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ANALYSIS OF RECENT ILLINOIS SUPREME COURT CRIMINAL LAW DECISIONS

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In this Article, the authors survey the recent criminal law decisions of the Supreme Court of Illinois. While emphasizing the decisions focusing on the procedural aspects of criminal trials, the Article also discusses interesting cases dealing with the scope of discovery allowed a defendant, prejudicial closing arguments, sentencing, and the defense attorney's role in a fair proceeding. The authors conclude with a discussion of the court's decisions dealing with substantive criminal law. Of those included, one focuses on the constitutionality of the Illinois reckless homicide statute, while the other two analyze and interpret the bribery sections of the Criminal Code.

IN surveying the criminal law cases decided by the Illinois Supreme Court[1] during the past year, it would be a disservice to both the court and the reader to structure the discussion around an artificially unifying theme. There is, of course, no reason to expect a unifying theme when the cases accepted for review by Illinois' highest court generally represent a wide range of procedural issues which recognize no substantive limitations.

As expected, the court considered adherence to procedure as a means of insuring fundamental fairness in the criminal justice system. The acceptability of the procedure depended upon both precedent and the evaluation of prejudicial effects. When the court entered the forest of substantive law, the results produced were less than inspiring.[2]

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1. This Article is devoted to a survey of Illinois law. For a review of United States Supreme Court decisions *see The Supreme Court, 1973 Term*, 88 HARV. L. REV. 1 (1974). For a review of Seventh Circuit Court of Appeals decisions *see* Dienes, *Criminal Law and Procedure, Review of the Law of the United States Court of Appeals for the Seventh Circuit*, 50 CHI.-KENT L. REV. 285 (1973).

2. *See* People v. Wallace, 57 Ill. 2d 285, 312 N.E.2d 263 (1974) discussed at pp. 423-24 *infra*; People v. McCollough, 57 Ill. 2d 440, 313 N.E.2d 462 (1974) discussed at pp. 421-23 *infra*.

SEARCH AND SEIZURE

In *People* v. *Nunn*,[3] the Illinois Supreme Court adopted a new standard concerning the consent of a third person to warrantless searches and seizures. The defendant was a nineteen year old who lived in his mother's house, in a bedroom with an adjoining kitchenette. This area had been set apart for his exclusive use. Ten to fourteen days prior to the search he had left the rooms, locking them, and telling his mother not to allow anyone to enter. His mother, concerned about her son's activities within the rooms, gave the police written consent to search the locked rooms. The police entered by use of a pass key and seized items which were the basis of the subsequent indictment.

The circuit court granted the defendant's motion to suppress the evidence and this decision was affirmed in the appellate court.[4] The State based its appeal to the Illinois Supreme Court on that court's prior decisions which held that a co-occupant, with an equal or greater right to the use or occupancy of the premises, has the right to consent to a search of the premises and that any evidence found therein is admissible against a non-consenting co-occupant.[5] This rule was based on the theory that the consenting co-occupant was not waiving the rights of the non-consenting co-occupant, but was only exercising his own rights by consenting to the search.

The supreme court rejected this argument and overruled its previous holdings, by affirming the suppression of the items seized. The court based its decision on the test set down by the United States Supreme Court in *Katz v. United States*.[6] *Katz* states that "[t]he Fourth Amendment protects people—not simply 'areas'—against unreasonable searches and seizures."[7] Building on *Katz*, the court, in a well reasoned opinion, determined that the defendant's fourth

3. 55 Ill. 2d 344, 304 N.E.2d 81 (1973).

4. 7 Ill. App. 3d 601, 288 N.E.2d 88 (4th Dist. 1972).

5. *See* People v. Koshiol, 45 Ill. 2d 573, 262 N.E.2d 446 (1970); People v. Haskell, 41 Ill. 2d 25, 241 N.E.2d 430 (1968); People v. Palmer, 31 Ill.2d 58, 198 N.E.2d 839 (1964); People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236 (1962); People v. Stacey, 25 Ill. 2d 258, 184 N.E.2d 866 (1962); People v. Speice, 23 Ill.2d 40, 177 N.E.2d 233 (1961); People v. Perroni, 14 Ill. 2d 581, 153 N.E.2d 578 (1958); People v. Shambley, 4 Ill. 2d 38, 122 N.E.2d 172 (1954).

6. 389 U.S. 347 (1967).

7. *Id.* at 353.

amendment rights were violated since he had a reasonable expectation of privacy when he locked the rooms and ordered his mother to allow no one entrance. He had at no time voluntarily waived his fourth amendment rights; such a waiver is required for a valid consent search. The court here relied on the standard for waiver set forth in *Schneckloth* v. *Bustamonte*,[8] in which it was held that voluntariness is a question of fact to be determined from all the relevant circumstances rather than exclusively from a person's knowledge of his right to refuse a warrantless search.

Interestingly enough, the court in *Nunn* drew no distinctions between the rights of a tenant, a lodger, a dormitory dweller, or a minor child living in his parents' home. Conceivably, under the *Nunn* doctrine, a minor child with "his" own room could forbid his parents' entrance thereto and thus cut off their right to consent to search. This open issue undoubtedly will be presented to the court for resolution as soon as the proper case arises.

