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Alan Raphael
Assist. Prof., Loyola University Chicago, School of Law, araphae@luc.edu

Leslie Khoshaba

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*Alan Raphael**
*and Leslie Khoshaba***

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* Assistant Professor of Law, Loyola University of Chicago. B.A., 1966, Haverford; M.A., 1968, Ph.D., 1972, University of Chicago, J.D. 1979, Indiana University.
** B.S., 1985, Loyola University of Chicago; J.D. candidate, 1988, Loyola University of Chicago.

I. INTRODUCTION

During the *Survey* period, criminal procedure was the area of law most frequently considered by the Illinois Supreme Court. This article discusses the most significant rulings affecting criminal trials. Additionally, it discusses constitutional and legislative action concerning bail.

II. SEARCH AND SEIZURE

A. *Roadblocks*

In *People v. Bartley*,[1] the Illinois Supreme Court upheld the constitutionality of a temporary roadblock designed to detect and deter drunk drivers.[2] In *Bartley*, Illinois State Police supervisors

1. 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 106 S. Ct. 1384 (1986).

2. *Bartley*, 109 Ill. 2d at 284, 486 N.E.2d at 885. The United States Supreme Court has not addressed the constitutionality of temporary roadblocks to detect and deter drunk drivers. The question, however, has been addressed by many other courts. The majority of courts have ruled that roadblocks meeting certain requirements do not violate the fourth amendment. *See, e.g.*, Commonwealth v. Trumble, 396 Mass. 81, 483 N.E.2d 1102 (1985); Little v. State, 300 Md. 485, 479 A.2d 903 (1984); People v. Scott, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984). Several decisions have invalidated arrests following roadblock stops as a result of the method of carrying out the stops. *See, e.g.*, State *ex rel.* Ekstrom v. Justice Court, 136 Ariz. 1, 663 P.2d 992 (1983); State v. Koppel, 127 N.H. 286, 499 A.2d 977 (1985); State v. Smith, 674 P.2d 562 (Okla. App. 1984); State v. Marchand, 104 Wash.2d 434, 706 P.2d 225 (1985). Two of these states subsequently upheld roadblocks as constitutional. *See* Lindsay v. City of Seattle, 46

established a checkpoint where officers stopped every westbound vehicle during a two hour period.[3] The area of the roadblock was lighted and police vehicles had their lights flashing.[4] The stop entailed an examination of the vehicle's exterior, a driver's license check, and a flashlight inspection of the auto's interior by a police officer standing outside the vehicle.[5] If the police observed any possible violation of the law, they detained the driver for further inquiry.[6]

Police testified that when the defendant, Jimmy Bartley, stopped at the checkpoint, he appeared intoxicated.[7] The police then detained Bartley and subjected him to field sobriety tests which he failed.[8] After Bartley refused to submit to a breathalyzer test, police officers arrested him for driving under the influence of alcohol or drugs ("DUI").[9]

At a hearing on a motion to suppress, the officers involved testified that the primary purpose of the roadblock was to check drivers' licenses,[10] but the court found that the stop was a subterfuge to apprehend drunken drivers.[11] The trial court ruled that Bartley's arrest was invalid because the roadblock stop and search was not based upon probable cause or reasonable suspicion, as required by the fourth and fourteenth amendments to the United States Constitution.[12]

Wash. App. 110, 730 P.2d 62 (1986); State v. Super. Ct. In & For County of Pima, 143 Ariz. 45, 691 P.2d 1073 (1984).

3. *Bartley*, 109 Ill. 2d at 277, 486 N.E.2d at 881-82. In a joint effort, the Illinois State Police, the McDonough County Sheriff's Department, the Macomb Police Department, and the Illinois Secretary of State's Police conducted the roadblock in Macomb, Illinois. *Id.* An Illinois State Police lieutenant and captain supervised the roadblock. *Id.*

4. *Id.* at 278, 486 N.E.2d at 882.

5. *Id.*

6. *Id.*

7. *Id.* at 279, 486 N.E.2d at 882-83.

8. *Id.*

9. *Id.* During the roadblock, police made 21 arrests, including seven for DUI, 10 for illegal transportation of alcohol, and four for driver's license violations. *Id.* at 279, 486 N.E.2d at 882. Police also issued sixty-four written warnings. *Id.*

10. *Id.* at 278-79, 486 N.E.2d at 882-83.

11. *Id.*

12. *Id.* The fourteenth amendment to the United States Constitution states in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The fourth amendment to the United States Constitution reads as follows: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

On appeal, the Illinois Supreme Court reversed the trial court's ruling. It concluded that, although the police lacked probable cause or individualized suspicion to stop Bartley, the roadblock satisfied constitutional requirements because it was reasonable.[13] The court analyzed the reasonableness of the roadblock by balancing the extent of the intrusion on the individual's privacy against the public's need for the intrusion.[14] The public's compelling interest in preventing drunken driving justified the minimal intrusion involved in the stop.[15]

To gauge the harm to individual privacy posed by a temporary roadblock, the court utilized a two-part test.[16] First, the court considered such factors as the length of the stop, the nature of the questions asked by the police, and whether a search was conducted.[17] The second factor was whether the stop generated fear[18]

13. *Bartley*, 109 Ill. 2d at 280, 486 N.E.2d at 883. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the United States Supreme Court held that police needed neither individualized suspicion nor a warrant to question a driver at a permanent immigration checkpoint. *Bartley*, 109 Ill. 2d at 281, 486 N.E.2d at 883. Conversely, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975) and Almeida-Sanchez v. United States, 413 U.S. 266 (1973) the United States Supreme Court held that police needed individualized suspicion to stop persons in cars to find illegal aliens. *Bartley*, 109 Ill. 2d at 281, 486 N.E.2d at 883.

14. *Bartley*, 109 Ill. 2d at 280, 486 N.E.2d at 883. The balancing test employed by the *Bartley* court was derived from Delaware v. Prouse, 440 U.S. 648 (1979), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

In *Martinez-Fuerte*, the Court determined that a checkpoint near the Mexican border was justified by a substantial public need to prevent illegal aliens from migrating into the United States. 428 U.S. at 562. The Court further found that the intrusion on individual privacy was minimal because the checkpoint was clearly marked and lighted and because police stopped all drivers in a brief, systematic, nonrandom procedure. *Id.* at 559. Accordingly, drivers had no apprehension of being singled out for arbitrary law enforcement without warning. *Id.* at 560. The minimal nature of the intrusion and the great public need for it made the roadblock stop reasonable and, hence, the Court held that the police did not need individualized suspicion or a search warrant to question drivers at the checkpoint. *Id.* at 566.

In *Prouse*, however, the Court invalidated an arrest based on a random stopping of cars. 440 U.S. at 663. The Court held that police could not stop cars randomly to check for license violations unless they had a reasonable suspicion that the driver did not possess a license. *Id.* The Court based its conclusion on two factors. First, the Court determined that no circumstances indicated a compelling public necessity for checking license violations. *Id.* at 659-61. Second, the Court found that the police had total discretion in selecting motorists for the spot check, and that such unbridled discretion could be abused. *Id.* at 661. Therefore, the Court concluded that the random stops for license checks were unreasonable because the need for the stops did not justify the extent of the intrusion involved. *Id.* The *Prouse* Court, however, noted that police could use roadblocks as an alternative to spot checks. *Id.* at 663.

15. *Bartley*, 109 Ill. 2d at 285, 486 N.E.2d at 885.

16. *Id.* at 281, 486 N.E.2d at 883.

17. *Id.* at 282, 486 N.E.2d at 884.

18. *Id.* (citing United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)).

or annoyed motorists.[19] In applying the balancing test, the court concluded that the roadblock caused an insignificant intrusion because it generally consisted of a fifteen to twenty second stop, during which motorists remained in their cars and produced their drivers' licenses.[20] Although the court acknowledged that the use of roadblocks to deter drunk driving may be less effective than other methods of police work, such as routine police patrol with stopping of motorists who are driving erratically, it stressed the necessity of permitting the State to use all available resources to combat drunken driving.[21]

Finally, the court emphasized that the assessment of the subjective intrusiveness of the stop also depended upon whether the officers had acted with unbridled discretion.[22] In *Bartley*, because police stopped each westbound vehicle and because the police were not singling out motorists arbitrarily for initial detention, the court found the roadblock constitutional.[23] Thus, based upon a weighing of the competing interests, the court held that under the procedures present in *Bartley*, no probable cause or individualized suspicion was necessary to establish a temporary roadblock designed to detect and deter DUI violators.[24]

B. Expectation of Privacy

In *People v. Neal*,[25] the defendant, Jerry Neal, was convicted of official misconduct[26] and forgery[27] for issuing traffic citations that

19. *Bartley*, 109 Ill. 2d at 282, 486 N.E.2d at 884 (citing United States v. Ortiz, 422 U.S. 891, 895 (1975)).

20. *Bartley*, 109 Ill. 2d at 287-88, 486 N.E.2d at 886.

21. *Id.* at 286-87, 486 N.E.2d at 886. The *Bartley* decision did not indicate specifically the police manpower involved in the roadblock at issue. In another Illinois decision, some useful data appear. In People v. Conway, 135 Ill. App. 3d 887, 482 N.E.2d 437 (4th Dist. 1985), the Illinois Appellate Court upheld the constitutionality of a DUI roadblock. Five to seven police officers participated in the roadblock for an unstated number of hours. *Id.* at 889, 482 N.E.2d at 438. Of the 582 vehicles stopped, six citations were issued for DUI, three for driver's license violations, two for registration violations, and five for violations of alcohol laws. *Id.*

22. *Bartley*, 109 Ill. 2d at 289, 486 N.E.2d at 887.

23. *Id.* The court found that the police systematically conducted the roadblock following procedures established ahead of time by supervisory personnel, that the roadblock was well-marked and well-lighted, that it was clear to motorists that the stop was a police operation, and that the stops did not involve the use of a roving patrol, thereby alleviating motorists' fears of being singled out for arbitrary law enforcement. *Id.* at 288, 486 N.E.2d at 887.

24. *Id.* at 292-93, 486 N.E.2d at 889.

25. 109 Ill. 2d 216, 486 N.E.2d 898 (1985).

26. ILL. REV. STAT. ch. 38, para. 33-3 (1985).

27. *Id.* at para. 17-3.

he signed with a fictitious name and never turned over to the clerk of the circuit court.[28] Neal issued the citations to drivers and retained the cash bonds that they gave him.[29] Upon a complaint by a person who had been issued an irregular citation, Neal's supervisor searched Neal's patrol car, raincoat, and pouch.[30] The supervisor found copies of the illegal citations in an unmarked, zippered, raincoat pouch located under the front seat of the patrol car.[31]

Neal contended that the supervisor's search violated the fourth amendment. Neal maintained that the search violated his reasonable expectation of privacy in the raincoat pouch because it had been issued to him for his exclusive use.[32] The *Neal* court, however, decided that society was not prepared to recognize as reasonable Neal's subjective expectation of privacy.[33] In reaching this conclusion, the court stressed that Neal's supervisors were permitted to conduct periodic inspections of the patrol car and raincoat pouch.[34] Moreover, the court noted that Neal knew that these periodic inspections could occur in his absence.[35] Finally, the court pointed out that Neal's supervisors had inspected only state-owned property related to the defendant's employment.[36] Concluding that the inspection had not violated a reasonable expectation of privacy, the *Neal* court held that the supervisor was not required to obtain a search warrant.[37]

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28. *Neal*, 109 Ill. 2d at 217-19, 486 N.E.2d at 889-900.

29. *Id.* at 219, 486 N.E.2d at 900.

30. *Id.* at 218-19, 486 N.E.2d at 899-900.

31. *Id.* at 219, 486 N.E.2d at 900.

32. *Id.* at 220, 486 N.E.2d at 900.

33. *Id.* at 221-22, 486 N.E.2d at 901 (citing Smith v. Maryland, 442 U.S. 735, 740 (1979); Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring)).

34. *Neal*, 109 Ill. 2d at 222, 486 N.E.2d at 901.

35. *Id.*

36. *Id.*

37. *Id.* The court held that United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951), on which the defendant relied, was distinguishable. *Neal*, 109 Ill. 2d at 224, 486 N.E.2d at 902. The *Blok* court held that a government employee had a reasonable expectation of privacy in her desk which could not be searched without a search warrant for evidence of criminal activity unrelated to her job. 109 Ill. 2d at 220, 486 N.E.2d at 900. The Illinois Supreme Court held that *Blok* was distinguishable because (1) the employee had exclusive use of her desk, (2) the offense was larceny and unrelated to her work, (3) the search was made by a police officer, and not by her supervisor, and (4) the search was not made pursuant to any valid office procedures. 109 Ill. 2d at 224, 486 N.E.2d at 902. The *Neal* result is consistent with other cases involving similar facts. *See, e.g.*, United States v. Bunkers, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975); Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196 (9th Cir. 1973); People v. Tidwell, 133 Ill. App. 2d 1, 266 N.E.2d 787 (lst Dist. 1971). In addition, the United States Supreme Court recently considered a similar issue in O'Connor v. Ortega, 55 U.S.L.W. 4405, 4410 (U.S. March 31, 1987) (No. 85-530) ("[P]ublic employer intrusions on the

C. *Probable Cause to Search*

In *People v. Gutierrez*,[38] police officers had purchased drugs from a woman and then obtained a warrant to search her home.[39] When police arrived to execute the warrant, the defendant, Frank Gutierrez, unsuccessfully attempted to prevent the police from entering.[40] During the ensuing search pursuant to the warrant, Gutierrez appeared "agitated."[41] After noticing bulges in Gutierrez's pocket, an officer requested that he empty them.[42] At that point, the officer recovered heroin from Gutierrez who subsequently was convicted of possession of a controlled substance.[43]

On appeal, Gutierrez argued that the trial court erred in denying his motion to suppress.[44] Gutierrez relied upon *Ybarra v. Illinois*[45] as authority for his contention that the police had searched him illegally.[46] In *Ybarra*, the United States Supreme Court held that a search warrant did not yield probable cause to search a subject on the premises named in the warrant.[47] The Illinois Supreme Court, however, distinguished the instant case from *Ybarra* because Gutierrez's suspicious behavior and apparent connection with the premises provided the police with probable cause, independent of the warrant, to search him.[48]

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constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.")

38. 109 Ill. 2d 59, 485 N.E.2d 845 (1985).

39. *Id.* at 61, 485 N.E.2d at 846.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. 444 U.S. 85 (1979).

46. *Gutierrez*, 109 Ill. 2d at 62, 485 N.E.2d at 846-47. In *Ybarra*, 444 U.S. 85 (1979), the police obtained a warrant to search a tavern and one of its bartenders. *Ybarra*, 444 U.S. at 88. During the execution of that warrant, the police searched all the patrons of the tavern, including the defendant, although they did not have any reason to believe that any patron possessed weapons or had committed any illegal activity. *Id.* at 90-91. During the search of the defendant, the police found heroin contained in a cigarette package. *Id.* at 88-89.

47. *Ybarra*, 444 U.S. at 91. The Court ruled that "a person's mere propinquity to others independently suspected of criminal activity [did] not, without more, give rise to probable cause to search that person." *Id.* Accordingly, the *Ybarra* Court concluded that the search warrant gave police license to search the tavern and the bartender, but did not give them authority to search each patron of the tavern. *Id.* at 92.

48. *Gutierrez*, 109 Ill. 2d at 64, 485 N.E.2d at 847. ILL. REV. STAT. ch. 38, para. 108-9 (1985) provides: "In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time: (a) to protect himself from attack, or (b) to prevent the disposal or concealment of any instruments, articles, or things particularly described in the warrant." Illinois courts have interpreted this section

D. Probable Cause to Arrest

In *People v. Wright*,[49] the Illinois Supreme Court examined whether police had probable cause to make an arrest.[50] The arresting officer in *Wright* knew that a homicide had been committed by a man whose description matched that of the defendant.[51] Further, police suspected Wright because he wore glasses similar to those recovered at the crime scene, and because he had a shoe fetish and shoes in the victim's apartment had been disturbed.[52] While on patrol, the police officer arrested Wright on a street near the scene of the homicide, a few hours after the crime.[53] He was not wearing eyeglasses at that time.[54]

The supreme court held that information known to the police when they apprehended the defendant provided probable cause to arrest.[55] The court concluded that the police had "knowledge of facts which would lead a reasonable [person] to believe that a crime [had] occurred and that it [had] been committed by the defendant."[56] Accordingly, the supreme court held that the trial court had properly denied Wright's motion to suppress his post-arrest statement and affirmed the conviction.[57]

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as authorizing a search of a person only if that person has a significant connection with the persons or premises named in the warrant; it does not permit a search of a person who just happens to be on the premises during the execution of a warrant on that basis alone. *See* People v. Campbell, 67 Ill. App. 3d 748, 752-53, 385 N.E.2d 171, 173-74 (3d Dist. 1979); People v. Miller, 74 Ill. App. 3d 177, 184-85, 392 N.E.2d 271, 275-77 (1st Dist. 1979).

49. 111 Ill. 2d 128, 490 N.E.2d 640 (1985), *cert. denied*, 107 S. Ct. 1327 (1987).

50. *Id.* at 141, 490 N.E.2d at 644.

51. *Id.* at 142, 490 N.E.2d at 644. After his arrest, the defendant's statement revealed that he entered the apartment of a woman and her daughter, attempted to rape both of them, and then stabbed each woman. *Id.* at 138-39, 490 N.E.2d at 642. The defendant also stated that he had planned to burglarize the apartment. *Id.*

52. *Id.* at 142-45, 490 N.E.2d at 644-45.

53. *Id.* at 142, 490 N.E.2d at 644.

54. *Id.*

55. *Id.* at 147, 490 N.E.2d at 646. An arrest is lawful when a peace officer "has reasonable grounds to believe that the person is committing or has committed an offense." ILL. REV. STAT. ch. 38, para. 107-2(c) (1985). "Reasonable grounds" is equivalent to "probable cause." *Wright*, 111 Ill. 2d at 145, 490 N.E.2d at 645 (citing People v. Tisler, 103 Ill. 2d 226, 236-37, 469 N.E.2d 147, 153 (1984)).

56. *Wright*, 111 Ill. 2d at 145, 490 N.E.2d at 646 (quoting People v. Eddmonds, 101 Ill. 2d 44, 60, 461 N.E.2d 347, 354, *cert. denied*, 469 U.S. 894 (1984)).

57. *Wright*, 111 Ill. 2d at 147, 490 N.E.2d at 646.

