Loyola University Chicago Law Journal

Volume 19
Issue 2 *Winter 1988 1986-1987 Illinois Law Survey*

Article 6

1988

Criminal Procedure

James P. Carey
Assoc. Prof. of Law, Loyola University of Chicago

Paul A. Gilman

Criminal Procedure

James P. Carey and Paul A. Gilman***

TABLE OF CONTENTS

* Associate Professor of Law, Loyola University of Chicago; B.A., 1965, Holy Cross College; J.D., 1968, University of Chicago.

** B.A., 1985, University of Illinois; J.D. candidate, 1989, Loyola University of Chicago.

I. INTRODUCTION

This *Survey* article examines the area of criminal procedure by discussing the most significant rulings by the Illinois Supreme Court. Some of the major decisions handed down by the court were in the areas of search and seizure, the right to counsel, and its waiver and severance. Additionally, this article discusses legislation enacted that relates to the substitution of judges and jury service exemption.

II. SEARCH AND SEIZURE

A. Franks' *Attack on a Search Warrant*

In *People v. Lucente*,[1] police searched Lucente's apartment pursuant to a search warrant.[2] The police officers charged the defend-

1. 116 Ill. 2d 133, 506 N.E.2d 1269 (1987).
2. *Id.* at 139, 506 N.E.2d at 1271.

ant with possession of a controlled substance with intent to deliver after recovering drugs during the search.[3] Lucente filed a motion to quash the search warrant, alleging that the affiant police officer intentionally misrepresented information contained in the warrant's affidavit.[4] The police officer's affidavit alleged that Lucente sold drugs to a police informant.[5] Lucente, however, presented affidavits showing that he was not present at the time of the alleged sale.[6] After making this preliminary showing of the affidavit's falsity, Lucente requested an evidentiary hearing to determine if the police officer "knowingly or recklessly misled the judicial officer who issued the search warrant."[7] Based on the affidavits, the trial court granted the defendant's request for an evidentiary hearing.[8] The trial court also ordered the State to produce the police reports relating to previous cases in which the confidential informant provided information.[9] The State failed to produce these reports.[10] After an evidentiary hearing, the trial judge quashed the search warrant.[11]

The State then appealed the trial court's ruling, contending that

3. *Id.* Lucente was arrested pursuant to an Illinois law that governs the sale and possession of cocaine, heroin, morphine, and other similar substances. ILL. REV. STAT. ch. 56 1/2, para. 1401 (1985).

4. *Lucente*, 116 Ill. 2d at 140, 506 N.E.2d at 1271. Lucente alleged when the time the informant purportedly purchased drugs from Lucente, Lucente was at his sister's house. *Id.* In support of his alibi, Lucente presented affidavits of people who had seen him at his sister's house when the alleged sale to the informant took place. *Id.* at 140, 506 N.E.2d at 1271-72.

5. *Id.* at 139, 506 N.E.2d at 1271.

6. *Id.* at 140, 506 N.E.2d at 1271.

7. *Id.* at 141, 506 N.E.2d at 1272. According to Franks v. Delaware, 438 U.S. 154 (1978), a defendant may attack a search warrant by proving two things. First, the defendant must prove that the officer knowingly or recklessly misrepresented facts to the judicial officer issuing the search warrant. Second, the defendant must prove that the misrepresented facts were necessary to the establishment of probable cause. *Franks*, 438 U.S. at 171-72.

The defendant originally requested a hearing based on the rationale of People v. Garcia, 109 Ill. App. 3d 142, 440 N.E.2d 269 (1st Dist. 1982). The *Garcia* court held that a warrant should be quashed if it contains *any* false information. *Id.* at 145, 440 N.E.2d at 1274. The *Lucente* court, however, refused to extend *Garcia* to the protections afforded by *Franks*. *Id.* at 146, 440 N.E.2d at 1274. *Franks* only provides for invalidating the warrant if the false statements were necessary to a finding of probable cause. *Franks*, 438 U.S. at 155-56.

8. *Lucente*, 116 Ill. 2d at 144, 506 N.E.2d at 1272.

9. *Id.* at 141, 154, 506 N.E.2d at 1272, 1278.

10. *Id.* at 154, 506 N.E.2d at 1272. The Illinois Supreme Court noted that although the defendant's showing was not very convincing, the State's failure to turn over these reports weakened the State's argument and bolstered the defendant's case. *Id.* at 154, 506 N.E.2d at 1278.

11. *Id.* at 139, 506 N.E.2d at 1273.

the defendant was not entitled to an evidentiary hearing because the defendant had not made a substantial preliminary showing.[12] Specifically, the State contended that because the defendant's affidavit attacked the veracity of the informant, rather than the veracity of the affiant, the allegations attacking the search warrant were insufficient under *Franks v. Delaware*.[13]

The Illinois Supreme Court agreed with the trial court, holding that the defendant was entitled to an evidentiary hearing.[14] The court ruled that as long as the defendant's affidavit showed that someone had lied, either the affiant or informant, the allegations were sufficient.[15] The court also defined the quantum of proof necessary for a "substantial preliminary showing," holding that the burden of proof was "somewhere between mere denials . . . and proof by a preponderance . . . ."[16] In *Lucente*, this burden was met by the affidavits, which were more than mere denials because they presented an alibi defense to the alleged sales.[17]

B. Probable Cause to Arrest

In *People v. Cabrera*,[18] the police arrested the defendant because he was identified as a companion of a person who used a murder victim's checkbook.[19] After his arrest, the defendant gave the police statements implicating himself in the murder.[20] The defendant then contended that the police did not have probable cause to arrest him; and, therefore, that the incriminating statements made after the arrest were inadmissible in court.[21] The trial court disagreed with the defendant.[22]

---

12. *Id.*

13. *Id.* at 148-49, 506 N.E.2d at 1275 (citing Franks v. Delaware, 438 U.S. 154 (1978)).

14. *Id.* at 154, 506 N.E.2d at 1278.

15. *Id.* at 150, 506 N.E.2d at 1275. The court stated "[a]s a preliminary matter, the defendant cannot be required to establish what an anonymous, perhaps nonexistent informant did or did not say. At the hearing stage, of course, the defendant retains the full *Franks* burden of showing that the officer acted intentionally or with reckless disregard for the truth." *Id.* at 150, 506 N.E.2d at 1276.

16. *Id.* at 151-52, 506 N.E.2d at 1276-77.

17. *Id.* at 154, 506 N.E.2d at 1278.

18. 116 Ill. 2d 474, 508 N.E.2d 708 (1987).

19. *Id.* at 480-81, 508 N.E.2d at 709. The defendant was arrested for the murder of a seventy-four-year-old man. Traveler's checks taken from the victim were used to make purchases at a clothing store. The store manager identified the defendant out of a mug shot book. The police subsequently arrested the defendant based on this information. *Id.* at 480-81, 508 N.E.2d at 709-10.

20. *Id.* at 481-82, 508 N.E.2d at 710.

21. *Id.* at 479, 508 N.E.2d at 709.

22. *Id.*

The Illinois Supreme Court conceded that the record was devoid of explicit evidence of probable cause.[23] The majority combed the record, however, to discern information the police might have had at the time they arrested the defendant.[24] Specifically, the court inferred that, because a witness picked out the defendant's picture from a mug book, the police must have had knowledge of the defendant's prior burglary conviction.[25] The court concluded that this fact, along with the witness from the clothing store, could support probable cause.[26] Justice Simon argued in dissent that probable cause must be demonstrated by facts known to the officer when he arrested the defendant, and not by what judges assume the officer probably knew at the time of the arrest.[27]

III. SELF-INCRIMINATION

A. Statements Following an Illegal Arrest

In *People v. Franklin*,[28] the court held that the defendant's post-arrest statements should have been suppressed as a result of his illegal arrest.[29] In *Franklin*, the police questioned the defendant about a murder and asked him to take a polygraph examination.[30] The defendant agreed to take the polygraph test, but when he missed his scheduled appointment, the police went to his residence to bring him to the police station.[31] The defendant spent the remainder of the night in police custody.[32] During that night, the police gave the defendant his *Miranda* warnings and then gave the

23. *Id.* at 488, 508 N.E.2d at 711-12.

24. *Id.* at 488, 508 N.E.2d at 712-13.

25. *Id.*

26. *Id.* at 488, 508 N.E.2d at 713.

27. *Id.* at 497, 508 N.E.2d at 718 (Simon, J., dissenting). Justice Simon termed the majority opinion an "innovative concept of appellate review." *Id.* at 497, 508 N.E.2d at 717 (Simon, J., dissenting). Simon pointed out that the State admitted during oral argument that "it is not in the record what police officer[s] actually knew at the time [they] arrested the defendant." *Id.* at 498, 508 N.E.2d at 718 (Simon, J., dissenting). Simon's dissent criticized the court for filling the gaps in the record with what they, as police officers, would have done or known. *Id.* at 497, 508 N.E.2d at 717-18 (Simon, J., dissenting).

28. 115 Ill. 2d 328, 504 N.E.2d 80 (1987).

29. *Id.* at 337, 504 N.E.2d at 84. The seminal case holding that statements made after an illegal arrest should be suppressed is Brown v. Illinois, 422 U.S. 590 (1975).

30. *Franklin*, 115 Ill. 2d at 331, 504 N.E.2d at 81. The defendant was a friend of the murder victim. *Id.*

31. *Id.*

32. *Id.* The defendant, however, spent the entire night in an interview room at the police station. *Id.* The court noted that there was some confusion about whether the defendant was ordered or asked to spend the night. *Id.*

defendant a polygraph examination.[33] Later, the defendant gave a written confession after the police took the defendant to the victim's apartment.[34]

The defendant contended that the police lacked probable cause to arrest him after he missed his scheduled polygraph examination.[35] The defendant argued, therefore, that his statement should have been suppressed as a result of his illegal arrest.[36] The State contended that the defendant voluntarily submitted to the polygraph examination, thus removing any "taint" created by the defendant's illegal arrest.[37] The State argued further that the continuous giving of the *Miranda* warnings attenuated the taint of that arrest.[38] The trial court admitted the defendant's statements into evidence.[39]

On appeal, the Illinois Supreme Court reversed the defendant's conviction.[40] The court held that the defendant's voluntary submission to the polygraph examination did not purge the taint of the illegal arrest because the polygraph examination was itself a form of interrogation.[41]

B. Involuntary Confessions

In *People v. Wilson*,[42] the police arrested Andrew Wilson for the murder of two Chicago Police Officers and Wilson remained in police custody for over twelve hours.[43] Wilson contended that the police inflicted wounds to his chest and face and inflicted burns on

33. *Id.* at 333, 504 N.E.2d at 82.

34. *Id.* at 332, 504 N.E.2d at 81. The police confronted the defendant with the results of his polygraph examination which suggested that his answers were not truthful. *Id.* Thereafter, the defendant made a statement implicating himself in the murder. *Id.* After being escorted to the victim's apartment, the defendant gave a written confession. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 334, 504 N.E.2d at 82.

38. *Id.*

39. *Id.* at 332, 504 N.E.2d at 81.

40. *Id.* at 337, 504 N.E.2d at 84. The appellate court affirmed the defendant's conviction, *Franklin*, 130 Ill. App. 3d 1157, 493 N.E.2d 755 (1st Dist. 1984) and the defendant appealed.

41. *Franklin*, 115 Ill. 2d at 334, 504 N.E.2d at 82. The court stated also that intervening circumstances can operate to attenuate the taint of an illegal detention, but that none were present. The giving of *Miranda* warnings, alone, did not "purge the taint of the illegal arrest." *Id.* at 337, 504 N.E.2d at 84.

42. 116 Ill. 2d 29, 506 N.E.2d 571 (1987).

43. *Id.* at 32-34, 506 N.E.2d at 572. The defendant was arrested at 5:15 a.m., and was in custody until 6:00 p.m. when he gave a statement to the police. He was taken to the hospital later that evening. *Id.* at 33, 506 N.E.2d at 572.

his thigh while in police custody.[44] Wilson gave the police a written statement implicating himself in the murders. Wilson contended, however, that he confessed after police officers beat him.[45] Wilson, therefore, filed a motion to suppress his confession contending that he made it involuntarily, as evidenced by his injuries.[46] The prosecution conceded that police officers injured Wilson, but contended that the beatings occurred after the confession.[47] The trial court ruled that the defendant voluntarily confessed and that any injuries inflicted upon the defendant occurred after his confession.[48]

On appeal, the Illinois Supreme Court considered who bears the burden of proving voluntariness when the issue is not who caused the injuries, but rather, when the injuries occurred.[49] The *Wilson* court answered the question by extending the rule of *People v. LaFrana*[50] to the instant situation.[51] The *LaFrana* rule places upon the prosecution the burden of proving by clear and convincing evidence that the police did not cause the injuries suffered by an accused while he is in police custody.[52] According to the *Wilson* court, the same rule applies to the question of when the injuries occurred.[53] Specifically, the state has the burden of proof by clear and convincing evidence that the injuries occurred after the confession.[54] In *Wilson*, the State failed to meet this burden and should have been precluded from introducing Wilson's confession as substantive evidence of his guilt.[55] The trial court erred, therefore, in

44. *Id.* at 33-34, 506 N.E.2d at 573. The defendant presented testimony from witnesses at Mercy Hospital, who observed the defendant's head, body, and leg injuries. *Id.* at 36-37, 506 N.E.2d at 573-74. The court summarized the defendant's testimony as follows: "The defendant testified that he was punched, kicked, smothered with a plastic bag, electrically shocked and forced against a hot radiator throughout the day . . . until he gave his confession." *Id* at 33-34, 506 N.E.2d at 573.

