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Criminal Procedure

Howard Suskin
Assoc., Jenner & Block, Chicago, IL

Amy Rosenberg Small

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*Howard Suskin**
*and Amy Rosenberg Small***

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* Associate, Jenner & Block, Chicago, Illinois; B.A., 1989, Northwestern University; J.D., 1983, University of Michigan.
** B.A., 1987, University of Michigan; J.D. candidate, 1991, Loyola University of Chicago.

I. INTRODUCTION

During the *Survey* year, the Illinois Supreme Court reviewed many criminal procedure issues. Significantly, in one case, the court expanded exceptions to the exclusionary rule. This decision, however, was reversed by the United States Supreme Court.[1] As a result of a decision regarding jury instructions for the defenses of insanity and guilty but mentally ill, the law is now in a state of flux.[2] In a case involving the allegedly discriminatory use of peremptory challenges, the Illinois Supreme Court, for the first time, applied the United States Supreme Court's decision in *Batson v. Kentucky*.[3] The supreme court also refused to follow a federal district court's conclusion that the Illinois death penalty statute was unconstitutional.[4] In addition, Illinois courts decided many cases in the area of defendants' rights under the fifth and sixth amendments. As well as discussing these developments, this Article also highlights some of the significant legislation affecting criminal procedure passed during the *Survey* period.[5]

II. CASE LAW

A. Arrest, Search and Seizure

1. Evidence Obtained During a Stop and Frisk

In *People v. Galvin*,[6] the State charged the defendant with theft and possession of burglary tools.[7] Prior to trial, the defendant moved to suppress evidence of the burglary tools that were found in his car and that were seized during a warrantless search.[8] The circuit court allowed the motion, a decision the appellate court affirmed by a divided opinion.[9] Both courts concluded that the stop

1. James v. Illinois, 123 Ill. 2d 523, 528 N.E.2d 723 (1988), *rev'd*, 110 S. Ct. 648 (1990). *See infra* notes 34-57 and accompanying text.

2. People v. Fierer, 124 Ill. 2d 176, 529 N.E.2d 972 (1988). *See infra* notes 153-65 and accompanying text.

3. *See infra* notes 182-96 and accompanying text.

4. People v, Coleman, 129 Ill. 2d 321, 544 N.E.2d 330 (1989). *See infra* notes 313-19, 359-62 and accompanying text.

5. *See infra* notes 320-42 and accompanying text.

6. 127 Ill. 2d 153, 535 N.E.2d 837 (1989).

7. *Id.* at 156, 535 N.E.2d at 838. The defendant was charged pursuant to ILL. REV. STAT. ch. 38, paras. 16-1(d)(1) and 19-2(a), (1987).

8. *Galvin*, 127 Ill. 2d at 156, 535 N.E.2d at 838.

9. *Id.* (citing People v. Galvin, 161 Ill. App. 3d 190, 514 N.E.2d 260 (3rd Dist. 1988)).

was valid but the frisk was not.[10] After granting the State's petition for leave to appeal, the Illinois Supreme Court affirmed the lower courts' rulings.[11] Relying on *Terry v. Ohio*[12] and section 107-14 of the Illinois Code of Criminal Procedure,[13] the court agreed with the lower courts that the police had sufficient, articulable facts to justify a temporary stop for investigatory purposes.[14]

With regard to the frisk's legality, both *Terry* and section 108-1.01[15] allow for the procedure only when a reasonably prudent per-

10. *Id.* at 163-65, 535 N.E.2d at 841-42.

11. *Id.* at 174, 535 N.E.2d at 846. In reviewing the lower court's ruling, the Illinois Supreme Court noted that a trial court's determination on a motion to suppress will not be overturned unless it is manifestly erroneous. *Id.* at 162-63, 535 N.E.2d at 841 (citing People v. Winters, 97 Ill. 2d 151, 158, 454 N.E.2d 299, 303 (1983)). The circuit court's function at a suppression hearing is to determine the witnesses' credibility, the weight to be given to the testimony, and the inferences drawn from the evidence. *Id.* at 163, 535 N.E.2d at 841 (citing People v. Akis, 63 Ill. 2d 296, 298, 347 N.E.2d 733, 734 (1976)).

12. *Galvin*, 127 Ill. 2d at 163, 535 N.E.2d at 841 (citing Terry v. Ohio, 392 U.S. 1 (1968)). In *Terry*, the Supreme Court held that when a policeman observes unusual conduct leading him reasonably to believe, in light of his experience, that criminal activity may have occurred or may about to occur, and that the people with whom he is dealing may be armed and presently dangerous, he is entitled to conduct a carefully limited search of the person in an attempt to discover weapons. The policeman must identify himself and make reasonable inquiries. *Terry*, 392 U.S. at 30. The Court held that such a search is reasonable under the fourth amendment. *Id.* at 31.

13. *Galvin*, 127 Ill. 2d at 163, 535 N.E.2d at 841. Section 107-14 provides that a peace officer, after identifying himself,

> may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense as defined in section 102-15 of this Code, and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.

ILL. REV. STAT. ch. 38, para. 107-14 (1987).

14. *Galvin*, 127 Ill. 2d at 164, 535 N.E.2d at 842. At trial, the officer testified that there had been multiple burglaries in the neighborhood where the defendant was stopped. *Id.* at 156, 535 N.E.2d at 838. A neighborhood resident informed the police that an anonymous woman noticed a parked brown Oldsmobile in an alley and saw a man heading toward the car with something hidden under his coat. When the man entered the car, another male, who apparently had been hiding in the car, sat up and the two men drove away. The woman wrote down the license plate and a description of the car. The officer saw a similar car. *Id.* at 158, 535 N.E.2d at 839. The supreme court decided that the officer's suspicion was reasonable because defendant's unusual conduct could be indicative of past or prospective criminal activity. *Id.* at 164, 535 N.E.2d at 842.

15. *Id.* at 165, 535 N.E.2d at 842 (citing ILL. REV. STAT. ch. 38, para. 108-1.01 (1987)). Section 108-1.01 provides:

> [w]hen a peace officer has stopped a person for temporary questioning pursuant to § 107-14 of this Code and reasonably suspects that he or another is in danger of attack, he may search the person for weapons. If the officer discovers a weapon, he may take it until the completion of the questioning at which time he shall either return the weapon, if lawfully possessed, or arrest the person so questioned.

ILL. REV. STAT. ch. 38, para. 108-1.01 (1987).

son in the circumstances would be warranted in the belief that his safety or the safety of others was in danger.[16] Here, the officer specifically testified that he did not believe that he was in danger or that the suspect was armed.[17] The court recognized that although an objective standard is used to determine whether a frisk is justified,[18] a police officer's testimony as to his subjective feelings is one of the factors that may be considered in light of all the circumstances known to the officer at the time of the frisk.[19]

Holding the frisk invalid, the court rejected the argument favoring any legal presumption that burglary suspects are armed and dangerous and may be frisked as a routine matter.[20] The court noted that the reasonableness of an officer's conduct must be evaluated in light of the facts.[21] In this case, the officer's testimony failed to establish that a reasonably prudent person in the same situation would have been warranted in the belief that his safety or that of others was in danger.[22]

2. Illegal Stops

In *People v. Fenton*,[23] the Illinois Supreme Court addressed whether an Illinois police officer may stop a speeding driver in another jurisdiction.[24] In *Fenton*, an Illinois police officer stopped the defendant in Iowa for speeding.[25] At the time of the stop, the officer identified the driver.[26] At trial, the defendant moved to suppress the identification.[27] The defendant argued that the stop was illegal because it occurred in Iowa, outside the officer's jurisdiction.

16. *Galvin*, 127 Ill. 2d at 165, 535 N.E.2d at 842 (citing *Terry*, 392 U.S. at 27).

17. *Id.* at 166, 535 N.E.2d at 843. Prior to the search, three police cars effectuated the defendant's stop. The five police officers present requested the defendant to exit his vehicle and the defendant complied. Three of the officers had their guns drawn. *Id.* at 160, 535 N.E.2d at 840.

18. *Id.* at 167, 535 N.E.2d at 843. In *Terry*, the Supreme Court indicated that the legality of a search must be scrutinized in a detached, neutral fashion against an objective standard. *Terry*, 392 U.S. at 21.

19. *Galvin*, 127 Ill. 2d at 168, 535 N.E.2d at 843. When the officer was asked whether the search was made to protect his own safety, he answered yes. *Id.* at 168-69, 535 N.E.2d at 844.

20. *Id.* at 173, 535 N.E.2d at 846.

21. *Id.* at 173-174, 535 N.E.2d at 846 (*citing* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) (quoting *Terry*, 392 U.S. at 19)).

22. *Id.* at 174, 535 N.E.2d at 846.

23. 125 Ill. 2d 343, 532 N.E.2d 228 (1988).

24. *Id.* at 345, 532 N.E.2d at 229.

25. *Id.* at 344, 532 N.E.2d at 228.

26. *Id.* The officer identified the defendant by looking at him. *Id.*

27. *Id.* at 345, 532 N.E.2d at 229.

The circuit court agreed and granted the motion.[28] The appellate court affirmed, concluding that the police officer, having the status of a private citizen in Iowa, was proscribed from making an investigative stop.[29]

The Illinois Supreme Court reversed.[30] The court agreed that the officer acted only in the capacity of a private citizen when he left Illinois. The court, however, would not deem the momentary encounter a seizure within the meaning of the fourth amendment. The officer only identified the defendant;[31] there was neither an arrest nor an investigatory stop.[32] Emphasizing the narrowness of the question presented, the court expressly reserved deciding whether, under similar circumstances, an Illinois officer may, as a private citizen, make an arrest or conduct a noncustodial investigation.[33]

B. Self-Incrimination

1. Exclusionary Rule

In one of its most significant decisions during the *Survey* year, *People v. James*,[34] the Illinois Supreme Court addressed whether a defense witness, whose direct testimony contradicts evidence that has been suppressed, may be impeached by the use of that evidence.[35] A divided court expanded the exceptions to the exclusionary rule by allowing the State to introduce the suppressed statement for impeachment purposes.[36]

James was charged with murder and attempted murder.[37] Prior to trial, the defendant successfully moved to suppress a post-arrest statement that he made to the police regarding his hair color.[38] At

28. *Id.*

29. *Id.* (citing People v. Fenton, 154 Ill. App. 3d 152, 154, 506 N.E.2d 979, 981 (3d Dist. 1987)).

30. *Id.* The defendant in this case took no part in the appeal. The appeal came to the supreme court on a stipulated record. *Id.*

31. *Id.* at 346, 532 N.E.2d at 229. The court stated that this momentary encounter was far less intrusive than the actions of a police officer in State v. Gully, 346 N.W.2d 514 (Iowa, 1984). In *Gully*, a defendant voluntarily accompanied a police officer after the officer informed the defendant that he was wanted for questioning. *Id.* at 516.

32. *Fenton*, 125 Ill. 2d at 347, 532 N.E.2d at 230.

33. *Id.*

34. 123 Ill. 2d 523, 528 N.E.2d 723 (1988), *rev'd*, 110 S. Ct. 648, 652 (1990).

35. *Id.* at 529, 528 N.E.2d at 725.

36. *Id.* at 538, 528 N.E.2d at 730. For a discussion of the exclusionary rule, see *supra* Sullivan and Marcouiller, *Administrative Law*, 21 LOY. U. CHI. L.J. 221 n.48 (1990).

37. *Id.* at 525, 528 N.E.2d at 723.

38. *Id.* at 527, 528 N.E.2d at 724. James told the police that on the evening in question his hair was long, reddish in color, and combed back straight. *Id.* The defendant

trial, the State sought to use the defendant's suppressed statement to impeach the testimony of the defense's principal witness.[39] The circuit court permitted the State to introduce the statement for impeachment purposes,[40] but the appellate court reversed and ordered a new trial.[41]

On appeal, the Illinois Supreme Court traced the evolution of the exclusionary rule's impeachment exception,[42] and it rejected defendant's argument that the impeachment exception should apply only to impeach the defendant's testimony and not to impeach a witness' testimony.[43] The court further disapproved its use by defendants as "a shield for knowing perjury or intentional misrepresentation."[44] Instead, the court included within the impeachment exception, a defense witness' direct testimony that squarely contradicts suppressed evidence that is not in the nature of a confession.[45] The court reasoned that as a defendant cannot perjure himself and hide behind the exclusionary rule, the defendant also cannot use the exclusionary rule to further the perjurious testimony of a biased defense witness.[46]

The court emphasized the very narrow area in which the impeachment exception to the exclusionary rule may operate.[47] First, the witness' statement to be rebutted by the suppressed statement must be elicited on direct examination.[48] Second, the witness'

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also told the police that on the next day he had gone to his mother's beauty shop to change his hair color. *Id.* The trial judge granted the defendant's motion to suppress this statement after finding that there was no probable cause to arrest James. Thus, the statement was the fruit of an unlawful arrest. *Id.* at 527, 528 N.E.2d at 724-25.

39. *Id.* at 527, 528 N.E.2d at 724. The witness testified that, on the day of the shooting, James' hair was black. *Id.*

40. *Id.* at 528, 528 N.E.2d at 724 (citing People v. James, 153 Ill. App. 3d 131, 505 N.E.2d 1118 (1st Dist. 1987)). At the defendant's request, the trial court instructed the jury that the statement was offered only for impeachment purposes. *Id.* at 527-28, 528 N.E.2d at 725.

41. *Id.* at 528, 528 N.E.2d at 725.

42. *Id.* at 529-35, 528 N.E.2d at 725-28 (citing United States v. Havens, 446 U.S. 620 (1980) (further expanded impeachment exception by allowing impeachment statements to be brought out on cross-examination); Harris v. New York, 401 U.S 222 (1971) (expanded impeachment exception to include references to previously suppressed statements that were contradictory to defendant's testimony in order to assess defendant's credibility); Walder v. United States, 347 U.S. 62 (1954) (allowed testimony relating to defendant's prior drug arrest for purposes of impeaching defendant's credibility); People v. Payne, 98 Ill. 2d 45, 456 N.E.2d 44 (1983) (allowed introduction of suppressed evidence because defendant's cross-examination misled jury)).

43. 123 Ill. 2d at 535-36, 528 N.E.2d at 728.

44. *Id.* at 535, 528 N.E.2d at 729.

45. *Id.* at 538, 528 N.E.2d at 730.