III. SELF-INCRIMINATION

A. The Jury's Evaluation of the Veracity of a Confession

In *People v. Britz*,[58] the Illinois Supreme Court held that the trial court erred in not admitting into evidence pre-confession tape recordings which could have been relevant in the jury's assessment of the defendant's confession.[59] In *Britz*, the defendant, John Britz, contacted a youth counselor and told her that he had committed a murder.[60] The counselor then contacted the police and agreed to place an eavesdropping device on her telephone.[61] In several subsequent recorded conversations with the counselor, the defendant denied involvement in the murder.[62] When initially questioned by the police, Britz again asserted his innocence.[63] When police challenged the truthfulness of the statements, however, Britz confessed.[64]

At trial, the court refused to admit into evidence the tape-recorded telephone conversations in which Britz denied guilt.[65] The Illinois Supreme Court, however, held that the tapes should have been admitted into evidence.[66] Notwithstanding the trial court's finding that Britz had confessed voluntarily, the court noted that it was up to the jury to evaluate the confession for veracity.[67] Moreover, because a possibility existed that the defendant may have thought that the counselor would have been impressed by a confession to murder, the circumstances surrounding the confession were especially relevant to the jury's assessment of Britz's state of mind and the weight to be accorded the confession.[68]

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58. 112 Ill. 2d 314, 493 N.E.2d 575 (1986). Britz also raised an issue regarding jury selection. *See infra* note 216 and accompanying text.

59. *Id.* at 320-21, 493 N.E.2d at 577.

60. *Id.* at 317, 493 N.E.2d at 576.

61. *Id.*

62. *Id.* During the conversations, the counselor told Britz that his involvement with the police "turn[ed her] on" and that the defendant was "a real man." *Id.* Britz also told the counselor that he loved her. *Id.*

63. *Id.*

64. *Id.* at 317-18, 493 N.E.2d at 576.

65. *Id.* at 319, 493 N.E.2d at 577. The appellate court reversed the conviction and held that the tapes were admissible as bearing on the defendant's state of mind which was relevant to the question of voluntariness of the confessions. *Id.*

66. *Id.* at 320-21, 493 N.E.2d at 578.

67. *Id.* at 319-20, 493 N.E.2d at 577.

68. *Id.* at 320, 493 N.E.2d at 577. *Accord* Crane v. Kentucky, 106 S. Ct. 2142 (1986)(due process requires that a defendant be allowed to present evidence at trial that bears upon the credibility of his pre-trial statement when that statement is introduced in evidence by the prosecution). The *Britz* court rejected the State's argument that the tapes were inadmissible hearsay. *Britz*, 112 Ill. 2d at 320, 493 N.E.2d at 578. The court held

B. Voluntariness

In *People v. Kashney*,[69] the Illinois Supreme Court addressed whether a defendant's statement was voluntary if made in response to misrepresentations by police.[70] During initial police questioning regarding a sexual assault, the defendant denied committing the crime.[71] Subsequently, an assistant state's attorney falsely informed the defendant that his fingerprints were found in the victim's apartment.[72] The defendant then admitted to being in the apartment and to having intercourse with the victim.[73]

To determine the voluntariness of the defendant's statement, the court examined the totality of the circumstances, including the misrepresentation.[74] Several factors led the court to conclude that Kashney had made the statement voluntarily despite the misrepresentation.[75] First, the defendant willingly had presented himself for questioning.[76] Second, the defendant knowingly had waived his *Miranda* rights.[77] Finally, the court noted that the defendant had not alleged that the police had threatened him during the

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that the counselor's stimulating language was admissible for the limited purpose of establishing the effect that it had on Britz. *Id.* at 320-21, 493 N.E.2d at 578.

69. 111 Ill. 2d 454, 490 N.E.2d 688 (1986). This case is a consolidation of two cases: People v. Kashney, 129 Ill. App. 3d 218, 472 N.E.2d 164 (1st Dist. 1984), and People v. Lee, 128 Ill. App. 3d 774, 471 N.E.2d 567 (1st Dist. 1984).

70. *Id.* at 465, 490 N.E.2d at 690.

71. *Id.* at 465, 490 N.E.2d at 691.

72. *Id.*

73. *Id.*

74. *Id.* at 466, 490 N.E.2d at 693. (citing People v. Martin, 102 Ill. 2d 412, 466 N.E.2d 228, *cert. denied*, 469 U.S. 935 (1984)). In *Martin*, the defendant made incriminating statements after he was told falsely that his co-defendant had named him as the "triggerman." 102 Ill. 2d at 417, 466 N.E.2d at 229-30. The *Martin* court held that a misrepresentation which prompted inculpatory statements did not necessarily vitiate an otherwise voluntary statement. *Id.* at 427, 466 N.E.2d at 234. Rather, the court should look to the totality of the circumstances. *Id.* The *Martin* court considered factors such as (1) the intelligence and education of the defendant, (2) the length of questioning, (3) whether the defendant was informed of his *Miranda* rights, and (4) whether the defendant was subjected to any physical intimidation. *Id.* at 427, 466 N.E.2d at 235.

75. *Kashney*, 111 Ill. 2d at 467, 490 N.E.2d at 694.

76. *Id.* at 466, 490 N.E.2d at 693.

77. *Id.* In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that the fifth amendment requires the suppression of any statement made during custodial interrogation unless, prior to any questioning, law enforcement officials explain to a suspect that (1) he has a right to remain silent, (2) any statement he does make may be used as evidence against him, (3) he has a right to have an attorney present during questioning, and (4) an attorney will be appointed for him if he is indigent. Furthermore, the Court held that the suspect may waive these rights, but that the waiver must be made voluntarily, knowingly, and intelligently. 384 U.S. at 467-73.

questioning.[78]

C. *Comment on Defendant's Silence*

In *People v. Bean*,[79] the Illinois Supreme Court reversed the defendant's conviction because of comments by co-defendant's counsel concerning the defendant's failure to testify.[80] In *Bean*, the defendant, Harold Bean, was tried jointly with a co-defendant for murder and other crimes.[81] Throughout the trial, the co-defendant's counsel made reference to Bean's failure to testify and tried to convince the jury that Bean had committed the crimes and that the co-defendant had not.[82] In response to these prejudicial comments, Bean's attorney made repeated motions for a mistrial which the trial court denied.[83]

In reversing Bean's conviction,[84] the supreme court held that the statements had the same effect as a comment by a judge or prosecutor about the accused's failure to take the stand.[85] Hence, the comments by co-defendant's counsel violated Bean's fifth amendment right not to testify.[86]

In *People v. Stack*,[87] the Illinois Supreme Court reversed a conviction because of a violation of the privilege against self- incrimi-

78. *Kashney*, 111 Ill. 2d at 466, 490 N.E.2d at 693. The court, however, reversed the convictions on other grounds. *See infra* notes 129-48 and accompanying text.

79. 109 Ill. 2d 80, 485 N.E.2d 349 (1985).

80. *Id.* at 92, 485 N.E.2d at 354.

81. *Id.* at 84, 485 N.E.2d at 350.

82. *Id.* at 87-88, 485 N.E.2d at 352. For example, during his opening statement, the co-defendant's attorney stated, "[T]he defendant need never take the stand because the burden of proof is on the state. But [the co-defendant] is going to take the witness stand . . . . Because an innocent man can't wait to tell his story. And a guilty man will never take the stand." *Id.* at 87, 485 N.E.2d at 352.

83. *Id.* at 90, 485 N.E.2d at 353.

84. The court also based its reversal on the grounds that the trial court should have granted Bean's motion for a severance. *Id.* at 92, 488 N.E.2d at 354. For discussion of the severance issue, see *infra* notes 332-35 and accompanying text.

85. *Id.* at 98, 485 N.E.2d at 357.

86. *Id.* at 98, 485 N.E.2d at 358 (citing DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)). In *DeLuna*, two defendants were jointly indicted and tried. The co-defendant's counsel in *DeLuna* repeatedly commented upon DeLuna's failure to testify. The court reversed DeLuna's conviction, holding that the comment by the co-defendant's counsel violated DeLuna's right to remain silent and that the trial judge's instructions to the jury to disregard the counsel's comments did not undo the prejudicial effects of the references to DeLuna's silence. *DeLuna*, 308 F.2d at 154. Unlike the judge in *DeLuna*, the trial judge in *Bean* made no instructions to the jury regarding comments by the co-defendant's counsel. *Bean*, 109 Ill. 2d at 98, 485 N.E.2d at 357.

87. 112 Ill. 2d 301, 493 N.E.2d 339, *cert. denied*, 107 S. Ct. 236 (1986).

nation.[88] In *Stack*, the defendant asserted an insanity defense.[89] To rebut the defendant's claim of insanity, the State introduced evidence that Stack had refused to speak after being given *Miranda* warnings.[90] The Illinois Supreme Court, however, concluded that the State's use of this evidence was barred under the United States Supreme Court decision in *Wainwright v Greenfield*,[91] which held that the use of post-*Miranda* silence as evidence of sanity was fundamentally unfair because it constituted a breach of the State's implied promise not to use the exercise of *Miranda* rights against a defendant.[92]

In *People v. Neal*,[93] the Illinois Supreme Court rejected the defendant's claim that the prosecutor had referred to his failure to testify and therefore violated his right to remain silent.[94] In *Neal*, the prosecutor told the jury during the sentencing phase of a capital case that "you have not seen or observed in court one moment of remorse by the defendant."[95] The court held that the prosecutor's comment was not improper because it referred to Neal's taped confession, rather than to Neal's failure to testify.[96]

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88. *Id.* at 310, 493 N.E.2d at 343. Stack was also reversed on other grounds. For further discussion of this issue, see *infra* notes 208-11 and accompanying text.

89. *Id.* at 304, 493 N.E.2d at 340.

90. *Id.* at 305-06, 493 N.E.2d at 341. The State acknowledged that it could not comment on Stack's silence to draw an inference of guilt. *Id.*

91. 106 S. Ct. 634 (1986).

92. *Stack*, 112 Ill. 2d at 307, 493 N.E.2d at 341 (citing Wainwright v. Greenfield, 106 S. Ct. 634 (1986)).

93. 111 Ill. 2d 180, 489 N.E.2d 845 (1985), *cert. denied*, 106 S. Ct. 2292 (1986).

94. *Id.* at 196, 489 N.E.2d at 851. The *Neal* court distinguished the defendant's claim from those situations in which a prosecutor comments on a defendant's assertion of his right to remain silent. *Id.* *See* Doyle v. Ohio, 426 U.S. 610 (1976) (the use of the defendant's post-arrest silence by the prosecutor at trial in order to impeach the defendant violates due process); Griffin v. California, 380 U.S. 609 (1965) (comment by the prosecutor on the defendant's failure to testify violated the self-incrimination clause of the fifth amendment); People v. Lyles, 106 Ill. 2d 373, 390, 478 N.E.2d 291, 297 (1985) (a prosecutor cannot comment on a defendant's failure to take the stand in his own behalf), *cert. denied*, 106 S. Ct. 171 (1986). *See also* ILL. REV. STAT. ch. 38, para. 155-1 (1985), which states in pertinent part: "the person's neglect to testify shall not create any presumption against the person, nor shall the court permit any reference or comment to be made to or upon such neglect."

95. *Neal*, 111 Ill. 2d at 195-96, 489 N.E.2d at 851.

96. *Id.* at 196, 489 N.E.2d at 851. The *Neal* court cited People v. Albanese, 102 Ill. 2d 54, 80-81, 464 N.E.2d 206, 219, *cert. denied*, 469 U.S. 892 (1984), for the proposition that the defendant's remorse may be considered at sentencing. *Neal*, 111 Ill. 2d at 196, 489 N.E.2d at 851. The *Neal* court stated that the trial court had corrected any potential prejudicial effect from the prosecutor's comment by instructing the jury to disregard the comment. *Id.*

IV. GUILTY PLEAS

A. Voluntariness

In *People v. Correa*,[97] the defendant, Cesar Correa, contended that his pleas of guilty were not made knowingly and intelligently because they were based on erroneous advice of counsel.[98] Specifically, Correa, an alien, entered the guilty pleas without knowledge that he could be deported as a result of the convictions.[99] The Illinois Supreme Court held that Correa's guilty pleas were not made voluntarily and knowingly because they were entered in reliance upon counsel's erroneous response to Correa's inquiry as to whether a conviction could result in his deportation.[100]

In *People v. McCutcheon*,[101] the Illinois Supreme Court determined that the defendant, John McCutcheon, knowingly and voluntarily entered a guilty plea to an attempt murder charge.[102] In *McCutcheon*, the appellate court concluded that the defendant had pleaded guilty without being apprised sufficiently of the nature of the charge against him. The court reasoned that the grammatical structure of the attempt murder counts could have led him to believe mistakenly that he could have been found guilty of attempt murder if his intent was only to cause great bodily harm.[103]

The Illinois Supreme Court, however, held that McCutcheon had been apprised sufficiently of the nature of the charges.[104] The

97. 108 Ill. 2d 541, 485 N.E.2d 307 (1985). This decision also addressed the issue of incompetence of counsel. For a discussion of that issue, see *infra* notes 237-44 and accompanying text.

98. *Correa*, 108 Ill. 2d at 544, 485 N.E.2d at 308.

99. *Id.* Correa entered pleas of guilty to three charges of delivery of a controlled substance and the court sentenced him to concurrent terms of three years in prison on each charge. *Id.* After Correa's release from prison, the United States Immigration and Naturalization Service took him into custody and ordered his deportation. *Id.* Correa contended that he then first learned that his guilty pleas were grounds for deportation. *Id.* at 544, 485 N.E.2d at 307-08. At a post-conviction hearing, the trial court held that the guilty pleas were not made voluntarily. *Id.* The trial court vacated the convictions, set aside the guilty pleas, and set a new trial date. *Id.* The State appealed and the appellate court affirmed. *Id.*

100. *Id.* at 553, 485 N.E.2d at 312. *See* Brady v. United States, 397 U.S. 742, 748 (1970) (plea of guilty must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences).

101. 111 Ill. 2d 487, 490 N.E.2d 662, *cert. denied*, 107 S. Ct. 135 (1986).

102. *Id.* at 493-94, 490 N.E.2d at 665.

103. *Id.* at 491, 490 N.E.2d at 663-64 (citing People v. Roberts, 75 Ill. 2d 1, 387 N.E.2d 331 (1975)).

104. *McCutcheon*, 111 Ill. 2d at 493, 490 N.E.2d at 665. The attempt murder counts read, in pertinent part, as follows:

> Count I: . . . said defendant with the intent to commit the offense of Murder, . . . performed a substantial step toward the commission of that offense, in that

court determined that the language of the attempt murder charge was identical to the language approved in a prior case.[105] Accordingly, the supreme court reinstated the conviction.[106]

The court also analyzed the voluntariness of a guilty plea in *People v. Walker*.[107] In *Walker*, the defendant, Charles Walker, asserted that he had not entered a knowing and voluntary guilty plea because the court erred in explaining the range of sentences for multiple murders.[108] Although Illinois law mandates a sentence of not less than natural life upon conviction of murdering more than one person, the trial court had told Walker that he could receive a sentence ranging from twenty years to death.[109]

Even assuming that the trial court's explanation had misled Walker, the Illinois Supreme Court held that he voluntarily pleaded guilty.[110] The court found that the trial court had complied substantially with Illinois Supreme Court Rule 402[111] which requires the court to inform the defendant of the minimum and maximum sentences for the crime to which the defendant is pleading guilty.[112] Furthermore, the court examined the entire record

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> he, without lawful justification, knowingly struck Shara Briner on the head with a tire iron, knowing such act created a strong probability of death or great bodily harm to Shara Briner. Count II: . . . said defendant with the intent to commit the offense of Murder, . . . performed a substantial step toward the commission of that offense, in that he without lawful justification, *and with the intent to do great bodily harm to Shara Briner* knowingly struck Shara Briner with a tire iron, knowing such act created a strong probability of death or great bodily harm to Shara Briner.

Id. at 490-91, 490 N.E.2d at 663 (emphasis added).

105. *McCutcheon*, 111 Ill. 2d at 493, 490 N.E.2d at 665 (citing People v. Van Winkle, 88 Ill. 2d 220, 224, 430 N.E.2d 987, 989 (1981)). In *Van Winkle*, the Illinois Supreme Court held that the language in the attempt murder charge did not "negate the requirement of proof of the specific intent to kill." *Van Winkle*, 88 Ill. 2d at 224, 430 N.E.2d at 989. *See* ILL. REV. STAT. ch. 38, para. 8-4 (1985), which states, "a person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." *Id.*

106. *McCutcheon*, 111 Ill. 2d at 493, 490 N.E.2d at 665.

107. 109 Ill. 2d 484, 488 N.E.2d 529 (1985), *cert. denied*, 107 S. Ct. 598 (1986).

108. *Id.* at 496, 488 N.E.2d at 534.

109. *Id.* at 496-97, 488 N.E.2d at 534. Walker pleaded guilty to two murders. *Id.* at 489, 488 N.E.2d at 531. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1)(c)(1985), states in relevant part: "If a defendant has been found guilty of murdering more than one victim, the court shall sentence the defendant to a term of natural life imprisonment." *Id.*

110. *Walker*, 109 Ill. 2d at 498-99, 488 N.E.2d at 535.

111. ILL. S. CT. R. 402, ILL. REV. STAT. ch. 110A, para. 402 (1985). Rule 402 was enacted to insure compliance with the requirements of Boykin v. Alabama, 395 U.S. 238 (1969). *Walker*, 109 Ill. 2d at 498, 488 N.E.2d at 535. *Boykin* requires that a guilty plea be shown to have been made intelligently and voluntarily before it could be accepted by the court. *Boykin*, 395 U.S. at 244.

112. *Walker*, 109 Ill. 2d at 498, 488 N.E.2d at 535 (citing People v. Stewart, 101 Ill.

and concluded that the trial court's misstatement had not misled Walker, and that Walker had understood the nature of the charges.[113] The court noted that Walker knew that the prosecutor had planned to ask for the death penalty, and that Walker had stated that he expected to be sentenced to nothing less than life imprisonment.[114]

Walker also contended that he had neither knowingly nor voluntarily entered the guilty plea because the trial court failed to advise him of the possible plea of guilty but mentally ill.[115] The supreme court, however, held that the trial court had no duty to advise Walker of this plea because Walker had not offered any evidence that such a plea might be appropriate.[116] The court emphasized that a guilty but mentally ill plea would have depended upon Walker's alleged alcoholism. The supreme court determined that the plea would not have been appropriate because Walker had denied that he suffered from alcohol dependence.[117]

B. Specific Enforcement of Plea Agreement

The final case to be discussed regarding guilty pleas, *People v. Boyt*,[118] involved whether a prosecutor must honor a plea agreement. In that case, the defendant, Kathleen Boyt, agreed to testify against her co-defendant.[119] In exchange for her testimony, the prosecutor agreed to allow Boyt to enter a guilty plea to reduced charges with the prosecutor recommending a specific sentence.[120] Before Boyt could testify, however, the co-defendant pleaded guilty

2d 470, 484, 463 N.E.2d 677, 684, *cert. denied*, 469 U.S. 920 (1984) (quoting People v. Krantz, 58 Ill. 2d 187, 192, 317 N.E.2d 559, 562 (1974))).