The United States Supreme Court holding in *Chimel* v. *California*[9] was applied with little or no precision in *People v. Williams*.[10] In *Williams*, the defendant was confronted by a mob of about twenty-five persons in front of his apartment. After phoning the police, he went outside with a pistol in his pocket. Upon receiving threats from the crowd, the defendant pulled out the pistol to hold them at bay. When the police arrived, the leader of the mob told the officers that the defendant had assaulted them with a revolver.

The police then went to the apartment and were admitted by the defendant. The police placed him under arrest. They searched the defendant's person and a bag of dog food in the kitchen, located between seven to ten feet away from the defendant. A .22 caliber pistol was found in the dog food bag. The gun was introduced at the defendant's trial as evidence of the unlawful use of weapons, failure to register firearms with the City of Chicago, and failure to obtain an owner's registration card.

The supreme court reversed the unlawful use of weapons conviction on the facts, but affirmed the validity of the search of the dog food bag. Based on *Chimel*, the court held that a warrantless search

8. 412 U.S. 218 (1973).
9. 395 U.S. 752 (1969).
10. 57 Ill. 2d 239, 311 N.E.2d 681 (1974).

incident to an arrest may be made of the defendant's person plus the area within his immediate control from which he might obtain either a weapon or an evidentiary item.[11] The question in the instant case was whether "lunging distance" was to be included within the area of immediate control. The court cited a number of federal cases which, because of their factual situations, affirmed searches beyond the immediate reach of the defendant.[12]

As a result, the court concluded that *Chimel* only required that each case be examined individually to determine the reasonableness of the search and, that under the facts of *Williams*, lunging area was within the permissible perimeter of a warrantless search. Thus, *Williams* leaves no precise rules in Illinois for the police or defendants to rely upon when a search is conducted in the immediate area of an arrest.

MOTIONS TO SUPPRESS

In *People* v. *Armstrong*,[13] the defendant was indicted for armed robbery. Subsequently, he was indicted for the murder of a police officer during the commission of an earlier armed robbery. The murder charge was tried first and, prior to that trial, the defendant moved to suppress as evidence a shotgun and a pistol found in his apartment. The motion was denied on the ground that the defendant had consented to the search which uncovered the weapons. The items were received in evidence and the jury found the defendant guilty of murder. While that judgment was pending on appeal, the armed robbery case went to trial. A motion to suppress the same shotgun and pistol was made, the parties stipulating that it be heard on the same evidence as was heard in the murder trial. The judge here sustained the motion to suppress and the weapons were not admitted into evidence in the armed robbery trial. The Illinois Supreme Court subsequently affirmed the legality of the search, but reversed the murder conviction and remanded on other grounds.[14]

11. *Id.* at 243, 311 N.E.2d at 684.

12. United States v. Wysocki, 457 F.2d 1155 (5th Cir. 1972); United States v. Manarite, 448 F.2d 583 (2d Cir. 1971); United States v. Patterson, 447 F.2d 424 (10th Cir. 1971); United States v. Williams, 454 F.2d 1016 (D.C. Cir. 1971); Application of Kiser, 419 F.2d 1134 (8th Cir. 1969). *But see* United States v. Shy, 473 F.2d 1061 (6th Cir. 1973).

13. 56 Ill. 2d 159, 306 N.E.2d 14 (1973).

14. 41 Ill. 2d 390, 243 N.E.2d 825 (1969). The case was remanded for improper testimony of a State's witness concerning a prior statement of a co-defendant.

On remand, the murder case came to trial before a third judge and the defendant again renewed his motion to suppress. No additional evidence was heard. The judge suppressed the evidence based on the ruling in the armed robbery case and on section 114-12(b) of the Code of Criminal Procedure:

> The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant at any trial; except that, if the order suppressing evidence is nonfinal according to Section 109-3 of this Act, the property shall not be restored and shall not because of such order be inadmissible in evidence at any proceeding other than such preliminary hearing or examination.[15]

The State appealed from that ruling and the order was reversed by the appellate court.

The supreme court, relying on *People v. Hopkins*,[16] affirmed the appellate court, holding that under the doctrine of collateral estoppel, the original denial of the motion to suppress barred relitigating the matter at the armed robbery trial. Only when there is additional evidence or peculiar circumstances shown at a second trial can the previously litigated matter be reopened. This being the case, section 114-12(b) was precluded from operation in the third trial and the motion to suppress should have been denied.

The same issue was presented in a different context in *People v. Holland*,[17] in which the motion to suppress was both made and rejected orally at the preliminary hearing. When the case came to trial, the defendant, in writing, renewed his motion to suppress. The trial court held that his motion had been decided at the preliminary hearing, and therefore was not properly before the court. The supreme court affirmed, but held that had there been additional evidence presented in support of the written motion, the trial court would have the ability to hear and grant the motion despite its rejection at the preliminary hearing.

In ruling on motions to suppress confiscations, the court may have laid the foundation for admission of confessions obtained in violation

15. ILL. REV. STAT. ch. 38, § 114-12(b) (1973).

16. 52 Ill. 2d 1, 284 N.E.2d 283 (1972).

17. 56 Ill. 2d 318, 307 N.E.2d 380 (1974).

of *Miranda v. Arizona*.[18] In *People v. Henenberg*,[19] the court correctly suppressed a confession obtained during an interrogation where despite the defendant's request for the presence of an attorney, the questioning continued unabated. What is significant about this case is that the court refused to decide if a confession obtained in violation of *Miranda* and admitted into evidence could ever constitute non-reversible error.[20] It may be that the court was laying the groundwork for a future ruling to the effect that *Miranda* violations should be viewed as any other trial error, and in the face of large amounts of uncontroverted evidence of guilt, the admission of a tainted confession would not require a reversal.