45. *Id.* at 34-35, 506 N.E.2d at 574. The State presented testimony that the defendant also gave an oral statement on the morning of the arrest. *Id.*

46. *Id.* at 33, 506 N.E.2d at 572.

47. *Id.* at 34-35, 37-38, 506 N.E.2d at 574.

48. *Id.* at 37-38, 506 N.E.2d at 574. The trial court noted that the defendant did receive a cut on his face, but found that the police inflicted a cut at the time of his arrest. *Id.*

49. *Id.* at 40, 506 N.E.2d at 576.

50. 4 Ill. 2d 261, 122 N.E.2d 583 (1954). In *LaFrana*, the court held that when it is conceded, or clearly established that the defendant was injured while in custody "and the issue is how and why . . . [the injuries] were inflicted, we have held that something more than a mere denial by the police of coercion is required." *Id.* at 267, 122 N.E.2d at 586.

51. *Wilson*, 116 Ill. 2d at 40, 506 N.E.2d at 575.

52. *LaFrana*, 4 Ill. 2d at 267, 122 N.E.2d at 586.

53. *Wilson*, 116 Ill. 2d at 40-41, 506 N.E.2d at 575-76.

54. *Id.* at 40-41, 506 N.E.2d at 576.

55. *Id.* at 41-42, 506 N.E.2d at 576. The court concluded that the State had ac-

denying the defendant's motion to suppress.[56]

C. *Confessions and the Material Witness Rule*

In *People v. Brooks*,[57] Barbara Brooks was arrested for the murder of her son.[58] Although she gave a statement incriminating herself in the murder, she moved the trial court to suppress the statement, claiming that the police and State's Attorneys threatened to take her children from her if she did not admit to the killing.[59] Additionally, Brooks claimed that her statement was involuntary because of her distress over her son's death.[60] At her suppression hearing, Brooks claimed that the State failed to present two "material witnesses" to the alleged misconduct.[61]

The Illinois Supreme Court held that the failure of these two witnesses to testify did not violate the material witness rule.[62] The first "material" witness to the alleged misconduct, a youth officer, was in the hospital during the suppression hearing.[63] The court held this to be an adequate excuse for his absence from the suppression hearing.[64] Regarding the second witness, an assistant State's Attorney, the court concluded that, although Brooks had spoken to the witness during her custody, she did not testify that the witness "took part in any of the misconduct she allege[d] or that he was present when any of the threats were uttered . . . ."[65] The supreme court concluded, therefore, that because the prosecution was not obligated to present the testimony of either witness at

---

counted for some of the defendant's injuries, but failed to explain others. *Id.* at 41, 506 N.E.2d at 576. Instead, the State relied upon naked denials of coercion and failed to explain the other injuries. *Id.*

56. *Id.* at 41-42, 506 N.E.2d at 576.

57. 115 Ill. 2d 510, 505 N.E.2d at 336 (1987).

58. *Id.* at 513, 505 N.E.2d at 337. The defendant's husband was also tried for the murder. At the close of the State's case, the trial judge found him not guilty. *Id.*

59. *Id.* at 515, 505 N.E.2d at 338.

60. *Id.*

61. *Id.* at 514, 505 N.E.2d at 338. The material witness rule requires that when "the voluntary nature of a confession is brought into question by a motion to suppress, the state must produce all material witnesses connected with the taking of the statements or explain their absence." *Id.* at 516, 505 N.E.2d at 339 (quoting People v. Armstrong, 51 Ill. 2d 471, 475-76, 282 N.E.2d 712, 715 (1972)).

62. *Brooks*, 115 Ill. 2d at 518, 505 N.E.2d at 339.

63. *Id.* at 514, 505 N.E.2d at 339.

64. *Id. See also* People v. Wright, 24 Ill. 2d 88, 180 N.E.2d 689 (1962)("[t]he burden of proving that a confession is voluntary is one which the State must assume when the admissibility of a confession is questioned on the grounds that it was coerced. Only by producing all material witnesses connected with the controverted confession can the State discharge this burden.").

65. *Brooks*, 115 Ill. 2d at 514, 505 N.E.2d at 339.

the suppression hearing, the State did not violate the material witness rule.[66]

D. Family Visitation and Edwards

In *People v. Whitehead*,[67] the police arrested the defendant for the murder of a five-year-old girl.[68] In response to *Miranda* warnings, the defendant asserted his right to counsel.[69] Thereafter, he made statements to his sister-in-law implicating himself in the murder.[70] The defendant filed a motion to suppress these statements on the ground that the police interrogated him after he invoked his right to counsel by encouraging his sister-in-law to visit with him while his attorney was not present.[71]

The Illinois Supreme Court addressed whether the police violated the rule of *Edwards v. Arizona*[72] by permitting the defendant to visit with his sister-in-law.[73] Specifically, the court considered whether allowing such a visit was an "initiation" of conversation about the crime by the police.[74] If it was an initiation, then the visit, and the subsequent statement, amounted to a violation of *Edwards*.[75]

The supreme court held that the police conduct was not initiation because the police initially refused the visit between the defendant and his sister-in-law, and further, because the police did not coax the sister-in-law to talk to the defendant.[76] Because the

66. *Id.* at 518, 505 N.E.2d at 339.

67. 116 Ill. 2d 425, 508 N.E.2d 687 (1987).

68. *Id.* at 434, 508 N.E.2d at 689.

69. *Id.* at 435, 508 N.E.2d at 690. The police questioned the defendant for two hours, but stopped the questioning when the defendant indicated that he wanted to consult with an attorney. *Id.*

70. *Id.* at 436-37, 508 N.E.2d at 690-91.

71. *Id.* at 436, 508 N.E.2d at 690.

72. 451 U.S. 477 (1981). *Edwards* operates to prevent the police from "reinitiating" an interrogation with a suspect after the suspect invokes his right to counsel. *Id.* at 485. Once a defendant indicates his right to have an attorney, all questioning must stop until he either retains an attorney himself or is provided with one by the State. *Id.* at 485. The *Edwards* rule does not apply when the defendant initiates contact with the police. Oregon v. Bradshaw, 462 U.S. 1039 (1983).

73. *Whitehead*, 116 Ill. 2d at 436, 508 N.E.2d at 690.

74. *Id.* at 436-37, 508 N.E.2d at 690-91. The court phrased the issue in terms of "the characterization of this conversation with [the sister-in-law]: if the conversation [was] cast as a form of police interrogation, the statements should have been excluded; otherwise, the defendant's statements were properly admitted." *Id.* at 437, 508 N.E.2d at 690.

75. *Id.* at 436-37, 508 N.E.2d at 691.

76. *Id.* at 437-40, 508 N.E.2d at 690. The court reasoned that *Miranda* was intended to guard against police trickery, not against family visitation. *Id.* at 439, 508 N.E.2d at 691. There was no evidence of trickery presented. *Id.* The court stated that "[s]o long as the police have not incited or coerced family members to prompt a confession, it is not a

police did not use the sister-in-law as an instrument of the State, the statements were admissible.[77]

E. References to the Defendant's Refusal to Reduce an Oral Statement to Writing

In *People v. Christiansen*,[78] the Illinois Supreme Court held that a prosecutor could make reference to the defendant's refusal to reduce an oral statement to writing, if that oral statement had not been made in violation of *Miranda*.[79] In *Christiansen*, a State's Attorney interviewed the defendant after the defendant's arrest for murder.[80] During this interview, the defendant gave an oral statement after waiving his right to remain silent.[81] At trial, the State presented testimony concerning the defendant's refusal to reduce his oral statement to writing.[82] The defendant argued that this testimony violated his fifth amendment right to remain silent.[83]

The supreme court ruled that testimony about the defendant's refusal to reduce a confession to writing is impermissible only when the defendant has invoked his right to remain silent.[84] Because the defendant had not invoked this right, testimony about his subsequent silence was properly admitted.[85]

F. Uncounseled Post-Indictment Statements

In *People v. Patterson*,[86] the defendant claimed that the trial court erred in admitting post-indictment statements that he made outside the presence of an attorney.[87] The issue before the court was whether waiver of the sixth amendment right to counsel must

---

proper are for judicial intrusion to perpetuate the incommunicado nature of police custody." *Id.* at 440, 508 N.E.2d at 692.

77. *Id.* at 437, 508 N.E.2d at 691-92. The court noted that the defendant argued that his sister-in-law was an instrument of the police. This argument failed because the defendant failed to show that her interests were closely aligned with the police. *Id.*

78. 116 Ill. 2d 96, 506 N.E.2d 1253 (1987).

79. *Id.* at 120, 506 N.E.2d at 1263.

80. *Id.* at 119, 506 N.E.2d at 1262.

81. *Id.* at 120, 506 N.E.2d at 1263.

82. *Id.* at 119, 506 N.E.2d at 1259.

83. *Id.* at 119, 506 N.E.2d at 1262-63.

84. *Id.* at 120, 506 N.E.2d at 1263 (citing Wainwright v. Greenfield, 106 S. Ct. at 638-40 (1986)). The court stressed that when the right to remain silent was invoked, "*Any* comment at trial upon his subsequent silence constitutes a clear violation of his rights under the fifth amendment." *Id.* (emphasis added).

85. *Id.*

86. 116 Ill. 2d 290, 507 N.E.2d 843 (1987).

87. *Id.* at 297, 507 N.E.2d at 844. In *Patterson*, the defendant was arrested and later indicted for a gang-related murder in Evanston, Illinois. *Id.* at 297, 507 N.E.2d at 844-45.

be governed by a stricter standard than that which applies to the waiver of counsel under the fifth amendment.[88]

The court concluded, under the authority of *People v. Owens*,[89] that a waiver is valid when the evidence shows that the defendant has been given *Miranda* warnings and is aware of the gravity of the offense about which he is to be interrogated.[90] In the instant case, the defendant was given *Miranda* warnings and was aware that he had been indicted for murder.[91] Consequently, his waiver was valid.[92]

IV. GUILTY PLEAS

In *People v. Wade*,[93] the supreme court addressed whether a trial court has the jurisdiction to vacate a sentencing order after thirty days, when the defendant was ineligible for the sentence he received.[94] Reginald Wade pled guilty to robbery as part of a negotiated plea agreement. [95] The trial court sentenced him to a term of probation.[96] During the probation period, Wade's probation officer discovered that, because of Wade's previous convictions for armed robbery and rape, probation was not an authorized penalty.[97] The trial court vacated the sentence order and allowed

88. *Id.* at 297-98 507 N.E.2d at 846. The court agreed with the defendant that there are two separate rights to counsel. One has the right to counsel under the sixth amendment and the right to counsel during interrogation under the fifth amendment. *Miranda* warnings are intended to protect the latter right. *Id.* at 298, 507 N.E.2d at 846.

The court also noted that the United States Supreme Court has reserved ruling on the question of the differing standards for waiving the right to counsel under the fifth and sixth amendments, and that opinions in the lower courts are divided. *Id.* at 299, 507 N.E.2d at 846. Certiorari was granted. 108 S. Ct. 227 (1987).

89. 102 Ill. 2d 88, 464 N.E.2d 261, *cert. denied*, 469 U.S. 963 (1984). In *Owens*, the court held that a defendant could validly waive his sixth amendment right to counsel without the knowledge that a criminal complaint had been filed. The dispositive issue was whether the defendant knew the "severity of the situation facing him . . . [and was given] the *Miranda* warnings . . . ." *Id.* at 102-03, 464 N.E.2d at 267.

90. *Patterson*, 116 Ill. 2d at 299-300, 507 N.E.2d at 847.

91. *Id.*

92. *Id.* at 300, 507 N.E.2d at 847.

93. 116 Ill. 2d 1, 506 N.E.2d 954 (1987).

94. *Id.*

95. *Id.* at 4, 506 N.E.2d at 955.

96. *Id.* The court sentenced the defendant to thirty-six months probation. *Id.*

97. *Id.* This discovery came after the defendant had served nine of the thirty-six months. *Id.* The court held that ILL. REV. STAT. ch. 38, para. 1005-5-3(c)(2)(F) applied to the instant case. *Id.* at 5, 506 N.E.2d at 955. This section provides that "an offender shall not receive probation if he has been convicted of a Class 2 or a greater felony in the 10 years preceding the Class 2 or greater felony for which he is being sentenced." ILL. REV. STAT. ch. 38, para. 1005-5-3(c)(2)(F). Because rape is a Class X felony, greater than a class 2 felony, Wade was ineligible for probation. *Wade*, 116 Ill. 2d at 5, 506 N.E.2d at 955.