113. *Walker*, 109 Ill. 2d at 499, 488 N.E.2d at 535.

114. *Id.*

115. *Id.* at 500, 488 N.E.2d at 535. *See* ILL. REV. STAT. ch. 38, para. 115-2 (1985), which provides, in part, that a court may accept a plea of guilty but mentally ill after it has determined that there is a factual basis that the defendant was mentally ill at the time of the offense. *Id.*

116. *Walker*, 109 Ill. 2d at 500, 488 N.E.2d at 536.

117. *Id.* In a related argument, the defendant contended that the trial court erred by denying his motion to withdraw his guilty plea and substitute for it a plea of guilty but mentally ill. *Id.* at 501-02, 488 N.E.2d at 536. Walker made a motion to withdraw his guilty plea after the court had already entered judgment on that plea. *Id.* ILL. REV. STAT. ch. 38, para. 115-2 (1985), guides a trial court in determining whether to accept a plea of guilty but mentally ill. That section, however, is applicable before or during trial, but not after judgment has been entered. *Walker*, 109 Ill. 2d at 501, 488 N.E.2d at 536. Thus, the court rejected Walker's contention because he had not made the substituted plea in a timely fashion. *Id.* at 501, 488 N.E.2d at 536.

118. 109 Ill. 2d 403, 488 N.E.2d 264 (1985), *cert. denied*, 106 S. Ct. 2254 (1986).

119. *Id.* at 406, 488 N.E.2d at 266.

120. *Id.*

to robbery.[121] The State then refused to honor its agreement with Boyt.[122] The trial court ordered specific performance of the plea agreement.[123] When the State would not abide by the order, the court dismissed the indictments against Boyt.[124]

On appeal, the Illinois Supreme Court held that the trial court erred in ordering specific performance of the plea agreement.[125] The court found that an unexecuted plea agreement was not a constitutionally protected property or liberty interest which could be specifically enforced under the due process clause.[126] In addition, the court noted that Boyt had not pleaded guilty in reliance on the prosecutor's promise, and that the State had not deprived Boyt of her liberty in any way.[127] Thus, absent a showing that the agreement affected Boyt's due process rights, the court ruled that she was not entitled to specific performance.[128]

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121. *Id.*

122. *Id.*

123. *Id. See* Santobello v. New York, 404 U.S. 257 (1971). In *Santobello*, a judge imposed a maximum sentence on the defendant after the prosecutor, who did not know about any plea agreement between the defendant and a former prosecutor, recommended the maximum sentence. *Santobello*, 404 U.S. at 259-60. The Supreme Court vacated the judgment, holding that a prosecutor's promise must be fulfilled when it induces a guilty plea. *Id.* at 262.

124. *Boyt*, 109 Ill. 2d at 406, 488 N.E.2d at 266. The appellate court held that dismissal was inappropriate, reversed the order of dismissal, and remanded for further proceedings. *Id.* at 407, 488 N.E.2d at 266.

125. *Id.* at 415, 488 N.E.2d at 270.

126. *Id.* The concern of due process is not with the benefit conferred on the State, but rather, "the manner in which persons are deprived of their liberty." Mabry v. Johnson, 467 U.S. 504, 511 (1984). The defendant in *Boyt* cited People v. Starks, 106 Ill. 2d 441, 478 N.E.2d 350 (1985), as controlling authority for her request for specific enforcement. *Boyt*, 109 Ill. 2d at 415-16, 488 N.E.2d at 270. The prosecutor in *Starks* had promised that if the defendant took and passed a polygraph test, charges against him would be dismissed. *Starks*, 106 Ill. 2d at 444, 478 N.E.2d at 352. The Illinois Supreme Court reasoned that the defendant surrendered his fifth amendment privilege against self-incrimination by submitting to the polygraph examination and, therefore, that due process required the prosecutor to drop the charges. *Id.* at 451, 478 N.E.2d at 355. Distinguishing *Starks* from *Boyt*, the Illinois Supreme Court held that, unlike the defendant in *Starks*, Boyt had surrendered no rights in reliance on the prosecutor's promise. *Boyt*, 109 Ill. 2d at 416, 488 N.E.2d at 271. In a dissent joined by Justices Simon and Goldenhersh, Chief Justice Clark argued that Boyt's reliance on *Starks* was not misplaced. *Id.* at 417, 488 N.E.2d at 271 (Clark, C.J., dissenting). The dissent reasoned that by agreeing to testify, the defendant incriminated herself by confessing her presence and knowledge of the crime, which should have entitled her to specific performance of the plea agreement. *Id.* at 419, 488 N.E.2d at 272 (Clark, C.J., dissenting).

127. *Boyt*, 109 Ill.2d at 415, 488 N.E.2d at 270.

128. *Id.*

V. INSANITY DEFENSE

A. Use of Statements Made During Fitness Examination to Rebut Insanity Defense

In *People v. Kashney*,[129] the Illinois Supreme Court consolidated two cases to consider whether the State may introduce, for purposes of impeachment, statements made by a defendant during a court-ordered fitness examination.[130] According to Illinois law, the State can use such statements only if the defendant has raised an insanity or intoxication defense.[131] Prior to trial, the first defendant, Ronald Kashney, filed a suppression motion, claiming that he had confessed to murder because a police officer had hit him.[132] After the trial court denied this motion, it found Kashney unfit to stand trial and remanded him to the Department of Mental Health.[133] Subsequently, Kashney was ruled fit to stand trial.[134] At trial, Kashney denied committing the crime charged and claimed that demons possessing one of the investigating officers coerced him into confessing.[135] To support his claim, Kashney called two psychiatrists who had participated in the court-ordered examination.[136] The State impeached the psychiatrists' testimony with statements that Kashney had made during the examination.[137]

On appeal, Kashney argued that the trial court erred in permitting the State to introduce his statements because he had not tech-

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129. 111 Ill. 2d 454, 490 N.E.2d 688 (1986).

130. *Id.* at 458, 490 N.E.2d at 690. The court consolidated People v. Kashney, 129 Ill. App. 3d 218, 472 N.E.2d 164 (1st Dist. 1984), and People v. Lee, 128 Ill. App. 3d 774, 471 N.E.2d 567 (1st Dist. 1984).

131. The issue in *Kashney* arose under ILL. REV. STAT. ch. 38, para. 104-14(a) (1985), which provides in pertinent part:

> Statements made by the defendant and information gathered in the course of any [court-ordered] examination or treatment shall not be admissible against the defendant unless he raises the defense of insanity or the defense of drugged or intoxicated condition, in which case they shall be admissible only on the issue of whether he was insane, drugged or intoxicated.

Id.

The statute governing the insanity defense provides that "[a] person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." ILL. REV. STAT. ch. 38, para. 6-2(a)(1985).

132. *Kashney*, 111 Ill. 2d at 459, 490 N.E.2d at 690.

133. *Id.* at 459-60, 490 N.E.2d at 690.

134. *Id.* at 460, 490 N.E.2d at 690.

135. *Id.*

136. *Id.* at 460, 490 N.E. 2d at 691.

137. *Id.*

nically asserted an insanity defense.[138] The court stated that the pivotal issue was not whether Kashney had raised the insanity defense but, rather, whether Kashney waived his right to exclude the statements at trial.[139] The court held that Kashney had waived the right to exclude the statements by calling psychiatrists to testify in support of his coerced confession claim.[140]

The court reached a contrary result in the second case. There, the defendant, David Lee, testified that the complainant falsely accused him of rape as a result of his verbal abuse towards her during consensual intercourse.[141] Lee's psychiatrist testified at trial that Lee suffered from a mental disorder which could cause verbal or physical abusiveness.[142] In rebuttal, the State called the psychiatrist who had interviewed Lee pursuant to a court order.[143] The psychiatrist testified that Lee had told him that he was abusive with the complainant because he felt anger towards her, and, further, because he had heard a voice commanding him to "[g]et her, kill her, choke her, [and] beat her."[144]

Like Kashney, Lee maintained that the State was precluded from using these statements because the insanity defense had not been asserted.[145] The State contended that it could use the statements to impeach the testimony of the defendant's psychiatrist because the defendant, in effect, had raised the insanity defense by introducing expert testimony that he suffered from a psychiatric disorder.[146] The supreme court disagreed and concluded that Lee had not raised the insanity defense.[147] Therefore, the court concluded that the trial court erred in allowing the State to impeach

138. *Id.* at 457-58, 490 N.E.2d at 689-690.

139. *Id.* at 461, 490 N.E.2d at 691.

140. *Id.* The court also noted that the defendant had agreed that the State could cross-examine the psychiatrists as to their diagnosis of Kashney. *Id.*

141. *Id.* at 463, 490 N.E.2d at 692.

142. *Id.* at 462-63, 490 N.E.2d at 692. The psychiatrist testified that Lee suffered from post-traumatic stress syndrome characterized by flashbacks to prior stressful experiences. *Id.* at 462, 490 N.E.2d at 692. Lee testified that he was abusive with the complainant because of a flashback to experiences at a brothel that he had frequented while in the military service. *Id.* at 463, 490 N.E.2d at 692.

143. *Id.* at 463, 490 N.E.2d at 692.

144. *Id.*

145. *Id.* at 464, 490 N.E.2d at 692.

146. *Id.*

147. *Id.* at 465, 490 N.E.2d at 693. The court stated that a defendant raises the insanity defense when he admits the offense charged but claims he suffered from insanity at the time of the act. *Id.* at 464-65, 490 N.E.2d at 693. The court explained that Lee denied that he committed the rape and had called the psychiatrist to explain why the complainant falsely accused him. *Id.* at 465, 490 N.E.2d at 693.

the defendant with his fitness examination statements.[148]

B. Use of Insanity Defense at Probation Revocation Hearing

In *People v. Allegri*,[149] the Illinois Supreme Court held that a defendant could not raise the insanity defense in a probation revocation proceeding.[150] In that case, the defendant, Anita Allegri, violated her probation by committing a crime.[151] At the ensuing probation revocation hearing, Allegri raised the insanity defense, arguing that her probation could not be revoked because she was not criminally responsible for her actions.[152] The trial court ruled that the insanity defense could not be asserted in a probation revocation proceeding.[153]

In affirming the trial court's decision, the Illinois Supreme Court noted that the Illinois Criminal Code was silent on the question of whether an insanity defense could be invoked in a probation revocation hearing.[154] The court reasoned that, because probation is granted when a convicted person's release into the community will not present a threat to society, it can be revoked when the defendant subsequently poses a threat to society.[155] Accordingly, the court concluded that whether the defendant's insanity would excuse her from criminal responsibility was irrelevant for purposes of a probation revocation proceeding.[156]

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148. *Id.* at 465, 490 N.E.2d at 693.

149. 109 Ill. 2d 309, 487 N.E.2d 606 (1985).

150. *Id.* at 317, 487 N.E.2d at 609. *See* ILL. REV. STAT. ch. 38, para. 1005-6-4 (1985), concerning probation revocation hearing procedures.

151. *Allegri*, 109 Ill. 2d at 311, 487 N.E.2d at 606. Allegri was charged with unlawfully attempting to take a two-year-old child from his father in violation of ILL. REV. STAT. ch. 38, para. 10-3(a) (1985). *Allegri*, 109 Ill. 2d at 311, 487 N.E.2d at 606. After entering a negotiated plea, she was sentenced to thirty months probation. *Id.* One of the probation conditions required Allegri to refrain from violating any state laws. *Id.* Six months later, the State charged Allegri with a probation violation and attempted to revoke her probation because she unlawfully restrained a 13-year-old boy. *Id.*

152. *Allegri*, 109 Ill. 2d at 312, 487 N.E.2d at 606.

153. *Id.*

154. *Id.* at 313, 487 N.E.2d at 607.

155. *Id.* at 314, 487 N.E.2d at 607-08. The court also noted that other state and federal courts considering this issue have reached similar conclusions. *Id.* at 316, 487 N.E.2d at 608. *See, e.g.*, Steinberg v. Police Court, 610 F.2d 449 (6th Cir. 1979); Knight v. Estelle, 501 F.2d 963 (5th Cir.), *cert. denied*, 421 U.S. 1000 (1975); Pierce v. State Department of Social & Health Services, 97 Wash. 2d 552, 646 P.2d 1382 (1982); State ex rel. Lyons v. Department of Health & Social Services, 105 Wis. 2d 146, 312 N.W.2d 868 (1980).

156. *Allegri*, 109 Ill. 2d at 314, 487 N.E.2d at 607-08. The Illinois Criminal Code states that, "[t]he court may at any time terminate probation . . . if warranted by the *conduct* of the offender and the ends of justice as provided in Section 5-6-4." ILL. REV. STAT. ch. 38, para. 1005-6-2(c)(1985) (emphasis added). The court construed the legisla-

VI. DOUBLE JEOPARDY

A. Double Jeopardy as Limitation on the State's Power to Prosecute

In *People v. Mueller*,[157] the defendant, Neil Mueller, shot and killed two men and concealed their bodies on his farm.[158] Later, he deposited the bodies into a creek in another county.[159] After a jury acquitted Mueller on charges of murder,[160] the State obtained a conviction in another county for concealment of a homicide.[161]

On appeal, Mueller contended that the conviction for concealment of a homicide after the murder acquittal violated his constitutional right not to be placed twice in jeopardy.[162] The Illinois Supreme Court rejected this contention and held that the offenses of murder and concealment of a homicide were distinct because each required different acts and different mental states, and because each required proof of a fact that the other did not.[163] Thus, the court held that the State did not prosecute Mueller twice for the same offense.[164]

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ture's choice of the word "conduct" to suggest that the key question is whether objective acts require revocation, not whether one is legally responsible for such acts. *Allegri*, 109 Ill. 2d at 314-15, 487 N.E.2d at 608. In dissent, Justice Ward stated that the General Assembly intended to insure fairness toward those with mental disease or defect by enacting the insanity defense. *Allegri*, 109 Ill. 2d at 318, 487 N.E.2d at 609. Accordingly, he concluded, "[i]t is inconceivable that the General Assembly intended that this fairness to handicapped persons would not be extended to all proceedings and especially to those in which punishment was sought by the state." *Id.* (Ward, J., dissenting).

157. 109 Ill. 2d 378, 488 N.E.2d 523 (1985).

158. *Id.* at 381, 488 N.E.2d at 524.

159. *Id.*

160. *Id.* Mueller claimed he committed the shootings in self-defense. *Id. See* ILL. REV. STAT. ch. 38, para. 7-1 (1985), which provides in pertinent part: "a person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." *Id.*

161. *Mueller*, 109 Ill. 2d at 381, 488 N.E.2d at 524. Concealment of a homicidal death occurs when a person "conceals the death . . . with knowledge that such other person has died by homicidal means." ILL. REV. STAT. ch. 38, para. 9-3.1 (1985).

162. *Mueller*, 109 Ill. 2d at 382, 488 N.E.2d at 524-25. The fifth amendment to the United States Constitution provides that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb". U.S. CONST. amend. V. In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court held that the double jeopardy clause applied to the states through the fourteenth amendment's due process clause. The Illinois constitution also contains a double jeopardy provision. ILL. CONST. art. 1, § 10.

163. *Id.* at 388, 488 N.E.2d at 527-28. To determine whether the offenses were distinct, the court looked to the statutory elements of the offenses charged, and determined "whether each provision [in the two offenses] require[d] proof of a fact which the other [did] not." *Id.* (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

164. The court rejected Mueller's double jeopardy argument, which was based on Harris v. Oklahoma, 433 U.S. 682 (1977), that concealment of a homicide was a lesser

Mueller also argued that the State could not try him for concealment of a homicide because it had relied on evidence of the concealment to prove Mueller's intent to commit murder.[165] The Illinois Supreme Court responded by stating that a substantial overlap in the proof adduced at separate prosecutions did not necessarily give rise to a double jeopardy violation.[166]

Finally, the court rejected Mueller's contention that the murders and the act of concealment constituted one course of action which compelled the State to try both the charges at once.[167] The *Mueller* court held that the compulsory joinder statute[168] required joinder only when the offenses were based on the same act.[169] Although the acts were related, the court determined that the crimes could be tried separately because the defendant had accomplished the murder and concealment of a homicide by different acts.[170]

Another decision involving double jeopardy was *People ex rel. Daley v. Crilly*.[171] In *Crilly*, a jury found the defendant guilty of

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included offense of murder. *Mueller*, 109 Ill. 2d at 390, 488 N.E.2d at 528. In *Harris*, the United States Supreme Court held that a prior conviction for felony murder based on a robbery barred a subsequent prosecution for the robbery itself. *Harris*, 433 U.S. at 682. Unlike the robbery in *Harris*, concealment of a homicide would not be established automatically by a conviction for murder and, thus, was not a lesser included offense. *Mueller*, 109 Ill. 2d at 390, 488 N.E.2d at 528-29.

165. *Mueller*, 109 Ill. 2d at 387, 488 N.E.2d at 527. In support of his challenge to the concealment charge, Mueller cited People v. Zegart, 83 Ill. 2d 440, 415 N.E.2d 341 (1980), *cert. denied*, 452 U.S. 948 (1981). *Id.* In *Zegart*, the court held that, after the defendant was convicted of illegally crossing a highway median, double jeopardy barred the State from a subsequent reckless homicide prosecution in which the State planned to use the factual basis which led to the first conviction as the basis for the second conviction. *Zegart*, 83 Ill. 2d at 445, 415 N.E.2d at 343-44.

166. *Mueller*, 109 Ill. 2d at 387, 488 N.E.2d at 527 (citing Ianelli v. United States, 420 U.S. 770, 785 n. 17 (1975)). In *Ianelli*, the United States Supreme Court held that an overlap in proof would not raise a double jeopardy question as long as the offenses charged were distinct. *Ianelli*, 420 U.S. 770, 785 n. 17. The *Mueller* court noted that if the concealment issue had been resolved in favor of the defendant by the court during the initial prosecution, then the State would have been collaterally estopped from trying that issue in a subsequent prosecution. *Mueller*, 109 Ill. 2d at 387, 488 N.E.2d at 527 (citing Ashe v. Swenson, 397 U.S. 436 (1970)). In *Mueller*, the defendant did not contend that the concealment issue had already been resolved, and therefore collateral estoppel did not apply. *Mueller*, 109 Ill. 2d at 388, 488 N.E.2d at 527.