DISCOVERY BY THE DEFENDANT

The issue of discovery of materials in the prosecutor's control continues to plague the court. In *People v. Bassett*,[21] the court may have expanded a defendant's resources for the impeachment of prosecution witnesses. This case grew out of the prison riot which occurred at Menard Penitentiary in November, 1965. In the course of the disturbance, three prison guards were killed and the defendants were tried for these murders.

In preparing the case, the state personnel interviewed at least 800 inmates of the penitentiary. Notes, which were not verbatim, were taken on yellow paper during the interviews. After the interviews were completed, the notes were transcribed onto white cards, allegedly containing a narrative of what the prosecutor expected to prove. The defendants contended that they had the right to use these white cards for impeachment purposes.

The court first looked to *People v. Wolff*,[22] whose holding is now incorporated in Supreme Court Rule 412.[23] Section (a)(i) of Rule

18. 384 U.S. 436 (1966).

19. 55 Ill. 2d 5, 302 N.E.2d 27 (1973).

20. *Id.* at 12, 302 N.E.2d at 30.

21. 56 Ill. 2d 285, 307 N.E.2d 359 (1974).

22. 19 Ill. 2d 318, 167 N.E.2d 197 (1960).

23. ILL. REV. STAT. ch. 110A, § 412 (1973). This rule and the *Wolff* decision are generally based on the reasoning found in Palermo v. United States, 360 U.S. 343 (1959); Jencks v. United States, 353 U.S. 657 (1957); and People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1957).

412 provides that upon written motion of the defense counsel, the State shall disclose to the defense counsel .

> the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing *substantially verbatim* reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements.

The rule further provides that "memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be *substantially verbatim* reports or oral statements shall be disclosed to defense counsel."[24]

The State argued that the *Wolff* decision precluded the defense from demanding disclosure of the white cards since they were not verbatim or substantially verbatim reports of the interviews with the potential witnesses. In rejecting this contention, the court found that the State had misconstrued the rationale behind the *Wolff* line of cases.[25] The court, citing *People v. Sumner*,[26] stated:

> [W]here the relevancy and competency of a statement or report has been established, and no privilege exists, the trial court, on appropriate demand, shall order the statement or report delivered directly to the accused for his inspection and possible use for impeachment purposes. . . . It was expressly recognized in *Wolff* that once a statement is shown to contain pertinent material, only the defense should be permitted to determine whether it may be useful for impeachment.[27]

Based upon this holding, a majority of the court concluded that the white cards should be made available to the defense, especially since the original notes of the interviews were destroyed by the prosecution. Believing that the cards must contain some type of reproduction of what the witnesses had said when interviewed earlier, the court held that the cards should be turned over to the trial judge to have the State's work product deleted and then given to the defense counsel for examination for impeachment purposes.[28]

The dissent by Chief Justice Underwood argued that this decision went far beyond the holdings of *Wolff* and its predecessors. By per-

24. ILL. REV. STAT. ch. 110A, § 412(a)(i) (1973) (emphasis added). *See generally*, MacCarthy, *Criminal Law, 1971-1972 Survey of Illinois Law*, 22 DEPAUL L. REV. 223, 226-28 (1972).

25. 56 Ill. 2d at 291, 307 N.E.2d at 363.

26. 43 Ill. 2d 228, 252 N.E.2d 534 (1969).

27. 56 Ill. 2d at 291, 307 N.E.2d at 363 (citations omitted).

28. *Id.* *See* ILL. SUP. CT. R. 412(j)(i).

mitting discovery of non-verbatim notations, the court had ignored the very essence of impeachment—use of the witness's prior statements, *in his own words,* to contradict what the witness testifies to on the stand. In the Chief Justice's view, it would be fundamentally unfair to impeach a witness with prior statements not shown to be substantially in the witness's own words.[29] It would have been far preferable, according to the Chief Justice, if the majority had grounded its holding solely on the fact that the original notes were destroyed, rather than extending the scope of criminal discovery beyond the bounds of substantially verbatim reports.[30] The dissent further noted that the majority's holding was merely dicta since the testimony of the interviewed witnesses was not needed to prove murder on an accountability theory.

Does a defendant ever have the right to the name and address of a paid informer in a sale of narcotics case? In *People v. Lewis,*[31] the court held that under certain factual situations, the defendant is entitled to such information unless the prosecution can establish that the health and safety of the informer will be put in jeopardy by the disclosure.[32] In *Lewis,* and the two cases with which it was consolidated,[33] the sole witnesses to the alleged sale of narcotics were the purchasing officers and the paid informant. The convictions were reversed at the appellate level because of the State's failure to disclose the identity of the informers involved in the transactions.[34] The State contended that where there are two witnesses to the sale and only the purchasing agent testifies, the trial judge should be permitted to approve nondisclosure.[35]

The Illinois Supreme Court, in affirming the appellate court's judgments of reversal, relied on the United States Supreme Court's rea-

29. 56 Ill. 2d at 303, 307 N.E.2d at 369.

30. *Cf.* People v. Norris, 17 Ill. App. 3d 23, 308 N.E.2d 30 (1st Dist. 1974).

