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Introduction/Exclusionary Rule/Arrest/Identifications/Confessions/Preliminary Proceedings/Discovery/Speedy Trial/Selection of Jurors/Instruction to Jurors/Sentencing/Illinois Post-Conviction Hearing Act/Prisoners' Rights

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INTRODUCTION

This year marks the expanded publication of the *Loyola University of Chicago Law Journal* to four issues. In order to more effectively fulfill the needs of the legal community of Illinois, the *Journal* format includes a special issue focused on a particular legal area. The topic selected for 1975-76 is Criminal Procedure, an area subject to intense activity and rapid change. This note seeks not to provide exhaustive treatment of this volatile area, but rather to review and analyze developments in selected aspects of Criminal Procedure through 1975. It is hoped that this issue will prove a useful tool for all involved in the Illinois criminal justice system—judges, prosecutors and defense counsel alike.

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PRETRIAL POLICE PROCEDURES

THE EXCLUSIONARY RULE GENERALLY

The exclusionary rule, a judicially created rule of evidence designed to secure the guarantees of the fourth amendment, excludes

evidence obtained as a result of an "unreasonable" search or seizure. In the absence of a warrant, or in the case of a challenge to the validity of a warrant, the issue of reasonableness is resolved by determining the existence, or lack, of probable cause; that is, by evaluating the reasonableness of the police officer's belief that a crime has been or is being committed. Recent developments, both on the state and federal level, reveal a variety of solutions to troublesome issues regarding the scope of the fourth amendment and the application of the exclusionary rule within its framework.

Scope of the Fourth Amendment

In 1953, the Illinois Supreme Court held that the fourth amendment to the Federal Constitution and article II, section 6 of the 1870 Illinois Constitution should be identically construed.[1] *Mapp v. Ohio*,[2] mandating the application of the exclusionary rule in state courts, insured that the remedy for fourth amendment violations, and therefore for violations of the Illinois constitutional provisions, would be uniform.

An elementary rule of construction is that "the Fourth Amendment protects people, not places."[3] In practice, this maxim takes the form of a standing requirement. To rightfully urge application of the exclusionary rule, the interest invaded must be one which is personal to the defendant. In *People v. Basile*,[4] the court affirmed denial of a motion to suppress where the defendant alleged that a co-defendant, who later testified against him, had been arrested under an invalid warrant, since defendant had shown no violation of his own constitutional rights. However, on the authority of *Berger v. New York*,[5] the United States Court of Appeals for the Seventh Circuit, in *United States v. Ramsey*,[6] held that the defendant had standing to maintain a challenge to the constitutionality of a statute[7] which established a statutory procedure for obtaining authority

1. People v. Tillman, 1 Ill. 2d 525, 116 N.E.2d 344 (1953). This rule of construction is equally applicable to article I, section 6 of the 1970 Illinois Constitution. People v. Holliman, 22 Ill. App. 3d 95, 316 N.E.2d 812 (2d Dist. 1974).

2. 367 U.S. 643 (1961).

3. Katz v. United States, 389 U.S. 347, 351 (1967).

4. 21 Ill. App. 3d 273, 312 N.E.2d 748 (4th Dist. 1974).

5. 388 U.S. 41 (1967).

6. 503 F.2d 524 (7th Cir. 1974).

7. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 entitled "Wiretapping and Electronic Surveillance" is found at 82 Stat. 211. In § 801 of that Act, Congress set forth its findings supporting the legislation; § 802 enacts a new Chapter 119 of the Criminal Code entitled "Wire Interception and Interception of Oral Communications." See 18 U.S.C. §§ 2510-2520. Section 803 amended § 605 of the Communications Act of 1934, 47 U.S.C. § 605, to remove the complete prohibition against interception of telephonic communications

to engage in electronic eavesdropping. The defendant did not allege that the wiretap involved violated his own constitutional rights, for the application for the order authorizing the wiretap demonstrated the existence of adequate probable cause. Rather, he contended that the authorization to listen continuously to all conversations over a given telephone for 30 days was the equivalent of a general search warrant forbidden by the fourth amendment, and also that the failure of the statute to require that notice must be given to every person whose conversations had been overheard conferred impermissible authority to conduct secret searches. While expressing considerable doubt as to the wisdom of the Court's holding in *Berger*, the court of appeals nevertheless granted the defendant standing, if only because *Berger* had not been overruled and could not be readily distinguished. This obvious reluctance to follow *Berger* indicates that a relaxation of traditionally strict standing requirements may be the exception, rather than the rule.

Further, to obtain the benefits of fourth amendment protection, the person allegedly searched must have exhibited an actual expectation of privacy, and that expectation must be one that the courts are prepared to recognize as reasonable.[8] This "expectation of privacy" test has posed problems in cases where the consent of a person other than the defendant has been relied upon as a defense to a motion to suppress. For example, the fact that a person shares an apartment with another does not necessarily mean that his expectation of privacy, with respect to outside intrusions, is completely negatived. To circumvent this problem, Illinois courts have chosen to apply the "common authority" test articulated by the United States Supreme Court in *United States v. Matlock*.[9] This doctrine

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without the consent of either party. Section 804 established a National Commission for the review of federal and state laws relating to wiretapping and electronic surveillance.

8. People v. Ciochon, 23 Ill. App. 3d 363, 319 N.E.2d 332 (2d Dist. 1974). In response to the defendant's contention that a police officer's use of binoculars, per se, amounted to an invasion of privacy, the court held that the permissibility of their use, as well as other eavesdropping devices, depends upon the surrounding circumstances:

> Whether, prior to the use of binoculars, authorities had reason to believe that a crime had taken place or was taking place is of vital importance.

Id. at 365, 319 N.E.2d at 33. *See also* Butler v. Bensinger, 377 F.Supp. 870 (N.D.Ill. 1974). The defendant alleged that he had been deprived of certain items of personal property in violation of the fourth amendment while he was incarcerated. The court rejected his claim, stating that a jail shares none of the attributes of privacy common to other conventional places of residence.

9. 415 U.S. 164 (1974). The Court stated:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed

is not new,[10] and it provides a feasible alternative to the "expectation of privacy" test which has engendered much confusion and criticism. Thus, where a member of the defendant's family,[11] or a person with whom he is living,[12] voluntarily consents to a search of the premises, defendant may not contest the validity of the search. Similarly, if the defendant stores his property in a warehouse to which others have authorized access, their consent to a search will be binding upon him.[13] A limitation upon consent given by one with common authority over the premises is that the law enforcement officials must be warranted in their belief that the person consenting to the search has authority to do so. Where the belief is not reasonable, taking into account the surrounding circumstances, the consent will be held invalid.[14] Of course, the defendant's own consent to a search, if voluntarily given, will defeat a motion to suppress.[15]

The character of the evidence itself may determine whether the protection of the fourth amendment may successfully be invoked. The production of unalterable physical characteristics of the accused as evidence has been held not to violate the fourth amendment.[16] However, in *People v. Hinkle*,[17] the court, relying on *Davis v. Mississippi*,[18] reversed defendant's conviction for burglary where

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common authority over or other sufficient relationship to the premises or effect sought to be inspected.

Id. at 171.

10. *See, e.g.*, People v. Nunn, 55 Ill. 2d 344, 304 N.E.2d 81 (1973); People v. Walker, 34 Ill. 2d 23, 213 N.E.2d 552 (1966).

11. People v. Stacey, 58 Ill. 2d 83, 317 N.E.2d 24 (1974) (defendant's wife); People v. Johnson, 23 Ill. App. 3d 886, 321 N.E.2d 38 (1st Dist. 1974) (defendant's mother).

12. People v. Nicks, 23 Ill. App. 3d 443, 319 N.E.2d 524 (4th Dist. 1974) (woman with whom defendant was living, or at least sharing an apartment on some type of continuing basis).

13. United States v. Piet, 498 F.2d 178 (7th Cir.), *cert. denied*, 419 U.S. 1069 (1974) (foreman, who had one of two keys to a common storage area where defendant's goods were kept, allowed FBI agents to search area); United States v. Novello, 519 F.2d 1078 (5th Cir. 1975) (consent by person who had access to warehouse where defendant kept his truck held valid even though that person was tricked into granting permission to search by law enforcement officials).

14. People v. Taylor, 31 Ill. App. 3d 576, 333 N.E.2d 41 (4th Dist. 1975) (consent to search given by accused's brother held invalid where the brother was not a co-occupant and nothing in the record indicated that the police officer knew, prior to the search, the extent of his access to the premises or what his authority over the premises might have been).

15. People v. Hooker, 21 Ill. App. 3d 26, 313 N.E.2d 468 (3d Dist. 1974). Defendant went to the police station to report a stolen car; when asked to display his arms, he rolled up his sleeves and then voluntarily lifted his shirt which revealed the fresh cuts that precipitated his arrest.

16. *In re* Special September, 500 F.2d 1283 (7th Cir. 1974). The court of appeals held that a subpoena requiring petitioner to give voice exemplars for a grand jury did not constitute a "seizure" and violated no legitimate fourth amendment interest.

17. 23 Ill. App. 3d 134, 318 N.E.2d 690 (5th Dist. 1974).

18. 394 U.S. 721 (1969).

defendant's fingerprints, taken shortly after his arrest without a warrant, were shown at trial to match those found at the scene of the crime. The court apparently chose to ignore Justice Brennan's dicta in *Davis* to the effect that detentions for fingerprinting may be found to comply with the fourth amendment under certain circumstances, even though there is no probable cause in the traditional sense. Instead, the court gave a very literal interpretation to *Davis*:

> The Court made it clear that the taking of fingerprints is within and controlled by fourth- and fourteenth- amendment restrictions on search and seizure. The State here attempts to distinguish *Davis*, since the police here used no dragnet tactics. However, the clear thrust of *Davis* militates against this view. It is the taking from the person without warrant or probable cause that invalidates the evidence.[19]

In addition to delineating the contours of the fourth amendment with respect to those individual interests which may claim its protection, courts must also take cognizance of the realities of everyday law enforcement. While there is an understandable preference for searches conducted pursuant to warrants, there are certain well-recognized exceptions to this blanket requirement. Perhaps the most universally accepted exception to the warrant requirement is the right of a limited search incident to a lawful arrest.[20] The legal sufficiency of the arrest justifies the police officer in conducting a limited search to protect himself and to prevent the destruction of evidence. Also, particularly in cases involving automobile stops, if a justifiable search reveals evidence of another crime of which the officer was previously unaware, the evidence thereby discovered is admissible.[21] Similarly, if, in the course of lawful activities, the officer encounters evidence in "plain view," the fourth amendment will not prevent its seizure.[22]

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19. 23 Ill. App. 3d at 135, 318 N.E.2d at 690.

20. People v. Nickson, 22 Ill. App. 3d 836, 318 N.E.2d 73 (1st Dist. 1974).

21. People v. Bennett, 17 Ill. App. 3d 928, 309 N.E.2d 50 (2d Dist. 1974) (marijuana found in glove compartment during warrantless search of automobile held admissible).

22. People v. Griffin, 18 Ill. App. 3d 873, 310 N.E.2d 746 (1st Dist. 1974):

> It is well established that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."

Id. at 876, 310 N.E.2d at 748 (citations omitted). *See also* People v. Rogers, 18 Ill. App. 3d 940, 310 N.E.2d 854 (1st Dist. 1974) (trial court properly denied defendant's motion to suppress a shotgun where officer had stopped the automobile driven by the defendant for improperly signalling a right turn and thereupon observed a portion of the shotgun protruding from underneath the seat).

Where probable cause for an arrest exists, the absence of a warrant will not invalidate the subsequent seizure of evidence, provided the search is conducted reasonably[23] or is warranted by the exigencies of the situation.[24] Conversely, if the search is not based upon probable cause, or exceeds the scope which is reasonably necessary under the circumstances, it will be held illegal and evidence obtained thereby will be suppressed.[25] Similarly, evidence procured by a search conducted pursuant to a warrant will be held inadmissible when the search ranges beyond the scope authorized by the warrant[26] or the warrant itself is fatally defective.[27]

Application of the Exclusionary Rule to Verbal Evidence

In *Boyd v. United States*,[28] the Supreme Court noted the intimate relationship between the fourth and fifth amendments:

Breaking into a house and opening boxes and drawers are circum-

23. People v. Grant, 57 Ill. 2d 264, 312 N.E.2d 276 (1974) (scope of search which included entrance into attic of apartment was reasonable in light of officer's belief that the defendant was in the apartment and had committed a crime).

24. People v. Miller, 19 Ill. App. 3d 103, 311 N.E.2d 179 (1st Dist. 1974). (police officer's seizure of defendant's clothes at hospital held reasonable where officer had reason to believe that the defendant had committed a crime and, in all likelihood, the evidence would be destroyed unless seized immediately).

25. People v. Felton, 20 Ill. App. 3d 103, 313 N.E.2d 642 (2d Dist. 1974) After stopping a car described in connection with a theft of sunglasses, a police officer seized a revolver from defendant's person. Defendant's motion to suppress was granted due to the fact that defendant's description was not among three given in connection with the theft; also, no mention had been made of firearms and the police officer had no reason to believe he would find any.

26. People v. Gualandi, 21 Ill. App. 3d 992, 316 N.E.2d 195 (4th Dist. 1974) (search of second floor of building where warrant authorized search of first floor only held unreasonable and items seized from the second floor were properly suppressed).

27. People v. Holmes, 20 Ill. App. 3d 167, 312 N.E.2d 748 (1st Dist. 1974) (evidence seized pursuant to a search warrant which failed to state the date of the offense and failed to describe with sufficient particularity the items to be seized held inadmissible).

However, in Stone v. Powell, 44 U.S.L.W. 5313 (July 6, 1976), the Court altered this rule with respect to a search conducted pursuant to a warrant which is later held invalid. In that case the prisoner had been provided opportunity to challenge the fourth amendment claim. The Nebraska Supreme Court and the lower federal courts held that the invalidity of the warrant required suppression of the evidence obtained pursuant to its authority, despite the fact that the police officers acted in good faith reliance upon the warrant, and despite the existence of exigent circumstances. In this factual context, the argument that the application of the exclusionary rule in this situation will in no way serve to deter future official misconduct did appeal to the present Court. *See, e.g.*, the statement in Michigan v. Tucker, 417 U.S. 433, 446 (1974):

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

28. 116 U.S. 616 (1886).

> stances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[29]

Consequently, courts evolved the doctrine that a fourth amendment violation may "taint" subsequent statements ostensibly protected by the fifth amendment. However, it was recognized that the connection between the illegal arrest and subsequent confession "may have become so attentuated as to dissipate the taint,"[30] so that not every statement arguably derived from a fourth amendment violation requires suppression.[31]

After the decision in *Miranda v. Arizona*,[32] courts were faced with the difficult question of whether the giving of prescribed warnings would without more, attenuate the taint of an illegal arrest. Prior to the Supreme Court's decision in *Brown v. Illinois*,[33] the issue was resolved primarily by an examination of the temporal proximity between the illegal and subsequent confession. Thus, proceeding upon the assumption that an illegal arrest, per se, does not invalidate a later confession,[34] Illinois courts have held that, while a confession given at the scene of the illegal arrest subsequent to the giving of *Miranda* warnings was not sufficiently purged of the primary taint,[35] a confession given one hour later was.[36] These cases were decided in accordance with *People v. Brown*,[37] in which the Illinois Supreme Court unanimously held that the giving of the *Miranda* warnings per se furnished the requisite attenuation between illegal arrest and subsequent confession. In *Brown v. Illinois*,[38] the United States Supreme Court unanimously reversed. However,

29. *Id.* at 630.
30. Nardone v. United States, 308 U.S. 338, 341 (1939).
31. The leading case on the issue of attenuation is Wong Sun v. United States, 371 U.S. 471 (1963). There the Court stated:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 487-88.
32. 384 U.S. 436 (1966).
33. 422 U.S. 590 (1975).
34. *See In re* Lamb, 61 Ill. 2d 383, 336 N.E.2d 753 (1975).
35. People v. Riszowski, 22 Ill. App. 3d 741, 318 N.E.2d 10 (1st Dist. 1974).
36. *In re* Tucker, 20 Ill. App. 3d 377, 314 N.E.2d 42 (1st Dist. 1974).
37. 56 Ill. 2d 312, 307 N.E.2d 356 (1974).
38. 422 U.S. 590 (1975).

the Court's discussion of the issue reveals that the attitudes of the respective courts are not as diametrically opposed as the unanimity of both decisions seems to manifest. The Supreme Court did not unequivocally state that *Miranda* warnings could never attenuate the taint of an illegal arrest. Instead, given the paucity of the Illinois court's discussion of other circumstances surrounding Brown's arrest, specifically, whether or not probable cause existed prior to the arrest,[39] the Court concluded that such a blanket holding was unwarranted. Rather than establishing any revolutionary constitutional principles, *Brown* merely re-emphasized the concept that once the illegality of an arrest is established, a confession following the arrest is presumed to be a product of that illegality, and the state must sustain its burden of proving purgation of the illegality based upon *Wong Sun v. United States*.[40] Indeed, the appellate court's decision in *People v. Fields*[41] indicates that application of the standards enunciated in *Brown*[42] will not radically affect the outcome of the usual case. In holding the defendant's written statement admissible, the court stated:

> While there is no evidence of any intervening factors separating defendant's arrest and subsequent statement, there is also no evidence to indicate that defendant was arrested as a pretext for some collateral objective of the police. Nor does the evidence reflect that the arresting officers were acting upon such absence of indicia of probable cause as to render entirely unreasonable any belief on their part that probable cause existed.[43]

Electronic Surveillance

Effective July 1, 1976, electronic surveillance in Illinois is governed by a new statutory scheme,[44] which is virtually identical to the

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39. Concurring in part in the Court's opinion, Justice Powell would have remanded the case for further factual findings regarding this issue:

> Although *Wong Sun* establishes the parameters within which this case must be decided, the incompleteness of the record leaves me uncertain that it compels the exclusion of petitioner's statements.

Id. at 607.

40. 371 U.S. 471 (1963).

41. 31 Ill. App. 3d 458, 334 N.E.2d 752 (1st Dist. 1975).

42. In addition to the *Miranda* warnings, the Court enumerated three additional factors to be considered in determining whether a confession has been obtained by exploitation of an illegal arrest:

> The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

422 U.S. at 603-04 (citations omitted).

43. 31 Ill. App. 3d at 467-68, 334 N.E.2d at 760-61.

44. Pub. L. No. 79-1159 (Dec. 18, 1975), to be codified at ILL. REV. STAT. ch. 38, §§ 14-1, 14-3 to 14-7, and 108A.

federal law.[45] Section 14-2 of the Criminal Code now provides that the offense of eavesdropping is committed if a person uses an eavesdropping device to hear or record a conversation unless he acts with the consent of all parties to the conversation, or with the consent of one party and in accordance with the provisions of newly enacted article 108A, which establishes judicial supervision of electronic eavesdropping. A brief summary of the new law and a comparison to the pertinent federal statute follows.

Section 108A-1 provides that a circuit judge, acting on an application authorized by the state's attorney, may grant an order approving the use of an eavesdropping device by a law enforcement officer where any one party to the conversation to be monitored consents.[46] This requirement is similar to that of the federal law; however, the federal statute is broader in that it also authorizes interception of communications by persons other than law enforcement officials.[47]

Most of the remainder of article 108A is adopted from section 2518[48] of the federal statute and concerns procedures for authorizing the use of an eavesdropping device. Section 108A-3 requires that each application to a judge for authorization contain the following information:

(1) identity of the officer or agency making the request and the state's attorney authorizing the application;

(2) statement of facts justifying the order including the identity of parties to conversations sought;

(3) period of time for which use will be maintained;

(4) existence of any previous applications regarding the same target person and action on those previous applications; and

(5) if the request is for extension of use, the results of the previous use.[49] However, deleted from section 108A-3 is the federal requirement that the applicant demonstrate that normal investigative techniques have been exhausted,[50] indicating that eavesdropping may be employed merely to obtain corroborative evidence.

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45. Title III of the Omnibus Crime and Safe Streets Act of 1968, 18 U.S.C. §§ 2511-20 (1970).

46. Pub. L. No. 79-1159 § 108A-1.

47. 18 U.S.C. § 2511(2)(c), (d) (1970) provides for legal interception by persons "acting under color of state law" and persons not so acting if consent is given in either instance.

48. 18 U.S.C. § 2518 (1970).

49. Pub. L. No. 79-1159 § 108A-3.

50. 18 U.S.C. § 2518 (1)(c) (1970). This "necessity" requirement is thought to be included in the federal statute in response to the Supreme Court's decision in Berger v. New York, 388 U.S. 41 (1967). Perhaps the rationale for its exclusion from the Illinois statute is that it is only minimally complied with in federal courts. *See* Note, 2 HASTINGS CONST. L.Q. 571, 616 (1975).

According to section 108A-4, a circuit judge may issue an approving order if he finds that: (1) one party to the conversation has consented; (2) there is reasonable cause to believe that an individual is committing, has committed or will commit a felony; and (3) there is reasonable cause to believe that conversations concerning that felony will be obtained.[51] Once more, the requirement that the judge find that it is necessary to resort to eavesdropping because normal investigative sources are not adequate[52] is omitted.

The judge's order must specify the identity of the person consenting, the identity of the person who is to be monitored and the period of time for which eavesdropping is authorized.[53] No order may be entered authorizing use of an eavesdropping device for more than ten days.[54] In contrast, Title III authorization is permitted for a period no longer than necessary to achieve the purpose of the authorization, with a maximum of 30 days. Extension of authorization orders must be obtained in the same manner as the original order.[55]

Article 108A provides an exception to the authorization procedures in emergency situations in which a law enforcement officer has insufficient notice to obtain judicial approval, *i.e.*, either the conversation sought will occur within a short period of time or the use of a device is necessary to protect a law enforcement officer.[56] An emergency situation can exist in any situation ordinarily covered by the authorization provisions, *e.g.*, any felony.[57] In any event, the law enforcement officer must reasonably believe that an authorization could be obtained under normal circumstances, and an application to obtain authorization must be made within 48 hours.[58] If not granted, any conversations overheard are obtained in violation of statute[59] and are inadmissible as evidence against the person monitored.[60]

ARREST

Probable Cause for Arrest

The constitutional validity of an arrest focuses upon whether the arresting officer had probable cause to believe that an offense had

51. Pub. L. No. 79-1159 § 108A-4.
52. 18 U.S.C. § 2518 (3) (c) (1970).
53. Pub. L. No. 79-1159 § 108A-5(a).
54. *Id.* § 108A-5(b).
55. 18 U.S.C. § 2518(5) (1970).
56. Pub. L. No. 79-1159 § 108A-6(a).
57. *Id.*
58. *Id.* § 108A-6(a),(b).
59. *Id.* § 108A-6(c).
60. ILL. REV. STAT. ch 38, § 14-5 (1975).

been or was being committed, and that the person arrested committed or was committing the offense.[61] Illinois has codified this probable cause requirement:[62] a police officer may arrest a person without a warrant if he has "reasonable grounds"[63] to believe that the person has committed or is committing an offense.

The general concept of probable cause should be divided into two separate elements, both of which must be present before an arrest can be lawfully effected: *crime* probable cause and *offender* probable cause. First, probable cause to arrest requires that some crime, either felony or misdemeanor, has been committed. This probability need not necessarily relate to a specific crime with a known victim; a police officer who sees a suspect fleeing through an alley with certain goods may have crime probable cause even though that particular officer had no knowledge of a specific burglary.[64]

A valid arrest requires not only the probability that a crime has been committed, but also the probability that the person who is arrested has committed that crime. The distinction between these two requirements is illustrated in *People v. Harshbarger*[65] where an officer, after smelling marijuana in a living room, attempted to arrest one of its occupants. The court held that the officer's mere suspicion that someone had been smoking marijuana was insufficient probable cause to arrest and search the defendant for possession of marijuana.

The amount of evidence necessary to establish probable cause is distinct from that required to convict the suspect.[66] Instead, probable cause is said to exist when a reasonable and prudent man, hav-

61. Henry v. United States, 361 U.S. 98 (1959).

62. ILL. REV. STAT. ch. 38, § 107-2(c) (1975).

63. This "reasonable grounds" criteria has been generally translated to mean probable cause. People v. Jones, 16 Ill. 2d 569, 158 N.E.2d 773 (1959).

64. *See, e.g.*, People v. Georgev, 38 Ill. 2d 165, 230 N.E.2d 851 (1967). Defendant and an accomplice were arrested for a traffic violation by a police officer at 2:00 a.m. The car bore fictitious license plates and neither party could produce a valid driver's license. An adding machine and rolls of coins lay in plain view in the car. Under these circumstances, the court found that the officer was justified in searching the car without a warrant, although he did not know which specific offense the search might disclose.

65. 24 Ill. App. 3d 335, 321 N.E.2d 38 (5th Dist. 1974). *See also* People v. Hornal, 29 Ill. App. 3d 808, 330 N.E.2d 225 (5th Dist. 1975), where a stolen check was cashed by a party who fit the description of Duke Gilliam and endorsed the check with the name and address of Duke Gilliam. This man was accompanied by three others who were described only as having long hair. When police arrived at Gilliam's address they made a warrantless arrest of Gilliam and three other men in his apartment who had long hair. The court held that because there was no evidence that any of the three men accompanying Gilliam had participated in the passage of the check, there was no probable cause to support their arrest.

66. People v. Wright, 41 Ill. 2d 170, 242 N.E.2d 180 (1968); People v. Denham, 41 Ill. 2d 1, 241 N.E.2d 415 (1968).

ing the knowledge possessed by the officer at the time of the arrest, would believe that the person committed the offense.[67] Since many of the situations which law enforcement officers confront are more or less ambiguous, courts tend to allow police officers broad discretion in determining whether probable cause exists.[68]

Probable cause for arrest is generally established through one of three methods. The police officer may effect an arrest based upon his own observations or knowledge, upon information supplied to him by others, or from the actions, statements or appearance of the accused. When a police officer arrests on the basis of his own personal observations probable cause is seldom questioned since the officer has either viewed the offense, or suspects that an offense has been or is being committed. For example, observing a person slumped over the steering wheel of a car parked in a no-parking zone with a pistol on the seat constituted sufficient probable cause to arrest the defendant for unlawful use of weapon.[69]

In other cases where evidence of the crime is not readily apparent, the expertise of the police officer may be considered by the court in determining whether probable cause exists. Thus, a police officer may have probable cause to arrest a person present in an office when he smells burning marijuana drifting from the office, provided that the state can demonstrate that the patrolman had made previous arrests for drugs.[70] However, when no showing by the state exists that the particular officer has ever made any arrests for drugs or has received training regarding marijuana, probable cause may not exist and the arrest may be invalid.[71]

Mere "hunches" or suspicions on the part of police officers, without more, may also be insufficient to constitute probable cause for arrest.[72] Suspicion gives the police officer cause to stop and question

67. People v. Wright, 41 Ill. 2d 170, 173-74, 242 N.E.2d 180, 183 (1968). In People v. Denham, 41 Ill. 2d 1, 241 N.E.2d 415 (1968), the court held that police are required to act only as reasonable and prudent men and not as legal technicians. Therefore, probable cause may be based on hearsay and other evidence which is inadmissible in a court of law.

68. Brinegar v. United States, 338 U.S. 160 (1949), *cited in* People v. Wright, 56 Ill. 2d 523, 309 N.E.2d 537 (1974). *See also* People v. Clay, 55 Ill. 2d 501, 304 N.E.2d 280 (1973), wherein the court reasoned that in deciding the question of probable cause in a particular case the courts address probabilities and therefore are not disposed to be unduly technical. "These probabilities are the factual and practical considerations of everyday life on which reasonable men, not legal technicians act." *Id.* at 505, 304 N.E.2d at 282.

69. People v. Hayes, 55 Ill. 2d 78, 302 N.E.2d 37 (1973).

70. People v. Tippit, 17 Ill. App. 3d 163, 308 N.E.2d 15 (1st Dist. 1974).

71. People v. Damon, 32 Ill. App. 3d 937, 337 N.E.2d 262 (1st Dist. 1975).

72. *In re* Brewer, 24 Ill. App. 3d 330, 320 N.E.2d 340 (5th Dist. 1974). In that case, a police officer patrolling the neighborhood for possible vandalism became suspicious when he saw four or five youngsters run into a garage adjacent to a residence. The court held that where

the person, but does not permit him to conduct a full search; thus, any evidence obtained through such a search would be suppressed. However, where "hunches" are coupled with other corroborating evidence, such as the conduct of the defendant, there may be sufficient probable cause to constitute a lawful arrest.[73]

The evidence establishing probable cause for arrest need not be admissible at trial,[74] hearsay evidence may be considered when determining probable cause for arrest.[75] Probable cause may be based upon statements made to police officers, whether the declarant is a victim or witness to a crime,[76] a co-conspirator,[77] an informant,[78] or a citizen.[79] Reliance upon a professional informant's tip as the basis for probable cause to arrest requires the arresting officer to either establish the prior reliability of the informer or present independent information which corroborates the essential particulars of the tip.[80] The reliability of the informant may be established by the degree

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the officer did not see any acts of vandalism or crime, had received no report of any crime being committed, and had no reason to believe that a crime was being committed, the officer had no probable cause to arrest and search the minors. *See also* People v. Harshbarger, 24 Ill. App. 3d 335, 321 N.E.2d 138 (5th Dist. 1974) (officer's mere suspicion, based on smell, that defendant had been smoking marijuana was not sufficient to support an arrest or search); United States v. Guana-Sanchez, 484 F.2d 590 (7th Cir. 1973) (hunches of criminality are not sufficient to support arrest). However, these hunches may be sufficient to warrant an investigatory "stop and frisk" under the guidelines set forth in Terry v. Ohio, 392 U.S. 1 (1968).

73. United States v. Clay, 495 F.2d 700 (7th Cir. 1974); People v. Christo, 22 Ill. App. 3d 656, 318 N.E.2d 275 (1st Dist. 1974).

In People v. Johnson, 23 Ill. App. 3d 886, 321 N.E.2d 38 (1st Dist. 1974), a patrolman without knowledge that a crime was being committed first observed the defendant walking across a vacant lot towards his automobile at a distance of 100 feet. The officer shined his spot light on the suspect, and claimed he saw a hairline reflection from what appeared to be a cylindrical object about 20 to 24 inches long. The defendant deposited the object in a trunk of his car. The court held this sufficient for the officer to believe that the defendant was concealing a rifle in the car.

74. Brinegar v. United States, 338 U.S. 160 (1949); People v. Denham, 41 Ill. 2d 1, 241 N.E.2d 415 (1969). *See also* United States v. Simon, 409 F.2d 474 (7th Cir. 1969).

75. Draper v. United States, 358 U.S. 307, 311-12 (1958); People v. Darrah, 18 Ill. App. 3d 1018, 310 N.E.2d 448 (2d Dist. 1974).

76. People v. Canale, 52 Ill. 2d 107, 285 N.E.2d 133 (1972).

77. People v. Denham, 41 Ill. 2d 1, 241 N.E.2d 415 (1968) (where a member of a robbery gang implicated defendant and a third party, and interrogation of the third party corroborated the implication of defendant, police had probable cause to arrest and search defendant). *See also* People v. Atkinson, 21 Ill. App. 3d 258, 315 N.E.2d 152 (2d Dist. 1974).

78. People v. Nickson, 22 Ill. App. 3d 836, 318 N.E.2d 73 (1st Dist. 1974); People v. Davis, 28 Ill. App. 3d 189, 328 N.E.2d 89 (1st Dist. 1975).

79. People v. Evans, 32 Ill. App. 3d 865, 336 N.E.2d 792 (2d Dist. 1975).

80. Draper v. United States, 358 U.S. 307 (1959); People v. Clay, 55 Ill. 2d 501, 304 N.E.2d 280 (1973) (even when an informant had never previously given police reliable information, sufficient independently developed information corroborating the informant's story rendered a warrantless arrest legal). *See also* People v. Bambulas, 42 Ill. 2d 419, 247 N.E.2d 873 (1969).

of detail evident in the information given by the informant, and by the fact that the informant's tip is adverse to his penal interest.[81] The reliability of the informant is not determined solely upon the number of arrests which the informant's prior information led to, but rather the accuracy of the information supplied by the informant in the past.[82]

This requirement of pre-established reliability is not applied to ordinary citizens or to victims of crime who offer police information.[83] In these cases, the courts generally overlook minor discrepancies in the descriptions of the accused when making a probable cause determination.[84] In cases involving statements to police by nonprofessional informants, the required specificity of the description of the accused to establish probable cause for an arrest varies depending on other relevant factors involved in the arrest.[85]

The previous distinction drawn between crime probable cause and offender probable cause becomes more acute when police are forced to rely solely upon the actions of the defendant in meeting both requirements. In *People v. Pruitt*,[86] police learned a crime had been committed and proceeded to the location of the crashed car. The police had no description of the offenders, but stopped the defendant as he walked in a direction opposite from the inoperative car. When defendant could not provide police with an adequate explanation of his actions, he was placed under arrest. The court found sufficient probable cause for this arrest. Conversely, where police had no knowledge that a crime had been committed, but observed defendants walking down a street with a portable televi-

81. People v. Nickson, 22 Ill. App. 3d 836, 318 N.E.2d 73 (1st Dist. 1974). The police testified that their informant had been known to them for 14 months and had supplied them with information which resulted in arrests and the discovery of narcotics on four prior occasions. These arrests had resulted in one conviction and three pending cases. In addition, the informant met the officers the night of the arrest and told them that he had purchased a quantity of heroin only 45 minutes before and revealed where on the defendant's person the heroin could be found. The court held that the reliability of the informant was sufficiently established.

82. People v. Packer, 25 Ill. App. 3d 332, 323 N.E.2d 39 (1st Dist. 1974) (true test of an informant's reliability is not prior arrests but the accuracy of the information provided).

83. People v. Evans, 32 Ill. App. 3d 865, 336 N.E.2d 792 (2d Dist. 1975).

84. People v. Turner, 32 Ill. App. 3d 221, 336 N.E.2d 49 (1st Dist. 1975); People v. Jenkins, 31 Ill. App. 3d 910, 335 N.E.2d 87 (1st Dist. 1975).

85. People v. Davis, 21 Ill. App. 3d 177, 315 N.E.2d 79 (1st Dist. 1974) (general description of getaway car and the offenders found sufficient when coupled with proximity in time and location to place of the crime). *But see In re* Woods, 20 Ill. App. 3d 641, 314 N.E.2d 606 (1st Dist. 1974) (where evidence showed that arresting officer had at most only a general description of assailant, unsupported by other relevant facts, such description was insufficient to justify arrest of defendant).

86. 16 Ill. App. 3d 930, 307 N.E.2d 142 (2d Dist. 1974).

sion and a rifle at 11:30 p.m., the court refused to find sufficient probable cause to arrest, since there was no reason to believe a crime had been committed.[87]

Illinois courts have consistently recognized that the mere association of defendant with a known criminal is insufficient to provide the requisite probable cause for his arrest.[88] Since the lawfulness of an arrest depends upon the existence of probable cause at the time the arrest is effected, after-discovered evidence does not relate back to operate as a justification for an arrest previously made.[89]

Legality of Arrest

Warrant Requirement. In Illinois a police officer may also arrest when he has a properly executed arrest warrant in his possession or reasonably believes that such a warrant has been issued.[90] Generally, an arrest warrant is obtained upon the issuance of a complaint in which the police, or prosecutors, accompanied by the complaining witness, outline for the court the offense and the evidence linking the accused to that offense.[91]

United States v. Watson[92] marks the Supreme Court's latest rul-

87. People v. Robinson, 23 Ill. App. 3d 955, 320 N.E.2d 388 (1st Dist. 1974). *See also* People v. Riszowski, 22 Ill. App. 3d 741, 318 N.E.2d 10 (1st Dist. 1974). In People v. Macklin, 353 Ill. 64, 186 N.E. 531 (1933), police observed defendant leave a gasoline service station at approximately 10:40 p.m. He was joined by another man after walking about 25 feet. The police stopped both men for questioning. A search revealed a revolver on defendant's person. The court found that since no overt act of a criminal nature had been committed and that the actions of neither man could have led the officers to suspect that defendant carried a concealed weapon, the arrest was unjustified.

In United States v. Clay, 495 F.2d 700 (7th Cir. 1974), police observed the two defendants loitering in the parking lot near a savings and loan building at night for over an hour. A third man then walked from the rear of the building toward the pair, placed something at their feet, and ran away. The officers approached the pair to investigate and noticed a pistol, crowbar, screwdriver and pair of gloves lying nearby. The defendants' arrest for possession of burglary tools was upheld. The court found that the police had probable cause to believe that a crime was being committed and that the defendants were committing it.

88. *See, e.g.*, People v. Carnivale, 21 Ill. App. 3d 780, 315 N.E.2d 609 (1st Dist. 1974), where the court held that the mere association of the defendant with two known gamblers in the lobby of a hotel was not sufficient to constitute probable cause to arrest and search him. In People v. Galloway, 7 Ill. 2d 527, 131 N.E.2d 474 (1956), an officer's warrantless arrest of an individual merely because he was found in the presence of a man reasonably believed by the officer to have illegally sold heroin was found unlawful. *See also* People v. Hornal, 29 Ill. App. 3d 808, 330 N.E.2d 225 (5th Dist. 1975); People v. Johnson, 14 Ill. App. 3d 254, 302 N.E.2d 430 (1st Dist. 1973) (police lack probable cause to search passengers of an automobile that is stopped for a minor traffic offense).

89. People v. Roebuck, 25 Ill. 2d 108, 183 N.E.2d 166 (1962); People v. Harshbarger, 24 Ill. App. 3d 335, 321 N.E.2d 38 (5th Dist. 1974); United States v. Guana-Sanchez, 484 F.2d 590 (7th Cir. 1973).

90. ILL. REV. STAT. ch. 38, § 107-2 (1975).

91. ILL. REV. STAT. ch. 38, § 107-9 (1975).

92. 96 S. Ct. 820 (1976).

ing on the constitutional validity of a warrantless arrest in those situations where the arresting officer had sufficient time to procure an arrest warrant. The Court held that an arrest in a public place will not be invalidated solely on the grounds that the arresting officer had adequate time to obtain a warrant. The Court, refusing to transform the judicial preference for arrest warrants to a constitutional requirement, stated:

> The necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest.[93]

To require such a warrant would constitute an intolerable handicap for legitimate law enforcement activities, the Court reasoned, particularly since the Court had never invalidated an arrest supported by probable cause solely on the grounds that the officers failed to secure a warrant.[94]

The unanswered question of *Coolidge v. New Hampshire*[95] remains: whether, and under what circumstances, an officer may enter a suspect's home to effect a warrantless arrest. The Court specifically limited the *Watson* holding to its facts, *i.e.*, warrantless arrests in a public place.[96] The *Watson* decision does not expressly approve the practice in Illinois which allows warrantless arrests to be effected any time of the day or night at one's dwelling.[97] A successful challenge to an arrest without a warrant may lie within these narrow parameters.

Elements of Arrest. The United States Supreme Court has broadly defined the concept of arrest on two occasions. In *Henry v. United States*[98] the Court stated:

> When the officers interrupted the two men and restricted their liberty of movement, the arrest for purposes of this case, was complete.[99]

The Court impliedly defined the concept of arrest in *Miranda v. Arizona*,[100] holding that an individual must be informed of his rights

93. *Id.* at 824.

94. *See* Gerstein v. Pugh, 420 U.S. 103, 113 (1975); Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959).

95. 403 U.S. 443, 474-81 (1971). *See also* Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975).

96. 96 S. Ct. at 824-27.

97. People v. Marigny, 51 Ill. 2d 445, 282 N.E.2d 734 (1972); People v. Johnson, 45 Ill. 2d 283, 259 N.E.2d 57 (1970); People v. Franklin, 22 Ill. App. 3d 775, 317 N.E.2d 611 (1st Dist. 1974).

98. 361 U.S. 98 (1959).

99. *Id.* at 103.

100. 384 U.S. 436 (1966).

against self-incrimination when he is "taken into custody or otherwise deprived of his freedom by the authorities in any significant way."[101]

In Illinois "'[a]rrest' means the taking of a person into custody."[102] It is accomplished "by an actual restraint of the person or by his submission to custody."[103] In *People v. Howlett*,[104] the court declared that every arrest involves three elements: (1) authority to arrest; (2) assertion of that authority with intention to effect an arrest; and (3) restraint of the person to be arrested.[105] Focusing on the element of intention, the *Howlett* court stated:

> Although the intention to arrest must be communicated, and defendants' understanding of that intent is a factor to be considered, "[t]he test must be not what the defendant . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes."[106]

Illinois courts have consistently held that an individual questioned on the street by police regarding his identity and conduct has no reasonable grounds to believe he is under arrest.[107] Likewise, the mere ordering of a person to stop by police does not in itself constitute an arrest.[108]

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101. *Id.* at 478.

102. ILL. REV. STAT. ch. 38, § 102-5 (1975).

103. *Id.* § 107-5(a).

104. 1 Ill. App. 3d 906, 274 N.E.2d 885 (1st Dist. 1971). *See also* People v. Mirbelle, 276 Ill. App. 533 (1st Dist. 1934).