Wade to withdraw his earlier plea of guilty.[98] Following his conviction, Wade contended that the trial court did not have jurisdiction to modify or vacate the original sentence order of probation because thirty days had elapsed before the vacating order.[99]

The Illinois Supreme Court disagreed with the defendant and held that the trial court could vacate a void judgment[100] at any time.[101] A trial judge has authority to impose sentences only within the guidelines set by the legislature.[102] The court concluded that, by granting probation when it was not authorized, the trial court acted outside the scope of its authority. Therefore the original probation order was void.[103]

V. The Insanity Defense: Fitness Hearings

In *People v. Lang*,[104] murder charges were brought against Donald Lang, a visually impaired, deaf mute.[105] In 1981, the trial court found Lang unfit to stand trial on a 1971 murder charge, and admitted him to the Department of Mental Health under the Mental Health Code.[106] The court made nine determinations between 1981 and 1985 (concerning Lang's involuntary admission status).[107] Each time, the court concluded that Lang's condition met the criteria for involuntary admission.[108] Since 1981, however, the State failed to conduct a re-hearing concerning Lang's fitness to

98. *Wade*, 116 Ill. 2d at 4, 506 N.E.2d at 955. Wade then was granted a jury trial. *Id.* Wade also contended that the sentencing judge should have recused himself. *Id.* at 7, 506 N.E.2d at 957. The court determined that Wade had an opportunity to make a motion for a substitution of judge but failed to do so, and that this failure precluded Wade from claiming error. *Id.* at 9, 506 N.E.2d at 957.

99. *Id.* at 4-5, 506 N.E.2d at 955. The defendant argued that the sentence was valid based on the evidence the trial judge had before himself at the time of sentencing. *Id.*

100. "A void judgement is one entered by a court without jurisdiction over the parties or the subject matter or that lacks the 'inherent power to make or enter the particular order involved.'" *Id.* at 5, 506 N.E.2d at 955 (quoting in part R.W. Sawart & Co. v. Allied Programs Corp., 111 Ill. 2d 304, 309, 489 N.E.2d 1360, 1363 (1986)).

101. *Id.* at 6, 506 N.E.2d at 956.

102. *Id.*

103. *Id.* at 7, 506 N.E.2d at 956. The court rejected the defendant's argument that a judgment is valid if the information before the court at sentencing supported the judgment. The court responded to this argument by stating that "knowledge of the trial court that it was exceeding its authority is [not a] prerequisite to a reviewing court's determination that the trial court's judgment was void." *Id.*

104. 113 Ill. 2d 407, 498 N.E.2d 1105 (1986).

105. *Id.* at 414, 498 N.E.2d at 1108.

106. *Id.* (citing Ill. Rev. Stat. ch. 91 1/2, para. 1-119 (1985)).

107. *Id.* at 415, 498 N.E.2d at 1108.

108. *Id.* The mental health code provides for periodic review of involuntary admission status. Ill. Rev. Stat. ch. 91 1/2, para. 3-813 (1985).

stand trial.[109] When Lang petitioned the trial court for a formal hearing on his fitness to stand trial on the murder charge, the trial court denied his request.[110] Lang appealed the trial court's decision.[111]

On appeal, the Illinois Supreme Court considered whether the trial court erred in refusing to grant Lang a fitness hearing.[112] The State contended that the defendant was precluded from a fitness determination because the State had sought involuntary admission and dismissal of the charges with leave to reinstate.[113] The State contended that, according to Illinois law, because no charges were pending, the defendant had no right to a determination of his fitness to stand trial on non-existent charges.[114]

The court disagreed with the State and concluded that due process required fitness hearings every twelve months.[115] The court reasoned first, that the dormant charges constituted a restraint on the defendant's liberty because the State could reinstate them at any time.[116] Second, the court reasoned that the charge affected Lang's quality of life because it limited the type of mental health

---

109. *Lang*, 113 Ill. 2d at 415, 498 N.E.2d at 1108.

110. *Id.*

111. *Id.* Lang also was involved in other involuntary admissions from which he took the following appeals: People v. Lang, 76 Ill. 2d 311, 391 N.E.2d 350 (1979); People *ex. rel.* Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970); People v. Lang, 37 Ill. 2d 75, 224 N.E.2d 838 (1967).

112. *Lang*, 113 Ill. 2d at 416, 498 N.E.2d at 1108.

113. *Id.* at 441-42, 498 N.E.2d at 1120-21.

114. *Id.* at 441-42, 498 N.E.2d at 1120. The statute that the State relied upon provides in relevant part:

> (b) If at any time the court determines that there is a not a substantial probability that the defendant will become fit to stand trial or to plead within one year from the date of the original finding of unfitness . . . the State shall request the court :
>
> . . . .
>
> (3) To remand the defendant to the custody of the department . . . and order a hearing to be conducted pursuant to the . . . [Mental Health Code]. If the defendant is committed to the department . . . pursuant to such hearing, the court having jurisdiction over the criminal matter shall dismiss the charges against the defendant with leave to reinstate . . . . A former defendant so committed shall be treated in the same manner as any other civilly committed patient for all purposes including admission, selection of place of treatment and the treatment modalities, entitlement to rights and privileges, transfer, and discharge . . . .
>
> (c) If the defendant is restored to fitness and the original charges against him are reinstated, the speedy trial provisions of section 103-5 shall commence to run.

ILL. REV. STAT. ch. 38, paras. 104-23(b)(3), (c) (1985).

115. *Lang*, 113 Ill. 2d at 442-43, 498 N.E.2d at 1120-21.

116. *Id.* at 442-44, 498 N.E.2d at 1121-22.

facility available to him.[117] According to the record, private facilities had refused to accept the defendant because of his "forensic involvement."[118] The court, therefore, ordered that the trial court give the respondent a fitness hearing.[119]

VI. DOUBLE JEOPARDY

A. The Trial Stage

In *People v. Camden*,[120] the Illinois Supreme Court held that double jeopardy was not a bar to retrial when the defendant implicitly consented to a mistrial declared by the trial judge on the judge's own motion.[121] During Julia Camden's trial, the trial judge learned of one juror's doubt about whether he could remain impartial.[122] The judge declared a mistrial, and ordered a retrial without

117. *Id.* at 444-45, 498 N.E.2d at 1122.

118. *Id.* The court also considered related issues. First, it held that defendant's first trial (resulting in a conviction that was reversed because of the defendant's incompetency) was a sufficient "innocent only" determination. *Id.* An innocent only hearing, also called a discharge hearing, allows a defendant who has been adjudged unfit to test the sufficiency of the state's case against him. *Id.* at 445-46, 498 N.E.2d at 1122. Thus, the trial court's refusal to conduct another such hearing in 1981 was not error. *Id.* at 447-48, 498 N.E.2d at 1122-23. Given the passage of time since the first trial, however, the Illinois Supreme Court in *Lang* required that an innocent only hearing be held if the defendant is determined to be unfit for trial and if there is a further determination that there is "no substantial probability that he will become fit within one year." *Id.*

Secondly, the court responded to the defendant's contention that the involuntary admission statute was unconstitutionally vague in its definition of mentally ill. *Id.* at 448, 498 N.E.2d at 1123-24. The court held that the statute did not offend the constitution. *Id.* at 456-57, 498 N.E.2d at 1128. The court emphasized that the various categories of mental illness utilized by psychologists and psychiatrists do not necessarily define mental illness. *Id.* at 452, 498 N.E.2d at 1125. The touchstone under the code is not the label on the illness, but the relationship between the illness and the defendant's ability to function. *Id.* at 454-56, 498 N.E.2d at 1126-27. The court defined mental illness for purposes of the involuntary admission section as follows: "A mentally ill person . . . is an individual with an illness or disorder which substantially impairs the person's thought, perception of reality, emotional process, judgment, behavior or ability to cope with the ordinary demands of life." *Id.* at 455, 498 N.E.2d at 1127. The court concluded that the definition of mental illness, when viewed in its statutory nexus to danger to self or others, is not vague. *Id.* at 456, 498 N.E.2d at 1127.

Finally, the court reviewed the evidence in all consolidated appeals from the various orders of involuntary admission and concluded that the State met its burden of proving by clear and convincing evidence that the defendant met the requisite criteria. *Id.* at 457-62, 498 N.E.2d at 1128-30.

119. *Id.* at 472, 498 N.E.2d at 1135.

120. 115 Ill. 2d 369, 504 N.E.2d 96 (1987).

121. *Id.* at 379, 504 N.E.2d at 100.

122. *Id.* at 372-73, 504 N.E.2d at 97. One juror stated that he doubted whether he could remain impartial because he had a prior drinking problem and the defendant was using her drinking problem as a defense. *Id.* at 372, 504 N.E.2d at 97.

objections by the State or the defense.[123] The defendant later made a motion to bar retrial, contending that a retrial would violate the defendant's protection against double jeopardy.[124] The trial judge denied the defendant's motion, finding that the defendant had consented to the mistrial.[125]

In an interlocutory appeal, the supreme court held that, once a defendant consents to a mistrial, he cannot later claim constitutional protection against retrial.[126] To determine whether the defendant consented to the mistrial, the court examined the defendant's conduct during and after the mistrial ruling.[127] The court in *Camden* pointed out that the judge, with agreement of the defense and the State, set the case for retrial.[128] The court also emphasized that the defendant did not object to retrial until two months after the mistrial was declared.[129] Consequently, the court held that the defendant's conduct amounted to consent and that retrial did not offend double jeopardy principles.[130]

B. The Death Penalty Sentencing Stage

In *People v. Ramirez*,[131] the defendant was convicted of murder

123. *Id.* at 374-75, 504 N.E.2d at 98. The court conducted a voir dire of the doubtful juror. After this voir dire, the trial judge declared a mistrial on his own motion. *Id.*

124. *Id.* at 375, 504 N.E.2d at 98. Prior to the filing of his motion to bar further proceedings, the defendant requested a substitution of judges. This request was granted and the new judge heard the double jeopardy motion. *Id.*

125. *Id.* at 376, 504 N.E.2d at 98. The trial court found that the defendant's actions amounted to consent. The judge found that the defendant failed to object to the mistrial, waived a previous demand for a speedy trial, and agreed on a new date for retrial. *Id.* On appeal, the appellate court reversed the trial court, concluding that the defendant's silence did not amount to consent. People v. Camden, 140 Ill. App. 3d 480, 488 N.E.2d 1082 (5th Dist. 1986).

126. *Camden*, 115 Ill. 2d at 377-79, 504 N.E.2d at 99. The court quoted the following standard from *Jorn*:

> [W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.

Id. at 377, 504 N.E.2d at 99 (quoting U.S. v. Jorn, 400 U.S. at 485). The court pointed to cases in which the *Jorn* standard has been applied in which the defendant "sought or at least consented to the mistrial." People *ex rel.* Roberts v. Orenic, 88 Ill. 2d 503, 431 N.E.2d 353 (1981); People *ex rel.* Moseley v. Carey, 74 Ill. 2d 527, 387 N.E.2d 325, *cert. denied*, 444 U.S. 940 (1979).

127. *Camden*, 115 Ill. 2d at 377-79, 504 N.E.2d at 99.

128. *Id.* at 378, 504 N.E.2d at 100.

129. *Id.* The court noted that the defendant had several opportunities to object to the mistrial but failed to do so. *Id.*

130. *Id.* at 379, 504 N.E.2d at 100.

131. 114 Ill. 2d 125, 500 N.E.2d 14 (1986).

and sentenced to death.[132] The Illinois Supreme Court, in an earlier opinion,[133] had vacated the death sentence, citing four errors that deprived the defendant of a fair sentencing hearing.[134] The defendant argued that a second death sentence hearing would violate his protection against double jeopardy afforded by the United States and Illinois Constitutions.[135]

The supreme court rejected the defendant's argument.[136] The court conceded that double jeopardy applied to a sentencing hearing.[137] The court also conceded that resentencing would be barred if the evidence showed that the prosecutor intended to provoke a mistrial.[138] Ramirez contended that the prosecutor had "purposely" called the victim's widow as a witness when her testimony was immaterial and that this purposeful conduct evinced the requisite intent.[139]

The court disagreed, stressing that there was no necessary equation between "purposeful conduct" in offering evidence in error and intentional provocation of a mistrial.[140] The conduct, therefore, was insufficiently egregious to support the inference that the prosecutor intended to provoke a mistrial.[141]

---

132. *Id.* at 128, 500 N.E.2d at 15.

133. People v. Ramirez, 98 Ill. 2d 439, 457 N.E.2d 31 (1983).

134. 114 Ill. 2d at 128, 500 N.E.2d at 15-16. The four errors the court cited were as follows:

> (1) the trial court had refused to instruct the jury that it was not to consider the defendant's silence at the hearing; (2) the prosecutor had commented during closing arguments on the defendant's silence at both stages of the hearing; (3) during the first stage of the hearing, the prosecutor improperly called the widow of the deceased as a witness; and (4) the prosecutor had continually referred to the deceased as being a police officer when that circumstance had not been invoked as an aggravating factor to qualify the defendant for the death sentence.

Id.