46. *Id.* at 536, 528 N.E.2d at 729.

47. *Id.* at 537, 528 N.E.2d at 729.

48. *Id.*

statement and the suppressed statement must directly contradict each other. Mere inconsistency is insufficient.[49] Third, the defendant must present the witness' false statement purposely.[50] Fourth, any part of the defendant's suppressed statement that can be characterized as a confession cannot be used to rebut the witness' testimony.[51] Finally, the defendant must be able to deny all of the elements of the case against him without allowing the government to introduce illegally-obtained evidence in rebuttal.[52]

The United States Supreme Court reversed, concluding that the Illinois Supreme Court's expansion of the impeachment exception would frustrate the purposes underlying the exclusionary rule.[53] Specifically, the decision to extend the exclusionary rule to defense witnesses because a defendant, who himself is frustrated by the impeachment exception, can easily find a witness to engage in "perjury by proxy" was rejected by the Court.[54] The Court found this premise suspect because the threat of criminal prosecution for perjury is far more likely to deter a witness from intentionally lying.[55]

In addition, expanding the impeachment exception could discourage defendants from calling *any* witnesses in their defense for fear that the witness, although offering some favorable evidence, would give testimony that slightly contradicted the tainted statement so that the prosecutor could use the statement for impeachment purposes.[56] Finally, expanding the exception to all defense witnesses would increase the prosecutor's expected value of illegally-obtained evidence. Accordingly, police might be encouraged to engage in misconduct in a misguided effort to help the prosecution.[57]

2. Confessions

In *People v. Evans*,[58] the Illinois Supreme Court examined whether the defendant's inculpatory statements were properly ad-

49. *Id.* The court noted that the two statements must be so contradictory that the witnesses' statement cannot be true when compared to the suppressed statement. *Id.*

50. *Id.* Evidence that is "purposely presented" is evidence that the defendant intentionally wants admitted in order to prove his innocence.

51. *Id.*

52. *Id.* at 538, 528 N.E.2d at 729 (citing Walder v. United States, 347 U.S. 62 (1954)).

53. 110 S. Ct. 648, 652 (1990).

54. *Id.* at 653 (quoting *James*, 123 Ill. 2d at 536, 528 N.E.2d at 729).

55. *Id.*

56. *Id.*

57. *Id.* at 654-55.

58. 125 Ill. 2d 50, 530 N.E.2d 1360, *cert. denied*, 109 S. Ct. 3175 (1988).

mitted into evidence at trial.[59] The defendant contended that his arrest on an unrelated assault charge was merely a pretext to question him about a murder, thus rendering his statements the fruits of an illegal arrest.[60] To support his claim, the defendant pointed to the six-day lapse between the assault and defendant's arrest. According to the defendant, the fact that a violent crimes detective arrested him for a misdemeanor aggravated assault also demonstrated the arrest's pretextual nature.[61]

The court rejected the defendant's argument that the arrest was a sham.[62] First, the six-day lapse between the assault and the arrest was not a significant delay and did not render the arrest illegal.[63] Second, the mere fact that a misdemeanor arrest was made by a violent crimes detective did not render an otherwise lawful arrest pretextual.[64] Finally, the court discounted the fact that police briefly asked the defendant about four other offenses.[65] Although the defendant was in custody for one charge, the police were not precluded from investigating other unrelated charges.[66] Concluding that the trial court correctly ruled the defendant's arrest legal, and not pretextual, the supreme court held that the statements were not suppressed properly.[67]

3. Post-Arrest Silence

In *People v. Pegram*,[68] the Illinois Supreme Court addressed whether the prosecution's cross-examination of the defendant, about his silence after his arrest for robbery, denied him a fair trial.[69] The court held that the questioning was improper and

59. *Id.* at 69, 530 N.E.2d at 1367.

60. *Id.* at 70, 530 N.E.2d at 1368. The defendant was arrested initially for aggravated assault, a misdemeanor, against one woman, and felony robbery and attempted rape of a second woman. *Id.* Previously, a third woman had been raped and murdered in a nearby apartment's elevator. *Id.* at 60, 530 N.E.2d at 1364. While in custody, the defendant was asked only about the murder victim. *Id.* at 71-72, 530 N.E.2d at 1368.

61. *Id.* at 70, 530 N.E.2d at 1368.

62. *Id.* at 72, 530 N.E.2d at 1369.

63. *Id.* at 71, 530 N.E.2d at 1369. The detective arrested the defendant for assault immediately after the victim filed her complaint. There was no "delay" between the time the officers obtained probable cause to arrest and the defendant's arrest. *Id.*

64. *Id.* The court was unaware of any authority to support the defendant's proposition. *Id.*

65. *Id.*

66. *Id.* at 72, 530 N.E.2d at 1369 (citing People v. Cocroft, 37 Ill. 2d 19, 225 N.E.2d 16 (1967)).

67. *Id.*

68. 124 Ill. 2d 166, 529 N.E.2d 506 (1988).

69. *Id.* at 174-75, 529 N.E.2d at 510. The defendant contended that the state's cross-examination violated his fifth amendment right to remain silent and his sixth amendment

should be avoided on retrial.[70]

At trial, the defendant testified on direct examination that he had talked to the police concerning the robbery following his arrest.[71] On cross-examination, the defendant admitted that his direct testimony constituted the first time he had offered his account of the crime.[72] In his closing argument, the prosecutor commented upon defendant's failure to tell his side of the story immediately following his arrest.[73] The supreme court held that the prosecutor's questions and remarks were improper.[74] Although the defendant's attorney broached the issue of the defendant's post-arrest silence, the prosecutor's inquiry and comment on the defendant's failure to present his version of the crime at any time before trial was not harmless beyond a reasonable doubt.[75]

C. Double Jeopardy

In *People v. Brisbon*,[76] the Illinois Supreme Court addressed whether the prosecutor's conduct during the defendant's first sentencing hearing manifested an intent to provoke a mistrial, thereby barring the State, under the constitutional guarantee against double jeopardy, from proceeding with a second sentencing hearing.[77] The court concluded that although some of the prosecutor's acts during the first sentencing hearing mandated a new hearing, the conduct did not reveal an intent to cause a mistrial.[78] The defendant pointed to three instances of prosecutorial conduct that

right to counsel. *Id.* The defendant conceded that these issues were not preserved for appeal. The court applied the plain error rule, which states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." ILL. REV. STAT. ch. 110A, para. 615(a) (1987).

70. *Pegram*, 124 Ill. 2d at 176, 529 N.E.2d at 510. The court previously held that the case must be retried because the defendant's attorney provided ineffective assistance. *Id.* at 174, 529 N.E.2d at 509-10.

71. *Id.* at 175, 529 N.E.2d at 510. The defendant travelled with a detective from Buffalo to Chicago. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 176, 529 N.E.2d at 510 (citing Doyle v. Ohio, 326 U.S. 610 (1976)). In *Doyle*, the Court held that prosecutorial questions and remarks concerning a defendant's post-arrest silence are generally improper. *Doyle*, 326 U.S. at 617-18.

75. *Pegram*, 124 Ill. 2d at 176, 529 N.E.2d at 510.

76. 129 Ill. 2d 200, 544 N.E.2d 297 (1989), *cert. denied*, 110 S. Ct. 1796 (1990). *See also infra* notes 287-90 and accompanying text (for further discussion of *Brisbon*).

77. 129 Ill. 2d at 219-21, 544 N.E.2d at 306.

78. *Id.* at 220-21, 544 N.E.2d at 306. The defendant was found guilty of murdering a fellow inmate in prison. At the first sentencing hearing, the defendant was sentenced to death. On appeal, the Illinois Supreme Court vacated the death sentence because of er-

indicated an intent to provoke a mistrial: use of parole considerations, use of statistics to show the death penalty's deterrent value, and mention of previous murders committed by the defendant.[79] Rejecting these factors as insufficient to prove defendant's claim, the court stated that more than harassment or bad faith is required for a mistrial to be deemed to have been provoked.[80] Instead, defendant must show " 'the prosecutor's *intent* to provoke a motion for mistrial.' "[81]

D. Trial Practice

1. Right to a Fair Trial

In *People v. Phillips*,[82] the court considered whether the defendant was denied a fair trial because of certain statements made by the prosecutor during closing argument.[83] The prosecutor's allegedly improper statements included remarks accusing the defense of being a fraud,[84] attempting to shift the burden of proof to the defendant,[85] and minimizing the meaning of reasonable doubt.[86] The court held that the defendant was not denied a fair trial because, taken together, the statements did not amount to improper argument.[87]

First, the court concluded that the prosecutor's characterization of the defense as being a "fraud" and having a "shotgun" approach did not rise to the level of plain error.[88] The court stated that the

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rors at the first sentencing hearing. *Id.* at 206, 544 N.E.2d at 299. At the second sentencing hearing, the defendant was also sentenced to death. *Id.*

79. *Id.* at 206, 544 N.E.2d at 300.

80. *Id.* at 221, 544 N.E.2d at 307.

81. *Id.* (quoting People v. Ramirez, 114 Ill. 2d 125, 130, 500 N.E.2d 14, 16 (1986) (emphasis in original)).

82. 127 Ill. 2d 499, 538 N.E.2d 500 (1989).

83. *Id.* at 522-23, 538 N.E.2d at 509.

84. *Id.* at 523, 538 N.E.2d at 509.

85. *Id.*

86. *Id.*

87. *Id.* at 529, 538 N.E.2d at 512.

88. *Id.* at 524, 538 N.E.2d at 509. In particular, two prosecutorial statements prompted the defendant's challenge. The first involved a discussion of the reliability and credibility of certain defense witnesses. The prosecutor stated that "[i]t is the weaknesses that expose this defense as nothing more than a fraud. It is nothing more than a type of trickery. . . ." *Id.* at 523, 538 N.E.2d at 509. The prosecutor made the second statement in response to contradictory testimony by the defendant and his former wife: "[i]t is all part of a shotgun defense. Throw that out and see what sticks. It is nothing more than a red herring intended to distract you from the real issues in this case." *Id.* The defendant argued plain error because the State contended that the defendant waived consideration of his claim on appeal by failing to object at trial and in a post-trial motion. *Id.* at 523-24, 538 N.E.2d at 509. *See supra* note 69 and accompanying text (text of the plain error rule).

prosecutor's statements were not "so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten deterioration of the judicial process."[89] Next, the court rejected the defendant's contention that certain statements made by the prosecutor during rebuttal of the defendant's closing argument impermissibly attempted to shift the burden of proof.[90] The court noted that defendant waived this argument because he made no objection to the remarks at trial,[91] and even if he had, although the prosecutor is not allowed to shift the burden of proof to the defense, the prosecutor is allowed to comment on the credibility of defendant's case.[92]

Finally, defendant objected to a remark about "reasonable doubt" as an impermissible attempt to minimize the state's burden of proof.[93] The court held that the statement did not reduce the State's burden of proof to a minor detail.[94] The court also rejected the defendant's contention that the combined effect of the prosecutor's statements denied defendant due process under the fourteenth amendment to the federal Constitution.[95]

2. Right to Confront the Witness

During the *Survey* period, the Illinois Supreme Court decided whether a defendant's sixth amendment right to confront witnesses testifying against him was violated when he was tried with a codefendant. In *People v. Duncan*,[96] the defendant argued that he was denied a fair trial because testimony was admitted concerning

89. *Id.* at 524, 538 N.E.2d at 509-10.

90. *Id.* at 526, 538 N.E.2d at 510. The prosecution commented after reviewing the defendant's theory of the case that "if they had a good defense couldn't they come up with something better than that?" *Id.* The prosecutor also stated: "If you examine the evidence of [defense counsel] and the type of defense they presented does it raise a reasonable doubt? No. It does just the opposite. It establishes even further the fact that he is guilty of the murder. . . . If they had anything better they would have put it on." *Id.* at 526, 538 N.E.2d at 511.

91. *Id.* at 526, 538 N.E.2d at 510 (citing People v. Weinstein, 35 Ill. 2d 467, 470, 220 N.E.2d 432, 434 (1966)).

92. *Id.* at 527, 538 N.E.2d at 511.

93. *Id.* at 528, 538 N.E.2d at 511. The prosecutor stated in part: "[l]adies and gentlemen suffice it to say it is not proof beyond all doubt, it is not proof beyond any doubt, it is proof beyond a reasonable doubt." *Id.*

94. *Id.* at 528, 538 N.E.2d at 511-12 (distinguishing People v. Starks, 116 Ill. App. 3d 384, 451 N.E.2d 1298 (1st Dist. 1983)). The court determined that the prosecutor's statement did not cross the "boundary of propriety" as it did in *Starks*. *Phillips*, 127 Ill. 2d at 528, 538 N.E.2d at 512.

95. *Id.* at 528-29, 538 N.E.2d at 512.

96. 124 Ill. 2d 400, 530 N.E.2d 423 (1988). *See also infra* Carey and Maley, *Evidence*, 21 LOY. U. CHI. L.J. 391, 398 (1990) (additional discussion of *Duncan*).

statements made by his codefendant. The codefendant did not testify and thus was not subject to cross-examination regarding the statements.[97] Two witnesses, however, testified regarding the codefendant's out-of-court statements and implicated both defendants.[98]

In a previous decision in *Duncan*, the court had relied on *Bruton v. United States*[99] to conclude that the first witness' statements so inculpated the defendant that they violated his right to confrontation and that fundamental fairness required a new trial.[100] *Bruton* was limited by the United States Supreme Court's decision in *Richardson v. Marsh*,[101] which held that if use of the nontestifying codefendant's confession in a joint trial is redacted to eliminate anonymous references to the defendant and the jury receives a limiting instruction not to use the confession against the defendant, the right of confrontation is not violated.

In holding improper the admission of the nontestifying codefendant's statements, the Illinois Supreme Court concluded that *Duncan* was distinguishable from *Richardson*.[102] First, in *Duncan* the statement attributed to the codefendant was not redacted. Second, the references that the codefendant made to the defendant were not anonymous.[103] Third, the jury instructions failed to

97. 124 Ill. 2d at 402, 530 N.E.2d at 424. *Duncan* was on remand from the United States Supreme Court. The Illinois Supreme Court had previously reversed the defendant's convictions and remanded for a new trial. The Supreme Court vacated the Illinois Supreme Court's decision and remanded it for further consideration in light of Richardson v. Marsh, 481 U.S. 200 (1987).