105. 1 Ill. App. 3d at 910, 274 N.E.2d at 887.

106. *Id.*, *citing* Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967).

107. People v. Howlett, 1 Ill. App. 3d 906, 274 N.E.2d 885 (1st Dist. 1971). In *Howlett*, police officers investigating an attempted auto theft first requested the two defendants to approach them. When the defendants failed to respond, the officers approached them on foot. The patrolmen observed the defendants drop something from under their shirts at a distance of ten feet. The officers drew their guns and proceeded towards the two men. Upon discovering that the objects on the ground were sawed off shotguns, the officer informed defendants they were under arrest. The court held that even at the point when the officers drew their guns and approached defendants for questioning, the latter had no reason to believe that they were under arrest. *But see* People v. Ussery, 24 Ill. App. 3d 864, 321 N.E.2d 718 (3d Dist. 1975), where police searching for a dark green automobile in connection with a cannabis violation observed defendant parked alongside a road in a dark green car. As the police car approached, defendant drove away, but later parked at the side of the road to permit the police car to pass her. When an officer approached defendant on foot, she fled in her car, allegedly dropping a bag containing cannabis from the window. The court rejected defendant's contention that the bag was the fruit of an illegal arrest, holding that a reasonable person who was innocent of any crime would not think he had been arrested when defendant first curbed her automobile.

108. *See, e.g.*, People v. Bridges, 123 Ill. App. 2d 58, 259 N.E.2d 626 (1st Dist. 1970), where a plain-clothes policeman saw defendant drop a tin which the officer believed contained narcotics. The officer ordered the defendant to "stop" and the defendant obeyed. The court held that merely commanding an individual to stop does not afford that individual reasonable

In order to arrest an individual, the police need not physically seize him;[109] an arrest may occur when police officers "request" or "invite" suspects to accompany them to police headquarters for further questioning.[110] However, the mere curbing of a car by police is not a restraint of liberty sufficient to constitute an arrest.[111]

Method of Arrest. Under Illinois law an arrest "may be made on any day and at any time of the day or night."[112] In addition, "[a]ll necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest."[113] In construing this statute, courts have held that police may conduct midnight arrest raids[114] and forcibly enter one's

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grounds to believe that he is under arrest. *See also* People v. Clay, 133 Ill. App. 2d 334, 273 N.E.2d 254 (1st Dist. 1971).

109. In People v. Mirbelle, 276 Ill. App. 533, 541 (1st Dist. 1934), although the court defined arrest as the taking possession of the person by manual capture or otherwise, it stated that the requisite control may be assumed without force, in any manner by which the subject of the arrest is brought within the power of control of the person making the arrest.

110. *See, e.g.*, People v. Schmidt, 5 Ill. App. 3d 787, 284 N.E.2d 72 (2d Dist. 1972), where the court found that an arrest had been made when an officer requested the occupants of a vehicle to accompany him to the police station so that he could determine whether "they had a valid driver's license." In People v. Pruitt, 79 Ill. App. 2d 209, 223 N.E.2d 537 (2d Dist. 1967), the court held that an arrest had occurred when police entered a church study and informed defendants that they were suspected of a crime and would have to accompany the police to headquarters. In United States v. Guana-Sanchez, 484 F.2d 590 (7th Cir. 1973), defendant was observed by police sitting in a car in a vacant lot at 2:30 a.m. accompanied by three others. The police determined that defendant had a valid driver's license, that he was not wanted by the police and that his passengers were probably of Mexican nationality. The police directed two of the passengers to enter one police car, and "invited" defendant to follow with the third passenger. The court found that the officers' testimony that they had "invited" defendant to follow meant that defendant had been ordered to follow, thus constituting an arrest. *But see* People v. Jackson, 98 Ill. App. 2d 238, 240 N.E.2d 421 (1st Dist. 1968). Upon spotting defendant, a police officer shouted "police officers, you are under arrest." The defendant tossed a small package of heroin to the ground and ran into a nearby tavern, where he was overtaken by the officer and placed in custody. The court rejected defendant's claim that the heroin had been obtained only after an unlawful arrest, finding that arrest occurred when defendant was overtaken in the tavern, rather than during the preliminary encounter. The court reasoned that:

> [M]ere naked words of intention were communicated and no effective restrain concomitant with the proclamation, even in a constructive manner, was achieved until the eventual confrontation removed in both points of time and place from the initial encounter.

Id. at 245, 240 N.E.2d at 425.

111. People v. Colon, 9 Ill. App. 3d 989, 293 N.E.2d 468 (1st Dist. 1973). *But see* United States v. Ruffin, 389 F.2d 76 (7th Cir. 1968), wherein a police officer, in the course of his off-duty employment as a security guard, observed defendant running toward a car idling with no lights. The officer positioned his own auto behind the parked car so as to block its movement, identified himself as a police officer, and proceeded to question and detain the defendant. The court found that such actions by the officer constituted an arrest.

112. ILL. REV. STAT. ch. 38, § 107-5(b) (1975).

113. *Id.* § 107-5(d).

114. In People v. Mallett, 45 Ill. 2d 388, 259 N.E.2d 241 (1970), a person suspected of

residence[115] when pursuing a dangerous criminal[116] or when swift action is needed to prevent the destruction of evidence[117] or the flight of a suspect.[118] Under such exigent circumstances, Illinois courts have also allowed law enforcement officials to forcibly enter a dwelling without first announcing their authority or purpose.[119]

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murder and armed robbery was arrested pursuant to a warrant in his apartment at 3:30 a.m. by four armed police officers. The court found the manner of this arrest reasonable, stating that "[i]n making the arrest of such a person, means otherwise considered improper may be utilized in order to insure the safety of the police officers and avoid flight by the defendant." Id. at 394-95, 259 N.E.2d at 245. In People v. Barbee, 35 Ill. 2d 407, 220 N.E.2d 401 (1966), the police arrived at defendant's home at 1 a.m. without a warrant and inquired of defendant's wife whether he was at home. When told that they would need a search warrant to look inside the house, the police kept the apartment under surveillance and obtained a warrant. Returning at 6 a.m., the police searched both the home and rear garage. In discussing the permissible scope of that search and entry into the dwelling the court declared:

> [W]hen an officer is authorized to make an arrest, he is also authorized "to break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose."

Id. at 411, 220 N.E.2d at 403.

115. *See* People v. Jones, 5 Ill. App. 3d 667, 284 N.E.2d 44 (1st Dist. 1972). In that case, police officers knocked on defendant's door and identified themselves, but were unable to state their purpose because defendant slammed the door. The officers entered forcibly and arrested defendant. The court held that the defendant's act of slamming the door afforded the police cause to believe that he would destroy the narcotics sought as evidence, so that the forcible entry was reasonable. In People v. Sprovieri, 43 Ill. 2d 223, 252 N.E.2d 531 (1969), police were informed by defendant's landlord that he was not at home. Nevertheless, the police searched defendant's abode and garage and recovered certain evidence. The court maintained that this entry into both the apartment and the garage was reasonable, since police may permissibly eliminate all possible hiding places as a precautionary measure. *See also* People v. Keelen, 130 Ill. App. 2d 52, 264 N.E.2d 757 (1st Dist. 1970); People v. Barbee, 35 Ill. 2d 407, 220 N.E.2d 401, 403 (1966).

116. People v. Mallett, 45 Ill. 2d 388, 259 N.E.2d 241 (1970) (police arrest of defendant at 3:30 a.m. in his apartment held reasonable since defendant was suspected of murder and armed robbery). *See also* People v. Macias, 39 Ill. 2d 208, 234 N.E.2d 783 (1968).

117. *See* People v. Jones, 5 Ill. App. 3d 667, 284 N.E.2d 44 (1st Dist. 1972) (where police officers believed that defendant was in possession of narcotics which could be quickly and easily destroyed, forcible entry into defendant's apartment was not unreasonable). *See also* People v. Keelen, 130 Ill. App. 2d 52, 264 N.E.2d 757 (1st Dist. 1970); People v. Hartfield, 94 Ill. App. 2d 421, 237 N.E.2d 193 (5th Dist. 1968).

118. People v. Mallett, 45 Ill. 2d 388, 259 N.E.2d 241 (1970); People v. Macias, 39 Ill. 2d 208, 234 N.E.2d 783 (1968). In People v. Keelen, 130 Ill. App. 2d 52, 264 N.E.2d 753 (1st Dist. 1970), police used a sledgehammer to break down the door of defendant's apartment in order to effect a narcotics arrest when defendant failed to respond to knocks. The court stated:

> The trier of fact could reasonably conclude that the defendant, when the second knock came, became suspicious, was attempting to flee, to secrete evidence, or the like, and that they found it necessary to gain entrance immediately.

Id. at 59, 264 N.E.2d at 757.

119. In People v. Macias, 39 Ill. 2d 208, 234 N.E.2d 783 (1968), police officers intended to arrest the defendant at his home, but upon arrival were informed by his son that he would be back in a short time. The policemen told the son that they were gas inspectors and asked to remain inside the house to wait for the defendant. While admitting that the police had probable cause to arrest, the defendant claimed that the police must first announce their

Time for Arrest. Both Illinois and federal courts have recognized the possibility of prejudice to the defendant where delay occurs in the pre-arrest period.[120] Delays may occur, for example, between the issuance of an arrest warrant and the actual arrest,[121] between the date of the incident and the date a complaint is filed,[122] between indictment and arrest,[123] or between issuance of a complaint and arrest.[124] Both the speedy trial provision of the sixth amendment and the due process clauses of the fifth and fourteenth amendments have been invoked as prohibitive of such pre-arrest delays.[125] Generally, a claim that pre-arrest delay prejudiced the defense of the accused must be supported by proof of actual prejudice,[126] although prejudice may be presumed where delay is unreasonably protracted.[127] Further, courts generally require a showing that the delay was an intentional device to gain tactical advantage over the accused.[128] As evidence of the motive of the police in delaying an arrest, courts often consider whether the accused was accessible during the period of the delay[129] and whether the police made an

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authority and purpose before they may enter the house. In determining the police actions were reasonable, the court reasonsed:

> [T]he officers had just reason to believe that they were dealing with a man who had just engaged in a violent armed robbery in which one policeman had been shot and three hostages taken as prisoners and threatened with death, that their mission could be perilous, that the defendant may already have heard the radio news of his codefendant's arrest and his arrest could be frustrated by further flight. We therefore hold that under the exigent circumstances of this case the officers' method of entry was not unreasonable under either State or Federal constitutions.

Id. at 216, 234 N.E.2d at 788. *See also* People v. Hartfield, 94 Ill. App. 2d 421, 237 N.E.2d 193 (5th Dist. 1968).

120. *See, e.g.*, United States v. Marion, 404 U.S. 307 (1971); People v. Love, 39 Ill. 2d 436, 235 N.E.2d 819 (1968).

121. People v. Jennings, 11 Ill. App. 3d 940, 298 N.E.2d 409 (1st Dist. 1973).

122. People v. Holland, 28 Ill. App. 3d 89, 327 N.E.2d 597 (2d Dist. 1975).

123. People v. Walker, 24 Ill. App. 3d 421, 321 N.E.2d 114 (4th Dist. 1974).

124. People v. Love, 39 Ill. 2d 436, 235 N.E.2d 819 (1968).

125. *See* United States v. Ewell, 383 U.S. 116 (1966). The purpose of the sixth amendment is

> to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.

Id. at 120.

126. United States v. Marion, 404 U.S. 307 (1971); People v. Holland, 28 Ill. App. 3d 89, 327 N.E.2d 597 (2d Dist. 1975); People v. Adams, 14 Ill. App. 3d 764, 303 N.E.2d 428 (1st Dist. 1973); People v. Walker, 24 Ill. App. 3d 421, 321 N.E.2d 114 (4th Dist. 1974).

127. People v. Love, 39 Ill. 2d 436, 235 N.E.2d 819 (1968); People v. Jennings, 11 Ill. App. 3d 940, 298 N.E.2d 409 (1st Dist. 1973).

128. United States v. Marion, 404 U.S. 307, 324 (1971).

129. People v. Jennings, 11 Ill. App. 3d 940, 944, 298 N.E.2d 409, 411 (1st Dist. 1973); People v. Walker, 24 Ill. App. 3d 421, 423-24, 321 N.E.2d 114, 116-17 (4th Dist. 1974).

effort to locate him.[130] However, time expended in reasonable investigatory activity does not result in denial of due process to a defendant.[131]

Terry Stops

A police officer may, under appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior even though no probable cause to make an arrest exits.[132] To justify a "stop" a "police officer must be able to point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrant that intrusion."[133] In evaluating the reasonableness of the "stop," the circumstances necessitating this measure are evaluated by use of an objective standard, to-wit:

> Would the facts available to the officer at the moment of the seizure . . . warrant a man of reasonable caution in the belief that the action taken was appropriate?[134]

The sole justification for a "stop and frisk" is protection of the police officer and others nearby. Therefore, any frisk must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other concealed instruments.[135]

Illinois Procedures. Illinois has codified the *Terry* procedures for "stop[136] and frisk."[137] The Illinois statute permitting investigatory stops expands *Terry* to the extent that police officers may demand the name and address of the individual under suspicion as well as an explanation of his conduct.[138] The validity of a *Terry* stop is not dependent upon the nature of the suspected crime.[139] Any detention

130. People v. Adams, 14 Ill. App. 3d 764, 303 N.E.2d 428 (1st Dist. 1973).

131. People v. Allen, 130 Ill. App. 2d 510, 263 N.E.2d 495 (2d Dist. 1970).

132. Terry v. Ohio, 392 U.S. 1 (1968).

133. *Id.* at 21. In Adams v. Williams, 407 U.S. 143 (1972), the Court upheld a police officer's protective search for the deterrence of a possessory offense rather than a crime of violence where the only basis for fear of danger was an uncorroborated informant's tip. The Court held the information of a reliable informant to be sufficient for the specificity of information necessary to justify a valid protective search for weapons.

134. *Id.* at 22.

135. *Id.* at 31. However, a protective weapons search, justified at its inception, may become unreasonable if its scope is not confined to what is minimally necessary for the officer's protection.

136. ILL. REV. STAT. ch. 38, § 107-14 (1975).

137. ILL. REV. STAT. ch. 38, § 108-1.01 (1975).

138. ILL. REV. STAT. ch. 38, § 107-14 (1975).

139. ILL. REV. STAT. ch. 38, § 107-14 (1975) provides that police may make "stops" when they reasonably believe that a person is committing, is about to commit or has committed an offense as defined in ILL. REV. STAT. ch. 38, § 102-15 (1975).

and temporary questioning of a suspect must be conducted in the vicinity of the place where the person was stopped.[140] Merely directing an individual to approach an officer does not amount to a stop.[141] Instead, the essence of a stop is an element of force or threatened force which constitutes a temporary restraint on the freedom of the individual detained to walk away.[142]

Justification for Stops. Illinois courts have consistently maintained that a stop must be based upon something more than an inarticulable hunch of an officer.[143] A stop is allowed only when the officer has sufficient grounds to reasonably believe that the person stopped was involved in or possesses information concerning the criminal activity under investigation.[144] Although officers are not required by statute to seek identification or an explanation of the individual's actions, at least one court has considered an officer's failure to seek such information an element in determining whether

140. ILL. REV. STAT. ch. 38, § 107-14 (1975).

141. People v. Ortiz, 18 Ill. App. 3d 431, 305 N.E.2d 418 (1st Dist. 1973); People v. Hines, 12 Ill. App. 3d 582, 299 N.E.2d 581 (1st Dist. 1973).

142. People v. Ortiz, 18 Ill. App. 3d 431, 305 N.E.2d 418 (1st Dist. 1973).

143. People v. Moorhead, 17 Ill. App. 3d 521, 308 N.E.2d 381 (1st Dist. 1974). In that case, police officers stopped defendant nearly three hours after receiving a report of a robbery as they observed him walking down a crowded street approximately two and one-half miles from the location of the crime. The court found this detention arbitrary and not based on a reasonable belief that defendant was involved in the robbery or privy to information concerning it. In People v. Watson, 9 Ill. App. 3d 397, 292 N.E.2d 457 (1st Dist. 1972), police officers were approached by a bus driver who reported the presence of "two suspicious looking young Negro men" in front of a savings and loan association in a white neighborhood. Arriving at the bank, the officers observed defendants at a teller's window, and followed them. Despite defendants' claim that they were opening savings accounts, the officers searched them. The court, in rejecting the validity of the "stop and frisk" found that the officers were acting merely on inarticulable hunches. The bus driver's tip, under Adams v. Williams, 407 U.S. 143 (1972), was deemed "completely lacking in indicia of reliability." Id. at 400, 292 N.E.2d at 459.

144. *See, e.g.*, People v. Housby, 26 Ill. App. 3d 92, 324 N.E.2d 465 (3d Dist. 1975). A patrol officer learned via his police radio that two suspects named Housby and Seibach were being sought in connection with a burglary on the east side of the city. The officer was patrolling the west side of the city, a mile from the crime and approximately an hour after its report. He noticed two men walking in the business area of the city at 1:00 a.m., stopped them and asked their names. When they replied "Housby and Seibach" he arrested them. The court found the officer's initial stop justified. In People v. Winslow, 26 Ill. App. 3d 1035, 325 N.E.2d 426 (2d Dist. 1975), a police officer temporarily detained the two defendants after noticing suspicious activity in a shopping center parking lot. He observed one of the defendants move in a "jerking" and "pulling" fashion alongside an automobile door and then walk away swiftly, throwing certain objects under the car, which were later discovered to be burglary tools. The court found the initial stop and forcible holding of the defendants after they dropped these tools under the car a valid "stop." The court emphasized the fact that this "stop" was effected to maintain the status quo while additional information could be gathered, and was thus reasonable. Once the tools were found, along with the removed lock of the car door, probable cause to arrest was present.

a "stop and frisk" was justified.[145]

Frisks. If facts exist which validate a stop, a limited search of the suspect for weapons is justified only if a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others is in danger.[146] An authorized search must be confined in scope to an intrusion reasonably designed to discover weapons or objects capable of use as weapons.[147] Where police are not authorized to "stop" a defendant a subsequent search is not permissible; evidence obtained through such an illegal search cannot be used as a basis for finding probable cause to arrest the defendant.[148]

Automobile Searches. Illinois courts have expanded *Terry* to include limited automobile searches as well as "frisks" of drivers who police reasonably believe to be dangerous. In *People v. Watkins*,[149] the driver of a vehicle had been validly stopped for a traffic violation at 4:00 a.m. While the driver, who did not have a

145. People v. Felton, 20 Ill. App. 3d 103, 313 N.E.2d 642 (2d Dist. 1974).

146. In People v. Lee, 48 Ill. 2d 272, 269 N.E.2d 488 (1971), police officers heard gun shots after they had been warned that gang-oriented violence was expected in their area. They then observed the two defendants wearing clothing identifying them with a youth gang. They stopped the defendants, talked with them briefly and engaged in a "pat" search. The first defendant searched was found with a empty shoulder holster beneath his outer coat, as well as a shotgun shell in his coat pocket. At this point, allegedly to discover the gun, the other defendant was searched, whereupon more gun shells were discovered. The court held that both the stop and frisk were necessary for the protection of the officers and others nearby.

In *In re* Longley, 16 Ill. App. 3d 405, 306 N.E.2d 527 (1st Dist. 1973), officers, while looking for an armed robber, observed the defendant, who matched the description of the suspect, 15 minutes after the armed robbery at a location which was approximately four blocks from the scene of the crime. When the officers spoke to the defendant, he responded vaguely. In the process of questioning the defendant, the officers noticed a lump shaped like an automatic pistol in the upper right hand corner of the defendant's clothing. The court held that the officers had reasonable grounds to believe that they were dealing with an armed and dangerous person, and therefore justified in conducting a limited patdown search of the defendant. *See also* People v. Evans, 22 Ill. App. 3d 733, 317 N.E.2d 734 (1st Dist., 1974). *But see* People v. Felton, 20 Ill. App. 3d 103, 313 N.E.2d 642 (2d Dist. 1974). A gas station attendant reported a theft of sunglasses by two black men, describing their car and license plate number to a police officer. No mention was made of a black woman. Later, an officer apprehended the described car, ordering not only the two men but also the defendant, a black woman, out of the car. A check of the woman's coat pockets revealed a revolver. The court found the "stop and frisk" of defendant unjustified in that the police officer had no reason to believe that defendant was involved in the theft and, because no mention of firearms had been made by the attendant, the officer had no reason to believe that he would find weapons.

147. In People v. McCarty, 11 Ill. App. 3d 421, 296 N.E.2d 862 (5th Dist. 1973), the court held that while reasonable grounds for an investigatory stop existed, once the officer "patted down" the individual and determined that no weapons existed, the officer's insertion of his hand into the suspect's pocket exceeded the bounds of section 107-14, and the contraband so discovered was suppressed.

148. People v. Moorhead, 17 Ill. App. 3d 521, 308 N.E.2d 381 (1st Dist. 1974).

149. 23 Ill. App. 3d 1054, 320 N.E.2d 59 (1st Dist. 1974).

driver's license, was talking to the driver of the police vehicle, the other police officer noticed movement from the front seat of the stopped vehicle. At this point, the officer became fearful of his own and his partner's safety and ordered the passenger out of the vehicle. The court ruled that the search under the front seat where the passenger had been sitting was reasonable. Extending *Terry*, the court reasoned:

> Although *Terry* involved a limited intrusion of one's person, in our view, *Terry* would not be adverse, in a case having facts as these, to permit an officer to conduct a restricted search of the area of the vehicle in which the suspicious movement was observed. It would appear illogical, if not foolhardy, to say that, where suspicious movement is noted in a particular part of a vehicle, the person may be asked to step out and be frisked for the protection of the officer, and then not allow an inspection of the place where the movement was sighted.[150]

It is important to note that, unlike searches incident to a custodial arrest as defined in *United States v. Robinson*[151] and *Gustafson v. Florida*,[152] a *Terry*-type search of traffic violators can only be made when an officer reasonably suspects imminent danger to himself or others[153] and is limited to the person of the automobile occupant and the area immediately accessible to that individual.[154]

IDENTIFICATIONS

Procedures employed by law enforcement officials in gathering identification evidence must meet standards of due process before such evidence is admissible against the accused.[155] In *Stovall v. Denno*,[156] the United States Supreme Court maintained that an accused is denied due process of law when the "totality of circum-

150. 23 Ill. App. 3d at 1064, 320 N.E.2d at 67.

151. 414 U.S. 218 (1973). In *Robinson*, the Court held that where an officer has probable cause for custodial arrest of defendant for operating a vehicle after revocation of his drivers license, a complete search of the defendant's person was legal.

152. 414 U.S. 260 (1973).

153. People v. Johnson, 14 Ill. App. 3d 254, 302 N.E.2d 430 (1st Dist. 1973).

154. People v. Tilden, 26 Ill. App. 3d 447, 325 N.E.2d 431 (1st Dist. 1974). When the police officer stopped defendant for an automobile violation, he observed an empty holster on the right side of the defendant's pants. At that point, the officer searched defendant, went to the automobile, the front door of which remained open, and looked under the front seat. Relying upon *Terry, Adams, Gustafson* and *Robinson*, the court held that the officer was justified in conducting a limited inspection of the person and the area immediately accessible to the person even without a prior formal arrest for carrying a concealed weapon.

155. Stovall v. Denno, 388 U.S. 293, 301-02 (1967); Neil v. Biggers, 409 U.S. 188, 198 (1972).

156. 388 U.S. 293 (1967).

stances" surrounding an identification procedure reveals that a confrontation between the witness and the accused was unnecessarily suggestive and conducive to irreparable mistaken identification.[157] Identification testimony concerning pretrial confrontations which are found unnecessarily suggestive and conducive to mistaken identification is not admissible at trial.[158] Additionally, in-court identifications are admissible only after a showing that they are based on a source independent from an improperly suggestive pretrial proceeding.[159]

Three different aspects of *Stovall*'s "totality of circumstances" standard have received judicial consideration in cases testing the admissibility of pretrial identification evidence: (1) the suggestiveness of police procedures; (2) the reliability of the pretrial identification; and (3) the justification for use of a suggestive procedure by police.

Unnecessarily Suggestive Confrontations

Suggestive pretrial confrontations are disapproved because they increase the probability of misidentification; it is this likelihood of misidentification which violates a defendant's right to due process.[160] In Illinois the burden of proving that a pretrial identification procedure was unfairly suggestive is upon the defendant.[161]

The *Wade-Gilbert* test as to whether a lineup is unnecessarily suggestive is objective rather than subjective.[162] The trial court's responsibility is to determine whether a lineup itself is unconstitutionally suggestive and not whether suggestiveness produced an unconstitutional effect on each viewing witness.[163] Nevertheless, in

157. *Id.* at 301-02.

158. Neil v. Biggers, 409 U.S. 188, 198 (1972); Stovall v. Denno, 388 U.S. 293, 302 (1967).

159. *See* United States v. Wade, 388 U.S. 218, 241 (1967), relying upon Wong Sun v. United States, 371 U.S. 471, 488 (1962), which phrased the proper inquiry as follows:

> [W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguished to be purged of the primary taint.

See also Gilbert v. California, 388 U.S. 263, 272 (1967) (admission of an in-court identification without first determining that it was not tainted by an illegal lineup, but was of independent origin found constitutional error).

160. Neil v. Biggers, 409 U.S. 188, 198 (1972).

161. People v. Brown, 52 Ill. 2d 94, 285 N.E.2d 1 (1972); People v. Worlow, 25 Ill. App. 3d 793, 325 N.E.2d 699 (1st Dist. 1974) (burden is on defendant to establish that within the totality of circumstances the lineup was so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable mistaken identification).

162. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

163. People v. Franklin,2 Ill. App. 3d 775, 317 N.E.2d 611 (1st Dist. 1974). Here, defendant was the only member of a lineup wearing clothing similar to that allegedly worn by the

ascertaining the suggestiveness of a pretrial confrontation, Illinois courts consider a witness' testimony concerning the lineup procedure.[164]

Lineups found unnecessarily suggestive are those where the police single out the suspect and influence the witness by directing his attention to an element known to be connected with the crime.[165] The Supreme Court in *United States v. Wade*,[166] warned against the inherent danger of suggestibility in a lineup where a suspect is the only person exhibited to an identifying witness in "distinctive clothing which the culprit allegedly wore" or where the other participants in a lineup are grossly dissimilar in physical appearance to the suspect.[167] Illinois courts, however, are in agreement that the fact that a suspect is the only lineup member wearing clothing worn by the offender does not in and of itself warrant a finding of unnecessary suggestiveness.[168] Likewise, differences in age, height or facial

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offender, but the witness who identified defendant at the lineup testified that her pretrial identification was not based on defendant's attire. The court held that the subjective notions of the witness are not the standard by which a denial of due process is determined.

164. *See, e.g.*, People v. Weathers, 23 Ill. App. 3d 907, 320 N.E.2d 442 (1st Dist. 1974), where the suspect was the only member of the four-man lineup wearing an army fatigue jacket similar to that worn by the robber. Each member was asked to utter the words spoken by the robber: "Give me some bread man." The court found that the lineup was not unnecessarily suggestive because the identifying witness' testimony was that his identification was based on the defendant's voice and not his attire. *See also* People v. Jones, 7 Ill. App. 3d 820, 288 N.E.2d 918 (1st Dist. 1972), where the complainant informed police that the man who robbed her store was wearing a fur hat. When she identified defendant at a lineup within 45 minutes of the robbery, only defendant wore a fur hat. The court found this lineup not suggestive after the victim testified that she identified defendant by his face, not his clothing. The court also indicated that since the complainant had an ample opportunity to observe defendant in a well-lighted store, her identification was reliable even if made during a suggestive lineup procedure.

165. In Foster v. California, 394 U.S. 440 (1968), the complaining witness observed a police station lineup involving three men — defendant, who was six feet tall and two much shorter men. The witness could not identify the defendant at this time and instead asked to speak to him. A confrontation was immediately arranged, but the witness remained uncertain. Approximately a week later, at a second lineup in which the defendant was the only person who had also appeared in the first, the witness became "convinced" that defendant was the robber. The Court found the pretrial identification evidence inadmissible on the ground that "the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable." *Id.* at 443.

166. 388 U.S. 263 (1967).

167. 388 U.S. at 233.

168. People v. Martin, 24 Ill. App. 3d 710, 321 N.E.2d 368 (1st Dist. 1974) (fact that defendant was the sole lineup person wearing pants the color of those worn by the robber did not make the lineup unnecessarily suggestive). In People v. Jackson, 24 Ill. App. 3d 700, 321 N.E.2d 420 (1st Dist. 1974), a robbery victim viewed a lineup of four black males; only the suspect wore red pants, as allegedly worn by the robber. The court held that the differences between defendant and the others in the lineup were not of the sort which affect admissibility of the identification. *See also* People v. Weathers, 23 Ill. App. 3d 907, 320 N.E.2d 442 (1st Dist. 1974) (suspect was only member of four-man lineup wearing an army fatigue jacket said

appearance between the suspect and others exhibited in a lineup are broadly tolerated in Illinois.[169] In those cases where single elements of suggestivity do appear, courts are prone to inspect the lineup procedure for other factors upon which the witness' identification could have been independently based.[170] However, where a lineup is fraught with suggestion, identification testimony is not admissible[171] unless the identification is based on a source independent of the pretrial confrontation.

In *Gilbert v. California*,[172] the Supreme Court held that group identifications, where several witnesses identify a suspect in each other's presence, is a procedure laden with dangers of suggestion.[173] Illinois courts tend to find group identification lineups unnecessarily suggestive[174] unless proper precautions are taken by police to

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to have been worn by robber); People v. Jones, 7 Ill. App. 3d 820, 288 N.E.2d 918 (1st Dist. 1972) (suspect was only member of lineup wearing fur hat allegedly worn by robber of witness' store). In People v. Wicks, 115 Ill. App. 2d 19, 252 N.E.2d 698 (1st Dist. 1969), the robber wore a black trench coat during commission of the crime and defendant was the only person attired in such a coat during the lineup. The court held that the defendant's attire did not emphasize him in such a manner as to fatally taint the identification, and relied upon the victim's testimony that his identification was not based on the trench coat.

169. *See, e.g.*, People v. Frazier, 25 Ill. App. 3d 761, 324 N.E.2d 10 (1st Dist. 1975) (even though defendant was the only person in five-man lineup who wore a mustache and goatee, a lineup composed of men approximately same height, age and complexion and all wearing dark jackets of various lengths and styles found not unnecessarily suggestive); People v. Scott, 20 Ill. App. 3d 880, 314 N.E.2d 671 (1st Dist. 1974) (fact that defendant was sole member of lineup displaying a full beard did not make lineup unnecessarily suggestive); People v. Norfleet, 4 Ill. App. 3d 758, 281 N.E.2d 761 (1st Dist. 1972) (considerable differences in age and appearance between the suspect and others exhibited in a lineup affects the weight of the evidence, not its admissibility).

170. *See* People v. Weathers, 23 Ill. App. 3d 907, 320 N.E.2d 442 (1st Dist. 1974); People v. Scott, 20 Ill. App. 3d 880, 314 N.E.2d 671 (1st Dist. 1974), where witness' lineup identifications were found to be based on voice identification and not on distinct physical differences between the suspect and other lineup members.

171. People v. Pierce, 53 Ill. 2d 130, 290 N.E.2d 256 (1972). Here, the court found the lineup procedure impermissibly suggestive; the lineup was viewed simultaneously by several victims who were able to discuss their identifications among themselves and defendants were the only subjects wearing leather coats which had been described previously by the complainant. In People v. Boyd, 22 Ill. App. 3d 1010, 318 N.E.2d 212 (1st Dist. 1974), the two Indian suspects were placed in a review room with ten other people, five of whom were uniformed police. The suspects were the only Indians in the room, as well as the only people in the room wearing clothing similar to that described by the complaining witness. The court found this procedure unnecessarily suggestive.

172. 388 U.S. 263 (1967).

173. *Id.* at 270-72.

174. *See, e.g.*, People v. Johnson, 55 Ill. 2d 62, 302 N.E.2d 20 (1973), where the court indicated that a procedure by which four robbery victims viewed a lineup together and one victim identified the suspect in the presence of the other three, before they had an opportunity to make an independent identification, was unnecessarily suggestive. In People v. Pierce, 53 Ill. 2d 130, 290 N.E.2d 256 (1972), the identification procedure was found unnecessarily suggestive where the lineup was viewed simultaneously by several victims who were able to discuss their identifications among themselves.

insure independent identifications.[175] However, the grouping together of several suspects of a crime in the same lineup is not in itself unfairly suggestive.[176] Likewise, a lineup is not rendered defective or prejudicial merely because of its numerical composition[177] or because a witness is informed that a suspect is in the lineup prior to viewing the procedure.[178] Courts will not find a lineup unnecessarily suggestive where prejudice is caused by the suspect's failure to cooperate with police requests which are not violative of due process.[179]

While the lineup is the pretrial identification procedure (as compared to showups or photograph identifications) championed by Illinois courts as providing an accused the best protection from misidentification, an accused has no affirmative right to a lineup.[180]

Showup identification procedures are inherently suggestive and thus "widely condemned."[181] Illinois courts have acknowledged two

175. In People v. Williams, 52 Ill. 2d 455, 288 N.E.2d 406 (1972), police conducted a lineup with all the witnesses present in the room. The court held that this lineup was not suggestive because the officers had prevented each witness from learning which identification might have been made by a prior viewer of the lineup. This was accomplished by requiring the viewers to turn their backs to the lineup, excepting the individual witness brought forward to attempt an identification. In People v. Norfleet, 4 Ill. App. 3d 758, 281 N.E.2d 761 (1st Dist. 1972), the court held that the grouping of witnesses together prior to observing the lineup was not suggestive so long as those witnesses who made identifications were separated from others waiting their turn to view the lineup.

176. *See, e.g.*, People v. Norfleet, 4 Ill. App. 3d 758, 281 N.E.2d 761 (1st Dist. 1972), where the lineup was composed of seven people, four of whom were suspects. Each suspect was separated by a stranger similar in age and height. The court refused to find this procedure suggestive, holding that each defendant is not entitled to a separate lineup under due process of law.

177. People v. Irons, 20 Ill. App. 3d 125, 312 N.E.2d 664 (5th Dist. 1974) (fact that only one other person appeared in a lineup with two suspects did not render the lineup impermissibly suggestive); People v. Williams, 117 Ill. App. 2d 34, 254 N.E.2d 81 (1st Dist. 1969).

178. *See* People v. Martin, 24 Ill. App. 3d 710, 321 N.E.2d 368 (1st Dist. 1974). In stating that the mere fact that a robbery victim is told by police that a suspect is in custody before he views the lineup does not render the procedure unnecessarily suggestive, the court queried: "What person called to view a lineup would not conclude that the police had some idea an individual in the lineup might be the offender?" *Id.* at 715, 321 N.E.2d at 373. *See also* People v. McMorris, 17 Ill. App. 3d 364, 308 N.E.2d 291 (1st Dist. 1974).

179. In People v. Broadnax, 23 Ill. App. 3d 68, 318 N.E.2d 499 (2d Dist. 1974), all participants in a lineup were requested to repeat the words allegedly spoken by the robber. Only the suspect refused that request. The court held that the defendant could not properly argue prejudice from the fact that he singled himself out by his lack of cooperation at the lineup.

180. People v. Nightengale, 24 Ill. App. 3d 129, 320 N.E.2d 359 (1st Dist. 1974) (defendant not entitled to a lineup where complaining witness singles defendant out on the street and hails a police officer to arrest him); People v. DeSavieu, 11 Ill. App. 3d 529, 297 N.E.2d 336 (1st Dist. 1973); People v. Kimmons, 6 Ill. App. 3d 565, 286 N.E.2d 115 (2d Dist. 1972).

181. Stovall v. Denno, 388 U.S. 293, 302 (1967). However, testimony of suggestive showup identifications is not per se inadmissible. Where the state makes a showing under the totality of circumstances that the identification was reliable, *i.e.*, based on an observation indepen-

situations where a showup will not be considered unnecessarily suggestive. Inadvertent or unintentional showups between witness and suspect at investigatory[182] or judicial proceedings[183] are generally not found suggestive. Additionally, situations where a victim or witness at his own instance summons an officer and identifies a suspect are not considered suggestive.[184] In these circumstances, testimony regarding the showup identification and any in-court identification is admissible, and the state need not prove that the identification stemmed from a source independent of the showup.[185]

Despite the hazards of initial identification by photograph, the Supreme Court, in *Simmons v. United States*,[186] refused to prohibit its employment per se as a matter of constitutional requirement. Recognizing the increased potential for suggestiveness, Illinois courts have often voiced disfavor with the use of photographic identifications where the suspect is in custody and a lineup is feasible.[187]

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dent of the suggestive showup, or that law enforcement officers were justified in the use of a suggestive procedure such identification testimony is admissible.

182. People v. Pardue, 6 Ill. App. 3d 430, 286 N.E.2d 29 (1st Dist. 1972) (inadvertent confrontation between victim and suspect at police station not unnecessarily suggestive where the identification is immediate, spontaneous, unprompted and positive).

183. People v. Pittman, 55 Ill. 2d 39, 302 N.E.2d 7 (1973). Here, during defendant's cross-examination of a witness, the prosecutor requested a side bar conference, leaving defendant as the only white male seated at the defense table. The court held that the state's action was not unduly suggestive and that the witness' subsequent identification of defendant was not inadmissible because no evidence suggested that the state's request was designed to create suggestion to the witness. In People v. Martin, 47 Ill. 2d 331, 265 N.E.2d 685 (1970), *cert. denied*, 403 U.S. 921 (1971), approximately eight months before defendant's trial and two years after the alleged crime, two witnesses attended a pretrial hearing at which the defendant was identified by name as the person accused of robbing a tavern. The court found that the viewing of defendant at the pretrial hearing was neither improper nor necessarily suggestive in the absence of any evidence of design:

> The State has no duty, nor would it be practical, to conceal defendant from all potential witnesses throughout all preliminary hearings preceding an actual trial.

Id. at 338, 265 N.E.2d at 689. *See also* People v. Finch, 47 Ill. 2d 425, 266 N.E.2d 97 (1970); People v. Lee, 54 Ill. 2d 111, 295 N.E.2d 449 (1973) (showup found unnecessarily suggestive where witness was told by police to attend coroner's inquest because the police "had the guys that did it." *Id.* at 115, 295 N.E.2d at 451).

184. People v. Nightengale, 24 Ill. App. 3d 129, 320 N.E.2d 359 (1st Dist. 1974) (police failure to separate defendant from prosecuting witness during ride to police station, after witness had voluntarily pointed out defendant on the street as man who had robbed him, did not constitute prejudicial pretrial confrontation).

185. People v. Finch, 47 Ill. 2d 425, 266 N.E.2d 97 (1970).

186. 390 U.S. 377 (1968). In refusing to prohibit the use of photographic identification per se, the Court noted that such procedures have been used "widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." *Id.* at 384. Thus, while acknowledging the suggestive nature of photograph identifications, the Court maintained that such a procedure is often justified by demands for effective law enforcement.

187. People v. Williams, 60 Ill. 2d 1, 322 N.E.2d 819 (1975); *see* People v. Brown, 52 Ill.

The practice of displaying multiple or similar photographs of the same person[188] or of allowing a witness to identify a suspect from a single photograph[189] is generally found to be unnecessarily suggestive. Additionally, the point in time prior to trial at which a witness is shown a photograph of the suspect for identification is an element determinative of unnecessary suggestion.[190] It is prejudicial for police to inform an identifying witness that the photograph displayed is that of the person in custody.[191] Illinois courts, however, have generally permitted police to present witnesses with an array of photographs which includes depictions of individuals physically dissimilar to the suspect.[192]

In satisfying its burden of showing unnecessary suggestiveness, the defense may seek a court order requiring the state to produce those photographs exhibited to witnesses in a photograph identification or a picture and report of the allegedly suggestive lineup.[193]

2d 94, 285 N.E.2d 1 (1972) (although undesirable, it is not per se error for police to first show photographs of suspect to witness while suspect is in custody, before conducting a lineup); People v. Holiday, 47 Ill. 2d 300, 265 N.E.2d 634 (1970).

188. *See, e.g.*, People v. Williams, 60 Ill. 2d 1, 322 N.E.2d 819 (1975), where a robbery victim was shown eight photographs by police, three of which were of the suspect. One of these was a black and white photo showing a side and front view of the suspect's head, depicting the suspect wearing a narrow-brimmed hat and sunglasses similar to those described by the victim as worn by her assailant. A second black and white photograph showed similar views of the suspect, without the hat and sunglasses. The third photo was a color print of the suspect wearing clothes different from those worn in the two black and white photographs. The court held that the photograph identification procedure was not impermissibly suggestive because the three pictures of the suspect were so dissimilar that it was not really apparent that they were photos of the same man. In People v. Lee, 54 Ill. 2d 111, 295 N.E.2d 449 (1973), however, the identification procedure was found unnecessarily suggestive where the witness was shown nine pictures, one of which was of a woman, one of a known accomplice, and three of the male suspect.