167. *Mueller*, 109 Ill. 2d at 386, 488 N.E.2d at 527. *See* Brown v. Ohio, 432 U.S. 161 (1977)(double jeopardy protections could not be circumvented by dividing one continuing offense into several individual offenses to prosecute a defendant repeatedly).

168. Illinois law provides: "[i]f the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution . . . if they are based on the same act." ILL. REV. STAT. ch. 38, para. 3-3(b)(1985).

169. *Mueller*, 109 Ill. 2d at 385, 488 N.E.2d at 526.

170. *Id.*

171. 108 Ill. 2d 301, 483 N.E. 2d 1236 (1985), *cert. denied*, 106 S. Ct. 1261 (1986).

conspiracy to commit murder but failed to reach a verdict on a murder charge.[172] The trial court discharged the jury without declaring a mistrial and entered judgment on the conspiracy charge.[173] Subsequently, the trial judge granted the defendant's motion for a directed verdict of not guilty and entered a judgment of acquittal on the murder charge.[174]

Thereafter, the State sought a writ of mandamus against the trial judge, contending that his act of discharging the jury and declaring a mistrial had the effect of "nullifying" the entire murder trial so that the court no longer had evidence before it on which to base an acquittal.[175] The supreme court, however, concluded that the trial judge had the power to correct errors and to substitute a judgment of acquittal despite his previous refusal to enter a directed verdict for the defendant at the close of evidence.[176]

The supreme court also upheld the judgment of acquittal because a retrial on the murder charge would have subjected the defendant to a double jeopardy.[177] Although a mistrial because of a deadlocked jury normally does not bar retrial, the proscription against double jeopardy bars retrial if the evidence adduced at trial was insufficient to convict the defendant.[178] In *Crilly*, the trial judge determined, as a matter of law, that the State had presented insufficient evidence to establish the essential elements of murder.[179] Accordingly, the supreme court reasoned that double jeopardy principles precluded the State from retrying the defendant on the murder charge.[180]

B. Double Jeopardy at Sentencing

In two capital cases, the supreme court considered double jeopardy issues regarding sentencing. In *People v. Davis*,[181] the Illinois Supreme Court held that an earlier decision vacating a death sen-

172. *Id.* at 304, 483 N.E.2d at 1237.
173. *Id.*
174. *Id.* at 305, 483 N.E.2d at 1237.
175. *Id.* at 305, 483 N.E.2d at 1237-38.
176. *Id.* at 311, 483 N.E.2d at 1240-41. The court stated, "It would be absurd to suppose that trial judges who conclude they have made mistakes should not be permitted to correct them within an appropriate time frame." *Id.* at 311, 483 N.E.2d at 1240. The court also noted that this power to correct errors is equivalent to Federal Rule of Criminal Procedure 29(c) which permits a trial judge to enter a judgment of acquittal when a jury is discharged without having returned a verdict. *Id.* (citing FED. R. CRIM. P. 29(c)).
177. *Crilly*, 108 Ill. 2d at 311, 483 N.E.2d at 1240-41.
178. *Id.* at 308, 483 N.E.2d at 1239.
179. *Id.* at 311-12, 483 N.E.2d at 1241.
180. *Id.*
181. 112 Ill. 2d 78, 491 N.E.2d 1163 (1986).

tence for trial error did not preclude a second capital sentencing hearing.[182] The court determined that double jeopardy barred a second capital sentencing hearing when the State failed in the first sentencing proceeding to prove the existence of any of the statutory aggravating circumstances necessary to impose a death sentence.[183] Because the earlier death sentence in *Davis* had been vacated as a result of errors at the sentencing hearing rather than because of evidentiary insufficiency, the court held that the defendant could be sentenced to death at the second capital sentencing hearing without any violation of double jeopardy.[184]

The court reached a similar conclusion in *People v. Szabo*.[185] In John Szabo's initial appeal,[186] the Illinois Supreme Court had reversed his death sentence because the trial court improperly excluded a prospective juror from the jury.[187] On remand, the defendant was sentenced to death.[188] Szabo again appealed, arguing that the decision of the United States Supreme Court in *Davis v. Georgia*[189] barred the State from obtaining a death sentence.[190] In *Davis v. Georgia*, the Supreme Court held that when a trial court improperly excluded a person from a jury, any "subsequently imposed death penalty [could not] stand."[191] Szabo argued that *Davis*

182. *Id.* at 83, 491 N.E.2d at 1165.

183. *Id.* at 81, 491 N.E.2d at 1164 (citing Arizona v. Rumsey, 467 U.S. 203 (1984)(double jeopardy clause prohibited the State from sentencing the defendant to death upon reconviction after an initial conviction set aside on appeal had resulted in a life sentence); Bullington v. Missouri, 451 U.S. 430 (1981)(State was prohibited from obtaining a death sentence on reconviction when the death penalty had been rejected in the first conviction which was then set aside on appeal)).

184. *Davis*, 112 Ill. 2d at 86, 491 N.E.2d at 1167. Davis also suggested that the reversal of his death sentence operated as an acquittal because there was no factual finding at the trial or sentencing hearing that Davis actually killed, attempted, or intended to kill or use lethal force. *Id.* at 82, 491 N.E.2d at 1165. The defendant's argument was based on Enmund v. Florida, 458 U.S. 782 (1982), which held that such a factual finding is required before the court can impose a death penalty. *Id.* at 797. The Illinois Supreme Court, however, rejected Davis's argument and held that the *Enmund* proportionality finding could await an ultimate affirmance by the Supreme Court of a death sentence. *Davis*, 112 Ill. 2d at 83, 491 N.E.2d at 1165. The finding need not be made in the original appeal once the court determines it will vacate the sentence and remand for further proceedings. *Id.* *See* Cabana v. Bullock, 106 S. Ct. 689, 696-97 (1986)(factual finding required by *Enmund* need not take place in the trial court, but, rather, may be made on review).

185. 113 Ill. 2d 83, 497 N.E.2d 995 (1986), *cert. denied*, 107 S. Ct. 1330 (1987).

186. People v. Szabo, 94 Ill. 2d 327, 447 N.E.2d 193 (1983).

187. *Id.* at 357, 447 N.E.2d at 207.

188. *Szabo*, 113 Ill. 2d at 88, 497 N.E.2d at 996.

189. 419 U.S. 122 (1976).

190. *Szabo*, 113 Ill. 2d at 88, 497 N.E.2d at 996.

191. *Id.* at 96, 497 N.E.2d at 1000 (quoting Davis v. Georgia, 429 U.S. 122, 123 (1976)).

forever barred the State from obtaining a future death penalty.[192] The Illinois Supreme Court, however, interpreted *Davis* to require only that a new venire be drawn and a new sentencing hearing be conducted.[193]

VII. JURY SELECTION

A. Peremptory Challenges

In *People v. Moss*,[194] the court analyzed whether the trial court erred in prohibiting the defendant from exercising a peremptory challenge.[195] Prior to jury selection in *Moss*, the judge advised opposing counsel that, once a side passed upon a panel of four prospective jurors and tendered the panel to the other side, the side tendering the panel would not be allowed to challenge a juror previously tendered.[196] In contravention of the trial court's order, the defense attempted to challenge a juror from a panel it previously had tendered.[197] The trial court denied the request to excuse the juror.[198] On appeal, the supreme court approved the trial court's ruling, holding that the court had discretion[199] to alter the usual procedure for peremptory challenges if the parties had adequate notice and were not unduly restricted in the use of challenges.[200] Accordingly, the court ruled that the trial judge did not abuse his discretion by designating when a peremptory challenge could be exercised.[201]

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192. *Szabo*, 113 Ill. 2d at 96, 497 N.E.2d at 1000.

193. *Id.* The *Szabo* court stated, "we do not think that the Supreme Court meant to forever preclude the imposition of the death penalty because of a single error." *Id.* at 96, 497 N.E.2d at 1001.

194. 108 Ill. 2d 270, 483 N.E.2d 1252 (1985).

195. *Id.* at 273, 483 N.E.2d at 1253.

196. *Id.* at 273, 483 N.E.2d at 1254. The practice by which a counsel challenges a juror whom he previously tendered is known as backstriking. *Id.* at 275, 483 N.E.2d at 1255.

197. *Id.* at 273, 483 N.E.2d at 1254.

198. *Id.*

199. The court in *Moss* noted that Illinois Supreme Court Rule 434(a) provided the basis for the court's discretion. *Id.* at 275, 483 N.E.2d at 1255 (citing ILL. S. CT. R. 434(a), ILL. REV. STAT. ch. 110A, para. 434(a)(1985)). Supreme Court Rule 434(a) states, "in criminal cases, the parties shall pass and accept the jury in panels of four, commencing with the state unless the court in its discretion directs otherwise." ILL. S. CT. R. 434(a), ILL. REV. STAT. ch. 110A, para. 434(a)(1985). This rule permits use of traditional procedures such as backstriking in exercising peremptory challenges unless the court directs otherwise. *Moss*, 108 Ill. 2d at 275, 483 N.E.2d at 1255 (citing People v. Robinson, 121 Ill. App. 3d 1003, 1012, 460 N.E.2d 392, 399 (1st Dist. 1984)).

200. *Moss*, 108 Ill. 2d at 275, 483 N.E.2d at 1255.

201. *Id.*

B. *Fair Cross-Section of Community*

In *People v. Free*,[202] the court considered whether a defendant's sixth amendment right to a jury selected from a fair cross-section of the community was violated because a federal court, in an unrelated civil case,[203] had found that discriminatory housing practices existed in the county from which the defendant's venire was chosen.[204] On appeal of a murder conviction and a resulting death sentence, the defendant, James Free, argued that the discriminatory housing policies in DuPage County unconstitutionally tainted the venire by eliminating minority and low income citizens from the jury pool.[205] The Illinois Supreme Court, however, held that an adjudication that discriminatory housing practices existed in a county did not mandate reversal of the convictions of all defendants tried in that county.[206] The court reasoned that the fair cross-section requirement was not violated because the defendant could not establish that under-representation of racial minorities and low income groups on the venire resulted from the systematic exclusion in the jury selection process.[207]

C. *Manner and Scope of Voir Dire*

In *People v. Stack*,[208] the court determined that the trial court committed reversible error by denying a murder defendant's request to ask prospective jurors if they had any feelings or viewpoints concerning the insanity defense in a criminal case when the

202. 112 Ill. 2d 154, 492 N.E.2d 1269, *cert. denied*, 107 S. Ct. 246 (1986).

203. Hope, Inc. v. County of DuPage, 717 F.2d 1061 (7th Cir. 1983).

204. *Id.* at 163-64, 492 N.E.2d at 1273. The sixth amendment to the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend VI. In Taylor v. Louisiana, 419 U.S. 522 (1975), the United States Supreme Court held that a jury is not constituted properly "if the jury pool is made up of only segments of the populace or if large distinctive groups are excluded from the pool." *Id.* at 530.

205. *Free*, 112 Ill. 2d at 163-64, 492 N.E.2d at 1273.

206. *Id.* at 165, 492 N.E.2d at 1273.

207. *Id.* at 164, 492 N.E.2d at 1273. The court concluded that Free could not satisfy the three-step test formulated by the United States Supreme Court to determine whether the fair cross-section requirement had been violated. *Id.* (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)). Under this test, the defendant must prove the following:

> [T]he group which the defendant claims was excluded from his venire must be a distinctive group in the community; representation of this group was not fair and reasonable in proportion to the population of the community; and lastly, the disproportionate representation resulted from systematic exclusion of the group in the jury selection process.

Id.

208. 112 Ill. 2d 301, 493 N.E.2d 339, *cert. denied*, 107 S. Ct. 236 (1986).

defendant had asserted that defense.[209] Reasoning that the insanity defense was well-recognized but controversial, the court held that a defendant's right to an impartial jury would not be protected completely when voir dire questioning on the insanity defense involved only whether a juror generally would follow the court's instructions on insanity.[210] Thus, to probe effectively for juror bias, the court held that additional specific questions were required concerning the insanity defense.[211]

In *People v. Bowel*,[212] the Illinois Supreme Court reached a different result on an issue similar to that in *Stack*. In *Bowel*, the court rejected the defendant's claim that the trial court's refusal to ask prospective jurors questions concerning mistaken identification denied his right to an impartial jury.[213] Distinguishing mistaken identification from the insanity defense, the court held that mistaken identification was not a subject about which prospective jurors would harbor predetermined viewpoints.[214] Rather, the court noted that the claim of mistaken identification depended on the credibility of the witnesses and the weight of the evidence; therefore, no specific questions probing for bias against that claim were necessary.[215]

In *People v. Britz*,[216] the court again considered an issue related to questioning during voir dire. In *Britz*, the defendant, John Britz, argued that the trial court erred in refusing to allow questions concerning the presumption of innocence, the State's burden of proof, and the privilege against self-incrimination.[217] *People v.*

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209. *Id.* at 313, 493 N.E.2d at 344-45.

210. *Id.* at 313, 493 N.E.2d at 344. The court stated that the defendant's right to identify and challenge prospective jurors who would refuse to apply the law regarding the insanity defense was analogous to the State's right to probe the venire for jurors who would not follow the law regarding the death penalty in a capital case. *Id. See* People v. Wright, 111 Ill. 2d 128, 490 N.E.2d 640 (1985)(State may ask potential jurors if they would be able to impose the death sentence if it was supported by the law or facts in a case). The *Stack* court stated that, although Illinois Supreme Court Rule 234 prohibited questions on voir dire directly or indirectly concerning matters of law or instruction, the question at issue did not violate Rule 234. *Stack*, 112 Ill. 2d at 311, 493 N.E.2d at 344 (citing ILL. S. CT. R. 234, ILL. REV. STAT. ch. 110A, para. 234 (1985)). The question sought only to assess juror bias against the insanity defense. *Stack*, 112 Ill. 2d at 311, 493 N.E.2d at 344. For the text of Illinois Supreme Court Rule 234, see *infra* note 219.

211. *Stack*, 112 Ill. 2d at 313, 493 N.E.2d at 344.

212. 111 Ill. 2d 58, 488 N.E.2d 995 (1986).

213. *Id.* at 64-65, 488 N.E.2d at 998-99.

214. *Id.* at 65, 488 N.E.2d at 999.

215. *Id.*

216. 112 Ill. 2d 314, 493 N.E.2d 575 (1986).

217. *Id.* at 318, 493 N.E.2d at 576.

Zehr,[218] decided by the Illinois Supreme Court subsequent to the trial in *Britz*, held that questions substantially similar to those asked in *Britz* should have been addressed to prospective jurors.[219] The Illinois Supreme Court in *Britz*, however, held that *Zehr* would not be applied retroactively to the review of any conviction prior to the *Zehr* ruling.[220]

In *People v. Porter*,[221] the defendant, Anthony Porter, contended that the trial court erred by failing to ask prospective jurors whether they knew any of the parties, victims, or their families.[222] After the *Porter* jury reached its verdict, it was discovered that a member of the jury knew the mother of one of the victims.[223] Because Porter's counsel had not requested the trial court to ask these questions during voir dire, the supreme court held that the defendant was not denied his constitutional right to an impartial jury.[224]

In *People ex rel. Daley v. Hett*,[225] the Illinois Supreme Court held that when a defendant in a capital case waives his right to a sentencing jury prior to the determination of guilt or innocence,

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218. 103 Ill. 2d 472, 469 N.E.2d 1062 (1984).

219. *Britz*, 112 Ill. 2d at 318, 493 N.E.2d at 576 (citing *Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984)). Illinois Supreme Court Rule 234 states:

> The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, or may permit the parties to supplement the examination by such direct inquiry as the court deems proper. Questions shall not directly or indirectly concern matters of law or instructions.

ILL. S. CT. R. 234, ILL. REV. STAT. ch. 110A, para. 234 (1985).

The defendant in *Britz* was denied the right to ask the following questions: "(1) whether the jurors understood that the defendant was presumed to be innocent of the charge; (2) whether the jurors understood that the defendant need not produce any evidence; (3) whether the jurors could return a verdict of not guilty if the prosecution failed to prove each and every element of the offense." *Britz*, 112 Ill. 2d at 318, 493 N.E.2d at 576-77. The *Zehr* decision changed Illinois law by granting the trial court discretion to permit such questions in voir dire. *Britz*, 112 Ill. 2d at 319, 493 N.E.2d at 877.

220. *Britz*, 112 Ill. 2d at 319, 493 N.E.2d at 577. The Illinois Supreme Court reversed *Britz* on grounds unrelated to *Zehr* and remanded the case for a new trial. *Id.* at 321, 493 N.E.2d at 578. Consequently, the holding in *Zehr* will be applied at Britz's new trial. For a discussion of the grounds for reversal, see *supra* notes 58-68 and accompanying text. *Id.*

221. 111 Ill. 2d 386, 489 N.E.2d 1329, *cert. denied*, 107 S. Ct. 298 (1986).

222. *Id.* at 401, 489 N.E.2d at 1335.

223. *Id.* at 402, 489 N.E.2d at 1335.

224. *Id.* at 401-02, 489 N.E.2d at 1335. The defense counsel could have submitted supplemental questions to the court pursuant to Supreme Court Rule 234. ILL. S. CT. R. 234, ILL. REV. STAT. ch. 110A, para. 234 (1985). For the text of Illinois Supreme Court Rule 234, see *supra* note 219.

225. 113 Ill. 2d 75, 495 N.E.2d 513 (1986). *See infra* notes 385-92 and accompanying text for a discussion of *Hett's* significance regarding sentencing in a death penalty case.

the State is precluded from asking prospective jurors about their views on the death penalty.[226] Because the trial jurors would not consider the defendant's eligibility for the death penalty, their views on the death penalty were irrelevant to their fitness to serve as trial jurors.[227]

In *People v. Neal*,[228] the defendant, Johnny Neal, contended that the trial court erred by failing to question each prospective juror outside the presence of the other prospective jurors.[229] Noting that Illinois Supreme Court Rules 431 and 234 permit, but do not require, a trial judge to conduct voir dire out of the presence of other jurors, the *Neal* court concluded that the trial judge did not abuse his discretion because he took proper precautions to prevent juror prejudice, and because an individualized voir dire was impracticable as a result of a lack of security and appropriate facilities.[230]

VIII. RIGHT TO COUNSEL

A. Ineffective Assistance of Counsel

Several decisions during the *Survey* period examined the issue of ineffective assistance of counsel.[231] In four cases, the Illinois Supreme Court held that the defendant had been denied ineffective assistance of counsel.

In *People v. Hattery*,[232] the defendant, Charles Hattery, who had entered a not guilty plea to a murder charge, claimed that his trial counsel's conduct amounted to a guilty plea and therefore constituted per se ineffective assistance of counsel.[233] At trial, Hattery's counsel stated, "[a]t the end of your deliberations, you will find

226. *Hett*, 113 Ill. 2d at 82, 495 N.E.2d at 516-17. In a capital case, the state is permitted to ask potential jurors if they would be able to vote for the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 513-14 (1968).