98. *Duncan*, 124 Ill. 2d at 403, 530 N.E.2d at 425. The first witness testified that the codefendant named the murder victim and "Bill" (defendant's first name is William) as two people who stood in the way of taking over the local drug traffic. *Id.* From the testimony, the State theorized that the codefendant made a deal with the defendant, and together they murdered the victim and two other people. *Id.* at 404, 530 N.E.2d at 425. The second witness' testimony placed the codefendant at the crime scene. *Id.* at 405, 530 N.E.2d at 425.

99. 391 U.S. 123 (1968).

100. *Duncan*, 124 Ill. 2d at 402, 530 N.E.2d at 426 (citing Bruton v. United States, 391 U.S. 123 (1968)). In *Bruton*, the Court held that a limiting jury instruction sometimes is not an adequate substitute for the defendant's constitutional right of cross-examination. Such a situation occurs when a nontestifying codefendant's incriminating statements having doubtful credibility are introduced in a joint trial. 391 U.S. at 124-25.

101. *Duncan*, 124 Ill. 2d at 402, 530 N.E.2d at 426 (citing Richardson v. Marsh, 481 U.S. 200 (1987)).

102. *Id.* at 407, 530 N.E.2d at 427.

103. *Id.* at 408, 530 N.E.2d at 427. In *Richardson*, the testifying witness made no reference whatsoever to the defendant's existence. In *Duncan*, on the other hand, the codefendant's statement referred to "Bill." *Id.* at 409, 530 N.E.2d at 427. In addition, the codefendant in *Duncan* referred to "someone." The court concluded that this reference, along with other testimony, could lead the jury to believe that the "someone" was the defendant. *Id.*

clearly direct the jury to disregard the statements as part of the case against the defendant.[104] Finally, the court stated that the admission of extrajudicial statements at the joint trial, absent complete deletion of all references to the defendant, violated established Illinois case law and the Illinois Constitution, independent of the federal constitutional doctrine recognized in *Bruton* and *Richardson*.[105]

The sixth amendment right of confrontation issue also arose in *People v Young*.[106] The Illinois Supreme Court decided in *Young* whether the circuit court's refusal to inspect, *in camera*, summaries of a prosecution witness' pretrial oral statements deprived the defendant of the opportunity to cross-examine the witness effectively. The case arose after the prosecution conducted four pretrial interviews of a witness,[107] and the defense orally moved for disclosure of any memoranda summarizing the witness' statements.[108] The State refused to produce the notes taken during these interviews, asserting that they were not verbatim statements.[109] The defense counsel requested that the circuit court inspect these notes *in camera*.[110] The circuit court refused, relying on the prosecutor's declarations that the notes were not verbatim statements.[111]

On appeal, the supreme court held that the trial court erred by

104. 124 Ill. 2d at 411, 530 N.E.2d at 428. The limiting instruction was given much later than the testimony, and the prosecutor ignored it in closing argument. *Id.*

105. *Id.* at 414, 530 N.E.2d at 429 The court pointed to a line of Illinois cases to support its decision, including People v. Miller, 40 Ill. 2d 154, 158-159, 238 N.E.2d 407, *cert. denied*, 393 U.S. 961 (1968); People v. Clark, 17 Ill. 2d 486, 162 N.E.2d 413 (1959); People v. Johnson, 13 Ill. 2d 619, 150 N.E.2d 597 (1958); People v. Smuk, 12 Ill. 2d 360, 146 N.E.2d 32 (1957); People v. Patris, 360 Ill. 596, 196 N.E.2d 806 (1955); People v. Hodson, 406 Ill. 328, 94 N.E.2d 166 (1950); People v. Barbaro, 395 Ill. 264, 69 N.E.2d 692 (1946). The holdings in these cases are all traceable to People v. Buckminster, 274 Ill. 435, 113 N.E. 713 (1916), which reversed a conviction on the ground that a nontestifying codefendant's confession implicating the defendant was admitted into evidence, even though there was a limiting jury instruction. *Duncan*, 124 Ill. 2d at 412-413, 530 N.E.2d at 429 (citing *Buckminster*, 274 Ill. at 447-48, 113 N.E.2d at 716-17). The court noted that *Buckminster* and its progeny relied on fundamental fairness, not the sixth amendment. *Id.*

106. 128 Ill. 2d 1, 538 N.E.2d 453 (1989).

107. 128 Ill. 2d at 40, 538 N.E.2d at 468.

108. *Id.*

109. *Id.* Defendant made a request pursuant to Illinois Supreme Court Rule 412, which provides that upon written motion of defense, the State shall disclose relevant information in its possession or control, and "memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel." ILL. REV. STAT. ch. 110A, para. 412(a)(i) (1987).

110. *Young*, 128 Ill. 2d at 40-41, 538 N.E.2d at 468-69.

111. *Id.* at 41, 538 N.E.2d at 469.

relying on the prosecutor's representations.[112] The court, not the prosecutor, must determine whether memoranda contain verbatim or substantially verbatim reports summarizing a witness's oral statements.[113] The supreme court concluded, however, that the error was harmless beyond a reasonable doubt[114] because the witness' testimony was not the only evidence establishing the defendant's guilt.[115] Denial of the opportunity to use the interview notes in cross-examining the witness did not affect the reliability of the fact-finding process. Further, the defendant might have been convicted even if the court had conducted an *in camera* inspection.[116]

In *People v. Flores*,[117] the Illinois Supreme Court rejected the defendant's claim that a state witness' professed memory loss of his grand jury testimony deprived the defendant's counsel of the opportunity to cross-examine the witness effectively, thereby violating defendant's right to confront the witness.[118] Quoting the United States Supreme Court's opinion in *United States v. Owens*, the Illinois Supreme Court emphasized that "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination," not effective cross-examination itself.[119] When a witness testifies as to his current belief but cannot remember the source of his belief, the defendant's opportunity to bring out such matters as the witness' bias, lack of care or attentiveness, or the very fact of his bad memory, is sufficient to create an opportunity to cross-examine.[120]

112. *Id.*

113. *Id.*

114. *Id.* at 42-44, 538 N.E.2d at 469-70. To determine whether an error is harmless, the reviewing court should consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* at 44, 538 N.E.2d at 470 (quoting Delaware v. Van Arsdale, 475 U.S. 673, 684 (1986)).

115. *Id.* at 44-45, 538 N.E.2d at 470.

116. *Id.* at 45, 538 N.E.2d at 471. The court acknowledged, however, the notes may have contained prior statements that would have contradicted the witness' testimony. *Id.* at 45, 538 N.E.2d at 470.

117. 128 Ill. 2d 66, 538 N.E.2d 481 (1989).

118. *Id.* at 88, 538 N.E.2d at 489.

119. *Id.* at 89, 538 N.E.2d at 489 (quoting United States v. Owens, 484 U.S. 554 (1988) (emphasis in original)). In *Owens*, the Supreme Court held that the confrontation clause is not violated by the admission of testimony concerning a prior out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification. *Id.* at 555.

120. *Flores*, 128 Ill. 2d at 89, 538 N.E.2d at 489-90 (quoting *Owens*, 484 U.S. at 555).

3. Right to a Speedy Trial

In *People v. Shukovsky*,[121] the defendant, who was released on bond, filed a speedy trial demand.[122] After granting several continuances to the State, the trial court granted the defendant's motion for discharge on the ground that the State had failed to bring him to trial within 160 days.[123] The appellate court reversed reasoning that the Assistant State's Attorney's filing of a notice of appeal stayed the prosecution and deprived the circuit court of jurisdiction to discharge the defendant.[124]

The Illinois Supreme Court reversed the appellate court's holding.[125] Distinguishing cases in which the State appeals from a pretrial order,[126] the court observed that the appeal was on behalf of the Assistant State's Attorney, who had been held in contempt; therefore, the appeal was collateral and did not deprive the circuit court of jurisdiction.[127] The supreme court affirmed the trial court's holding that the defendant's statutory assurance of a speedy trial had been violated by the State's refusal to produce the materials for an *in camera* inspection.[128]

In *People v. Turner*,[129] the defendant contended that he should be released because he was not tried within 120 days, as the speedy trial statute demands.[130] The trial court denied the defendant's motion to discharge.[131] The Illinois Supreme Court affirmed,

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121. 128 Ill. 2d 210, 538 N.E.2d 444 (1988).

122. *Id.* at 228, 538 N.E.2d at 451.

123. *Id.* at 227, 538 N.E.2d at 450-51. Section 103-5(b) of the Illinois Code of Criminal Procedure provides that "[e]very person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant . . . ." ILL. REV. STAT. ch. 38, para. 103-5(b) (1985). Here, the delay was not "occasioned by the defendant." The State filed a criminal charge against the defendant for battery but later dropped it; subsequently, the State reinstated the charge. The State failed to provide the materials that the defendant requested and refused the trial court's request for an *in camera* inspection. The continuances were granted because of the prosecutor's refusal to comply with the *subpoena duces tecum*, for which he was held in contempt. 128 Ill. 2d at 227, 538 N.E.2d at 450-51. The trial court stated that although the State expressed its willingness to proceed to trial, its failure to comply with the subpoena caused the delay. *Id.*

124. *Id.*

125. *Id.* at 229, 538 N.E.2d at 451.

126. *Id.* at 228, 538 N.E.2d at 451. In such cases, the time for discharge under the speedy trial statute does not run while the appeal pends. *Id.* (citing ILL. REV. STAT. ch. 110A, para. 604(a)(4) (1987)).

127. *Id.*

128. *Id.*

129. 128 Ill. 2d 540, 539 N.E.2d 1196 (1989), *cert. denied*, 110 S. Ct. 337 (1989).

130. *Id.* at 549, 539 N.E.2d at 1198-99 (citing ILL. REV. STAT. ch. 38, para. 103-5(a) (1985)).

131. *Id.* at 553, 539 N.E.2d at 1200.

agreeing with the trial court that the defendant himself contributed to the delay.[132]

The court noted that section 103-5 is to be construed liberally to give effect to the constitutional right to a speedy trial, with each case decided on its own facts.[133] On a motion to discharge, the defendant bears the burden of establishing facts that show a statutory violation.[134] Any decision by the trial court as to the reason for the delay in bringing the defendant to trial should be sustained, absent a clear showing of abuse of discretion.[135] Here, defendant's actions justified the trial court's impression that the defendant was not ready for trial.[136] Further, the defendant expressly agreed to the trial date and had never indicated that he was ready for, or wanted, an earlier trial date.[137]

4. Substitution of Judge

Section 114-5(c) of the Criminal Code allows the State to move for substitution of the judge on the grounds of prejudice.[138] In *People v. Williams*,[139] the Illinois Supreme Court affirmed the constitutionality of this substitution provision. The defendant was arraigned for attempted murder, aggravated battery, and armed violence.[140] After the case was assigned to a judge, the State moved for substitution.[141] The sitting judge denied the State's request on the ground that section 114-5(c) violated the Illinois Constitution's separation of powers clause and it interfered with the exercise of power granted to the judiciary.[142] The supreme court reversed.[143]

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132. *Id.*

133. *Id.* at 550, 539 N.E.2d at 1199.

134. *Id.* (citing People v. Jones, 33 Ill. 2d 357, 361, 211 N.E.2d 261, 263-64 (1965)).

135. *Id.* at 555, 539 N.E.2d at 1199.

136. *Id.* at 553, 539 N.E.2d at 1200-01. The court noted that much deference should be given to the trial court's judgment when it is difficult to determine which party is responsible for the delay. *Id.* Here, the record revealed that the defendant indicated that March was a bad time for him to go to trial and that he would prefer April or May. *Id.* After the hearing, the defendant requested several continuances for a variety of reasons. *Id.*

137. *Id.* at 553, 539 N.E.2d at 1201.

138. Section 114-5(c) provides:

> [w]ithin 10 days after a cause has been placed on the trial call of a judge the state may move the court in writing for a substitution of that judge on the ground that such judge is prejudiced against the State. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion . . . .

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

139. 124 Ill. 2d 300, 307, 529 N.E.2d 558, 561 (1988).

140. *Id.* at 303, 529 N.E.2d at 559.

141. *Id.*

142. *Id.*

The defendant first argued that section 114-5(c) conflicted with Supreme Court Rule 21(b) by interfering with the right of the chief judge of each circuit to provide for the assignment of judges.[144] The court noted that the same separation of powers arguments had been made unsuccessfully with regard to section 114-5(a) of the Criminal Code, which gives the defendant a right to substitute judges on the grounds of prejudice. In *People v. Walker*,[145] the court held that section 114-5(a) did not conflict with Supreme Court Rule 21(b) because section 114-5(a) can be used only *after* the assignment of a case to a judge.[146] It thus does not interfere with the chief judge's power to assign. Similarly, the court concluded that section 114-5(c) does not impermissibly infringe on the role of the judiciary.[147] Because section 114-5(c) "only peripherally affects the role of the judiciary," it did not violate the separation of powers.[148]

Finally, the court rejected the defendant's contention that section 114-5(c) violated his due process rights.[149] The court stated that due process requires only an impartial judge, not a choice of judge.[150] When the State exercises its right to substitute a judge under section 114-5(c), the State is seeking only an impartial judge.[151] If the defendant believes that the substituted judge could not be impartial towards him, the defendant has other remedies

143. *Id.*

144. *Id.* at 306, 529 N.E.2d at 560. Rule 21(b) provides that "[t]he chief judge of each circuit may enter general orders in the exercise of his general administrative authority, including orders providing for assignment of judges, general or specialized division, and times and places of holding court." ILL. REV. STAT. ch. 110A, para. 21(b) (1987).

145. *Williams*, 124 Ill. 2d at 306, 529 N.E.2d at 560 (citing People v. Walker, 119 Ill. 2d 465, 519 N.E.2d 890 (1988)). In *Walker*, the court found section 114-5(a) of the substitution of judge statute constitutional. *Id.* Section 114-5(a) provides:

> [w]ithin 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion. The defendant may name only one judge as prejudiced, pursuant to this subsection; provided, however, that in a case in which the offense charged is a Class X felony or may be punished by death or life imprisonment, the defendant may name two judges as prejudiced.

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

146. *Williams*, 124 Ill. 2d at 307, 529 N.E.2d at 560.

147. *Id.* at 307, 529 N.E.2d at 561 (citing People v. Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1988)). In *Joseph*, the court held that the legislature may pass legislation which has a peripheral effect on a judicial administration. *Id.*

148. *Williams*, 124 Ill. 2d at 307, 529 N.E.2d at 561.