189. People v. Brown, 52 Ill. 2d 94, 285 N.E.2d 1 (1972) (showing a witness only one picture — that of the suspect — is impermissibly suggestive procedure). In People v. Holliday, 47 Ill. 2d 300, 265 N.E.2d 634 (1970), police, the day following a murder, showed a witness a single three-view color photograph of a suspect who was already in custody. The court found this procedure unnecessarily suggestive.

190. People v. Martin, 47 Ill. 2d 331, 265 N.E.2d 685 (1970), *cert. denied*, 403 U.S. 921 (displaying suspect's photograph for identification to witness just prior to trial is prejudicial).

191. People v. Hannah, 11 Ill. App. 3d 232, 296 N.E.2d 387 (3d Dist. 1973) (pretrial photograph identification found suggestive where victim was shown five photos by police and was told that his assailant might be among them); People v. Willis, 126 Ill. App. 2d 348, 261 N.E.2d 723 (1970) (officer should in no way indicate a suspect's photo is included in group of photographs shown in pretrial identification).

192. People v. Scott, 23 Ill. App. 3d 956, 320 N.E.2d 360 (1st Dist. 1974) (photograph identification procedure not rendered impermissibly suggestive by fact that some of the pictures were of older men, while suspect was a young man, or that one witness viewed photographs in another witness' presence shortly after that witness had identified the suspect).

193. People v. Pierce, 53 Ill. 2d 130, 290 N.E.2d 256 (1972); People v. Scott, 23 Ill. App. 3d 956, 320 N.E.2d 360 (1st Dist. 1974).

While it is not mandatory in Illinois for police to retain records of the other individuals or photographs displayed to an identifying witness, the courts have strongly suggested that effective police and prosecutorial procedures require retention of such records.[194] Upon the state's failure to comply with a court order to produce photographs exhibited to witnesses in photograph showups, the defendant's proper recourse is to object to any testimony concerning the photograph identification until compliance occurs or noncompliance is sufficiently explained.[195]

Where the trial court fails to find a pretrial identification procedure unnecessarily suggestive and admits such identification testimony into evidence, the defense may expose the suggestive elements during cross-examination of the identifying witness.[196] Any defects brought out at trial may be considered by the jury in its assessment of the credibility of testimony regarding defendant's identification.[197]

The overwhelming majority of all identification witnesses are allowed to testify at trial even in those situations where the court finds the pretrial confrontation to have been unnecessarily suggestive. Nevertheless, the determination that a pretrial confrontation was unnecessarily suggestive is of considerable practical significance to the defense. Illinois courts have held that the defendant, at the hearing on his motion to suppress, may not inquire into the circumstances surrounding the initial viewing of the defendant by the witness until the defendant demonstrates the identification confrontation was suggestive.[198] Thus, the valuable discovery which a defendant may gain as a result of inquiring into the initial viewing of the

194. For example, the court indicated in People v. Pierce, 53 Ill. 2d 130, 290 N.E.2d 256 (1972), that in situations where defendant claims the lineup was unnecessarily suggestive, judicial appraisal of the integrity of the identification process would be substantially assisted by the presence of either a lineup photograph or report. In People v. Jackson, 12 Ill. App. 3d 789, 299 N.E.2d 142 (1st Dist. 1973), the court noted that in a hearing to suppress photograph identification, it is difficult to prove suggestiveness without the production of the photographs used. In People v. Brown, 131 Ill. App. 2d 669, 267 N.E.2d 142 (3d Dist. 1971), the court stated that where no records existed regarding the identity of five other persons whose photographs were shown to victim with defendant's, the procedure was faulty and disapproved.

195. People v. Scott, 23 Ill. App. 3d 956, 320 N.E.2d 360 (1st Dist. 1974).

196. Simmons v. United States, 390 U.S. 377, 384 (1968).

197. People v. Jackson, 24 Ill. App. 3d 700, 321 N.E.2d 420 (1st Dist. 1974). It was determined in that case that the trial court properly allowed defense counsel to spotlight the lineup problems, allowing the jury to assess the credibility of the identifying witness' testimony and to determine how much weight it was to be afforded. *See* People v. Norfleet, 4 Ill. App. 3d 758, 281 N.E.2d 761 (1st Dist. 1972), holding that considerable differences in age and appearance between suspects and others exhibited in a lineup do not establish that a lineup was unnecessarily suggestive but affect only the weight of the identification testimony.

198. People v. Williams, 131 Ill. App. 2d 280, 283, 268 N.E.2d 730, 732 (1st Dist. 1972).

defendant by the witness will only be available once the defendant demonstrates that the pretrial confrontation was unnecessarily suggestive.

Reliability of Identification

Where the trial court finds the pretrial identification procedure to be so unnecessarily suggestive as to cause a possible denial of due process, the burden shifts to the state to prove by clear and convincing evidence that each witness' identification stemmed from an origin independent of the improperly suggestive confrontation.[199] The state must demonstrate from the "totality of circumstances" that the witness' identification of the suspect is reliable despite the suggestive procedure employed.[200] In *Neil v. Biggers*, the Supreme Court set forth five general factors to be considered in determining whether testimony regarding the pretrial identification was reliable notwithstanding suggestive confrontation procedure: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.[201] In *United States v. Wade*, the Supreme Court enumerated five similar elements to be considered when determining whether an in-court identification is admissible in the wake of a suggestive out-of-court identification.[202]

Illinois courts hare charitably employed the *Stovall-Biggers* "totality of circumstances" standard as a means by which to avoid rejecting testimony of identifications made during suggestive pretrial procedures. In determining whether a witness was afforded adequate opportunity to view the criminal at the time of the offense, courts particularly consider the amount of time the witness had to

199. People v. Blumenshine, 42 Ill. 2d 508, 250 N.E.2d 152 (1969).

200. As stated in Neil v. Biggers, 409 U.S. 188, 199 (1972), "the central question [is] whether under the 'totality of circumstances' the identification was reliable even though the confrontation procedure was suggestive." Similarly, in Simmons v. United States, 390 U.S. 377, 385-86 (1968), the critical factor was the Court's confidence "that the identification of Simmons was correct. . . ."

201. 409 U.S. 188, 199 (1972). No one factor is controlling.

202. 388 U.S. 218, 241 (1967). These factors include: the witness' opportunity to observe the criminal act and the person committing it; the existence of any discrepancy between the witness' description of the offender and the accused's appearance; identification by the witness of someone other than the accused; failure of the witness to identify the accused prior to the in-court identification; and the amount of time elapsed between the criminal act and the identification.

observe the suspect and the lighting conditions at the scene.[203] Courts also note distinctive features of the suspect upon which the witness can base his identification.[204] Additionally, where the witness presents police with an accurate and complete description of the culprit[205] and is promptly afforded an opportunity to identify the

203. People v. Johnson, 55 Ill. 2d 62, 302 N.E.2d 20 (1973). An in-court identification was upheld because it was based on a source independent from and uninfluenced by the suggestive pretrial lineup. Each of four witnesses had been individually robbed by defendant in a well-lighted tavern; each viewed the defendant for five minutes during the robbery. In People v. Owens, 54 Ill. 2d 286, 296 N.E.2d 728 (1973), the in-court identification was found reliable where witnesses kidnapped by defendant had a lengthy period to observe defendant while in his captivity. In People v. Rodgers, 53 Ill. 2d 207, 290 N.E.2d 251 (1972), the court found pretrial photograph identification testimony reliable where the witness viewed defendant for 15 minutes in a well-lighted area, despite the fact that the identification occurred two years after the crime. In People v. Hudson, 46 Ill. 2d 177, 263 N.E.2d 473 (1970), the witness observed defendant for thirty seconds in a store, establishing an adequate independent source for the identification. In People v. Weathers, 23 Ill. App. 3d 907, 320 N.E.2d 442 (1st Dist. 1974), the court found adequate independent source for identification where witness had ample time to observe defendant during the night under street lights. In People v. Smith, 18 Ill. App. 3d 859, 310 N.E.2d 734 (1st Dist. 1974), an identification was found reliable where the victim viewed defendant's face for 10 seconds under adequate lighting. In People v. Jiles, 13 Ill. App. 3d 245, 300 N.E.2d 803 (1st Dist. 1973), the victim observed defendant on the street in daylight as he walked pass him and had excellent opportunity to observe him during their 45 second face-to-face struggle, rendering the victim's in-court identification testimony admissible.

But see People v. Calhoun, 11 Ill. App. 3d 600, 297 N.E.2d 304 (1st Dist. 1973), where the complaining witness was awakened in her apartment at 1:00 a.m. She turned on the light and saw a man standing in the doorway. The intruder immediately stepped back into the hall and commanded the witness to turn off the light. This was the witness' only occassion to view her intruder. Although the witness subsequently identified defendant at the police station in an impermissibly suggestive showup, the court held that the witness' in-court identification lacked an origin independent from the suggestive pretrial confrontation. In People v. Magadanz, 126 Ill. App. 2d 335, 261 N.E.2d 703 (1st Dist. 1970), the court found no independent basis for the in-court identification where the victim testified that the robbers kept their faces covered with scarves during criminal act.

204. *See, e.g.*, People v. Connolly, 55 Ill. 2d 421, 303 N.E.2d 409 (1973), where the court found it unnecessary to evaluate the integrity of the pretrial lineup since defendants were readily recognizable by distinctive features such as processed hair, moustache, goatee and sun glasses. In People v. McMath, 45 Ill. 2d 33, 256 N.E.2d 835, *cert. denied*, 400 U.S. 846 (1970), the victim's in-court identification was deemed independent of a suggestive police station confrontation because the victim was able to identify the assailant by his distinctive voice. In People v. Bey, 42 Ill. 2d 139, 246 N.E.2d 287 (1969), the court held that where an identification by victim of sexual assault was not wholly dependent upon visual observation, but involved recognition of defendant's voice and visible bumps on his head, which the witness had felt at the time of the assault, there was substantial, independent corroborating evidence on that issue. *See also* People v. Weathers, 23 Ill. App. 3d 907, 320 N.E.2d 442 (1st Dist. 1974).

205. In People v. Lee, 54 Ill. 2d 111, 295 N.E.2d 449 (1973), the witness' testimony of suggestive pretrial identification was found unreliable because the witness described the suspect as a tall black man, and failed to identify him in court until suspect stood up at the request of the prosecutor. But in People v. Jiles, 13 Ill. App. 3d 245, 300 N.E.2d 803 (1st Dist. 1973), the victim immediately gave police a detailed description of the suspect and positively identified him 15 minutes after the alleged criminal act occurred. This in-court identification was found reliable. In People v. Sanders, 4 Ill. App. 3d 494, 280 N.E.2d 269 (5th Dist. 1972),

suspect[206] his identification testimony is deemed reliable. The identifying witness' aquaintance with a suspect prior to the crime in question is also an important factor considered when determining the reliability of identification testimony.[207] Once an identification is found reliable, the witness' testimony concerning his pretrial identification[208] and his in-court identification of the accused[209] is admissible.

Justification for Suggestive Procedures

Great latitude is accorded the prosecution in introducing identification testimony which is the product of suggestive confrontation where exigent circumstances justify the use of suggestive procedures.[210] Single suspect showups or photograph identifications have been justified where: (1) the viewing in a hospital was necessary because it was uncertain whether the victim or suspect would survive;[211] and (2) a prompt identification is necessary to determine

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the court found no independent origin for victim's identification testimony where the victim's initial description of the suspect to police varied notably in terms of size, weight and attire from the suspect's actual appearance upon his arrest.

206. *See, e.g.*, People v. McMath, 45 Ill. 2d 33, 256 N.E.2d 835, *cert. denied*, 400 U.S. 846 (1970). The victim was robbed at gun point by a man wearing a stocking cap over his face. Moments later, an officer brought a suspect to a service station where the victim identified defendant by his voice, height and weight. Later that same day, the victim identified defendant at a police station showup. The victim's testimony concerning both his out-of-court identifications and in-court identification was deemed reliable despite police use of suggestive showup. *See also* People v. Jiles, 13 Ill. App. 3d 245, 300 N.E.2d 803 (1st Dist. 1973).

207. *See* People v. Robinson, 42 Ill. 2d 371, 247 N.E.2d 898 (1969) (where witness who identifies defendant at trial was acquainted with defendant prior to the crime, pretrial identification by such witness is unnecessarily suggestive). *See also* People v. Farrar, 7 Ill. App. 3d 312, 287 N.E.2d 475 (2d Dist. 1972).

208. Neil v. Biggers, 409 U.S. 188, 199 (1972); Stovall v. Denno, 388 U.S. 293, 302 (1967); United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975).

209. Coleman v. Alabama, 399 U.S. 1 (1969); Simmons v. United States, 390 U.S. 377, 385-86 (1968); United States v. Wade, 388 U.S. 218, 241 (1967).

210. In Stovall v. Denno, 388 U.S. 293, 300 (1967), the Court held that the validity of conduct which is a claimed violation of due process in the course of a confrontation depends on the totality of the surrounding circumstances. Police are justified in conducting immediate showups at hospitals between suspects and critically injured victims. In Simmons v. United States, 390 U.S. 377, 385 (1968), the Court held that F.B.I. agents were justified in using photograph identifications where a serious felony had been committed, the perpetrators were at large and it was essential for the agents to swiftly determine whether they were on the right track in their investigation.

211. *See, e.g.*, People v. Gersbacher, 44 Ill. 2d 321, 255 N.E.2d 429 (1970) (police found justified in showing hospitalized victim a single photo of the suspect, whom she immediately identified as her rapist); People v. Smith, 18 Ill. App. 3d 859, 310 N.E.2d 734 (1st Dist. 1974) (police procedure in conducting hospital showup justified by circumstances where, one hour after commission of the offense, victim was about to undergo emergency surgery); People v. Young, 6 Ill. App. 3d 119, 285 N.E.2d 159 (1st Dist. 1972) (rape victim's pretrial identification

whether the defendant was the offender or whether the officers should continue their search.[212] Where the identification procedure employed is justified under the "totality of circumstances," testimony regarding the pretrial identification[213] and the in-court identification[214] is admissible.

CONFESSIONS

Miranda Warnings

Where an accused is subjected to custodial interrogation, any statements elicited from him during the course of such interrogation are inadmissible in evidence unless specified warnings are given before the interrogation is begun.[215] This expansive interpretation of the privilege against self-incrimination is predicated upon recognition of the questionable character of admissions obtained in the inherently coercive atmosphere of the interrogation process. This presumption concerning the nature of the statements made by an accused in such situations extends to exculpatory and inculpatory admissions,[216] both of which are inadmissible if given without effective *Miranda* warnings. The protection afforded, however, is personal; the dictates of *Miranda* are violated only when evidence obtained in contravention of *Miranda* procedures is introduced against the person whose questioning produced the evidence.[217]

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of accused while accused lay alone in a hospital bed in critical condition after being shot by police officer deemed justified and not so impermissibly suggestive as to violate due process). *But see* People v. Stock, 15 Ill. App. 3d 722, 304 N.E.2d 646 (1st Dist. 1973) (one-man hospital showup found unnecessarily suggestive and violative of due process where victim was able to leave hospital after one day and viewed a lineup with the suspect); People v. Hannah, 11 Ill. App. 3d 232, 296 N.E.2d 387 (3d Dist. 1973) (pretrial photograph identification held suggestive where hospitalized victim shown five or six photos by police and told that his assailant might be among them).

212. *See* People v. Hudson, 46 Ill. 2d 177, 263 N.E.2d 473 (1970). Immediate on-the-scene showup is desirable since it may lead to the prompt release of an innocent suspect, while enabling the police to resume the search for the fleeing culprit while the trail is fresh. *See also* People v. McMath, 45 Ill. 2d 33, 256 N.E.2d 835 (1970); People v. John, 21 Ill. App. 3d 353, 315 N.E.2d 281 (1st Dist. 1974).

213. Stovall v. Denno, 388 U.S. 293 (1967).

214. Simmons v. United States, 390 U.S. 377, 385 (1968).

215. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* requires that an accused be advised that he has the right to remain silent and that any statement made may be used against him. In addition, he must be advised that he is entitled to have an attorney present during interrogation, whether the attorney be appointed or retained. *Id.* at 444.

216. People v. Roy, 49 Ill. 2d 113, 273 N.E.2d 363 (1971) (defendant in a murder case, when asked whether he had shot the victim replied that he did not shoot the victim, but had hit him with a blackjack).

217. People v. Denham, 41 Ill. 2d 1, 241 N.E.2d 415 (1968). Defendant in that case moved to suppress evidence obtained as a result of interrogation of third parties who had not been warned of their constitutional rights. The court reasoned that noncoercive questioning, in

Custodial Interrogation. *Miranda* safeguards the rights afforded an accused in situations which create an atmosphere of compulsion or duress. To determine whether, in the context of police interrogation, *Miranda* warnings are required, courts first consider whether the interrogation has in fact been initiated by police to elicit incriminating testimony or admissions.[218] Conversation between the police and the accused which the accused initiates is not within the ambit of the protections, especially when the dialogue does not occur in a police station.[219] Such declarations are often admissible under the concept of the "volunteered statement."[220] The exception is limited in application to those situations which are not characterized as custodial interrogations.[221] Courts define the outlines of the excep-

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itself, is not unlawful and that, in the absence of any demonstration of actual coercive tactics used by police on the third parties, such statements could be admitted; defendant, however, had no right to assert the omission of the *Miranda* warnings. In People v. Hudson, 46 Ill. 2d 177, 263 N.E.2d 473 (1970), the Illinois Supreme Court reiterated this standing requirement, but acknowledged that strong public policy considerations forbid the introduction of such statements when the statements are products of coercion. In *Hudson*, defendant argued that damning testimony of an accomplice was improperly admitted because of prosecution threats to try the accomplice for murder and promises of leniency. The court affirmed the trial court's finding that no such coercion occurred.

See also People v. McLean, 2 Ill. App. 3d 307, 276 N.E.2d 72 (1st Dist. 1971) (*Miranda* found inapplicable to adverse inferences drawn by defendant's companion's refusal to make a statement after *Miranda* warnings were given); People v. Joyner, 50 Ill. 2d 302, 278 N.E.2d 756 (1972) (standing denied murder suspect to raise the absence of *Miranda* warnings to his brother, a witness to the incident).

218. For example, routine, preliminary questions by police which are part of the booking procedure—a request for a name and address—do not amount to such interrogation. People v. Fognini, 47 Ill. 2d 150, 265 N.E.2d 133 (1970).

219. In People v. Langford, 123 Ill. App. 2d 437, 259 N.E.2d 79 (2d Dist. 1970), a suspected burglar, a police officer, invited the Chief of Police to his home for a drink and confessed during the course of conversation. Although noting that defendant was under suspicion at the time of the event, the court held that since the conversation took place at the insistence of defendant, in his own home, there was neither police-initated nor custodial interrogation. In People v. Kelley, 10 Ill. App. 3d 193, 293 N.E.2d 158 (2d Dist. 1973), defendant called and met a police officer at a restaurant. This conference, during which defendant confessed, was held not to have been initiated by the officer. People v. Thompson, 48 Ill. 2d 41, 268 N.E.2d 369 (1971), noted that *Miranda* applied solely to interrogation by police, holding that statements made by the accused while at gunpoint arrest, after instructions to place his hands over his head, were not the result of custodial interrogation by non-verbal methods. Such police actions could not be characterized as "interrogation."

220. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or make any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Miranda v. Arizona, 384 U.S. 436, 478 (1966).

221. People v. Ruegger, 32 Ill. App. 3d 765, 336 N.E.2d 50 (4th Dist. 1975), held the exception inapplicable to the statement of the accused made in the form of tape-recorded answers to questions by police while the accused was in police custody. The court distinguished between a volunteered and a voluntary statement; in order for the latter declaration

tion to include those statements which are spontaneous,[222] regardless of whether the defendant was in police confinement[223] or whether law enforcement authorities initiated the dialogue.[224] Dur-

to be admissible the state must demonstrate that the defendant was given adequate *Miranda* warnings and that the defendant knowingly waived his privilege.

The "volunteered statement" exception depends on the absence of clear police interrogation. In cases where the police actions were characterized not as "questioning" but as a "confrontation" of the accused courts have upheld statements as within the exemption. In both instances the accused was clearly "in custody." In People v. Doss, 44 Ill. 2d 541, 256 N.E.2d 753 (1970), the defendant had claimed his right to remain silent; the police placed him in the presence of his accomplice—who had already confessed—who urged him to show the officers where the weapon was hidden. Without prompting, the defendant did so; his action was characterized as a "volunteered expression." However, the Seventh Circuit Court of Appeals later granted a petition for a writ of habeas corpus to the defendant, noting defendant's conduct was actually police-initiated, so that admission of the evidence required a showing of positive waiver by Doss of his fifth amendment rights. United States *ex rel.* Doss v. Bensinger, 463 F.2d 576, *cert. denied*, 409 U.S. 932 (1972). In People v. Townsend, 6 Ill. App. 3d 873, 286 N.E.2d 801 (1st Dist. 1972), the defendant was confronted by police with inconsistencies in a version of the incident he had previously related to them. The court held that the defendant's subsequent confession to "get it off his chest" was an unprompted and volunteered statement.

In People v. Hicks, 44 Ill. 2d 550, 256 N.E.2d 823, *cert. denied*, 400 U.S. 845 (1970), the Illinois Supreme Court held that where a defendant freely and voluntarily makes incriminating admissions to police, the absence of *Miranda* warnings will not preclude the use of such statements as testimony at trial. In *Hicks*, police acted upon information received from an eyewitness to the crime and proceeded to defendant's apartment to make the arrest. Upon encountering the defendant in the hallway of the apartment building the defendant stated, "I am Morris Hicks. I knew you were coming. I did it." Due to the apparent spontaneity of the defendant's utterance, the police had no opportunity to advise the defendant of his rights before he made the statement. Similarly, in People v. Howell, 44 Ill. 2d 264, 255 N.E.2d 435 (1970), the court found that defendant was not deprived of his constitutional privilege against self-incrimination when he voluntarily walked into a local district police station and confessed to murder. The defendant had not been advised of his *Miranda* rights either before he confessed or before he escorted the police to the scene of the crime.

222. In People v. Goodwin, 24 Ill. App. 3d 1090, 322 N.E.2d 569 (5th Dist. 1975), upon being advised at his home that the sheriff wanted to see him defendant responded to the police officer by saying, "I guess you want this knife. I ain't done nothing I'm ashamed of." These statements were found spontaneous and voluntary, and since not elicited during custodial interrogation were admissible under *Miranda* principles. In People v. Jenkins, 131 Ill. App. 2d 49, 268 N.E.2d 198 (1st Dist. 1971), defendant was arrested after being pursued by police. The arresting officer said, "You killed a woman back there" to which the defendant replied, "The bitch needed killing." The court held that the officer's remark was an explanation to the defendant of the reason for the arrest and that thereafter the defendant voluntarily and spontaneously made his statement, which was admissible without the *Miranda* predicate.

223. *See In re* Stiff, 32 Ill. App. 3d 971, 336 N.E.2d 619 (2d Dist. 1975), where the court held that a statement was admissible without preceding *Miranda* warnings, though it was uttered while the defendant was detained in a police car travelling to the police station. The statement was held competent evidence because it was volunteered by Stiff without interrogation. *See also* People v. Jackson, 2 Ill. App. 3d 297, 275 N.E.2d 737 (1st Dist. 1971). Defendant, after being arrested, responded, "What do you want me now for? You put me out of business when you got my stuff at the house." This statement, which was not the product of interrogation, was found to be a volunteered declaration.

224. People v. Lowe, 122 Ill. App. 2d 197, 258 N.E.2d 370 (4th Dist. 1970). The accused

ing such a statement the police are not required to interrupt a suspect for the purposes of giving the *Miranda* warnings.[225] Moreover, *Miranda* warnings are not required when the participants in the interrogation or conversation are neither police[226] nor representatives of law enforcement agencies.[227]

The determination of whether the interrogation has been conducted in a custodial, and therefore coercive, setting is not solely dependent upon either its location or the fact that the accused has been arrested.[228] Rather, courts consider the amount of knowledge possessed by the police at the time of the questioning and whether anyone was the focus of the investigation at the time of interroga-

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was found with his wrists slashed, in a weakened condition, near the body of his wife. In reply to an officer's questioning about need for medical care, the defendant said "I killed her and the gun is on the living room floor." The declaration was admitted without *Miranda* warnings.

225. People v. Jackson, 2 Ill. App. 3d 297, 275 N.E.2d 737 (1st Dist. 1971).

226. People v. Morehead, 45 Ill. 2d 326, 259 N.E.2d 8, *cert. denied*, 400 U.S. 945 (1970). A man accused of criminally damaging telephone property spoke to a special agent for the phone company at the police station following his arrest. The agent testified to the substance of the conversation. The court found *Miranda* inapplicable since the agent was a private individual and there was no assertion of compulsion or duress. *See also* People v. Hawkins, 53 Ill. 2d 181, 290 N.E.2d 231 (1972) (accused rapist answered his father's question "what happened" with a confession in the presence of a police officer; the confession was found admissible absent a demonstration that the police had initiated the conversation or attempted to interrogate the accused through his father).

In People v. Brooks, 51 Ill. 2d 156, 281 N.E.2d 326 (1972), three defendants accused of involvement in a murder conversed in a room next door to several policemen; the police were in full view of the defendants. The court found that such conversation, not the result of compelling influence nor elicited by police interrogation, was specifically excluded from *Miranda*. *See also* People v. Griffin, 23 Ill. App. 3d 461, 318 N.E.2d 671 (3d Dist. 1974), which held admissible statements by a defendant to his wife over the telephone. The defendant spoke over a phone located on the jailer's desk and in full view of the jailer.

227. In People v. Baugh, 19 Ill. App. 3d 448, 311 N.E.2d 607 (4th Dist. 1974) it was held that when the questioner functions as a police conduit for the information elicited, where his interest is integrated and aligned with authorities and where the conduct and questions of the interrogation are accusatory in nature, the absence of official affiliation does not negate the need for *Miranda* warnings. In *Baugh*, after the accused had been arrested for theft, he was taken by police to the home of the victim. The victim's attorney not only interrogated him in the presence of the police regarding the incident, but also confronted him with incriminating evidence in a successful attempt to force a confession. Even though no compulsion or duress was shown, such statements were inadmissible as violative of *Miranda*.

In *Baugh* the court found the defendant to be "in custody." In two earlier cases, People v. Shipp, 96 Ill. App. 2d 364, 239 N.E.2d 296 (3d Dist. 1968), and People v. Vlcek, 114 Ill. App. 2d 74, 252 N.E.2d 377 (2d Dist. 1969), the fact that the defendants, questioned similarly to Baugh, were not "in custody" mitigated against the necessity for *Miranda* warnings. In *Shipp* the accused made an oral confession to his high school principal; in *Vlcek* the accused made admissions to an insurance agent whom defendant mistook for a fire marshall. Neither statement was suppressed.

228. *See* Orozco v. Texas, 394 U.S. 324 (1969), where defendant was placed under arrest in his home, in the early hours of the morning and questioned by police. The Supreme Court found such questioning violative of *Miranda*.

tion.[229] However, in Illinois, the *sine qua non* for invoking the *Miranda* rule appears to be not merely that the interrogation is focused on the accused, but that it is done so while he is ". . . deprived of his freedom of action in any significant way."[230] That is, even after knowledge of the commission of a crime by police and a centering of suspicion on the defendant, statements of the accused made in a non-hostile atmosphere, such as a home or hospital, have been held to be admissible, without *Miranda* protections issued.[231] However, when such focus culminates in directive questioning from which the accused cannot depart, adequate *Miranda* warnings are required, regardless of location.[232]

229. People v. Baily, 15 Ill. App. 3d 558, 304 N.E.2d 668 (1st Dist. 1973). In People v. Burris, 49 Ill. 2d 98, 273 N.E.2d 605 (1971), defendant voluntarily went to the police station accompanied by others and was questioned. The court held that only after the initial questioning, during which police investigation uncovered discrepancies in his story, was he "treated differently from the others" and therefore entitled to *Miranda* warnings initially.

230. People v. Fischetti, 47 Ill. 2d 92, 264 N.E.2d 191 (1970); People v. Tolefree, 9 Ill. App. 3d 475, 292 N.E.2d 452 (1st Dist. 1972).

231. *See, e.g.*, People v. Fischetti, 47 Ill. 2d 92, 264 N.E.2d 191 (1970), in which a coat was found containing drugs, and police questioned the accused regarding the ownership of the coat. His admission of ownership, made in the familiar environment of his parents' apartment, with his family present, without prolonged interrogation, was found to be not made while "in custody" or in deprivation of his freedom. In People v. Jones, 2 Ill. App. 3d 575, 277 N.E.2d 144 (2d Dist. 1971), defendant, in his own home, was answering questions for an accident report. The state trooper who initiated the meeting had investigated the accident and already discovered evidence which incriminated the defendant. Defendant's descriptions of the accident, without *Miranda* warnings, were admissible. In People v. Reeder, 2 Ill. App. 3d 471, 276 N.E.2d 768 (2d Dist. 1971), defendant, in a hospital, was asked by the police to take a breathalyzer test after the accident. His reply, "This will kill me; I have alcohol in my blood," was admissible without *Miranda* warnings because no "focused" investigations had been instigated at the time.

In People v. Helm, 10 Ill. App. 3d 643, 295 N.E.2d 78 (1st Dist. 1973) the court relied on an objective reasonable man standard to determine whether the defendant had been in custody at the time of his statements, so as to require *Miranda* warnings. The defendant had been stopped while driving a car known by the police to be stolen. His statements, given without *Miranda* warnings, were admitted.

> [A]t the time he was stopped . . . and asked about the ownership of the car he was driving, [he] could not reasonably have believed he was in custody until after he went with the officer to the police station. . . . This lack of pressure is particularly apparent in the present case because the defendant was questioned on a public street in his own car, in the presence of two of his friends. . . .

Id. at 649, 295 N.E.2d at 82. This standard for analysis appears to control in People v. Hooker, 21 Ill. App. 3d 26, 313 N.E.2d 468 (3d Dist. 1974). There police, while investigating a burglary, noticed a car parked in front of the burglarized home. Later that day defendant, the owner of the car, reported it stolen at the police station. The court held the police were not required at the time of interviewing the defendant about his claim of auto theft to inform him of his *Miranda* rights.

232. People v. Braun, 98 Ill. App. 2d 5, 241 N.E.2d 25 (5th Dist. 1968). The court held inadmissible statements of an accused elicited by continual questioning while the accused was confined to a hospital bed. The prosecution admitted that such interrogation was "custodial;" the court found that the inadequate warnings given required reversal even though,

This type of analysis has rendered *Miranda* warnings inapplicable per se to routine traffic stops unless and until such time as probable cause exists for the arrest for a specific offense.[233]

The most prominent application of the non-custody rule is questioning conducted at or near the scene of the crime. The *Miranda* decision expressly recognized such interrogations as being essential to effective law enforcement and excluded them from application under the rule.[234] This exception to *Miranda* has been construed broadly.[235] "On the scene" is not limited to the exact place of the crime but rather extends to include any preliminary investigative work by police, whether at the location of a crime[236] or soon thereafter at another locale.[237] Answers by a person to police questions as

absent the defendant's admissions, there might have been enough evidence to convict independent of the statements.

233. In People v. Pullum, 56 Ill. 2d 15, 309 N.E.2d 565 (1974), the Illinois Supreme Court held that *Miranda* warnings were not necessary with reference to interrogation concerning an accused's drivers license, ownership of a car or running of a red light. The court based this holding on the concept of "on the scene questioning" as first established in People v. Parks, 48 Ill. 2d 232, 269 N.E.2d 484 (1971). *See also* People v. Ricketson, 129 Ill. App. 2d 365, 264 N.E.2d 220 (2d Dist. 1970) (*Miranda* warnings not required where defendant stopped for traffic violation was questioned about burglar tools in the back seat); People v. Helm, 10 Ill. App. 3d 643, 295 N.E.2d 78 (1st Dist. 1973).

234. In *Miranda*, the court stated:

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.

384 U.S. at 477-78.

235. Courts have distinguished the custodial from the investigative interrogation by suggesting that the exception to *Miranda* warnings applies where there has been neither coercion, whether actual or potential, nor police domination of the individual's will. People v. Dunn, 3 Ill. App. 3d 854, 334 N.E.2d 866 (1st Dist. 1975).

236. When a police officer is confronted in a public place with suspicious circumstances his inquiries to persons and their replies have been held without the scope of *Miranda*. People v. Tolefree, 9 Ill. App. 3d 475, 292 N.E.2d 452 (1st Dist. 1972). There, during investigation of a burglary the police noticed a vehicle with an open trunk containing items similar to those reported stolen. Upon approaching the vehicle they saw the defendant crouched near it with a wrench in his hand. The officers inquired as to the ownership of the car and its contents. The defendant's answers were admissible. In People v. Jones, 13 Ill. App. 3d 684, 301 N.E.2d 85 (1st Dist. 1973), the accused, under suspicion of stealing credit cards, was asked by a store security officer, an off-duty policeman, for identification including credit cards. No *Miranda* warnings were given and the court upheld the action. The most influential Illinois case is People v. Parks, 48 Ill. 2d 232, 269 N.E.2d 484 (1971). There the police, investigating a tip that the accused was purchasing drugs with false identification, encountered the accused as he left a drug store. They questioned him, without warnings, about the purchase. The defendant's responses, it was held, were properly admitted at trial.

237. In cases involving traffic accidents, preliminary questioning of a person, removed from the scene of the occurrence, which produced statements later used in criminal trial was upheld as within the exception of required *Miranda* warnings. People v. Reeder, 2 Ill. App. 3d 471, 276 N.E.2d 768 (2d Dist. 1971); People v. Jones, 2 Ill. App. 3d 575, 277 N.E.2d 144 (2d Dist. 1971). In *Reeder*, the defendant was questioned at a hospital and asked to take a

to "what happened" or as to the ownership of any weapon or instrumentality involved in an incident are admissible without prior warning to the person of his constitutional rights.[238]

Adequacy of the Warnings. Prior to interrogation, it is not necessary to inform the accused in custody of the nature of the charge against him[239] or that he has the right to terminate the interrogation at any time.[240] Further, courts do not require that the accused be made aware of the manner in which his statement is recorded. Since the persons witnessing the making of the statement are competent to testify later at trial, whether notes are taken by the police at the time of the questioning[241] or the questioning is recorded on videotape

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test to determine alcohol content of his blood. His response was held admissible as elicited through general on-the-scene questioning. The court noted that the officer had no knowledge as to whether the defendant was intoxicated and had confined his queries to facts of the accident. In *Jones*, the questioning, in defendant's home, was limited to inquiries necessary for the officer to fill out the accident report.

In People v. Mattison, 132 Ill. App. 2d 1069, 271 N.E.2d 119 (4th Dist. 1971), the court characterized the exception as applicable to "initial interrogations in which the officer asks general questions." There, the defendant, arrested by state narcotics agents without being given *Miranda* warnings, was questioned by the agents in a car which was transporting him to jail. The defendant's statement that he sold "baking soda to two white dudes in a blue car," was held properly admitted; the defendant's conviction for agreeing to sell a narcotic drug and then selling a non-narcotic substance was affirmed. *See also* People v. Dunn, 31 Ill. App. 3d 854, 334 N.E.2d 866 (1st Dist. 1975), where, acting on a description of an armed robber, police stopped the defendant's car and questioned him about his activities. Such questioning, under circumstances described by the court as suspicious, did not require *Miranda* warnings.

238. People v. Bailey, 15 Ill. App. 3d 558, 304 N.E.2d 668 (1st Dist. 1973). In that case, the police, called to investigate a death, asked the victim's wife what had occurred. She was subsequently charged with murder. Her response, indicating that the deceased had committed suicide, was held properly admissible. *See also* People v. Linwood, 30 Ill. App. 3d 454, 333 N.E.2d 520 (3d Dist. 1975) (preliminary police inquiries as to the location of a gun and its ownership while investigating a death did not require *Miranda* warnings).

239. People v. Walls, 9 Ill. App. 3d 696, 292 N.E.2d 915 (2d Dist. 1973) (abstract) (admission of defendant's confession, in the absence of notification to him that if his victim died he would be charged with murder, held not a denial of the defendant's constitutional rights). In People v. Smith, 108 Ill. App. 2d 172, 246 N.E.2d 689 (2d Dist. 1969), a murder conviction was upheld where defendant, although given *Miranda* warnings, was not informed of the death of the victim. The defendant claimed that withholding such information was trickery on the part of the police. The court held that the police had no duty to disclose to an accused all material facts known to them from other sources prior to interrogation. In People v. Gunn, 15 Ill. App. 3d 1050, 305 N.E.2d 598 (1st Dist. 1973), the court held that the accused, during interrogation, was not entitled to police-supplied explanations of the principles of criminal accountability.

240. People v. Washington, 115 Ill. App. 2d 318, 253 N.E.2d 677 (1st Dist. 1969); People v. Hudson, 8 Ill. App. 3d 813, 291 N.E.2d 308 (1st Dist. 1972).

241. The lack of recording, *i.e.*, note-taking by the police while a suspect speaks, generally arises in the context of "waiver" of constitutional rights. In People v. Burbank, 53 Ill. 2d 261, 291 N.E.2d 161 (1972), the defendant argued that even though warned of his rights, by not rendering his statement in a written form, the police led him to believe that his words would not be used against him. The court found no merit in this argument.

without the knowledge of the accused is irrelevant.[242]

Words of warning employed must convey the substance of the *Miranda* requirements along with the necessary information to enable the accused to understand his rights. Courts, in interpreting *Miranda*, do not engage in a word-for-word comparison between its precise language and the warnings given;[243] nor do they scrutinize the words used for all possible implications. Rather, the substance of the warnings is evaluated in the context of the entire recitation.[244] Varieties of wording have been upheld as adequate for *Miranda* purposes. It is sufficient that the accused be told he is not required to "give a statement," but if he does the statement could be used as evidence against him at trial, although courts have indicated that the preferred phrasing encompasses a caution that the accused has a "right to remain silent."[245]

It is not necessary that the accused be told explicitly he has the "right to an attorney prior to questioning." Language suggesting that the "court will appoint an attorney" for the defendant, in combination with the other warnings, has been found adequate to con-

242. People v. Ardella, 49 Ill. 2d 517, 276 N.E.2d 302 (1971), held that additional caution to a defendant that his words and movements (intoxication tests) were being transcribed by video equipment was unnecessary. If the defendant waives his essential rights such transcription is appropriate. In People v. Fenelon, 14 Ill. App. 3d 622, 303 N.E.2d 38 (2d Dist. 1973), the question arose whether a waiver of *Miranda* rights is a prerequisite to the admission of a video recording of physical tests to determine intoxication. The court, predicating its reasoning on *Ardella*, held that the critical inquiry is whether the responses to the tape were testimonial in nature or merely physical evidence. This determination requiries an analysis of the tape itself. The implication is, of course, that testimonial expressions, to be admitted into evidence, necessitate waiver of *Miranda* rights. Even though the recorded reponses to the intoxication tests are the "psychological" equivalent to questions and answers, the defendant's physical movements alone (the video and not the audio) corresponding to the police instructions are admissible without *Miranda* warnings.

Video evidence of questioning has been used by the courts to evaluate a defendant's contentions concerning the adequacy of *Miranda* warnings. In People v. Gonzales, 22 Ill. App. 3d 83, 316 N.E.2d 800 (2d Dist. 1974), the court analyzed such a recording in conjunction with the accused's claim of inability to understand the *Miranda* protections. He had alleged that his fluency in English was such that the warnings given in English were faulty. A review of the tape demonstrated his grasp of the English language.

243. In People v. Walker, 2 Ill. App. 3d 1026, 1032, 279 N.E.2d 23, 28 (1st Dist. 1971), the defendant was told "he could remain mute if he so chose, but that if he spoke, what he said would be used against him in court; that he didn't have to make any statement one way or the other without counsel, and if he didn't have counsel or could not afford an attorney, one would be provided for him." On appeal, his claim that the warnings were defective as not being in the precise language of *Miranda*, was rejected.

244. In People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), the Illinois Supreme Court conceded that one part of the warning, viewed alone, may be subject to a variety of interpretations. A proper reading, however, involves viewing the separate part in the context of the entire discussion.

245. People v. Landgham, 122 Ill. App. 2d 9, 257 N.E.2d 484, *cert. denied*, 402 U.S. 911 (1970).

vey notice of this essential constitutional right. Courts have discounted the implication that variant wording may impart the understanding to an indigent defendant that an attorney will be provided only in formal court proceeding, but not before.[246]

Nor is it mandatory that the accused be informed specifically of his right to counsel during interrogation. In *People v. Prim*,[247] the Illinois Supreme Court, noting that the important consideration is the contextual evaluation, held that the defendant has been adequately warned that his rights include the presence of an attorney at the time of questioning if he is told of his "right to have an attorney present" and that "if he cannot afford one the State would get one for him."[248]

Waiver. An accused may waive his rights under *Miranda* provided the waiver is knowingly, voluntarily, and intelligently made.[249] However, admissions of the defendant based upon a waiver

246. In People v. Durham, 23 Ill. App. 3d 737, 320 N.E.2d 144 (1st Dist. 1974), the accused was told that he had a right to have an attorney before answering any question and that if he could not afford an attorney the court would appoint one. He maintained that the warning implied that an indigent defendant had a right to an attorney *only* when he went to court. Citing People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), the court rejected the argument. In People v. Hoffman, 32 Ill. App. 3d 785, 336 N.E.2d 209 (4th Dist. 1975), an identical contention was advanced regarding similar warnings. The court there held the warnings sufficient to provide the accused with knowledge of his absolute right to a lawyer; the variation merely informed the defendant of the method by which lawyers were appointed, and did not qualify the protection in any way. *See also* People v. Williams, 131 Ill. App. 2d 149, 152, 264 N.E.2d 901, 903 (1st Dist. 1970), where the accused signed a writtten statement which read, in part:

> You have [the] right to the advice and presence of an attorney whether you can afford to hire one or not. We have no way of furnishing you with an attorney, but one will be appointed for you if you wish, if and when you go to court.