135. *Id.* at 129, 500 N.E.2d at 16. The defendant argued:

> [T]hat the assurances against double jeopardy in the Constitution of Illinois and the Constitution of the United States bar the state from again seeking the death penalty because the prosecutor's errors at the first sentencing hearing would have justified the trial judge's declaring a mistrial, even though a mistrial was not declared.

Id. (citations omitted).

136. *Id.* at 131, 500 N.E.2d at 17.

137. *Id.* at 129, 500 N.E.2d at 16.

138. *Id.* The court derived this standard from Oregon v. Kentucky, 456 U.S. 667 (1982). This approach was adopted by the Illinois Supreme Court in People v. Davis, 112 Ill. 2d 78, 491 N.E.2d 1163 (1986).

139. *Ramirez*, 114 Ill. 2d at 130, 500 N.E.2d at 16.

140. *Id.* at 131, 500 N.E.2d at 16-17.

141. *Id.* at 131, 500 N.E.2d at 17. The court refused to respond to the defendant's other claims of error because the defendant failed to object to them at trial. *Id.*

VII. RIGHT TO COUNSEL

A. Implied Consent Hearings

In *Koss v. Slater*,[142] the Illinois Supreme Court ruled that an indigent defendant does not have the right to appointed counsel at an implied consent hearing.[143] In *Koss*, Harold Koss was arrested and charged with driving under the influence ("DUI").[144] Koss's driving privileges were suspended because he failed to submit to a breathalyzer examination.[145] Because he was indigent, he requested that counsel be appointed to represent him at the implied consent hearing.[146] This request was denied after the trial court decided that the hearings were civil in nature, and, therefore, the right to appointed counsel did not attach.[147]

The supreme court agreed with the trial court.[148] The court based its conclusion that no right to counsel attached to the implied consent hearing on four grounds. First, the court held that the issues in a DUI proceeding are distinct from those in an implied consent hearing because the latter is not properly considered part of the criminal process.[149] Second, the court held that the implied consent hearing is not a critical stage of the prosecution be-

142. 116 Ill. 2d 389, 507 N.E.2d 826 (1987). This case arose from a motion to the supreme court for a supervisory order directed at the trial judge, David Slater. *Id.*

143. *Id.* at 397, 507 N.E.2d at 830. An implied consent hearing is a hearing to determine whether a person who has refused to submit to tests pursuant to ILL. REV. STAT. ch. 95 1/2, para. 11-501.1(a) (1985), has properly had his driving privileges suspended. The statute, in pertinent part, provides as follows:

> (a) Any person who drives or is in actual physical control of a motor vehicle upon the public highway of this State shall be deemed to have given consent, subject to the provisions of Section 11-501.2, to a chemical test or tests of blood, breath or urine for the purpose of determining the alcohol, other drug, or combination thereof content of such person's blood . . . .

ILL. REV. STAT. ch. 95 1/2, para. 11-501.1(a)(1985)

> (b) Upon notice of statutory summary suspension served under Section 11-501.1, the person may make a written request for a judicial hearing in the circuit court of venue . . . Within 30 days after receipt of the written request or the first appearance date on the Uniform Traffic Ticket issued pursuant to a violation of Section 11-501, or similar provision of a local ordinance, the hearings shall be conducted by the circuit court having jurisdiction. This judicial hearing, request or process shall not stay or delay the statutory summary suspension. Such hearings shall proceed in the court in the same manner as in other civil proceedings.

ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b) (1985).

144. ILL. REV. STAT. ch. 95 1/2, para. 11-501(a)(1) (1985).

145. *Koss*, 116 Ill. 2d at 390, 507 N.E.2d at 826.

146. *Id.* at 390, 507 N.E.2d at 826-27.

147. *Id.* at 390, 507 N.E.2d at 827.

148. *Id.* at 397, 507 N.E.2d at 830.

149. *Id.* at 393, 507 N.E.2d at 828.

cause such a hearing is not part of a criminal prosecution.[150] The results at an implied consent hearing are not binding on a defendant at a subsequent hearing.[151] Third, the court concluded that an implied consent hearing is not equivalent to a motion to suppress because a ruling in an implied consent hearing does not result in the dismissal of the criminal charges; it only serves to stay the suspension of driving privileges.[152] Finally, the court concluded that there is no deprivation of liberty involved in suspensions because no imprisonment is possible.[153] Accordingly, there is no right to appointed counsel in an implied consent hearing.[154]

B. Assistance of Counsel

In *People v. Brooks*,[155] the Illinois Supreme Court held that the defendant was not deprived of assistance of counsel when the trial court sequestered her during a recess in her testimony.[156] In *Brooks*, the trial court recessed after the defendant's direct testimony.[157] During this recess, the trial court ordered the defendant sequestered without any communications with counsel.[158] Brooks claimed that this sequestration deprived her of assistance of counsel.[159]

The supreme court held that the sequestration was not error.[160] The court noted that the defendant failed to object to the seques-

---

150. *Id.* at 395, 507 N.E.2d at 829. The court noted that the burdens of proof at the DUI hearing and at the implied consent hearing are different. In an implied consent hearing, the issues are

> whether there is evidence to establish that the defendant was arrested for driving under the influence of alcohol, whether the arresting officer had reasonable grounds to believe the defendant was driving under the influence of alcohol, and whether the defendant, after being advised by the arresting officer that his license would be suspended if he refused to submit to chemical tests, refused to submit.

Id. at 394-95, 507 N.E.2d at 829.

The court stated further that the issue in a criminal case is whether the state proved beyond a reasonable doubt "that the defendant was actually under the influence of alcohol while operating a motor vehicle." *Id.*

151. *Id.* at 396, 507 N.E.2d at 829.

152. *Id.* at 396, 507 N.E.2d at 829-30.

153. *Id.*

154. *Id.* at 397, 507 N.E.2d at 830.

155. 115 Ill. 2d 510, 510 N.E.2d 336 (1987). *See supra* notes 57-66 and accompanying text for further discussion of *Brooks* and the issue of whether the State violated the material witness rule.

156. *Id.* at 520-21, 505 N.E.2d at 341.

157. *Id.* at 518, 505 N.E.2d at 340.

158. *Id.* at 519, 505 N.E.2d at 340.

159. *Id.* at 518, 505 N.E.2d at 340.

160. *Id.* at 520, 505 N.E.2d at 341.

tration.[161] Moreover, the defendant did not ask to speak to her lawyer, and her lawyer did not ask to speak to her.[162] Because the defendant could show no prejudice resulting from the trial court's action, the supreme court concluded that the trial court acted properly.[163]

C. *Ineffective Assistance of Counsel*

In *People v. Kubat*,[164] the defendant alleged in his post-conviction petition that he was denied effective assistance of counsel.[165] The defendant contended that his trial counsel provided ineffective representation because counsel failed to call alibi witnesses on the defendant's behalf, failed to move to suppress illegally seized evidence, failed to properly investigate the defendant's case, failed to present exculpatory evidence,[166] and failed to consult the defendant on a jury waiver for sentencing.[167]

The supreme court relied on the standards announced in *Strickland v. Washington*,[168] and held that the defendant had not been denied his right to effective assistance of counsel.[169] The court ruled that the attorney's alleged failures did not prejudice the defendant.[170] The court noted that the testimony of alibi witnesses whom the defendant wanted to call had no probative value.[171] The court reviewed the search warrant in question and concluded that probable cause existed to search the defendant's vehicle, and therefore, that the attorney did not err in failing to move to suppress the

161. *Id.*

162. *Id.*

163. *Id.* at 520-21, 505 N.E.2d at 340-41.

164. 114 Ill. 2d 424, 501 N.E.2d 111 (1986).

165. *Id.* at 429, 501 N.E.2d at 112-13. The defendant's conviction for murder and death sentence was first affirmed in People v. Kubat, 94 Ill. 2d 437, 447 N.E.2d 247, *cert. denied*, 464 U.S. 865 (1983).

166. *Id.* at 429, 501 N.E.2d at 113.

167. *Id.* The defendant cited Faretta v. California, 422 U.S. 806 (1975), as support for his contention that he should have been allowed to make fundamental decisions regarding the proceedings. *Kubat*, 114 Ill. 2d at 429, 501 N.E.2d at 117.

168. 466 U.S. 668 (1984). *Strickland* requires that a defendant make two showings in an ineffective assistance of counsel claim. The defendant first must show that his counsel's performance was deficient. The second prong of the *Strickland* test requires the defendant to show that, in the absence of counsel's errors, the result of the trial would have been different. 466 U.S. at 687.

169. *Kubat*, 114 Ill. 2d at 430-39, 501 N.E.2d at 115-18.

170. *Id.* at 432-39, 501 N.E.2d at 115-18.

171. *Id.* at 433, 501 N.E.2d at 115. The court disagreed with the defendant's characterizing his attorney's failures as "shocking and inexplicable." *Id.* at 433, 501 N.E.2d at 115.

evidence seized during the search.[172] The other errors were dismissed by the court as either strategic or not prejudicial.[173]

In *People v. Hall*,[174] Anthony Hall, an inmate at Pontiac Correctional Institute, was convicted of murder and sentenced to death.[175] Hall requested that the court appoint an attorney other than the public defender.[176] Hall then expressed his desire to proceed pro se, and the trial court held a conference, with Hall and his public defender present.[177] During this conference, Hall struck the public defender on the head with a chair and struck the trial judge on the head with his fist.[178] The defendant contended that the failure to appoint new counsel after the incident denied him effective assistance of counsel.[179]

The supreme court disagreed with the defendant and ruled that, according to Illinois law, an indigent defendant may obtain counsel other than a public defender if he makes a showing of actual prejudice by continued representation.[180] The court reasoned that, the defendant not only failed to make this showing, but also, "embarked on a deliberate course designed to delay and disrupt his trial."[181]

VIII. TRIAL PRACTICE

A. The Right to Speedy Trial

In *People v. Arnhold*,[182] the defendant claimed that he was denied his statutory right to a speedy trial.[183] The defendant was

172. *Id.* at 436, 501 N.E.2d at 115.

173. *Id.* at 432-39, 501 N.E.2d at 115-18.

174. 114 Ill. 2d 376, 499 N.E.2d 1335 (1986).

175. *Id.* at 385, 499 N.E.2d at 1337. The defendant was convicted of murdering a civilian employee of the inmate kitchen. *Id.* at 386, 499 N.E.2d at 1337.

176. *Id.* at 386-87, 499 N.E.2d at 1337-38.

177. *Id.* at 389, 499 N.E.2d at 1339.

178. *Id.* at 389-90, 499 N.E.2d at 1339.

179. *Id.* at 401, 499 N.E.2d at 1344-45.

180. *Id.* at 402, 499 N.E.2d at 1344-45. The relevant statute provides that a defendant is entitled to the appointment of other counsel when he can establish good cause. ILL. REV. STAT. ch. 38, para. 113-3(b) (1985). This is a discretionary appointment. The courts have held that good cause requires a showing of prejudice. People v. Clark, 108 Ill. App. 3d 1071, 440 N.E.2d 387 (1st Dist. 1982).

181. *Hall*, 114 Ill. 2d at 404, 499 N.E.2d at 1346. A defendant is estopped from asserting ineffective assistance of counsel when the claim arises from lack of cooperation. People v. Myles, 86 Ill. 2d 260, 427 N.E.2d 59 (1981).

182. 115 Ill. 2d 379, 504 N.E.2d 100 (1987).

183. *Id.* at 381, 504 N.E.2d at 101. This appeal followed the defendant's conviction for aggravated kidnapping and conspiracy to commit theft charges. *Id.*

The statutory right to a speedy trial is found in ILL. REV. STAT. ch. 38, para. 103-5 *et. seq.* The pertinent parts are as follows:

released on bond on the charge at issue and was later arrested for an unrelated charge.[184] Thereafter, the defendant remained in custody.[185] He withdrew his bond from the first charge after approximately one month.[186] The defendant argued that the one month custody on the unrelated charge should have counted as custody for the first charge, even though his bond was still in effect during that period.[187]

The supreme court reasoned that a defendant's right to a speedy trial on a particular charge is determined by his custody status on that charge.[188] Arnhold was not in custody on the initial charge until he withdrew his bond.[189] The one month incarceration on the second charge, therefore, did not count in the speedy trial computation for the first charge.[190]

B. Severance

In *People v. Duncan*,[191] the defendant claimed that the trial court erred by denying his motion to sever certain counts and to sever

---

(a) Every person in custody in this State for an 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 . . .

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless the delay is occasioned by the defendant . . .

(e) If a person is simultaneously in custody upon more than one charge pending against him in the same county, or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried or adjudged guilty after waiver of trial, upon at least one such charge before expiration relative to any of such pending charges of the period prescribed by subparagraphs (a) and (b) of this Section.

ILL. REV. STAT. ch. 38, paras. 103-5(a),(b),(e) (1979).

184. *Arnhold*, 115 Ill. 2d at 381, 504 N.E.2d at 101. On June 3, 1980, the defendant was arrested for aggravated kidnapping and conspiracy to commit theft. He posted bond on July 18, 1980. On July 24, 1980, he was arrested on unrelated charges. He turned in his bond, or surrendered the bond, for the kidnapping and conspiracy charges on August 21, 1980. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 383, 504 N.E.2d at 101.