149. *Id.* at 309, 529 N.E.2d at 561.

150. *Id.*

151. *Id.*

that he may pursue.[152]

5. Jury Instructions

In *People v. Fierer*,[153] the Illinois Supreme Court examined the jury instructions regarding the burden of proof for the statutory, guilty but mentally ill ("GBMI") and not guilty by reason of insanity verdicts.[154] Although acknowledging that the seemingly conflicting nature of the two provisions makes the task of fashioning intelligible instructions difficult, the court emphasized that jury instructions in GBMI and insanity cases must reflect the burdens of proof in their corresponding statutes.[155]

A GBMI conviction requires the State to prove three distinct elements: "commission of a criminal act, noninsanity and mental illness-beyond a reasonable doubt."[156] In order for the defendant to prevail on the affirmative defense of insanity, the defendant must prove insanity by a preponderance of the evidence.[157] Thus, the defendant bears the burden of proving insanity by a preponderance of the evidence to obtain a not guilty by reason of insanity verdict; the State must prove non-insanity beyond a reasonable doubt for purposes of the GBMI verdict.[158]

In trying to reconcile these two statutes, the trial judge modified the GBMI provision by instructing the jury to return a GBMI verdict if it found by a preponderance of the evidence, rather than beyond a reasonable doubt, that the defendant was sane at the time of the offense.[159] Although the defendant did not object to the

152. *Id.* Under section 114-5(a), the defendant can make his own motion to substitute. ILL. REV. STAT. ch. 38, para. 114-5(a) (1987). *See supra* notes 145-46. Under section 114-5(d), the defendant can make his own motion to change for cause. ILL. REV. STAT. ch. 38, para. 114-5(d) (1987).

153. 124 Ill. 2d 176, 529 N.E.2d 972 (1988). *See also* Carey and Maley, *supra* note 96, at 403.

154. 124 Ill. 2d at 184, 529 N.E.2d at 975.

155. *Id.* at 191, 529 N.E.2d at 978.

156. *Id.* at 185, 529 N.E.2d at 975 (citing ILL. REV. STAT. ch. 38, para. 115-4(j) (1985)).

157. *Id.* (citing ILL. REV. STAT. ch. 38, paras. 3-2(b), 6-2(e) (1983)). Sections 3-2(b) and 6-2(e) were amended, effective January 1, 1984. Previously, the defendant had to present only evidence sufficient to raise a reasonable doubt as to his insanity; the state then was required to prove sanity beyond a reasonable doubt. *See* ILL. REV. STAT. ch. 38, paras. 3-2(b), 6-2(a) (1981); People v. Silagy, 101 Ill. 2d 147, 168, 461 N.E.2d 415, 425-26 (1984). *See infra* notes 318, 357 and accompanying text (additional discussion of *Silagy*). The burden of proof under both the GBMI and insanity statute were consistent. *Fierer*, 124 Ill. 2d at 185, 529 N.E.2d at 975.

158. *Id.*

159. *Id.* at 186, 529 N.E.2d at 975. The judge instructed the jury that it could return a GBMI verdict if it found "beyond a reasonable doubt that the defendant committed the offense . . . by a preponderance of the evidence that the defendant was sane at the time he

modified instruction at trial or in his post-trial motion, the court declined to treat the issue as waived or harmless in the interest of fundamental fairness.[160]

Holding that the GBMI verdict should be sustained, the court rejected as contrary to the GBMI statute's express language the State's assertion that the statute be interpreted as requiring proof of sanity by a preponderance, as opposed to beyond a reasonable doubt.[161] The court acknowledged the implication of the gap in the current scheme.[162] Some defendants cannot establish the affirmative defense of insanity because they have not proven insanity by a preponderance of the evidence. They also cannot be found guilty but mentally ill because the State is unable to prove the defendant's non-insanity beyond a reasonable doubt.[163] The defendant who falls into this category will be found guilty because this is the only verdict that a properly instructed jury can reach.[164] The court invited the legislature "to carefully review the interplay between these unclear and confusing statutes."[165]

6. In Absentia Proceedings

In *People v. Partee*,[166] the defendant contended that it was error to conduct the trial and sentencing hearing in his absence because the record failed to show he was advised that *in absentia* proceedings could occur as required by Section 113-4(e) of the Illinois Code of Criminal Procedure.[167]

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committed the offense . . . and beyond a reasonable doubt the defendant was mentally ill at the time he committed the offense." *Id.* This GBMI instruction conflicted with the unambiguous "beyond a reasonable doubt" language of section 115-4(j). *See* ILL. REV. STAT. ch. 38, para. 115-4(j) (1985).

160. *Fierer*, 124 Ill. 2d at 187, 529 N.E.2d at 976. The court also rejected the argument that the modification was harmless. Modification of the instruction made the GBMI verdict easier to attain and more likely to result. Because the modified GBMI instruction might have affected the outcome, it was not harmless. *Id.* In order for an error in a jury instruction to be harmless, the contending party must show that the verdict would have been the same if the proper instruction had been given. *Id.*

161. *Id.* at 188, 529 N.E.2d at 976-77.

162. *Id.*

163. *Id.* at 190, 529 N.E.2d at 977.

164. *Id.*

165. *Id.* at 191, 529 N.E.2d at 977.

166. 125 Ill. 2d 24, 530 N.E.2d 460 (1988).

167. *Id.* at 38-39, 530 N.E.2d at 466. Section 113-4(e) provides:

> If a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence.

ILL. REV. STAT. ch. 38, para. 113-4(e) (1985).

The supreme court held that such warnings were required under the statute even when the defendant flees during trial.[168] Although, as a matter of constitutional law, warnings are required if the defendant flees before trial, and not if the defendant flees during trial, this distinction is not reflected in the statutory law.[169] Statutory language indicated that the warnings are mandatory for any defendant who pleads guilty.[170]

7. Right to a Fair and Impartial Jury[171]

In *People v. Britz*,[172] the supreme court held that the trial court properly rejected the defendant's challenges for cause of veniremen who had read about his offense in a local newspaper.[173] The court stated that in order for the defendant to show that he was denied a fair trial, the pretrial "coverage must be extensive, close in proximity to the trial, and contain prejudicial and inadmissible material which would warrant a change of venue or excusing jurors for cause."[174] In *Britz*, the defendant did not make the required showing.[175] Even though the article contained some inflammatory words and a prejudicial description of the defendant, the article did not amount to "unprecedented" publicity.[176] Most significantly,

168. *Partee*, 125 Ill. 2d at 41, 530 N.E.2d at 468.

169. *Id.* at 39-40, 530 N.E.2d at 467.

170. *Id.* at 40, 530 N.E.2d at 467. In *Partee*, the court also held that a defendant who is convicted *in absentia* may appeal his conviction without first moving under section 115-4.1(e) of the Code of Criminal Procedure for a hearing to determine whether his absence from the trial was willful. *Id.* at 38, 530 N.E.2d at 463. Section 115-4.1(e) provides that a defendant who is tried and convicted *in absentia* must be granted a new trial or sentencing hearing if the defendant can establish that his absence was not his fault and was beyond his control. A hearing to determine the willfulness of the defendant's absence must be granted before a new trial or sentencing hearing is granted. ILL. REV. STAT. ch. 38, para 115-4.1(e) (1985). The court observed that the language of section 115-4.1(e) does not deprive the appellate court of jurisdiction over an absent defendant's immediate appeal, nor is there evidence that the legislature intended this result. *Partee*, 125 Ill. 2d at 30, 530 N.E.2d at 463.

171. During the *Survey* year, the court decided People *ex rel.* Daley v. Joyce, 126 Ill. 2d 209, 533 N.E.2d 873 (1988). In *Joyce*, the court held that section 115-1 of the Code of Criminal Procedure, which gave the prosecution the right to a jury trial in certain felony drug prosecutions despite a defendant's waiver of a jury trial, violates the State Constitution. *Id.* at 211, 533 N.E.2d at 873 (citing ILL. REV. STAT. ch. 38, para. 115-1 (West Supp. 1986)). *Joyce* is analyzed at length *infra* in Note, *People ex rel. Daley v. Joyce: Death Knell for the Lockstep Doctrine*, 21 LOY. U. CHI. L.J. 693 (1990).

172. 123 Ill. 2d 446, 528 N.E.2d 703 (1988), *cert. denied*, 109 S. Ct. 1100 (1989).

173. *Id.* at 470, 528 N.E.2d at 714.

174. *Id.* at 467, 528 N.E.2d at 713.

175. *Id.* at 469-70, 528 N.E.2d at 714.

176. *Id.* at 469, 528 N.E.2d at 714. Although the article was published close to trial, it did not contain prejudicial information and inadmissible evidence that would warrant a change of venue. *Id.*

the court noted that the veniremen who read the article or received another form of pretrial publicity did not remember any prejudicial material regarding the defendant's criminal record.[177]

8. Jury Selection

People v. Salazar[178] involved a case that had been transferred out of the county in which the crime was committed. Defendant alleged he was denied equal protection of the laws because the jury was not drawn from a cross-section of the transferor's community, i.e., the place of the crime's commission.[179] The court held that the Constitution does not require a jury chosen in a transferee venue to reflect a fair cross-section of the community in which the crime was committed and from where the cause was transferred.[180] Stating that the defendant had no right to choose venue, the court concluded that the trial judge did not abuse his discretion to choose the proper venue based on consideration of pretrial publicity and convenience of counsel.[181]

During the *Survey* period, the Illinois Supreme Court decided several cases similar to *Batson v. Kentucky*,[182] in which the United States Supreme Court held that a prosecutor cannot exercise peremptory challenges to exclude veniremen solely because of race.[183]

177. *Id.* at 470, 528 N.E.2d at 714. Four jurors had been exposed to pretrial publicity. Only one juror remembered reading the article that the defendant cited. This juror, however, did not form an opinion about the case from the article. *Id.* at 469, 528 N.E.2d at 714.

178. 126 Ill. 2d 424, 535 N.E.2d 766 (1988).

179. *Id.* at 432, 535 N.E.2d at 768. Trial had been transferred out of the county in which the crime had occurred. *Id.* On the date set for trial, defendant's counsel filed a motion to discharge the jury and transfer the case to another county because the percentage of Latinos and and African-Americans was smaller than in the county of the incident. The trial judge denied the motion. *Id.* at 434, 535 N.E.2d at 769.

180. *Id.* at 432, 535 N.E.2d at 768 (citing People v. Johnson, 114 Ill. 2d 170, 180-81, 449 N.E.2d 1355, 1359 (1986), *cert. denied*, 480 U.S. 951 (1987) (requiring the transferee county's venue to mirror the transferor county's population would be an impossible task)).

181. *Salazar*, 126 Ill. 2d at 434-35, 535 N.E.2d at 769. The court also concluded that the circuit court did not abuse its discretion in denying the defendant's motion. *Id.*

182. 476 U.S. 79 (1986).

183. *Id.* Under *Batson*, a criminal defendant must establish a prima facie case of discrimination by showing the following: (1) that he is a member of a cognizable racial group and that the prosecutor used peremptory challenges to remove members of the defendant's race from the venire; (2) assert the presumtpion that peremptory challenges "constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate"; (3) these facts, taken together with any other relevant circumstances, raise an inference that the prosecutor excluded the veniremen on account of their race. *Id.* at 96. Once the defendant makes this prima facie showing of discrimination, the burden shifts to the State to come forward with a neutral explanation for challenging African-American jurors. *Id.* at 97.

In *People v. Evans*,[184] the Illinois Supreme Court applied *Batson* to determine whether the criminal defendant had made a prima facie case of discrimination.[185] The African-American defendant satisfied the first element of the *Batson* prima facie case test by showing that the prosecutor exercised peremptory challenges to remove from the venire, potential African-American jurors.[186] According to the supreme court, however, the defendant failed to establish a prima facie case of discrimination.[187]

The court noted that the trial judge is in the best position to determine whether a prosecutor's use of peremptory challenges is motivated by a group bias.[188] In *Evans*, the excluded potential African-American jurors shared significant characteristics besides race.[189] In addition, this case did not involve an interracial crime, in which specific racial groups could tend to be prejudiced.[190]

In *People v. McDonald*,[191] the Illinois Supreme Court held the African-American defendants established a prima facie case that the prosecutor had unconstitutionally exercised his peremptory challenges on the basis of race.[192] The prosecutor gave several

184. 125 Ill. 2d 50, 530 N.E.2d 1360, *cert. denied*, 109 S. Ct. 3175 (1988).

185. *Id.* at 61, 530 N.E.2d at 1365.

186. *Id.* at 63, 530 N.E.2d at 1365.

187. *Id.* at 64, 530 N.E.2d at 1365 (citing *Batson*, 476 U.S. at 97). The *Batson* Court listed a variety of "relevant circumstances" that the trial court should consider when determining whether there was discrimination, including: a pattern of strikes against potential African-American jurors, the prosecutor's questions and statements during *voir dire* and in exercising challenges, the disproportionate use of peremptory challenges against African-Americans, the level of minority representation in the venire as compared to the jury, whether the excluded African-Americans were a heterogeneous group sharing race as their only common characteristic, the race of the defendant and victim, and the witnesses' race. *Evans*, at 125 Ill. 2d at 63-64, 530 N.E.2d at 1365 (citations omitted).

188. *Id.* at 66-67, 530 N.E.2d at 1366 (citing *Batson*, 476 U.S. at 97).

189. *Id.* at 65, 530 N.E.2d at 1366. The four excluded veniremen were all male and engaged in non-professional occupations or were unemployed. *Id.* Although the state also struck a female African-American venireman, the defendant was held to have waived his right to assert that she was stricken improperly because he failed to object in a timely manner. *Id.* at 61, 530 N.E.2d at 1364 (citing *Batson*, 476 U.S. at 99).

190. *Id.* at 65-66, 530 N.E.2d at 1366. The court noted, both before and after *Batson*, cases recognized a crime's racial component as an important factor in determining whether a prima facie case of discrimination has been established. *Id.* at 66, 530 N.E.2d at 1366. *See, e.g.*, *State v. Butler*, 731 S.W.2d 265, 269 (Mo. App. 1987) (susceptibility of the particular case to racial discrimination should be evaluated); *Commonwealth v. Soares*, 377 Mass. 461, 490-91, 387 N.E.2d 499, 517 (1979), *cert. denied*, 444 U.S. 881 (1979) (common group membership of the victim and majority of remaining jurors).