The court approved these warnings, holding that when read in combination with other statements in the signed document, they clearly and understandably informed the defendant of his entitlement to an attorney prior to questioning.

247. 53 Ill. 2d 62, 289 N.E.2d 601 (1972).

248. In People v. Young, 131 Ill. App. 2d 113, 266 N.E.2d 160 (1st Dist. 1970), the court sanctioned, as properly advising the defendant of his right to an attorney during interrogation, warnings advising the accused that if he wished, he could voluntarily talk to police; if he did not so desire, he could talk to police in the presence of a lawyer. In People v. Walker, 18 Ill. App. 3d 351, 355, 309 N.E.2d 716, 719 (1st Dist. 1974), defendant under arrest in a tavern was told "he didn't have to answer any question. . . . if he did say anything, it could be used against him at some future proceeding." The officer also informed him that he should obtain the advice of an attorney, and if he lacked money the state would provide an attorney for him. The court reasoned that since the defendant was told about obtaining the advice of counsel immediately subsequent to being informed of his right to remain silent, the understanding that the accused had a right to have an attorney present during interrogation was conveyed. Similarly, the court in People v. Gazic, 30 Ill. App. 3d 1063, 336 N.E.2d 73 (1st Dist. 1975) held that a defendant cautioned that "he had a right to consult with a lawyer; if he could not afford one, one would be appointed for him by the court" was effectively apprised of his right to an attorney during interrogation.

249. 384 U.S. at 444.

may be introduced in evidence, if it is first demonstrated that the waiver met constitutional standards.[250] This determination is not dependent upon any single factor, but rather upon the totality of the circumstances under which the confession was elicited. The most frequently cited test is found in *Coyote v. United States*:[251]

> What *Miranda* does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all his rights.[252]

The waiver must be knowing, requiring more than perfunctory reading of the *Miranda* rights by the defendant from a card supplied by the police;[253] rather, there must be comprehension of these rights by the defendant. Illinois courts, in making the evaluation, attempt to objectively weigh the pertinent factors. On the whole, although courts have found relevant a diversity of considerations — *e.g.*, the mental age of defendant,[254] his emotional state,[255] his understanding

250. *Id.* at 475.

251. 380 F.2d 305 (10th Cir. 1967).

252. *Id.* at 308.

253. People v. Schoenbeck, 1 Ill. App. 3d 395, 274 N.E.2d 483 (2d Dist. 1971). In that case, defendants were read their "rights" by police, were given the card from which the police had read and told to "read it; sign it;" the court suppressed the confessions.

254. The police, under *Miranda*, are not required to conduct an examination of the mental capacity of an accused to determine his ability to understand his rights. People v. Smith, 108 Ill. App. 2d 172, 246 N.E.2d 689 (2d Dist. 1969). In that case the court did not find persuasive evidence that a 19 year old defendant, unfamiliar with police procedures, had only 10 years of schooling. The court noted that formal scholastic deficiency is insufficient to prove substandard intelligence. However, in People v. Turner, 56 Ill. 2d 201, 306 N.E.2d 27 (1974), the record demonstrated that prior to defendant's arrest, police were aware of his history of mental retardation. Not only did the police fail to tailor the warnings so that the accused could understand them, but a polygraph examiner hired by the police to test the defendant, also with knowledge of his mental condition, failed to honor the defendant's request for an attorney and continued to question him for five hours. The court found that such conduct clearly negated a possibility of waiver. Similarily in People v. Baker, 9 Ill. App. 3d 654, 292 N.E.2d 760 (4th Dist. 1973), the defendant had a sub-par mentality. Since police gave warnings to him "as the advice of rights would be given to any individual," without modification, there was no knowing waiver.

These cases were distinguished in three recent decisions. In People v. White, 61 Ill. 2d 288, 335 N.E.2d 457 (1975), the Illinois Supreme Court held that an accused of substantially the same mental age as the defendant in *Turner* (an I.Q. of 75) had properly waived his rights. In weighing the countervailing considerations involved, the court found that the defendant was familiar with police proceedings, and further, that the police had proceeded scrupulously in each questioning period, articulating the *Miranda* warnings separately and questioning the defendant about each offense he was accused of independently. This showing was sufficient

of the language used to inform him,[256] and his condition at the time of the warnings[257] — the issue of waiver is generally decided on the trial court's analysis of the credibility of police testimony.[258] When there is an equivocation in police testimony, in addition to the confluence of several factors indicating the presence of a mental deficiency on the part of the defendant, the courts find an absence of knowing waiver and hold the proferred admission or confession inadmissible.[259] To prove a valid waiver the state must present

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to validate the confession. In *In re* Morgan, 35 Ill. App. 3d 10, 341 N.E.2d 19 (1st Dist. 1975), defendant was a 15 year old attending the 9th grade of a vocational school. The court distinguished *Turner* and *Baker* on the consideration that the instant defendant, although not at the normal level, was a functional student who testified he "understood some of the admonishments." Finally, in People v. Gonzales, 22 Ill. App. 3d 83, 316 N.E.2d 800 (2d Dist. 1974), the court, employing the *Coyote* test, found that a 27 year old accused possessing an average I.Q., but minimal language skills, had been effectively apprised of his rights and had waived them, noting that subnormal mentality alone does not *ipso facto* render an oral statement involuntary.

255. The emotional or psychological state of the defendant has been considered relevant in determining the presence of a valid waiver. People v. Reed, 8 Ill. App. 3d 977, 290 N.E.2d 612 (2d Dist. 1972); People v. Merkel, 23 Ill. App. 3d 298, 319 N.E.2d 77 (2d Dist. 1974). In *Reed*, the appellate court upset a trial court ruling of inadmissibility based on psychiatrist's testimony that the defendant was "very suggestible," and that the request of a police officer could heavily and unduly influence her. The appellate court found no evidence indicating that the police "suggested" or elicited her statements by trickery or cunning. In *Merkel*, defendant urged that at the time of his statment he was too emotionally upset to knowingly and intelligently waive his rights. The court held that even were such true, emotional turmoil alone does not create a situation where an accused cannot be queried after being given proper warnings.

256. People v. Gonzales, 22 Ill. App. 3d 83, 316 N.E.2d 800 (2d Dist. 1974). The court, in analyzing the totality of the circumstances held that although the defendant alleged a lack of understanding of English, two facts — police recitation of the rights in both English and Spanish, and that defendant was a native-born citizen who required no interpreter during his interrogation — mitigated against defendant's contention that he did not knowingly waive his rights.

257. In People v. Roy, 49 Ill. 2d 113, 273 N.E.2d 363 (1971), the state urged that, although the defendant was clearly drunk and handcuffed in a police car at the time he received *Miranda* warnings, he gave a "volunteered statement." The court rejected this contention: since defendant was drunk during his interrogation, a knowing waiver was impossible. Subsequently, however, in People v. Henne, 23 Ill. App. 3d 567, 319 N.E.2d 596 (2d Dist. 1974), defendant's appeal to suppress a confession on the grounds that he was too intoxicated to knowingly waive his rights was denied. The court found controlling evidence indicating that defendant's mental processes were functioning well enough at the time of his arrest so that he not only responded to the police signal to stop his car, but attempted to dispose of incriminating evidence he possessed. Thsese facts, coupled with the defendant's act of nodding affirmatively after each specific warning was read to him, sufficed to show an understanding waiver.

258. The trial court, in determining whether voluntary waiver occurred need not be convinced beyond a reasonable doubt. Further, its finding will not be disturbed on review unless it is contrary to the manifest weight of the evidence. People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601 (1972).

259. *Compare* People v. Roy, 49 Ill. 2d 113, 273 N.E.2d 363 (1971) *with* People v. Henne, 23 Ill. App. 3d 567, 319 N.E.2d 596 (2d Dist. 1974).

evidence which either explicitly or inferentially displays this knowing and voluntary disposition on the part of the accused to dispense with the privilege against self-incrimination.[260] Silence in response to a reading of *Miranda* warnings is not a sufficient indication that a defendant has done so.[261] Positive demonstrations, such as an acknowledgement in the form of saying "yes" after each enumerated protection,[262] or testimony that the defendant nodded his head affirmatively after every right[263] or that the defendant states he is "familiar" with his rights, coupled with the accused's prior criminal experience have been accepted by courts as affirmative proof of waiver.[264] The absence of a signed waiver form or the defendant's refusal to sign the waiver form is not controlling.[265] In *People v. Higgins*,[266] the Illinois Supreme Court articulated a standard by which the state may prove a voluntary waiver by the accused of his constitutional protections; although silence creates no presumption of waiver

> [a]n express, formulistic waiver is unnecessary . . . any clear manifestation of a desire to waive is sufficient. The test is the showing of a knowing intent, not the utterance of a shibboleth. The criterion is . . . a combination of that articulation and the surrounding facts and circumstances. . . . [O]nce the defendant has been informed of his rights and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them.[267]

People v. Brooks[268] clarified the standard as a negation of the need for an express waiver of the right to counsel: "the test is that there

260. *See* People v. Landgham, 122 Ill. App. 2d 9, 257 N.E.2d 484 (1st Dist. 1970), wherein the court held inadmissible a confession where no such evidence appeared in the record.

261. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

262. People v. Willis, 26 Ill. App. 3d 518, 325 N.E.2d 715 (1st Dist. 1975). The court held inadmissible an oral statement made by defendant shortly after his arrest because no evidence on the record indicated any response of the defendant to the reading of his rights. However, a subsequent written confession was admitted into evidence when the record demonstrated the accused responded "yes" after each right.

263. People v. Henne, 23 Ill. App. 3d 567, 319 N.E.2d 596 (2d Dist. 1974).

264. People v. Clemens, 9 Ill. App. 3d 312, 292 N.E.2d 232 (1st Dist. 1972).

265. *See, e.g.*, People v. Starnes, 8 Ill. App. 3d 709, 289 N.E.2d 264 (2d Dist. 1972) (refusal to sign a waiver found insufficient to establish that the defendant wished to stop the interrogation); People v. Myles, 132 Ill. App. 2d 962, 271 N.E.2d 62 (3d Dist. 1971); People v. Patton, 33 Ill. App. 3d 923, 339 N.E.2d 22 (5th Dist. 1975) (waiver found where defendant signed a statement that his rights had been read to him, but refused to sign a statement of waiver).

266. 50 Ill. 2d 221, 278 N.E.2d 68 (1972).

267. *Id.* at 226-27, 278 N.E.2d at 71-72.

268. 51 Ill. 2d 156, 281 N.E.2d 326 (1972).

be a showing of a knowing intent to speak without counsel."[269] The criteria for admissibility, then, is a combination of statements made viewed in the context of surrounding circumstances.[270]

Exercise of Miranda Rights. The *Miranda* protections are absolute; if an accused chooses to exercise them by remaining silent or by requesting an attorney the police must cease any interrogation.[271] The manner of the exercise of these rights must be clear; it will not be surmised from a subjective interpretation of the defendant's actions that he has done so.[272] Police are precluded from conducting an interrogation merely because they are aware that a suspect has an attorney[273] or because they overhear the suspect's request for an attorney to a third party.[274] However, when a person does choose to

269. *Id.* at 164, 281 N.E.2d at 332.

270. In *Brooks*, the substance of the defendant's initial statement after the police recitation of the *Miranda* warnings was that he understood his rights; he did not say at this time that the did not want to talk about the crime, nor did he request an attorney. His subsequent confession to the police was upheld; the court reasoned that such expression of comprehension, coupled with a voluntary statement, was a waiver. 51 Ill. 2d at 164, 281 N.E.2d at 332. In People v. Johnson, 13 Ill. App. 3d 1020, 304 N.E.2d 681 (4th Dist. 1973), the court admitted into evidence admissions by an accused, finding a waiver where the accused, upon the reading of the *Miranda* cautions, said that he was aware of his rights from other cases and he was not sure whether he wanted to talk to an attorney. The defendant, after responding to several questions, asserted his right to counsel and the interrogation was terminated. *But see* People v. Dennison, 13 Ill. App. 3d 423 300 N.E.2d 300 (4th Dist. 1973), where defendant, when asked after a police statement of *Miranda* rights whether there was anything he would like to say at that time, requested that he be told the charge against him. The State's Attorney interrogator, in answering this question explained that his lack of information about the event made it difficult to charge defendant. The State's Attorney then asked follow-up questions. The subsequent admissions of the defendant contained in the "follow-up" answers were held to be inadmissible over an argument by the state that waiver could be found in the record because the defendant did not issue an "absolute refusal" to talk and that his inquiry as to the charge suffices to permit initiation of a voluntary conversation and indicates a waiver of his prior refusals to make a statement. However, in People v. Madison, 56 Ill. 2d 476, 309 N.E.2d 11 (1974), where the record contained no express waiver or indication of waiver, the defendant's testimony as to his awareness of the meaning of *Miranda* rights at the time of his interrogation was sufficient to establish that his statements were voluntarily made. *See also* People v. Clemens, 9 Ill. App. 3d 312, 292 N.E.2d 232 (1st Dist. 1972) (defendant's initial refusal to give a statement, followed by a confession was indication of his awareness and ability to exercise his *Miranda* rights).

271. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

272. People v. Madison, 56 Ill. 2d 476, 309 N.E.2d 11 (1974) (court rejected defendant's contention that because he informed the police that while he would give a statement he would not sign it until a public defender was present as establishing intent not to give a statement that could be used against him and that he wanted to consult an attorney).

273. People v. Merkel, 23 Ill. App. 3d 298, 319 N.E.2d 77 (2d Dist. 1974). *See also* People v. Johnson, 13 Ill. App. 3d 1020, 304 N.E.2d 681 (4th Dist. 1973) (court permitted police questioning which continued when defendant merely indicated he might want an attorney).

274. People v. Smith, 108 Ill. App. 2d 172, 246 N.E.2d 689 (2d Dist. 1969) (defendant's waiver of counsel not vitiated by proof that police overheard his request to his brother to "post bond or hire a lawyer").

However, when ths third party is an agent of the authorities an unequivocal request for an

exercise his constitutional right to remain silent and obtain counsel, notification to one officer will be imputed to others with whom he comes in contact during his custody.[275]

After defendant exercises his right to remain silent the police cannot by immediate and persistent inquiry persuade the defendant into a waiver. Courts view these tactics as a ruse designed to circumvent the mandate of *Miranda* and perceive such actions as employing trickery or cajolery to produce admissions.[276]

The Illinois Supreme Court in *People v. Henenberg*[277] noted that:

> the language of the Supreme Court in *Miranda* could hardly have been more uncompromising. If the accused indicates in any manner and at any stage of the process that he wishes to consult with an attorney there can be no questioning.[278]

In *Henenberg* the court suppressed a statement achieved at an interrogation session during which the defendant repeatedly told the police that he wanted to consult with an attorney. The police halted the questioning only after a confession was obtained. This decision has been carefully followed.[279]

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attorney by the accused during questioning must be imputed to the police and honored. In People v. Turner, 56 Ill. 2d 201, 306 N.E.2d 27 (1974), the defendant was questioned by a polygraph operator hired by the police. The operator did not tell the police of the accused's request nor did he halt the interrogation, which continued for five hours. The statements made after the request were held inadmissible.

274. People v. Turner, 56 Ill. 2d 201, 306 N.E.2d 27 (1974); People v. White, 61 Ill. 2d 288, 335 N.E.2d 457 (1975), noting that notice to one officer is imputed to others, declared:

> To hold otherwise could make it possible to nullify an accused's request for the assistance of counsel by the expedient of transferring his custody for questioning to an officer who would be unaware of the request for an attorney.

Id. at 293, 335 N.E.2d at 461.

276. People v. Dennison, 13 Ill. App. 3d 423, 300 N.E.2d 300 (4th Dist. 1973); People v. Pendleton, 24 Ill. App. 3d 385, 321 N.E.2d 433 (1st Dist. 1974). There, after the defendant clearly stated his wish to refrain from answering police inquiries, an officer persisted by asking if the accused had "any questions concerning the case." The court held that in view of the fact that the officer refused to explicitly answer the questions the defendant asked, the only inference to be drawn from the officer's actions was that the police were attempting to trick the accused into a confession.

277. 55 Ill. 2d 5, 302 N.E.2d 27 (1973).

278. *Id.* at 11, 302 N.E.2d at 30.

279. *See* People v. Turner, 56 Ill. 2d 201, 306 N.E.2d 27 (1974). In People v. Parnell, 31 Ill. App. 3d 627, 334 N.E.2d 403 (3d Dist. 1975), defendant, following her arrest for murder, immediately and explicitly claimed her right to remain silent and requested an attorney. At the police station, while conducting a dermal nitrate test, a detective, who had been informed of the accused's exercise of her rights, questioned her about the events of the evening. During the conversation the defendant confessed. The court held:

> [W]here there is a request for an attorney prior to any questioning . . . a finding of knowing and intelligent waiver of the right to an attorney is impossible. . . . [T]he defendant has an absolute right to delay interrogation by requesting an attorney. We interpret *Miranda* to mean that the accused has an unqualified right

However, in *People v. White*[280] the Illinois Supreme Court employed an "attenuation" test to uphold the admission of a confession obtained during questioning by the police some time after the defendant had requested to see an attorney. The police never furnished the accused an attorney. The court characterized the actions of the police as a *procedural violation* of *Miranda* and not as involving an infringement of the defendant's constitutional right to counsel. Following the approach suggested by the United States Supreme Court in *Brown v. Illinois*,[281] the court scrutinized the record for circumstances which neutralized the effect of the *Miranda* violation. *Henenberg* was distinguished on the grounds that in that case, the interrogation which produced the confession followed immediately upon the defendant's request for an attorney, while in the instant case, a two-day interval separated the request from the interrogation. The court acknowledged that the accused's low I.Q., the length of the interrogation period, and the impact of the defendant's participation in a line-up all might unduly influence the accused. However, considering the defendant's prior contact with police investigations, the lapse of time from the violation to the confession, the repeated *Miranda* admonitions by the police at each questioning session, and other intervening events, the court held that the effect of the violation was dissipated; defendant's confession was voluntary.

An accused cannot be penalized for the exercise of constitutional rights. Therefore, once the accused has been informed of his right to remain silent, his silence, even in the face of accusations of guilt, cannot be considered probative of guilt.[282] Admission of testimony which raises this inference is error.[283] Absent *Miranda* warnings, evidence of the silence of the defendant when confronted with an

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to stop the questioning and consult with an attorney and this request precludes further questioning until there is in fact the requested consultation. If the police disregard such a request and the interrogation proceeds any statement taken thereafter cannot be the result of waiver but must be presumed a product of compulsion, subtle or otherwise.

Id. at 630, 334 N.E.2d at 406.

280. 61 Ill. 2d 288, 335 N.E.2d 457 (1975).

281. 422 U.S. 590 (1975).

282. United States v. Hale, 422 U.S. 171 (1975); People v. McVet, 7 Ill. App. 3d 381, 287 N.E.2d 479 (2d Dist. 1972); People v. Owens, 32 Ill. App. 3d 893, 337 N.E.2d 60 (4th Dist. 1975).

283. United States v. Hale, 422 U.S. 571 (1975); People v. Owens, 32 Ill. App. 3d 893, 337 N.E.2d 60 (4th Dist. 1975). The court emphasized that in such circumstances admission of the evidence violates the dictates of *Miranda* and that the question of the admissibility must be determined by the court and not the jury.

accusation of guilt is admitted only under exiguous circumstances.[284]

Miranda is perceived as a prophylactic measure. The United States Supreme Court, in two recent decisions, has indicated that *Miranda* procedures are not a per se device used to admit or deny statements without consideration of the underlying circumstances attending the making of the statements. In *Brown v. Illinois*,[285] the Supreme Court held that when an illegal arrest is established, a subsequent confession will not be admissible solely on the showing that effective *Miranda* warnings were given. The Court rather emphasized consideration of the totality of the circumstances which demonstrate whether attentuation occurred between the claimed illegality and the statements.[286] In *Michigan v. Mosley*[287] the Court considered the effect of consecutive interrogations by police after defendant has indicated during the first questioning that he wishes to exercise his right to remain silent. The Court declared that *Miranda* creates no per se proscription of infinite duration upon further questioning once a person has indicated a desire to remain silent. Instead, the Court focused upon the question of whether an accused's right to cut off questioning was scrupulously honored.

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284. Standards used by the courts were outlined in People v. Bennett, 3 Ill. 2d 357, 121 N.E.2d 595 (1954).

> [A]n admission may be implied from the conduct of a party charged with a crime who remains silent when one states in his hearing that he was concerned in the commission of the crime, when the statement is made under circumstances which allow an opportunity to him to reply and where a man similarly situated would ordinarily deny the imputation. It is also true that evidence of this character should be received with great caution and only under proper conditions. Where charges against him are made in the presence of an accused person under circumstances such that he is in no position to deny them, or if his silence is of such character that it does not justify the inference that he should have spoken, or if in any way he is restrained from speaking either by fear, doubt of his rights, instructions given him by his attorney or a reasonable belief that it would be better or safer for him if he kept silent, his standing mute does not amount to the admission of the charges against him.

Id. at 361, 121 N.E.2d at 598.

Another consideration is that once a defendant has denied his guilt he may think it useless to continue to do so. People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1953). Further it must affirmatively appear that the defendant knew he was being asked about the crime. People v. Smith, 25 Ill. 2d 219, 184 N.E.2d 841 (1962). Furthermore, courts have been cautious in including evidence of such tacit admissions and allow its consideration only when conditions clearly show admissibility. *See* People v. Aughinbaugh, 36 Ill. 2d 320, 223 N.E.2d 117 (1961).

285. 422 U.S. 590 (1975).

286. In People v. Fields, 31 Ill. App. 3d 458, 334 N.E.2d 752 (1st Dist. 1975), applying the *Brown* standard, an Illinois court held written statements of an accused admissible even though they resulted from an illegal arrest. The court indicated that the absence of a police pretext in making the arrest and the presence of an indicia of probable cause mitigated in favor of admissibility.

287. 423 U.S. 96 (1975).

Prior to the *Mosely* decision, Illinois courts held that *Miranda* contains no implications of inherent disability on the part of the police to pursue interrogation as long as no coercion or continued importunity is evident.[288] Further, Illinois courts have held that it is not necessary in subsequent interviews for the police to reiterate the *Miranda* warnings once adequate cautions had been recited and the suspect understood them.[289] The courts emphasize not the overall duration of the period of custody, but rather on the length of each questioning period.[290]

Motion To Suppress

Procedure. Pursuant to statute,[291] the constitutionality of a government-obtained confession may be challenged at a hearing prior to trial or immediately subsequent to an objection to the introduction of the confession during the trial.[292] Procedural due process

288. In People v. Brookshaw, 12 Ill. App. 3d 221, 299 N.E.2d 20 (3d Dist. 1973), defendant declined to make a statement after *Miranda* rights were read to him; one hour later police again approached him and admonished him as to his rights. He unequivocally refused to make a statement. The next day police again attempted to interrogate him; defendant waived his rights and confessed. On appeal, defendant's contention, that any police request following one refusal is per se conducive to compulsion, was rejected due to an absence of evidence that the attempts to question involved undue pressure in the guise of a request for reconsideration.

Compare People v. Dennison, 13 Ill. App. 3d 423, 300 N.E.2d 300 (4th Dist. 1973); People v. Pendleton, 24 Ill. App. 3d 385, 321 N.E.2d 433 (1st Dist. 1974). Immediately after the suspects refused to make a statement the authorities persisted in questioning them, resulting in admissions. In both cases the continued inquiry, in disregard of the defendant's instant assertion to remain silent was held violative of *Miranda*.

289. People v. Hill, 39 Ill. 2d 125, 233 N.E.2d 367 (1968):

> It should be made clear that once *Miranda's* mandate was complied with at the threshold of the questioning it was not necessary to repeat the warnings at the beginning of each successive interview.

Id. at 130, 233 N.E.2d at 371. Most courts, though, consider that a simple inquiry as to whether the defendant is aware of his constitutional rights, after earlier effective and adequate warnings were given, is sufficient to withstand challenge. *See, e.g.*, People v. Henne, 23 Ill. App. 3d 567, 319 N.E.2d 596 (2d Dist. 1974).

290. In People v. McCottrell, 117 Ill. App. 2d 1, 254 N.E.2d 284 (5th Dist. 1971), the court found the time of custody (the police claiming two hours of interrogation, the defendant indicating a period of seven hours) irrelevant. The court considered the presence of the accused's father at the police station and continued consultation with the accused, and the fact that the accused made the disputed statement after a relatively short period of interrogation in denying defendant's motion to suppress. People v. Rosario, 4 Ill. App. 3d 642, 281 N.E.2d 714 (1st Dist. 1972) held that the state has no duty to give additional *Miranda* warnings prior to the time of the second custodial interrogation where the questioning periods were of short duration.

The time element separating the warnings by police to the defendant and the second questioning period — nine hours — was also considered irrelevant in People v. Henne, 23 Ill. App. 3d 567, 319 N.E.2d 596 (2d Dist. 1974), where the court found that the span between the recitation and the interrogation did not destroy the effectiveness of the warnings.

291. ILL. REV. STAT. ch. 38, § 114-11 (1975).

292. ILL. REV. STAT. ch. 38, § 114-11(g) (1975). The primary purpose for this hearing is to

demands that the admissibility of a confession be determined outside the jury's presence.[293] Timely objection requires the trial court to conduct a separate hearing on the question of admissibility of a confession, even without a specific request by the defense.[294] However, the burden of raising an objection to the admissibility of a confession remains on the defense; a failure to make a timely objection ordinarily precludes consideration of the voluntariness of a confession on appeal.[295]

Three basic tenets must be maintained in all judicial procedures determining the voluntariness of a confession. First, since the constitutionality of the confession depends upon the totality of circumstances surrounding its making, the hearing must be broad in scope to allow for the introduction of all evidence relevant to the allegedly coercive acts and the mental state of the defendant.[296] Second, if the

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eliminate coerced confessions at the earliest possible opportunity. People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706 (1968). While the preferred method is to conduct such hearing separate from and prior to trial, the Illinois Supreme Court upheld an alternative method in People v. Hickman, 56 Ill. 2d 175, 306 N.E.2d 32 (1973). In that case, defense counsel did not learn of the possibility of an illegally obtained confession until defendant's cross-examination at trial. Defense counsel objected to the introduction of the confession, and the trial was recessed for an in camera conference to determine the nature of the confession. The confession was found voluntary and was subsequently introduced into evidence. On appeal, defendant contended that he had not been given an opportunity to testify on his own behalf outside the presence of the jury on the issue of voluntariness. The court found this procedure adequate in that the totality of the circumstances surrounding defendant's act of confessing was allegedly reviewed in the conference, but noted that this method of reviewing confessions is both "unusual and not to be favored." *Id.* at 185, 306 N.E.2d at 38. The court concluded that, in the absence of unfair prejudice to defendant, the failure to hold a complete hearing outside the jury's presence is not tantamount to reversible error. *Id.* at 186, 306 N.E.2d at 38. *See also* People v. Fultz, 32 Ill. App. 3d 317, 336 N.E.2d 288, 301 (1st Dist. 1975).

293. ILL. REV. STAT. ch. 38, § 114-11(f) (1975). In Jackson v. Denno, 378 U.S. 368 (1964), the Court discussed the rationale for withholding the confession from the jury until after its constitutionality is determined, reasoning that the jury may have difficulty in disregarding a confession, albeit coerced.

In bench trials, the voluntariness of a confession may be determined by the judge hearing the case. People v. Fultz, 32 Ill. App. 3d 317, 336 N.E.2d 288 (1st Dist. 1975). The Illinois Supreme Court had held that the judge conducting a bench trial is required, upon timely objection, to hold a separate hearing regarding the voluntariness of a confession. However, it is not reversible error for the trial judge to rule on the voluntariness of the confession absent a hearing if, during the course of the trial, he has heard all of the relevant information, so that the purpose underlying the procedure is fulfilled. People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673 (1965).

294. People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673 (1965).

295. People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706 (1968); People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673 (1965). *But see* People v. Odom, 71 Ill. App. 2d 480, 218 N.E.2d 116 (5th Dist. 1966). In *Odom*, evidence existed regarding defendant's mental incompetency, his lack of sleep at the time of the confession, and promises by police officers of mental treatment rather than prison. Since no motion to suppress the confession was made by defense counsel, the court found on appeal that defendant was denied due process because of incompetent counsel.

296. Two extremes may be seen in People v. Nemke, 23 Ill. 2d 591, 179 N.E.2d 825 (1962)

issue of voluntariness is raised, the state bears the burden at the hearing of going forward with evidence to prove that the confession was in fact voluntary.[297] Finally, the state is obliged to call all material witnesses on the issue of whether the confession was voluntary.[298] Except in rare cases,[299] all witnesses present at the time of

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and People v. Chambers, 15 Ill. App. 3d 23, 303 N.E.2d 24 (3d Dist. 1973). In *Nemke*, the scope of the hearing was found too narrow in that not all of the relevant circumstances were heard. The defendant, a 17-year old boy charged with rape, alleged that he had been denied counsel during his interrogation, that his mother had been denied permission to talk with him, and that not all of the required material witnesses were present. The court reversed, finding the hearing defective because defendant was not asked why he confessed, no testimony was introduced regarding an attempted telephone call by defendant's mother, and all material witnesses were not present. In contrast, defendant in *Chambers* was charged with taking indecent liberties with a minor. Defendant alleged that during the interrogation she was scared, ill and in pain. The trial court refused to admit evidence that she had suffered a miscarriage six days after the interrogation. In viewing the totality of the circumstances surrounding the confession, the reviewing court found that the defendant had neither complained of pain nor asked for a doctor. Therefore, evidence of the miscarriage was not probative of her mental state during the confession.

People v. Sims, 21 Ill. 2d 425, 173 N.E.2d 494 (1961) represents a situation where the hearing was found too broad in scope; there, evidence was admitted of occurrences from which no coercion was alleged.

297. ILL. REV. STAT. ch. 38, § 114-11(d) (1975). The trial court need not be convinced beyond a reasonable doubt that the defendant was warned of his rights and voluntarily waived them. *See* Lego v. Twomey, 404 U.S. 477 (1972), where the Court upheld Illinois' standard in criminal cases of proving merely by a preponderance of the evidence that a confession was knowingly, intelligently and voluntarily given. In so holding, the Court commented that requiring a stricter standard would not deter police officers from the use of coercion, implying that this was the primary purpose behind the right to suppress illegal confessions. However, the Court did permit states to set a stricter standard than the preponderance of the evidence as they see fit. *Id.* at 489.

In Illinois, use of a preponderance standard presupposes a procedurally adequate hearing. *See* People v. Nemke, 23 Ill. 2d 591, 179 N.E.2d 825 (1971). The Illinois Supreme Court intimated that without all of the relevant data before the court, allowing less than the "beyond a reasonable doubt" standard might deny the defendant due process. *Id.*

298. ILL. REV. STAT. ch. 38, § 114-11(d) (1975).

299. In People v. McGee, 64 Ill. App. 2d 33, 212 N.E.2d 741 (1st Dist. 1965), the defendant alleged error because the state failed to supply another prisoner who had witnessed the defendant's second confession. The appellete court held that this failure alone did not render the confession inadmissible. The Illinois Supreme Court in *In re* Lamb, 61 Ill. 2d 383, 336 N.E.2d 753 (1975) declared that:

> This court has interpreted the "material witness rule" to mean that "where there is no claim of coercion at the time a written confession was executed, but only the claim by the defendant that he was in fear of further beatings, the state [is] not required to call all of the witnesses present at the time the defendant signed the confession."

Id. at 389-90, 336 N.E.2d at 757. The missing witness in *Lamb* was not present at the exact time the alleged coercive activities took place. Further, defendant's motion to suppress was vague in alleging precisely which witnesses were present during the coercion. The state presented witnesses who supposedly were able to account for the entire time defendant was in custody until he confessed. Furthermore, during trial defense counsel indicated that he found the witness' absence excusable. Viewing all these aspects together, the supreme court found no reversible error in the state's failure to call all material witnesses.

the confession are considered material and must be present at the suppression hearing, or reasonably accounted for if absent.[300]

Elements of Coercion. All allegations of coercion must be heard and weighed for relevance and credibility during the hearing. Courts have traditionally found certain distinctive acts, circumstances or mental states of the parties to be clearly probative of coercion. Understandably, physical acts of brutality present the strongest evidence of coercion. Once the defendant establishes that he received injuries while in custody, and alleges that the injuries were inflicted during the interrogation process, the state must prove by clear and convincing evidence the manner of their occurrence.[301] Photographs of physical injuries are often introduced at the hearing to support the defendant's allegations.[302] However, when no outward manifestations of the injuries are provable, and the state denies the allegations, trial courts are prone to find that no physical brutality occurred.[303]

300. People v. Armstrong, 51 Ill. 2d 471, 475-76, 282 N.E.2d 712, 715 (1972); People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673 (1965).

301. People v. La Franca, 4 Ill. 2d 261, 267, 122 N.E.2d 583 (1954). The court in this case found evidence of abrasions on both of defendant's wrists which resulted from something other than the normal use of handcuffs. Defendant alleged other acts of physical brutality which were unexplained. Reinforcing defendant's case was evidence that the police officers kept the defendant in custody for at least a week after the confession. Since such conduct is unusual and was unexplained by the police, the court inferred that the police had held defendant in order to allow time for the bruises to heal. Based on this evidence, the court held that the state failed to meet the clear and convincing test.

In People v. Wilson, 16 Ill. App. 3d 473, 306 N.E.2d 626 (1st Dist. 1973), defendant alleged beatings by police, and attempts by the latter to force defendant to put electric wires into his mouth. Since medical reports described bruises and wounds on the defendant's body after the interrogation, and no clear and convincing evidence from the state explained how they originated, the confession was held inadmissible.

302. In People v. Cavin, 28 Ill. App. 3d 863, 329 N.E.2d 382 (1st Dist. 1975) the defendant alleged severe beatings for seven hours during his interrogation by the police. Not only did defendant claim that the beatings caused bleeding and vomiting, but also three inmates testified that defendant's face was swollen after the interrogation. However, no injuries were visible in pictures taken soon after the interrogation which were introduced at the hearing. The court held that since injuries would be apparent if in fact they had occurred, the trial court's denial of the motion to suppress should be affirmed.

303. The defendant in *In re* Lamb, 61 Ill. 2d 383, 336 N.E.2d 753 (1975), claimed that he was handcuffed and hung from the top of a window for a half an hour, beaten, and handcuffed to a wall all night. Only the latter claim was admitted by the interrogating police officers. Since the other claims were unsupported by evidence, the court chose not to believe the defendant. In People v. Pittman, 55 Ill. 2d 39, 302 N.E.2d 7 (1973) one defendant alleged that during the interrogation process police hit him in the stomach with knowledge that he suffered from appendix trouble. Although defendant suffered an appendix attack soon after, the Illinois Supreme Court found the trial court's denial of the motion to suppress the confession not against the manifest weight of evidence. In People v. Caldwell, 39 Ill. 2d 346, 236 N.E.2d 706 (1968), the court determined that the mere fact that defendant was handcuffed to a radiator to prevent his escape was insufficient evidence upon which to base a charge of physical brutality.

A confession may be adjudged involuntary absent physical coercion if various other factors exist which interfere with the defendant's ability to knowingly, intelligently and voluntarily waive his right to remain silent. Psychological coercion is often found as coercive as actual physical brutality.[304] This type of activity may include threats of physical violence to defendant's family or friends, reports that all of the other suspects arrested with defendant have already confessed,[305] or promises to release others if defendant confesses.[306] Other external factors considered relevant to establishing coercion include extensive lack of sleep at the time of the confession,[307] length of the detention,[308] or lack of food.[309]

Personal Characteristics of the Accused. The courts, however, go beyond these external factors to view personal characteristics of the defendant which may have affected his mental state and free will. For example, courts find the fact of whether defendant was in

304. In People v. Gunn, 15 Ill. App. 3d 1050, 305 N.E.2d 598 (1st Dist. 1973), the court reiterated the United States Supreme Court holding in Garrity v. New Jersey, 385 U.S. 493 (1967), that "to vitiate a confession, coercion may be mental as well as physical. . . .Subtle pressures on person in custody can be as telling as coarse and vulgar ones." 15 Ill. App. 3d at 1055, 305 N.E.2d at 601. The determining factor is whether the defendant was deprived of free choice to admit, deny or refuse to answer.

305. People v. Wilson, 16 Ill. App. 3d 473, 306 N.E.2d 626 (1st Dist. 1974). Defendant alleged that police officers had placed electric wires in his mouth which would electricute him if he lied; informed him that his cohort had confessed; and told him they would beat his brother and grandmother if he did not confess. Nevertheless, the court, in suppressing the confession, placed greater weight on the evidence of physical coercion also existing in the case.

306. People v. Higgins, 50 Ill. 2d 221, 278 N.E.2d 68 (1972). Defendant, arrested with four other suspects for murder and armed robbery, specifically asked, "If I tell the truth will you let the other people go?" to which the officers replied they had no such authority, but that the state's attorney would consider it. *Id.* at 223, 228 N.E.2d at 70. In viewing the totality of the circumstances and the credibility of the witnesses, the Supreme Court of Illinois did not find that denial of the motion to suppress against the manifest weight of evidence.

307. In People v. Pittman, 55 Ill. 2d 39, 302 N.E.2d 7 (1973), the Illinois Supreme Court noted that lack of sleep was a factor to be considered when determining the voluntariness of the confession. In *In re* Lamb, 61 Ill. 2d 383, 336 N.E.2d 753 (1975) the minor defendant was left handcuffed to a wall and sitting in a chair all night. The court did not find that this activity influenced the voluntariness of his confession in that the defendant had been allowed to sleep off and on throughout the night.

308. In People v. Wilson, 16 Ill. App. 3d 473, 306 N.E.2d 626 (1st Dist. 1974), the court maintained that extended incummunicado questioning is inherently coercive, and should be considered in the totality of circumstances surrounding the confession.

309. ILL. REV. STAT. ch. 38, § 103-2 (1975) provides: "Persons in custody shall be treated humanely and provided with proper food, shelter and, if required, medical treatment." In People v. Wilson, 16 Ill. App. 3d 473, 306 N.E.2d 626 (1st Dist. 1974), the court commented that lack of food must be considered in relation to the voluntariness of a confession. The Illinois Supreme Court in *In re* Lamb, 61 Ill. 2d 383, 336 N.E.2d 753 (1975) found that providing the minor defendant with only a polish sausage and a canned beverage at 7:30 a.m. and a hamburger at 8:00 p.m. of the same day before taking his confession was sufficient to fulfill the requirement. The court noted that the defendant had been arrested right after dinner the night before and allegedly had requested no other food.

pain,[310] drugged,[311] or intoxicated[312] to be relevant in determining the voluntariness of his confession. Furthermore, mental incompetency which affects a defendant's ability to understand the rights expressed to him through the *Miranda* warnings is an element of prime concern in suppression hearings.[313] All such factors, to be relevant to a motion to suppress, must be probative of the defend-

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310. A written statement signed by the defendant is not involuntary when the answers to the questions are intelligent, direct, and positive, and there is no indication that defendant was distracted by pain or that his mind was diverted from the statement he was giving.

People v. Pote, 5 Ill. App. 3d 856, 859, 284 N.E.2d 366, 369 (1st Dist. 1972).

311. *Id.* The court found that the defendant's confession was admissible even though it was taken from him in the hospital and he had been sedated the day before. The court stated:

> When the statement is clear and lucid and witnesses testify that at the time defendant was alert and able to give a rational statement, prior medical treatment with drugs will not render the statement inadmissible.

Id. at 859-60, 284 N.E.2d at 369. This rationale was applied in People v. Miller, 19 Ill. App. 3d 103, 311 N.E.2d 179 (1st Dist. 1974), where defendant was sedated at the time of his confession. During the three days he was under sedation he had appeared hostile and incoherent. However, the police officer maintained that he and defendant had a normal conversation, with no evidence of defendant's not understanding his actions. Even though defendant declared he had no memory of this confession, the court denied his motion to suppress.

312. In People v. Pickerel, 32 Ill. 2d 822, 336 N.E.2d 778 (3d Dist. 1975), the court held that no presumption of intoxication exists regarding a defendant's legal capacity to voluntarily confess. In this case, even though the defendant had 0.21 percent alcohol in his blood at the time of the confession, had a history of excessive drinking, had blacked out the morning before, and had been found to be a chronic alcoholic by a psychiatrist, his confession was admissible. The facts which persuaded the court were that defendant was responsive, cooperative, coherent, able to walk without falling, and oriented to his surroundings.

