in Rule 804 but did "embrace the general principles reflected therein." *Johnson*, 118 Ill. 2d at 509, 517 N.E.2d at 1073. The court concluded that the Rule 804 definition of "unavailability" is very narrow and does not encompass the raped child's mere reluctance. *Id.* at 509, 517 N.E.2d at 1074.

63. *Johnson*, 118 Ill. 2d at 508-10, 517 N.E.2d at 1073-74.

64. *Id.* at 510, 517 N.E.2d at 1074.

65. ILL. REV. STAT. ch. 38, para. 115-11 (1987).

66. ILL. REV. STAT. ch. 38, para. 106A (1987). For a further discussion of *Johnson*, see Clarke & Jacobson, *Juvenile Law*, 20 LOY. U. CHI. L.J. 501, 502 (1989).

67. 123 Ill. 2d 322, 528 N.E.2d 612 (1988).

68. *Id.* at 339, 528 N.E.2d at 617. The defendant had committed two robberies after the armed robbery and murder for which he was on trial. *Id.* at 338, 528 N.E.2d at 617. In a second armed robbery committed three days after the murder, witnesses identified him, and the bullet he shot into a bystander was recovered and found to be the same as two bullets shot in the first robbery-murder. *Id.* at 339-40, 528 N.E.2d at 617. Following a third robbery committed approximately one month later, the defendant was apprehended as matching the description of a fleeing robber. *Id.* at 342, 528 N.E.2d at 619. The defendant argued that evidence of these later robberies tended to prejudice the jury unduly. *Id.* at 343, 528 N.E.2d at 619. *See* People v. Lindgren, 79 Ill. 2d 129, 137, 402 N.E.2d 238, 242 (1980) (extensive testimony on defendant's involvement in an arson committed after the murder unduly prejudiced the jury to believe that he had also committed the murder).

69. *Richardson*, 123 Ill. 2d at 339, 528 N.E.2d at 617. The defendant claimed that

identical to the crime charged.[70] The supreme court also upheld the admission into evidence of the gun used in both crimes and the eyewitness identification of the defendant in the second crime because both the gun and the identification tied the defendant to the charged crime.[71]

In *Richardson*, the supreme court also held that evidence of a third crime was not admissible to show "how the investigation unfolded and how defendant came into custody."[72] The court concluded that the State failed to link the third crime to the charged crime or to show a "threshold similarity" to establish a *modus operandi* connection between the two crimes.[73] The court stated that admission of evidence of a third crime was not reversible error because its discussion was not extensive.[74]

In *People v. Johnson*,[75] the Illinois Supreme Court reaffirmed its prior holding[76] that mercy is a relevant consideration in a capital sentencing hearing, within the context of all factors in aggravation and mitigation.[77] In *Johnson*, the aggravating factors included an associated felony, multiple homicides,[78] and previous convictions

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significant differences distinguished the two crimes. *Id.* For example, at the second robbery, the defendant was observed waving a gun, jumping over a counter, using profanity, and wearing a full, trimmed beard. *Id.* None of these were observed at the murder-robbery. *Id.*

70. *Id.* (citing People v. Taylor, 101 Ill. 2d 508, 463 N.E.2d 705 (1984)).

71. *Id.* at 340-41, 528 N.E.2d at 617. *See also* People v. McKibbins, 96 Ill. 2d 176, 182, 449 N.E.2d 821, 825, *cert. denied*, 464 U.S. 844 (1983) (evidence of defendant's involvement in an armed robbery similar to one committed two days earlier in which a man was killed was admissible to show defendant's identity and motive). The *Richardson* court also stated that by these evidentiary rulings, the trial court had admitted no more detail of the crime than was necessary, and even if the jury heard some nonessential details, it was not reversible error. *Richardson*, 123 Ill. 2d at 341-42, 528 N.E.2d at 618.

72. *Richardson*, 123 Ill. 2d at 342, 528 N.E.2d at 618.