227. *Hett*, 113 Ill. 2d at 82, 495 N.E.2d at 516-17.

228. 111 Ill. 2d 180, 489 N.E.2d 845 (1985), *cert. denied*, 106 S. Ct. 2292 (1986).

229. *Id.* at 197-98, 489 N.E.2d at 852.

230. *Id.* (citing ILL. S. CT. R. 234, 431, ILL. REV. STAT. ch. 110A, paras. 234, 431 (1985)). Rule 431 states, "In criminal cases the voir dire examination of jurors shall be conducted in accordance with Rule 234." ILL. S. CT. R. 431, ILL. REV. STAT. ch. 110A, para. 431 (1985). For the text of Rule 234, see *supra* note 219.

231. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court announced a two-part test for judging actual ineffective assistance of counsel claims. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 690-94. Second, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

232. 109 Ill. 2d 449, 488 N.E.2d 513 (1985), *cert. denied*, 106 S. Ct. 3314 (1986).

233. *Id.* at 458, 488 N.E.2d at 516.

[the defendant] guilty of murder. The question and the only question facing you will be whether to impose the death penalty on Charles Hattery for trying to save the life of his family."[234] Because Hattery's counsel did not present the issue of his guilt or innocence to the jury, the supreme court held that Hattery had been denied effective assistance of counsel.[235] The court predicated this result on the following factors: the defense counsel's actions were at odds with Hattery's plea of not guilty; the record did not contain evidence that Hattery consented to counsel's actions; and the trial counsel should have held the prosecution to its burden of proof.[236]

The Illinois Supreme Court also concluded there was ineffective assistance of counsel in *People v. Correa*.[237] There, the defendant, Cesar Correa, entered guilty pleas to several charges pursuant to a plea agreement.[238] Prior to the agreement, Correa had asked his attorney whether the pleas would affect his status as an immigrant.[239] The attorney responded that, because Correa's wife was a United States citizen, the pleas would not affect his status.[240] The attorney's advice was incorrect — after Correa's release, the United States Immigration and Naturalization Service took Correa into custody and ordered him deported on the basis of the convictions.[241] Thereafter, Correa sought and was granted post-conviction relief.[242] Concluding that the attorney's advice in response to Correa's specific questions was "not within the range of competence required of counsel in such situations,"[243] the supreme court held that Correa had been denied effective assistance of counsel.[244]

In *People v. Wright*,[245] the defendant, Hazel Wright, contended

234. *Id.* at 458-59, 488 N.E.2d at 516.

235. *Id.* at 464-65, 488 N.E.2d at 519.

236. *Id.* at 464-65, 488 N.E.2d at 519 (citing United States v. Cronic, 466 U.S. 648 (1984)). *Cronic* held that, at a minimum, defendant's counsel must act as a true advocate for the accused. *Cronic*, 466 U.S. at 659. If the process loses its character as a confrontation between adversaries, the sixth amendment guarantee is violated. *Id.* at 656-57.

237. 108 Ill. 2d 541, 485 N.E.2d 307 (1985).

238. *Id.* at 547, 485 N.E.2d at 309.

239. *Id.*

240. *Id.* at 548, 485 N.E.2d at 309.

241. *Id.* at 544, 485 N.E.2d at 308.

242. *Id.* The trial court granted the petition and the Illinois appellate court affirmed. *Id.*

243. *Id.* at 553, 485 N.E.2d at 313 (citing McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).

244. *Correa*, 109 Ill. 2d at 553, 485 N.E.2d at 312. *See also* People v. Morreale, 412 Ill. 528, 107 N.E.2d 721 (1952) (counsel misrepresented to defendant that if he pleaded guilty he would receive a sentence of probation; the court held the plea was involuntary).

245. 111 Ill. 2d 18, 488 N.E.2d 973 (1986).

that she was denied effective assistance of counsel because her attorney failed to present a voluntary intoxication defense to the crime of murder.[246] Wright claimed that when she awoke from an alcohol-induced sleep, she heard noises and began to investigate, forgetting that her daughter was in her home.[247] While Wright stood at the top of the stairs, her daughter asked her why she was carrying a gun.[248] At that point, the gun discharged, the bullet striking her daughter.[249]

Subsequently, Wright sought post-conviction relief on the ground that she was denied effective assistance of counsel because her attorney failed to interpose a voluntary intoxication defense and because her attorney should have pursued an involuntary manslaughter theory.[250] At the post-conviction hearing, Wright's trial counsel stated that he thought that voluntary intoxication could be used as a defense only if Wright had no recall of the alleged crime.[251] Because Wright remembered the shooting, the attorney thought that he could not present a voluntary intoxication defense or pursue the theory of involuntary manslaughter.[252]

The trial court, holding that Wright was denied effective assistance of counsel, granted post-conviction relief by vacating the murder conviction, entering judgment for involuntary manslaughter, and reducing the sentence from twenty to five years.[253] In granting the petition, the trial court noted that it would have found Wright guilty of involuntary manslaughter instead of murder had the post-conviction evidence been presented at trial.[254] The appellate court affirmed the decision.[255]

The supreme court held that an attorney's decision to raise a specific defense usually is a matter of trial strategy and does not constitute ineffective assistance of counsel.[256] The court, however,

246. *Id.* at 26, 488 N.E.2d at 977. ILL. REV. STAT. ch. 38, para. 6-3(a) (1985), states in pertinent part, "a person who is in intoxicated or drugged condition is criminally responsible for conduct unless such condition . . . negates the existence of a mental state which is an element of the defense." *Id.*

247. *Wright*, 111 Ill. 2d at 22, 488 N.E.2d at 975.

248. *Id.*

249. *Id.*

250. *Id.* at 26, 488 N.E.2d at 977.

251. *Id.* at 23, 488 N.E.2d at 975.

252. *Id.*

253. *Id.* at 24-25, 488 N.E.2d at 976.

254. *Id.* at 31, 488 N.E.2d at 979.

255. *Id.* at 21, 488 N.E.2d at 975.

256. *Id.* at 26-27, 488 N.E.2d at 977 (citing People v. Greer, 79 Ill. 2d 103, 122, 402 N.E.2d 203, 212 (1980); People v. Haywood, 82 Ill. 2d 540, 543-44, 413 N.E.2d 410, 412 (1980)).

ruled that the defense counsel's decision not to present a voluntary intoxication defense was based not on trial strategy but, rather, on a misunderstanding of the law.[257] Because the counsel's error concerned a matter central to the case, and because the result of trial would have been different but for the error, the supreme court affirmed the judgment of the trial court that Wright had been denied effective assistance of counsel.[258]

People v. Weir[259] presents another instance in which the defendant argued that his attorney's failure to raise a voluntary intoxication defense denied him the effective assistance of counsel.[260] In *Weir*, the defendant, Leonard Weir, was convicted of unlawful use of a weapon and aggravated assault for firing a gun at a law enforcement officer.[261] In response to an interrogatory, Weir's counsel stated that the defendant's consumption of alcohol on the day in question would be presented for purposes of mitigation, but not as a defense.[262]

Following the appellate court's holding that Weir had been denied effective assistance of counsel, the Illinois Supreme Court reversed because Weir had failed to show a reasonable probability that a defense of intoxication would have succeeded.[263] The supreme court noted that the evidence supported a finding that Weir acted knowingly, thus showing the mental state necessary for his convictions.[264] Consequently, the court held that Weir was not denied effective assistance of counsel because the trial counsel's error was not prejudicial.[265]

In *People v. Walker*,[266] the defendant claimed that he was denied

257. *Wright*, 111 Ill. 2d at 27, 488 N.E.2d at 977-78.

258. *Id.* at 31, 488 N.E.2d at 979-80.

259. 111 Ill. 2d 334, 490 N.E.2d 1 (1986).

260. *Id.* at 335, 490 N.E.2d at 1. For the statutory language of the defense of voluntary intoxication, see *supra* note 246.

261. *Id.* at 336, 490 N.E.2d at 2.

262. *Id. See* Strickland v. Washington, 466 U.S. 668 (1984)(a defendant asserting a denial of effective assistance of counsel must show both that counsel's performance fell below accepted professional norms and that defendant suffered prejudice from that deficient performance). *Accord* People v. Hattery, 109 Ill. 2d 449, 488 N.E.2d 513 (1985), *cert. denied*, 106 S. Ct. 3314 (1986).

263. *Weir*, 111 Ill. 2d at 339-40, 490 N.E.2d at 3. The court noted that the degree of Weir's impairment was disputed and, at both trial and sentencing, the trial judge discounted the evidence of intoxication. *Id.* at 339, 490 N.E.2d at 3.

264. *Id.* at 340, 490 N.E.2d at 3-4.

265. *Id.* at 340, 490 N.E.2d at 4. The court stated that in a narrow range of cases, a defendant need not show actual prejudice, but stated, "[w]e decline to presume that the defendant necessarily was prejudiced by counsel's belief that intoxication could not be raised here as a defense to the charges." *Id.* at 338, 490 N.E.2d at 3.

266. 109 Ill. 2d 484, 488 N.E.2d 529 (1985), *cert. denied*, 107 S. Ct. 598 (1986).

effective assistance of counsel because his attorney did not advise him of the possible plea of "guilty but mentally ill."[267] The court rejected this claim, holding that Walker made no showing that the result at trial was likely to have been different had counsel advised him of the plea.[268]

B. Conflict of Interest

In *People v. Griffin*,[269] the defendant, Lee Griffin, argued that his attorney's joint representation of him and his co-defendant created a conflict of interest which violated the defendant's right to effective assistance of counsel.[270] At trial, Griffin had testified to a common alibi for himself and his co-defendant.[271] At a subsequent post-conviction hearing, however, Griffin recanted this testimony, explaining that he had testified falsely to the alibi because his counsel discouraged him from testifying that he was present at the scene of the crime but that he did not participate in its commission.[272]

On appeal, the supreme court determined that Griffin had failed to demonstrate an actual conflict of interest.[273] The court also held that, in denying Griffin's post-conviction petition, the circuit court properly had exercised its discretion to determine the credibility and weight of Griffin's testimony.[274] Moreover, the court stated, "[I]t would seem incongruous to permit a defendant to perjure himself, and then benefit from that perjury by successfully contending that his attorney, because of the perjury, did not most effectively explore grounds for his advantage."[275] Accordingly, the court concluded that the trial court's findings were not manifestly erroneous and that the appellate court erred in reversing the denial of the post-conviction petition.[276]

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267. *Id.* at 503, 488 N.E.2d at 537. Walker also argued that, in his post-trial motion, his attorney failed to raise the issue of the trial court's inaccurate admonition concerning the plea of guilty but mentally ill. *Id.* For further discussion of this issue, see *supra* notes 107-17 and accompanying text.

268. *Walker*, 109 Ill. 2d at 504, 488 N.E.2d at 537.

269. 109 Ill. 2d 293, 487 N.E.2d 599 (1985).

270. *Id.* at 302, 487 N.E.2d at 602.

271. *Id.* at 299, 487 N.E.2d at 601.

272. *Id.* at 303, 487 N.E.2d at 603. The *Griffin* court cited People v. Washington, 101 Ill. 2d 104, 112, 461 N.E.2d 393, 397, *cert. denied*, 469 U.S. 1022 (1984), for the proposition that when a defendant claims ineffective assistance of counsel based on joint representation, evidence of an actual conflict must be shown. *Griffin*, 109 Ill. 2d at 303, 487 N.E.2d at 603.

273. *Griffin*, 109 Ill. 2d at 302, 487 N.E.2d at 603.

274. *Id.* at 305-306, 487 N.E.2d at 604.

275. *Id.* at 306, 487 N.E.2d at 604.

276. *Id.* at 307, 487 N.E.2d at 605.

The defendant in *People v. Cunningham*[277] also claimed that his attorney's representation of another defendant created a conflict of interest which deprived him of effective assistance of counsel.[278] In *Cunningham*, the State used separate informations to charge the defendant, Edward Cunningham, his stepson, and his step-grandson with different incidents of indecent liberties with the same child.[279] The same public defender represented the three defendants.[280] After the stepson and the step-grandson entered negotiated pleas of guilty, the public defender informed the court that a potential conflict of interest existed because the State listed the stepson and step-grandson as potential witnesses against Cunningham.[281]

Although the three men were not tried together, Cunningham argued that the representation by the public defender of two persons who might have been called as witnesses at Cunningham's trial created a per se conflict of interest.[282] The court rejected this argument and held that the defendant was required to demonstrate that an actual conflict of interest occurred at trial.[283] Because the representation of the other men had not inhibited Cunningham's defense in any way, the court ruled that the defendant failed to satisfy the conflict of interest standard.[284]

In *People v. Free*,[285] the court considered whether an attorney's prior representation in an unrelated matter of an adverse witness at the defendant's preliminary hearing created a per se conflict of interest.[286] In *Free*, the court appointed a public defender to represent the defendant, James Free, on a post-conviction petition.[287] While familiarizing himself with the trial record, the public defender discovered that a witness who had testified adversely to Free at a pre-trial hearing previously had been the attorney's client.[288]

The Illinois Supreme Court held that the circumstances had not created a per se conflict of interest because the professional rela-

277. 107 Ill. 2d 143, 481 N.E.2d 722 (1985).
278. *Id.* at 148-49, 481 N.E.2d at 725.
279. *Id.* at 146, 481 N.E.2d at 723.
280. *Id.*
281. *Id.* at 146-47, 481 N.E.2d at 724.
282. *Id.* at 147, 481 N.E.2d at 724.
283. *Id.* (citing *Washington*, 101 Ill. 2d at 112, 461 N.E.2d at 397).
284. *Griffin*, 109 Ill. 2d at 150, 481 N.E.2d at 725.
285. 112 Ill. 2d 154, 492 N.E.2d 1269, *cert. denied*, 107 S. Ct. 246 (1986).
286. *Id.* at 166, 492 N.E.2d at 1274.
287. *Id.*
288. *Id.* That witness did not testify at trial because the trial court had suppressed his statements. *Id.* at 167, 492 N.E.2d at 1274.

tionship between the public defender and Free had not occurred simultaneously with the relationship between the public defender and the adverse witness.[289] In addition, the court held that Free had not established actual prejudice resulting from a conflict of interest and, therefore, it rejected Free's claim of ineffective assistance of counsel.[290]

People v. Olinger[291] addressed whether the defendant, Perry Olinger, had waived the right to recourse for a potential conflict between himself and his attorney. In *Olinger*, the trial court informed Olinger that his attorney had been investigated for witness tampering and thereafter advised Olinger of the ramifications of the potential conflict of interest.[292] After the State informed the trial court that it did not plan to pursue a criminal prosecution of the attorney, Olinger advised the court that he consented to continued representation by the attorney.[293]

On appeal, Olinger argued that his waiver was invalid because the trial court had failed to inform him that the attorney could be subjected to disciplinary proceedings.[294] The Illinois Supreme Court, however, concluded that Olinger had waived his right to conflict-free counsel.[295] Although the court noted that the waiver would have been ineffective if the defendant had not been advised of the conflict and its significance, it also noted that the trial court did not have to "engage in counseling with the defendant."[296] Because Olinger understood the general nature of the conflict, the trial court did not have a duty to explain every possible consequence of the conflict.[297] The trial court's admonishments had sufficiently apprised Olinger of the potential for conflict; accordingly, his waiver was valid.[298]

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289. *Id.* at 168, 492 N.E.2d at 1275 (citing People v. Robinson, 79 Ill. 2d 147, 402 N.E.2d 157 (1979); People v. Strohl, 118 Ill. App. 3d 1084, 1092, 456 N.E.2d 276, 280 (4th Dist. 1983)). The adverse witness's testimony was suppressed before Free's trial and the public defender did not undertake the representation of Free until the post-conviction petition was filed. *Free*, 112 Ill. 2d at 169, 492 N.E.2d at 1275.

290. *Free*, 112 Ill. 2d at 169, 492 N.E.2d at 1275.

291. 112 Ill. 2d 324, 493 N.E.2d 579 (1986), *cert. denied*, 107 S. Ct. 1329 (1987).

292. *Id.* at 338-39, 493 N.E.2d at 586.

293. *Id.* at 339, 493 N.E.2d at 586.

294. *Id.*

295. *Id.* at 340, 493 N.E.2d at 587. The court cited Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1977), for the proposition that the right to conflict-free counsel can be waived.

296. *Olinger*, 112 Ill. 2d at 339, 493 N.E.2d at 587.

297. *Id.* at 339-40, 493 N.E.2d at 587.

298. *Id.* at 340, 493 N.E.2d at 587.

IX. IMPARTIAL TRIAL

A. Procedures at Trial

In *People v. Griffin*,[299] the defendant, Lee Griffin, argued that testimony of a State's witness was misleading and caused him unfair prejudice.[300] At trial, the witness, Charles Kellick, testified that he had criminal charges pending against him but did not have an agreement with the State regarding the disposition of those charges.[301] On appeal, Griffin asserted that Kellick's testimony was false because the prosecutor had told Kellick's counsel that he would "observe" Kellick's "cooperation" at Griffin's trial and consider it in arriving at a plea bargain, but that any understanding between them would be cancelled if the attorney conveyed the arrangement to Kellick.[302] Because Kellick was unaware of the conversation between his lawyer and the prosecutor, the court found that Kellick had not misled the jury.[303] Accordingly, the court rejected Griffin's argument that he had been prejudiced by Kellick's testimony.

The defendant in *People v. Coates*[304] asserted that he was denied a fair trial because the trial court had conducted an *in camera* inspection of confidential Department of Children and Family Services ("DCFS") records.[305] After inspecting the records outside the presence of counsel, the trial court permitted the defendant, Rocky Coates, to use certain portions for purposes of impeaching his wife.[306] On appeal, the supreme court determined that this proce-

299. 109 Ill. 2d 293, 487 N.E.2d 599 (1985).

300. *Id.* at 307, 487 N.E.2d at 605.

301. *Id.* at 297, 487 N.E.2d at 600.

302. *Id.* at 308, 487 N.E.2d at 605.

303. *Id.*

304. 109 Ill. 2d 431, 488 N.E.2d 247 (1985), *cert. denied*, 106 S. Ct. 1474 (1986).

305. *Id.* at 437, 488 N.E.2d at 249. Coates argued that the action violated the sixth and fourteenth amendments to the United States Constitution, sections 2 and 8 of article I of the 1970 Illinois Constitution, and provisions of Illinois Supreme Court Rule 412(h). *Id.* Rule 412(h) states in relevant part: "upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by this rule." ILL. S. CT. R. 412(h), ILL. REV. STAT. ch. 110A, para. 412(h)(1985).