313. Blackburn v. Alabama, 361 U.S. 199 (1960) articulated judicial disfavor with taking a confession from a mentally incompetent defendant.

> Surely in the present stage of our Civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

361 U.S. at 207.

This rationale applies in reviewing the voluntariness of a confession of a sane defendant with a low I.Q. Furthermore, *Miranda* warnings must be given in a manner understandable to the defendant of a low I.Q. In People v. Baker, 9 Ill. App. 3d 654, 292 N.E.2d 760 (4th Dist. 1973) the court held that *Miranda* warnings as given to the average defendant were insufficient in the instant case, in that the defendant had a mental age four years below his actual age, and was an almost non-functional student. However, in *In re* Morgan, 35 Ill. App. 3d 10, 341 N.E.2d 19 (1st Dist. 1975), the court found defendant's confession voluntary where defendant, despite a low I.Q., was a functional student in the ninth grade of vocational school. In People v. Cooper, 30 Ill. App. 3d 326, 332 N.E.2d 453 (1st Dist. 1975) the court maintained that police officers are not required to conduct a mental examination of defendant before initiating the interrogation process. However, since it was clearly established through the testimony of one psychiatrist and two psychologists that defendant was slow, below average in intelligence, and incapable of understanding his constitutional rights, the court suppressed the confession.

ant's mental state at the time of the confession.[314] Additionally, the existence of any one factor does not provide prima facie evidence of involuntariness, but must be considered in the totality of the circumstances surrounding the confession.

Many cases have considered the age of the defendant in determining the voluntariness of his confession. The United States Supreme Court warned that in juvenile cases

> the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or adolescent fantasy, fright or despair.[315]

Although adhering to this philosphy,[316] Illinois courts have, more often than not, found confessions by juveniles voluntary. For example, in *In re Lamb*,[317] a juvenile was handcuffed to a wall all night, and fed sparsely by interrogating police. Although expressly disapproving such conduct, the court did not find the confession involuntary. In disposing of the challenge to the confession based on the defendant's youth, the court maintained that the defendant was of normal intelligence and "no stranger to the criminal justice system."[318] Apparently, these factors protected the juvenile from the "fright or adolescent fantasy" warned of by the United States Supreme Court.[319] Illinois courts agree that the age of the defendant does not *ipso facto* render his statements involuntary and therefore inadmissible.[320]

Commonly, the only evidence proffered during a suppression hearing consists of testimony by the interrogating officer and the defendant. When opposing stories are presented, the issue becomes one of credibility. The trial court's determination regarding the witnesses' credibility is set aside only if found to be clearly erroneous.[321]

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314. People v. Chambers, 15 Ill. App. 3d 23, 303 N.E.2d 24 (3d Dist. 1973).

315. *In re* Gault, 387 U.S. 1, 55 (1967).

316. *See, e.g.*, People v. Simmons, 60 Ill. 2d 173, 326 N.E.2d 383 (1975), where the Illinois Supreme Court declared that special care must be taken to ascertain the voluntariness of a juvenile's confession.

317. 61 Ill. 2d 383, 336 N.E.2d 753 (1975).

318. *Id.* at 388, 336 N.E.2d at 756.

319. 387 U.S. at 55.

320. In People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466 (1968), the Illinois Supreme Court determined that, absent a showing of coercive evidence, a 14 year old defendant of subnormal intelligence confessed voluntarily. The minor defendant in *In re* Morgan, 35 Ill. App. 3d 10, 341 N.E.2d 19 (1st Dist. 1975) complained of not understanding the rights expressed during *Miranda* warnings. However, the court looked beyond defendant's youth — 15 years — to his previous arrest experience and his ability to make intelligent decisions, and found his confession voluntary.

321. People v. Higgins, 50 Ill. 2d 221, 278 N.E.2d 68 (1962); People v. Fields, 31 Ill. App.

At the close of the hearing, the trial judge makes a primary finding regarding the voluntariness of the confession.[322] Should the confession be adjudged voluntary, the state may introduce it into evidence.[323] However, the defense may present evidence at trial regarding the circumstances surrounding the confession in an attempt to influence the weight accorded it by the jury.[324]

Use of Improperly Obtained Statements

Prior to the decision of the United States Supreme Court in *Harris v. New York*,[325] Illinois applied the standards articulated in *Walder v. United States*[326] narrowly, considering use of an impro-

3d 458, 334 N.E.2d 752 (1st Dist. 1975). People v. Noblin, 15 Ill. App. 3d 1060, 305 N.E.2d 658 (1st Dist. 1973).

322. Sims v. Georgia, 385 U.S. 538 (1967).

323. In attempting to prove its case, the state may inform the jury that the confession was deemed voluntary in the hearing. This does not unduly enhance the credibility of the confession. People v. Pittman, 55 Ill. 2d 39, 302 N.E.2d 7 (1973).

324. ILL. REV. STAT. ch. 38, § 114-11(f) (1975). *See also* Sims v. Georgia, 385 U.S. 538, 544 (1967).

325. Harris v. New York, 401 U.S. 222 (1970). In *Harris*, the Burger Court took its first major step toward undermining the protections afforded an accused by the requirements established in Miranda v. Arizona, 384 U.S. 436 (1966). The Court held that a defendant's statements procured in the absence of proper *Miranda* warnings, although inadmissible as substantive evidence, may be admitted for the purpose of impeaching the defendant's credibility. The *Harris* Court declared:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . .
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

401 U.S. at 225-26. The Court dismissed as dicta, pertinent language from the *Miranda* opinion which had noted that:

> . . . statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without full warnings and effective waiver required for any other statement.

Miranda v. Arizona, 384 U.S. 436, 477 (1966).

326. 347 U.S. 62 (1954). The *Harris* Court chose to rely on precedent established in this case, which permitted the prosecution to impeach defendant's denial that he had ever possessed illegal drugs through questioning defendant regarding possession of heroin on a previous occasion. The drugs seized in the prior incident had been suppressed because improperly obtained. The Court in *Walder* reasoned that a contrary holding would allow the defendant to perjure himself, assured that such perjury was protected. The fourth amendment was not intended to cover such conduct.

It was a natural progression from the *Walder* ruling in 1954 to the *Harris* decision; rather than illegally seized evidence, the Court affirmed the use of an illegally obtained confession to impeach the credibility of defendant. The same reluctance to shield defendant so that he is free to deny or contradict prior statements formed the basis of the Supreme Court's reasoning.

perly obtained confession for purposes of impeaching a defendant on matters bearing directly on the crime charged reversible error.[327] However, this position has since been rejected;[328] Illinois presently allows the use of defendant's or defense witnesses' prior statements[329] or confessions, both oral and written,[330] to impeach the credibility of the declarant.

Illinois courts have so expanded the *Harris* ruling that adequacy of the *Miranda* warnings prior to the defendant's statement is no longer considered an issue.[331] Further, so long as the use of such prior statements is confined to impeachment, the prosecution need not prove the truth or falsity of the prior statement.[332] The defendant,

327. *See, e.g.*, People v. Luna, 37 Ill. 2d 299, 226 N.E.2d 586 (1967). The prosecutor attempted to impeach defendant's testimony at trial through use of a statement made by defendant at the preliminary hearing in which defendant's confession had been suppressed. The court declared the introduction of these statements prejudicial, since the statements focused directly on the issue of the defendant's guilt.

328. People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974) expressly overruled *Luna* to the extent that it conflicted with the rationale of *Harris*. The defendant in *Sturgis* stated in a preliminary motion that he had been arrested at a particular address. At trial, defendant testified that he was arrested at a different address. The prior statement was found admissible to impeach his credibility.

329. *See, e.g.*, People v. Byers, 50 Ill. 2d 210, 278 N.E.2d 65 (1972), where the court allowed the defendant to be impeached by statements made at a coroner's inquest, despite the fact that insufficient *Miranda* warnings were given to defendant at the pretrial inquest. *See also* People v. Wolfram, 12 Ill. App. 3d 262, 298 N.E.2d 188 (1st Dist. 1973). Defendant had testified during the motion to suppress his confession that he had taken two kinds of drugs before confessing. At trial defendant testified that, in addition to the aforementioned drugs, he had taken morphine with a needle. The court allowed the prosecutor to introduce defendant's prior statement in an attempt to impeach his credibility.

330. People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974).

331. Even though the adequacy of the warnings is no longer at issue, courts still articulate the inadequacy of *Miranda* warnings which would render the statement inadmissible as substantive evidence. In People v. King, 22 Ill. App. 3d 66, 316 N.E.2d 642 (4th Dist. 1974), the defendant alleged that insufficient *Miranda* warnings were given because he was not told he could stop talking anytime he wished. The court ruled that regardless of the claimed inadequacy, the statement was sufficiently probative for impeachment purposes. Furthermore, in People v. Hooks, 14 Ill. App. 3d 89, 302 N.E.2d 241 (1st Dist. 1973) the defendant alleged insufficient *Miranda* warnings in that he was allowed to make a statement before the warnings were given. However, the court concluded:

> [s]ince the statement was not used in the State's case-in-chief as evidence against defendant, but was used only for purposes of impeachment, it was not necessary that the statement comply with all the requirements of *Miranda*.

14 Ill. App. 3d at 92-93, 302 N.E.2d at 243. *See also* People v. Moore, 54 Ill. 2d 33, 294 N.E.2d 297, *cert. denied*, 412 U.S. 943 (1973). Defendant orally confessed to murder, but moved to suppress his confession, claiming insufficient *Miranda* warnings were given. The motion was denied. The confession was not entered as substantive evidence, but used solely for impeachment purposes. The Illinois Supreme Court affirmed, finding no need to review the trial court's determination concerning the adequacy of the warnings afforded defendant.

332. People v. Moore, 54 Ill. 2d 33, 37-38, 294 N.E.2d 297, 299 (1973). Both confessions and admissions are characterized simply as "tenders of proof." People v. King, 22 Ill. App. 3d 66, 316 N.E.2d 642 (4th Dist. 1974).

by taking the stand, therefore, risks challenge by the prosecution through the use of otherwise inadmissible statements.[333]

Prior statements are suppressed for all purposes if there is a finding that the statement was involuntary,[334] a determination distinct from the issue of the adequacy of the *Miranda* warnings.[335] Voluntariness of the confession is determined in accordance with the traditional test: whether, by reviewing the totality of the circumstances, the confession can be found to have been knowingly, intelligently and voluntarily given.[336] To enable the court to determine the voluntariness of the confession a hearing must be requested.[337] The absence of such a request is deemed a waiver by the defendant of the voluntariness challenge, and the statement may be used to impeach the defendant's credibility.[338] However, a finding of involuntariness renders the confession entirely incompetent.[339]

Various procedural requirements control the introduction of a prior statement. A proper foundation must be laid to adequately protect the declarant from surprise and confusion,[340] and afford him an opportunity to "explain or deny the substance or the existence of the alleged inconsistent statement in the first instance."[341] In addition, the laying of a foundation aids the jury in realizing that the statement is being introduced for impeachment rather than substantive purposes. Failure to lay such a foundation, however, is

333. *See, e.g.*, People v. Doss, 26 Ill. App. 3d 1, 324 N.E.2d 210 (2d Dist. 1975) (defendant may be impeached by a confession otherwise inadmissible so long as pertinent to direct examination). *See also* People v. Wright, 18 Ill. App. 3d 1028, 310 N.E.2d 494 (4th Dist. 1974), where the court confronted a slightly different problem. Defendant's confession was found voluntary, and the *Miranda* warnings sufficient in the pre-trial motion. However, since a witness to the confession failed to testify at the hearing, the confession was suppressed. This otherwise inadmissible confession was found admissible at trial for purposes of impeachment; this deviation was found by the court no greater than that in *Harris*.

334. Statements used to impeach a witness' credibility must meet the legal standards of trustworthy evidence. Harris v. New York, 401 U.S. 222 (1970).

335. People v. Doss, 26 Ill. App. 3d 1, 324 N.E.2d 210 (2d Dist. 1975).

336. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

337. *See, e.g.*, People v. Doss, 26 Ill. App. 3d 1, 324 N.E.2d 210 (2d Dist. 1975). Defendant failed to raise the issue of the voluntariness of his confession during a pre-trial hearing in which the confession was suppressed because inadequate *Miranda* warnings were given. Review was considered waived and the confession was admitted to impeach the defendant. *See also* People v. King, 22 Ill. App. 3d 66, 316 N.E.2d 642 (4th Dist. 1974).

338. People v. Ortiz, 22 Ill. App. 3d 788, 317 N.E.2d 763 (1st Dist. 1974).

339. People v. King, 22 Ill. App. 3d 66, 316 N.E.2d 642 (4th Dist. 1974); People v. Hiller, 2 Ill. 2d 323, 118 N.E.2d 11 (1954).

340. People v. Harbin, 31 Ill. App. 3d 485, 334 N.E.2d 379 (1st Dist. 1975). In that case, the prosecutor failed to inquire of defendant whether he had made a statement to a police officer on a particular date. The statements had been previously suppressed.

341. *Id.* at 490, 334 N.E.2d at 383. Although articulating the requirement of an adequate foundation, the court found use of this particular statement harmless error and affirmed the conviction.

not reversible error if there exists sufficient cross-examination to satisfy the rationale for the rule,[342] or if the statement itself is harmless the jury is advised that any prior inconsistent statement is limited to use for impeachment purposes.[343]

Issues raised in two important federal cases have yet to be considered by Illinois courts. In *United States v. Montanye*,[344] defendant's suppressed written confession was used to rehabilitate a police witness. In *Oregon v. Haas*,[345] the Supreme Court permitted a statement to be introduced for impeachment which was inadmissible substantively because made in response to a police officer's question after the defendant had requested an attorney. Unlike *Harris*, adequate *Miranda* warnings had been given. Apparently, pursuant to *Haas*, an investigator may persist in questioning the suspect even after he has exercised his rights under *Miranda*. The Supreme Court based its decision on the reasoning expounded in *Harris*—a defendant may not falsify freely and expect to be protected. The safeguard imposed is similar to that of *Harris* in that coerced confessions are still entirely inadmissible for any purpose.

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342. *Id.*; People v. Powell, 27 Ill. App. 3d 662, 327 N.E.2d 111 (5th Dist. 1975).

343. People v. Harbin, 31 Ill. App. 3d 485, 334 N.E.2d 379 (1st Dist. 1975). In People v. Bolton, 18 Ill. App. 3d 512, 310 N.E.2d 22 (4th Dist. 1974), the court noted that if the statement otherwise admissible is used to impeach, failure to instruct the jury as to the purpose of the statement's introduction is not reversible error.

In bench trials, the court is presumed to have considered only competent evidence. People v. West, 13 Ill. App. 3d 550, 300 N.E.2d 808 (1st Dist. 1973). During a bench trial defendant moved to suppress a statement made without sufficient *Miranda* warnings. His motion was sustained. Defendant then sought a directed verdict, which was denied. On appeal, defendant claimed that the court had used the statement substantively, rather than for impeachment purposes. The appellate court viewed the trial judge's ruling on defendant's motion to suppress as evidence that the confession did not receive substantive treatment.

344. 486 F.2d 263 (2d Cir. 1973). Here, the witness was allowed to refer to the defendant's suppressed written confession. The witness maintained that the statements were "in sum and substance" the same as the verbal admissions made by defendant while in custody before he had asked for an attorney.

345. 420 U.S. 714 (1975). Defendant was given full *Miranda* warnings after being arrested for bicycle theft. After defendant declared his desire to consult an attorney, the police officer indicated defendant would be accommodated once they arrived at the station. Defendant then offered inculpatory information, which he contradicted at trial. Citing *Harris*, the Court maintained:

> . . .assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrance flows when the evidence in question is made unavailable to the prosecutor in its case-in-chief. Harris v. New York, 401 U.S. 222, 225.

420 U.S. at 721.

PROCEEDINGS PRIOR TO TRIAL

PRELIMINARY PROCEEDINGS

Commencement of Prosecution

A recent enactment amending section 111-2 of the Criminal Code[346] permits prosecution of felonies to be commenced by information as well as by indictment. If the information route is taken, the statute requires that the accused be afforded a preliminary hearing to establish probable cause.[347]

This scheme appears to conform with *Gerstein v. Pugh*,[348] which held that a prompt probable cause determination by a judicial officer is a "condition for any significant pretrial restraint on liberty."[349] Since the Illinois Constitution requires a prompt preliminary hearing[350] and section 111-2 makes such a hearing a prerequisite to prosecution by information, the preliminary examination in Illinois most likely fulfills the probable cause requirement of *Gerstein*.

Section 111-2(e)[351] provides that where prosecution is by information after preliminary hearing, the accused can be prosecuted for all offenses arising from the same transaction or conduct even though the additional crimes were not charged at the preliminary hearing. This section can be expected to be the subject of some litigation. For example, it is permissible under section 111-2(e), if probable cause is found on a charge of aggravated battery, for the prosecutor to subsequently add to the information a charge of attempted murder. However, it may be contended that under article I, section 7 of the Illinois Constitution an accused has the right to a probable cause determination on the charge of attempted murder.

Initial Appearance

The provisions of article 109 of the Code of Criminal Procedure[352] prescribe procedures after the arrest of a defendant through preliminary hearing. Section 109-1(a)[353] requires that a defendant must be taken after arrest "without unnecessary delay"[354] before the nearest

346. ILL. REV. STAT. ch. 38, § 111-2 (1975).
347. *Id.* § 111-2(a).
348. 420 U.S. 103 (1975).
349. *Id.* at 125.
350. ILL. CONST. art. I, § 7 (1970).
351. ILL. REV. STAT. ch. 38, § 111-2(e) (1975).
352. ILL. REV. STAT. ch. 38, §§ 109-1 *et seq.* (1975).
353. ILL. REV. STAT. ch. 38, § 109-1(a) g1975.
354. Claims of unnecessary delay prior to this initial appearance often involve confessions made during the interval between arrest and presentment to a magistrate. As a result, delay in contravention of section 109-1(a) is often considered in the context of determining the

and most accessible judge or, if the arrest was pursuant to warrant, before the judge who issued the arrest warrant. Generally, delays of under 24 hours are found not to be in violation of statute.[355] Even where violations of section 109-1 occur, inculpatory statements made by the accused are suppressed only upon clear showing by the accused that the delay influenced the voluntariness of the statement.[356]

Preliminary Hearing

Prompt Preliminary Hearings. Article I, section 7 of the Illinois Constitution of 1970 provides in part:

> No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.[357]

The wording of this section has been the subject of controversy since the Illinois Supreme Court first considered its meaning in 1972. In *People v. Kent*[358] the court stated that the constitutional provision:

> . . . appears to be designed to insure that the existence of probable cause will be determined promptly *either* by a grand jury or by a judge.[359]

Later, in *People v. Hendrix*,[360] the supreme court found no violation of defendant's right to a prompt preliminary hearing when he was

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voluntariness of a confession. It has been held that the statute does not require immediate presentment to a judicial officer even in those counties in which bond court is available on a 24-hour basis. People v. Brooks, 51 Ill. 2d 156, 281 N.E.2d 326 (1972).

355. *See* People v. Mallet, 45 Ill. 2d 388, 259 N.E.2d 241 (1970) (defendant, taken before magistrate eight hours after arrest, had confessed seven hours after arrest); People v. Watkins, 23 Ill. App. 3d 1054, 320 N.E.2d 59 (1st Dist. 1974) (delay of less than a day is not unnecessary or unreasonable); People v. Stamps, 8 Ill. App. 3d 896, 291 N.E.2d 274 (5th Dist. 1972). In People v. Redden, 10 Ill. App. 3d 889, 295 N.E.2d 23 (3d Dist. 1973), defendant held for over 24 hours and interrogated twice at length was released without being charged when he agreed to return 20 hours later to take a polygraph examination. His confession to a civilian polygraph examiner was found voluntary and not affected by a delay in presentment since defendant had been released from custody.

356. People v. Harper, 127 Ill. App. 2d 420, 262 N.E.2d 298 (1st Dist. 1970). In that instance the confessions were made soon after arrest, and written statements completed within 10 hours of arrest. Therefore, since the delay did not precede the confessions, it did not affect their voluntariness.

357. ILL. CONST. art I, § 7 (1970).

358. 54 Ill. 2d 161, 295 N.E.2d 710 (1972) (article I, section 7 does not bar indictment of defendant after finding of no probable cause at preliminary hearing).

359. Id. at 163, 295 N.E.2d at 711.

360. 54 Ill. 2d 165, 295 N.E.2d 724 (1973).

indicted one day after arrest and later refused the state's offer to hold a preliminary hearing.[361] Apparently, Illinois courts interpret section 7 as being more concerned with the point in time when probable cause is determined than with the form of this determination. Both appellate and supreme court decisions since *Kent* and *Hendrix* have reflected this stance: indictment is considered equivalent to preliminary hearing when faced with claims of denial of prompt preliminary hearing in violation of article I, section 7.[362] In this view, either prompt preliminary hearing or prompt indictment satisfies the constitutional requirements of section 7.

Unreasonable delay between arrest and determination of probable cause by indictment or preliminary hearing, under the present state of law, affords the defendant little recourse. In *Hendrix*, the supreme court found, in spite of the wording[363] of the constitution, that:

> The second paragraph of section 7 does not provide a grant of immunity from prosecution as a sanction for its violation. Nor would an interpretation make sense which required the dismissal of the present indictment and the discharge of the defendant, to be followed by his reindictment and rearrest upon a new indictment.[364]

Recently, the supreme court noted that the legislature had provided no remedy for violation of section 7, as it has for violation of the right to speedy trial, and called for legislation providing sanc-

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361. The dissent argued that the court's construction of the second paragraph of section 7 ignored the "initial charge" language which requires a preliminary hearing when the initial charge is not by indictment. 54 Ill. 2d at 170-73, 295 N.E.2d at 727-29 (Ward, J., dissenting).

362. *See* People v. Howell, 60 Ill. 2d 117, 324 N.E.2d 403 (1975) (violation of article I, section 7 where defendant was indicted 65 days after arrest with no preliminary hearing); People v. Hood, 59 Ill. 2d 315, 319 N.E.2d 802 (1975) (four-week delay between arrest and indictment is not unreasonable); People v. Moore, 28 Ill. App. 3d 1085, 329 N.E.2d 893 (5th Dist. 1975) (constitutional requirements of article I, section 7 are satisfied by prompt indictment); People v. Williams, 19 Ill. App. 3d 136, 310 N.E.2d 666 (2d Dist. 1974) (no violation of right to prompt preliminary hearing where defendant indicted 17 days after arrest); People v. Hunsaker, 23 Ill. App. 3d 155, 318 N.E.2d 737 (5th Dist. 1974) (no violation of right to prompt preliminary hearing when defendant indicted 48 days after arrest); People v. Brown, 11 Ill. App. 3d 67, 296 N.E.2d 77 (2d Dist. 1973) (no violation of article I, section 7 when defendant indicted nine days after arrest); People v. Savage, 12 Ill. App. 3d 734, 298 N.E.2d 758 (4th Dist. 1973) (no violation of article I, section 7 when defendant indicted 22 days after arrest).

363. *No person shall be held to answer* for a crime . . . unless either the initial charge has been brought by indictment . . . or the person has been given a prompt preliminary hearing . . . .

ILL. CONST. art. I, § 7 (1970) (emphasis added). The first phrase of this paragraph can be read to mean that prosecution is barred unless the provisions are met.

364. People v. Hendrix, 54 Ill. 2d 165, 169, 295 N.E.2d 725, 727 (1973).

tions to protect the right to a prompt preliminary hearing.[365] Thus, the judicial position is that, albeit unreasonable delays[366] are violative of the constitutional right to a prompt determination of probable cause, dismissal of indictment or reversal of conviction are improper remedies.[367] Further, it was recently held that a conviction will not be vacated unless defendant can prove that denial of his constitutional right to a prompt probable cause determination deprived him of "a substantial means of enjoying a fair and impartial trial."[368]

Motions to Suppress. Section 109-3(e)[369] provides that motions to suppress confessions and other illegally obtained evidence can be made at the preliminary examination. The remaining part of the section concerns the appealability and binding effect of suppression orders entered at the preliminary hearing stage. This part of the section was declared unconstitutional in *People v. Taylor*.[370] The section had provided that an order of suppression at preliminary hearing was a nonfinal order from which the state could not appeal and which was not binding in subsequent proceedings. *Taylor* held that the Illinois Constitution[371] granted the supreme court authority to provide for appeals from other than final judgments, and that the legislature, by enacting section 109-3(e), had invaded the court's rule-making power in violation of the constitution. Under Supreme Court Rule 604,[372] orders suppressing evidence are appealable by the state. Therefore, when the state does not appeal such an order, it is binding upon the trial court.[373]

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365. People v. Howell, 60 Ill. 2d 117, 120, 324 N.E.2d 403, 404 (1975).

366. People v. Howell, 60 Ill. 2d 117, 324 N.E.2d 403 (1975) (65-day delay between arrest and indictment violated defendant's rights under article I, section 7, but error waived by failure to raise objection at trial); People v. Hunt, 26 Ill. App. 3d 776, 326 N.E.2d 164 (1st Dist. 1975) (unexplained delay of 66 days between arrest and preliminary hearing is violation of article I, section 7); People v. Price, 32 Ill. App. 3d 610, 336 N.E.2d 56 (5th Dist. 1975) (defendant denied right to prompt preliminary hearing when indicted 168 days after arrest and given preliminary hearing 403 days after arrest). The first appellate district has also indicated that a 43-day delay may be unreasonable but found it unnecessary to decide the question since dismissal of indictment is improper. *See* People v. Fields, 29 Ill. App. 3d 1042, 331 N.E.2d 826 (1st Dist. 1975) (abstract).

367. People v. Hunt, 26 Ill. App. 3d 776, 326 N.E.2d 164 (1st Dist. 1975); People v. Price, 32 Ill. App. 3d 610, 336 N.E.2d 56 (5th Dist. 1975); People v. Fields, 29 Ill. App. 3d 1042, 331 N.E.2d 826 (1st Dist. 1975) (abstract).

368. People v. Price, 32 Ill. App. 3d 610, 613, 336 N.E.2d 56, 58, (5th Dist. 1975).

369. ILL. REV. STAT. ch. 38, § 109-(3)(e) (1975).

370. 50 Ill. 2d 136, 277 N.E.2d 878 (1971).

371. *Taylor* was decided under the 1870 Constitution; however, the applicable provision is substantially unchanged. See ILL. CONST. art. VI, § 6 (1970).

372. ILL. REV. STAT. ch. 110A, § 604 (1975).

373. People v. Holland, 56 Ill. 2d 318, 307 N.E.2d 380 (1974) (motions of each defendant at preliminary hearing to suppress physical evidence denied; trial court refused to hear

When a motion to suppress evidence is denied at preliminary hearing, the trial court may hear a renewed motion only in order to determine whether circumstances have changed or if additional evidence is available. Granting a motion to suppress solely on the evidence heard at the preliminary hearing by the trial court constitutes reversible error.[374]

Right to Counsel. *Coleman v. Alabama*[375] recognized that the preliminary hearing is a critical stage of the criminal process at which an accused is constitutionally entitled to be represented by counsel. In *People v. Adams*,[376] Illinois determined that since preliminary procedures in Alabama and Illinois were substantially alike, Illinois was bound to follow the *Coleman* decision. However, although the preliminary hearing is a critical stage, the right to counsel is not absolute; denial of the right does not always necessitate reversal, unless defendant can demonstrate prejudice in his efforts to secure a fair trial.[377]

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renewal of motions); People v. Durruty, 18 Ill. App. 3d 335, 309 N.E.2d 802 (1st Dist. 1974) (motion to suppress seized narcotics granted by trial court on transcript of preliminary hearing motion which was denied).

374. People v. Durruty, 18 Ill. App. 3d 335, 309 N.E.2d 802 (1st Dist. 1974).

375. 399 U.S. 1 (1970).

376. 46 Ill. 2d 200, 263 N.E.2d 490 (1970), *aff'd*, 405 U.S. 278 (1972). *Adams* held that *Coleman* had no retroactive application.

377. *See, e.g.*, People v. Edmondson, 30 Ill. App. 3d 763, 332 N.E.2d 493 (1st Dist. 1975). In that case, defendants appeared without counsel on the date designated for preliminary hearing. One defendant stated that he had an attorney; the hearing was delayed while defendant's wife attempted to contact counsel. The court decided that the hearing should proceed and, after denying a request for a continuance, appointed two public defenders to represent defendants, who were later indicted. The appellate court for the first district reversed and remanded the trial court's dismissal of the indictment, finding that the right to be assisted by counsel at preliminary examination is not absolute. The court reasoned that defendants had a reasonable opportunity to obtain an attorney and the trial court did not abuse its discretion in denying a continuance. The right to counsel can not be used to hamper effective administration of justice.

See also People v. Clontz, 31 Ill. App. 3d 35, 334 N.E.2d 317 (5th Dist. 1975). There defendant, who appeared without counsel, was told by the court that he could either have a preliminary hearing immediately, or waive his right to a prompt preliminary hearing and have it the following week. Defendant chose to proceed and probable cause was found. At no time was the accused notified of his right to be assisted by counsel.

Upon review of his conviction, the appellate court for the fifth district found that denial of right to counsel at preliminary hearing does not per se deprive an accused of a fair trial. In this instance, the error was harmless because the testimony of the only witness at the preliminary hearing was the same in substance as five other police officers at trial. Therefore, the testimony of the preliminary hearing witness was unnecessary to the state's case and did not contribute to the defendant's conviction.

BAIL

Illinois Constitutional Right

In *People ex rel. Hemingway v. Elrod*,[378] the Illinois Supreme Court declared unconstitutional the following provision of article 110:

> (a) All persons shall be bailable before conviction, except when the offense charged is murder, aggravated kidnapping or treason and the proof is evident or the presumption great that the person is guilty of the offense.
> (b) A person charged with murder, aggravated kidnapping or treason has the burden of proof that he should be admitted to bail.[379]

Prior to 1972, the section denied bail to those charged with an offense for which death was a possible punishment.[380] After *Furman v. Georgia*[381] the legislature amended section 110-4 to exclude from bail those charged with specific offenses.

In *Hemingway* defendant was charged with murder, a non-bailable offense under section 110-4. He argued, however, that since he was not charged with an offense punishible by death[382] he was entitled to bail as a matter of right under article I, section 9 of the Illinois Constitution. That section provides in part: "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great."[383]

The court noted that there were two possible approaches regarding the effect of *Furman* on the bail provision in the constitution. The term "capital offenses" might refer to a category of offenses with respect to bail before trial and punishment after trial. If this view were adopted, offenses within the meaning of "capital offense" are still nonbailable under the constitution.[384] This "classification" approach was taken by the legislature when it amended section 110-4 in 1972.

The court rejected this approach and found that precedent[385] and

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378. 60 Ill. 2d 74, 322 N.E.2d 837 (1975).
379. ILL. REV. STAT. ch 38, § 110-4 (1975).
380. ILL. REV. STAT. ch. 38, § 110-4 (1973), *as amended*, ILL. REV. STAT. ch. 38, § 110-4 (1975).
381. 408 U.S. 238 (1972).
382. ILL. REV. STAT. ch. 38, § 1005-8-1A (1975).
383. ILL. CONST. art. I, § 9 (1970).
384. 60 Ill. 2d at 78, 322 N.E.2d at 840.
385. People v. Turner, 31 Ill. 2d 197, 201 N.E.2d 415 (1964).

constitutional debates[386] indicated that a capital offense was one for which the death penalty may, but need not necessarily, be inflicted.[387] Accordingly, section 110-4 was held unconstitutional to the extent that it attempted "to render nonbailable offenses other than those for which the death penalty may be imposed . . . ."[388] The practical effect of this holding is to amend section 110-4 to read as it did before the 1972 amendment.

1975 Amendments to Article 110

Recent amendments to two sections[389] of the bail article are apparently the result of lengthy dictum in the *Hemingway* decision. Rejecting petitioner's claim of absolute right to be admitted to bail,[390] the court noted that, due to the fact that crimes are often committed by those freed on bail, it is proper to "balance the right of an accused to be free on bail against the right of the general public to receive reasonable, protective consideration by the courts."[391] This balance could be effectuated by the imposition of certain restrictive conditions of bail which the court found to be within the authority to impose conditions of bail accorded trial judges under section 110-10.

The court found it properly within the scope of section 110-10 to require that the accused not commit a criminal offense while on bail.[392] Recently the Illinois General Assembly amended section 110-10(a) to specifically include this condition in all bail bonds.[393] This same enactment amended section 110-6 governing reduction and increase in bail to allow alteration of the conditions of bail if the accused violates a criminal statute while awaiting trial.[394] If the offense is a forcible felony revocation of bail is authorized.[395] The section also provides for an adversary hearing to be held when commission of an offense by a person on bail is alleged.[396] If the state can prove by clear and convincing evidence that a forcible felony

386. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1654-56 (1970).
387. 60 Ill. 2d at 79-80, 322 N.E.2d at 840-41.
388. *Id.*
389. ILL. REV. STAT. ch. 38, §§ 110-6, 110-10 (1975).
390. 60 Ill. 2d at 79-80, 322 N.E.2d at 840-41.
391. *Id.* at 81, 322 N.E.2d at 841.
392. *Id.* at 82, 322 N.E.2d at 842.
393. ILL. REV. STAT. ch. 38, § 110-10(a)(4) (1975).
394. *Id.* § 110-6(b).
395. *Id.*
396. *Id.* § 110-6(e).

was committed by the accused, he may be held for trial without bail if certain speedy trial conditions are met.[397]

DISCOVERY

Supreme Court Rules 411 to 415[398] regulate discovery procedures in felony cases after indictment.[399] The rules grant broad remedial power for failure to comply with appropriate provisions.[400] However, to obtain reversal on appeal for noncompliance, the appealing party must generally demonstrate actual prejudice.[401]

A defendant has a constitutional right to information which tends to negate his guilt or mitigate his punishment.[402] A denial of due process results when evidence favorable to the defendant is withheld.[403] These principles are reflected in Supreme Court Rule 412(c).[404] Along with a provision granting discretion to the trial court to grant reasonable discovery requests,[405] this rule is the basis for permitting discovery beyond information and material categorized as discoverable by Rule 412(a).[406]

Witnesses

Under Rule 412(a)(i)[407] the state must disclose to the defendant the names and addresses of witnesses it intends to call and recorded or memorialized statements of such witnesses which are "substantially verbatim reports of their oral statements." This requirement that the memoranda be substantially verbatim is loosely inter-

397. *Id.* §§ 110-6(e)(1)-(4).

398. ILL. REV. STAT. ch. 110A, §§ 411-15 (1975).

399. *Id.* § 411. For a discussion of discovery in misdemeanor cases *see* Note, *The Constitutional Implications of Discovery Practice In Quasi-Criminal Prosecutions In Illinois*, 7 LOY. CHI. L.J. 79 (1976). *See also* People v. Schmidt, 8 Ill. App. 3d 1024, 291 N.E.2d 225 (2d Dist. 1975).

400. ILL. REV. STAT. ch. 110A, § 415(g) (1975).

401. *See, e.g.*, People v. Fields, 59 Ill. 2d 516, 322 N.E.2d 33 (1974) (error in requiring defendant to disclose alibi witnesses without reciprocal discovery found harmless error due to overwhelming evidence of defendant's guilt); People v. Horton, 14 Ill. App. 3d 957, 304 N.E.2d 21 (1st Dist. 1974) (no prejudice shown by state's failure to disclose grand jury transcript of witness's testimony when defense attorney given transcript at outset of cross-examination and granted short recess).

402. Brady v. Maryland, 373 U.S. 83 (1963); Moore v. Illinois, 408 U.S. 786 (1972).

403. People v. Murdock, 39 Ill. 2d 553, 237 N.E.2d 442 (1968).

404. ILL. REV. STAT. ch. 110A, § 412(c) (1975).

405. *Id.* § 412(h).

406. *Id.* § 412(a). *See, e.g.*, People v. De Stephano, 30 Ill. App. 3d 935, 332 N.E.2d 626 (1st Dist. 1975), where defendant's murder conviction was reversed because the state did not turn over to defendant the file of an attorney contacted by the murder victim three weeks before his death which reflected that the victim had been severely beaten and threatened by police.

407. ILL. REV. STAT. ch. 110A, § 412(a)(i) (1975).

preted. For example, the Illinois Supreme Court found that interviews of 800 prison inmates which were reduced to index cards were "a reproduction in one form or another of what [each] witness said when interviewed earlier" and were therefore discoverable.[408]

Since the purpose of pretrial discovery of witnesses' statements is to permit effective cross-examination and not to provide for a general survey of prosecution files,[409] police reports containing no information favorable to defendant are not generally discoverable unless the police officer is going to testify.

Two recent appellate court decisions considered the discoverability of the names and addresses of occurrence witnesses whom the state did not intend to call at trial. This information is not encompassed by Rule 412(a)(i) and, therefore, determination of the issue of its disclosure remains within the discretion of the trial judge. In *People v. Longstreet*,[410] the trial court's denial of defendant's request for the names of two young children was found proper when conclusive proof that they were in fact occurrence witnesses was absent. In *People v. Williams*,[411] however, the court required that defendant be permitted to learn which inmates were in a cell house at the time of his attack on a jail officer.

Discovery of Alibi and Alibi Rebuttal Witnesses. In *People v. Fields*,[412] the Illinois Supreme Court held unconstitutional the statute[413] requiring notice to the prosecution of intent to rely on an alibi defense and disclosure of the identity of alibi witnesses, based on the reasoning of *Wardius v. Oregon*.[414] Because the Illinois law failed to require the state to disclose rebuttal witnesses, the court in *Fields* held the notice of alibi defense statute violative of due process.[415]

408. People v. Basset, 56 Ill. 2d 285, 292, 307 N.E.2d 359, 363 (1974) (defendants convicted of murdering three prison guards had right to index cards which contained memos of interviews of 800 witnesses, but conviction affirmed).

409. People v. Basile, 21 Ill. App. 3d 273, 315 N.E.2d 293 (4th Dist. 1974).

This same purpose of discovery provided the rationale for properly denying disclosure to defendant of a police report containing the statements of a stabbing victim who later died; since the murder victim could not testify at trial, the report was not discoverable. People v. Jenkins, 30 Ill. App. 3d 1034, 333 N.E.2d 497 (4th Dist. 1975). *Jenkins* also held that an in camera inspection of material to determine discoverability under Rule 412(a)(i) did not require presence of defense counsel. *Id.* at 1042, 333 N.E.2d at 533-34.

410. 23 Ill. App. 3d 874, 320 N.E.2d 529 (1st Dist. 1974).

411. 24 Ill. App. 3d 666, 321 N.E.2d 74 (3d Dist. 1974).

412. 59 Ill. 2d 516, 322 N.E.2d 33 (1974).

413. ILL. REV. STAT. ch. 38, § 114-14 (1973).

414. 412 U.S. 470, 476 (1973).

415. 59 Ill. 2d at 521, 322 N.E.2d at 35. The court found that the error in requiring defendant to disclose his alibi witnesses without reciprocal discovery was harmless due to the overwhelming evidence of defendant's guilt. A different result was reached in People v. Cline, 60 Ill. 2d 561, 328 N.E.2d 534 (1975); where one of defendant's alibi witnesses, unlisted

The controversy arose again recently in *People ex rel. Carey v. Strayhorn*,[416] where the state filed a motion requesting notice of alibi defense and disclosure of alibi witnesses, and guaranteed reciprocal discovery regarding rebuttal witnesses. The state argued that it had complied both with *Wardius* and Rule 413(d) governing discovery of defenses. The defendant countered that the state's offer to supply rebuttal witnesses was unenforceable because contrary to section 114-9(c), which exempts the state's rebuttal witnesses from disclosure. In a decision presaged by appellate court decisions,[417] the court held that existing Supreme Court Rules were broad enough to provide for the type of reciprocal discovery required by *Wardius* in cases involving alibi defense.[418] It also found section 114-9(c) invalid as violative of due process.[419]

Statements by Defendant

Rule 412(a)(iii) requires disclosure to the defendant of

> any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements.[420]

However, noncompliance with this provision results in reversal only where defendant demonstrates actual prejudice; his claim is considerably weakened where the content of testimony regarding his statements is made known to him prior to its admission.[421]

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pursuant to section 114-14, was not permitted to testify. This conviction was reversed.

416. 61 Ill. 2d 85, 329 N.E.2d 194 (1975).

417. *See* People v. Jarret, 22 Ill. App. 3d 61, 316 N.E.2d 659 (2d Dist. 1974) (failure of state to inform defendant of intent to call rebuttal witnesses found denial of proper reciprocal discovery); People v. Manley, 19 Ill. App. 3d 365, 311 N.E.2d 593 (2d Dist. 1974) (continuing duty to disclose under Rule 415(b) required state to supply names and statements of rebuttal witnesses).