73. *Id.* at 342, 528 N.E.2d at 618-19 (citing People v. Bartall, 98 Ill. 2d 294, 310-11, 456 N.E.2d 59, 67 (1983) (intent to commit murder could be inferred from a later shooting incident with the same gun)).

74. *Id.* at 343, 528 N.E.2d at 619. The mere reference to the third crime was not reversible error because it did not impair substantial rights or contaminate the jury; the testimony disclosed only that "the police had apprehended the defendant as matching . . . the description of a[n armed robbery] suspect." *Id.* The court distinguished People v. Lindgren, 79 Ill. 2d 129, 402 N.E.2d 238 (1980), in which it reversed a conviction because of prejudice arising from the more extensive testimony of the collateral crime and weaker evidence on the trial offense than in *Richardson*.

75. 119 Ill. 2d 119, 518 N.E.2d 100 (1987).

76. *See* People v. Hall, 114 Ill. 2d 376, 499 N.E.2d 1335 (1986), *cert. denied*, 107 S. Ct. 1618 (1988); People v. Holman, 103 Ill. 2d 133, 469 N.E.2d 119 (1984), *cert. denied*, 469 U.S. 1220 (1985).

77. *Johnson*, 119 Ill. 2d at 150, 518 N.E.2d at 115.

78. *Id.* at 148, 518 N.E.2d at 113. The defendant stabbed to death four unarmed females while robbing a ceramic shop. *Id.* at 123, 518 N.E.2d at 102.

for murder and other violent crimes.[79] The supreme court noted that it previously had found that mercy and other mitigating factors were relevant at the sentencing phase.[80] The court also noted that the United States Supreme Court has held that "compassionate factors" are relevant in capital cases,[81] but in some instances jury instructions not to consider sympathy or prejudice are appropriate.[82] Finally, the Illinois Supreme Court stated that the trial judge had properly considered mercy, but found no facts warranting its application.[83]

IV. HEARSAY

A. Double Hearsay

In *People v. Rogers*,[84] the Illinois Supreme Court upheld the exclusion of testimony by the defendant's family members regarding police abuse while the defendant was in custody.[85] At trial, the defendant offered the testimony of family members who he telephoned shortly after confessing to the murder.[86] This testimony was offered to bolster the defendant's claims of involuntary waiver of *Miranda* rights and involuntary confession to the murder because of threats and promises from police officers.[87] The defendant's family members would have testified that the defendant mentioned threats to them shortly after his confession.[88] The court upheld both the exclusion of this testimony and the trial court's decision to allow the relatives' statements as "an offer of proof."[89]

79. *Id.* at 133, 518 N.E.2d at 106.

80. *Id.* at 150, 518 N.E.2d at 114 (citing People v. Hall, 114 Ill. 2d 376, 499 N.E.2d 1335 (1976)).

81. Caldwell v. Mississippi, 472 U.S. 320, 330 (1985).

82. California v. Brown, 479 U.S. 538, 542 (1987) (upholding trial judge's instruction not to consider "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"). The trial judge instructed the jury on the weight to be given three days of character testimony on behalf of a defendant who had confessed to murder in open court. *Id.*

83. *Johnson*, 119 Ill. 2d at 150, 518 N.E.2d at 115. The court stated that the trial court correctly found no evidence warranting either mercy or a sentence other than death. *Id.*

84. 123 Ill. 2d 487, 528 N.E.2d 667 (1988).

85. *Id.* at 499, 528 N.E.2d at 673.

86. *Id.*

87. *Id.* at 498-99, 528 N.E.2d at 673.

88. *Id.* at 499, 528 N.E.2d at 673.