31. 57 Ill. 2d 232, 311 N.E.2d 685 (1974).

32. United States v. Palermo, 410 F.2d 468 (7th Cir. 1969); United States v. Varelli, 407 F.2d 735 (7th Cir. 1969); People v. Manzella, 56 Ill.2d 187, 306 N.E.2d 16 (1973).

33. People v. Flippo and People v. Weathers, 57 Ill. 2d 232, 311 N.E.2d 685 (1974).

34. People v. Lewis, 12 Ill. App. 3d 762, 301 N.E.2d 469 (3d Dist. 1973); People v. Flippo, 12 Ill. App. 3d 774, 301 N.E.2d 477 (3d Dist. 1973); People v. Weathers, 12 Ill. App. 3d 776, 301 N.E.2d 479 (3d Dist. 1973).

35. 57 Ill. 2d at 234, 311 N.E.2d at 687.

soning in *Roviaro v. United States*.[36] In that case, the Court said:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defense, the possible significance of the informer's testimony, and other relevant factors.[37]

Utilizing such an approach the Illinois Supreme Court held that where there were only three possible witnesses to the alleged sale and the defendant denied that a sale ever took place, the disclosure of the informer's name and address was required in order for the defendant to be able to prepare his defense. Even though the State may not choose to call the informer to testify, the defendant may require the informer's testimony. This option cannot be closed by the unilateral act of the prosecution in not allowing the defendant to have the informer's true identity, especially where, as here, the defendants already know the informer by sight and an assumed name.[38] Thus, while there is no definite rule concerning the disclosure of the identity of informants, it appears that the fewer the existing witnesses to the alleged act, the greater the need of the defense to know the informant's identity.

In *People v. Schmidt*,[39] the defendant was arrested for driving under the influence of alcohol. His pre-trial motion for discovery of the police arrest report was denied. The trial court refused to admit the police report into evidence, an order which was reversed and remanded in the appellate court.[40] The supreme court affirmed the appellate court judgment, holding that in prosecutions for misdemeanors, the scope of pre-trial discovery is entirely controlled by statute.[41] A trial court has no discretion to expand or contract the scope of items which are discoverable. Thus, with the exception of

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36. 353 U.S. 53 (1957).

37. *Id.* at 62.

38. *Cf.* ILL. SUP. CT. R. 412(j)(ii).

39. 56 Ill. 2d 572, 309 N.E.2d 557 (1974).

40. 8 Ill. App. 3d 1024, 291 N.E.2d 255 (2d Dist. 1972).

41. *See* ILL. REV. STAT. ch. 38, §§ 114-9, -10 (1973); *Id.* at ch. 95½, § 11-501(g). *But see* Brady v. Maryland, 373 U.S. 83 (1963) (suppression of evidence favorable to an accused who has requested it violates due process when evidence is material to either guilt or punishment).

witness lists and confessions of the defendant, a misdemeanor arrest report will only be available to defendants for use in impeaching the witness who prepared the report.[42]

TRIAL PROBLEMS

Three interesting cases dealing with jurors' requests for testimony, severance, and closing arguments were decided by the Illinois Supreme Court during the past year. A denial by the trial judge of the jury's request for review of the testimony of the prosecuting witness and the arresting officer was held to be within the scope of the trial court's discretion in *People v. Pierce*.[43] The court adopted the view followed by the majority of jurisdictions. Justice Schaefer registered a strong dissent, declaring that the court should have adopted the American Bar Association Minimum Standards,[44] which, in effect, declares that if the jury's request is reasonable, the trial judge should, after giving notice to the prosecuting and defense attorneys, permit the jury to re-examine the requested materials. This view curtails a court's discretion but leaves the trial judge free to determine the reasonableness of the jury's request.

A failure of the trial court to sever an armed robbery trial from one for possession of marijuana caused a reversal in *People v. Pullman*.[45] The sole connection between the two crimes was that when defendant was arrested on the marijuana charge he was in possession of the automobile allegedly stolen in an armed robbery sixteen days earlier. The court based its decision on section 111-4(a) of the Code of Criminal Procedure,[46] which provides that two or more charges may be brought in the same indictment or information if they are based on the same act or arose out of the same compre-

42. *See* People v. Cagle, 41 Ill. 2d 528, 244 N.E.2d 299 (1969).

43. 56 Ill. 2d 361, 308 N.E.2d 577 (1974).

44. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice to the prosecutor and counsel for the defense, shall have the requested parts of the testimony read to the jury and shall permit the jury to reexamine the requested materials admitted into evidence.

ABA ADVISORY COMMITTEE ON THE CRIMINAL TRIAL, STANDARDS RELATING TO TRIAL BY JURY, § 5.2(a) (1968).

45. 57 Ill. 2d 15, 309 N.E.2d 565 (1974).

46. ILL. REV. STAT. ch. 38, § 111-4(a) (1973).

hensive transaction. The supreme court held that the mere surface relationship between the two acts fell far short of what was statutorily required for a trial joining both counts.

The effect of prejudicial closing arguments by the prosecutors was the issue before the court in *People v. Stock*.[47] There, prosecutors were found to have (1) gone outside the record, (2) accused the defense attorneys of concocting the defense case and suborning perjury, and (3) commented on the fact that two of the three defendants did not testify.