188. *Id* at 383-84, 504 N.E.2d at 101-02.

189. *Id.* at 384, 504 N.E.2d at 102.

190. *Id.*

191. 115 Ill. 2d 429, 505 N.E.2d 307, *rev'd*, 108 S. Ct. 53 (1987). The Supreme Court reversed the judgement and remanded the case to the Illinois Supreme Court for reconsideration in light of Richardson v. Marsh, 107 S. Ct. 1702 (1987) ("We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence."). The defendant was convicted in a joint trial with his co-defendant, Perry Olinger. Olinger's appeal is at 112 Ill. 2d 324, 493 N.E.2d 579 (1986).

the trial of his co-defendant.[192] In *Duncan*, the prosecution arose out of a series of murders.[193] The defendant claimed that the events that led up to the deaths of the two victims were not sufficiently related to be joined in the same indictment.[194] The defendant also claimed that, because the prosecution introduced his co-defendant's statement implicating him in the murders, and because the co-defendant did not testify at trial, he was denied his right to confront the witnesses against him, as provided for in *Bruton v. United States*.[195]

The Illinois Supreme Court considered whether the admission of a statement that implicates only the defendant, but does not directly accuse him, constitutes a *Bruton* violation.[196] The court concluded that, on the facts in *Duncan*, mere implication was sufficient to raise the *Bruton* danger.[197] The State lacked direct evidence of the defendant's guilt, and the non-testifying co-defendant's statement was used to implicate the defendant.[198] The court stated that the defendant did not have the opportunity to cross-examine the co-defendant, although the co-defendant's statement implicated him.[199]

In *People v. Byron*,[200] the supreme court held that the trial court erred by denying a defense request for a severance.[201] The defendant claimed that, because the co-defendant's defense was antagonistic to his defense and because the evidence to be introduced at

192. *Duncan*, 115 Ill. 2d at 439-40, 505 N.E.2d at 311.

193. *Id.* at 432-38, 505 N.E.2d at 308-11.

194. *Id.* at 439, 505 N.E.2d at 311.

195. *Id.* at 442, 505 N.E.2d at 311 (citing Bruton v. United States, 391 U.S. at 123 (1968)). *Bruton* dealt with the prejudice that results when a co-defendant's out-of-court statement inculpating the defendant is used in the defendant's trial and the co-defendant does not take the stand. *Bruton*, 391 U.S. at 123. In *Bruton*, the Supreme Court held that a severance should be granted because the defendant's right to confront witnesses through cross-examination was violated when he could not compel his codefendant to testify. *Id.* at 126-28. He therefore cannot cross-examine the statement that is being used against him. *Id.* at 136.

196. *Duncan*, 115 Ill. 2d. at 443, 505 N.E.2d at 313. The court said "[w]e must consider whether the challenged statements sufficiently implicate the defendant in the crimes to warrant examination under *Bruton*." *Id.*

197. *Id.* at 443-44, 505 N.E.2d at 313.

198. *Id.* at 444, 505 N.E.2d at 313. The court said about direct evidence of the defendant's guilt: "[w]e note that the record does not disclose direct evidence against the defendant." *Id.*

199. *Id.* This was relevant because a co-defendant was accused of striving to take over the local drug trade and was "willing to rob and kill those presently involved . . . ." *Id.* at 443, 505 N.E.2d at 313.

200. 116 Ill. 2d 81, 506 N.E.2d 1247 (1987). A co-defendant's case was reversed in People v. Bean, 109 Ill. 2d 80, 485 N.E.2d 349 (1985).

201. *Byron*, 116 Ill. 2d at 94, 506 N.E.2d at 1250.

trial "overwhelmingly implicated" the defendant, a severance was necessary to insure a fair trial.[202] The supreme court agreed with the defendant's contentions.[203] Reasoning that the trial became "more of a contest between the two defendants than between the People and each defendant," the court concluded that a severance was required to give Byron a fair trial.[204]

In *People v. Thomas*,[205] the supreme court also considered a denial of a severance motion.[206] In *Thomas*, an Assistant State's Attorney testified about the co-defendant's statement and referred to Thomas.[207] The defendant claimed he was prejudiced by this testimony.[208] The court reviewed the co-defendant's statement and noted that, although it placed the defendant at the scene of the murder, his own confession also placed him at the murder scene.[209] Moreover, unlike *Bruton*, there was other significant evidence of the defendant's presence.[210] The co-defendant's confession, therefore, did not "add substantial . . . weight to the government's case."[211]

C. *Prosecutorial Misconduct*

In *People v. Sanchez*,[212] the Illinois Supreme Court considered a claim of prosecutorial misconduct.[213] Specifically, the defendant

---

202. *Id.* at 90-91, 506 N.E.2d at 1251.

203. *Id.* at 94, 506 N.E.2d at 1251.

204. *Id.* at 93, 506 N.E.2d at 1251. Although ruling that Byron was entitled to a severance, the court noted the general rule that "defendants jointly indicted are to be tried together unless fairness to one defendant requires a separate trial to avoid prejudice." *Id.* (quoting People v. Lee , 87 Ill. 2d 182, 429 N.E.2d 461 (1981)).

205. 116 Ill. 2d 290, 507 N.E.2d 843 (1987). *See also supra* notes 86-92 and accompanying text for a discussion of issues relating to post-indictment uncounseled statements.

206. *Id.* at 300, 507 N.E.2d at 847.

207. *Id.* at 302, 507 N.E.2d at 848. The co-defendant's statement implicated the defendant by placing him at the scene of the murder. *Id.*

208. *Id.* at 301, 507 N.E.2d at 847. The defendant claimed that the admission of the co-defendant's statement that implicated him violated *Bruton*. *Id.* For a discussion of *Bruton*, *see supra* note 195.

209. *Id.* at 302-303, 507 N.E.2d at 847.

210. *Id.* at 303, 507 N.E.2d at 848. Specifically, the court noted that Thomas, by his own statement, placed himself at the murder scene. *Id.*

211. *Id.* at 303, 507 N.E.2d at 848. The court also noted that the State presented other evidence of the defendant's guilt. *Id.*

212. 115 Ill. 2d 238, 503 N.E.2d 277 (1986).

213. *Id.* at 266, 278, 503 N.E.2d at 287, 292. The defendant was convicted of murder and sentenced to death. The defendant then sought relief under section 2-1401 of the Illinois Code of Civil Procedure. ILL. REV. STAT. ch. 110, para. 2-1401 (1985). His post-conviction petition was dismissed without an evidentiary hearing. He appealed this dismissal and the supreme court transferred the appeal to the supreme court and consolidated it with the direct appeal from the trial court. *Id.* at 251-52, 503 N.E.2d at 280.

claimed that the prosecutor failed to call a witness listed on the prosecutor's list of potential witnesses.[214] The defendant claimed also that the prosecutor improperly cross-examined the defendant at the sentencing phase of the proceedings by asking him to tell the jury why he should not be put to death for the "savage" and "sadistic" murder.[215] The prosecutor asked also if the defendant thought the way in which the victim was sodomized was "ugly and brutal and despicable."[216]

Addressing the defendant's first claim, the court responded that the State need not call all of its listed potential witnesses.[217] The court held that if any of the witnesses were essential to the defendant's case, the defendant could call those witnesses.[218] Also, though finding that the prosecutor probably was "overzealous" in his cross-examination of the defendant, the court held that the trial court has discretion to grant "wide latitude" to the prosecutor.[219]

D. Jury Selection

In *People v. Whitehead*[220] and *People v. Sanchez*,[221] the defendants claimed that the exclusion of jurors for cause because of their opposition to the death penalty denied the defendants a fair jury trial.[222] The supreme court disagreed, in light of the United States Supreme Court's decision in *Lockhart v. McCree*.[223] *Lockhart* held that the practice of examining jurors to determine their feelings about the death penalty, in order to excuse for cause those who are unalterably opposed to the death penalty, does not violate either

214. *Id.* at 266, 503 N.E.2d at 887. The defendant contended that in anticipation of the testimony of one of the State's potential witnesses, he did not object to certain testimony of other State witnesses. He stated that he planned on cross-examining one of the State's witnesses to counter certain testimony of other witnesses. *Id.*

215. *Id.* at 279-80, 503 N.E.2d at 293.

216. *Id.*

217. *Id.* at 266-67, 503 N.E.2d at 287. The court noted that the purpose of Rule 412, requiring the state to list potential witnesses, is to "combat surprise and afford an opportunity to combat false testimony." *Id.* (citing ILL. S. CT. R. 412).

218. *Id.* at 267, 503 N.E.2d at 287.

219. *Id.* at 281, 503 N.E.2d at 294. The court stated that the appropriate standard of review of prosecutorial conduct is whether "manifest prejudice resulted" from that conduct. *Id.* at 281 (citing People v. Williams, 66 Ill. 2d 478, 363 N.E.2d 801 (1977)).

220. 116 Ill. 2d 425, 508 N.E.2d 687 (1987). *See also supra* notes 67-77 and accompanying text.

221. 115 Ill. 2d 238, 503 N.E.2d 277 (1986). *See also supra* notes 212-19 and accompanying text.

222. *Whitehead*, 116 Ill. 2d at 449, 508 N.E.2d at 696; *Sanchez*, 115 Ill. 2d at 265-66, 503 N.E.2d at 286.

223. *Whitehead*, 116 Ill. 2d at 449, 508 N.E.2d at 696; *Sanchez*, 115 Ill. 2d at 265-66, 503 N.E.2d at 286 (citing Lockhart v. McCree, 106 S. Ct. 1758 (1986)).

the defendant's right to a jury drawn from a fair cross section of the community or the right to an impartial jury.[224] According to *Lockhart*, there is no violation of the fair cross section requirement because those jurors who are absolutely opposed to the death penalty are not a distinctive group in the community.[225] As for the right to an impartial jury, the court reiterated its previous holdings in other cases that there is no evidence that juries examined concerning their ability to vote for the death penalty are conviction prone.[226]

E. Substitution of Judges

In *People v. Hall*,[227] the defendant, Anthony Hall struck the trial judge in a closed door conference room, outside the presence of the jury.[228] The defendant argued that the judge was obligated to recuse himself after this incident.[229] The court noted that a defendant is entitled to a substitution of judges when he is able to establish prejudice by the trial judge's refusal either to recuse himself or to transfer the case to another judge.[230] The court held that

---

224. *Lockhart*, 106 S. Ct. at 1766.

225. *Id.* In Duren v. Missouri, 439 U.S. 357 (1979), the Supreme Court espoused the elements a defendant needs to show for a violation of the fair-cross-section requirement. 439 U.S. at 364. These elements of a prima facie showing are:

> (1) That the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id.

226. *Sanchez*, 115 Ill. 2d at 265, 503 N.E.2d at 286.

227. 114 Ill. 2d 376, 499 N.E.2d 1335 (1986). *See supra* notes 174-81 and accompanying text for a discussion of issues relating to ineffective assistance of counsel in *Hall*.

228. *Id.* at 390, 499 N.E.2d at 1339. The trial judge related the incident as follows:

> [l]et the record show that the defendant has now been removed and that the prosecution is now present in chambers and that we are outside the presence of the jury and the persons assembled in the courtroom, and let the record further show that defense counsel, Steven Skelton has just been struck on the head by the defendant with a chair and that the court has also been struck by the defendant on the head with his fists.

Id.

229. *Id.* at 405-06, 499 N.E.2d at 1346.

230. *Id.* at 406, 499 N.E.2d at 1346. The court noted that ILL. REV. STAT. ch.38, para. 114-5(c) (1963), created an absolute right for a substitution of judges if the defendant makes a motion within ten days of the case being placed on the judge's docket. After the ten day period, a defendant is entitled to a transfer if he can establish "cause." *Hall*, 114 Ill. 2d at 406, 499 N.E.2d at 1346. In People v. Vance, 76 Ill. 2d 171, 390 N.E.2d 867 (1979), the court held that the burden for establishing cause rests on the defendant, not on the trial judge. *Id.* at 178, 390 N.E.2d at 870. The determination of prejudice is usually left to the court's discretion. People v. Polk, 55 Ill. 2d 327, 303 N.E.2d 137 (1973).

the defendant failed to establish such prejudice.[231] The court stated that the "record fails to show any unfairness to the defendant or even want of evenhandness."[232] The court reasoned that to reverse a case on these grounds would be to invite angry defendants to commit this type of assault.[233]

F. Jury Waiver

In *Hall*,[234] the defendant also claimed that he did not waive a jury for his death sentencing hearing knowingly or intelligently.[235] The defendant argued that he would not have waived a jury if he had been admonished, by the trial court or by counsel, that the jury's sentencing recommendation must be unanimous.[236] The court concluded that the defendant knowingly and intelligently waived the jury for the sentencing hearing.[237] The court responded that the defendant had continuously asserted his desire to have the judge, not the jury, decide his case.[238]

G. Change of Venue

In *People v. Lego*,[239] the Illinois Supreme Court held that the trial court did not err by denying the defendant's request for a change of venue.[240] The defendant was charged with the murder of an eighty-two-year-old woman.[241] The defendant argued that, because of extensive pretrial publicity, he could not receive a fair trial.[242] Although three of the jurors admitted that they had heard

231. *Hall*, 114 Ill. 2d at 406-07, 499 N.E.2d at 1347.