89. *Id.* The court also held that co-conspirator confessions are not admissible during the second phase of a sentencing hearing because the confessions lack credibility. *Id.* at 521-23, 528 N.E.2d at 684. The two co-conspirators were lovers and had read newspaper accounts indicating what the police knew before they were arrested. *Id.* One co-conspirator admitted having had several conversations with the other between the killings and

In *People v. Foster*,[90] the Illinois Supreme Court reaffirmed its prior holding that double hearsay is admissible in a capital sentencing hearing when it is adequately "corroborated by other evidence."[91] The double hearsay occurred when police officers testified to second-hand accounts of the defendant's prior crimes.[92] With regard to the first prior crime, the supreme court held that the trial court did not abuse its discretion when it admitted the double hearsay corroborated by a certified copy of conviction for armed robbery and eyewitness testimony.[93] Regarding the second crime, the court also held that the uncorroborated testimony regarding the incident was reliable because the testifying officer obtained the information during an official investigation.[94]

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their arrest; hence, they probably synchronized their stories before arrest. *Id.* When the two co-conspirators were arrested, the police had already obtained the defendant's confession and the statement of another participant and no doubt pressured the two co-conspirators into giving statements. *Id.* at 521, 528 N.E.2d at 683. These confessions are distinguished from co-conspirator admissions which are not hearsay if they are made during and in furtherance of the conspiracy. *See* E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 802.10 (4th ed. 1984); FED. R. EVID. 801(d)(2)(E). The Illinois Supreme Court decision follows the United States Supreme Court decision in *Lee v. Illinois*, 476 U.S. 530 (1986), in which the Court held that co-conspirator statements benefitting the declarant and incriminating a defendant are "presumptively unreliable" and should not be admitted during the guilt phase of a criminal trial. *Id.* at 541. Additionally, the Illinois Supreme Court stated that these inculpating confessions must also be excluded from the sentencing hearing. *Rogers*, 123 Ill. 2d at 521, 528 N.E.2d at 683. The trial record indicated that these co-conspirator statements were unreliable for the following reasons: One statement was internally inconsistent; the prosecutor thought that a party was too unreliable to testify; and the stories minimized the co-conspirators' involvement. *Id.* at 522-23, 528 N.E.2d at 683-84. Thus, the court remanded the case for a new sentencing hearing without consideration of the co-conspirator confessions. *Id.* at 523, 528 N.E.2d at 684.

90. 119 Ill. 2d 69, 518 N.E.2d 82 (1987).

91. *Id.* at 98, 518 N.E.2d at 95. Even though hearsay is generally inadmissible in criminal proceedings, it "is not *per se* inadmissible at a sentencing hearing as unreliable . . . . The objection goes to the weight and not the admissibility." *Id.* at 98, 518 N.E.2d at 94 (citing People v. Hall, 114 Ill. 2d 376, 499 N.E.2d 1335 (1986), *cert. denied*, 480 U.S. 951 (1987); People v. Perez, 108 Ill. 2d 70, 86-87, 483 N.E.2d 250, 258-59 (1985), *cert. denied*, 474 U.S. 1110 (1986); People v. Brisbon, 106 Ill. 2d 342, 478 N.E.2d 402, *cert. denied*, 474 U.S. 908 (1985)).

92. *Id.* at 97-98, 518 N.E.2d at 95. The police officers testified about two of the defendant's past crimes. *Id.* at 97, 518 N.E.2d at 94. The first crime concerned a tavern robbery during which the defendant intended to murder the bartender. *Id.* The crime was adequately corroborated by a certified copy of conviction and by testimony from two witnesses. *Id.* at 98, 518 N.E.2d at 95. The second crime concerned an unindicted crime in which the police received an uncorroborated complaint that the defendant and others had beaten a woman with a stick and knocked her teeth loose. *Id.* at 97, 518 N.E.2d at 94.

93. *Id.* at 99, 518 N.E.2d at 95.