After setting forth several excerpts at great length,[48] the court concluded:

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47. 56 Ill. 2d 461, 309 N.E.2d 19 (1974).

48. The opinion sets forth two pages of direct quotes from the transcript to document the characterizations. A shortened portion follows:

> The prosecutor then proceeded in argument:
> "Mr. Elsener: * * * And with a straight face, with a straight face defense counsel said, and she worked in a den, in a den. Why do you think they used words like that? To encourage sympathy for Janet Meyer? or to shift the light, get it away from the defendants. * * * I'll say it's the most incredible defense that this whole court room has ever seen.
> Then good old Charles Liphardt, innocent, uninterested Charles Liphardt, he comes in and he corroborates Dianne. You have to believe Dianne because of Charles Liphardt. Charles Liphardt can say anything he wants, because if he doesn't she will go to his wife.
> Mr. Toomin: Object.
> Mr. Bloom: Object.
> The Court: Mr. State's Attorney, I sustain the objection. Strike the remark and instruct the jury to disregard it. There is no evidence of that.
> Mr. Elsener: Fine, ladies and gentlemen—
> The Court: I must direct you to conduct yourself to the evidence in this case.
> Mr. Elsener: Fine, and the evidence shows he has known her for two years. The evidence shows he is married, the evidence shows he goes over and meets her over at her friend's. The evidence shows that her husband doesn't know where she is and she doesn't know where her husband is. The evidence shows that he just drives her around and the evidence shows he doesn't testify to some of the most important things in the case until after he goes to lunch with the good old defense lawyers."
> Thus, the prosecution then went on to indirectly accuse the defense lawyers of suborning perjury:
> "Mr. Elsener: What do you do when you're caught? What do you do when you're guilty? What is the first thing you do if you haven't got anything else to rely on, you start accusing everybody else, put a finger on them, them, them, them, and them. Get the light off you, get the heat off you, keep in the background, sit back there nice and quiet behind your lawyers and don't do anything.
> Mr. Toomin: Object.
> Mr. Bloom: Object.

> The repeated disregard of the bounds of proper argument was so flagrant and purposeful that we can only conclude that it was done for the purpose of prejudicing the defendants. Such behavior should not be tolerated by the courts of this State.[49]

The court also criticized the trial judge for not adequately controlling the trial, although he did sustain some objections and did admonish the prosecutors to limit their remarks to the evidence. The court said that the trial judge had a duty to take further action when repeated improprieties occurred. No mention was made of granting a mistrial, although the opinion by Justice Davis ominously commented that "[c]ounsel's disregard of court rulings and the continuance of such misconduct warrants the imposition of sanctions by the court."[50]

The court's willingness to give close scrutiny to allegations of prosecutorial misconduct in closing arguments is demonstrated by its decision in *People v. Moore*.[51] Accused of murder, Moore relied upon an alibi defense, testifying that he had gone to his mother's home and had gone to bed before the murder took place. He further testified that his mother was not home because she was at work, and although his father, sister, two nieces, and two nephews also lived there, he did not know if anyone had seen him enter the house.[52] In closing argument, the prosecutor alluded to the fact that

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> The Court: Sustain the objection.
> Mr. Bloom: I ask that he be admonished for that conduct.
> The Court: Yet, Mr. Elsener, I will strike the remark and instruct the jury to disregard it and I do admonish you.
> Mr. Magnes: * * * You have the defendants' case. There very briefly you have the testimony of Dianne Stock. Now, I sat here and listened to the testimony of Dianne Stock, as well as the rest of it. The defendants got together and decided to make Dianne Stock their hope and so she picked herself up off that chair and took the witness stand.
> Mr. Toomin: Your Honor, I will object to what the defendants did.
> The Court: I will sustain the objection, strike the reference, and I instruct the jury to disregard it.
> Mr. Magnes: She paraded to the witness stand, took a seat, and described the facts and circumstances of this grand plan, as Mr. Robert Stock and Mr. Charles Wilfong sat silently by.
> Mr. Toomin: I object to that, your Honor.
> The Court: I will sustain the objection and strike the reference and instruct the jury to disregard it."

Id. at 470-71, 309 N.E.2d at 24-25.

49. *Id.* at 470, 309 N.E.2d at 25.

50. *Id.* at 473, 309 N.E.2d at 25.

51. 55 Ill. 2d 570, 304 N.E.2d 622 (1973).

52. *Id.* at 575, 304 N.E.2d at 624.

the defendant's alibi was uncorroborated because "[e]ven his own family didn't come in here and under oath say that he was with them."[53]

The First Appellate District, Second Division, reversed the lower court's conviction, holding that since a defendant has no duty to call witnesses on his behalf, an argument that comments on his failure to do so is prejudicial.[54] In this opinion, Justice Leighton noted that the defendant did not inject his relatives into the case because he did not testify that any of them had, in fact, seen him. Further, these persons were accessible to the prosecution as witnesses. Such a state of facts called for a reversal, even though no objection was made by defense counsel.

The supreme court saw the failure to object by defense counsel not only as a waiver of any error but as purposeful when seen from counsel's rebuttal—in which he stated that no one saw the defendant come home—which "alleviate[d] any possible misleading inference which may have arisen as a result of the State's comment."[55] Finally, in light of the overwhelming evidence against the defendant, the court concluded that the statement was not a significant factor in the jury's determination.