418. 61 Ill. 2d at 91, 329 N.E.2d at 197-98. The court cited the following rules as being broad enough to require this type of discovery: Rule 412 (Disclosure to Accused); Rule 413 (Disclosure to Prosecution); Rule 415(b) (Continuing Duty to Disclose).

419. 61 Ill. 2d at 91, 329 N.E.2d at 198.

420. ILL. REV. STAT. ch. 110A, § 412(a)(ii) (1975).

421. *See, e.g.*, People v. Gilbert, 26 Ill. App. 3d 284, 325 N.E.2d 134 (4th Dist. 1975), where defendant was indicted for burglary of a high school. The state's attorney planned to show that the burglary was one of several in a common scheme to burglarize schools, intending to call as a witness a woman who had overheard the defendant making plans with two accomplices. The state had not turned over the substance of defendant's statements as overheard by the witness. However, because the state had informed the defendant of the content of the testimony the day before it was offered, the appellate court found no reversible error in the trial court's denial of defendant's request to interview the witness or in the admission of the testimony. The dissent, however, viewed the state's failure to disclose as a clear violation of Rule 412 and found reversible error in the state's use of an undisclosed

Grand Jury Transcripts

Rule 412(a)(iii) requires disclosure by the state of transcripts of grand jury testimony of the accused and witnesses to be called at trial.[422] Prior to recent legislation, this provision did not compel recordation of grand jury proceedings, but merely required disclosure if the proceedings were recorded.[423] Amendments effective October 1, 1975, require that transcripts be made of all questions asked and answers given before the grand jury.[424]

Matters Not Subject to Disclosure — Informants

Rule 412(j)(ii) states that the identity of an informant need not be divulged if he is not to testify, if his identity is a prosecution secret and if failure to disclose does not infringe upon the constitutional rights of the defendant.[425] Whether identity of an informant should be divulged necessitates a balancing test: the interest of the public in protecting the free flow of information regarding criminal activity is balanced against the individual's right to discover the identity of the informant in preparing his defense.[426]

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inculpatory admission coupled with the trial court's refusal to allow the defendant's attorney to interview the witness.

422. ILL. REV. STAT. ch. 110A, § 412(a)(iii) (1975). Delay in handing over grand jury transcripts must cause prejudice to defendant to be reversible error. In People v. Horton, 14 Ill. App. 3d 957, 304 N.E.2d 21 (1st Dist. 1973) (no prejudice found when defense counsel given grand jury transcript at the outset of cross-examination of a witness and then granted short recess).

423. *See, e.g.*, People v. Lintz, 55 Ill. 2d 517, 304 N.E.2d 278 (1973) (failure of state to have grand jury proceedings recorded does not require dismissal of indictment); People v. Stinger, 22 Ill. App. 3d 371, 317 N.E.2d 340 (2d Dist. 1974) (no duty to record grand jury proceedings; court is without authority to require state's attorney to assign court reporter to grand jury); People v. Holman, 19 Ill. App. 3d 544, 311 N.E.2d 696 (4th Dist. 1974) (failure to make grand jury record not violative of defendant's due process rights).

424. ILL. REV. STAT. ch. 38, § 112-7 (1975). Note that the section requires recordation only of questions and answers and not of the entire proceeding.

425. ILL. REV. STAT. ch. 110A, § 412(j)(ii) (1975).

426. Roviaro v. United States, 353 U.S. 53 (1957); People v. Lewis, 57 Ill. 2d 232, 311 N.E.2d 685 (1974). *See, e.g.*, People v. Perez, 25 Ill. App. 3d 371, 323 N.E.2d 399 (1st Dist. 1974). In response to defendant's discovery motion the state had replied that there was no informant. In testimony at trial, however, a police officer contradicted the state's assertion. The court rejected the state's argument that failure to disclose was harmless error since the informant had assisted in staging the sale, had driven the police officer to the location of the sale, and had observed the entire transaction. The informant was potentially an important source of information for defendant.

See also People v. Chaney, 27 Ill. App. 3d 366, 326 N.E. 2d 491 (1st Dist. 1975). The informer's privilege was found not absolute; rather, the state had a duty to disclose the identity of the informant and a statement made by him when they were crucial to defendant's theory of the case. In *Chaney*, defendant contended that he had been lured to a building to be arrested for burglary. When police officers were questioned on cross-examination regarding an informant, the state's objections were sustained. Subsequently, defendant called a witness

SPEEDY TRIAL

General Statutory Provisions

The guarantee of a speedy and public trial embodied in the sixth amendment[427] serves to safeguard the interests of both the accused and society in swift disposition of criminal charges.[428] In Illinois, this right is implemented by statute,[429] which provides that every person accused of a criminal offense[430] who is confined in Illinois while awaiting trial[431] must be brought to trial within 120 days from the date of custody. An accused who secures release through bond or recognizance must be brought to trial within 160 days from the date he demands trial.[432] This right to immediate trial is waived by entry of a plea of guilty.[433] The statutory period is tolled by dilatory con-

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to corroborate his story, unaware that the witness was the informer. The state used a statement given by informer to impeach his testimony.

427. This constitutional guarantee was incorporated into the due process clause of the fourteenth amendment in Klopfer v. North Carolina, 386 U.S. 213 (1967). The Illinois Constitution, art. I, § 8, echoes this guarantee.

428. Barker v. Wingo, 407 U.S. 514 (1972).

429. ILL. REV. STAT. ch. 38, § 103-5 (1975).

430. People v. Dery, 31 Ill. App. 3d 70, 333 N.E.2d 259 (3d Dist. 1975) (abstract). Section 103-5 is not applicable to prosecutions for violation of a municipal ordinance; however, trial in those cases is required "without unnecessary delay" by ILL. REV. STAT. ch. 24, § 1-2-9. City of Chicago v. Wisniewski, 54 Ill. 2d 149, 295 N.E.2d 453 (1973). The provision is also not applicable to probation proceedings. People v. Westphal, 1 Ill. App. 3d 223, 273 N.E.2d 477 (2d Dist. 1971) (abstract); People v. Williams, 10 Ill. App. 3d 428, 294 N.E.2d 61 (2d Dist. 1973).

431. People v. Poturalski, 30 Ill. App. 3d 694, 332 N.E.2d 415 (1st Dist. 1975) (abstract).

432. An oral demand for trial by defendant is sufficient to begin the running of the 160-day period, so long as the demand is presented so that it is preserved in the record. People v. Snyder, 32 Ill. App. 3d 1003, 337 N.E.2d 108 (4th Dist. 1975); People v. Rockett, 85 Ill. App. 2d 24, 228 N.E.2d 219 (2d Dist. 1967). Although a demand for trial by an accused in custody is superfluous, since the 120-day period commences automatically from the date of custody, People v. Byrn, 3 Ill. App. 3d 362, 274 N.E.2d 186 (5th Dist. 1971), a demand by an accused prior to the time he is released on bond or recognizance should be in writing in order to assure its effectiveness as a continuing demand and to commence the 160-day period running from the date of release. *Compare* People v. Byrn, 3 Ill. App. 3d 362, 274 N.E.2d 186 (5th Dist. 1971) (defendant's oral demand for trial, made at the time of arraignment on the charge of murder while defendant was in custody, and not renewed either at the time of the filing of the motion for bail or subsequent to defendant's admission to bail, was not made by a "person on bail," as required by section 103-5(b), and did not operate retroactively to begin the statutory period when defendant was released) *with* People v. Arch, 33 Ill. App. 3d 331, 337 N.E.2d 221 (3d Dist. 1975) (defendant's written motion demanding speedy trial filed at the time of the preliminary hearing on the charge of theft gave actual notice to the prosecution that defendant insisted on his right to a speedy trial and was sufficient to commence the 160-day period when defendant was released on bond the next day).

A demand for trial by jury is not, in and of itself, sufficient to commence the running of the statutory period; the jury trial demand is not equivalent to demand for prompt trial, but has been interpreted as a demand that the trial, whenever it is held, be before a jury. *See, e.g.*, People v. Baskin, 38 Ill. 2d 141, 230 N.E.2d 208 (1967).

433. People v. Kuknyo, 21 Ill. App. 3d 790, 315 N.E.2d 657 (1st Dist. 1974) (abstract);

duct on the part of the defendant or his attorney, by proceedings to determine the defendant's competency to stand trial,[434] by a determination of the defendant's physical incapacity for trial,[435] or by an interlocutory appeal. On motion of the prosecution, the court may exercise its discretion to extend the statutory time limitations for a period not exceeding 60 days

> [i]f the court determines that the State has exercised without success due diligence to obtain evidence material to the case and

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People v. Prater, 20 Ill. App. 3d 962, 310 N.E.2d 431 (2d Dist. 1974) (abstract). Failure of the court to advise defendant of his rights under section 103-5 will not render a guilty plea involuntary. People v. Scott, 13 Ill. App. 3d 287, 300 N.E.2d 850 (1st Dist. 1973) (abstract) (defendant's attorney ready for trial on the 119th day, when defendant pleaded guilty). A defendant cannot avail himself of the 120-day rule by changing his plea to not guilty several days before expiration of the 120-day term. People v. Hickman, 3 Ill. App. 3d 919, 280 N.E.2d 787 (2d Dist. 1971), *aff'd*, 56 Ill. 2d 175, 306 N.E.2d 32 (1973).

434. Specifically, the statute is tolled by "an examination for competency ordered pursuant to section 104-2 . . ., by a competency hearing, or by an adjudication of incompetency for trial. . . ." ILL. REV. STAT. ch. 38, § 103-5(a). Section 104-2 was repealed, P.A. 77-2097, effective Jan. 1, 1973. Its provisions are now codified at ILL. REV. STAT. ch. 38, § 1005-2-1 (1975). *See* People v. Browry, 8 Ill. App. 3d 599, 290 N.E.2d 650 (1st Dist. 1972) (request by an accused for a psychiatric examination to determine his competency violates neither defendant's constitutional right to a speedy trial nor the statute enacted to implement the constitutional guarantee). *See also* People v. Murdock, 3 Ill. App. 3d 746, 279 N.E.2d 159 (5th Dist. 1972) (delay of six months from order for competency hearing to hearing itself found not so unreasonable and oppressive as to violate defendant's right to a speedy trial).

However, the state may not avoid operation of section 103-5 by merely suggesting that the defendant is incompetent; good cause must exist for the filing of a petition to determine competency.

> [A] mere arbitrary suggestion of insanity will not suffice, and whether such ground constitutes a good cause for delay in a given case must be a matter resting within the discretion of the trial court, to be resolved from the particular facts and circumstances before it. On review, the ruling will not be disturbed unless the record shows a clear abuse of discretion.

People v. Benson, 19 Ill. 2d 50, 55, 166 N.E.2d 80, 83 (1960). *See, e.g.*, People v. Hugley, 1 Ill. App. 3d 828, 275 N.E.2d 178 (5th Dist. 1971) (state's petition was not filed until more than a month after defendant was returned from a security hospital and certified as "not in need of mental treatment," and the state requested no reexamination of defendant until the petition was filed, although the acts which formed the basis for questioning defendant's competence occurred prior to his examination in the security hospital).

Further, in determining whether good cause exists the trial court retains discretion, and may consider factors such as defendant's lucidity and understanding of the proceedings. People v. Gibson, 21 Ill. App. 3d 692, 315 N.E.2d 557 (1st Dist. 1974) (granting of the state's request for a second behavior clinic examination did not toll the statute where the trial court found no bona fide doubt regarding defendant's ability to stand trial).

A defendant who, although competent, is in need of mental treatment, retains the same rights to a speedy trial as other competent defendants. People v. Hannah, 31 Ill. App. 3d 1087, 335 N.E.2d 84 (3d Dist. 1975) (hospitalization of defendant for a portion of the 120-day period for reasons unrelated to his competency did not toll the statute); People v. Leonard, 34 Ill. App. 3d 911, 341 N.E.2d 141 (4th Dist. 1976) (psychiatric examinations required by ILL. REV. STAT. ch. 23, §§ 401-02 are unrelated to competency and therefore did not toll the statute).

435. *See* ILL. REV. STAT. ch. 38, § 114-4(i) (1975).

> that there are reasonable grounds to believe that such evidence may be obtained at a later day. . . .[436]

A defendant seeking vindication of his right to prompt disposition of the criminal charges pending against him through discharge in accordance with section 103-5(d)[437] must assert denial of that right in a motion for discharge, prior to conviction, in the court in which his indictment is pending.[438] Allegations charging denial of the right

436. ILL. REV. STAT. ch. 38, § 103-5(c). *See* People v. Wollenberg, 37 Ill. 2d 480, 229 N.E.2d 490 (1967); People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961); People v. Irish, 77 Ill. App. 2d 67, 222 N.E.2d 114 (1966).

In a criminal case, the material facts "are the final essential elements of the crime, being the ultimate conclusions of fact from every variety of evidence tending to establish them." People v. Ruffin, 406 Ill. 437, 443, 94 N.E.2d 433, 436 (1950). Obviously, therefore, any evidence tending to establish the ultimate facts would be "material to the case," which is all section 103-5(c) requires. People v. Wilkes, 2 Ill. App. 3d 626, 276 N.E.2d 761 (3d Dist. 1971). Neither the statute nor case law requires that the trial court conduct an evidentiary hearing before granting or denying a prosecution request for an extension of time.

The exercise of discretion by the trial court must be viewed in light of the situation as it existed at the time the matter was presented to the court, and not as it might appear in retrospect, or in view of subsequent events. People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961). If defendant fails to challenge the truth of the allegations of fact offered by the state through objection, it is not an abuse of discretion for the trial court to rely upon those allegations of fact as constituting a sufficient showing of due diligence to obtain material evidence. People v. Bey, 12 Ill. App. 3d 256, 298 N.E.2d 184 (1st Dist. 1973); People v. Stephenson, 12 Ill. App. 3d 201, 298 N.E.2d 218 (1st Dist. 1973); People v. Moore, 27 Ill. App. 3d 337, 326 N.E.2d 420 (1st Dist. 1975).

No abuse of discretion in granting a 60-day extension was found in the following cases: People v. Arndt, 50 Ill. 2d 390, 280 N.E.2d 230 (1972) (principal witness was at sea, but prosecution's communications with the navy indicate he would be available to testify in 60 days); People v. Stephens, 13 Ill. App. 3d 642, 301 N.E.2d 89 (1st Dist. 1973) (trial court determined that the police had made repeated efforts to locate the two principal witnesses without success, but there were reasonable grounds to believe they could be found at a subsequent date); People v. Walker, 24 Ill. App. 3d 421, 321 N.E.2d 114 (4th Dist. 1974) (delay in locating defendant, who had left the jurisdiction, and whose whereabouts were known by an aunt who refused to reveal defendant's location to the police, did not establish negligence or want of due diligence).

No different standards are applicable when the proposed witnesses named in the state's petition are police officers. People v. Morris, 1 Ill. App. 3d 566, 274 N.E.2d 898 (1st Dist. 1971); due diligence must be reasonably exercised to ascertain their availability. In People v. Shannon, 34 Ill. App. 3d 185, 340 N.E.2d 129 (1st Dist. 1975), defendant's conviction for attempted murder was reversed and he was discharged pursuant to ILL. REV. STAT. ch. 38, § 103-5(d) where no attempt to locate the two eyewitness police officers was made until four days prior to the expiration of the 120-day statutory period, although the prosecution could have ascertained long in advance that these officers were scheduled to leave on furlough eleven days before the trial date.

When the 120th day of the statutory term falls on a Sunday, the prosecution may appear in court on the 121st day and request a continuance. People v. Hill, 15 Ill. App. 3d 349, 304 N.E.2d 490 (3d Dist. 1973).

437. ILL. REV. STAT. ch. 38, § 103-5(d) (1975).

438. People v. Kuczynski, 33 Ill. 2d 412, 211 N.E.2d 687 (1965); People v. Stahl, 26 Ill. 2d 403, 186 N.E.2d 349 (1962); People v. Browry, 8 Ill. App. 3d 599, 290 N.E.2d 650 (1st Dist. 1972); People v. Gibson, 30 Ill. App. 3d 860, 333 N.E.2d 549 (2d Dist. 1975). This rule applies

to speedy trial are dismissed when raised initially on appeal.[439]

An important revision to section 103-5 was recently enacted, in apparent response to the Illinois Supreme Court's pronouncement in *People v. Lewis*.[440] Prior to *Lewis*, Illinois courts had traditionally interpreted the statute as requiring that any tolling of the statutory period, whether due to delay attributable to the defendant or other reasons, caused the statutory computation to begin anew. The new statutory period was then computed from the date of the delay, or from the date to which the case was continued as a consequence of the delay.[441] In *Lewis*, however, the supreme court reinterpreted the requirements of section 103-5, declaring that delays occasioned by the defendant would merely suspend operation of the statute, so that days lost due to such delay would be excluded from computation of the statutory term.[442] Although the supreme court subse-

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whether defendant was represented by an attorney of his own choice or by court-appointed counsel. People v. Reader, 26 Ill. 2d 210, 186 N.E.2d 298 (1963); People v. Browry, 8 Ill. App. 3d 599, 290 N.E.2d 650 (1st Dist. 1972).

439. People v. Glanton, 33 Ill. App. 3d 124, 338 N.E.2d 30 (1st Dist. 1975). People v. McAdrian, 52 Ill. 2d 250, 287 N.E.2d 688 (1972) is an interesting case; there, the state appealed defendant's discharge under section 103-5 on the theory that defendant's earlier discharge from custody because no probable cause was found at his preliminary hearing tolled the statute, and it was incumbent upon defendant to lodge a new demand for trial upon re-indictment. This issue, however, had not been raised by the state in the trial court, and was therefore deemed to be waived.

440. No. 46574 (Ill. S. Ct., filed Jan. 21, 1975).

441. *See, e.g.*, People v. Gooding, 61 Ill. 2d 298, 335 N.E.2d 769 (1975); People v. Stock, 56 Ill. 2d 461, 309 N.E.2d 19 (1974); People v. Zuniga, 53 Ill. 2d 550, 293 N.E.2d 595 (1973); People v. Bombacino, 51 Ill. 2d 17, 280 N.E.2d 697, *cert. denied*, 409 U.S. 912 (1972). In People v. Hairston, 46 Ill. 2d 348, 263 N.E.2d 840, *cert. denied*, 402 U.S. 972 (1971), the court rationalized that:

> [Section 103-5] and its predecessors have been repeatedly and consistently construed to mean that a delay occasioned by an accused is a waiver of the right to be tried within the statutory period, and that the period starts to run anew from the date to which the cause has been continued because of such delay. . . . It is axiomatic that where a statute has been judicially construed and the construction has not evoked an amendment, it will be presumed that the legislature has acquiesced in the court's exposition of the legislative intent.

Id. at 353, 263 N.E.2d at 844-45.

Further, if defendant agrees to or requests an indefinite continuance, the speedy trial provision is inapplicable during that period, People v. Siglar, 49 Ill. 2d 491, 274 N.E.2d 65 (1972), but commences again only when defendant appears in court, ready for trial. People v. Cornwell, 9 Ill. App. 3d 799, 293 N.E.2d 139 (5th Dist. 1973).

442. The court noted that:

> By its terms Section 103-5 does not require recommencement of another 120 day term whenever a defendant occasions a delay. In view of the realities now existing in many of our trial courts, we believe it would be more consistent with the intent of the legislature to construe that section as simply excluding from the count of the 120 day term any delays occasioned by the defendant for whatever reason . . . . [T]he new rule will not prejudice the State . . . if the State would have been ready for trial within the original 120 day term when the defendant did not

quently withdrew this opinion in response to the statewide furor it generated,[443] the gist of the original *Lewis* opinion has been enacted and codified as section 103-5(f).[444]

Delay Occasioned by the Defendant

Illinois courts have consistently maintained that the mandate of section 103-5 be liberally construed in order to afford effective preservation of citizens' liberty.[445] The state bears responsibility in the first instance for providing the accused a prompt trial;[446] technical evasions or maneuvers, such as dismissing and refiling the same charge, will be held ineffective as an attempt to avoid the "salutary provisions" of the statute.[447] The sole remedy for deprivation of de-

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request a continuance, then there would seem to be no reason why the State would not be just as ready or [for example] the 125th day.

No. 46574 (Ill. S. Ct., filed Jan. 21, 1975), Slip Opinion at 5. The new rule was granted prospective application to all cases wherein arrest occurred on or after June 1, 1975. *Id.* at 6.

443. *See* People v. Lewis, 60 Ill. 2d 152, 158, 330 N.E.2d 857, 861 (1975).

444. P.A. 79-842, effective October 1, 1975, provides in pertinent part:

(f) Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subparagraphs (a), (b), or (e) of this Section and on the day of expiration of the delay the said period shall continue at the point at which it was suspended. Where such delay occurs within 21 days of the end of the period within which a person shall be tried as prescribed by subparagraphs (a), (b), or (e) of this Section, the court may continue the cause on application of the State for not more than an additional 21 days beyond the period prescribed by subparagraphs (a), (b), or (e).

This subparagraph shall become effective on, and apply to persons charged with alleged offenses committed on or after, July 1, 1976.

445. People v. Benson, 19 Ill. 2d 50, 166 N.E.2d 80 (1960).

446. People v. Rice, 109 Ill. App. 2d 212, 248 N.E.2d 332 (4th Dist. 1969).

447. People v. House, 10 Ill. 2d 556, 559, 141 N.E.2d 12, 14 (1957). The court refused to view as chargeable to defendant a continuance he had not requested which was granted when defendant appeared without his attorney. *See also* People v. Fosdick, 36 Ill. 2d 524, 224 N.E.2d 242 (1967); People v. McAdrian, 52 Ill. 2d 250, 287 N.E.2d 688 (1972).

Generally, it has been held that the sufficiency of the indictment is immaterial to the enforcement of section 103-5 unless it is demonstrated that the state has nolle prossed an indictment and reindicted solely for the purpose of circumventing the statute. *See, e.g.*, People v. Wey, 34 Ill. App. 3d 916, 341 N.E.2d 83 (4th Dist. 1976); People v. Nelson, 129 Ill. App. 2d 92, 262 N.E.2d 505 (4th Dist. 1970); People v. Stuckey, 83 Ill. App. 2d 137, 227 N.E.2d 135 (1st Dist. 1967).

Defendant in People v. Lee, 44 Ill. 2d 161, 254 N.E.2d 469 (1969) presented a novel claim, alleging deprivation of his right to a speedy trial while maintaining that all delays attributable to him under the prior indictment, which was subsequently dismissed, were removed and eliminated from consideration to the same extent as the indictment itself, so that no delay attributable to him tolled the statute. The court firmly reiterated that re-indictment for the same offense does not toll the statute:

Re-indictment following ths dismissal of a prior indictment on the same offense, although in form a new crime, in substance continues to represent the State's original charge against the individual. Logic and fairness require that dismissal of

fendant's right to speedy disposition of criminal charges lodged against him is discharge.[448]

However, delay occasioned by or attributable to the defendant[449] effectively tolls the running of the statutory period; therefore, the salient inquiry remains: under what circumstances is delay chargeable to the accused? The statute contemplates no inquiry into the defendant's motivation for inducing delay;[450] the supreme court has declared:

> [I]n determining this question, the criterion in each case is whether the defendant's acts in fact caused or contributed to the delay. In the varied fact situations that involve the 120-day rule, we have carefully examined the facts to prevent a "mockery of justice" either by technical evasion of the right to speedy trial by the State, or by a discharge of a defendant by a delay in fact caused by him.[451]

In application, however, these criteria have proved neither simple nor precise. Generally, any continuance granted at the behest or acquiescence of the defendant constitutes delay attributable to him and tolls the statutory period,[452] as does a motion for substitution

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the first indictment not operate to erase for purposes of the statute the delays caused by the defendant under that indictment.

Id. at 166, 254 N.E.2d at 472.

448. People v. Shannon, 34 Ill. App. 3d 185, 340 N.E.2d 129 (1st Dist. 1975).

449. People v. Partee, 17 Ill. App. 3d 166, 308 N.E.2d 18 (1st Dist. 1974) is noteworthy. Defendant in that case maintained that when two distinct causes for delay exist, one due to the state, the other due to the defendant, the delay should be attributed to the state, reasoning that the state had failed to meet its obligation to promptly bring defendant to trial. The court rejected this argument, finding the fact that the delay was partially attributable to defendant dispositive of the issue.

450. *See, e.g.*, People v. Petropoulos, 59 Ill. App. 2d 298, 208 N.E.2d 323 (1st Dist. 1965) where the gist of defendant's argument was that she sought delay (two continuances) in order to permit developments which she thought would be to her best interest and lead to a favorable disposition of the case; that these expectations were reasonable and were induced by police, but did not materialize, thus demonstrating that her request for continuance were not an exercise of free choice on her part. The court dismissed defendant's claim with a statement indicating that defendant's motivation is not germane to the issue of delay, and affirmed the conviction.

451. People v. Fosdick, 36 Ill. 2d 524, 528-29, 224 N.E.2d 242, 246 (1967); *see also* People v. Bagato, 27 Ill. 2d 165, 188 N.E.2d 716 (1963); People v. Iasello, 410 Ill. 252, 102 N.E.2d 138 (1951).

452. People v. Gooding, 61 Ill. 2d 298, 335 N.E.2d 769 (1975). The supreme court held that any continuance of a preliminary hearing, whether or not such postponement actually hinders the eventual trial of defendant, constitutes delay per se which causes the statutory period to begin anew. *See* People v. Partee, 17 Ill. App. 3d 166, 308 N.E.2d 18 (1st Dist. 1974); People v. DeStefano, 64 Ill. App. 2d 389, 212 N.E.2d 357 (1st Dist. 1965). *But see* People v. Sharos, 24 Ill. App. 3d 265, 320 N.E.2d 351 (5th Dist. 1974) where failure of the state to comply with defendant's uncomplicated discovery request necessitated defendant's motion for a continuance; that delay was held not chargeable to defendant. *See also* People v.

of judges[453] or change of venue.[454] The accused is also held accountable under section 103-5 for delays incurred while he attempts to retain counsel,[455] or when a substitution of defense attorneys occurs.[456] Similarly, since the defendant is bound by actions of his attorney,[457] any dilatory conduct occasioned by defense counsel, regardless of the necessity or purposes underlying the undertaking of

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Townsel, 32 Ill. App. 3d 932, 337 N.E.2d 408 (1st Dist. 1975) (defendant's conviction for armed robbery reversed and defendant discharged where, as conceded by the state's attorney, a series of five continuances granted were by order of court, and therefore not attributable to defendant).

453. Defendant's motion and consequent reassignment of his case "begins anew the administrative procedure of bringing a case to trial," and therefore virtually always constitutes delay per se. *See, e.g.*, People v. Zuniga, 53 Ill. 2d 550, 293 N.E.2d 595 (1973) (defendant's motion for substitution of judges held to be delay chargeable to him, although defendant had his case advanced three weeks for purposes of presenting his motion); People v. Spicuzza, 57 Ill. 2d 152, 311 N.E.2d 112 (1974) (motion for substitution of judges allowed on the same day it was filed, no actual delay demonstrated); People v. Richmond, 34 Ill. App. 3d 328, 340 N.E.2d 240 (1st Dist. 1975) (motion for substitution of judges constituted delay even though assignment and reassignment of judges was completed on the same day with 75 days remaining in the 120-day period); People v. Ellis, 4 Ill. App. 3d 585, 281 N.E.2d 405 (3d Dist. 1972).

But see People v. Macklin, 7 Ill. App. 3d 713, 288 N.E.2d 503 (5th Dist. 1972), where defendant's case was not assigned until the 120th day. Defendant's timely motion for substitution of judges was granted. Consequently, defendant was not brought to trial within 120 days and was discharged. On appeal, the court specifically found:

> In defendant's case the record is clear that this motion need not have caused delay; that in fact defendant's motion did not cause the delay but rather merely occasioned circumstances in which either a lack of diligence on the part of the State or the faulty operation of judicial administration occasioned delay.

Id. at 716, 288 N.E.2d at 505-06. This holding was specifically limited in People v. Lewis, 17 Ill. App. 3d 188, 308 N.E.2d 59 (1st Dist. 1974), *aff'd*, 60 Ill. 2d 152, 330 N.E.2d 857 (1975). *See also* People v. Hatchett, 82 Ill. App. 2d 40, 226 N.E.2d 97 (5th Dist. 1967) (substitution of judges held not to constitute delay).

454. People v. Hairston, 10 Ill. App. 3d 678, 294 N.E.2d 748 (1st Dist. 1973) (motion for change of venue held to constitute delay even though denied).

455. People v. Poteat, 12 Ill. App. 3d 1068, 299 N.E.2d 565 (1st Dist. 1973) (defendant affirmatively requested continuance in order to secure assistance of private counsel); People v. Miller, 21 Ill. App. 3d 762, 316 N.E.2d 269 (1st Dist. 1974) (continuance to retain counsel chargeable as delay to defendant although the request was made by someone other than defendant, and defendant himself did not expressly join in that request or accede to the continuance where defendant is a minor and person placing the request in his mother).

456. People v. Denham, 33 Ill. 2d 599, 213 N.E.2d 539 (1966) (private counsel retained until the 120-day term was virtually expired; appointed counsel was then substituted); People v. Jenkins, 101 Ill. App. 2d 414, 243 N.E.2d 259 (1968) (request for new attorney and the attorney's request for a psychiatric examination); People v. Behning, 130 Ill. App. 2d 536, 263 N.E.2d 607 (2d Dist. 1970) (substitution of attorney); People v. Thomas, 25 Ill. App. 3d 88, 322 N.E.2d 597 (3d Dist. 1975) (substitution of appointed counsel for private counsel when case was set on the trial calendar); People v. Todd, 34 Ill. App. 3d 844, 340 N.E.2d 669 (5th Dist. 1976) (substitution of appointed attorney on the 112th day of the term).

457. People v. Rankins, 18 Ill. 2d 260, 163 N.E.2d 814, *cert. denied*, 363 U.S. 822 (1960) (any delay occasioned by defendant's counsel is attributable to him); People v. Steele, 127 Ill. App. 2d 366, 262 N.E.2d 269 (1st Dist. 1970) (defendant fully and adequately represented by competent public defender is bound by attorney's request for a continuance).

such procedures or maneuvers, constitutes delay which is ascribable to the defendant.[458] The accused is required to object, either personally or through counsel, to delay occasioned by a co-defendant prior to expiration of the statutory term, or request a separate trial in order to effectuate his constitutional guarantee. The consequence of failure to act under these circumstances is that any continuance entered pursuant to motion of a co-defendant is attributable to him.[459]

Of course, implicit in this rule is the assumption that the defendant either acted on the basis of advice of competent counsel,[460] or effectively waived his sixth amendment right to counsel. When de-

458. *See, e.g.*, People v. Mack, 17 Ill. App. 3d 352, 307 N.E.2d 646 (1st Dist. 1974) (defense counsel's request for time to consider an offer made by the prosecution delayed the proceedings, thereby tolling the statute); People v. Howard, 34 Ill. App. 3d 135, 340 N.E.2d 53 (1st Dist. 1975) (defense attorney's failure to answer ready for trial while engaged in business elsewhere held delay properly charged to accused).

Inversely, defense counsel's failure to move for discharge under section 103-5 is not per se denial of effective assistance of counsel. People v. Gibson, 30 Ill. App. 3d 555, 333 N.E.2d 549 (2d Dist. 1975). An allegation of incompetence of counsel will be sustained only where the attorney's performance as a whole, demonstrates inadequate skill and preparation. People v. Morris, 3 Ill. 2d 437, 452-53, 121 N.E.2d 810, 819 (1954).

459. This rule was fashioned by the Illinois Supreme Court in People v. Hickman, 56 Ill. 2d 175, 306 N.E.2d 32 (1973), where defendant and three accomplices were charged with attempted murder and attempted armed robbery. Postponements in the proceedings were incurred when one co-defendant's counsel failed to appear, and another co-defendant changed his plea from guilty to not guilty. The court rejected defendant's contention that such delay was not attributable to him, stating:

> To permit defendant's discharge upon the facts of the record presented might countenance tactical maneuvers originating at or near the expiration of the time limit provided by the statute. Such dilatory actions would permit an advantage to an attorney representing joint defendants or to joint defendants represented by separate counsel by allowing counsel to cause delay as to one defendant. The trial court would then be placed in a position of having to refuse counsel's requests or grant an otherwise undesired severance if the co-defendants or their attorney did not affirmatively acquiesce in such delay. This result is neither necessary nor beneficial to an orderly judicial process.

Id. at 180, 306 N.E.2d at 35.

460. Clearly, where the court or the prosecution actually cause the delay in the proceedings, such delay is not chargeable to the accused, particularly when he appears without counsel. *See, e.g.*, People v. House, 10 Ill. 2d 556, 141 N.E.2d 12 (1957), where the court at arraignment entered a continuance sua sponte. In reversing defendant's conviction for assault with intent to commit rape, the Illinois Supreme Court admonished that:

> The constitutional guarantee of a speedy trial would be a mockery, indeed, if this court were to permit the State's Attorney and trial court, either with intent or through inadvertance, to ascribe to the defendant, when appearing for arraignment and without counsel, a motion for continuance which he did not make, and thereby toll the running of this statute.

Id. at 559, 141 N.E.2d at 14. *Accord* People v. Wyatt, 24 Ill. 2d 151, 180 N.E.2d 478 (1962); People v. Rice, 109 Ill. App. 2d 212, 248 N.E.2d 332 (4th Dist. 1969). *But see* People v. Poteat, 12 Ill. App. 3d 1068, 299 N.E.2d 565 (1st Dist. 1973) (defendant affirmatively requested continuance in order to secure an attorney).

fense counsel is present in court as a participant in the proceedings, "[o]n motions for continuances, as in jury waivers, the trial court is entitled to rely on the professional responsibility of the defendant's attorney that when he requests a continuance it was done knowingly and understandingly consented to by his client."[461]

Various motions are by their nature time-absorbing, and are therefore deemed dilatory when presented on or near the date scheduled for the commencement of trial.[462] The record must clearly evidence the nature of the motion presented, and the identification of the party offering it; no authority exists for the proposition that "where the record is silent the defendant has the burden of affirmatively proving that the delay was not occasioned by his own ac-

461. People v. Carillo, 27 Ill. App. 3d 603, 607, 327 N.E.2d 1, 4 (1st Dist. 1975). In that case, defendant's conviction for rape and burglary was reversed on grounds that a request for a psychiatric examination of defendant had been lodged by the state, necessitating continuance, but defendant had not been examined before the new trial date previously set; defendant spoke no English, and the court proceedings were not interpreted for him; also, defendant's appointed counsel had been unable to consult with defendant, since an unidentified interpreter had advised counsel that defendant "made no sense." The court found that "the public defender, as the [trial] court knew, could not speak for the defendant." *Id.* at 607, 327 N.E.2d at 4. The court further declared:

> Implicit in the rule charging a defendant with waiver by his attorney, however, is the supposition that the attorney has had an opportunity to confer with the defendant. . . . [W]e make no broad holding that the record must affirmatively show every time an attorney requests or agrees to a continuance that he has consulted with the defendant and has advised him, for such a holding would place an intolerable burden on the trial courts.

Id. at 606-07, 327 N.E.2d at 4.

462. People v. Richards, 28 Ill. App. 3d 505, 328 N.E.2d 692 (5th Dist. 1975). In that case, defendant's motion to dismiss the indictment and hold an evidentiary hearing on the 79th day of the term was held to constitute delay, even though the court conceded the motion was timely:

> But that [timeliness of defendant's motion] does not relieve defendant of the burden of the delay. It is the nature of the motion that is crucial. That defendant might have been able to present and argue her motion earlier does not mitigate the fact that a delay was inevitable.

Id. at 508, 328 N.E.2d at 694.

See also People v. Fosdick, 36 Ill. 2d 524, 224 N.E.2d 242 (1967). The court held that although ordinarily a waiver of jury would expedite rather than delay trial, actual delay attributable to defendant resulted when defendant filed a jury waiver on the last day of the 120-day term when his case was already allotted on the jury call. The court declared:

> While we will not permit the State to evade the right to a speedy trial, neither will we permit a defendant to evade prosecution by creating a delay.

Id. at 530, 328 N.E.2d at 246.

But see People v. Moore, 26 Ill. App. 3d 282, 325 N.E.2d 33 (4th Dist. 1975) (defendant's timely request that the preliminary hearing, to which he is constitutionally entitled, be held on a certain date, which date was agreed to by the state, was not equivalent of a request for a continuance of a preliminary hearing, nor was it delay occasioned by defendant; request did not toll the running of the 120-day statutory period).

tions."[463] Further, inaction on the part of either the accused[464] or the prosecution[465] in seeking prompt disposition of motions filed results in fixing the burden of the delay upon the erring party, whether or not the motions are ultimately heard.[466]

In the event that trial of the accused results in mistrial, the statutory term does not commence anew, regardless of the length of time which has already elapsed from the date of the defendant's initial confinement or demand for trial.[467] In these circumstances, the Illinois Supreme Court has declared:

> The overriding consideration is the constitutional right to a speedy trial, and where delay is not attributable to the defendant, that right is not measured by aggregating successive [statutory] periods. . . .[468]

In this constitutional context, reasonableness is not measured by the length of the statutory term; clearly the constitutional and statutory requirements for speedy trial are not coextensive.[469] Imple-

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463. People v. Yates, 17 Ill. App. 3d 765, 769, 308 N.E.2d 679, 681 (4th Dist. 1974) (where delay between defendant's release on bond and subsequent trial exceeded 160 days, and a large portion of the delay was unexplained by anything in the record, court would not presume that the delay was chargeable to the defendant).

464. People v. Stock, 56 Ill. 2d 461, 309 N.E.2d 19 (1974); People v. Lott, 33 Ill. App. 3d 779, 338 N.E.2d 434 (3d Dist. 1975). Defendants in both cases sought to rationalize lengthy delays in seeking a hearing on pretrial motions through a claim that they sought to minimize inconvenience to witnesses by not compelling their attendance at the hearing as well as at trial. This contention was rejected in each case, the court in *Stock* stating:

> The defendant's consideration and generosity in attempting to avoid inconvenience to witnesses does not relieve them of the responsibility of having their pretrial motions heard. . . [D]efendant's failure to seek an earlier hearing on their pretrial motions leaves those motions in a situation analagous to motions made on the eve of trial. Such motions may be considered to cause delay.

56 Ill. 2d at 467, 309 N.E.2d at 22.

465. People v. Terry, 61 Ill. 2d 593, 338 N.E.2d 162 (1975). The trial court twice ordered the prosecution to respond to defendant's pretrial motions, and set defendant's case for trial. This order was ignored. Defendant filed a demand for trial 99 days subsequent to the filing of his last motion. The court viewed this action as inconsistent with an intention on the part of defendant to have his previous motions answered. Under these circumstances, where defendant desired trial, but was hindered by prosecutorial delay, the court held that defendant was properly discharged at the exhaustion of his term.

466. People v. Wilson, 19 Ill. App. 3d 466, 311 N.E.2d 759 (5th Dist. 1974). The court found defendant's contention that no actual delay was occasioned by his pretrial motion because no hearing was held to be without merit. The court reasoned that defendant knew, or should have known, that delay would result from the filing of his motion. Defendant's election to file, therefore, constituted acquiescence in the delay. *See also* People v. Ross, 132 Ill. App. 2d 1095, 271 N.E.2d 100 (4th Dist. 1971).

467. People v. Gilbert, 24 Ill. 2d 201, 181 N.E.2d 167, *cert. denied*, 371 U.S. 844 (1962).

468. *Id.* at 204-05, 181 N.E.2d at 170.

469. In a constitutional context there is no absolute period for establishing a deprivation of the right of speedy trial. It is a relative right determined through a "functional analysis" of the right in the particular context of the case. Barker v. Wingo, 407 U.S. 514, 522 (1972).

mentation of the defendant's constitutional and statutory rights in this situation requires the state to afford the defendant a second trial within a reasonable period of time.[470]

Due to the integral role discovery assumes in pretrial practice, determination of the circumstances under which the filing of a discovery motion by the defendant occasions delay ascribable to him remains a pertinent inquiry. Cognizant of the import of the entitlement to discovery for the criminal accused, the Illinois Supreme Court ruled in *People v. Nunnery*[471] that a discovery motion is not intrinsically dilatory, and therefore does not extend automatically the statutory term within which an accused must be brought to trial. The criteria by which to gauge the effect of a motion for discovery filed by the defendant were refined by the appellate court in *People v. Scott*:[472]

> A discovery motion which the State can answer quickly would

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Utilizing a constitutional analysis, therefore, requires examination of the totality of the factors of the length of the delay, the reason for such, the degree of prejudice shown, and whether there has been a waiver of the right to speedy trial. People v. Walker, 24 Ill. App. 3d 421, 321 N.E.2d 114 (4th Dist. 1974); People v. Ellis, 4 Ill. App. 3d 585, 281 N.E.2d 405 (3d Dist. 1972). *See* People v. Young, 46 Ill. 2d 82, 263 N.E.2d 72 (1970) (delay of 243 days from time of arrest to trial found not unreasonable). *See also* People v. Dodd, 58 Ill. 2d 53, 317 N.E.2d 28 (1974) (absent special circumstances, retrial of defendant within 120 days of circuit court's receipt of mandate from reviewing court remanding cause for trial satisfies constitutional requirement that accused be afforded a speedy trial).