94. *Id.* at 98-99, 518 N.E.2d at 95. In addition, because the trial court would have reached the same conclusion without the uncorroborated testimony and because evidence

B. Spontaneous Declaration Exception

In *People v. Gacho*,[95] the Illinois Supreme Court upheld, under the spontaneous declaration exception,[96] the admission of a statement made six and one-half hours after the declarant was shot.[97] In *Gacho*, the declarant was confined to a car trunk for the six and one-half hours after he and a companion were shot and left for dead.[98] When the police officer first opened the trunk and asked the victim who had shot him, the victim named the defendant.[99] The supreme court held that the declarant's multiple gunshot wounds and confinement in a cold car trunk with a dead body were sufficiently startling to produce an unreflected statement.[100] The court further noted that the declarant's statement was his first chance to speak following his confinement.[101] Finally, the court found that the identification of the defendant as the killer was related to the shooting.[102]

In *People v. Thompkins*,[103] the Illinois Supreme Court held that the spontaneous declaration exception to the hearsay rule was satisfied when the declarant's statement was an immediate response to hearing gunshots.[104] The court stated that the declarant's state-

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rules are less stringent during the sentencing phase, admission of uncorroborated hearsay is not reversible error. *Id.* at 99, 518 N.E.2d at 95.

In *Foster*, the court also affirmed the trial court's ruling that the admission of a photograph of a sleeping child in the apartment where her mother had been murdered was harmless error because the evidence of the defendant's guilt was so overwhelming that any prejudice caused by the photo was harmless. *Id.* at 89, 518 N.E.2d at 90 (citing People v. Neal, 111 Ill. 2d 180, 197, 489 N.E.2d 845, 851 (1985), *cert. denied*, 476 U.S. 1165 (1986) (passing reference to children and grandchildren of victim was not reversible error); People v. Holman, 103 Ill. 2d 133, 166, 469 N.E.2d 119, 144 (1984) (during final arguments, defense counsel mentioned defendant's family and then prosecutor mentioned victim's family, to which no timely objection was made)).

95. 122 Ill. 2d 221, 522 N.E.2d 1146 (1988).

96. The court reaffirmed the spontaneous declaration test from People v. Poland, 22 Ill. 2d 175, 181, 174 N.E.2d 804, 807 (1961), which defined a spontaneous declaration as: "(1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence." *Gacho*, 122 Ill. 2d at 240-41, 522 N.E.2d at 1155.

97. *Gacho*, 122 Ill. 2d at 240, 522 N.E.2d at 1155-56.

98. *Id.* at 240-41, 522 N.E.2d at 1155.

99. *Id.* at 240, 522 N.E.2d at 1155.

100. *Id.* at 240-41, 522 N.E.2d at 1156.

101. *Id.* at 240, 522 N.E.2d at 1155.

102. *Id.* at 241-42, 522 N.E.2d at 1156.

103. 121 Ill. 2d 401, 521 N.E.2d 38 (1988).

104. *Id.* at 428-29, 521 N.E.2d at 49. The defendant planned to lure two drug dealers to the declarant's home to rob and kill them. *Id.* at 421, 521 N.E.2d at 45. The declarant asked the drug dealers to bring a large quantity of drugs to her home. *Id.* at 415, 521 N.E.2d at 43. When the drug dealers arrived, the declarant took them to the basement. *Id.* The defendant burst into the room with a gun and claimed to be a policeman. *Id.* He

ment was a spontaneous declaration because the gunshots were a sufficiently startling event, the statement was made immediately after the startling event, and the statement was directly related to the circumstances of the shooting.[105]

C. *Prior Consistent Statement*

In *People v. Ashford*,[106] the Illinois Supreme Court held that a witness's prior consistent statement may be used to rebut a charge of motive for false testimony when the witness made the statement before having a reason to fabricate.[107] On cross-examination of the witness, the defendant questioned whether the witness fabricated his testimony about the murder weapon in return for the State dropping drug charges against him.[108] On redirect, the witness stated that he had made the consistent statement before the State agreed to drop the charges.[109] The defendant argued that the prior consistent statement did not predate the motive to fabricate because the witness was already jailed and hoping for release.[110] The court held that the prior consistent statement was properly admitted because mere hope for release from jail is not proof of motive to fabricate.[111]

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tied up the drug dealers and took them to another room while the declarant and the defendant's girlfriend went upstairs. *Id.* Later, when two shots rang out, the declarant cried: "No, I told them not to do it here. I knew it wouldn't go according to plans." *Id.* at 416, 521 N.E.2d at 43. The girlfriend later testified to having heard this statement. *Id.* at 427-29, 521 N.E.2d at 49.