It is interesting to note that the weight of the evidence played no role in the reversal of the conviction by the court in *Stock*, where the prosecutors' misdeeds were numerous and repeated. However, the weight of the evidence did become a factor in *Moore* where the comment was isolated from a long summation.

Obviously, not every improper remark by the prosecutor in his closing argument will result in the reversal of conviction. In *People v. Skorusa*,[56] the prosecutor felt compelled to tell the jury "that if we in conscience didn't know for a fact that the defendant, Stanley Skorusa, shot and killed Irene Kowalkowski, you ladies and gentlemen wouldn't be sitting here in judgment of him."[57] While labeling this remark an improper expression of personal opinion, the court

53. *Id.* at 576, 304 N.E.2d at 625.
54. People v. Moore, 9 Ill. App. 3d 231, 292 N.E.2d 42 (1st Dist. 1972).
55. 55 Ill. 2d at 577, 304 N.E.2d at 625.
56. 55 Ill. 2d 577, 304 N.E.2d 630 (1973).
57. *Id.* at 585, 304 N.E.2d at 634.

found it to be harmless error because of the overwhelming evidence of defendant's guilt.[58]

Another allegedly erroneous prejudicial comment by the prosecutor in *Skorusa* was found to be proper. The prosecutor stated, "We have heard no evidence here from the stand of what the reason, from his side, for this death was."[59] The court found this statement to be a permissible reference to the uncontradicted nature of the State's case rather than an attempt to focus the jury's attention on the defendant's failure to testify. Thus, the principle remains intact that a prosecutor may allude to the uncontradicted nature of the evidence supporting the State's case although the only person who could offer contradiction is the defendant.[60]

SENTENCING—POST CONVICTION REMEDIES

In *People v. Mahle*,[61] the defendant was convicted of deceptive practices and sentenced to five years probation, upon condition that the first year of the probationary period be served at the State Penal Farm, located in Vandalia. This sentence was approved by the appellate court.[62] Defendant contended successfully that this condition on his probation was improper under the Unified Code of Corrections.[63] The parole provisions of the Unified Code of Corrections[64] were held to apply to prisoners sentenced prior to its adoption. In *People ex rel. Weaver v. Longo*,[65] the court held that the legislature intended these provisions to apply retroactively because of its desire to show clemency to those incarcerated.[66] Citing *Longo*, the supreme court upheld the defendant's contentions and reversed the sentence.[67]

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58. *Id.*

59. *Id.* at 584, 304 N.E.2d at 634.

60. The court cited with approval this statement of the law from People v. Mills, 40 Ill. 2d 4, 8, 237 N.E.2d 697, 700 (1968).

61. 57 Ill. 2d 279, 312 N.E.2d 267 (1974).

62. People v. Mahle, 9 Ill. App. 3d 166, 292 N.E.2d 119 (3d Dist. 1972).

63. ILL. REV. STAT. ch. 38, § 1005-6-3(d) (1973).

64. ILL. REV. STAT. ch. 38, §§ 1001-1-1 *et seq.* (1973).

65. 57 Ill. 2d 67, 309 N.E.2d 581 (1974).

66. The legislature's authority to act in this manner was affirmed in People *ex rel.* Kubala v. Kinney, 25 Ill. 2d 491, 185 N.E.2d 337 (1962).

67. 57 Ill. 2d at 284, 312 N.E.2d at 270.

In *People v. Sarelli*,[68] the defendant's petition for post-conviction relief was denied by the circuit court. He appealed to the supreme court alleging, *inter alia*, that the statute under which he was convicted was unconstitutional.[69] This issue was raised neither at trial, nor on appeal to the appellate court.[70] The supreme court had previously held the statute unconstitutional;[71] however, this was after the defendant's post-conviction petition had been denied in circuit court. In *Sarelli*, the supreme court, out of consideration for justice and fairness, held that the issue of unconstitutionality could be raised for the first time on appeal.

APPELLATE PROCEDURE

This past year the court found one occasion to criticize the manner in which a brief was prepared. In *People v. Peter*,[72] defense counsel was criticized for exceeding the seventy-five page limit and for using a shotgun approach. The court stated:

> We do not feel, however, that it is necessary to make an appellant's brief a catalogue of every conceivable error. . . . A more selective presentation involving substantial rights or matters prejudicial to the defendant would more precisely define the issues.[73]

In *People ex rel. Millet v. Woods*,[74] a habeas corpus proceeding, the petitioner had exhausted his appellate options in 1965. On November 24, 1965, the supreme court issued its mandate to the appellate court to that effect. However, it was not until August 19, 1970, that the appellate court's mandate of affirmance was made part of the record in the circuit court. During all this time petitioner was free on bond pending appeal. The circuit court issued a writ of habeas corpus, discharging petitioner from custody. The supreme court affirmed, holding that where petitioner had been leading a lawful and productive life in the years subsequent to his conviction, the five year period between mandate and sentencing was an

68. 55 Ill. 2d 169, 302 N.E.2d 317 (1973).
69. Narcotic Drug Act, ILL. REV. STAT. ch. 38, §§ 22-1 *et seq.* (1969).
70. People v. Sarelli, 105 Ill. App. 2d 167, 245 N.E.2d 49 (1st Dist. 1969).
71. People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971).
72. 55 Ill. 2d 443, 303 N.E.2d 398 (1973).
73. *Id.* at 447, 303 N.E.2d at 401.
74. 55 Ill. 2d 1, 302 N.E.2d 32 (1973).

unreasonable delay, especially since the delay was in no manner attributable to petitioner.