191. 125 Ill. 2d 182, 530 N.E.2d 1351 (1988).

192. *Id.* at 196, 530 N.E.2d at 1357. Sixteen of the eighteen peremptory challenges were used to exclude prospective African-American jurors. *Id.* The court found that the sixteen African-American veniremen shared race as their only common characteristic. *Id.* at 197, 530 N.E.2d at 1357.

race-neutral reasons for his challenges.[193] In order for these reasons to be valid, however, the prosecutor must demonstrate that the excluded veniremen exhibit a bias that is related to the case at trial, rather than to their race.[194] The supreme court agreed with the trial court that the prosecutor's reasons for the exclusion of the African-American veniremen were not credible.[195] Thus, the court concluded that there was a violation of the *Batson* rule in the jury selection.[196]

193. *Id.* at 192, 530 N.E.2d at 1358. One of the veniremen was a nurse, and the prosecutor stated that he felt a nurse would rely on her specialized knowledge if there was medical testimony. *Id.* at 192-93, 530 N.E.2d at 1355. The prosecutor also struck two African-American prospective jurors because their wives were teachers. He argued that teachers or teachers' spouses would not be good jurors because they would rely on their own reasoning, rather than arguments presented by counsel. *Id.* at 193, 530 N.E.2d at 1355-56. He also struck a young single male, arguing that young single males are the worst jurors for a rape case because they cannot appreciate the gravity of the offense. *Id.* at 193, 530 N.E.2d at 1356.

194. *Id.* at 198, 530 N.E.2d at 1358 (citing *Batson*, 476 U.S. at 97).

195. *Id.* at 200, 530 N.E.2d at 1359. The trial court noted that the prosecutor's reasons were inconsistent. For instance, the prosecutor excluded an African-American nurse from the jury but did not apply the same reason to exclude a white nurse's assistant. *Id.* Similarly, the prosecutor excluded a young, African-American, single male, but he accepted a white, eighteen-year-old single male. *Id.* at 199, 530 N.E.2d at 1359.

196. *Id.* at 200, 530 N.E.2d at 1359. During the *Survey* period, the supreme court decided other cases in *Batson's* wake, including People v. Young, 128 Ill. 2d 1, 538 N.E.2d 453 (1989); People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107 (1989), *cert. granted and vacated*, 110 S. Ct. 1170, *reh'g denied*, 58 U.S.L.W. 3659 (1990); People v. Mahaffey, 128 Ill. 2d 388, 539 N.E.2d 1172, *cert. denied*, 110 S. Ct. 203 (1989); and People v. Harris, 129 Ill. 2d 123, 544 N.E.2d 357 (1989), *cert. denied*, 110 S. Ct. 1323 (1990). In *Young*, the defendant established a prima facie case of discrimination, but the State provided neutral explanations for challenging the African-American jurors. 128 Ill. 2d at 24, 538 N.E.2d at 459. The prosecutor stated that he challenged the jurors who lived in neighborhoods where there was gang activity because the murder in this case was gang-related. *Id.* at 22-24, 538 N.E.2d at 458-59. In *Mack*, the supreme court upheld the trial court's determination that the State's explanation for challenging African-American jurors was race-neutral. 128 Ill. 2d at 244, 538 N.E.2d at 1113. In *Mahaffey*, the supreme court agreed with the trial court's determination that the defendant failed to establish a prima facie case of discrimination. 128 Ill. 2d at 413, 539 N.E.2d at 1184. The *Mahaffey* defendant argued that he established a prima facie case because the state excluded seven African-American veniremen who remained after challenges for cause. The supreme court responded that numbers are not enough to establish discrimination. *Id.* at 414, 539 N.E.2d at 1184. In *Harris*, the court upheld a trial court finding that a defendant had established a prima facie case of discrimination when the state challenged fifteen veniremen whose only common characteristic was their race. 129 Ill. 2d at 140, 544 N.E.2d at 379.

E. Right to Counsel

1. Effective Assistance of Counsel

In *People v. Jimerson*,[197] the defendant contended that he was denied effective assistance of counsel because his attorney did not impeach a critical state witness with her prior inconsistent statements.[198] The defendant also contended that his attorney should have offered the testimony as substantive evidence.[199] The court applied the two-part standard set forth in *Strickland v. Washington* to assess counsel's performance.[200] Under *Strickland*, the defendant must prove that counsel's performance was deficient and that such deficiency deprived the defendant of a fair trial.[201] The court noted that an attorney's strategic choices, made after thorough investigation of fact and law, are essentially unchallengeable.[202]

The court characterized the defendant's attorney's use of only one impeaching statement as trial strategy.[203] Efforts to impeach the witness further may have backfired and led the jury to believe that now she was telling the truth because the previous statements were so unbelievable.[204] The court concluded that it was quite plausible for counsel to decide that further attempts to impeach the

197. 127 Ill. 2d 12, 535 N.E.2d 889 (1989). *See also infra* at notes 201, 295-303 and accompanying text (for further discussion of *Jimerson*).

198. *Id.* at 31, 535 N.E.2d at 897.

199. *Id.*

200. *Id.* at 32, 535 N.E.2d at 897-98 (citing Strickland v. Washington, 466 U.S. 668 (1984)). Illinois adopted *Strickland* in People v. Albanese, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1255-56 (1984).

201. *Jimerson*, 127 Ill. 2d at 32, 535 N.E.2d at 897-98 (citing *Strickland*, 466 U.S. at 687).

202. *Id.* at 33, 535 N.E.2d at 898. The court also applied the *Strickland* standard to determine the effectiveness of counsel in People v. Bryant, 128 Ill. 2d 448, 539 N.E,2d 1221 (1989). There, the defendant contended that his public defender was incompetent because she failed to read the police report and, as a result, she did not move to quash the arrest or suppress admissions revealed in the report. *Id.* at 458, 539 N.E.2d at 1226. The defendant was arrested for stealing a motorcycle. The defendant told the arresting officers: "[w]e saw it sitting there, so we took it." *Id.* at 453, 539 N.E.2d at 1223. The public defender explained that she made a strategic decision not to move to suppress statements because the defendant assured her that he did not make the statements to the police. *Id.* at 459, 539 N.E.2d at 1226. The court stated, "[i]t is axiomatic that a criminal defendant cannot state a falsehood to his attorney and later claim that his attorney's reliance on the falsehood resulted in ineffective assistance of counsel." *Id.* at 459, 539 N.E.2d at 1226 (citing People v. Green, 36 Ill. 2d 349, 351, 223 N.E.2d 101, 103 (1967)). The court concluded that it was not ineffective representation for the public defender to rely on her client's assurances rather than the police report in planning her trial strategy. *Id.*

203. *Jimerson*, 127 Ill. 2d at 33-34, 535 N.E.2d at 898.

204. *Id.* In her earlier testimony the witness maintained that she knew nothing about the offenses in this case. She said her original statements inculpating herself and others were lies. *Id.*

witness would be futile.[205] The court also ruled that counsel's failure to make substantive use of any of the witness's prior inconsistent statements did not render the representation deficient.[206] Further, under *Strickland*'s second prong, even if counsel were deficient, the defendant was not prejudiced.[207] The defendant failed to show that the substantive and impeachment value of the witness's testimony was so great that its inclusion would have altered the trial's outcome.[208]

In *People v. Caballero*,[209] the court applied the *Strickland* standard to determine whether the defendant's allegation that trial counsel's performance at the capital sentencing hearing was so constitutionally deficient as to warrant an evidentiary hearing.[210] When applied to death sentencing hearings, *Strickland* requires that the defendant show that his attorney's performance, judged by prevailing professional norms, did not constitute reasonably effective assistance. Defendant must also show a reasonable probability that if the errors were not made, the sentence, after balancing the relevant mitigating and aggravating factors, would not have imposed the death penalty.[211]

The defendant had argued that his counsel was incompetent in failing to call certain witnesses to provide mitigation testimony.[212] The defendant established by affidavits that the attorney failed to introduce the mitigating testimony of several potential witnesses solely because they did not oppose the death penalty.[213] The court stated that the counsel's action raised a serious question as to his competence.[214] The counsel's incompetence also was demonstrated

205. *Id.* at 34, 535 N.E.2d at 898.

206. *Id.* The court reasoned that substantive use of the statement would not have been more beneficial to the defendant that its use as impeachment. *Id.*

207. *Id. Cf.* People v. Pegram, 124 Ill. 2d 166, 529 N.E.2d 506 (1989). Applying the *Strickland* standard, the court held that defendant received ineffective assistance of counsel becuase his lawyer failed to tender an instruction on the defense of compulsion and the prosecution's burden of proof for that defense. *Id.* at 174, 529 N.E.2d at 509. The defendant testified that he was forced at gunpoint to assist the robbers. *Id.* at 169, 529 N.E.2d at 507. The court held that this omission so prejudiced the defense as to deny him his right to a fair trial. *Id.* at 174, 529 N.E.2d at 509.

208. *Jimerson*, 127 Ill. 2d at 35, 535 N.E.2d at 899.

209. 126 Ill. 2d 248, 533 N.E.2d 1089 (1989).

210. *Id.* at 274, 533 N.E.2d at 1098.

211. *Id.* (citing *Strickland*, 466 U.S. 668 (1984)).

212. *Id.* at 273-74, 533 N.E.2d at 1098.

213. *Id.* at 277, 533 N.E.2d at 1099.

214. *Id.* The court noted that a mitigating witness' opinion of the death penalty is irrelevant at a death penalty hearing. In addition, the court stated that a witness who supported the death penalty in all cases would be more credible than a witness who opposed the death penalty in all cases. *Id.*

by his failure to investigate mitigating evidence until after the defendant was convicted.[215] The court concluded that there was a reasonable probability that the sentencing hearing's outcome would have been different if the witnesses were called.[216] Thus, the court granted an evidentiary hearing to determine whether the defendant's counsel provided him with effective assistance.[217]

In *People v. Owens*,[218] the Illinois Supreme Court addressed whether the trial court erred in dismissing the defendant's post-conviction petition without an evidentiary hearing on grounds that the defendant waived the issue of ineffectiveness of counsel by failing to raise it on direct appeal.[219] Although recognizing that the issue of a trial counsel's competence is generally waived when the defendant's appellate counsel fails to raise the issue on direct appeal, the supreme court relaxed the waiver rule where, as here, the facts relating to the issue of incompetency did not appear on the face of the record.[220] Addressing the merits of the defendant's

215. *Id.* at 278, 533 N.E.2d at 1100. The court noted that other courts have held a similar failure to present mitigation testimony to fall below professional standards. *Id.* at 278-79, 533 N.E.2d at 1100. *See* Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983); Johnson v. Kemp, 615 F. Supp. 355 (S.D Ga. 1985), *aff'd*, 781 F.2d 1482 (11th Cir. 1986).

216. *Caballero*, 126 Ill. 2d at 282, 533 N.E.2d at 1102.

217. *Id.* The defendant also argued that his appellate counsel was incompetent because he argued frivolous issues instead of meritorious ones, failed to assert the trial counsel's incompetence and neglected to raise the issue of prosecutorial misconduct. *Id.* at 269, 533 N.E.2d at 1096. The court applied the *Strickland* standard to determine whether the defendant had effective assistance of appellate counsel and ruled that the errors did not warrant reversal of the defendant's conviction. *Id.*

218. 129 Ill. 2d 303, 544 N.E.2d 276 (1989).

219. *Id.* at 307-08, 544 N.E.2d at 277.

220. *Id.* at 308, 544 N.E.2d at 277. The record did not reflect the mitigation evidence that was available to the defense counsel on direct appeal. *Id.* at 308, 544 N.E.2d at 277-78. Also, the defendant contended that the Illinois Supreme Court may consider procedurally defaulted claims in post-conviction proceedings under the plain error rule. *Id.* at 316, 544 N.E.2d at 281. *See supra* note 69 and accompanying text (discussion of plain error rule). The supreme court, however, rejected the defendant's argument. 129 Ill. 2d at 316, 544 N.E.2d at 281 (citing People v. Free, 122 Ill. 2d 367, 522 N.E.2d 1184), *cert. denied*, 109 S. Ct. 190 (1988)). In *Free*, the court held that the plain error rule may not be invoked when a defendant collaterally attacks his conviction or sentence under the Post-Conviction Hearing Act. 122 Ill. 2d at 377-78, 522 N.E.2d at 1188. The Post-Conviction Hearing Act allows "[a]ny 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 (1987). The *Owens* court concluded that *Free* applies to procedurally defaulted claims regardless of whether the claims are raised in an original or amended post-conviction petition. *Owens*, 129 Ill. 2d at 316, 544 N.E.2d at 281. Further, the court found that the defendant could not show, even if his claim of a failure to instruct properly was valid, that the challenged jury instruction resulted in such prejudice that under fundamental fairness he was entitled to retrial. *Id.* at 317-18, 544 N.E.2d at 282.

claim under the *Strickland* standard, the court rejected the defendant's argument that his counsel was ineffective.[221] The court concluded that the defendant's trial counsel did not act unreasonably in failing to call his father, girlfriend, and girlfriend's mother to testify at his sentencing hearing.[222] The court reasoned that the witnesses were vulnerable because as family members and close friends, their testimony may have been discounted.[223] In addition, the court stated that excluding the testimony was part of the attorney's overall strategy.[224]

2. Conflict of Interest

In *People v. Flores*,[225] the defendant contended that he was denied his sixth amendment right to counsel because his attorney also represented one of the state's witnesses.[226] The defendant argued that the attorney's dual representation raised a per se conflict of interest that exists when " 'the professional relationship between the attorney and the witness is contemporaneous with counsel's representation of the defendant.' "[227]

The Illinois Supreme Court ruled that the defendant failed to show a per se conflict of interest.[228] Although the attorney had previously represented the State's witness, he did not represent the witness at the time of the defendant's trial or concerning the charged offense prior to the defendant's trial.[229] Because a per se conflict did not exist, the defendant had the burden of showing an actual conflict and demonstrating prejudice.[230] Moreover, although the defendant asserted that he was prejudiced because his counsel did not effectively cross-examine the witness for fear of revealing confidential information obtaining during the former attor-