105. *Id.* at 428-29, 521 N.E.2d at 49.

106. 121 Ill. 2d 55, 520 N.E.2d 332 (1988).

107. *Id.* at 70-72, 520 N.E.2d at 338. *See also* People v. Emerson, 97 Ill. 2d 487, 455 N.E.2d 41 (1983). In *Emerson*, the supreme court upheld the trial court's admission of witness testimony concerning the consistency of his identification of the defendant in order to rebut the inference of inconsistency. *Id.* at 500-01, 455 N.E.2d at 46-47.

108. *Ashford*, 121 Ill. 2d at 70, 520 N.E.2d at 338.

109. *Id.* at 71, 520 N.E.2d at 338.

110. *Id.*

111. *Id.* Even if the admission of the statement were error, it was harmless compared to the extensive evidence against the defendant, and the error was minimized by the trial judge's decision to limit its use solely for rehabilitation. *Id.* at 71-72, 520 N.E.2d at 338.

In *People v. Orange*, 121 Ill. 2d 364, 521 N.E.2d 69 (1988), the supreme court held that a letter offered as a prior consistent statement was inadmissible because the witness wrote it after he had a motive to fabricate. *Id.* at 378-79, 521 N.E.2d at 76 (citing People v. Clark, 52 Ill. 2d 389, 288 N.E.2d 363 (1972) (defendant's alibi witness for the murder told the same story when police initially searched her house as at the trial but had the same motive to fabricate on both occasions)). In *Orange*, the witness initially confirmed the sequence of events on the night of the murder in agreement with the defendant's confession to the multiple homicide. *Id.* at 371, 521 N.E.2d at 73. Later, he stated that his mother and grandmother had convinced him to tell the truth (his confession to the murders exculpating the defendant). *Id.* at 378-79, 521 N.E.2d at 76. Additionally, the witness wrote his confession in a letter. *Id.* The letter was inadmissible because it merely

V. PRIVILEGE

In *People v. Foggy*,[112] the Illinois Supreme Court upheld the constitutionality of the absolute rape-counselor-client privilege,[113] which prohibits rape counselors from disclosing any records of counseling rape victims without the victim's consent.[114] The defendant subpoenaed from the victim's rape counselor "all records, reports, notes, memoranda, statements, oral, recorded, or written, and any and all other documents concerning the alleged assault."[115] After the subpoena was quashed, the trial court denied the defendant's request for *in camera* inspection of "information that could be used for impeachment purposes."[116] The defendant argued that his sixth amendment right to confrontation rendered this privilege unconstitutional.[117] The defendant relied on the United States Supreme Court's decision in *Davis v. Alaska*,[118] which found a constitutional violation in legislation protecting juvenile arrest information.[119] The defendant also cited *Pennsylvania v. Ritchie*,[120] in which the United States Supreme Court refused to recognize an absolute privilege when a statute provided for *in camera* inspection of state agency investigational records of child abuse charges.[121]

The Illinois Supreme Court distinguished the cases cited by the

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"corroborated the change of heart" to which the witness had already testified. *Id.* at 379, 521 N.E.2d at 76.

112. 121 Ill. 2d 337, 521 N.E.2d 86 (1988).

113. ILL. REV. STAT. ch. 110, para. 8-802.1 (1987). Paragraph 8-802.1 extends an unqualified privilege to a rape victim's statements made to a rape crisis counselor. *Id.* *See infra* note 125 for the text of paragragh 8-802.1.