FAIR TRIAL AND THE ATTORNEY

The resolution of two problems that often face defense lawyers was considered and commented upon by the supreme court in *People v. McCalvin.*[75] Not only did the defendants reject their lawyers' advice to plead guilty, but one of them, against his lawyer's advice and in the face of overwhelming evidence, also elected to take the witness stand.

On appeal defendants asserted that they were deprived of a fair trial because the attorneys told the court, outside the presence of the jury, that the defendants had rejected the advice of counsel on both of the above matters. The defendants characterized these matters as a conflict of interest between the lawyer and his clients.

The court found that the attorney's concern that a complete record be made was understandable, and ultimately concluded that no conflict existed and that defendants were not deprived of a fair trial. Acknowledging that it is desirable that a record be made of a significant disagreement between a lawyer and his client, the court voiced its approval of the American Bar Association Standards relating to the Defense Functions, and the commentary to the Standard which calls for "a notation of the nature of the disagreement, the advice given, and the action taken, either in the lawyer's file or by letter to the client, depending upon the gravity of the problem."[76]

It is interesting to note that while the defendants alleged a conflict of interest, and the court mentioned protection against a post-conviction charge of incompetence, the major reason motivating the defense attorneys was probably the fear of a future allegation of subornation of perjury. What is sand to the court may be quicksand to the practitioner.

SUBSTANTIVE CONSTITUTIONAL ISSUES

The single case in which the constitutionality of a criminal statute

75. 55 Ill. 2d 161, 302 N.E.2d 342 (1973).

76. ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, COMMENTARY OF THE DEFENSE FUNCTION, § 5.2(c) at 241 (Tent. Draft Mar. 1970).

came under serious attack resulted in the statute being upheld by a four to three decision. From the authors' perspective, the majority opinion was inexplicable, the dissenting opinion being far more persuasive. In *People v. McCollough*,[77] the defendant was charged in a two count indictment with involuntary manslaughter and reckless homicide. Both counts charged violation of section 9-3 of the Criminal Code which reads:

> (a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual and he performs them recklessly.
>
> (b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide.
>
> (c) Penalty
>
> (1) A person convicted of involuntary manslaughter shall be imprisoned in the penitentiary from one to 10 years.
>
> (2) A person convicted of reckless homicide shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or in the penitentiary from one to five years, or both fined and imprisoned.[78]

Each count was framed in identical language, charging that defendant did

> recklessly and with willful and wanton disregard for the safety of * * * a five year old child, increase the speed of the motor vehicle he was driving * * * and failed to exercise due caution to avoid colliding with said child upon the roadway * * * and did * * * kill [the child] without lawful justification in violation of the Criminal Code. . . .[79]

After a bench trial, the defendant was found not guilty of involuntary manslaughter but guilty of reckless homicide and sentenced to six months probation.[80] The Fourth District Appellate Court reversed the conviction holding section 9-3(b) unconstitutional.[81] The State took an appeal to the supreme court as a matter of right.[82]

Defendant argued that since the two offenses, one a felony and the other a misdemeanor, contained exactly the same elements, he

77. 57 Ill. 2d 440, 313 N.E.2d 462 (1974).
78. ILL. REV. STAT. ch. 38, § 9-3 (1973).
79. 57 Ill. 2d at 441, 313 N.E.2d at 462-63.
80. *Id.* at 441, 313 N.E.2d at 463.
81. People v. McCollough, 8 Ill. App. 3d 963, 291 N.E.2d 505 (4th Dist. 1972).
82. *See* ILL. SUP. CT. R. 317.

was deprived of due process and equal protection of the law. Further, as was stated by the appellate court, the statute

> places within the uncontrolled and unguided discretion of the State's Attorney, the Grand Jury, and in some instances the trial judge or petit jury, the power to impose different degrees of punishment for different persons who commit identical acts under identical circumstances.[83]

The supreme court reversed the appellate court and held the statute constitutional. The majority based its opinion on two factors—interpretation of prior case law in the state and the rationale behind the passage of the original reckless homicide statute in 1949.[84]

In upholding the validity of the section, the majority relied on *People v. Garman*,[85] *People v. Rhodes*,[86] and *People v. Keegan*.[87] *Garman* had upheld the reckless homicide statute, holding that the same set of facts may constitute separate offenses under different statutes.[88] *Rhodes* held that where the acts of an accused constitute more than one offense, it is within the discretion of the state's attorney to evaluate the evidence and decide which offense or offenses can and should be charged.[89] *Keegan* held that charges could be brought for both the felony of indecent liberties with a child[90] and the misdemeanor of contributing to the sexual delinquency of a child[91] based on precisely the same conduct.[92]

What the majority overlooked in citing these cases, according to Justice Ryan's well reasoned dissent, was that in each instance the crimes charged either contained different elements or, as in *Keegan*, provided for different affirmative defenses.[93] This is a crucial distinction for it provides a legal consistency between a guilty verdict on one charge and an acquittal on the other. In *McCollough*, where the elements of the crimes charged were identical, that consistency

83. 8 Ill. App. 3d at 971, 291 N.E.2d at 511.
84. Laws of 1949, p. 716; ILL. REV. STAT. ch. 38, § 364a (1949).
85. 411 Ill. 279, 103 N.E.2d 636 (1952).
86. 38 Ill. 2d 389, 231 N.E.2d 400 (1967).
87. 52 Ill. 2d 147, 286 N.E.2d 345 (1971).
88. 411 Ill. at 285, 103 N.E.2d at 639.
89. 38 Ill. 2d at 396, 231 N.E.2d at 403.
90. ILL. REV. STAT. ch. 38, § 11-4 (1973).
91. ILL. REV. STAT. ch. 38, § 11-5 (1973).
92. 52 Ill. 2d at 153, 286 N.E.2d at 348.
93. 57 Ill. 2d at 446-47, 313 N.E.2d at 465-66.

is lacking in the different judgments—either the elements were present or they were not.