306. *Coates*, 109 Ill. 2d at 437, 488 N.E.2d at 249. The Abused and Neglected Child Reporting Act provides:

> All records concerning reports of child abuse and neglect and all records generated as a result of such reports, shall be confidential and shall not be disclosed except as specifically authorized by this Act or other applicable law. It is a Class A misdemeanor to permit, assist, or encourage the unauthorized release of any information contained in such reports or records.

ILL. REV. STAT. ch. 23, para. 2061.1, § 11 (1985). The Act further provides:

> A person shall have access to the records described in Section 11 only in fur-

dure was acceptable because defense counsel has no right to be present during an *in camera* inspection.[307]

In dissent, Justice Simon argued that the procedure whereby the circuit court judge examined the DCFS records without the benefit of counsel's insight, and then determined which documents were relevant, did not adequately safeguard the defendant's interests.[308] Justice Simon noted that a judge "cannot be expected to vigorously advance [the] defendant's interests from his position of judicial neutrality." [309]

In *People v. Allen*,[310] the appellate court reversed the defendant's attempt armed robbery conviction because the trial judge misstated the law when reading an attempt armed robbery instruction to the jury.[311] The State contended that the trial judge had stated the law correctly but that the transcript of the trial proceedings was inaccurate.[312] The supreme court remanded to the trial court for con-

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therance of purposes directly connected with the administration of this Act. Such persons and purposes for access include:

. . . .

(7) A court, upon its finding that access to such records may be necessary for the determination of an issue before such court; however, such access shall be limited to *in camera* inspection, unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it; . . . .

Id. at para. 2061.1(7).

307. *Coates*, 109 Ill. 2d at 437, 488 N.E.2d at 249. The court held that People v. Dace, 104 Ill. 2d 96, 470 N.E.2d 993 (1984), and People v. Phipps, 98 Ill. App. 3d 413, 424 N.E.2d 727 (4th Dist. 1981), *aff'd*, 104 Ill. 2d 96, 470 N.E.2d 993 (1984), were distinguishable from *Coates*. *Coates*, 109 Ill. 2d at 437, 488 N.E. at 249. Those cases concerned whether mental health records of prosecution witnesses were discoverable for impeachment purposes and held that, if either the witness or therapist attempted to invoke the statutory privilege, the court had to conduct an *in camera* hearing in the presence of both sides. *Id.* at 437-38, 488 N.E.2d at 249.

The defendant in *Coates* also argued that the court erred by failing to make a record of the *in camera* proceedings and by failing to preserve the records involved. *Id.* at 438, 488 N.E.2d at 250. Because the defendant failed to request such action, the court held that the issue was waived. *Id.*

308. *Coates*, 109 Ill. 2d at 443, 488 N.E.2d at 252 (Simon, J., dissenting).

309. *Id.* at 445, 488 N.E.2d at 253 (Simon, J., dissenting).

310. 109 Ill. 2d 177, 486 N.E.2d 873 (1985).

311. *Id.* at 180, 486 N.E.2d 873.

312. *Id.* The State asserted that the trial judge had given a correct attempt armed robbery instruction, as reflected in the common law record which stated: "To sustain the charge of attempt, the State must prove the following propositions: . . . Third: That the defendant did not act under compulsion." *Id.* at 181, 486 N.E.2d at 873. The transcript of proceedings, however, contained the following incorrect instruction: "To sustain the charge of attempt, the State must prove the following propositions: . . . Third: That the defendant, *or one for whose conduct she is legally responsible*, did not act under compulsion." *Id.* (emphasis added).

sideration of the State's claim.[313] At a hearing conducted by the trial court, the State presented the original stenographic notes of the proceedings and oral testimony of the stenographer.[314] Additionally, the State presented the written jury instructions given to the jurors.[315] These instructions did not contain the alleged misstatement.[316]

Viewing the record as a whole, the Illinois Supreme Court determined that the trial judge did not misstate the law and that the original transcript of proceedings contained an error.[317] Because fundamental fairness did not require a defendant to escape conviction because of a court reporter's error, the supreme court affirmed Allen's conviction for armed robbery.[318]

In *People v. Olinger*,[319] the defendant, Perry Olinger, asserted that he had been deprived of a fair trial in two regards.[320] First, Olinger argued that, after the State introduced inculpatory portions of statements he had made to the police and grand jury, he should have been permitted to introduce the exculpatory portions of those statements.[321] The court rejected Olinger's argument, holding that additional portions of the statements should have

313. *Id.* at 182, 486 N.E.2d at 874.

314. *Id.* The supreme court remanded the case to the trial court for the purposes of conducting a hearing pursuant to Illinois Supreme Court Rule 329 which states in part: "any controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by that court and the record made to conform to the truth." 109 Ill. 2d at 182, 486 N.E.2d at 874 (citing ILL. S. CT. R. 329, ILL. REV. STAT. ch. 110A, para. 329 (1985)).

315. *Allen*, 109 Ill. 2d at 184, 486 N.E.2d at 875.

316. *Id.* at 185, 486 N.E.2d at 875. The appellate court denied the State's motion for leave to supplement the record. *Id.* The original record had not contained the written jury instructions and the appellate court did not consider these instructions on appeal. *Id.* Thus, the instructions were not a part of the official record on appeal when leave to appeal to the supreme court was granted. *Id.*

317. *Id.* at 187, 486 N.E.2d at 876. The Illinois Supreme Court made the written instructions part of the record, pursuant to Illinois Supreme Court Rule 366(a)(3). *Id.* at 186, 486 N.E.2d at 876 (citing ILL. S. CT. R. 366(a)(3), ILL. REV. STAT. ch. 110A, para. 366(a)(3)(1985)). The mistake in the record was corrected pursuant to Rule 329 which states: "Material omissions or inaccuracies or improper authentication may be corrected . . . by the trial court, either before or after the record is transmitted to the reviewing court . . . ." *Allen*, 109 Ill. 2d at 185, 486 N.E.2d at 875 (citing ILL. S. CT. R. 329, ILL. REV. STAT. ch. 110A, para. 329 (1985)).

318. *Allen*, 109 Ill. 2d at 187, 486 N.E.2d at 876. The court determined there was no error in the instructions that were given. *Id.* at 186, 486 N.E.2d at 876.

319. 112 Ill. 2d 324, 493 N.E.2d 579 (1986), *cert. denied*, 107 S. Ct. 1329 (1987).

320. *Id.* at 332, 493 N.E.2d at 583.

321. *Id.* at 337, 493 N.E.2d at 585. Olinger argued that under *People v. Weaver*, 92 Ill. 2d 545, 442 N.E.2d 255 (1982), when the State introduces part of a statement into evidence, a defendant has the right to introduce the rest of that statement. *Olinger*, 112 Ill. 2d at 337, 493 N.E.2d at 585.

been admitted only if necessary to prevent the jury from receiving a misleading impression about the portions of the statements introduced by the State.[322] Because Olinger failed to indicate how the statements in evidence had misled the jury, the supreme court held that the trial court did not err in refusing to admit the exculpatory segments of the statements.[323]

Second, Olinger objected to the court's refusal to allow the jury to see transcripts of his trial testimony during its deliberations.[324] In *Olinger*, the jury sent a note to the judge, requesting transcripts. The judge replied by stating, "[N]o, the transcripts are not available. You must rely on your memories."[325] On appeal, Olinger relied upon *People v. Queen*[326] in which the Illinois Supreme Court reversed because the trial judge, in refusing to allow the jury to view transcripts, demonstrated that he did not realize that he had discretion to show transcripts of trial testimony to the jury.[327] The Illinois Supreme Court, however, distinguished the instant case from *Queen* and held that the trial judge had not failed to exercise his discretion.[328]

In *People v. Crow*,[329] the Illinois Supreme Court concluded that, because the evidence that the defendant, Linda Crow, killed her husband was totally circumstantial, the trial court committed reversible error in refusing to instruct the jury that every reasonable theory of innocence had to be excluded by the facts proved before the defendant could be convicted of murder.[330] The court further

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322. *Olinger*, 112 Ill. 2d at 338, 493 N.E.2d at 586.

323. *Id.*

324. *Id.* at 348, 493 N.E.2d at 591.

325. *Id.* at 349, 493 N.E.2d at 591.

326. 56 Ill. 2d 560, 310 N.E.2d 166 (1974).

327. *Id.* In *Queen*, the judge told the jury, "[Y]ou must decide on the basis of the testimony heard in the courtroom. I cannot have any testimony of any witness read to you." 112 Ill. 2d at 349, 493 N.E.2d at 591 (quoting *Queen*, 56 Ill. 2d, 560, 565, 310 N.E.2d 166, 169).

328. *Olinger*, 112 Ill. 2d at 349, 493 N.E.2d at 591.

329. 108 Ill. 2d 520, 485 N.E.2d 381 (1985).

330. *Id.* at 533, 536, 485 N.E.2d at 387-388. Illinois Pattern Jury Instruction No. 3.02 states:

> Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of [the] defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict.
>
> You should not find the defendant guilty unless the facts and circumstances proved exclude every reasonable theory of innocence.

Illinois Pattern Jury Instructions in Criminal Cases (IPI), Criminal 2d, No. 3.02 (1981).

The trial court refused to give the second paragraph of this instruction. *Crow*, 108 Ill. 2d at 522, 485 N.E.2d at 382.

concluded that the failure to give the instruction was not harmless.[331]

In *People v. Bean*,[332] the supreme court held that the trial court committed reversible error by denying the defendant's motion for severance.[333] The court held that the defenses of Harold Bean and his co-defendant, Robert Byron, were so antagonistic that their joint prosecution deprived Bean of his right to a fair trial.[334] The court reasoned that Byron's testimony that Bean was the killer, Byron's introduction of testimony damaging to Bean, and the adverse comments of Byron's counsel and the prosecutor about Bean's failure to testify unfairly placed Bean in the position of having to defend against both the State and his co-defendant.[335]

B. Prosecutorial Misconduct

In *Bean*, the Supreme Court also held that the prosecutor had violated Bean's right to a fair trial.[336] In closing argument, the prosecutor stated, "[t]hey have put on a show for you of being one opposed against the other in the hope that one would create reversible error for the other."[337] The court ruled that the prosecutor's personal attack on the defense counsel deprived the defendant of

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331. *Crow*, 108 Ill. 2d at 536, 485 N.E.2d at 389.

332. 109 Ill. 2d 80, 485 N.E.2d 349 (1985).

333. *Id.* at 97, 485 N.E.2d at 357. Under ILL. REV. STAT. ch. 38, para. 114-8 (1985), the defendant may file a pretrial motion for severance. *Id.* The motion must explain how the defendant will be prejudiced by a joint trial. *Bean*, 109 Ill. 2d at 92, 485 N.E.2d at 354-55. The decision whether to grant the motion is in the trial judge's discretion and will be reversed only for abuse of discretion. *Id.* at 93, 485 N.E.2d at 355.

334. *Bean*, 109 Ill. 2d at 93, 485 N.E.2d at 355. Two situations require severance. One occurs "[w]hen co-defendants' defenses are so antagonistic that one of the co-defendants cannot receive a fair trial jointly with the other." People v. Daugherty, 102 Ill. 2d 533, 541-42, 468 N.E.2d 969, 973 (1984). The other involves an interference with the constitutionally guaranteed right of confrontation. Bruton v. United States, 391 U.S. 123, 134 n. 10 (1968).

335. *Bean*, 109 Ill. 2d at 94, 485 N.E.2d at 355. For further discussion of the self-incrimination issue, see *supra* notes 79-86 and accompanying text. In *Bean*, the State argued that the defenses were not antagonistic because the co-defendants did not reciprocally blame each other, and when the co-defendant presented an alibi defense, Bean did not say "I didn't do it, he did." *Bean*, 109 Ill. 2d at 95, 485 N.E.2d at 356. The court reasoned that the facts in *Bean* were similar to People v. Daugherty, 102 Ill. 2d 533, 468 N.E.2d 969 (1984), and People v. Braune, 363 Ill. 551, 2 N.E.2d 839 (1939). *Bean*, 109 Ill. 2d at 94, 485 N.E.2d at 355. In both *Daugherty* and *Braune*, the court required severance because the trial became adversarial between the defendants instead of between the State and the defendants. *Id.*

336. *Bean*, 109 Ill. 2d at 91, 485 N.E.2d at 354.

337. *Id.* *See* People v. Weathers, 62 Ill. 2d 114, 338 N.E.2d 880 (1975)(improper statements made to the jury by the prosecutor in rebuttal argument severely prejudiced the defendant and required reversal of defendant's conviction).

his right to present a defense to an unbiased jury.[338] The court concluded that the prosecutor's comments unfairly discredited Bean's attorney, thus causing reversible error.[339]

In *People v. Olinger*,[340] the defendant, Perry Olinger, argued that the prosecution failed to disclose exculpatory information to the defense, as required by *Brady v. Maryland*.[341] Olinger contended that the State did not disclose the substance of a witness's statements that pointed to an alternative suspect for the murders for which Olinger was convicted.[342] Concluding that the statements were neither exculpatory nor material, the supreme court held that a *Brady* violation had not occurred.[343] The court characterized the evidence as inadmissible hearsay and emphasized that Olinger had not referred to any admissible evidence that the statements would have generated.[344] Thus, the court held that the nondisclosure did not cause reversible error.[345]

X. SENTENCING

A. Fines

People v. Maldonado[346] considered whether the trial court must examine the defendant's financial resources prior to imposing a

338. *Bean*, 109 Ill. 2d at 101, 485 N.E.2d at 359.

339. *Id.*

340. 112 Ill. 2d 324, 493 N.E.2d 579 (1986) *cert. denied*, 107 S. Ct. 1329 (1987).

341. *Id.* at 342, 493 N.E.2d at 588 (citing Brady v. Maryland, 373 U.S. 83 (1963)). In *Brady*, the court held that failure of the prosecutor to disclose material evidence favorable to a defendant violated due process. 373 U.S. at 87.

342. *Olinger*, 112 Ill. 2d at 342, 493 N.E.2d at 588. At the post-trial motion hearing, the defense presented a witness who testified that he had been told by a friend that another person had been present at the time of certain murders, of which Olinger was convicted. *Id.*

343. *Id.* (citing United States v. Bagley, 105 S. Ct. 3375, 3381 (1985)). In *Bagley*, the Court held that evidence is material only if there is a reasonable likelihood that had the prosecution disclosed the evidence, the result of the trial would have been different. 105 S. Ct. at 3381.

344. *Olinger*, 112 Ill. 2d at 342-43, 493 N.E.2d at 588.

345. *Id.* at 343, 493 N.E.2d at 588. *See also* People v. Wright, 111 Ill. 2d 128, 490 N.E.2d 640 (1985), *cert denied*, 107 S. Ct. 1327 (1987) (State's noncompliance with its discovery obligations under Illinois Supreme Court Rule 412 did not mandate reversal when the evidence withheld was unfavorable to the defendant).

Olinger also argued that the prosecution improperly asked questions of a witness for purposes of impeachment. *Olinger*, 112 Ill. 2d at 340, 493 N.E.2d at 587. After certain questions were asked by the prosecutor, he found out that he was mistaken as to the basis of the questions and, therefore, he could not perfect the impeachment. *Id.* The court held that the impeachment was improper, but that the curative instruction to the jury regarding the prosecutor's error eliminated any possible prejudice that may have occurred. *Id.* at 341, 493 N.E.2d at 588.

346. 109 Ill. 2d 319, 487 N.E.2d 610 (1985).

fine.[347] The defendant, Antonio Maldonado, was convicted of resisting and obstructing a police officer and fined $250 for each conviction.[348] Maldonado argued that the fines should be vacated because they were imposed without a determination of his financial resources and future ability to pay.[349] The Illinois Supreme Court rejected this contention and upheld the imposition of the fines.[350] The court concluded that the trial court had complied with the statutory requirement that it consider the financial resources of the defendant.[351] Moreover, because the trial court's order imposing a fine did not provide for times or methods of payment, the court concluded that Maldonado's ability to pay at the time of sentencing was irrelevant.[352]

In dissent, Justice Ward stated that the legislature intended that the trial court ascertain and consider the offender's available resources and future ability to pay before levying a fine.[353] The dissent contended that the statute was not satisfied merely by the judge's awareness that Maldonado had an unspecified income.[354] Furthermore, the trial court's ability to reduce or revoke a fine that

347. *Id.* at 321, 487 N.E.2d at 611. ILL. REV. STAT. ch. 38, para. 1005-9-1(d)(1)(1985), states, "In determining the amount and method of payment of a fine, the court shall consider the financial resources and future ability of the offender to pay the fine." *Id.*

348. *Maldonado*, 109 Ill. 2d at 320, 487 N.E.2d at 610. The court also sentenced the defendant to 90 days for obstructing a police officer and to 180 days for resisting a peace officer. *Id.*

349. *Id.* at 321, 487 N.E.2d at 611.

350. *Id.* at 324, 487 N.E.2d at 612.

351. *Id.* at 324, 487 N.E.2d at 612. The court stated that the trial court had considered Maldonado's financial resources and future ability to pay the fine, as required by the statute, when it stated, "I would note that the defendant has been gainfully employed, and that, as testified, he's been on unemployment." *Id.*

The court cited People v. Pittman, 93 Ill. 2d 169, 442 N.E.2d 836 (1982), as analogous. *Maldonado*, 109 Ill. 2d at 323, 487 N.E.2d at 612. In *Pittman*, the statute at issue required that, before a consecutive sentence could be imposed, the trial court had to be of the opinion "that such a term [was] required to protect the public." *Pittman*, 93 Ill. 2d 169, 177-78, 442 N.E.2d 836. Thus, the court was required to have made a determination in *Pittman*, and the Illinois Supreme Court held that the same requirement applied and was satisifed in *Maldonado*. *Maldonado*, 109 Ill. 2d at 323, 487 N.E.2d at 612.

352. *Maldonado*, 109 Ill. 2d at 325, 487 N.E.2d at 613. The court further noted that another statute provides protection for unintentional failure to pay a fine. *Id.* at 325, 487 N.E.2d at 613 (citing ILL. REV. STAT. ch. 38, para. 1005-9-3(c) (1985)). Paragraph 1005-9-3(c) states as follows:

> If it appears that the default in the payment of a fine is not intentional under paragraph (b) of this section, the court may enter an order allowing the offender additional time for payment, reducing the amount of the fine or of each installment, or revoking the fine or the unpaid portion.

ILL. REV. STAT. ch. 38, para. 1005-9-3(c) (1985).

353. *Maldonado*, 109 Ill. 2d at 326, 487 N.E.2d at 613 (Ward, J., dissenting).