221. *Owens*, 129 Ill. 2d at 312, 544 N.E.2d at 278.
222. *Id.* at 310-12, 544 N.E.2d at 278-79.
223. *Id.* at 312, 544 N.E.2d at 279.
224. *Id.*
225. 128 Ill. 2d 66, 538 N.E.2d 481 (1989).
226. *Id.* at 82, 538 N.E.2d at 486.
227. *Id.* at 83, 538 N.E.2d at 486 (quoting *Free*, 112 Ill. 2d at 168, 492 N.E.2d at 1275). *See also* People v. Robinson, 79 Ill. 2d 147, 161, 402 N.E.2d 157, 164 (1979); People v. Strohl, 118 Ill. App. 3d 1084, 1092, 456 N.E.2d 276, 280 (4th Dist. 1983). When a per se conflict of interest occurs, the defendant need not show that he was prejudiced. *Flores*, 128 Ill. 2d at 83, 538 N.E.2d at 486 (citing People v. Washington, 101 Ill. 2d 104, 110, 461 N.E.2d 393, 396 (1984)).
228. *Flores*, 128 Ill. 2d at 83, 538 N.E.2d at 487.
229. *Id.*
230. *Id.* at 84, 538 N.E.2d at 487 (citing *Free*, 112 Ill. 2d at 169, 492 N.E.2d at 1275 (in order to show an actual conflict, the defendant must show that, but for the attorney's professional shortcomings due to his relationship with the witness, the outcome of the proceedings would have been different)).

ney-client relationship,[231] the defendant failed to show that counsel possessed information obtained from the witness that might have hampered his cross-examination of the witness. The defendant also failed to demonstrate that his counsel's cross-examination was deficient.[232]

3. When the Right to Counsel Attaches

In *People v. Clankie*,[233] the Illinois Supreme Court examined the sixth amendment implications of surreptitiously using a government informant to obtain incriminating statements from a defendant, after the defendant already had been charged with closely related offenses.[234] The court concluded that, under the circumstances, the State's use of the government informant violated the defendant's sixth amendment right to counsel.[235]

At the defendant's first trial, a defense witness offered testimony that exculpated the defendant.[236] After the first trial, the witness told the police that she lied while on the stand.[237] She agreed to cooperate with the police in a continuing investigation of the crimes.[238] Pursuant to a warrant, the witness had a wiretap device during a meeting with the defendant.[239] She told the defendant that she wanted to rehearse her testimony for the second trial, but she actually tried to elicit incriminating statements from the defendant.[240] The defendant implicated himself in a fourth burglary and theft.[241] At the second trial, the State brought a fourth burglary count based on information on the tapes.[242]

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231. *Flores*, 128 Ill. 2d at 84, 538 N.E.2d at 487.

232. *Id.* at 85, 538 N.E.2d at 487.

233. 124 Ill. 2d 456, 530 N.E.2d 448 (1988).

234. *Id.* at 458, 530 N.E.2d at 449.

235. *Id.* at 466, 530 N.E.2d at 453.

236. *Id.* at 458-59, 530 N.E.2d at 449. At the first trial, the defendant was found guilty of two residential burglary counts. *Id.* at 457, 530 N.E.2d at 449. The defendant was granted a new trial because it was determined that his attorney had a conflict of interest. *Id.*

237. *Id.* at 459, 530 N.E.2d at 449-50.

238. *Id.* at 459, 530 N.E.2d at 450.

239. *Id.*

240. *Id.* The witness was trying to get the defendant to admit that he asked her to lie at the first trial. *Id.*

241. *Id.* The defendant told the witness about a burglary and theft on June 27, 1984. *Id.* The first trial regarded burglaries and thefts that occurred on June 11, 13 and 14, 1984. *Id.* at 458, 530 N.E.2d at 449. The defendant described how he gained entry to the homes and the specific items taken from the homes. *Id.* at 459, 530 N.E.2d at 450.

242. *Id.* at 459, 530 N.E.2d at 450. The defendant argued that these tapes were obtained in violation of his sixth amendment right to counsel. *Id.* at 460, 530 N.E.2d at 450. The State conceded that with respect to the pending charges the tapes were inadmissible because the defendant's right to counsel attached at the time of the taping. *Id.* It

Relying on the United States Supreme Court's decision in *Maine v. Moulton*,[243] the Illinois Supreme Court held that the fourth offense was sufficiently related to the previously charged burglaries and thefts so that the use of the surreptitiously obtained recorded statements violated the defendant's sixth amendment right to counsel, even though he had not been charged with that specific offense when the statements were made.[244] The court reasoned that the sixth amendment right to counsel could be deemed to have attached to the uncharged offense at the time the defendant was formally charged and that it continued during the State's knowing use of the wiretap.[245]

F. Sentencing Factors

1. Modification of Sentence

In *People v. Bainter*,[246] the Illinois Supreme Court consolidated two appeals to determine whether sections 5-8-4(a) and 5-8-1(f) of the Unified Code of Corrections violated the Illinois Constitution's separation of powers clause.[247] In one case, the appellate court had held the statutes were an impermissible attempt by the legislature to revest the circuit courts with jurisdiction over final judgments in criminal cases.[248] Reversing the lower court's findings, the Illinois Supreme Court upheld the constitutionality of these provisions.

In addition, one defendant moved pursuant to section 5-8-4(a)

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argued, however, that the taped statement could be used against the defendant with respect to the fourth burglary and theft. *Id.*

243. 474 U.S. 159 (1985).

244. *Clankie*, 124 Ill. 2d at 465-66, 530 N.E.2d at 452-53.

245. *Id.* at 463, 530 N.E.2d at 452. The court failed to define any parameters for this rule's application. Consequently, the relationship that is necessary between the charge prior to the elicitation of the challenged evidence and the charge subsequent to such elicitation is unclear. *Id.*

246. 126 Ill. 2d 292, 533 N.E.2d 1066 (1989).

247. The purpose of the Code is to prescribe uniform sentencing, recognize individual differences among offenders, and prevent arbitrary or oppressive treatment. *Id.* at 305, 533 N.E.2d at 1071. Section 5-8-4(a) grants the circuit court power to allow a defendant to serve concurrently a term of imprisonment by another state or by a federal district court and an Illinois circuit sentence. ILL. REV. STAT. ch. 38, para 1005-8-4(a) (1985). Section 5-8-1(f) provides in part that if a defendant has a previous and unexpired sentence of imprisonment and is subsequently sentenced to a term of imprisonment by another state or by any federal district court, the defendant may apply to the court that imposed the sentence to have his Illinois sentence reduced. Additionally, the circuit court can order that any time served on the sentence imposed by the other state or federal court be credited to the Illinois sentence. ILL. REV. STAT. ch. 38, para. 1005-8-1(f) (1985).

248. *People v. Bainter*, 154 Ill. App. 3d 1026, 1029, 507 N.E.2d 1309, 1311 (5th Dist. 1987).

that his State sentence be modified to run concurrently with his federal sentence.[249] The circuit court denied the defendant's request.[250] On appeal, the appellate court ruled that the portion of section 5-8-4(a) allowing a defendant to seek modification of a state court's previoulsy imposed sentence was an unconstitutional legislative attempt to revest the circuit courts with jurisdiction over final judgments.[251]

The Illinois Supreme Court concluded that section 5-8-4(a)'s thirty-day period following final judgment, in which a circuit court retains jurisdiction to modify a sentence, is not a constitutional mandate; therefore, the legislature can alter it.[252] The court rejected the lower court's conclusion that the provision was invalid under the separation of powers clause as an encroachment upon the judiciary's inherent powers.[253] Observing that the legislature has revested the circuit courts with jurisdiction over otherwise final judgments in other instances, the court concluded that such provisions demonstrate a considered judgment by the legislature "that special circumstances may arise in which the interests of finality are lessened and the circuit court should be revested with the jurisdiction over a previously determined matter."[254]

The second case decided in *Bainter* involved a section 5-8-1(f) motion.[255] The Illinois Supreme Court upheld the constitutionality of that provision using the same reasoning with which it upheld the

249. 126 Ill. 2d at 296, 533 N.E.2d at 1067.

250. *Id.* at 296-97, 533 N.E.2d at 1067.

251. *Id.* at 297, 533 N.E.2d at 1067.

252. *Id.* at 304, 533 N.E.2d at 1070. This rule is now expressed in section 5-8-1(c) of the Unified Code of Corrections. *See* ILL. REV. STAT. ch. 38, para. 1005-8-1(c) (1985).

253. *Bainter*, 126 Ill. 2d at 305, 533 N.E.2d at 1071.

254. *Id. See, e.g.*, ILL. REV. STAT. ch. 37, para. 705-11(1) (1985) (allowing the circuit court to terminate wardship of a juvenile at any time); ILL. REV. STAT. ch. 38, para. 1005-6-2(c) (1985) (allowing circuit court to terminate the defendant's probation or conditional discharge at any time); *Id.* paras. 1005-7-2, 1005-7-7 (1985) (allowing the circuit court to revoke sentence of periodic imprisonment at any time; circuit court retains jurisdiction over the defendant and may reduce sentence); ILL. REV. STAT. ch. 40, para. 510 (1985) (allowing post-judgment modifications of maintenance and support orders in dissolution of marriage proceedings). *Bainter*, 126 Ill. 2d at 304, 533 N.E.2d at 1071.

255. The second consolidated case involved a defendant who was sentenced by a federal district court to serve a term concurrently with a previously imposed state sentence and who also was sentenced by a state court to an additional sentence to be served concurrently with the federal sentence and the prior state sentence. *Id.* at 298, 533 N.E.2d at 1068. After serving the federal term, the defendant still had time remaining on his Illinois sentence. *Id.* The defendant's attorney filed a motion pursuant to section 5-8-1(f) of the Unified Code of Corrections asking that the defendant's Illinois sentences be commuted to time served in federal prison. *Id.* at 299, 533 N.E.2d at 1068. The circuit court held that it lacked authority to modify or commute the state court sentence and that section 5-8-1(f) was unconstitutional. *Id.*

constitutionality of section 5-8-4(a).[256]

In *People v. O'Neal*,[257] the Illinois Supreme Court reviewed the appellate court's decision to modify the defendant's sentence from consecutive to concurrent terms.[258] The trial court sentenced the defendant to forty years' imprisonment for murder to run consecutively with separate terms for rape and aggravated kidnapping.[259] The appellate court modified the prison terms to run concurrently rather than consecutively, basing its decision on the defendant's youth, family history and lack of significant past criminal behavior.[260] The supreme court held that the appellate court did not err in modifying the trial court's imposition of sentences from consecutive to concurrent terms.[261]

The State contended that the appellate court failed to find an abuse of discretion on the part of the trial court; therefore, the sentence's alteration was improper.[262] The supreme court disagreed.[263] Although stating that the appellate court should have set forth the standard of review in its order, the supreme court concluded that the appellate court implicitly held that the imposition of consecutive sentences was an abuse of discretion and that this did not exceed its authority.[264] The court noted that the mitigating factors considered in sentencing indicated that a consecutive term of imprisonment was not warranted.[265]

People v. Young[266] presented the Illinois Supreme Court with an issue involving the construction of section 5-8-2(a)[267] of the Unified

256. *Id.*

257. 125 Ill. 2d 291, 531 N.E.2d 366 (1988).

258. *Id.* at 294, 531 N.E.2d at 367.

259. *Id.* at 296, 531 N.E.2d at 368. The defendant was sentenced to twenty years for rape and fifteen years for aggravated kidnapping. *Id.* at 294, 531 N.E.2d at 366.

260. *Id.* at 296-97, 533 N.E.2d at 368.

261. *Id.* at 301, 531 N.E.2d at 370.

262. *Id.* at 297, 531 N.E.2d at 368. Under Illinois Supreme Court Rule 615(b), reviewing courts have the power and authority to reduce a sentence imposed by the trial court only if the record discloses that the trial court abused its discretion. ILL. REV. STAT. ch. 110A, para. 615(b)(4) (1987).

263. 125 Ill. 2d at 301, 531 N.E.2d at 370.

264. *Id.* at 299-300, 531 N.E.2d at 369.

265. *Id.* at 301, 531 N.E.2d at 370. The court noted that parole or other release provisions would help the defendant find his way back to the community and better preserve the purpose of the Unified Code of Corrections. *Id.*

266. 124 Ill. 2d 147, 529 N.E.2d 497 (1988).

267. *Id.* at 166, 529 N.E.2d at 506. Section 5-8-2(a) of The Unified Code of Corrections provides:

> A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present.

Code of Corrections. Defendant was convicted of murder and armed robbery and sentenced to natural life imprisonment because the murder was committed during the course of a felony. He received an extended sixty-year term for the armed robbery because it was accompanied by exceptionally brutal or heinous behavior. An extended-term sentence can be given only for the class of the most serious offense for which the defendant is convicted.[268] The defendant claimed that because murder is the most serious felony in Illinois and in a separate class from other felonies, his conviction for armed robbery was by statutory definition a less serious offense for which he could not receive an extended-term sentence.[269] The State argued that the extended-term statute applies only to a sentence for a fixed term of years.[270] A natural life sentence being

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Where the judge finds that such factors were present, he may sentence an offender to the following:

(1) for murder, a term shall be not less than 40 years and not more than 80 years;

(2) for a Class X felony, a term shall not be less than 30 years and not more than 60 years . . . .

ILL. REV. STAT. ch. 38, para. 1005-8-2(a) (1981). This section was amended effective January 1, 1988. Section 5-8-1 provides in part:

(a) A sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for murder, (a) a term shall be not less than 20 years and not more than 40 years, or (b) if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment, or (c) if the defendant has previously been convicted of murder under any state or federal law or is found guilty of murdering more than one victim, the court shall sentence the defendant to a term of natural life imprisonment.

ILL. REV. STAT. ch. 38, para. 1005-8-1 (1981). The extended-term sentence provided by section 5-8-2(a) for murder is not less than forty years and not more than eighty years, less severe than a natural life sentence under section 5-8-1. It is impossible, therefore, when aggravating factors are present, to impose an extended-term sentence in excess of the maximum sentenced authorized in section 5-8-1. *Young*, 124 Ill. 2d at 164-65, 529 N.E.2d at 505.

268. *Id.* at 160, 529 N.E.2d at 503 (citing People v. Jordan, 103 Ill. 2d 192, 469 N.E.2d 569 (1984)).