The second factor which the majority relied on was the legislators' intent in enacting the reckless homicide statute. The court stated:

> The General Assembly may well have established the new offense of reckless homicide in 1949 because it determined that in many cases judges and juries were reluctant to convict a defendant of involuntary manslaughter when the reckless conduct that caused death consisted of the driving of a motor vehicle. And it may also have decided that because of the many potential shadings of reckless automobile driving, ranging from that which borders upon willfulness to that which borders upon negligence, the offense of manslaughter, with its more severe penalties, should be retained for the more serious offenses. Such determinations are not unreasonable, in our opinion, and their expression in the statute deprives no one of due process or equal protection of the laws.[94]

The dissent, which was joined by Justices Ward and Goldenhersh, did not challenge the rationale behind the statute, but rather found fault with the majority's conclusion. It cited authority from a number of other jurisdictions which considered this issue.[95] In each instance the courts have held that where one cannot ascertain under what circumstances he may be guilty of a felony and under what circumstances he may be guilty of a misdemeanor only, equal protection principles are offended.[96]

McCollough presents an example of a defendant's inability to ascertain whether his acts were punishable as a felony or a misdemeanor. It is exactly this type of uncertainty that a criminal code is intended to eliminate.[97] The decision here is a giant step *away* from that goal.

BRIBERY ISSUES

In the substantive area, the court also accepted for review two cases in which it was necessary to interpret overlapping statutes. The decisions are confusing at best and poorly-reasoned at worst.

In one, *People v. Wallace*,[98] a bribe offer was rejected and the

94. *Id.* at 445, 313 N.E.2d at 465.

95. State v. Pirkey, 203 Ore. 697, 281 P.2d 698 (1955); State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959); Olsen v. Delmore, 48 Wash. 2d 545, 295 P.2d 324 (1956).

96. *See also* Palmore v. United States, 290 A.2d 573 (D.C.C.A. 1972).

97. *See* ILL. REV. STAT. ch. 38, § 1-3 (1973).

98. 57 Ill.2d 285, 312 N.E.2d 263 (1974).

defendants were charged with attempted bribery. Appellants contended that since their acts constituted bribery under the statute, they could not be convicted for attempt. The court held, that in the absence of manifest legislative intent to exclude bribery from the general attempt provisions of the Criminal Code,[99] one may be convicted of attempted bribery even if the act has been consummated according to the statutes. This is true because no actual passage of property is required to complete the offense.

Although the offer of a bribe falls within the statute defining bribery itself, the use of the attempt statute rather than the substantive statute alone does not create a legally inconsistent posture, but rather a logically inconsistent one. Although the court hypothesized a situation, "in which the conduct of a defendant does not amount to the unlawful tender or promise of property to a public official under the bribery section (par. 33-1) yet such activity might be construed as a substantial step toward the completion of the offense,"[100] it is difficult to conjure one up. The instant fact situation was certainly not one in which the prosecutor was well-advised to charge under the generalized attempt statute.

In *People v. Gokey*,[101] the defendant was arrested by a police officer of his acquaintance for reckless driving. While entering the police car, a pistol dropped through his pants leg to the ground at his feet. He was then charged with unlawful use of weapons and brought to the police station. The following scenerio occurred at the station house:

> Sergeant Matt Schalz testified that when the defendant was brought into the police station, he said, "Matt, you are not going to let them put me in jail, are you?" Schalz replied, "Sorry, Tom, I can't help you." Gokey then said, "I will give you 50 bucks—just don't lock me up." Schalz said, "I can't do you any good; come on, let's go." The officers then took Gokey downstairs to a squad room and there Gokey said, "Well, if $50.00 isn't enough, how about $500.00?" When Sergeant Schalz answered, "I don't want your money, Tom, I can't do anything for you.", Gokey then said, "How about $5,000.00?" When Stalz ignored this, the defendant said, "Here, take the whole goddamn thing." and he threw a roll of money on the table. There was $7,200 in the roll.[102]

99. ILL. REV. STAT. ch. 38, § 8-4 (1973).
100. 57 Ill. 2d at 292, 312 N.E.2d at 267.
101. 57 Ill. 2d 433, 312 N.E.2d 637 (1974).
102. *Id.* at 435, 312 N.E.2d at 638.

For this, the defendant was charged and convicted of bribery. The supreme court, analogizing the "bribe" to those extravagant contract offers which are not intended to be taken seriously, reversed the conviction holding that the intent was obviously not present despite defendant's words and actions.

While this case may be of little substantive significance, it is nice to note that the Supreme Court of Illinois has retained its perspective and sense of humor while maintaining its essential concern with fairness.