354. *Id.* (Ward, J., dissenting).

had been imposed arbitrarily did not justify the court's conclusion that the defendant's ability to pay at the time of sentencing was irrelevant.[355]

B. Extended Term Sentences

In *People v. Morgan*,[356] the court held that the trial court erred in imposing extended term sentences.[357] In that case, the defendant, Samuel Morgan, was sentenced to death for murder and to an extended term for aggravated kidnapping and rape.[358] Affirming the death sentence, but vacating the sentence for rape and aggravated kidnapping, the court held that exceptionally brutal and heinous behavior, one of the factors allowing imposition of an extended sentence, had characterized the two murders committed by Morgan but had not accompanied the aggravated kidnapping and rape.[359] Therefore, the supreme court concluded that brutal and heinous circumstances of another crime could not be the basis for extended term sentences for offenses not characterized by that behavior.[360]

In *People v. Harden*,[361] the defendant, Jimmie Harden, was convicted of armed robbery, a class X felony, and sentenced to an extended term of sixty years of incarceration.[362] On appeal, Harden asserted that an extended term sentence should not have been imposed because his other conviction was a federal conviction, rather than an Illinois conviction.[363] The court rejected Harden's argument, stating that the purpose of the extended term statute is "to

355. *Id.* (Ward, J., dissenting). The dissenting opinion relied upon People v. Morrison, 111 Ill. App. 3d 997, 444 N.E.2d 1144 (3d Dist. 1983). *Maldonado*, 109 Ill. 2d at 325, 487 N.E.2d at 613. In *Morrison*, the appellate court held that the trial court did not consider sufficiently the defendant's ability to pay the fine because there was no indication of the amount of unemployment benefits the defendant received and no assessment of the defendant's expenses. *Morrison*, 111 Ill. App. 3d at 999, 444 N.E.2d at 1145.

356. 112 Ill. 2d 111, 492 N.E.2d 1303 (1986), *cert. denied*, 107 S. Ct. 1329 (1987).

357. *Id.* at 149, 492 N.E.2d at 1320.

358. *Id.* at 121, 492 N.E.2d at 1306. Illinois law provides that a court may consider as a reason to impose an extended term sentence the fact that defendant had been "convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." ILL. REV. STAT. ch. 38, para. 1005-8-2 (1985).

359. *Morgan*, 112 Ill. 2d at 149, 492 N.E.2d at 1320.

360. *Id.*

361. 113 Ill. 2d 14, 495 N.E.2d 490 (1986).

362. *Id.* at 16, 495 N.E.2d at 491. *See* ILL. REV. STAT. ch. 38, para. 18-2, § 5-5-3.2(b)(1)(1985)(a sentence for an extended term may be imposed "[w]hen a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class felony within ten years").

363. *Harden*, 113 Ill. 2d at 20-21, 495 N.E.2d at 493.

impose harsher sentences on offenders whose repeated convictions have shown their resistance to correction."[364] Thus, the court reasoned that the statute's purpose of meting out harsh sentences to recidivists would be defeated if the statute only applied to convictions in Illinois state courts.[365]

C. *Reduction or Modification of Sentence*

In *People v. Crete*,[366] the court addressed whether the trial court was required to enter an order reducing or modifying a sentence within thirty days of sentencing.[367] Eight days after the court sentenced the defendant, Gary Crete, he filed a motion to vacate or modify the sentence.[368] Because the trial court failed to rule on the motion within thirty days of sentencing, it denied the motion.[369] The Illinois Supreme Court concluded that the lower courts correctly had determined that a trial court cannot vacate or modify a sentence pursuant to a defendant's motion if the order doing so is not entered within thirty days from the sentencing date.[370]

In dissent, Justice Simon sharply criticized the majority opinion. He asserted that the outcome of a defendant's motion to modify or reduce his sentence should not rest upon whether or not the court is able to rule on the motion within thirty days from sentencing.[371] Furthermore, the dissent asserted that the majority opinion raised a substantial constitutional issue because a person seeking a reduction or modification of his sentence pursuant to a "statutorily created liberty interest," could not be deprived of this interest for reasons not within his control.[372]

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364. *Id.* at 21, 495 N.E.2d at 494 (quoting People v. Robinson, 89 Ill. 2d 469, 476, 433 N.E.2d 674, 677 (1982), and People v. Baker, 114 Ill. App. 3d 803, 810, 448 N.E.2d 631, 637 (2d Dist. 1983)).

365. *Harden*, 113 Ill. 2d at 21-22, 495 N.E.2d at 494.

366. 113 Ill. 2d 156, 497 N.E.2d 751 (1986).

367. *Id.* at 159, 497 N.E.2d at 753.

368. *Id.* at 158, 497 N.E.2d at 752.

369. *Id.*

370. *Id.* at 162-63, 497 N.E.2d at 754-55. The court reached this result with reluctance; however, it reasoned that the clear language of the statute had to be given effect. *Id.* at 162, 497 N.E.2d at 754.

371. *Id.* at 166, 497 N.E.2d at 756 (Simon, J., dissenting). Justice Simon stated, "the majority's interpretation gives us . . . a . . . roulette justice under which a defendant who moves promptly to modify or reduce the sentence may or may not have his motion considered depending on the vagaries of the court's docket . . . and whether or not the sentencing judge gets around to ruling on the motion." *Id.*

372. *Id.* at 168, 497 N.E.2d at 757 (Simon, J., dissenting).

D. Death Penalty

In *People v. Buggs*,[373] the Illinois Supreme Court vacated the defendant's death sentence, holding that the sentence was excessive in view of the mitigating evidence.[374] In mitigation, the defendant, Carrus Buggs, showed that he had completed twenty-one years of military service and that he had no prior serious criminal record.[375] The evidence also indicated that Buggs had an alcohol problem.[376] Accordingly, the court held that the circumstances presented did not "bespeak a man with a malignant heart who must be permanently eliminated from society."[377]

The court also vacated a death sentence in *People v. Adams*.[378] In *Adams*, the prosecutor committed two significant errors during the sentencing hearing.[379] First, the prosecutor asserted in closing

373. 112 Ill. 2d 284, 493 N.E.2d 332 (1986).

374. *Id.* at 295, 493 N.E.2d at 337.

375. *Id.* at 294, 493 N.E.2d at 336. The defendant was convicted of killing his wife by setting her on fire after an argument. *Id.* at 288, 493 N.E.2d at 333. Buggs's son also was killed in the fire. *Id.*

376. *Id.* at 295-96, 493 N.E.2d at 337. The *Buggs* court reasoned that the mitigating circumstances in *Buggs* were analogous to those presented in People v. Carlson, 79 Ill. 2d 564, 404 N.E.2d 233 (1980), in which the court set aside the death penalty as excessive in light of evidence that Carlson had no prior criminal record and had a history of military service. *Buggs*, 112 Ill. 2d at 393-95, 404 N.E.2d at 336. In *Carlson*, the defendant was convicted of shooting and burning his ex-wife and of shooting a police officer. *Carlson*, 79 Ill. 2d at 570, 404 N.E.2d at 235. Evidence showed that the offense occurred after a marital argument and that Carlson was an elderly man in deteriorating health. *Id.* at 589-90, 404 N.E.2d at 244-45.

377. *Buggs*, 112 Ill. 2d at 294, 493 N.E.2d at 336 (quoting People v. Carlson, 79 Ill. 2d at 590, 404 N.E.2d at 245). The supreme court in *Buggs* also held that although Buggs failed to preserve the issue of whether he had knowingly and voluntarily waived a sentencing jury, he did not waive his right to review of the issue on appeal. *Buggs*, 112 Ill. 2d at 290-91, 493 N.E.2d at 334. The court stated that when there has been a plain error that has affected substantial rights, the waiver rule will not apply. *Id.* (citing People v. Foster, 76 Ill. 2d 365, 392 N.E.2d 6 (1979). *See also infra* note 413 for exceptions to the waiver rule under Illinois Supreme Court Rule 615(a). In *Buggs*, the defendant's constitutional right to a jury was affected, so no waiver resulted. *Buggs*, 112 Ill. 2d at 290-91, 493 N.E.2d at 334. Buggs asserted that his jury waiver was neither knowing nor voluntary because the court did not inform him that the jury had to be unanimous in voting for the death sentence. *Id.* at 292, 493 N.E.2d at 335. In response, the court reiterated its previous holdings that a court need not inform a defendant of the unanimity requirement before accepting jury waivers at death sentencing hearings. *Id.* (citing People v. Madej, 106 Ill. 2d 201, 220-21, 478 N.E.2d 392, 400 (1985); People v. Albanese, 104 Ill. 2d 504, 535, 473 N.E.2d 1246, 1260 (1984), *cert. denied*, 471 U.S. 1044 (1985)).

378. 109 Ill. 2d 102, 485 N.E.2d 339 (1985), *cert. denied*, 106 S. Ct. 1476 (1986).

379. *Id.* at 123, 485 N.E.2d at 346. The first phase of the sentencing hearing is to determine the defendant's eligibility for the death penalty. The State must prove beyond a reasonable doubt that the defendant committed murder, was over 18 years of age at the time of the offense, and that there is at least one statutory aggravating factor. ILL. REV. STAT. ch. 38, para. 9-1(b)(1985).

If the State meets its burden of proof, the second phase of the sentencing hearing is

argument that the defendant, Larry Adams, would have killed other persons if they had interrupted the robbery at issue.[380] The court held that this argument had no relevance and could have forced the jurors to focus on other potential victims, rather than on Adams's eligibility for the death penalty.[381] Second, the prosecutor argued that Adams could be sentenced to death because he killed a witness to the crime of armed robbery.[382] The court noted that this argument misstated the law because the statutory aggravating factor of killing a witness refers to a victim who witnessed an unrelated crime.[383] Therefore, the court vacated Adams's sentence and remanded the case for a new sentencing hearing.[384]

In *People ex rel. Daley v. Hett*,[385] the state's attorney sought a writ of mandamus to prevent a trial court from accepting, prior to trial, a defendant's waiver of his right to be sentenced by a jury in a capital case.[386] The State grounded its argument on the Illinois appellate decision in *People v. Wolfbrandt*,[387] which held that a defendant could not enter a pretrial waiver of a sentencing jury.[388] The Illinois Supreme Court held that *Wolfbrandt* was decided in-

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conducted. During this phase, the court considers factors in aggravation and mitigation that are relevant to the imposition of the death penalty. *Id.* at para. 9-1(c). The defendant will not be sentenced to death unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence. *Id.* at para. 9-1(g), (h).

380. *Adams*, 109 Ill. 2d at 125, 485 N.E. 2d at 347.

381. *Id.* (citing People v. Davis, 97 Ill. 2d 1, 25-29, 452 N.E.2d 525, 536-39 (1983)).

382. *Adams*, 109 Ill. 2d at 125-26, 485 N.E.2d at 347. The defendant was eligible for the death penalty because he had committed a murder during the course of committing a robbery; the fact that the victim was a witness to the felony had no significance. *Id.* at 125-26, 485 N.E.2d at 348.

383. *Id.* (citing ILL. REV. STAT. ch. 38, para. 9-1(b)(8)(1985)). Paragraph 9-1(b)(8) provides that it is an aggravating factor if: "the murdered individual was a witness in a prosecution against the defendant, gave material assistance to the state . . . or was an eye witness or possessed other material evidence against the defendant or another . . . ." ILL. REV. STAT. ch. 38, para. 9-1(b)(8) (1985).

384. *Adams*, 109 Ill. 2d at 129, 485 N.E.2d at 349. The court also held that it was error to admit as evidence in the sentencing hearing that a police officer saw Adams while investigating an unrelated armed robbery, took him into custody, but never charged him with an offense arising from that investigation. *Id.*

385. 113 Ill. 2d 75, 495 N.E.2d 513 (1986).

386. *Id.* at 77, 495 N.E.2d at 514. *Hett* originated when the state's attorney filed motions for leave to file complaints for writs of mandamus or writs of prohibition, or, in the alternative, supervisory orders under Illinois Supreme Court Rule 383. The court determined that writs of mandamus and writs of prohibition were procedurally inappropriate in this case. *Id.* at 80, 495 N.E.2d at 515-16.

387. 127 Ill. App. 3d 836, 469 N.E.2d 305 (3d Dist. 1984).

388. *Hett*, 113 Ill. 2d at 81, 495 N.E.2d at 516 (citing *Wolfbrandt*, 127 Ill. App. 3d at 844, 469 N.E.2d at 312). In *Wolfbrandt*, a defendant in a capital case attempted to waive the sentencing jury during voir dire and the trial court refused to accept the waiver. *Id.* at 843, 469 N.E.2d at 311. The appellate court affirmed, concluding that the waiver was untimely. *Id.* at 844, 469 N.E.2d at 312.

correctly and that the capital sentencing statute[389] did not prohibit a pretrial waiver of a sentencing jury.[390] The court construed the statute as neither limiting nor clarifying the point at which the defendant could exercise a waiver.[391] Thus, the court held that the trial court had the authority to accept a pretrial waiver of a sentencing jury, provided that the defendant voluntarily and knowingly waived that right.[392]

During the sentencing hearing in *People v. Olinger*,[393] the trial court stated that the defendant, Perry Olinger, had "the burden of proving [that the death penalty] does not apply."[394] Noting that the Illinois death penalty statute places upon the State the burden of proof of establishing the aggravating factors necessary to impose a death sentence, Olinger argued that the trial court's statement represented an erroneous shifting to the defendant of the burden of proof at sentencing.[395] The supreme court, however, held that "taken in context, it is clear that the trial court meant only that [after] the State established the existence of statutory aggravating factors, [Olinger] had the burden of coming forward with evidence of mitigating factors sufficient to preclude imposition of the death penalty."[396] Thus, the court held that the trial court did not improperly place the burden of proof on the defendant.[397]

In *People v. Szabo*,[398] the court held that a defendant who testifies at the sentencing hearing cannot shield himself from cross-ex-

389. ILL. REV. STAT. ch. 38, para. 9-1(d)(3)(1985), provides that "the court shall conduct a separate sentencing hearing . . . to consider any aggravating or mitigating factors . . . . " *Id.*

390. *Hett*, 113 Ill. 2d at 81-82, 495 N.E.2d at 516-17.

391. *Id.* at 82, 495 N.E.2d at 516. The ruling effects voir dire in a capital case, in that a defendant's pretrial waiver of a sentencing jury eliminates the need to conduct *Witherspoon* questioning in the voir dire. For discussion of this issue, see this article's section on jury selection, *supra* notes 225-27 and accompanying text.

392. *Id.* at 82, 495 N.E.2d at 516.

393. 112 Ill. 2d 324, 493 N.E.2d 579 (1986).

394. *Id.* at 351, 493 N.E.2d at 592.

395. *Id. See* ILL. REV. STAT. ch. 38, para. 9-1(f)(1985) ("[B]urden of proof of establishing the existence of any . . . [aggravating] factors . . . is on the State and shall not be satisfied unless established beyond a reasonable doubt").

396. *Olinger*, 112 Ill. 2d at 351, 493 N.E.2d at 592. *See* People v. DelVecchio, 105 Ill. 2d 414, 445-46, 475 N.E.2d 840, 855 (constitutionally permissible to place the burden of production of mitigating evidence on the defendant), *cert. denied*, 106 S. Ct. 204 (1985).

397. *Olinger*, 112 Ill. 2d at 351, 493 N.E.2d at 592. The court also reaffirmed its prior holding in People v. Stewart, 104 Ill. 2d 463, 493-94, 473 N.E.2d 1227, 1241 (1984), *cert. denied*, 471 U.S. 1120 (1985), that sympathy was not a proper factor to be considered in a capital sentencing hearing. *See also* People v. Wright, 111 Ill. 2d 128, 164, 490 N.E.2d 640, 654 (1985) (decision to impose the death penalty must be based on reason rather than emotion).

398. 113 Ill. 2d 83, 497 N.E.2d 995 (1986), *cert. denied*, 107 S. Ct. 1330 (1987).

amination.[399] In *Szabo*, the defendant, Joseph Szabo, wanted to testify about his behavior since being imprisoned.[400] Szabo also moved to preclude cross-examination pertaining to the murders he committed.[401] The trial court denied this motion and on appeal, the Illinois Supreme Court affirmed this ruling.[402] Although the supreme court agreed that Szabo could introduce evidence of good conduct during his incarceration,[403] it also ruled that a capital defendant could be impeached at a death penalty hearing according to the usual rules of evidence.[404]

XI. APPELLATE PROCEDURE

A. Waiver

In *People v. Szabo*,[405] the court also addressed the issue of whether the defendant had failed to preserve issues for appeal. The court held that assignment of error to rulings at a capital sentencing hearing must be raised in a motion for a new trial and that failure to raise those issue constituted a waiver for purposes of appeal.[406]

In *People v. Friesland*,[407] the State charged the defendant, William Friesland, and a co-defendant with burglary.[408] The co-defendant pleaded guilty to burglary and became the State's key witness.[409] The trial court denied Friesland's pretrial discovery motion requesting the co-defendant's mental health records.[410]

On appeal, Friesland argued that this denial violated his sixth amendment right to confront witnesses.[411] The Illinois Supreme Court, however, held that Friesland could not raise the issue because he had waived it by not including it in his post-trial motion for a new trial.[412] Additionally, the court ruled that none of the

399. *Id.* at 95, 497 N.E.2d at 1000.
400. *Id.*
401. *Id.*
402. *Id.* The defendant did not testify but made an offer of proof as to what his testimony would have been. *Id.*
403. *Id.* (citing Skipper v. South Carolina, 106 S. Ct. 1669 (1986)).
404. *Szabo*, 113 Ill. 2d at 95, 497 N.E.2d at 1000.
405. 113 Ill. 2d 83, 497 N.E.2d 995 (1986).
406. *Id.* at 93, 497 N.E.2d at 999.
407. 109 Ill. 2d 369, 488 N.E.2d 261 (1985), *cert. denied*, 107 S. Ct. 1330 (1987).
408. *Id.* at 372, 488 N.E.2d at 261.
409. *Id.* at 372-73, 488 N.E.2d at 262.
410. *Id.*
411. *Id.* at 373, 488 N.E.2d at 262.
412. *Id.* at 374, 488 N.E.2d at 262.

recognized exceptions to the waiver rule were applicable.[413] Furthermore, the court rejected the defendant's argument that the State was foreclosed from asserting the defendant's waiver because it failed to object when the defense counsel raised the issue.[414]

People v. Porter[415] also addressed the issue of whether the defendant had failed to preserve issues for appeal. In that case, the Illinois Supreme Court held that even though it automatically reviewed death penalty cases, trial counsel still had an obligation to comply with the statutory provisions regarding motions for a new trial.[416] Therefore, the court applied the general rule that failure to raise an issue in a written motion for a new trial constitutes a waiver of that issue for purposes of review.[417]

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413. *Id.* at 375, 488 N.E.2d at 263. Under Illinois Supreme Court Rule 615(a), the exceptions to the waiver rule are:

(1) an appeal involving a failure to prove a material allegation of an indictment;
(2) an alleged error is raised which is one that would not normally be expected to be included in the post-trial motion;
(3) an error is raised on appeal and the reviewing court decides to take notice of plain error involving substantial rights.