269. *Id.*

270. *Id.* at 160-62, 529 N.E.2d at 503. The State relied on People v. Neal, 111 Ill. 2d 180, 489 N.E.2d 845 (1985), *cert. denied*, 476 U.S. 1165 (1986). In *Neal*, the defendant was sentenced to death and an extended-term sentence for armed robbery. *Neal*, 111 Ill. 2d at 204, 489 N.E.2d at 855. The court held that the extended term sentence was proper because the statute authorizing extended terms refers to the maximum sentences authorized by section 5-8-1. The section refers to *terms of imprisonment*, not capital sentences; therefore, the provision for an extended term of imprisonment is not applicable to a death sentence. *Id.*

indeterminate is not a fixed-term sentence;[271] therefore, the extended-term statute could apply to the armed robbery conviction.[272]

The supreme court determined that the authorization in section 5-8-2 to impose an extended-term sentence does not apply to murder convictions for which a natural life imprisonment sentence has been imposed under section 5-8-1. Rather, the extended-term statute applies only when a term-of-years sentence is imposed under section 5-8-1.[273] Accordingly, the sixty-year sentence for armed robbery did not violate the extended-term provision of the Code.[274]

In *People v. Phillips*,[275] the supreme court examined whether the imposition of the defendant's death sentence was based on an impermissible double enhancement.[276] Section 9-1(b)(6)(c) of the Criminal Code allows a defendant to be sentenced to death if an individual was killed in the course of an aggravated kidnapping.[277] The defendant contended that because the court used the same facts to establish both the aggravated kidnapping and the murder, the court could find the defendant guilty of only one of these offenses.[278] Rejecting defendant's argument, the court concluded that the aggravated kidnapping could be established by evidence other than the causes of death.[279] Thus, the court concluded that the trial court did not impose the death penalty under an impermissible double enhancement.[280]

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271. *Young*, 124 Ill. 2d at 160-61, 529 N.E.2d at 503.

272. *Id.* at 161, 529 N.E.2d at 503. The State pointed out that the aggravating factors that support extended-term sentences are found in section 5-5-3.2 of the Uniform Code of Corrections, whereas the aggravating factors involved in natural life sentences are found in section 9-1(b) of the Criminal Code. *Id.* at 161, 529 N.E.2d at 503.

273. *Id.* at 165, 529 N.E.2d at 505.

274. *Id.* at 165-66, 529 N.E.2d at 505.

275. 127 Ill. 2d 499, 538 N.E.2d 500 (1989).

276. *Id.* at 539, 538 N.E.2d at 516. The defendant contended that double enhancement occurred when the acts that formed the basis of the murder charge were the same acts that already enhanced the crime of kidnapping to aggravated kidnapping. *Id.* at 538, 538 N.E.2d at 516.

277. *Id.* at 539, 538 N.E.2d at 517. The section permits a death sentence if the murder was committed in the course of another felony. ILL. REV. STAT. ch. 38, para. 9-1(b)(6)(c) (1981).

278. *Phillips*, 127 Ill. 2d at 539, 538 N.E.2d at 517.

279. *Id.* at 540, 538 N.E.2d at 517. The record indicated that at the time of abduction, the victim was choked until unconscious and put into the trunk of a car. In addition, her body showed signs of being tied up. Each of these facts would have been sufficient to find aggravated kidnapping, independent of the actions causing death. *Id.*

280. *Id.* at 541, 538 N.E.2d at 518.

2. Admissible Evidence

In *People v. Turner*,[281] the Illinois Supreme Court held that it is constitutionally permissible to introduce a victim impact statement[282] at a hearing for non-capital offenses.[283] The defendant relied on *Booth v. Maryland*,[284] in which the United States Supreme Court held that introduction of a victim impact statement violated the eighth amendment to the federal Constitution when the imposition of the death penalty was at issue.[285] Noting that the *Booth* holding was limited explicitly to capital cases, the *Turner* court refused to extend it to non-capital sentencing hearings.[286]

In *People v. Brisbon*,[287] the defendant contended that his death sentence should have been be reversed because the trial judge had erroneously allowed testimony at the sentencing hearing from a prison official, regarding the defendant's conduct while in prison.[288] The defendant argued that evidence he participated in a prison uprising constituted impermissible evidence of a collateral crime, but the court stated that the rule regarding collateral crimes was inapplicable.[289] The court observed that any reliable or relevant evidence concerning aggravating or mitigating factors may be admitted at the sentencing hearing regardless of its inadmissibility under the rules governing the admission of similar evidence at

281. 128 Ill. 2d 540, 539 N.E.2d 1196, *cert. denied*, 110 S. Ct. 337 (1989).

282. A victim impact statement describes the victim's personal characteristics and the crime's emotional impact on the victim's family.

283. *Turner*, 128 Ill. 2d at 578, 539 N.E.2d at 1213. In addition to murder, the defendant was convicted of one count of aggravated criminal sexual assault, criminal sexual assault, aggravated kidnapping, kidnapping, unlawful restraint, and robbery. *Id.* at 548, 539 N.E.2d at 1198.

284. 482 U.S. 496 (1987).

285. *Turner*, 128 Ill. 2d at 578, 539 N.E.2d at 1213 (citing *Booth*, 482 U.S. 496).

286. *Id.* In *Booth*, the Supreme Court stated that "[w]hile the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing." *Booth*, 482 U.S. at 504. In addition, the Supreme Court stated that although it disapproved of the admission of victim impact statements at the sentencing phase of a capital case, it necessarily did not preclude such testimony from non-capital criminal trials. *Id.* at 507 n.10.

287. 129 Ill. 2d 200, 544 N.E.2d 297 (1989), *cert. denied*, 110 S. Ct. 1796 (1990). *See also supra* notes 76-81 and accompanying text.

288. 129 Ill. 2d at 216, 544 N.E.2d at 304.

289. *Id.* at 218, 544 N.E.2d at 305. In People v. Lindgren, 79 Ill. 2d 129, 137, 402 N.E.2d 238, 242 (1980), the court held that "[e]vidence of collateral crimes, i.e., crimes for which the defendant is not on trial, is inadmissible if relevant merely to establish the defendant's propensity to commit crimes." *Id.* (citing Michelson v. United States, 335 U.S. 469, 475-76 (1948). *See also* People v. Romero, 66 Ill. 2d 325, 330, 362 N.E.2d 288, 290 (1977); People v. Lehman, 5 Ill. 2d 337, 125 N.E.2d 506 (1955).

criminal trials.[290]

3. Appropriateness of the Death Penalty

The Illinois Supreme Court decided that the death penalty was inappropriate in *People v. Johnson*;[291] the court explained that to comply with the principles underlying the eighth amendment, the trial court must consider the offender's character and record and the characteristics of the offense.[292] Moreover, the legislature intended that the trial court exercise discretion in imposing the death sentence.[293] If the defendant committed a murder under special circumstances that probably will not be repeated, the death penalty should not be imposed because neither its deterrent nor retribution functions are served.[294]

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290. *Brisbon*, 129 Ill. 2d at 218, 544 N.E.2d at 305. ILL. REV. STAT. ch. 38, para. 9-1(e) (1983) provides:

> [d]uring the proceeding any information relevant to any of the factors set forth in subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

Id. The supreme court gave similar discretion to the trial court in People v. Young, 124 Ill. 2d 147, 529 N.E.2d 497 (1988). There, the defendant argued that section 5-5-3(d) of the Unified Code of Corrections requires that after a sentence is vacated and the matter remanded, a new sentencing hearing *must* include evidence of the defendant's conduct since the original sentence. 124 Ill. 2d at 153, 529 N.E.2d at 500. Section 5-5-3(d) states that the trial court *shall* hold a hearing pursuant to section 5-4-1 of the Unified Code. Such a hearing *may* include evidence of the defendant's life, moral character and occupation during the time since the original sentence was imposed. *Id.* at 153-54, 529 N.E.2d at 500 (citing ILL REV. STAT. ch. 38, para. 1005-5-3(d) (1981) (emphasis added)). In *Young*, the supreme court declined to give section 5-5-3(d) the mandatory reading that the defendant suggested. *Id.* at 157, 529 N.E.2d at 502. The court noted that the legislature, in enacting section 5-5-3(d), used the word "may" when it intended the provision to be discretionary as opposed to mandatory. *Id.* Thus, it is not necessary to consider evidence of the defendant's conduct during the period after the original sentence was imposed. *Id.*

291. 128 Ill. 2d 253, 538 N.E.2d 1118 (1989).

292. *Id.* at 277-78, 538 N.E.2d at 1128-29 (citing People v. Carlson, 79 Ill. 2d 564, 590, 404 N.E.2d 233, 245 (1980) (quoting Woodson v. North Carolina, 428 U.S. 280 (1976))).

293. *Johnson*, 128 Ill. 2d at 277, 538 N.E.2d at 1128.

294. *Id.* at 278, 538 N.E.2d at 1129. In reaching its decision, the court relied on People v. Buggs, 112 Ill. 2d 284, 493 N.E.2d 332 (1986) and People v. Carlson, 79 Ill. 2d 564, 404 N.E.2d 233 (1980). In each of these cases, the defendants had no prior criminal record and the defendants acted under extreme or emotional disturbance. In *Johnson*, the defendant was not known to be violent or untruthful. He was caring, helpful, and friendly and had never had any gang involvement. The defendant completed high school in four years and received mostly *B*s and *C*s. He had no prior juvenile record and only

The supreme court also reviewed allegedly unfair penalties received by several other defendants. In *People v. Jimerson*,[295] the Illinois Supreme Court rejected the defendant's contention that his death sentence was disproportionate in comparison to the natural life imprisonment sentence imposed upon his codefendant.[296] The court stated that comparative proportionality review in death penalty cases is not required by the federal Constitution[297] or the Illinois capital sentencing procedure.[298] In *People v. Evans*,[299] the Illinois Supreme Court affirmed the trial court's finding that the defendant failed to establish he operated under an extreme mental or emotional disturbance when he committed the crime.[300] If he had operated in this fashion, defendant's emotional state could have proven a mitigating factor in his sentencing pursuant, to section 9-1(c)(2) of the Code. That provision requires the defendant to show that he acted under an extreme mental or emotional disturbance *at the time* of the offense.[301] The defendant's expert testified only that the defendant was suffering from emotional problems "which could contribute to the crimes."[302] Based upon the record, the Illinois Supreme Court concluded that the trial court did not

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had one misdemeanor unlawful possession of weapon charge. 128 Ill. 2d at 280, 533 N.E.2d at 1130. In addition, the defendant had a good work record for over four years. He was, however, often late, which the defendant blamed on his drug and alcohol use. The defendant also had a good working relationship with his superior until he was wrongly accused of stealing tires. He further expressed remorse to the victims and their families. *Id.* at 281, 538 N.E.2d at 1130.

295. 127 Ill. 2d 12, 535 N.E.2d 889 (1989). *See also supra* notes 197-208 and accompanying text (additional discussion of *Jimerson*).

296. *Id.* at 53, 535 N.E.2d at 907. The sentencing jury in the codefendant's trial could not reach an unanimous decision regarding the death penalty. *Id.*

297. *Id.* at 54, 535 N.E.2d at 907-08 (citing Pulley v. Harris, 465 U.S. 37 (1984)).

298. *Id.* at 54, 535 N.E.2d at 908 (citing People v. King, 109 Ill. 2d 514, 551, 488 N.E.2d 949, 967, *cert. denied*, 479 U.S. 872 (1986); People v. Kubat, 94 Ill. 2d 437, 502-04, 447 N.E.2d 247, 277, *cert. denied*, 464 U.S. 865 (1983); People v. Brownell, 79 Ill. 2d 508, 541-44, 404 N.E.2d 181, 198, *cert. dismissed*, 449 U.S. 811 (1980)). That several jurors in the codefendant's trial chose not to impose the death penalty did not render the defendant's sentence disproportionate. *Id.* at 54-55, 535 N.E.2d at 908. The court had already decided that the death sentence was not an excessive sentence here. *Id.* at 53, 535 N.E.2d at 907. The defendant was not under extreme mental or emotional distress at the time of the offense, and his act was not precipitated by some outside cause. *Id.* Previously, the court has reviewed whether a death sentence in one case is disproportionate to a codefendant's less severe sentence. *See, e.g.*, People v. Ashford, 121 Ill. 2d 55, 82-90, 520 N.E.2d 332, 343-47 (1988); People v. Erickson, 117 Ill. 2d 271, 302-03, 513 N.E.2d 367, 381 (1987), *cert. denied*, 486 U.S. 1017 (1988); People v. Szabo, 94 Ill. 2d 327, 351-53, 447 N.E.2d 193, 204-05 (1983), *cert. denied*, 479 U.S. 1101 (1987); People v. Glecker, 82 Ill. 2d 145, 167-69, 171, 411 N.E.2d 849, 861 (1980).

299. 125 Ill. 2d 50, 530 N.E.2d 1360 (1988).

300. *Id.* at 89, 530 N.E.2d at 1376.

301. ILL. REV. STAT. ch. 38, para. 9-1(c)(2) (1987).

302. *Evans*, 125 Ill. 2d at 87, 530 N.E.2d at 1376.

abuse its discretion in sentencing the defendant to death.[303]

Similarly, in a case in which the defendant was convicted of murdering five members of his family, *People v. Odle*,[304] the Illinois Supreme Court agreed with the trial court that no mitigating factors existed sufficient to preclude the death penalty's imposition.[305] Although the defendant raised as an issue his emotional state, no expert rendered an opinion at trial or at the sentencing hearing as to whether the defendant was acting under an extreme mental or emotional disturbance.[306] In addition, the court cited evidence that, at the time of the offense, the defendant planned and concealed the crimes and acted calmly and rationally afterwards.[307] Defendant's testimony regarding his drug abuse and child abuse was inconsistent with his actions;[308] he also had a prior record of criminal and antisocial behavior.[309] Given the nature of the crimes and the defendant's character, the Illinois Supreme Court found no reason to overturn the trial court's finding that there were no mitigating factors sufficient to preclude the death penalty's imposition.[310]

The Illinois Supreme Court in *Odle* observed parenthetically that section 9-1(b)(7) of the Criminal Code, which states that a person convicted of murder may be eligible for the death penalty if "the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty," was not invalid under the United States Supreme Court's recent holding in *Maynard v. Cartwright*.[311] The

303. *Id.* The court also rejected the defendant's assertion that he should not have been sentenced to death because he suffered from "a longstanding emotional and psychological illness," noting he did not cite any authority that this factor renders the death penalty inappropriate. *Id.* at 89, 530 N.E.2d at 1377.