232. *Id.* at 406, 499 N.E.2d at 1347. The court also noted that the defense counsel and the trial judge "carried out their responsibilities with professional competence, and, considering the circumstances, even grace." *Id.* at 407, 499 N.E.2d at 1347.

233. *Id.*

234. 114 Ill. 2d 376, 499 N.E.2d 1335 (1986).

235. *Id.* at 411, 499 N.E.2d at 1349. The defendant cited People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984), which held that the requirements of knowing and intelligent jury waiver apply to capital sentencing hearings. *Id.* at 534, 473 N.E.2d at 1260.

236. *Hall*, 114 Ill. 2d at 411, 499 N.E.2d at 1349.

237. *Id.* at 411-14, 499 N.E.2d at 1349. In other cases, the court has held that a trial court is not required to advise defendants at death sentencing hearings of the "unanimity-of-decision" requirement before a jury waiver is accepted. *See, e.g.*, People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984); People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 1815 (1980).

238. *Hall*, 114 Ill. 2d at 412, 499 N.E.2d at 1349.

239. 116 Ill. 2d 323, 507 N.E.2d 800 (1987).

240. *Id.* at 334, 507 N.E.2d at 804.

241. *Id.* at 332-33, 507 N.E.2d at 802.

242. *Id.* at 333, 507 N.E.2d at 802. The defendant contended that three jurors admitted having heard about this case through the media. The defendant argued that these outside influences deprived him of a fair trial. *Id.* The defendant cited Nebraska Press

about the case, they all stated that they would decide the defendant's guilt or innocence based upon the evidence presented at trial.[243] The supreme court held that, because each juror demonstrated an ability to render a verdict based on the evidence, and not on the publicity given the case, the defendant received a fair trial.[244]

IX. SENTENCING

A. Factors Used in Sentencing

In *People v. White*,[245] the defendant, Frank White contended that the trial court erred in using the victim's age as a factor in sentencing him for a crime in which the victim's age was an element of the offense.[246] The defendant was convicted of aggravated battery of a child,[247] and during sentencing the trial judge used the fact that the victim was under the age of twelve years as an aggravating factor in imposing sentence.[248]

The Illinois Supreme Court agreed with the defendant.[249] The court relied on *People v. Conover*,[250] which held that, "in determining the appropriate range of punishment for a criminal offense, the legislature must necessarily have considered the factors inherent in the offense."[251] Applying the reasoning in *Conover*, the court held that the trial court erred by considering the victim's age when sentencing the defendant for an offense in which the elements take into account the victim's age.[252]

In *People v. Saldivar*,[253] the defendant was sentenced to seven

---

Association v. Stuart, 427 U.S. 539 (1976), for the proposition that pretrial publicity can deprive a defendant of a fair trial. *Lego*, 116 Ill. 2d at 333, 507 N.E.2d at 802.

243. *Lego*, 116 Ill. 2d at 334, 507 N.E.2d at 802-03.

244. *Id.* at 334, 507 N.E.2d at 803-04. The court also noted that the three jurors questioned by the defendant were not challenged by the defendant during voir dire. *Id.*

245. 114 Ill. 2d 61, 499 N.E.2d at 467 (1986).

246. *Id.* at 65, 499 N.E.2d at 469.

247. ILL. REV. STAT. ch. 38, para. 12-4.3 (1983).

248. *White*, 114 Ill. 2d at 64, 499 N.E.2d at 468. The defendant was convicted of aggravated battery of his nine-year-old son. The trial court sentenced him to four years in prison. *Id.*

249. *Id.* at 65, 68, 499 N.E.2d at 469, 470.

250. 84 Ill. 2d 400, 419 N.E.2d 906 (1981).

251. *White*, 114 Ill. 2d at 66, 499 N.E.2d at 469 (citing People v. Conover, 84 Ill. 2d 400, 419 N.E.2d 906 (1981)).

252. *White*, 114 Ill. 2d at 66, 499 N.E.2d at 470. Although the court found that the trial judge erred in considering the victim's age, it decided not to remand for resentencing. The court noted that the trial judge did not rely primarily upon age as a factor. *Id.* at 66-68, 499 N.E.2d at 470.

253. 113 Ill. 2d 256, 497 N.E.2d 1138 (1986).

years imprisonment for voluntary manslaughter following a stipulated bench trial on the charge of murder.[254] The defendant claimed that the *Conover* rule was violated when the trial court stated that it was relying on the harm caused to the victim - his death - as the principle aggravating factor in sentencing.[255]

The supreme court agreed, and reduced the sentence to the minimum period of four years.[256] The court reasoned that harm to the victim could be an aggravating factor in a sentencing determination for voluntary manslaughter, but only when the trial court considered it under the rubric of harm, "the force employed and the physical manner in which the victim's death was brought about."[257] In *Saldivar*, the trial judge considered the fact of death itself.[258]

B. Credit for Time in Custody

In *Moore v. Strayhorn*,[259] Ike Moore sued the trial judge for refusing to grant him credit for the time he had already spent in custody on the charge for which he was sentenced.[260] After exercising its discretionary supervisory authority to review,[261] the Illinois Supreme Court held that, according to Illinois law,[262] a sentencing judge is required to give the defendant credit for time spent in custody for the offense for which he is sentenced.[263] The court issued a supervisory order, directing the circuit court to give the defendant credit for time spent in custody in accordance with Illinois law.[264]

---

254. *Id.* at 259-60, 497 N.E.2d at 1138-39.

255. *Id.* at 264, 497 N.E.2d at 1142. The primary factor that the trial judge relied upon was "the terrible harm that was caused the victim." *Id.* at 266, 497 N.E.2d at 1140. The court also noted that the trial judge "mentioned that the defendant's conduct caused the death and that a human life was taken." *Id.*

256. *Id.* at 272, 497 N.E.2d at 1144-45.

257. *Id.* at 271, 497 N.E.2d at 1143-44 (citing People v. Andrews, 105 Ill. App. 3d 1109, 435 N.E.2d 706 (5th Dist. 1982) and People v. Hughes, 109 Ill. App. 3d 352, 440 N.E.2d 432 (5th Dist. 1982)).

258. *Saldivar*, 113 Ill. 2d at 272, 497 N.E.2d at 1144.

259. 114 Ill. 2d 538, 502 N.E.2d 727 (1986).

260. *Id.* at 540, 502 N.E.2d at 728.

261. The court noted that "we improvidently granted leave to file such a petition . . . because Moore should have been left to his alternative remedy of appealing the sentencing order to the appellate court. *Id.*

262. The relevant statute provides in part as follows: "the offender should be given credit . . . for time spent in custody as a result of the offense for which the sentence was imposed." ILL. REV. STAT. ch. 38, para. 1005-8-7(b)(1985).

263. *Moore*, 114 Ill. 2d at 542, 502 N.E.2d at 728.

264. *Id.*

C. Challenges to the Length of Sentence

In *People v. Barrios*,[265] the defendant contested the length of his sentence.[266] Following a conviction for perjury and driving on a revoked license, the defendant was sentenced to four years incarceration.[267] The defendant argued that the "sentence [was] disproportionate to the offense."[268] As support for his argument, the defendant cited *City of Evanston v. Connelly*,[269] in which the court sentenced the defendant to forty-five days for falsifying a driver's license application.[270]

The supreme court held that the trial court did not abuse its discretion in imposing the sentence.[271] The court distinguished this case from *Connelly*.[272] In *Connelly*, the conviction was not for perjury, unlike the instant case.[273] Also in *Connelly*, unlike the defendant in *Barrios*, the defendant had no prior criminal history.[274] The court ruled, therefore, that if a sentence is within the statutory limit, "[it will] not be disturbed unless it is greatly at variance with the purpose and spirit of the law . . . ."[275]

D. Delay in Serving the Sentence

In *Crump v. Lane*,[276] the defendant contended that he should be excused from serving his sentence because there was a six year delay between the affirmance of his conviction and the issuance of the mittimus.[277] Michael Crump was convicted in 1974 for armed robbery.[278] He appealed this conviction and it was subsequently af-

265. 114 Ill. 2d 265, 500 N.E.2d 415 (1986).

266. *Id.* at 276, 500 N.E.2d at 419.

267. *Id.* at 268, 500 N.E.2d at 415. The perjury conviction was based on the defendant's having lied on a driver's license application. He was sentenced to four years for the perjury. He was sentenced to 364 days for driving on a revoked license. *Id.*

268. *Id.* at 276, 499 N.E.2d at 419.

269. 73 Ill. App. 3d 890, 392 N.E.2d 211 (1st Dist. 1979).

270. *Barrios*, 114 Ill. 2d at 276, 500 N.E.2d at 419. The defendant argued that lengthy sentences for perjury are appropriate only in major trials. The defendant also pointed to a prior armed robbery conviction for which he had only received a five year sentence. By comparison, he asserted his sentence was too severe. *Id.*

271. *Id.* at 276, 500 N.E.2d at 420.

272. *Id.* at 276-77, 500 N.E.2d at 419.

273. *Id.* at 276, 500 N.E.2d at 419.

274. *Id.* at 276-77, 500 N.E.2d at 420.

275. *Id.* at 277, 500 N.E.2d at 420.

276. 117 Ill. 2d 181, 510 N.E.2d 893 (1987).

277. *Id.* at 183, 510 N.E.2d at 894. A mittimus is an order from the court remanding the defendant to the custody of the sheriff, or an order affirming a conviction. BLACK'S LAW DICTIONARY 904 (5th Ed. 1979).

278. *Crump*, 117 Ill. 2d at 182, 510 N.E.2d at 894.

firmed.[279] The defendant later was arrested and convicted on an unrelated charge of aggravated battery, six years after his first conviction was affirmed.[280] At the sentencing hearing on the aggravated battery charge, the State became aware of the 1974 conviction and of the defendant's failure to serve the sentence.[281] The defendant sought habeas corpus relief on the armed robbery charge.[282] He claimed that the delay was attributable to the State because his attorney had told him the conviction had been reversed and because he had received a refund of his bond.[283]

The supreme court affirmed the denial of the defendant's habeas corpus application.[284] Relying on its recent decision in *Walker v. Hardiman*,[285] the court held that because the affirmance of the armed robbery conviction was promptly filed and entered into the record and because Crump's lawyer was notified of the affirmance, the delay was chargeable to the defendant.[286] The court emphasized that one of the conditions of bond is that the defendant surrender himself upon affirmance of a conviction.[287] The court stated that "[i]t was Crump's responsibility to comply with the conditions of his bail, not the state's to see that he did."[288]

E. Refusal to Allow the Defendant to Speak Before Imposing Sentence

In *People v. Christiansen*,[289] the defendant contended that the trial court violated his due process guarantees by refusing him a

279. *Id.*

280. *Id.* at 183, 510 N.E.2d at 894.

281. *Id.* at 182, 510 N.E.2d at 894. The defendant falsely testified that this conviction was reversed on appeal. *Id.*

282. *Id.*

283. *Id.* at 183, 510 N.E.2d at 894.

284. *Id.* at 185, 510 N.E.2d at 894.

285. 116 Ill. 2d 413, 507 N.E.2d 849 (1987). In *Walker*, the defendant's conviction was affirmed and his attorney was notified of the affirmance. The delay between the affirmance and the date Walker surrendered was five years. Walker did not get his bond returned to him, unlike Crump. Nor was Walker subsequently arrested for another crime, unlike Crump. The court held that the defendant could not escape his sentence by showing that the State failed to notify him to surrender. *Id.*

286. *Crump*, 117 Ill. 2d at 184, 510 N.E.2d at 894.

287. *Id.* at 185, 510 N.E.2d at 895. The bail statute requires a defendant whose conviction has been affirmed to surrender himself to the court immediately. ILL. REV. STAT. ch. 38, para. 110-10(b)(5) (1985).

288. *Id.*

289. 116 Ill. 2d 96, 506 N.E.2d 1253 (1987). *See also supra* notes 78-85 and accompanying text for a discussion of issues relating to comments on the defendant's refusal to reduce an oral statement to writing.

chance to speak[290] before imposing sentence.[291] The defendant argued also that this was a violation of equal protection because noncapital defendants are afforded this right by statute, and capital defendants are not.[292]

The Illinois Supreme Court disagreed with these arguments.[293] Relying on *Hill v. United States*,[294] the court held that allocution is not a fundamental right guaranteed by due process.[295] Because it is not a fundamental right, its denial to capital defendants does not deny those defendants equal protection of the laws.[296]

F. Death Penalty Issues

1. Qualification for the Death Penalty

In *People v. Guest*,[297] the Illinois Supreme Court held that a California murder conviction could constitute an aggravating factor to qualify the defendant for the death penalty under the Illinois statute.[298] The defendant claimed that it was error to use the Califor-

290. The chance to speak before imposition of sentence is referred to as the right of allocution. BLACK'S LAW DICTIONARY 70 (5th Ed. 1979).