ILL. S. CT. R. 615(a), ILL. REV. STAT. ch. 110A, para. 615(a)(1985).

In People v. Black, 107 Ill. App. 3d 591, 437 N.E.2d 1282 (2d Dist. 1982), the court held that "the doctrine of plain error may be invoked in criminal cases where the evidence is closely balanced or is of such magnitude that the accused is denied a fair trial." *Id.* at 593, 437 N.E.2d at 1284. The court in *Friesland* held that the evidence was not closely balanced and that the alleged error was not of great magnitude. *Friesland*, 109 Ill. 2d at 375, 488 N.E.2d at 263.

414. *Friesland*, 109 Ill. 2d at 377, 488 N.E.2d at 264.

415. 111 Ill. 2d 386, 489 N.E.2d 1329, *cert. denied*, 107 S. Ct. 298 (1986).

416. *Id.* at 399, 489 N.E.2d at 1334. ILL. REV. STAT. ch. 38, para. 116-1 (1985), provides:

(a) Following a verdict or finding of guilty the court may grant the defendant a new trial.
(b) A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict. Reasonable notice of the motion shall be served upon the state.
(c) The motion for a new trial shall specify the grounds therefor.

Id. *See* People v. Caballero, 102 Ill. 2d 23, 32-33, 464 N.E.2d 223, 227 (fact that the Illinois Supreme Court has a duty to review death penalty cases does not relieve trial counsel from his obligation to file a written motion for a new trial), *cert. denied*, 469 U.S. 963 (1984).

417. *Porter*, 111 Ill. 2d at 339, 489 N.E.2d at 1334 (citing People v. Pickett, 54 Ill. 2d 280, 282, 296 N.E.2d 856, 857 (1973)). *See also* People v. Free, 112 Ill. 2d 154, 170, 492 N.E.2d 1269, 1276 (defendant's failure to object to testimony admitted during his sentencing hearing constituted a waiver of his right to raise the issue on appeal), *cert. denied*, 107 S. Ct. 246 (1986).

In *Porter*, the defendant's post-trial motion raised the general issue of whether the defendant was denied a trial by an impartial jury; the motion, however, omitted any reference to the adequacy of the voir dire examination. *Porter*, 111 Ill. 2d at 399, 989 N.E.2d at 1334. The defendant challenged the voir dire examination as error in the Illinois Supreme Court. *Id.* In spite of its holding that the defendant had waived the issue,

B. Post-Conviction Act

One of the most significant post-conviction cases decided during the *Survey* period was *People v. Joseph.*[418] In *Joseph*, the petitioner, Michael Joseph, filed a post-conviction petition and motion pursuant to section 122-8 of the Post-Conviction Hearing Act, requesting that the court's chief judge assign the case to a judge other than the one who presided at trial.[419] The trial court denied Joseph's motion, ruling that the statute was unconstitutional.[420]

On appeal, the State asserted that the statute usurped the chief judge's authority to assign judges to cases.[421] The supreme court agreed, holding that section 122-8 violated the separation of powers clause of the Illinois Constitution by directly interfering with the judicial power of assignment.[422] Accordingly, the supreme court affirmed the trial court's ruling.[423]

In dissent, Justice Simon disagreed that the statute violated the

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the court proceeded to address and reject Porter's argument concerning the adequacy of voir dire. *Id.* at 402-05, 489 N.E.2d at 1335-37.

418. 113 Ill. 2d 36, 495 N.E.2d 501 (1986).

419. *Id.* at 40, 495 N.E.2d at 503. Section 122-1 of the Post-Conviction Hearing Act provides in relevant part, "Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article." ILL. REV. STAT. ch. 38, para. 122-1 (1985).

Section 122-8 provided, "All proceedings under this Article shall be conducted by a judge who was not involved in the original proceeding which resulted in conviction." ILL. REV. STAT. ch. 38, para. 122-8 (1985).

420. *Joseph*, 113 Ill. 2d at 40, 495 N.E.2d at 503.

421. *Id.* at 46, 495 N.E.2d at 505.

422. *Id.* at 48, 495 N.E.2d at 507. The separation of powers clause provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, § 1. *See* People v. Jackson, 69 Ill. 2d 252, 256, 371 N.E.2d 602, 604 (1977) ("If the power is judicial in character, the legislature is expressly prohibited from exercising it").

423. *Joseph*, 113 Ill. 2d at 48, 495 N.E.2d at 507. In People v. Mason, 145 Ill. App. 3d 218, 494 N.E.2d 1176 (1st Dist. 1986), the court considered a challenge to the constitutionality of section 122-2.1 of the Act which provides, prior to the appointment of counsel, for the dismissal of post-conviction petitions which the court considers "frivolous" or "patently without merit". *Mason*, 145 Ill. App. 3d at 219, 494 N.E.2d at 1177 (citing ILL. REV. STAT. ch. 38, para. 122-2.1 (1985)). The appellate court in *Mason* held that section 122-2.1 conflicted with Illinois Supreme Court Rule 651(c), which requires the appointment of counsel at the appellate level for an indigent post-conviction petitioner. *Mason*, 145 Ill. App. 3d at 221, 494 N.E.2d at 1178 (citing ILL. S. CT. R. 651(c), ILL. REV. STAT. ch. 110A, para. 651(c) (1985)). The court held that section 122-2.1 violated the separation-of-powers clause of the Illinois Constitution. *Mason*, 148 Ill. App. 3d at 222, 494 N.E.2d at 1179. The defendant in *Mason* also raised the issue of the constitutionality of section 122-8, but the court declined to consider the question in view of the fact that at the time of the appeal, *Joseph* was pending before the Illinois Supreme Court. *Id.* at 226, 494 N.E.2d at 1181.

separation of powers clause.[424] He stated that the legislature made a determination that "due to a contraction of other procedural safeguards, the defendant should be protected by having a fresh eye look at the case before it is summarily dismissed."[425] This necessary safeguard, according to Justice Simon, had only a "peripheral" impact on the administration of the judicial system, similar to statutes prescribing rules of evidence, or statutes of limitation, and did not in any way represent a legislative attempt to usurp judicial authority to manage the courts.[426] Furthermore, Justice Simon stated that, "[t]his decision leaves future decisionmakers to chart an unsurveyed course and likely wander in the wilderness of our separation-of-powers jurisprudence."[427]

In *People v. Correa*,[428] the supreme court held that, notwithstanding the fact that the Post-Conviction Act applies to "any person imprisoned in the penitentiary",[429] the petitioner, Cesar Correa, could request post-conviction relief even though he was not incarcerated when he filed the petition.[430] Because Correa was serving a period of mandatory supervised release at the time he filed the petition and because Correa could be confined if he violated a condition of his release, the court concluded that Correa had the right to file a post-conviction petition.[431]

Similarly, in *People v. Younger*[432] and *People v. Martin-Trigona*,[433] the court held that post-conviction relief could be requested by all whose liberty potentially could be restrained as a result of a criminal conviction.[434] Therefore, the court held that defendants placed on parole[435] or released on an appeal bond[436] had the right to seek post-conviction relief.

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424. *Joseph*, 113 Ill. 2d at 51, 495 N.E.2d at 508 (Simon, J., dissenting).

425. *Id.*

426. *Id.* at 50, 495 N.E.2d at 508 (Simon, J., dissenting).

427. *Id.* at 58-59, 495 N.E.2d at 512 (Simon, J., dissenting).

428. 108 Ill. 2d 541, 485 N.E.2d 307 (1985).

429. ILL. REV. STAT. ch. 38, para. 122-1 (1985). For the text of section 122-1, see *supra* note 419.

430. *Correa*, 108 Ill. 2d at 547, 485 N.E.2d at 309.

431. *Id.* at 546-47, 485 N.E.2d at 309.

432. 112 Ill. 2d 422, 494 N.E.2d 145 (1986).

433. 111 Ill. 2d 295, 489 N.E.2d 1356 (1986).

434. *Younger*, 112 Ill. 2d at 426-27, 494 N.E.2d at 146-47; *Martin-Trigona*, 111 Ill. 2d at 301, 489 N.E.2d at 1359.

435. *Younger*, 112 Ill. 2d at 422, 494 N.E.2d at 145.

436. *Martin-Trigona*, 111 Ill. 2d at 298, 489 N.E.2d at 1357.

C. *Appealable Decisions*

In *People v. Boyt*,[437] the trial court granted the defendant's motion to enforce a plea agreement.[438] The State refused to abide by the agreement and consequently the trial court dismissed the charges against the defendant, Kathleen Boyt.[439] The State then appealed the dismissal order.[440]

On appeal, defendant Boyt argued that Illinois Supreme Court Rule 604(a)(1) allowed the State to appeal only when the court dismissed a charge because of a defective charging instrument, a quashed arrest or search warrant, or suppressed evidence.[441] The supreme court, however, held that the State had the right to appeal from "any judgment the substantive effect of which resulted in the dismissal of an indictment, information or complaint."[442] Accordingly, the court held that the State had the right to appeal from the dismissal of Boyt's charges.[443]

XII. Bail Legislation and Constitutional Amendment

On November 4, 1986, Illinois voters approved a proposed amendment to article I, section 9, of the Illinois Constitution, authorizing preventive detention of some persons accused of serious crimes. The amended provision enables courts to deny bail to any defendant who is charged with a non-probationable offense[444] and

437. 109 Ill. 2d 403, 488 N.E.2d 264 (1985), *cert. denied*, 106 S. Ct. 2254 (1986).

438. *Id.* at 410, 488 N.E.2d at 268.

439. *Id.*

440. *Id.* at 411, 488 N.E.2d at 268.

441. *Id.* (citing Ill. S. Ct. R. 604(a)(1), Ill. Rev. Stat. ch. 110A, para. 604(a)(1)(1985)). Rule 604 (a)(1) provides: "In criminal cases the state may appeal only from an order of judgment the substantive effect of which results in dismissing a charge for any of the grounds enunciated in section 114-1 of the Code of Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence." Ill. S. Ct. R. 604(a)(1), Ill. Rev. Stat. ch. 110A para. 604(a)(1) (1985).

442. *Boyt*, 109 Ill. 2d at 411, 488 N.E.2d at 268 (quoting People v. Love, 39 Ill. 2d 436, 439, 235 N.E.2d 819, 821 (1968)).

443. *Boyt*, 109 Ill. 2d at 411, 488 N.E.2d at 268. The court also held that the dismissal was adverse to the State, and, contrary to Boyt's assertions, the State did not "obtain" the dismissal of the indictments. *Id.* at 411-12, 388 N.E.2d at 268-69. Rather, the dismissal of the indictments was intended to be a sanction against the State. *Id.*

444. In Illinois, the following offenses are non-probationable: (1) murder when the death penalty is not imposed; (2) attempt murder; (3) any Class X felony; (4) a violation of section 407 of the Controlled Substance Act; (5) a violation of section 9 of the Cannabis Control Act; (6) a Class 2 or greater felony if the offender had been convicted of a Class 2 or greater felony within 10 years of the date on which he committed the offense for which he is being sentenced; (7) residential burglary; and (8) certain instances of criminal sexual assault. Ill. Rev. Stat. ch. 38, para. 1005-5-3 (1986).

Examples of Class X felonies in Illinois are home invasion, aggravated criminal sexual

who poses a threat to any person's safety. Specifically, the article now reads:

Article I
Section 9. Bail and Habeas Corpus

> All persons shall be bailable by sufficient sureties, except for *the following offenses where the proof is evident or the presumption great*: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; *and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person.* The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it.
>
> *Any costs accruing to a unit of local government as a result of the denial of bail pursuant to the 1986 Amendment to this Section shall be reimbursed by the State to the unit of local government.*

(The newly adopted language is indicated by italics).

The amendment marks an abandonment of the traditional theory of bail in Illinois — to insure the defendant's appearance at trial. Formerly, judges could deny bail only in instances when the defendant was charged with a crime that had a penalty of life imprisonment or capital punishment or when the defendant was unlikely to appear at trial.[445] The prohibition of bail for these offenders was based not on the dangerousness of the defendant but, rather, on the theory that the harsh penalty would cause a defendant to flee the community.

The United States Supreme Court has agreed to consider whether a similar federal pretrial detention provision is constitutional;[446] the United States Court of Appeals for the Second Circuit ruled that the preventive detention provision of the federal Bail

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assault, and aggravated arson. ILL. REV. STAT. ch. 38, paras. 12-11, 12-14, 20-1.1 (1985).

445. Section 9 of the Illinois Constitution was previously amended on November 2, 1982. Prior to that change, all persons were bailable except for those charged with capital offenses and those unlikely to appear at trial. The 1982 change added as nonbailable "offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction where the proof is evident or the presumption great." ILL. CONST. art. I, § 9 (1983). It is not clear whether section 9 denies a judge discretion to set bail for the enumerated offenses. No Illinois case answers this question.

446. The United States Supreme Court granted the petition for a writ of certiorari for United States v. Salerno, 107 S. Ct. 397 (1986). The case was argued January 20, 1987.

Reform Act[447] was unconstitutional as a violation of the fifth amendment due process clause.[448]

The state's bail statute was altered in several ways by recently enacted legislation. Public Act 84-945, effective September 25, 1985, amended several areas of criminal procedure regarding bail. First, the Act provides that a sentence imposed for a willful failure to surrender after forfeiture of bail or for violation of bail conditions shall be served consecutively to the sentence imposed on the defendant for the original charge.[449]

Regarding proceedings after arrest, the statute now requires a judge to advise a defendant that, if he escapes from custody prior to trial or, after being admitted to bail and released on bond, he fails to appear in court when required, he waives his right to confront the witnesses against him and the trial will continue in his absence.[450] Further, the defendant will be required to sign a certificate indicating that he understands the consequences in the event that he fails to present himself in court for trial.[451]

Another change in the statute provides that the court should set monetary bail, as opposed to release on recognizance, only after it has concluded that no other condition of release will reasonably assure that the defendant will appear in court.[452]

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447. 18 U.S.C. § 3142(e)(Supp. II 1984). The federal Bail Reform Act of 1984 authorizes detention pending trial where "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community . . . ." *Id.*

448. United States v. Salerno, 794 F.2d 64 (2d Cir. 1986). In *Salerno*, the court stated, "the sole bases for the detention order in this case are the findings that the defendants would, if released, carry on 'business as usual' notwithstanding any release conditions, and that business as usual involves threats and crimes of violence. We regard sect. 3142(e)'s authorization of pretrial detention on this ground as repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id.* at 71-72.

See also United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986) (preventive detention is per se violative of due process). A number of federal courts have held that the length of the preventive detention may result in a due process violation. *See, e.g.*, United States v. Frisone, 795 F.2d 1 (2d Cir. 1986); United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986); United States v. Theron, 782 F.2d 1510 (10th Cir. 1986); United States v. Lofranco, 620 F. Supp. 1324 (N.D.N.Y. 1985). *See also* United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1986) ("at some point the length of delay might raise due process objections"); United States v. Hazzard, 598 F. Supp. 1442, 1451 n.5 (N.D. Ill. 1986) (defendant who is detained beyond 70-90 days "may have valid statutory and constitutional arguments favoring his release on bail or from detention.").

449. ILL. REV. STAT. ch. 38, para. 32-10 (1985).

450. *Id.* at para. 109-1. What is novel in the alteration in paragraph 109-1 is not that a defendant may be tried in absentia, but, rather, that the judge must advise the defendant of the consequences of failure to appear in court when required. *Id.*

451. *Id.*

452. *Id.* at para. 110-2.

Further, the court must determine not only the amount of bail, but also the conditions of release.[453] The amount of bail and the conditions of release should reasonably assure the defendant's appearance at trial or the safety of any other person in the community.[454] In making this determination, the court shall consider such matters as the weight of the evidence against the defendant, his family ties, employment, financial resources, prior record, and prior failure to appear in court.[455]

Another legislative change regards additional alternative conditions which may be imposed when a person is released before trial.[456] The additions include observing a curfew, remaining in the custody of a specific person or organization which has agreed to supervise the defendant's release, and "such other reasonable conditions as the court may impose."[457]

Finally, Public Act 84-945 provides that if a person who is charged with a felony is released pending trial, and subsequently commits a separate felony, any sentence imposed on that separate felony shall be served consecutively to any sentence imposed on the original felony.[458] The same rule also applies to a person who commits a separate felony after being admitted to bail following conviction of a felony.[459]

Another statute enacted during the *Survey* period also pertains to bail. Public Act 84-964, effective January 1, 1986, provides that a person found in Illinois who is allegedly in violation of a bail

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453. *Id.* at para. 110-5

454. *Id.* at para. 110-5(a). This same standard recently has been approved by the voters as reflected in the constitutional amendment to article I, section 9 of the Illinois Constitution. ILL. CONST. art. I, § 9.

455. ILL. REV. STAT. ch. 38, para. 110-5(a) (1985). Additionally, in instances in which drugs have been seized from a defendant, the "street value" of the drugs is considered by the court in the assessment of the amount of bail. In such cases, the State may submit a written estimate, based on reliable information by a law enforcement official assessing the "street value" of the drug seized. *Id.* at para. 110-5(b)(4).

Further, if a defendant is charged with a Class X felony under the "Illinois Controlled Substances Act," the court may require the defendant to deposit a sum equal to 100% of the bail. *Id.* at para. 110-7(a). For other offenses, the defendant need only deposit money equal to 10% of the bail. *Id.*

456. *Id.* at para. 110-10(b)).

457. *Id.* at para. 110-10(b)(12)-(14). Current possible conditions include (1) refraining from possessing a firearm, from approaching or communicating with particular persons, from going to certain described geographical areas, from engaging in certain activities, (2) undergoing drug addiction, alcohol, or medical or psychiatric treatment, (3) supporting dependents, (4) working or pursuing a course of study, and (5) attending or residing in a facility designated by the court. *Id.* at para. 110-10(1)-(11).

458. *Id.* at para. 1005-8-4(h).

459. *Id.* at para. 1005-8-4(i).

bond in another state may not be seized or unwillingly transported to that state by a bail bondsman.[460]

XIII. CONCLUSION

Criminal law and procedure continue to be areas to which the Illinois Supreme Court gives substantial attention. This *Survey* period was no exception. The court has continued to provide guidance in developing areas, such as standards for assessing competency of counsel and evaluating the legality of searches and seizures. In addition, this year the court decided significant issues in regard to jury selection, double jeopardy, self-incrimination, and guilty pleas.

460. *Id.* at para. 103-9.