304. 128 Ill. 2d 111, 538 N.E.2d 428 (1989).

305. *Id.* at 136, 538 N.E.2d at 438.

306. *Id.*

307. *Id.* at 136, 538 N.E.2d at 438-39. The defendant cleaned and locked up the family home after the murders. In addition, the evidence showed that the defendant was able to turn away callers to the house. *Id.* at 136, 538 N.E.2d at 439. He was also able to calmly explain his parent's absence and the presence of blood on his arm and neck. *Id.* at 137, 538 N.E.2d at 439.

308. *Id.* at 137, 539 N.E.2d at 439.

309. *Id.* at 138, 539 N.E.2d at 439. The defendant's record included four counts of residential burglary, one count of attempted residential burglary, and five counts of theft. There was also evidence that the defendant had beaten up one of his brothers, coerced another brother into committing theft, and engaged in sexual intercourse with a sixth grade girl when he was a high school sophomore. *Id.*

310. *Id.* at 138, 538 N.E.2d at 439.

311. *Id.* at 138-40, 538 N.E.2d at 440. In Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988), the Supreme Court held that the defendant's death sentence was based in part on a vague and overly broad statutory factor in aggravation, namely, that the murder for

Illinois Supreme Court concluded that section 9-1(b)(7) is much more specific in defining the conduct that qualifies an accused for the death penalty and is not susceptible to arbitrary application when the statute's requirements are followed strictly.[312]

4. Constitutionality of the Death Penalty

In *People v. Coleman*,[313] the supreme court upheld the constitutionality of the Illinois death penalty.[314] The court noted that it already had held that the statute does not place an impermissible burden of proof on the defendant to establish mitigating factors.[315] Furthermore, the statute does not lack adequate safeguards to prevent the arbitrary or capricious imposition of the death penalty.[316] Finally, the entire capital sentencing scheme, in combination, does not render the process arbitrary or capricious.[317] Although it acknowledged that a federal district court in Illinois concluded that the statute was unconstitutional,[318] the Illinois Supreme Court maintained that until the United States Supreme Court decides the issue, state courts are free to exercise their own judgment on federal constitutional questions.[319]

III. LEGISLATION

Concerned with the overcrowded prison situation, the legislature added a new paragraph to section 110-10 of the Criminal Code.[320] Public Act 85-1287 provides that a person released on bond can be

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which defendant was convicted was " 'especially heinous, atrocious or cruel.' " The Court concluded that the statute failed to sufficiently guide or limit the discretion of the sentence. *Id.*

312. *Odle*, 128 Ill. 2d at 140, 538 N.E.2d at 440.

313. 129 Ill. 2d 321, 544 N.E.2d 330 (1989).

314. *Id.* at 349, 544 N.E. 2d at 343.

315. *Id.* at 349, 544 N.E.2d at 343-44 (citing People v. Orange, 121 Ill. 2d 364, 390, 521 N.E.2d 69, 81, *cert. denied*, 109 S. Ct. 247 (1988); People v. Ramirez, 98 Ill. 2d 439, 468-69, 457 N.E.2d 31, 45-46 (1983), *later appeal*, 114 Ill. 2d 125, 500 N.E.2d 14 (1986), *cert. denied*, 481 U.S. 1053 (1987)).

316. *Id.* at 349, 544 N.E.2d at 344 (citing People v. Whitehead, 116 Ill. 2d 425, 465, 508 N.E.2d 687, 703 (1987); People v. Albanese, 104 Ill. 2d 504, 540-42, 473 N.E.2d 1246, 1262-63 (1984)).

317. *Id.* (citing People v. Jimerson, 127 Ill. 2d 12, 56, 535 N.E.2d 889, 909 (1988)). *See also supra* notes 197-208, 295-303 and accompanying text.

318. *See* United States *ex rel.* Silagy v. Peters, 713 F. Supp. 1246 (C.D. Ill. 1989), *aff'd in part and rev'd in part*, Nos. 89-2129, 89-2212, 89-3117, 1990 U.S. App. LEXIS 7007 (7th Cir. 1990). Federal District Court Judge Baker ruled that the Illinois death penalty statute violated the eighth amendment of the federal Constitution, in part, because it gives too much discretion to the prosecutor and because it lacks an adequate notice provision that the death penalty will be sought.

319. *Coleman*, 129 Ill. 2d at 349-50, 544 N.E.2d at 344.

320. ILL. REV. STAT. ch. 38, para. 110-10 (West Supp. 1988).

placed under home supervision with or without the use of an approved monitoring device.[321] An approved monitoring device is an electric device intended to record or transmit information about the defendant's presence or non-presence in his home.[322] The device must be minimally intrusive. For example, it cannot record or transmit visual images, auditory sound, or information about the defendant's activities while at home, without consent by all parties.[323]

Public Act 85-1287 adds similar requirements to sections 5-6-3 and 5-7-1 of the Unified Code of Corrections.[324] Section 5-6-3 is concerned with conditional discharge and conditions of probation.[325] Previously, the section required that a person serving home confinement must remain within his home and admit an agent appointed by the court to verify that the prisoner is complying with the conditions of his confinement.[326] Section 5-6-3 now provides that, if deemed necessary by the court or by the Probation or Court Services Department, a person on probation who serves a term of home confinement must be placed on an approved monitoring device.[327]

Section 5-7-1 deals with the sentence of periodic imprisonment.[328] Public Act 85-1287 amended Section 5-7-1(b)(8) to allow a defendant who is serving a sentence of periodic imprisonment to continue to reside at home with or without supervision involving the use of an approved monitoring device.[329]

Public Act 85-1293 amended section 5-8-4 of the Unified Code of Corrections,[330] regarding concurrent and consecutive terms of imprisonment.[331] The amendment provides that any person who is charged with a felony and who commits another felony while in pretrial detention, in a county jail or detention center, will serve consecutive sentences upon conviction for these felonies.[332] Previously, this paragraph dealt with only a person charged with a fel-

321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.* paras. 1005-6-3, 1005-7-1.
325. LLL. REV. STAT. ch. 38, para. 1005-6-3 (1987).
326. *Id.*
327. ILL. REV. STAT. ch. 38, para. 1005-6-3(a)(10)(iii) (West Supp. 1988).
328. ILL. REV. STAT. ch. 38, para. 1005-7-1 (1987). A sentence of periodic imprisonment is a sentence during which the prisoner may be released for periods of time. ILL. REV. STAT. ch. 38, para. 1005-7-1(a) (1987).
329. ILL. REV. STAT. ch. 38, para. 1005-7-1(b)(8) (West Supp. 1988).
330. ILL. REV. STAT. ch. 38, para. 1005-8-4 (West Supp. 1988).
331. ILL. REV. STAT. ch. 38, para. 1005-8-4 (1987).
332. ILL. REV. STAT. ch. 38, para. 1005-8-4(h) (West Supp. 1988).

ony who committed a separate felony while on pre-trial release.[333] In addition, if a person commits a separate felony while in detention following conviction for a previous felony, the sentence imposed for the separate felony will be consecutive.[334] This paragraph formerly applied only to persons who committed a separate felony while free on bond.[335]

Public Act 85-1190 added a provision regarding witness competency.[336] Every person is qualified to be a witness unless he is unable to understand the obligation to tell the truth, or he is unable to express himself so that he cannot be understood.[337] The amendment also provides that anyone who believes that the witness is incompetent can move to have the court determine the witness' competence.[338] A hearing will be conducted outside the jury's presence and the moving party will have the burden of proving the witness's incompetency.[339]

Public Act 85-1208 amended section 16 of paragraph 204-8 of the Criminal Code.[340] The purpose of section 16 is to encourage the use of more effective sentencing alternatives to imprisonment, so as to foster the development of a coordinated justice system.[341] The amendment provides expanded sentencing options for less serious felony offenders and delinquent juveniles.[342]

IV. CONCLUSION

This Article illustrates the great number of criminal procedure issues that faced the Illinois Supreme Court during the *Survey* period. The most publicized decision was the court's expansion of the exception to the exclusionary rule in *People v. James*, since reversed.[343] The United States Supreme Court rejected the court's narrow view that when a defense witness testifies on direct examination and such testimony is contradictory to evidence which has been suppressed, that evidence may be introduced to challenge the

333. ILL. REV. STAT. ch. 38, para. 1005-8-4(h) (1987).
334. ILL. REV. STAT. ch. 38, para. 1005-8-4(i) (West Supp. 1988).
335. ILL. REV. STAT. ch. 38, para. 1005-8-4(i) (1987).
336. ILL. REV. STAT. ch. 38, para. 115-14 (West Supp. 1988).
337. ILL. REV. STAT. ch. 38, para. 115-14(b)(1) and (2) (West Supp. 1988).
338. ILL. REV. STAT. ch. 38, para. 115-14(c) (West Supp. 1988).
339. *Id.*
340. ILL. REV. STAT. ch. 38, para. 204-8 (West Supp. 1988).
341. ILL. REV. STAT. ch. 38, para. 204-8 (16)(1) (1987). A coordinated justice system is one that more effectively protects society, promotes efficiency and economy in the delivery of services to offenders, and encourages utilization of appropriate sentencing alternatives to imprisonment in State-operated institutions. *Id.*
342. ILL. REV. STAT. ch. 38, para. 204-8(2)(e) (West Supp. 1988).
343. 123 Ill. 2d 523, 528 N.E.2d 723 (1988), *rev'd*, 110 S. Ct. 648 (1990).

veracity of the witness's testimony.[344] The Court held that by expanding the exclusionary rule's impeachment exception to include the testimony of all defense witnesses, the exclusionary rule's truthseeking and deterrent functions would be severely undermined.[345]

In addition, the supreme court's *People v. Fierer*[346] decision created much confusion regarding interpretation of the jury instructions for the guilty but mentally ill verdict and the affirmative defense of insanity. In its decision, the court strictly interpreted the statutes.[347] This decision currently leaves the law concerning the insanity defense and the guilty but mentally ill verdict of questionable validity.[348] The court strongly urged the legislature to rectify the conflicting nature of these statutes, and it appears that a bill will be proposed in the legislature to abolish the guilty but mentally ill statute in Illinois.[349]

Many cases decided during the *Survey* year concerned a defendant's rights under the fifth and sixth amendments. In one case, *People v. Duncan*,[350] the court found an independent ground in the Illinois Constitution protecting a defendant's right to confrontation.[351] Significantly, the court interpreted the Illinois Constitution without justification from the federal Constitution.[352] Many cases concerning defendant's rights under the fifth and sixth amendments turned in favor of the State. Although the court often found error; it held such error harmless.

For the first time, the Illinois Supreme Court applied the United States Supreme Court's decision in *Batson v. Kentucky*.[353] In order for a criminal defendant to challenge a State prosecutor's use of peremptory challenges, he must establish a prima facie case of discrimination. An Illinois defendant now must show membership in

344. *Id.* at 538, 528 N.E.2d at 730.

345. 110 S. Ct. at 652.

346. 124 Ill. 2d 176, 529 N.E.2d 972 (1988). *See supra* notes 153-65 and accompanying text.

347. *Id.* at 188, 529 N.E.2d at 976-77.

348. *Id.* at 190, 529 N.E.2d at 977.

349. Illinois State Bar Association, Criminal Justice, Vol. 32, No. 10, April 1989, 3-4. Such action has been recommended by the Illinois Supreme Court, Judge Steigmann of Champaign County, and the Committee to Revise the Mental Health Laws in Illinois. *Id.*

350. 124 Ill. 2d 400, 530 N.E.2d 423 (1988). *See supra* notes 96-105 and accompanying text.

351. *Id.* at 415, 530 N.E.2d at 430.

352. *See* Note, *supra* note 171, at 700.

353. Batson v. Kentucky, 476 U.S. 79 (1986). *See supra* notes 182-96 and accompanying text.

a cognizable racial group and that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race.[354] The prosecutor can rebut the inference of discrimination if he gives some race-neutral reasons for the State's challenges.[355] In order for the State to prevail, the prosecution must demonstrate that the excluded veniremen share a bias that is related to the case, not merely to their race.[356]

Finally, Judge Harold A. Baker of the United States District Court of the Central District of Illinois received a great deal of attention when he struck down the Illinois death penalty statute in *Silagy v. Peters*.[357] Though the statute has been criticized, particularly in vigorous dissents from retired Justice Simon,[358] the Illinois Supreme Court avoided addressing some of the statute's alleged deficiencies during the *Survey* year. In *People v. Coleman*[359] the court refused to apply Judge Baker's reasoning, and it upheld the statute's constitutionality.[360] Chief Justice Moran stated that until the United States Supreme Court has spoken on the issue, the Illinois Supreme Court will continue to exercise its own judgment.[361] Significantly, on May 2, 1990, the United States Court of Appeals for the Seventh Circuit reversed Judge Baker.[362] Thus, for now, there is no bar to the State executing any of its death row prisoners.

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354. 476 U.S. at 96.

355. *Id.* at 97.

356. *Id.*

357. United States *ex rel.* Silagy v. Peters, 713 F. Supp. 1246 (C.D. Ill. 1989), *aff'd in part and rev'd in part*, Nos. 89-2129, 89-2212, 89-3117, 1990 U.S. App. LEXIS 7007 (7th Cir. 1990). *See supra* note 318.

358. *See e.g.*, People v. Lewis, 88 Ill. 2d 129, 430 N.E.2d 1346 (1981) (Simon, J., dissenting), *cert. denied*, 456 U.S. 1011 (1982).

359. 129 Ill. 2d 321, 544 N.E.2d 330 (1989). *See supra* notes 313-19 and accompanying text.

360. *Id.* at 349, 544 N.E.2d at 343.

361. *Id.* at 349, 544 N.E.2d at 344.

362. *Silagy*, 713 F. Supp. 1246 (C.D. Ill. 1989), *aff'd in part and rev'd in part*, Nos. 89-2129, 89-2212, 89-3117, 1990 U.S. App. LEXIS 7007 (7th Cir. 1990). The court rejected the petitioner's arguments that the statute violates the eighth amendment by affording the prosecutor too much discretion in seeking the death penalty and that it establishes a rebuttable presumption in favor of the death penalty. The court also rejected the argument that the statute violates the sixth and fourteenth amendments by failing to notify the accused before trial that the death penalty will be sought.