291. *Christiansen*, 116 Ill. 2d at 127, 506 N.E.2d at 1266. The defendant contended that "the right to make such a statement is 'part of our concept of ordered liberty [so] as to constitute part of the due process guarantee.' " *Id.*

292. *Id. See* ILL. REV. STAT. ch. 38, para. 1005-4-1(a)(5) (1981), which provides, in relevant part, "(a) Except when the death penalty is sought under hearing procedures otherwise specified, after a determination of guilt a hearing shall be held to impose the sentence . . . . At the hearing the court shall: . . . (5) afford the defendant the opportunity to make a statement on his behalf . . . ."

293. *Christiansen*, 116 Ill. 2d at 129, 506 N.E.2d at 1266.

294. 368 U.S. 424 (1962).

295. The court quoted the following from *Hill*: "[t]he failure of a trial court to ask a defendant . . . whether he has anything to say before sentence is imposed . . . is not a fundamental which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Christiansen*, 116 Ill. 2d at 128, 506 N.E.2d at 1266-67 (quoting Hill v. United States, 368 U.S. at 428).

296. *Christiansen*, 116 Ill. 2d at 129, 506 N.E.2d at 1266-67. The supreme court noted that courts give deference to the legislature "unless the classification either impinges on some right deemed fundamental or [is] directed against a 'suspect' class." *Id.* (quoting People v. Gaines, 88 Ill. 2d 342, 380, 430 N.E.2d 1046, 1065 (1981)).

297. 115 Ill. 2d 72, 503 N.E.2d 255 (1986).

298. *Id.* at 102, 503 N.E.2d at 269. The Illinois statute provides as follows:

> (b) Aggravating factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of the offense of murder 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 which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts.

ILL. REV. STAT. ch. 38, para. 9-1(b)(3) (1985).

nia conviction because the mental states required for murder in California and Illinois differed and also because the California murder occurred after the Illinois murder.[299]

The court rejected these claims, holding that the murder statutes are "substantially similar" enough to qualify the defendant for the death penalty.[300] The court held also that it was immaterial that the California murder occurred after the Illinois murder.[301]

2. Constitutionality of the Death Penalty Statute

In *Guest*,[302] the court addressed also the constitutionality of the Illinois Death Penalty Statute.[303] The defendant first claimed that the death penalty gave the State's Attorney "discretionary authority to seek the death penalty."[304] The defendant next claimed that the sentencing procedure is arbitrary and provides no review of whether it is proportionate to the penalty given in other death cases.[305] Next, the defendant claimed that the statute places on the defendant the burden of proving the inappropriateness of death as a punishment, and the sentencer does not have to weigh aggravating and mitigating factors.[306] Finally, the defendant contended that the state is not required to prove the absence of mitigating factors beyond a reasonable doubt.[307]

The court has dealt with each of the foregoing issues in previous cases and dismissed each of the defendant's claims.[308] In generally upholding the constitutionality of the death penalty statute, the

299. 115 Ill. 2d *Id.* at 92-103, 503 N.E.2d at 263-69. The defendant argued that the California murder statute under which he was previously convicted is not "substantially similar" to the Illinois murder statute, as required by ILL. REV. STAT. ch.38, para. 9-1(b)(3). *Id.* at 93, 503 N.E.2d at 263. The principal difference he cited was that murder in Illinois requires proof of intent or knowledge, whereas murder in California requires proof of malice aforethought. The defendant argued that malice aforethought is no longer used in Illinois. *Id.* at 96, 503 N.E.2d at 266.

300. *Id.* at 95, 503 N.E.2d at 269.

301. *Id.* at 103, 503 N.E.2d at 273.

302. 115 Ill. 2d 72, 503 N.E.2d 255 (1987).

303. *Id.* at 109-13, 503 N.E.2d at 272-74.

304. *Id.* at 109, 503 N.E.2d at 272. The defendant's argument is based on the separation of powers doctrine. He claimed that this authority "delegates judicial functions to the executive branch." *Id.*

305. *Id.* at 110, 503 N.E.2d at 273.

306. *Id.* at 112, 503 N.E.2d at 273.

307. *Id.*

308. In rejecting the argument that the statute arbitrarily imposes the death penalty, the court cited People v. Kubat, 94 Ill. 2d 437, 447 N.E.2d 247 (1983)(the Illinois Death Penalty Statute limits and directs the discretion of the sentencer and provides for meaningful appellate review as required in Gregg v. Georgia, 428 U.S. 153 (1976)).

In rejecting the defendant's argument that the death penalty is unconstitutional because it places on the defendant the burden to prove that death is an inappropriate pun-

court relied upon *Gregg v. Georgia*,[309] which held that "a death penalty statute is valid if it limits and directs the discretion of the sentencer and provides for meaningful appellate review."[310]

3. Failure to Hold a Bifurcated Sentence Hearing

In *People v. Lego*,[311] the court held that the trial court did not err by holding a unitary sentence hearing.[312] The defendant argued that this procedure allowed the jury to hear non-statutory aggravating factors during the time when they were trying to decide whether, as a matter of fact, any statutory aggravating factor had been proved beyond a reasonable doubt.[313] The defendant claimed that the non-statutory aggravation is often quite inflammatory and thus prejudices the defendant on the factual question of the existence of the statutory aggravating factor.[314] The court disposed of this issue, relying on its earlier decision in *People v. Brisbon*.[315] In *Brisbon*, the court held that no prejudice results from this procedure.[316] The court noted that the only limits on what a jury shall hear in sentencing is "relevance and reliability."[317]

4. Factors in Aggravation

In *Christiansen*,[318] the supreme court held that the trial court did not err by using a twenty-two year-old armed robbery conviction as a death penalty aggravating factor.[319] The defendant argued that, because there was a ten year limitation on the admissibility of

---

ishment, the court cited People v. Del Vecchio, 105 Ill. 2d 414, 475 N.E.2d 840, *cert. denied*, 106 S. Ct. 204 (1985).

309. 428 U.S. 153 (1976).

310. *Guest*, 116 Ill. 2d at 110, 503 N.E.2d at 273 (citing Gregg v. Georgia, 428 U.S. at 188-95).

311. 116 Ill. 2d 323, 507 N.E.2d 800 (1987). *See also supra* notes 239-44 and accompanying text.

312. *Id.* at 346, 507 N.E.2d at 807.

313. *Id.*

314. *Id.* The defendant claimed that the jury was allowed to hear "unproved charges of prison escapes, repeated reference to his recent parole for an offense committed in a manner similar to the present one, testimony that an 'FBI' rap sheet existed, and evidence of juvenile adjudications . . . ." *Id.*

315. *Id.* (citing People v. Brisbon, 106 Ill. 2d 342, 478 N.E.2d 402 (1985)).

316. *Brisbon*, 106 Ill. 2d 342, 478 N.E.2d 402 (1985).

317. *Id.* The court stated: " 'The only limitation upon evidence admitted at the aggravation and mitigation phases of the sentencing hearing are relevance and reliability; the hearing is not confined by the rules of evidence in effect at the guilt phase of the trial.' " *Id.* (quoting People v. Brisbon, 106 Ill. 2d 342, 364-65).

318. 116 Ill. 2d 96, 506 N.E.2d 1253 (1987); *See supra* notes 289-96 and 78-85 and accompanying text for a discussion of issues relating to the right of allocution and comments on the defendant's refusal to reduce an oral statement to writing.

319. *Id.* at 124, 506 N.E.2d at 1264.

convictions for impeachment purposes,[320] a similar limitation should be applied to the aggravation stage of the death penalty sentence proceeding.[321]

The Illinois Supreme Court disagreed, holding that admissibility to prove aggravation or mitigation depends only on the relevance and reliability of the evidence.[322] The court held that evidence of another armed robbery was relevant here because the defendant was convicted of two armed robberies in addition to murder.[323] The previous armed robberies were relevant, to show that his "adult life was characterized by a pattern of criminal behavior, suggesting, in the words of the court, that his 'potential for rehabilitation or restoration to useful citizenship is poor, very poor.' "[324]

X. APPELLATE ISSUES

In *People v. Fike*,[325] the appellate court dismissed as untimely the defendant's appeal from a revocation of probation and sentence of six months imprisonment.[326] The dispositive issue for the supreme court in reversing was whether the notice of appeal was filed within the required thirty days.[327] Court documents were in disarray; there were two dates filed on the pertinent appeal documents, one timely and one of them untimely.[328] The court held that, although the common law record is presumed correct, when the record itself is contradictory the court must resolve the contradiction.[329] There was no direct evidence to explain the contradictory dates, but the court concluded that the defendant's hypotheses were reasonable since they fit most logically with the known facts.[330] The court concluded, therefore, that the defendant's ap-

320. *Id.* As support for the defendant's argument, he cited People v. Warmack, 83 Ill. 2d 112, 413 N.E.2d 1254 (1980), and People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971).

321. *Christiansen*, 116 Ill. 2d at 123, 506 N.E.2d at 1264.

322. *Id.* at 124, 506 N.E.2d at 1264. The court noted that the State correctly cited the rules governing admissibility of evidence in aggravation and mitigation. *Id.*

323. *Id.* at 123, 124, 506 N.E.2d at 1265.

324. *Id.* at 124, 506 N.E.2d at 1265.

325. 117 Ill. 2d 49, 509 N.E.2d 1011 (1987).

326. *Id.* at 52, 509 N.E.2d at 1011. The notice of appeal was due to be filed by August 17, 1984, which was thirty days after the defendant's sentence. On the motion for a new trial there appeared two dates, August 17 and August 21. *Id.*

327. *Id.* at 52, 509 N.E.2d at 1012.

328. *Id.* at 52-53, 509 N.E.2d at 1012-13.

329. *Id.* at 56, 509 N.E.2d at 1014. When there is a contradiction, the court may look at the record as a whole. *Id.*

330. *Id.* at 57, 509 N.E.2d at 1014.

peal must be reinstated.[331]

XI. POST-CONVICTION PETITION ISSUES

A. *Improper Denial of Hearing on Post-Conviction Petition*

In *People v. Sanchez*,[332] the Illinois Supreme Court held that the trial court erred in dismissing a post-conviction petition without a hearing.[333] The defendant submitted a petition for post-conviction relief that was supported only by an attorney's affidavit containing hearsay.[334] Although the court noted that this is generally insufficient to warrant post-conviction relief, capital cases require the rule to be applied more flexibly.[335] The court stayed the defendant's death sentence until disposition of the post-conviction petition.[336]

B. *Waiver by Failing to Raise Issues at Trial*

In *People v. Silagy*,[337] the defendant was convicted of murder and sentenced to death.[338] On direct appeal, the Illinois Supreme Court affirmed the conviction and death sentence.[339] The defendant then filed a petition for post-conviction relief which the trial court dismissed.[340] The trial court held that the issues raised in the petition were either already ruled upon in the defendant's direct appeal to the supreme court or were matters of trial strategy.[341]

The supreme court agreed with the trial court.[342] Principally, the defendant also claimed that newly discovered evidence warranted

---

331. *Id.* at 58, 509 N.E.2d at 1015. The court remanded the case to the appellate court for a decision on the merits of the defendant's appeal. *Id.* The court wanted to refrain from making a decision on a "hypertechnical reading" of the rules. *Id.*

332. 115 Ill. 2d 238, 503 N.E.2d 277 (1986). *See supra* notes 212-26, and accompanying text for a discussion of issues relating to prosecutorial misconduct and jury selection.

333. *Id.* at 287, 503 N.E.2d at 295.

334. *Id.* at 283, 284, 503 N.E.2d at 295.

335. *Id.* at 284, 503 N.E.2d at 295-96. The court held that in capital cases, "procedural fairness and factual accuracy are of paramount importance." *Id.* at 284, 503 N.E.2d at 296.

336. *Id.* at 287, 503 N.E.2d at 297.

337. 116 Ill. 2d 357, 507 N.E.2d 830 (1987).

338. *Id.*

339. *Id. See* People v. Silagy, 101 Ill. 2d 147, 461 N.E.2d 415, *cert denied*, 469 U.S. 873 (1984).

340. 116 Ill. 2d at 364, 507 N.E.2d at 832.