114. *Foggy*, 121 Ill. 2d at 350, 521 N.E.2d at 92.

115. *Id.* at 341, 521 N.E.2d at 88.

116. *Id.*

117. *Id.* at 342, 521 N.E.2d at 88 (citing U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."); Pointer v. Texas, 380 U.S. 400 (1965) (when the defendant did not cross-examine a witness at the preliminary hearing, he lost his opportunity to confront him and the witness's testimony was admissible at trial)). *See also* ILL. CONST. art. I, § 8; People v. Tennant, 65 Ill. 2d 401, 408, 358 N.E.2d 1116, 1120, *cert. denied*, 431 U.S. 918 (1976) (the witness died after testimony and cross-examination at preliminary hearing but before defendant's trial; defendant had adequate opportunity to confront and was not impaired by an absence of discovery before the preliminary hearing).

118. 415 U.S. 308 (1974).

119. *Id.* at 319-20 (defendant's right to confront and impeach witness was deemed superior to protection of confidentiality of juvenile arrests).

120. 480 U.S. 39 (1987).

121. *Id.* at 60-61.

defendant.[122] The court limited *Ritchie* to statutes that allow *in camera* inspections.[123] Illinois' earlier rape-counselor privilege statute permitted such limited use of rape counseling records;[124] however, the revised act no longer allows *in camera* inspection.[125] Furthermore, the court noted that *Ritchie* concerned an investigative fact-finding agency, and *Foggy* concerned a rape crisis counselor who was eliciting feelings, not necessarily facts.[126] The court concluded that the defendant had ample opportunity to confront and to impeach the witness, and that the defendant's rights were amply protected without access to statutorily protected records.[127]

VI. CONCLUSION

During the *Survey* year, the Illinois Supreme Court gradually refined Illinois evidence law. It attempted to even the balance between expert physician witnesses and opposing attorneys by expanding the grounds for impeachment. The court also expanded the spontaneous declaration time limit to six and one-half hours under special circumstances. It required that videotaped depositions only be allowed under the same conditions as written depositions. And finally, the supreme court relied on, but did not adopt, Federal Rule of Evidence 804 for determining witness unavailability.

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122. *Foggy*, 121 Ill. 2d at 343-47, 521 N.E.2d at 89-91.

123. *Id.* at 346-47, 521 N.E.2d at 89 (citing *Ritchie*, 480 U.S. at 57 n.14).

124. ILL. ANN. STAT. ch. 110, para. 8-802.1(c) (Smith-Hurd 1984). The prior statute provided for no disclosure without the consent of the victim, unless:

> [I]n any judicial proceeding, a party alleges that such statements are necessary to the determination of any issue before the court . . . the party may ask the court to consider the relevance and admissibility of the statements . . . [and] hold a hearing in camera . . . . If it finds them relevant and admissible to the issue, it shall order them disclosed.

Id.

125. ILL. REV. STAT. ch. 110, para. 8-802.1(c) (1987). Paragraph 8-802.1 provides: "No rape crisis counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal proceeding as to any confidential communication without the consent of the victim." *Id.*

126. *Foggy*, 121 Ill. 2d at 348-49, 521 N.E.2d at 91. The court also found no burden on the defendant who "had access to [many] unprivileged statements made by the [victim] to other persons . . . including the [victim's] nearly contemporaneous statements . . . and . . . testimony at the preliminary hearing." *Id.* at 349, 521 N.E.2d at 91-92.

127. *Id.* at 350, 521 N.E.2d at 92. Justice Simon's dissent reached the opposite conclusion — the victim's confidentiality was amply protected by *in camera* inspection. *Id.* at 351, 521 N.E.2d at 97 (Simon, J., dissenting). Justice Simon also concluded that the right to confront requires that the defendant have available all relevant information pertaining to the witness. *Id.* at 356, 521 N.E.2d at 98 (Simon, J., dissenting).