The constitutional requirement of reasonableness required reversal of defendant's conviction for armed robbery in People v. Aughinbaugh, 53 Ill. 2d 442, 292 N.E.2d 406 (1973), an apparently sui generis case, where the state tarried more than 120 days in retrying defendant following a mistrial. The analytical factors recited above are not expressly considered in the opinion. *See also* People v. Nunnery, 54 Ill. 2d 372, 297 N.E.2d 129 (1973).

470. Interpretation of this mandate of reasonableness necessitates an examination of instances termed reasonable by Illinois courts. In People v. Hudson, 46 Ill. 2d 177, 263 N.E.2d 473 (1970) the jury in defendant's first trial was unable to reach a verdict. The outcome of the second trial, commenced 55 days later, was conviction for murder. The court denied defendant's claims of deprivation of statutory and constitutional rights to a speedy trial, finding the delay incurred due to unavoidable circumstances in the interim, such as the death of a co-defendant's attorney and a determination as to whether severance should be ordered. Defendant's attorney did not object to the delay; rather he stated that any date agreeable to the court and to the state was agreeable to him. Further, defendant made no claim of actual prejudice by reason of the delay, and the record reflected none.

In People v. Eickert, 124 Ill. App. 2d 394, 260 N.E.2d 465 (1st Dist. 1970), a 20-day interlude between defendant's first trial for armed robbery and his second trial, resulting in conviction, was found not unreasonable and infringed neither statutory nor constitutional rights.

471. 54 Ill. 2d 372, 297 N.E.2d 129 (1973). For reasons undisclosed by the trial record, defendant was not arraigned, nor was counsel appointed for him, until the 115th day of his term. Finding that defendant was clearly entitled to discovery, the court opined that had the state been prepared for trial within the statutory term, it could have swiftly complied with defendant's discovery motion. Delay was therefore not chargeable to defendant, and he was ordered discharged.

472. 13 Ill. App. 3d 620, 301 N.E.2d 118 (1st Dist. 1973).

> cause little or no delay; the State should not be permitted to use such a motion as an excuse to toll the statute implementing the constitutional right to a speedy trial. On the other hand, a discovery motion that calls for answers which are not quickly available or requests answers replete in detail would cause a legitimate delay; such a motion is properly attributable to a defendant and tolls the running of the statutory period. Whether a motion falls into the former or the latter category would depend on the facts of each case. This calls for the trial court's appraisal of the motion; its need, timeliess and complexity; it calls for the trial court's appraisal of the State's ability to answer the motion immediately or the merit of the State's reasons for not doing so. The interpretation of the motion and of the availability of the required information, the reasonable time needed to answer and whether proposed objections are genuine or dilatory, should rest in the judgment of the trial court. . . .[473]

The criminal defendant retains the right to prompt disposition of criminal matters pending against him, as well as the right to secure information pertinent to his defense through utilization of criminal discovery. However, Illinois courts have concluded that "one right could not be balanced against the other in order to provide an avenue for the defendant to escape prosecution."[474] Cases subsequent to *Scott* and *Nunnery* demonstrate that the defendant may safeguard full vindication of both rights only where his discovery motion is timely[475] and unburdened by complexity.[476]

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473. *Id.* at 630, 301 N.E.2d at 125. In that case, defendant's discovery motion necessitated a two-week continuance, which was ascribed to defendant, thereby defeating his claim to deprivation of speedy disposition of the charges pending against him.

474. *Id.* at 629, 301 N.E.2d at 124.

475. *See, e.g.*, People v. Spicuzza, 57 Ill. 2d 152, 311 N.E.2d 112 (1974), where defendant represented by counsel procrastinated until the 117th day of his term to file a discovery motion. The court distinguished the plight of defendant in *Nunnery*, unrepresented by counsel until the 115th day of his term, and held the motion untimely. *But see* People v. Donalson, 32 Ill. App. 3d 195, 336 N.E.2d 539 (1st Dist. 1975) (defendant's motion for discovery, filed within 10 days of arraignment, held timely).

476. *Compare* People v. Ward, 13 Ill. App. 3d 745, 301 N.E.2d 139 (1st Dist. 1973) (defendant's motion requesting a list of witnesses on the 82nd day of her term easily complied with) and People v. Mollet, 28 Ill. App. 3d 415, 328 N.E.2d 697 (5th Dist. 1975) (defendant's one-page discovery motion filed on the day of his arraignment requested only material previously compiled by the state's attorney, therefore inducing no delay); People v. Donalson, 32 Ill. App. 3d 195, 336 N.E.2d 539 (1st Dist. 1975) (defendant's timely motion was a form requesting only information to which he was entitled under Supreme Court Rule 412) *with* People v. Green, 30 Ill. App. 3d 1000, 333 N.E.2d 478 (1st Dist. 1975) (defendant's form motion requiring all possibly pertinent information necessitated considerable time and investigation to determine whether the items sought actually existed; defendant's murder case was so complex that this discovery motion was found to have necessitated delay attributable to defendant).

An Apparent Clash of Sixth Amendment Rights: Speedy Trial v. Effective Assistance of Counsel

The sixth amendment guarantees a criminal accused a speedy, public trial and representation by counsel of his choice. Backlogs of criminal cases[477] engendered by unmanageably crowded court dockets have provided the basis for a recurring defense claim: that a defendant appointed counsel near the exhaustion of the statutory term is denied due process since he is compelled to choose between proceeding to trial, in order to preserve his statutory right to speedy trial, and requesting a continuance, to allow newly appointed counsel opportunity to prepare for trial, and thus assure effective representation. The defendant's "dilemma," however, is no more than apparent, for this contention, without exception,[478] has been rejected by Illinois courts, reasoning that although the 120-day statutory period implements the defendant's sixth amendment guarantee of prompt trial, it is neither coextensive with nor an absolute measure of the constitutional right.

> The right to a speedy trial and the right to avoid a precipitous trial are separate but related rights. Both are designed to assure an accused a fair trial, to prevent undue delay in one instance and undue haste in the other. He can demand action or avoid action as the exigencies of his situation may dictate. But fairness and justice are not a one-way street. The fact that on occasion the accused might have to jeopardize the legislative benefits of the four-month rule by asserting his right to a continuance does not entail a denial of his right to a speedy trial . . . . The election was defendant's to determine on the basis of what would better ensure him a fair trial, and, having chosen to proceed, his present argument is nothing more than technical obfuscation.[479]

The trial court, therefore, when confronted by an accused demanding an immediate trial and an attorney requesting a continuance on

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477. The Illinois Supreme Court took cognizance of this problem in People v. Williams, 59 Ill. 2d 402, 320 N.E.2d 849 (1974), where defendant was not arraigned and counsel not appointed to represent him until the 119th day of his term:

> There appears to be a growing tendency to countenance such delay, a practice which causes this court considerable concern, and a practice which harbors the danger of denying the defendant the effective assistance of counsel.

Id. at 405-06, 320 N.E.2d at 851. However, the court found no denial of effective assistance of counsel when defendant freely elected to proceed to trial despite his attorney's desire for a continuance in order to fully prepare.

478. *See, e.g.*, People v. Lewis, 60 Ill. 2d 152, 330 N.E.2d 857 (1975); People v. Williams, 59 Ill. 2d 402, 320 N.E.2d 849 (1974); People v. Hairston, 46 Ill. 2d 348, 263 N.E.2d 840 (1970); People v. Johnson, 45 Ill. 2d 38, 259 N.E.2d 3 (1970); People v. Ford, 34 Ill. App. 3d 79, 339 N.E.2d 293 (1st Dist. 1975); People v. Carr, 9 Ill. App. 3d 382, 292 N.E.2d 492 (1st Dist. 1972).

479. People v. Johnson, 45 Ill. 2d 38, 43-44, 257 N.E.2d 3, 7 (1970) (citations omitted).

the ground that more time is required for defense preparation, may, in the interests of securing the defendant's due process rights and to insure a fair trial, grant the request notwithstanding repeated and vociferous objection on the part of the defendant and notwithstanding that the continuance is attributable to the defendant so as to extend the statutory term.[480]

CRIMINAL JURIES AND DEFENSES

SELECTION OF JURORS

Procedures

Procedures for selection of the jury, as codified,[481] must comply with the due process and equal protection clauses of the fourteenth amendment, as well as with the sixth amendment's requirements of trial by an impartial jury of one's peers.[482] Proper objection to the manner of selection is raised by a motion to discharge the jury panel prior to the *voir dire* examination. For good cause, the court may entertain the motion after the *voir dire* has begun, but not after the jury has been sworn. The motion must be in writing and supported by affidavit. The burden of proving improper selection remains upon the movant.[483]

Charges of racial discrimination are recurring bases for challenging the array of jurors. As early as 1880, the United States Supreme Court ruled that equal protection was denied to a black defendant where all blacks were excluded from jury service by statute.[484] In 1935, the Court ruled in *Norris v. Alabama*[485] that where a statute,

480. People v. Ford, 34 Ill. App. 3d 79, 339 N.E.2d 293 (1st Dist. 1975). The court further stated, quoting People v. Carr, 9 Ill. App. 3d 382, 383-84, 292 N.E.2d 492, 494 (1st Dist. 1972):

> If the court had acceded to defendant's demands, and had defendant been found guilty, the question would surely have arisen as to whether defendant had been denied the effective assistance of counsel who had stated that he was not prepared to defend. The four-term act was not violated and the court took proper action in continuing the case.

34 Ill. App. 3d at 82, 339 N.E.2d at 296.

A priori, when both defendant and his counsel are amenable to continuing the case in order to afford the defense full discovery and adequate time for preparation, denial of a request for continuance on the grounds that defendant had previously demanded vindication of his right to prompt trial, constitutes an abuse of discretion. People v. Jefferson, 35 Ill. App. 3d 424, 342 N.E.2d 185 (1st Dist. 1976).

481. ILL. REV. STAT. ch. 78, §§ 1 *et seq.* (1975).

482. Trial by one's peers, however, refers to fellow citizens, and not to specific proportions of ethnic or racial persons. Newland v. Marsh, 19 Ill. 376 (1857). The law requires merely that "fellow citizens" who serve on jury be selected in a nondiscriminatory manner. People v. Fort, 133 Ill. App. 2d 473, 273 N.E.2d 439 (1st Dist. 1971).

483. ILL. REV. STAT. ch. 38, § 114-3(c) (1975).

484. Strauder v. West Virginia, 100 U.S. 303 (1880).

485. 294 U.S. 587 (1935).

as applied, resulted in total or substantial exclusion of blacks from a jury in a community composed of a large percentage of black people, the burden shifted to the state to demonstrate that its selection process was not discriminatory. Recently, the Court deemed a defendant's rights violated under the sixth amendment by the systematic exclusion of women, reasoning that selection of jurors from a representative cross-section of the community is an essential component of the sixth amendment jury trial guarantee.[486]

The prohibition against discriminatory selection practices, however, does not mean that all groups must be equally represented on a jury. In *Swain v. Alabama*,[487] the United States Supreme Court noted that

> [n]either the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.[488]

Voir Dire

Voir dire enables both the defendant and the state to secure an impartial and fair jury by exposing bases for peremptory and cause challenges.[489] The examination of jurors is provided for by § 115-4(f) of the Code of Criminal Procedure.[490] Supreme Court Rule 431[491] directs that in criminal cases, the examination shall be conducted in accordance with Rule 234,[492] which requires the court to initiate *voir dire* examination of prospective jurors. The parties or their

486. Taylor v. Louisiana, 419 U.S. 522 (1975). The sixth amendment guarantee of an impartial jury trial was declared applicable to the states by Duncan v. Louisiana, 391 U.S. 145 (1968).

487. 380 U.S. 202 (1965).

488. *Id.* at 208. In *Swain*, it was demonstrated that 26 percent of the persons eligible for jury duty were black, but the venire contained only ten to 15 percent blacks. The Court held that no constitutional rights were violated because no purposeful discrimination was demonstrated. *Accord*, People v. Butler, 46 Ill. 2d 162, 263 N.E.2d 89 (1970).

In People v. Powell, 53 Ill. 2d 465, 292 N.E.2d 409 (1973), the court rejected defendant's contention that the venire from which his petit jury was selected failed to represent a proportional number of black citizens. Noting that the racial heritage of prospective jurors was not recorded, and that selection of jurors summoned to compose a venire was random, the court concluded that defendant had failed to establish the required prima facie case of purposeful discrimination in the jury selection procedure.

See also People v. Wright, 23 Ill. App. 3d 43, 318 N.E.2d 102 (4th Dist. 1974). The court found defendant's challenge to the array of both grand and petit juries on the basis that 18 to 21 year olds were excluded from the jury list unwarranted where inclusion of this group was permissible, but not mandated until such time as the juror selection system was accorded a reasonable opportunity to absorb these newly enfranchised voters.

489. People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

490. ILL. REV. STAT. ch. 38, § 115-4(f) (1975).

491. ILL. REV. STAT. ch. 110A, § 431 (1975).

492. *Id.* § 234.

attorneys are permitted to reasonably supplement the court's examination. Section 115-4(c) of the Code serves as an aid in the examination by ordering that the parties, upon request, shall be furnished with a list of prospective jurors and their addresses.[493]

The Illinois Supreme Court, in *People v. Lobb*, noted that

> the only legitimate function and purpose of the *voir dire* examination is to secure an impartial jury. It was never designed or intended as a means of enabling a defendant to select particular jurors.[494]

Whether that goal is achieved, Rule 234 is designed to mitigate the opportunity for misuse of *voir dire*. By placing primary responsibility upon the judge, the rule attempts to reduce the possibility of attorney-induced influence upon prospective jurors at this preliminary stage of the trial, and further, attacks the propensity towards in-court time-wasting produced by a lawyer-dominated examination.[495]

An important issue litigated under Rule 234 concerns the power of the trial judge to limit supplemental examination by the parties of their attorneys. The trial court retains discretion to determine the scope of latitude permitted.[496] In *People v. Carruthers*,[497] a prosecution for murder and rape, the trial court refused to permit either party personally to direct questions to the jurors; instead, only written questions submitted to the judge were allowed. The defendant was forced to exercise his last peremptory challenge when he was refused permission to question directly a prospective juror who was a former police officer and friend of an FBI agent; defendant, however, had failed to submit any written questions to the court. The reviewing court acknowledged that the limitation imposed by the trial judge was not literally authorized by Rule 234, but found no reversible error absent an indication in the record that defendant was deprived of an impartial jury. The appellate court clarified this point in a later ruling:

> [I]t is incumbent on the objecting party to show that the prohibition against direct questioning imposed by the court prevented

493. ILL. REV. STAT. ch. 38, § 115-4(c) (1975).

494. 17 Ill. 2d 287, 301, 161 N.E.2d 325, 333 (1959).

495. ILL. ANN. STAT. ch. 110A, § 234, at 258-66, A. Jenner and P. Tone, Historical and Practice Notes (Smith-Hurd 1968). *See also* People v. Green, 30 Ill. App. 3d 1000, 333 N.E.2d 478 (1st Dist. 1975).

496. People v. Lexow, 23 Ill. 2d 541, 179 N.E.2d 683 (1962); People v. Stewart, 12 Ill. App. 3d 226, 297 N.E.2d 391 (4th Dist. 1973).

497. 18 Ill. App. 3d 255, 309 N.E.2d 659 (1st Dist. 1974).

> him from discovering any fact or reason why a prospective juror might be biased or lack of essential qualifications for service as a juror, or otherwise precluded him from an intelligent exercise of the right to challenge for cause or peremptorily.[498]

The court may exclude supplemental questioning relating to areas already adequately covered,[499] and the parties are strictly prohibited from questioning potential jurors on matters regarding law or instructions.[500]

Challenges

Challenges are made during *voir dire* by either party and are either for cause or peremptory. Each type of challenge embodies its own purpose:

> While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.[501]

The authority for the cause challenge is set forth in chapter 38, §115-4(d), providing simply that "[e]ach party may challenge jurors for cause."[502] One basis for a cause challenge is that the juror fails to meet statutory requirements for jury service.[503] Illinois law provides that a juror must be an inhabitant of the county in which he serves, 18 years of age or older, in possession of his natural faculties, of good character and judgment, and able to understand the English language.[504] In addition, he must not be a party to a suit in the same court, and, if he is not a member of the regular panel, he must not have been a juror in the same county within the previous year.[505]

Another basis for challenge is that the prospective juror has prior

498. People v. Turner, 27 Ill. App. 3d 239, 243, 326 N.E.2d 425, 428 (1st Dist. 1975). *See also* People v. Etten, 29 Ill. App. 3d 842, 331 N.E.2d 270 (1st Dist. 1975); People v. McClellan, 29 Ill. App. 3d 712, 331 N.E.2d 292 (1st Dist. 1975).

499. People v. Green, 30 Ill. App. 3d 1000, 333 N.E.2d 478 (1st Dist. 1975).

500. *See, e.g.*, People v. Lowe, 30 Ill. App. 3d 49, 331 N.E.2d 639 (5th Dist. 1975), where the court affirmed exclusion of defense counsel's inquiry of prospective jurors whether they would require defendant to present proof of his innocence. The prospective jurors had indicated they would follow the court's instructions on the law, and were instructed on the presumption of innocence and the fact that defendant was not required to prove his innocence.

501. Swain v. Alabama, 380 U.S. 202, 220 (1965) (citation omitted).

502. ILL. REV. STAT. ch. 38, § 115-4(d) (1975).

503. *See* ILL. REV. STAT. ch. 78, § 14 (1975).

504. ILL. REV. STAT. ch. 78, § 2 (1975).

505. ILL. REV. STAT. ch. 78, § 14 (1975).

knowledge of the facts of the case. The United States Supreme Court has ruled that the jurors need not be completely unaware of the facts and issues.[506] In a case where six of the 12 jurors had heard of the case but had formed no opinion of it, the Illinois Supreme Court declared:

> Jurors need not be totally ignorant of the facts and issues involved. It is sufficient if the juror can lay aside his impression and render a verdict based on the evidence presented.[507]

Further, Illinois law specifically provides that no cause for challenges can be premised upon a prospective juror's reading of newspaper accounts of the crime, so long as the juror reflects ability to render an impartial verdict.[508] However, a challenge for cause is properly granted where *voir dire* demonstrates that the juror would be biased towards one party.[509]

An important qualification to the requirement of jurors' freedom from bias was resolved by the Illinois Supreme Court in *People v. Cole*,[510] which departed from the common law rule that a juror must be wholly free from suspicion of bias, and enunciated a new test:

> The determination of whether or not the prospective juror possesses the state of mind which will enable him to give to an accused

506. Murphy v. Florida, 421 U.S. 794 (1975).

507. People v. Black, 52 Ill. 2d 544, 557, 288 N.E.2d 376, 384 (1972), *cert. denied*, 411 U.S. 967 (1973). In that case, defendant challenged the trial court's denial of a motion for a change of venue based on allegedly prejudicial pretrial publicity. Six of the 12 jurors had indicated during *voir dire* that they possessed complete lack of knowledge concerning the case. The remaining six jurors were familiar with the incidents involved, but stated that they had formed no opinion on defendant's guilt and would base their verdict solely on the evidence. Citing Irwin v. Dowd, 366 U.S. 717 (1961), the court found no prejudice established by denial of defendant's motion. *See also* People v. Williams, 40 Ill. 2d 522, 240 N.E.2d 645 (1968); People v. Hines, 28 Ill. App. 3d 976, 329 N.E.2d 903 (5th Dist. 1975).

508. ILL. REV. STAT. ch. 78, § 14 (1975).

509. *See, e.g.*, People v. King, 54 Ill. 2d 291, 296 N.E.2d 731 (1973), where *voir dire* questioning elicited from one juror the statement that, if accepted, he would not be fair and impartial since he was familiar with black people and prejudiced in their favor. The court rejected defendant's position that dismissal of this juror for cause, without further inquiry, constituted an abuse of discretion, since the fact that defendant was black prejudiced that juror's ability to render a fair verdict.

510. 54 Ill. 2d 401, 298 N.E.2d 705 (1973). In *Cole*, during *voir dire* of the juror in question, the defendant had exhausted all 20 of his peremptory challenges. In response to questioning, it was learned that the juror had had a contact with one of the deceased (a victim of the homicide), that he had worked in the State's Attorney's campaign, that he knew both the State's Attorney and the Assistant State's Attorney, that he had served as treasurer for the campaign fund of the Sheriff, who was a witness, and that one of his sons was married to the sister of a witness. The juror maintained that these contacts would not influence his ability to render an impartial verdict; the judge refused a challenge for cause. On appeal, the supreme court held that a juror need not be free from a suspicion of bias or prejudice. Rather, the trial judge is to determine the possible bias from the evidence presented during the *voir dire*.

> a fair and impartial trial rests in the sound discretion of the trial judge. His determination should not be set aside unless it is against the manifest weight of the evidence.[511]

Unlike challenges for cause, the number of peremptory challenges allotted each party is regulated by statute.[512] A defendant is allowed 20 peremptory challenges in a capital case, ten where conviction could result in imprisonment in the penitentiary, and five in all other cases. Where there is more than one defendant, each defendant has 12, six, and three challenges respectively. In each instance, the state has the same number of challenges as all the defendants have combined. If several charges are consolidated for trial, the peremptory challenges are allowed for one charge only, that authorizing the greatest penalty.

In *Swain v. Alabama*,[513] the exclusion of blacks from jury service through exercise of the state's peremptory challenges was attacked as a violation of the equal protection clause. The Court noted that the nature of the peremptory is that it is exercised without stated reason, inquiry, or court control. Although the allowance of peremptory challenges is not mandated by the Constitution, the exercise of peremptories is an important right of the accused. A constant practice of removing persons from juries solely because of race violates the equal protection clause. But to demonstrate such violation, systematic use of discriminatory challenges over a period of time, which was not demonstrated in *Swain*, must be proved. In the language of the Court:

> [t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation

511. 54 Ill. 2d at 414, 298 N.E.2d at 712. Justice Schaefer, in dissent, argued that acceptance of the test formulated by the majority will bind the trial judge to accept a juror's statement of impartiality without appraising his frame of mind. *Id.* at 418, 298 N.E.2d at 714.

An interesting tangential question was presented in People v. Higgins, 27 Ill. App. 3d 266, 327 N.E.2d 135 (1st Dist. 1975): whether the trial court, sua sponte, must excuse an "opinionated" juror for cause; and whether defense counsel's failure to challenge the juror constitutes ineffective assistance of counsel. The juror involved had stated in the course of *voir dire* that his opinion regarding the case was already formulated. Intense questioning by counsel revealed, however, that this opinion was partially based upon the juror's occupation and employment contacts. The juror reiterated his confidence in his ability to render an impartial verdict. The court denied the state's motion to dismiss the juror for cause. Defense counsel accepted the juror without challenge, and this tactic persuaded the reviewing court that defense counsel had presumed the juror's opinion to be in defendant's favor. The court was not obligated to dismiss the juror on its own motion, and exercise of legal trial strategy was found to be not chargeable as ineffective assistance of counsel.

512. ILL. REV. STAT. ch. 38, § 115-4(e) (1975).

513. 380 U.S. 202 (1965).

> of the challenge. The challenge . . . would no longer be peremptory, each and every challenge being open to examination . . . . [A] great many uses of the challenge would be banned.[514]

The constitutional mandate of *Swain* was applied in *People v. Butler*,[515] where the prosecution challenged peremptorily the sole black on the jury venire. The Illinois Supreme Court found no reversible error, in accordance with the presumption that the challenging party was attempting to achieve a fair and impartial jury. The defendant's rights would be violated only if, as in *Swain*, discriminatory challenges were demonstrated to be a constant practice.[516]

Requiring a party to use a peremptory challenge is not reversible error unless he uses all his peremptories and afterwards is forced, over objection, to take an unacceptable juror.[517] It is presumed that the defendant's jury was impartial where he failed to exhaust his peremptory challenges.[518]

Instruction of Jurors

In order that the jury not be left to its own speculation or improvisation, it is essential that jurors be correctly and fully instructed by the court concerning the elements of the crime charged, any defenses raised by the defendant, the burden of proof, and the quantum of proof required on all issues to support a verdict of guilty.[519]

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514. *Id.* at 221-22.

515. 46 Ill. 2d 162, 263 N.E.2d 89 (1970).

516. Id. at 165, 263 N.E.2d at 91. *See also* People v. King, 54 Ill. 2d 291, 296 N.E.2d 731 (1973); People v. Stewart, 12 Ill. App. 3d 226, 297 N.E.2d 391 (4th Dist. 1973); People v. Fort, 133 Ill. App. 2d 473, 273 N.E.2d 439 (1st Dist. 1971).

517. Graff v. People, 208 Ill. 312, 70 N.E. 299 (1904).

518. People v. Sleezer, 9 Ill. 2d 57, 136 N.E.2d 808 (1956); People v. Black, 52 Ill. 2d 544, 288 N.E.2d 376 (1972).

519. People v. Lewis, 112 Ill. App. 2d 1, 250 N.E.2d 812 (1st Dist. 1969). In that case, the jury was referred five times to the indictment for the elements of the crime charged. Since the indictment was not given to the jury, the reviewing court held that the jurors were without proper guidance. *See also* People v. Davis, 74 Ill. App. 2d 450, 221 N.E.2d 63 (1st Dist. 1966), where defendant was convicted of attempt to commit robbery. The jury was instructed as to the statutory definition of the crime of attempt, but was given no instruction as to the elements of the specific offense alleged to have been attempted, *i.e.*, robbery. The court held that to leave the jurors to their own conjecture in such a manner constituted fundamental error.

But see People v. Neal, 26 Ill. App. 3d 22, 324 N.E.2d 476 (3d Dist. 1975), where defendant contended on appeal that it was error for the trial court to instruct the jury solely on the elements of attempt, without also defining the elements of the crime attempted, which was murder. Defendant had not tendered a murder instruction. The court held that the burden was on him to do so, and, since the jury had been fully instructed on the elements of attempt, there was no reversible error. *Accord*, People v. Pulley, 11 Ill. App. 3d 292, 296 N.E.2d 373 (3d Dist. 1973). The principle followed in these cases was set down by the Illinois Supreme

Instructions should be given in plain language; the use of technical terms should be avoided as far as possible. Where the terms in question are of general usage and are not technical terms or words of art, they need not be defined in the absence of language in the charge which would obscure plain meaning.[520]

Only the statutory offense with which the defendant is charged,[521] or a lesser included offense thereof, is properly incorporated into the charge. It is proper to define the offense in terms of the statute,[522] and a slight variance between the indictment and the instructions will not vitiate a conviction.[523] An instruction which removes from the jury's consideration an element of the crime charged is improper.[524]

Instructions should be considered as a series, and a reviewing court will not necessarily reverse where one or more instructions is superfluous or misleading.[525] Further, it is not necessary that any one instruction contain all the law on a given subject; it is sufficient

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Court in People v. Gersbacher, 44 Ill. 2d 321, 325, 255 N.E.2d 429, 432 (1970):

> Although it would have been preferable to instruct the jury on the elements of the crime attempted, after reviewing the record before us, we find that the evidence presented to the jury regarding the attempted murder was such that no error was occasioned by the failure of the court to give an instruction in this regard.

520. In People v. Monroe, 32 Ill. App. 3d 482, 335 N.E.2d 783 (3d Dist. 1975), the defendant, who was convicted of possession of a controlled substance, requested an instruction as to the necessity and meaning of the element of possession. The instruction was held properly denied.

521. People v. Peck, 314 Ill. 237, 145 N.E. 353 (1924); *see* People v. Sanders, 34 Ill. App. 3d 253, 339 N.E.2d 33 (2d Dist. 1975), where defendant requested and was refused pattern instructions dealing with unlawful use of a weapon, and aggravated battery which results in great bodily harm or disfigurement to the victim. However, the indictment charged defendant with aggravated battery with a deadly weapon, which does not include great bodily harm or disfigurement as an element of the crime. The instruction was held properly refused.

522. People v. Monroe, 32 Ill. App. 3d 482, 335 N.E.2d 783 (3d Dist. 1975). Moreover, an instruction should not only state the pertinent law; it should apply the law it purports to state to the facts as they may be found by the jury. Therefore, an instruction consisting solely of the statutory language is defective. People v. Lucus, 41 Ill. 2d 370, 243 N.E.2d 228 (1968).

523. People v. McEvoy, 33 Ill. App. 3d 409, 337 N.E.2d 437 (1st Dist. 1975). The instruction given by the court stated, "a person commits the crime of battery who by any means knowingly or intentionally makes contact of an insulting or provoking nature with another person," while the complaint charged the defendant "with causing bodily harm." This variance was held too insubstantial to vitiate the conviction. In People v. Rosochacki, 41 Ill. 2d 483, 244 N.E.2d 136 (1969), the following test was suggested: "[I]t [the variance] would not vitiate the conviction unless it was of such a character as to mislead the defendant in his defense or expose him to double jeopardy." 41 Ill. 2d at 492, 244 N.E.2d at 141.

524. *See* People v. Richards, 28 Ill. App. 3d 505, 328 N.E.2d 692 (5th Dist. 1975). Defendant was convicted of armed robbery, but the jury had been instructed that the type of weapon used was a non-material allegation which the state need not prove. The instruction, which removed from the jury's consideration an element of the offense, was held erroneous.

525. People v. Hyde, 1 Ill. App. 3d 831, 275 N.E.2d 239 (5th Dist. 1971); People v. Juve, 106 Ill. App. 2d 421, 245 N.E.2d 293 (2d Dist. 1969); People v. Robinson, 21 Ill. App. 3d 343, 315 N.E.2d 95 (1st Dist. 1974).

that the instructions taken as a whole adequately inform the jury of the issues.[526]

Generally, all jury instructions must be in writing,[527] unless the parties agree otherwise.[528] Instructions are limited to an explanation of the law, and may not, directly or indirectly, comment upon the evidence.[529] This prohibition against oral instruction and comment, however, does not preclude a trial judge from making brief explanatory statements which do not contradict the written instructions.[530] Further, it has been held reversible error for a trial judge to refuse to clarify instructions for jurors when they manifest confusion.[531]

Illinois Supreme Court Rule 451(a)[532] mandates the use of pattern jury instructions in most instances; where I.P.I.-Criminal contains no accurate instruction on a matter proper for instruction, tendered instructions must be "simple, brief, impartial and free from argument."[533] Generally, when a party tenders an instruction not found in I.P.I.-Criminal, the trial court retains discretion to determine whether the instruction should be given.[534] The failure to allow such an instruction constitutes abuse of discretion only if such refusal results in the jury not being instructed as to a defense theory of the case which is supported by some evidence.[535]

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526. People v. Jones, 26 Ill. App. 3d 78, 325 N.E.2d 56 (4th Dist. 1975); People v. Harris, 33 Ill. App. 3d 600, 338 N.E.2d 129 (3d Dist. 1975). In the latter case, defendant contended that an instruction which stated that it was no defense to the crime of burglary that the premises entered upon were open to the public was erroneous, because the instruction failed to state that entry must be made with the requisite intent. The court refused to sustain this contention, since the instructions, read as a whole, adequately informed the jury that the entry must be made with intent.

527. Criminal jury instructions are governed by Supreme Court Rule 451, ILL. REV. STAT. ch. 110A, § 451 (1975) and by section 67 of the Civil Practice Act, ILL. REV. STAT. ch. 110, § 67 (1975). The requirement of written instructions is found in section 67(1). *See also* Ellis v. People, 159 Ill. 337, 42 N.E. 873 (1896).

528. ILL. REV. STAT. ch. 110, § 67 (1975).

529. People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934). This is a clear limitation upon the federal practice of allowing the trial judge to summarize and comment upon the evidence.

530. People v. Moore, 42 Ill. 2d 73, 246 N.E.2d 299 (1969).

531. In People v. Land, 34 Ill. App. 3d 548, 340 N.E.2d 44 (1st Dist. 1975), the jury, after commencing deliberations, requested further instruction. The judge refused the request, not permitting the jury to inform him as to what portion of the instructions were confusing. The reviewing court found this conduct reversible error. *But see* People v. Walker, 33 Ill. App. 3d 681, 338 N.E.2d 449 (2d Dist. 1975), where the jury, after retiring, asked if it could return a verdict on one charge if it could not reach a decision on the other. The trial judge merely referred the jury to the written instructions; the appellate court upheld this action.

532. ILL. REV. STAT. ch. 110A, § 451(a) (1975) (effective Jan. 1, 1969). Pattern jury instructions are hereinafter referred to as I.P.I.-Criminal.

533. ILL. REV. STAT. ch. 110A, § 451(a) (1975).

534. People v. Hines, 28 Ill. App. 3d 976, 329 N.E.2d 903 (5th Dist. 1975); People v. Henricks, 32 Ill. App. 3d 49, 335 N.E.2d 521 (3d Dist. 1975).

535. *Id.* In People v. Joyner, 50 Ill. 2d 302, 278 N.E.2d 756 (1972), the court found reversi-

In most situations, however, when an I.P.I.-Criminal instruction on a given subject exists, the courts will refuse other instructions.[536] Further, where the drafters of I.P.I.-Criminal recommend that no instruction be given on a certain subject, courts usually uphold the recommendation.[537] Illinois courts rarely approve non-I.P.I. instructions. Often, non-I.P.I. instructions tendered do not accurately state the law,[538] but even when correct, they may be refused if repetitious, argumentative, or otherwise not in accordance with the purposes of Supreme Court Rule 451(a).[539] However, giving a non-pattern in-

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ble error where the lower court refused a tendered non-I.P.I.-Criminal voluntary manslaughter instruction. No instruction relative to the law on voluntary manslaughter had been given, although evidence adduced at trial indicated that defendant could have been found guilty of manslaughter under the indictments for murder. Under these circumstances, the defendant's failure to tender the appropriate I.P.I.-Criminal instruction was less important in terms of fundamental fairness than the requirement that the jury be fully and properly instructed.

536. *See, e.g.*, People v. Dickens, 19 Ill. App. 3d 419, 311 N.E.2d 705 (5th Dist. 1974), where defendant's tendered non-I.P.I. instruction relating to the defense of compulsion was held properly refused. In People v. Kelly, 24 Ill. App. 3d 1018, 322 N.E.2d 527 (2d Dist. 1975), defendant tendered instructions relating to the justifiable use of force and burden of proof thereof. The court held that I.P.I. instructions on self-defense and burden of proof accurately stated the law and should have been given; defendant's instructions were properly refused. In People v. Conley, 3 Ill. App. 3d 75, 278 N.E.2d 806 (1st Dist. 1971), the defendant claimed error in the trial court's refusal to give his instruction on self-defense. As the court had instructed in accordance with I.P.I.-Criminal on the issue of self-defense, defendant's instruction was held properly refused.

537. *See, e.g.*, People v. Taylor, 8 Ill. App. 3d 727, 290 N.E.2d 342 (2d Dist. 1972), where defendant tendered an instruction on weighing police testimony; I.P.I.-Criminal No. 3.19 recommended that no such instruction be given. It was held properly refused. *See also* People v. Phillips, 129 Ill. App. 2d 455, 263 N.E.2d 353 (3d Dist. 1970), where defendant's attempt to define reasonable doubt was refused; I.P.I. recommends that no such definition be given.

538. *See, e.g.*, People v. Conley, 3 Ill. App. 3d 75, 278 N.E.2d 806 (1st Dist. 1971) where the following instruction was refused as a misstatement of Illinois law concerning self-defense:

> You are instructed that when a defendant charged with homicide is where he has a lawful right to be, he has a right to stand his ground, and, if he is reasonably apprehensive of injury, he is justified in taking his assailant's life.

539. In People v. Henricks, 31 Ill. App. 3d 1076, 335 N.E.2d 521 (3d Dist. 1975), the court refused a tendered instruction upon defendant's theory of the case concerning resistance to rape. Although the instruction accurately stated the law, it was held properly refused for repetitiousness where other instructions given directed that to find defendant guilty it was necessary to find that the act of intercourse was by force and against the will of the prosecutrix.

See also People v. Hammers, 35 Ill. App. 3d 498, 341 N.E.2d 471 (4th Dist. 1976) where the court found properly refused defendant's tendered non-I.P.I. instruction:

> You are instructed that each juror on his oath must vote according to his own conviction, and if any juror has a reasonable doubt to the guilt of the accused in this case, the law authorizes him to refuse to abdicate his position so long as he entertains such reasonable doubt.

The court, citing People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), noted that such an instruction, although proper in a case where the jury was unable to reach a verdict after lengthy deliberation, should not be given prior to the beginning of deliberations. The presumption of defendant's innocence and the state's burden of proof of guilt beyond a reason-

struction in violation of Rule 451 is not necessarily grounds for reversal.[540]

It is well settled in Illinois that any party who desires a specific instruction must offer it and request the court to give it. Generally, the trial court bears no obligation to instruct on its own motion,[541] or to correct erroneous instructions.[542] Further, if a party fails to request an instruction on his theory of the facts, he cannot assert error in the failure to give that instruction.[543] In criminal cases, however, these rules may be modified in certain situations whenever necessary to preservation of defendant's right to a fair trial.[544]

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able doubt were adequately explained through giving the jury I.P.I.-Criminal Instruction No. 2.03.

540. People v. Barber, 20 Ill. App. 3d 977, 313 N.E.2d 490 (2d Dist. 1974). The trial court gave a non-pattern instruction on the possession of stolen property; defendant neither objected nor tendered the appropriate I.P.I.-Criminal. On appeal, he contended that Supreme Court Rule 451 compelled the trial court to instruct in accordance with I.P.I.-Criminal sua sponte. The appellate court disagreed, finding no such obligation under these circumstances.

541. People v. Walls, 33 Ill. 2d 394, 211 N.E.2d 699 (1965); People v. Mueller, 2 Ill. 2d 311, 118 N.E.2d 1 (1954); People v. Taylor, 27 Ill. App. 3d 849, 327 N.E.2d 504 (3d Dist. 1975); People v. Neal, 26 Ill. App. 3d 22, 324 N.E.2d 476 (3d Dist. 1975); People v. Jones, 6 Ill. App. 3d 669, 286 N.E.2d 87 (5th Dist. 1972); People v. Carvin, 20 Ill. 2d 32, 169 N.E.2d 260 (1960); People v. Marshall, 96 Ill. App. 2d 124, 238 N.E.2d 182 (1st Dist. 1968); People v. Porterfield, 131 Ill. App. 2d 167, 268 N.E.2d 537 (1st Dist. 1971); People v. Lenker, 6 Ill. App. 3d 335, 285 N.E. 2d 807 (1st Dist. 1972); People v. Allen, 35 Ill. App. 3d 342, 341 N.E. 2d 431 (5th Dist. 1976).

542. In People v. Baylor, 25 Ill. App. 3d 1070, 324 N.E.2d 255 (2d Dist. 1975), defendant tendered I.P.I.-Criminal No. 3.02 concerning circumstantial evidence. This instruction included the second paragraph of the I.P.I. instruction, which is proper only when the proof in the case is entirely circumstantial. Since some of the evidence in the case was direct, trial court had properly refused the entire instruction. An instruction which includes both a correct and an incorrect proposition of law, the appellate court stated, is properly refused; the trial judge is under no obligation to rewrite an improper instruction.

People v. Moorelander, 25 Ill. 2d 309, 185 N.E.2d 166 (1962), concerned an instruction that the defendant's failure to testify created no presumption of guilt against him, which must be given when requested. Nevertheless, since the tendered instruction was not in proper form, it was held that the trial court was justified in refusing it, and was not obliged to rewrite it to include only proper elements.

See also People v. Lucus, 41 Ill. 2d 370, 243 N.E.2d 228 (1968), which held that it is the responsibility of the tendering party to insure that an instruction is in proper form. Here, defendant had tendered an instruction stating that since defendant had raised the defense of necessity and the defense was proper under the law, it must be considered by the jury. Because the instruction assumed the existence of material facts in issue, it was held properly refused.

543. People v. Lindsay, 412 Ill. 472, 107 N.E.2d 614 (1952); People v. Marshall, 96 Ill. App. 2d 124, 238 N.E.2d 182 (1st Dist. 1968); People v. Marchese, 32 Ill. App. 3d 872, 336 N.E.2d 795 (2d Dist. 1975); People v. Parks, 34 Ill. App. 3d 180, 340 N.E.2d 121 (1st Dist. 1975).

544. In situations involving fundamental fairness and denial of a fair trial, it has been held that a court bears a duty to instruct on its own motion. The leading case in this area is People v. Davis, 74 Ill. App. 2d 450, 221 N.E.2d 63 (1st Dist. 1966), which held that a trial judge must not leave the jury to its deliberations uninstructed by the law. If neither party tenders instructions on the elements of the crime charged, the court must so instruct sua sponte. *See*

Each party is entitled to instructions pertaining to his theory of the case, so long as there is evidence introduced which supports such a theory.[545] The court is obligated to give such instructions whenever they are tendered unless repetitive,[546] framed in language not authorized by Rule 451,[547] or inaccurate as a statement of the law.[548] A defendant is entitled to have the jury instructed as to the law applicable to any state of facts in defense which the jury might legitimately find from the entire evidence,[549] but where there

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also People v. Kuykendall, 120 Ill. App. 2d 225, 256 N.E.2d 869 (5th Dist. 1970).