341. *Id.*

342. *Id.* at 373, 507 N.E.2d at 834. The court stated that "[t]he sole issue on this appeal is whether the trial court erred in dismissing Silagy's post-conviction petition without an evidentiary hearing on the allegations raised by the affidavits that supported the petition." *Id.* at 364, 507 N.E.2d at 832.

an evidentiary hearing on his claim for post-conviction relief.[343] The defendant presented a psychiatrist's affidavit, which concluded that the defendant suffered from post-traumatic stress syndrome at the time of the murders.[344] The defendant contended that this diagnosis was not made at the time of the trial; in fact, it was not an accepted diagnosis in the scientific community at that time.[345] The Illinois Supreme Court disagreed with this contention as well, ruling that the defendant's insanity defense included the data to which the affidavit referred.[346] The court concluded that the defendant had not discovered new evidence; he sought merely to relabel what had already been presented.[347]

XII. LEGISLATION

A. Substitution of Judges for the State

Section 114-5 of the Illinois Code of Criminal Procedure was amended this past year to grant the state the right to move for a substitution of judges.[348] The state now has the right to move for a substitution of judges within ten days of the time at which the case is placed on the judges docket.[349] The motion will be granted automatically if done so within ten days.[350] If filed after the ten day period, the state will be required to show cause for the substitution.[351]

---

343. *Id.* at 367, 507 N.E.2d at 834. The defendant raised also four other issues. They were as follows: (1) he was denied his right to an impartial jury because of the statutory method of jury selection; (2) he received ineffective assistance of counsel for his counsel's failure to introduce factors in mitigation at the sentencing hearing and for his counsel's failure to suppress certain custodial statements; (3) his due process rights were violated because he wasn't told that his statements to examining psychiatrists could be used against him; and (4) he was not fit to waive counsel for sentencing, and that the trial court erred by allowing the sentencing jury to hear testimony regarding his violent acts while in Viet Nam. *Id.*

344. *Id.* The defendant claimed that this was a result of his "combat experience in Viet Nam." *Id.*

345. *Id.* at 368, 507 N.E.2d at 834. The psychiatrist who testified at trial as to Silagy's insanity, stated in an affidavit that this disorder was not considered by him because it was "not officially recognized by the psychiatric community." *Id.*

346. *Id.* at 368-69, 507 N.E.2d at 834-35.

347. *Id.* The court noted that the evidence of his experiences in Viet Nam was introduced at trial. *Id.* at 369, 507 N.E.2d at 834.

348. ILL. REV. STAT. ch. 38, para. 114-5(c)(amended by P.A. 84-1428, which became effective July 1, 1987).

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

350. *Id.*

351. *Id.*

B. Exemption from Jury Service

Public Act 84-1428 was amended, effective July 1, 1987, to eliminate most of the exemptions from jury service.[352] Members of the newspaper media are the only persons who are still exempt from jury service.[353] Previously there was an exemption for the Governor, Lieutenant Governor, Secretary of State and other State officials.[354] There was also an exemption for certain county and municipal officials, Christian Scientists, practicing attorneys and officers of the United States.[355]

C. State's Right to Jury Trial

The state now has a right to a jury trial where the only offense charged is a felony violation of either the Cannabis Control Act or the Illinois Controlled Substances Act.[356] For the defendant to waive a jury in the trial of the above two prosecutions, the court must require both the state and the defendant to waive the jury in writing.[357]

XIII. CONCLUSION

The area of Criminal Procedure is generally the subject of many Illinois Supreme Court opinions. This *Survey* period was no exception. The Illinois Supreme Court continued to follow the lead of the United States Supreme Court in analyzing fourth, fifth, and sixth amendment rights of the accused. The court has not resorted to the Illinois Constitution to provide greater protection.[358] Thus, at a time when the rights of the accused were given a constricted reading by the United States Supreme Court, the run of criminal cases in the Illinois Supreme Court was in the same direction. But there were some exceptions.

---

352. ILL. REV STAT. ch. 78, para. 4 (1987). The statute reads as follows:

> The following persons shall be exempt from serving as jurors, to wit: all persons actively employed upon the editorial or mechanical staffs and departments of any newspaper of general circulation printed and published in this State.

Id.

353. ILL. REV. STAT. ch. 78, para. 4 (1986).

354. *Id.*

355. *Id.*

356. ILL. REV. STAT. ch. 38, para. 115-1 (1987).

357. *Id.*

358. In People v. Tisler, the court held that the Illinois Supreme Court would follow the United States Supreme Court in analyzing search and seizure problems. The court found that the Illinois Constitution provided no greater protection than the fourth amendment. Specifically, the court adopted the Illinois v. Gates, 462 U.S. 213 (1983), definition of probable cause. 103 Ill. 2d 326, 469 N.E.2d 147 (1984).

Although applying principles embodied in the United States Constitution, the Illinois Supreme Court has, on occasion during the *Survey* period, ruled in favor of the accused. In the area of search and seizure, for example, the court in *People v. Lucente*[359] analyzed a *Franks v. Delaware*[360] attack upon a search warrant. The court upheld the order of the trial court quashing the warrant.[361] The court gave an expansive reading of *Franks* with respect to the kind of showing by an accused which will satisfy the "substantial preliminary showing" test.[362] A *Franks* attack has to be focused upon the veracity of the affiant, not the informant.[363] But what if an accused presents affidavits which assert an alibi for him during conduct alleged by the informant? Is this an attack on the affiant or the informant?

The Illinois Supreme Court held that such an affidavit will suffice even though it could be construed as an attack on either.[364] The court held that a contrary rule would virtually bar the accused from making the substantial preliminary showing required by *Franks*.[365]

While nodding in the accused's direction on this point, the court turned a deaf ear to Lucente's argument on a related matter. Justice Clark clarified a question which had persisted since the Appellate Court opinion in *People v. Garcia*,[366] in which Judge Rizzi held that a warrant should be quashed whenever it is shown to contain any false information.[367] *Franks* appears to say, however, that if probable cause still exists in the affidavit after the false information is excluded, the warrant is still valid.[368] In *Lucente*, Justice Clark reiterated this point. A warrant will be quashed only if the exclusion of the false information deprives the affidavit of probable cause.[369]

In analyzing confession cases, the court ruled in favor the accused on a voluntariness question, but against him in applying *Mi-*

359. 116 Ill. 2d 133, 506 N.E.2d 1269 (1987). *See also supra* notes 1-17, for a discussion of *Lucente*.

360. 438 U.S. 154 (1978).

361. *Lucente*, 116 Ill. 2d at 155, 506 N.E.2d at 1278.

362. *Id.* at 148-49, 506 N.E.2d at 1275.

363. *Franks*, 438 U.S. at 171.

364. *Lucente*, 116 Ill. 2d at 149-50, 506 N.E.2d at 1276.

365. *Id.* at 151-52, 506 N.E.2d at 1277.

366. 109 Ill. App. 3d 142, 440 N.E.2d 269 (1st Dist. 1982).

367. *Id.* at 149, 440 N.E.2d at 271.

368. *Franks*, 438 U.S. at 171-72.

369. *Lucente*, 116 Ill. 2d at 146, 506 N.E.2d at 1274.

randa and *Massiah*. In *People v. Wilson*,[370] the court reversed the defendant's double murder conviction, finding that the trial court erred in admitting the defendant's confession.[371] The court described the burden of proof that is to be applied when an accused is injured in police custody and considered the issue whether the injuries occurred before or after the confession. The court held that the state must establish by clear and convincing evidence that the injuries occurred after the confession.[372] This is the same burden which the state must meet when the issue is whether the injuries were caused by the state agents.[373] In contrast, in *Lego v. Twomey*,[374] the United States Supreme Court had held that a preponderance standard is sufficient on the overall question of voluntariness.[375] When an accused is injured in police custody, therefore, the Illinois Supreme Court has enunciated a tougher standard.

The *Miranda* rule has been under attack by the Justice Department, and recent Supreme Court decisions have undermined its effect.[376] In *People v. Whitehead*,[377] the court was called upon to apply the *Edwards v. Arizona*[378] rule that once a defendant in custody requests counsel, the police may not thereafter initiate any exchanges or conversations with him about the crime.[379] In *Whitehead*, the court held that the *Edwards* rule had not been violated by the police decision to permit the defendant to visit with his sister-in-law after he had requested counsel.[380]

In *People v. Christiansen*,[381] the court held that the prosecution could introduce evidence that the defendant refused to give a writ-

370. 116 Ill. 2d 29, 506 N.E.2d 571 (1987). See *supra* notes 42-56 and accompanying text for a discussion of *Wilson*.

371. *Id.* 41-42, 506 N.E.2d at 576.

372. *Id.* at 40, 506 N.E.2d at 575.

373. *Id.*

374. 404 U.S. 477 (1972).

375. *Id.* at 489.

376. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION. In New York v. Quarles, the Court created a "public safety" exception to *Miranda*. 467 U.S. 649 (1983). In *Quarles*, the Court held that in limited circumstances where public safety is involved, such as in a kidnapping situation where human life is at stake, a failure to give *Miranda* warnings will not invalidate a statement. *Id.* at 657-58.

377. 116 Ill. 2d 425, 508 N.E.2d 687 (1987). *See supra* notes 67-77 and accompanying text for a discussion of *Whitehead*.

378. 451 U.S. 477 (1981).

379. *Whitehead*, 116 Ill. 2d at 436, 508 N.E.2d at 690.

380. *Id.* at 440, 508 N.E.2d at 690.

381. 116 Ill. 2d 96, 506 N.E.2d 1253 (1987). *See also* notes 78 to 85 and accompanying text for a discussion of *Christiansen*.

ten statement after having given an oral confession preceded by a valid waiver.[382] This evidence did not constitute a comment upon his assertion of his right to silence, because he had waived that right before the oral statement.[383]

The court applied the *Massiah* rule strictly against the accused as well, holding in *People v. Patterson*[384] that the waiver standard under the sixth amendment is no higher than that which is applied in the *Miranda* fifth amendment setting.[385] The United States Supreme Court has granted certiorari in *Patterson* to consider whether a higher standard of waiver is required under the sixth amendment than under *Miranda*.[386]

Outside the context of the Fourth, Fifth and Sixth Amendment, the court analyzed several problem areas in trial and appellate procedure, including effective assistance of counsel, sentencing, and the death penalty. In the area of sentencing, the court confronted the vexing propensity of trial judges to "double count" aggravating factors in determining sentence. In *People v. White*[387] and *People v. Saldivar*[388] the trial judge had used the age of the victim and the harm caused the victim, respectively, as aggravating factors. The supreme court reversed these sentences.[389] The court reiterated the rule of *People v. Conover*[390] that when a factor such as age or degree of harm is an element of the offense, that factor cannot be counted as an aggravating factor for purposes of sentencing.[391]

The court had occasion during the *Survey* period to clarify sev-

382. *Id.* at 120, 506 N.E.2d at 1263.

383. *Id.*

384. 116 Ill. 2d 290, 507 N.E.2d 843 (1987). *See also* notes 86 to 92 and accompanying text for a discussion of *Patterson*.

385. *Id.* at 300, 507 N.E.2d at 847.

386. The Illinois Supreme Court ruled in *Patterson* that a valid waiver was made out where the State showed that the defendant had been adequately warned under *Miranda* and was aware of the charges pending against him. *Miranda*, of course, carries no requirement that the police advise an accused of the charges against him. In fact, in *Colorado v. Spring*, 107 S. Ct. 851 (1987), the Court held that a waiver was valid even though the police questioned the defendant about an offense unrelated to that for which he was arrested. Arguably then, the Illinois court did create a higher waiver standard by emphasizing that Patterson knew what he had been charged with. A valid sixth amendment waiver would require this additional showing. The drawback to such an interpretation is the court's explicit statement that it found no reason to create a higher standard.

387. 114 Ill. 2d 61, 499 N.E.2d 467 (1986). *See supra* notes 245-52 and accompanying text for a discussion of *White*.

388. 113 Ill. 2d 2556, 497 N.E.2d 1138 (1986). *See supra* notes 253-58 and accompanying text for a discussion of *Saldivar*.

389. *See supra* notes 252-56 and 258, and accompanying text respectively.

390. 84 Ill. 2d 400, 419 N.E.2d 906 (1981).

391. *See supra* notes 250-52 and 255 and accompanying text, respectively, for a discussion of *Conover* as applied to *White* and *Saldivar*.

eral aspects of the death penalty statute. Echoing the decision of the United States Supreme Court in *Lockhart v. McCree*[392] the court ruled that "death qualifying" prospective jurors during *voir dire* does not deprive a defendant of his right to a fair cross section on the jury or to an impartial jury.[393] The court upheld a defendant's jury waiver at a death penalty sentencing hearing even though the defendant claimed he waived the jury because he was unaware that the jury's decision on death had to be unanimous.[394]

The court also discussed the propriety of using certain convictions for establishing eligibility for the death penalty or as an aggravating factor. A twenty-two year old armed robbery conviction was admissible as aggravation,[395] and a California murder conviction was admissible to establish eligibility for the death penalty.[396] Finally, the court ruled that there is no requirement for the trial court to conduct a bifuricated hearing on the issue of death penalty eligibility and actual imposition.[397]

392. 106 S. Ct. 1758 (1986).
393. *Whitehead*, 116 Ill. 2d at 449, 508 N.E.2d at 696, and *Sanchez*, 115 Ill. 2d at 265, 503 N.E.2d at 286.
394. *Hall*, 114 Ill. 2d at 414, 499 N.E.2d at 1349.
395. *Christiansen*, 116 Ill. 2d at 123-24, 506 N.E.2d at 1264.
396. *Guest*, 115 Ill. 2d at 104, 503 N.E.2d at 273.
397. *Lego*, 116 Ill. 2d at 346, 507 N.E.2d at 807.