An instruction on the defendant's presumption of innocence and the burden of proof is considered so essential that it must be given on the court's motion if not tendered. People v. French, 5 Ill. App. 3d 908, 284 N.E.2d 481 (5th Dist. 1972).

The circumstances which may constitute a denial of fundamental fairness vary in accordance with the facts of each case. For example, in People v. Fields, 31 Ill. App. 3d 458, 334 N.E.2d 752 (1st Dist. 1975), it was held that the trial court was obliged to instruct the jury sua sponte concerning the use of impeachment testimony to ascertain that such testimony was not used substantively. Limiting instructions were held not fundamental, however, in People v. Legear, 29 Ill. App. 3d 884, 331 N.E.2d 659 (2d Dist. 1975); People v. Bell, 27 Ill. App. 3d 171, 326 N.E.2d 507 (2d Dist. 1975).

545. In City of Chicago v. Mayer, 56 Ill. 2d 366, 308 N.E.2d 601 (1974), defendant, a third-year medical student, was convicted of disorderly conduct and interfering with a police officer during a 1969 riot in Chicago. Defendant's theory of the case was that his conduct was necessary to prevent greater injury to an injured man whom the police were attempting to move. The Illinois Supreme Court reversed due to the lower court's refusal to give the defendant's instruction, holding that a jury might well conclude that a medical student had such a reasonable belief under the circumstances.

In People v. Kucala, 7 Ill. App. 3d 1029, 288 N.E.2d 622 (1st Dist. 1972), defendant, who was convicted of murder, contended that the trial court erred in refusing to give his tendered I.P.I.-Criminal instruction concerning defense of the life of another. Since defendant's girlfriend testified that she had seen the decedent hold a knife to the throat of defendant's friend, the court held evidence existed to support defendant's theory so that it should have been before the jury.

546. In People v. Robinson, 14 Ill. App. 3d 135, 302 N.E.2d 228 (1st Dist. 1973), defendant claimed she was denied the opportunity to place her theory of the case before the jury because the trial court denied her self-defense instruction, instead instructing in accordance with I.P.I.-Criminal. The appellate court found the refused instruction repetitious; the trial court is not obligated to give more than one instruction on the same subject matter, and if an instruction is given which covers the subject as well as the one refused, it is not error to reject the latter.

547. *See* People v. Tucker, 3 Ill. App. 3d 152, 278 N.E.2d 516 (1st Dist. 1971). The defendant, charged with murder and convicted of voluntary manslaughter, contended on appeal that the trial court had erred in refusing to instruct on his theory of the case, which was that the victim's death was the result of misadventure. However, because the defendant's tendered instruction was long and confusing, the reviewing court held it was properly refused.

548. In People v. Foster, 23 Ill. App. 3d 559, 319 N.E.2d 522 (1st Dist. 1974) the state's instructions informed the jury that defendant was not criminally reaponsible if he was intoxicated unless his intoxication was voluntary. As this was an inaccurate statement of the law, the instruction was held properly refused.

549. It has been suggested that a defendant is entitled to the benefit of any defense shown by the entire evidence, and the court should not weigh the evidence in making this determination. Thus, even if the evidence is conflicting and defendant's testimony is impeached, he

is no evidence to support a particular defense, it is not error for the court to refuse to instruct the jury on that defense.[550] Sufficient evidence must be adduced to support an instruction, lest the jury be confused by issues improperly before it.[551]

Similar principles apply in the area of lesser included offenses. A defendant is entitled, upon his request, to have the jury instructed regarding an offense included within the offense with which he is charged if there is evidence in the record which, if believed by the jury, would reduce a crime to the lesser offense.[552] Generally, it is error for a trial court to refuse an instruction on the lesser offense if there is any evidence to support such an instruction;[553] this rule pertains even if the theory of defendant at trial is inconsistent with the possibility that defendant is guilty of the lesser offense.[554] However, it is equally well-settled that where no evidence adduced supports the lesser offense, it is error to instruct the jury on it.[555]

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may be entitled to an instruction relative to his defense. People v. Boisvert, 27 Ill. App. 3d 35, 325 N.E.2d 644 (2d Dist. 1975).

550. *See, e.g.*, People v. Allen, 50 Ill. 2d 280, 278 N.E.2d 762 (1972), where the trial court properly refused a self-defense instruction when the defendant's own testimony as well as that of all witnesses established that there had been no argument or fight between the defendant and the decedent. *See also* People v. Miller, 21 Ill. App. 3d 762, 316 N.E.2d 269 (1st Dist. 1974), where the only evidence even remotely supporting a self-defense theory was the testimony of one defense eyewitness. The court held the instruction properly refused.

551. People v. Clark, 32 Ill. App. 3d 926, 337 N.E.2d 291 (1st Dist. 1975).

552. In People v. Foster, 32 Ill. App. 3d 1009, 337 N.E.2d 90 (4th Dist. 1975), the following fact situation was held sufficient to justify the lesser included offense instruction: defendant was convicted of aggravated battery with a deadly weapon. Defendant's testimony was that he did not hit the victim with a bottle as charged; he and the victim were trading punches and he thought he hit the victim in the mouth. Although defendant was intoxicated at the time of the incident and his testimony was conjectural, the appellate court held that the jurors might have believed him, so that his tendered battery instruction should have been submitted to the jury.

553. People v. Canada, 26 Ill. 2d 491, 187 N.E.2d 243 (1962). *See* People v. Davis, 18 Ill. App. 3d 173, 309 N.E.2d 338 (1st Dist. 1974), where defendant was convicted of murder after the court refused to give an involuntary manslaughter instruction. Defendant claimed that he had fired a gun at a person in the same room as decedent, thinking decedent was out of the way. The state contended that defendant had intended to kill decedent. The appellate court held that the jury should have been allowed to decide between the competing theories; the intentional act of shooting at the other person was not necessarily inconsistent with the reckless act of killing decedent. *See also* People v. Guthrie, 123 Ill. App. 2d 407, 258 N.E.2d 802 (4th Dist. 1970), where it is stated that it is not within the province of the court to determine which verdict is proper, and that it is error not to allow the jury a choice between two different concepts or theories as to which crime the evidence actually discloses.

554. People v. Bembroy, 4 Ill. App. 3d 522, 281 N.E.2d 389 (1st Dist. 1973); People v. McVet, 7 Ill. App. 3d 381, 287 N.E.2d 479 (2d Dist. 1973); People v. Williams, 31 Ill. App. 3d 161, 333 N.E.2d 655 (5th Dist. 1975).

555. *See* People v. Wilson, 12 Ill. App. 3d 59, 297 N.E.2d 790 (1st Dist. 1973), where defendant complained on appeal that the trial court had erred in refusing his involuntary manslaughter instruction. The evidence proved that defendant had shot a shoe store proprietor during a robbery attempt after the proprietor threw shoes at him. Since the victim was

It has been suggested that tendered lesser included offense instructions should be given as follows:

> [T]he most satisfactory trial solution would be for the judge to liberally apply the rules respecting the giving of instructions on lesser included offenses when requested by a defendant so as to give them freely in cases where there is any evidence fairly tending to bear upon the issue of that offense even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. Even in cases in which there is no direct testimony that could establish a lesser included offense but where the jury could fairly infer that the lesser offense had been committed the defendant should be given the benefit of the doubt and the instruction as to the lesser included offense should be given in respect for the jury's central role in our jurisprudence.[556]

When the evidence justifies an instruction on a lesser included offense, the trial court may, on its own motion, give such an instruction if neither party tenders it.[557] Failure of the court to do so, however, is not error.[558]

Objections

As a general rule, a party may not, on appeal, complain of error regarding instructions where that party did not raise an objection to tender the refused instruction in the trial court.[559] Therefore, error

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unarmed and 40 years older than defendant, the court held that there was no evidence justifying such an instruction. In People v. Boisvert, 27 Ill. App. 3d 35, 325 N.E.2d 644 (2d Dist. 1975), the defendant requested an involuntary manslaughter instruction which was held properly refused, since his defense was essentially lack of recall. *See also* People v. Jenkins, 30 Ill. App. 3d 1034, 333 N.E.2d 497 (4th Dist. 1975), where a voluntary manslaughter instruction was held properly refused because there was no evidence of provocation.

556. People v. Boisvert, 27 Ill. App. 3d 35, 42, 325 N.E.2d 644, 648 (2d Dist. 1975). *See also* People v. Johnson, 32 Ill. App. 3d 36, 335 N.E.2d 144 (3d Dist. 1975).

557. *See, e.g.*, People v. White, 8 Ill. App. 3d 416, 291 N.E.2d 46 (1st Dist. 1972), and cases cited therein.

558. The Illinois Supreme Court set forth this rule in People v. Taylor, 36 Ill. 2d 483, 224 N.E.2d 266 (1967). *But see* People v. Joyner, 50 Ill. 2d 302, 278 N.E.2d 756 (1972), where it was held that the trial court should have given an I.P.I.-Criminal instruction on involuntary manslaughter sua sponte. However, in that case, defendant had tendered and was refused a non-complying instruction. *See also* People v. Dortch, 20 Ill. App. 3d 911, 314 N.E.2d 324 (1st Dist. 1974), where five state witnesses testified that decedent deliberately shot and killed his cousin. Three defense witnesses testified that decedent's brother and sisters, armed with knives and bottles, assaulted decedent. The court, at defendant's request, gave an instruction on self-defense. However, it was held on review that the trial court should have recognized that such assault is provocation which will reduce intentional killing from murder to voluntary manslaughter, and should have so instructed on its own motion.

559. People v. Green, 27 Ill. 2d 39, 187 N.E.2d 708 (1963); People v. Neal, 26 Ill. App. 3d 22, 324 N.E.2d 476 (3d Dist. 1975); People v. Taylor, 27 Ill. App. 3d 849, 327 N.E.2d 504 (3d Dist. 1975); People v. Sims, 35 Ill. App. 3d 401, 342 N.E.2d 256 (1st Dist. 1976).

is usually waived if a party failed to raise an objection when the instruction was proposed or subsequent to the trial in a post-trial motion.[560]

However, a well-recognized exception to this general rule exists: Supreme Court Rule 451[561] provides that substantial defects are not waived by failure to make timely objection if the interests of justice so require.

Cautionary Instructions

Generally, a trial court retains discretion to give or refuse a cautionary instruction where the jury is otherwise properly instructed.[562] Illinois courts have observed that it is advisable to give a cautionary instruction directing the jurors to avoid news media

560. Section 67 of the Civil Practice Act, ILL. REV. STAT. ch. 110, § 67 (1975), requires that the trial court hold a conference to settle instructions. Objections should be noted at the conference. In People v. Knutson, 17 Ill. App. 2d 251, 149 N.E.2d 461 (2d Dist. 1958), it was held that where the trial court had held no conference, the defendant had not waived his objection by making it at the earliest opportunity, which was in his motion for a new trial. A defendant may not later complain of instructions given by agreement following a conference. People v. Allen, 56 Ill. 2d 536, 309 N.E.2d 544 (1974).

Moreover, certain procedural considerations govern the preservation of objections. An objection must be made with specificity or it will be waived. In People v. Brown, 9 Ill. App. 3d 730, 293 N.E.2d 1 (2d Dist. 1973), an instruction was given that the jury need not find, in order to convict, that the defendant's acts were the sole cause of death. At the conference, defendant's attorney had stated, "I am going to object to it for the record, Your Honor." This objection was held to be insufficient. *See also* People v. Hill, 34 Ill. App. 3d 193, 339 N.E.2d 405 (5th Dist. 1975), where defendant's attorney objected during the conference to a motive instruction on the ground that motive was neither an element of the crime charged (burglary) nor in issue. The appellate court held that defense counsel's objection constituted merely a statement of the reasons for which the instruction should, in a particular case, be given. A proper objection would have pointed out that the state had introduced evidence of motive, and that such issue should not be before the court.

On appeal, a party must abstract all instructions, both given and refused; the reviewing court has no obligation to search the record for all the instructions. People v. Harris, 33 Ill. App. 3d 600, 338 N.E.2d 129 (3d Dist. 1975); People v. Mostert, 34 Ill. App. 3d 767, 340 N.E.2d 300 (3d Dist. 1976).

561. ILL. REV. STAT. ch. 110A, § 451 (1975). It has been suggested that this rule places a dual burden upon defendant who, in the reviewing court, seeks to avoid a waiver for failure to make an objection. First, the defendant must establish that the defects in the instruction are substantial, and, second, that the giving of the instruction resulted in denial of a fair trial. This burden was not met in People v. Jones, 6 Ill. App. 3d 669, 286 N.E.2d 87 (5th Dist. 1972), where defendant argued that reversible error was committed by giving an I.P.I.-Criminal instruction on the forms of verdict. Defendant had not objected in the trial court. It was held that there was no substantial error to merit review. However, in People v. Horton, 35 Ill. App. 3d 208, 340 N.E.2d 700 (1st Dist. 1975), the trial court gave, without objection, an instruction concerning the proper use of a confession, where only an admission was in evidence. The reviewing court found this an inherently substantial defect; the jury, in its considerations, could easily have been swayed by a misbelief that the defendant had confessed to the crime.

562. People v. Rudnicki, 394 Ill. 351, 68 N.E.2d 723 (1946); People v. Konkowski, 378 Ill. 616, 39 N.E.2d 13 (1941).

coverage of the trial and conversation bearing on aspects of the case.[563] However, in certain instances defendant is absolutely entitled to a cautionary instruction. An instruction to the effect that defendant's failure to testify in his own behalf creates no inference of guilt is classified as a cautionary instruction in I.P.I.-Criminal.[564] The drafters' note to the instruction mandates that the instruction be given whenever requested;[565] however, a trial court is under no duty to give this instruction sua sponte.[566] Because of the damaging nature of an accomplice's testimony, it has been held that a defendant is entitled to a special instruction cautioning the jury to regard such testimony with suspicion.[567]

A deadlock instruction is considered cautionary. However, I.P.I.-Criminal contains none; therefore, it is usually held that no such instruction should be given.[568] However, an instruction which directs the jury to consider the opinions of their fellow jurors and attempt to reach a unanimous verdict has been held permissible.[569]

Credibility of Witnesses

An instruction concerning the credibility of witnesses is also considered cautionary, and is so classified by I.P.I.-Criminal.[570] Whether to instruct regarding credibility remains largely within the discretion of the trial court.[571] Where the determination of the truth-

563. *See, e.g.*, People v. Cox, 74 Ill. App. 2d 342, 220 N.E.2d 7 (4th Dist. 1966).

564. I.P.I.-Criminal No. 2.04 provides:

> The fact that (a) (the) defendant(s) did not testify should not be considered by you in any way in arriving at your verdict.

565. I.P.I.-Criminal Instruction No. 2.04. *See also* People v. Borneman, 66 Ill. App. 2d 251, 213 N.E.2d 52 (2d Dist. 1966).

566. In People v. Moorelander, 25 Ill. 2d 309, 185 N.E.2d 166 (1962), defendant tendered an incorrect instruction on his failure to testify, which was refused. The supreme court found this refusal was proper, for although defendant was entitled to such an instruction, under these circumstances the court was not obligated to give it sua sponte.

567. *See, e.g.*, People v. Georgev, 38 Ill. 2d 165, 230 N.E.2d 851 (1967); People v. Butler, 23 Ill. App. 3d 108, 318 N.E.2d 680 (5th Dist. 1974). In People v. Hill, 34 Ill. App. 3d 193, 339 N.E.2d 405 (5th Dist. 1975), no accomplice instruction was submitted to the jury, although an instruction was given regarding credibility of witnesses. The appellate court found that failure to submit an accomplice instruction was not so prejudicial as to require a new trial. *But see* People v. Parks, 34 Ill. App. 3d 180, 340 N.E.2d 121 (1st Dist. 1975), where discussion took place during the instruction conference regarding an accomplice instruction, but defendant's non-pattern instruction thereon was refused. The court held that in this situation, where all parties were aware of the need for the instruction, the court should have so instructed sua sponte.

568. People v. Mills, 131 Ill. App. 2d 693, 268 N.E.2d 571 (3d Dist. 1971).

569. People v. Jones, 6 Ill. App. 3d 669, 286 N.E.2d 87 (5th Dist. 1972). *But see* People v. Hammers, 35 Ill. App. 3d 498, 341 N.E.2d 471 (4th Dist. 1976); People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601 (1972).

570. I.P.I.-Criminal No. 1.02.

571. People v. Berne, 384 Ill. 334, 51 N.E.2d 578 (1943).

fulness of certain witnesses is an essential question of fact, the credibility instruction should be given.[572]

Such instructions must inform the jury of the factors which they may consider in determining the weight and value to be attached to testimony. It is proper to instruct the jury that it, as sole judge of the facts and the credibility of witnesses, may consider the appearance, manner, and means and opportunity of knowing the facts of any witness whose credibility is at issue.[573] It is proper to consider the interest of the witness in the result, and, thus it is proper to inform the jury that it may consider the defendant's interest.[574] Otherwise, the defendant's credibility is to be judged in the same way as that of other witnesses,[575] and an instruction which singles out his testimony and suggests that it is not worthy of belief is improper.[576]

Further, any fact or circumstance which tends to bear upon the witnesses' credibility appearing in the trial and in the evidence may be included in the instruction.[577]

DEFENSES

Entrapment

Section 7-12 of the Criminal Code[578] establishes entrapment as an affirmative defense, providing that a person is not guilty of an offense if his conduct is induced by a public officer or an agent of such officer. This defense is not available to a person who is merely afforded the opportunity through official conduct to commit an offense in furtherance of his own criminal purpose. In determining the fine distinction between a "trap for the unwary and innocent" and a "trap for the unwary criminal,"[579] courts examine both the conduct of the police and the conduct of the defendant.[580]

When a defendant invokes the defense of entrapment he admits the commission of the offense charged.[581] If the accused denies the

572. People v. Robinson, 132 Ill. App. 2d 1106, 271 N.E.2d 78 (1971).

573. People v. Miller, 31 Ill. App. 3d 436, 334 N.E.2d 421 (1st Dist. 1975); People v. Farnsley, 53 Ill. 2d 537, 293 N.E.2d 600 (1973).

574. People v. Farnsley, 53 Ill. 2d 537, 293 N.E.2d 600 (1973).

575. I.P.I.-Criminal No. 1.02.

576. People v. Montana, 380 Ill. 596, 44 N.E.2d 569 (1942).

577. *See, e.g.*, People v. Franklin, 22 Ill. App. 3d 775, 317 N.E.2d 611 (1st Dist. 1974), where it was held proper to instruct the jury on the weight to be given a witness's testimony where the defendant had shown that the witness was an addict.

578. ILL. REV. STAT. ch. 38, § 7-12 (1975).

579. Sherman v. United States, 356 U.S. 369, 372 (1958).

580. United States v. Russell, 411 U.S. 423 (1973); People v. Cooper, 17 Ill. App. 3d 934, 308 N.E.2d 815 (2d Dist. 1974).

581. People v. Cooper, 17 Ill. App. 3d 934, 308 N.E.2d 815 (2d Dist. 1974); People v.

facts constituting the offense, he may not raise the defense and no instruction on entrapment will be submitted to the jury.[582]

Once some evidence has been offered on entrapment, the issue is ordinarily a question for the jury[583] and the state must prove beyond a reasonable doubt that defendant was not entrapped.[584] The trial court may properly refuse to instruct the jury on entrapment when it is clear as a matter of law that the accused was predisposed to commit the offense charged.[585] Clear evidence of predisposition demonstrates that defendant was not an innocent person but was merely afforded the opportunity to commit the crime charged.[586]

A defendant is entitled to discharge or, if convicted, reversal upon appeal, if entrapment is established as a matter of law, requiring undisputed evidence demonstrating both inducement on the part of the state and lack of predisposition to commit the crime on the part of the defendant.[587] Courts have found entrapment as a matter of law and accordingly reversed improper convictions in several cases involving informants and sales of narcotics.[588] In those

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Gaines, 26 Ill. App. 3d 1059, 325 N.E.2d 679 (2d Dist. 1975) (abstract).

582. People v. Gonzalez, 24 Ill. App. 3d 259, 320 N.E.2d 197 (2d Dist. 1974) (defendant claimed that informer had "planted" drugs in his home and that defendant neither had possession nor made sale).

583. People v. Cooper, 17 Ill. App. 3d 934, 308 N.E.2d 815 (2d Dist. 1974); People v. Carpentier, 20 Ill. App. 3d 1024, 314 N.E.2d 647 (3d Dist. 1974) (slightest evidence of entrapment presents a jury question and trial court improperly denied jury instruction).

584. People v. Cooper, 17 Ill. App. 3d 934, 938, 308 N.E.2d 815, 818 (2d Dist. 1974).

585. *See* People v. Watson, 26 Ill. App. 3d 1081, 325 N.E.2d 629 (4th Dist. 1975) (defendant not entrapped into selling obscene materials when he possessed them for three months and had made previous sales); People v. Kadlec, 21 Ill. App. 3d 289, 313 N.E.2d 522 (3d Dist. 1974) (instruction on entrapment properly denied when defendant's own testimony revealed that he had sold narcotics to agent on two prior occasions and that he had sold to over 300 people in the last year and one half); People v. Deppert, 15 Ill. App. 3d 361, 304 N.E.2d 499 (3d Dist. 1973) (no entrapment where defendant did actual planning for burglary while incarcerated with informer). *See also* People v. Carpentier, 20 Ill. App. 3d 1024, 314 N.E.2d 647 (3d Dist. 1974). In *Carpentier* the court held defendant entitled to jury instruction on entrapment where evidence showed that the informant had attempted many times to have defendant sell him drugs and it could not be said that defendant was a "pusher" awaiting an opportunity to sell.

586. *See, e.g.*, People v. Kadlec, 21 Ill. App. 3d 289, 294, 313 N.E.2d 522, 526 (3d Dist. 1974), where the court stated:

> In other words, where a person is regularly engaged in doing certain prohibited acts such as unlawfully selling narcotics and has done such acts on his own intiative, it is no defense for him to show that for the purpose of bringing him to justice, an officer of the law directly or indirectly occasioned the commission of the particular act charged.

587. People v. Cooper, 17 Ill. App. 3d 934, 308 N.E.2d 815 (2d Dist. 1974).

588. *See* People v. Dollen, 53 Ill. 2d 280, 290 N.E.2d 879 (1972); People v. Housby, 33 Ill. App. 3d 762, 338 N.E.2d 461 (3d Dist. 1975); People v. Rogers, 6 Ill. App. 3d 1092, 286 N.E.2d 365 (3d Dist. 1972). In *Dollen*, defendant was manager of the cab company where the informer worked. He found narcotics in informant's taxicab which might have been planted for that

cases the following factors were present: (1) the drugs which were the subject of the sale were supplied by the informant; (2) the testimony of the defendant was uncontradicted; (3) the informant failed to testify; and (4) the defendant had no prior criminal record or no evidence of prior drug involvement by defendant was introduced.

Insanity

Section 6-2[589] of the Criminal Code defines the affirmative defense of insanity, providing that a person is not responsible for his conduct if, at the time in question, as a result of a mental disease or defect, he lacked substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The law presumes that all persons are sane.[590] A defendant raises the insanity defense by offering sufficient evidence to create a reasonable doubt as to his sanity;[591] the state then must sustain the burden of proving the defendant sane beyond a reasonable doubt.[592]

The question of the nature of evidence required in order to raise the defense of insanity is often the subject of litigation. Clearly, the opinion testimony of an expert witness creates a reasonable doubt

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purpose since animosity existed between informer and defendant. The informant immediately offered to find a buyer. Defendant resisted for several days, but subsequently relented. Price was negotiated by the informer, who disappeared and did not testify at trial. In *Housby*, the informant purchased peyote buttons while he and defendant were in California. The informant arranged sale between defendant and an agent of the Illinois Bureau of Investigation, purportedly to provide the proceeds as rent for staying in defendant's home. In *Rogers*, the informant, whom defendant had known as a friend for a year, came to defendant's house with an agent. Defendant testified that after asking to see her husband, the informant requested her to retrieve a packet he had left in a drawer in her husband's bedroom the day before. After initially refusing, defendant retrieved a foil packet. The informer put $125.00 on the table and left. Defendant refused the money and testified that the informant reclaimed it the next day. Testimony of the agent accompanying the informer did not controvert defendant's story. That the informer was an addict, in addition to the facts already stated, was held sufficient to entitle defendant to a discharge.

589. ILL. REV. STAT. ch. 38, § 6-2(a) (1975).

590. People v. Smothers, 55 Ill. 2d 172, 302 N.E.2d 324 (1973); People v. Moore, 19 Ill. App. 3d 334, 311 N.E.2d 401 (3d Dist. 1974); People v. Arnold, 17 Ill. App. 3d 1043, 309 N.E.2d 89 (3d Dist. 1974)

591. People v. Redmond, 59 Ill. 2d 328, 320 N.E.2d 321 (1974); People v. Smothers, 55 Ill. 2d 172, 302 N.E.2d 324 (1973); People v. Dread, 27 Ill. App. 3d 106, 327 N.E.2d 175 (1st Dist. 1975). In *Redmond*, the supreme court rejected the "some evidence" test for raising an insanity defense which had been adopted by the appellate court in that case, *see* People v. Redmond, 13 Ill. App. 3d 604, 300 N.E.2d 786 (1st Dist. 1973), and was strongly advocated by Justice Schaefer, dissenting in *Redmond*. Justice Schaefer contended that the court's decision was clearly contrary to ch. 38, section 3-2, which states that to raise an affirmative defense, defendant must present merely "some evidence" regarding that issue.

592. People v. Redmond, 59 Ill. 2d 328, 320 N.E.2d 321 (1974); People v. Arnold, 17 Ill. App. 3d 1043, 309 N.E.2d 89 (3d Dist. 1974).

as to sanity. The opinion of a nonexpert witness can raise the issue, as can the testimony of a nonexpert witness where no opinion is given.[593] However, self-serving testimony of the defendant,[594] or evidence that he was an epileptic,[595] or mentally retarded[596] or that he engaged in bizarre conduct[597] has been found insufficient, absent corroboration, to rebut the presumption of sanity.

Once the sanity of the defendant has been properly placed in issue, the prosecution can sustain its burden of proof by relying on expert or nonexpert testimony. However, the state need not introduce explicit opinion testimony regarding defendant's sanity. Rather, the prosecution is permitted to rely upon facts already in evidence as well as nonexpert testimony.[598] The trier of fact is entitled to weigh all evidence.[599] The fact finder is not required to place particular credence in expert testimony; findings of sanity have been sustained where expert opinion indicated that defendant was insane at the time in question, but nonexpert testimony demon-

593. People v. Smothers, 55 Ill. 2d 172, 175, 302 N.E.2d 324, 326 (1973). A nonexpert witness is permitted to offer an opinion as to the sanity of the defendant based upon sufficient personal observation. People v. Arnold, 17 Ill. App. 3d 1043, 309 N.E.2d 89 (3d Dist. 1974).

594. *See* People v. Redmond, 59 Ill. 2d 328, 320 N.E.2d 321 (1974); People v. Dread, 27 Ill. App. 3d 106, 327 N.E.2d 175 (1st Dist. 1975). In *Redmond*, the supreme court affirmed defendant's conviction for aggravated battery, indecent liberties with a child, and other offenses, finding insufficient to raise an insanity defense defendant's testimony that he had heard "spirits and voices" directing him to go out and play with little boys. Further, the court found insufficient the testimony of two police officers who testified that upon arrest defendant did not act "normal" and that defendant had told them that he had "lost his mind." 59 Ill. 2d at 338-39, 320 N.E.2d at 327. In *Dread*, defendant had testified that he had suffered blackout spells and could not remember the events of the day of the commission of the offense. 27 Ill. App. 3d at 111, 113 n.3, 327 N.E.2d at 177, 180 n.3.

595. *See* People v. Felton, 26 Ill. App. 3d 395, 325 N.E.2d 400 (3d Dist. 1975). In *Felton*, the court found, additionally, that evidence that defendant suffered a seizure or was in a postconvulsive episode at the time of the commission of the crime raises the issue under section 6-2.

596. *See* People v. Wells, 30 Ill. App. 3d 968, 333 N.E.2d 496 (3d Dist. 1975) (abstract).

597. *See* People v. Redmond, 59 Ill. 2d 328, 320 N.E.2d 321 (1974); People v. Smothers, 55 Ill. 2d 172, 302 N.E.2d 324 (1973); People v. Ward, 19 Ill. App. 3d 833, 313 N.E.2d 314 (1st Dist. 1974). In *Redmond*, defendant accosted a 12 year old boy on an elevated train in the presence of 15 others, took money from the boy and, at knife point, forced the child to perform a deviate sexual act. In *Ward*, defendant grabbed one witness, asked him whether he was a member of a street gang, and then attempted to strike him. Defendant then walked back and forth from one side of the street to another, striking people with a stick, until one boy was killed. Defendant's mother testified that defendant had no friends, suffered from seizures during which he foamed at the mouth, and wandered about calling for the grandfather who had died when defendant was four years old.

598. People v. Harrington, 22 Ill. App. 3d 938, 945, 317 N.E.2d 161, 166 (2d Dist. 1974); People v. Arnold, 17 Ill. App. 3d 1043, 309 N.E.2d 89 (3d Dist. 1974).

599. People v. Felton, 26 Ill. App. 3d 395, 325 N.E.2d 400 (3d Dist. 1975); People v. Banks, 17 Ill. App. 3d 746, 308 N.E.2d 261 (1st Dist 1974).

strated that defendant appeared normal following the commission of the crime.[600]

POST-CONVICTION PROCEEDINGS

SENTENCING

Procedural Requirements

Sentencing Investigation and Hearing. The Illinois Unified Code of Corrections[601] specifically requires that certain procedures be followed in the course of preparing to sentence a convicted felon.[602] Subsequent to an adjudication of guilt, section 1005-3-1 requires a written presentence investigation in all felony cases. This investigation is mandatory unless waived by defendant;[603] despite such a waiver[604] the court may order a presentence investigation and report on defendant.[605]

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600. *See* People v. Harrington, 22 Ill. App. 3d 938, 317 N.E.2d 161 (2d Dist. 1974); People v. Banks, 17 Ill. App. 3d 746, 308 N.E.2d 261 (1st Dist. 1974); People v. Arnold, 17 Ill. App. 3d 1043, 309 N.E.2d 89 (3d Dist. 1974). In *Harrington*, defendant broke into an apartment where his wife was visiting with another man and killed her. Two psychiatrists were of the opinion that defendant had suffered a "psychotic episode" and could be termed insane under section 6-2. Three police officers who had contact with the accused soon after the shooting testified that he had cried when informed that his wife was dead, and thereafter was generally calm and coherent. The jury found defendant guilty and his conviction was affirmed. In *Arnold*, defendant's jury conviction was upheld despite a claim that the evidence did not prove beyond a reasonable doubt that he was sane. Defendant, who had been separated from his wife, went to her home to await her return. Upon her arrival, defendant confronted her and shot her with a shotgun. A psychiatrist testifying for defendant stated that he was probably suffering from acute transitional reaction. Defendant's son testified that before the shooting his father appeared normal. A neighbor and eight police officers who saw defendant subsequent to the killing testified to his calm, normal demeanor. In *Banks*, defendant was found guilty in a bench trial. Two psychiatrists testified that defendant was a paranoid schizophrenic at the time she murdered. The state offered the opinion of a police officer who testified that he thought defendant sane upon her arrest. The appellate court affirmed the conviction, stating that the finder of fact is not required to accept expert opinion.

601. ILL. REV. STAT. ch. 38, §§ 1001-1008 (1975) [hereinafter referred to as IUCC].

602. IUCC § 1005-3 (1975). A presentence investigation and report is not required in the case of a convicted misdemeanant. *Id.*

603. The proposed Bill, amending provisions of the Unified Code of Corrections, [hereinafter referred to as "Walker" Bill] would eliminate the availability of waiver to defendant and require the court to order a presentence report before sentencing any defendant to a term of imprisonment. 79th General Assembly State of Illinois LRB 1737-79-PGB/1w (1975).

604. The provisions of the prior act, ILL. REV. STAT. ch. 38, § 1-7(g) (1971), provided only for a hearing in aggravation and mitigation. Further, Illinois courts under the former provisions had uniformly held that defendant was deemed to have waived such a proceeding unless it was specifically requested. People v. Long, 20 Ill. App. 3d 957, 313 N.E.2d 281 (2d Dist. 1974); People v. Fuca, 43 Ill. 2d 182, 251 N.E.2d 239 (1969). The question of waiver of the presentence investigation has been expressly met by statute, unlike the situation under prior law. *See* IUCC § 1005-3-1 (1975).

605. IUCC § 1005-3-1 (1975). The court may order a presentence report in any case,

Prior to the sentencing of a convicted felon, a sentencing hearing or hearing in aggravation or mitigation is required. At this hearing the court shall:

(1) consider the evidence, if any, received upon the trial;
(2) consider any presentence reports;
(3) consider evidence and information offered by the parties in aggravation and mitigation;
(4) hear arguments as to sentencing alternatives; and
(5) afford the defendant the opportunity to make a statement in his own behalf.[606]

In *People v. Nelson*,[607] the Supreme Court of Illinois answered affirmatively the question as to whether a defendant can waive a hearing in aggravation and mitigation, declaring that because the burden of presenting mitigating circumstances falls upon defendant, it is also incumbent upon defendant to request a hearing. Defendant's failure to lodge such a request was held to be a waiver of the hearing.[608]

In light of two recent decisions, *People v. Barto*[609] and *People v.*

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including petty offenses, business offenses, or misdemeanors regardless of whether or not the defendant wishes to waive the report.

606. IUCC § 1005-4-1 (1975).

607. 41 Ill. 2d 364, 243 N.E.2d 225 (1968). A hearing was held in *Nelson*, during which the state presented evidence in aggravation; defendant declined to comment or to proffer evidence in mitigation. The court held that defendant, through failure to take advantage of his opportunity to be heard, waived the salutary provisions of the statute.

608. *Id.* at 369, 243 N.E.2d at 228. *See also* People v. Muniz, 31 Ill. 2d 130, 198 N.E.2d 855 (1964).

Nelson predates the current statutory sentencing provisions and was an interpretation of the prior statute, ILL. REV. STAT. ch. 38, § 1-7(g) (1969), *as amended* ILL. REV. STAT. ch. 38, § 1005-4-1 (1975), which did not expressly mention a potential for waiver. In *People v. Miner*, 17 Ill. App. 3d 661, 307 N.E.2d 624 (4th Dist. 1974), the court held that the policy concerning waiver followed by the court in *Nelson* was not changed by the repeal of the law relied on in *Nelson*. In fact, the *Miner* court held that because the Code of Corrections expressly provided for the potential of a waiver of sentencing procedures, it did not effect a change in the law regarding a waiver of proceedings in aggravation and mitigation. 17 Ill. App. 3d at 665, 307 N.E.2d at 628. It should be recognized, however, that the *Minor* court, as well as the *Nelson* court, only discussed the issue of whether a waiver could be made and not the requirements for making such a waiver effective. Under the previous statute an effective waiver had to be "understanding," People v. Charles, 2 Ill. App. 3d 452, 277 N.E.2d 348 (2d Dist. 1971); People v. Ledferd, 94 Ill. App. 2d 74, 236 N.E.2d 19 (4th Dist. 1968); or made by the inaction of defendant aware of his right. People v. Tomkins, 112 Ill. App. 2d 251, 251 N.E.2d 75 (3d Dist. 1969). Certainly there is little doubt, as the *Miner* court indicated, that a waiver can be made of presentence procedure. IUCC § 1005-3-1 (1975).

609. 27 Ill. App. 3d 853, 327 N.E.2d 469 (3d Dist. 1975). In that case following a plea of guilty to involuntary manslaughter and arson, defendant was advised by the court that in accepting the plea the court would neither hold a hearing in aggravation and mitigation nor require a presentence report to be filed with the court. Defendant contended on appeal that a negotiated plea, in and of itself, did not abrogate the statutory requirement under IUCC §

Melvin,[610] the question of whether a presentence investigation and hearing are required when conviction is obtained through plea negotiation remains open. Apparently, under the *Barto* decision, defendant must be informed of his right to a presentence report and hearing and must knowingly relinquish this procedure before a waiver will be deemed effective. However, *Melvin* indicates that the waiver follows from defendant's acceptance of the plea bargain. Defendant may not have been aware of his right to a presentence report, much less have knowingly determined to waive such right, yet *Melvin* seems to hold that a defendant, by a plea bargain, determines his own sentence and bypasses statutory procedures.

In addition to the statutory provisions requiring the presentence investigation and report, the Code indicates with specificity requirements which the report shall contain.[611] The statute requires a complete description of defendant's history of delinquency or criminal-

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1005-8-1(c)(3) (1975) of a presentence investigation and hearing. The *Barto* court agreed, particularly emphasizing the Council Commentary explaining the intent of Section 1005-8-1(c)(3):

> The judge is required to take regard of the nature and circumstances of the offense *and the history and character of the defendant* before setting minimum terms above the norms established by the Legislature in the Statute . . .

27 Ill. App. 3d at 855, 327 N.E.2d at 471.

The court held that where no presentence report is prepared for the trial court's consideration and where no evidence in aggravation or mitigation is introduced, the trial court's sentencing is based not on the history and character of defendant, as is required by statute, but solely on the plea negotiation between the state and defendant. Since sentencing is deeemed a judicial function, the court failed to view that function as changed merely because the conviction is obtained through plea negotiation rather than by means of trial.

See People v. Matychowiak, 18 Ill. App. 3d 739, 310 N.E.2d 394 (5th Dist. 1974). The court vacated a sentence based on facts similar to those presented in *Barto*. The court stated "[n]owhere in the Code is there an indication that a negotiated plea ipso facto can waive the requirements expressed by sections 5-4-1 and 5-8-1(c)(3)." 18 Ill. App. 3d at 741-42, 310 N.E.2d at 396. *See also* People v. Congleton, 16 Ill. App. 3d 1003, 308 N.E.2d 156 (4th Dist. 1974), where the court, in addition to recognizing sentencing as a judicial function, indicated that agreements obtained pursuant to plea negotiationa are recommendations at most, and the sentence in any case is to be imposed solely by the court.

610. 27 Ill. App. 3d 269, 327 N.E.2d 139 (5th Dist. 1975). The court held, contrary to *Barto*, that a negotiated plea may operate to waive the sentencing hearing and procedures provided by statute. The *Melvin* court analyzed the statutory section making the sentencing procedures mandatory, IUCC § 1005-4-1(a), which requires the sentencing hearing. Concentrating on the language after a *determination* of guilt the court found that a plea agreement was not a *determination* of guilt but a situation in which the defendant *confesses* guilt. *See also* People v. Edwards, 18 Ill. App. 3d 379, 309 N.E.2d 713 (5th Dist. 1974). The interpretation of statutory language prompted the holding that the Code did not require these procedures following a plea negotiation agreement. Rather, defendant himself fulfills the statutory requirements that the nature and circumstances of the offense and the history and character of defendant be considered prior to sentencing; by confessing guilt, defendant decides to avoid having such factors considered by someone else in determining his sentence.

611. The guidelines set forth by the statute, IUCC § 1005-3-2(a) (1973), follow the American Bar Association Standards Relating to Probation, § 2.3 (1974).

ity.[612] However, in relation to the scope of such a description, the American Bar Association Standards recommended that the report should not go so far as to include mere arrests not culminating in conviction nor juvenile proceedings short of judgment.[613] In *People v. Simpson*,[614] the court confronted the question of whether improper evidence had been introduced and heard through the sentencing report when the court considered the arrest record of defendant. The court adhered to the traditional presumption "that in a situation such as this, it will be presumed that the court only considered proper evidence of prior offenses in imposing the sentence in a case before it,"[615] absent evidence to the contrary. Thus, the court affirmed the sentence.

In *People v. Grau*,[616] the court, interpreting IUCC § 1005-3-2(a) concerning the contents and admissibility of evidence inserted in the presentence report, found that the introduction of defendant's school and military records was proper.[617] Further, character evidence, including evidence regarding defendant's tendency toward violence and drunkenness, was also proper.[618] These cases indicate that the trend, concerning the propriety of the evidence considered in sentencing, is toward admitting even what may be improper, on the theory that the court considers only that which is proper.[619]

612. IUCC § 1005-3-2(a)(1) (1973).

613. American Bar Association Standards Relating to Probation § 2.3 (Approved Draft, 1970).

614. 26 Ill. App. 3d 205, 324 N.E.2d 635 (2d Dist. 1975).

615. *Id.* at 210, 324 N.E.2d at 639. *See also* People v. Kelley, 44 Ill. 2d 315, 255 N.E.2d 390 (1970); People v. Fuca, 43 Ill. 2d 182, 251 N.E.2d 239 (1969).

616. 29 Ill. App. 3d 327, 330 N.E.2d 530 (5th Dist. 1975).

617. *Id.* at 331, 330 N.E.2d at 533. The court based this finding on its interpretation of § 1005-3-2(a) requiring that the presentence report include ". . . family situation and background, economic status, education, occupation and personal habits . . . any other matters that the investigatory officer deems relevant."

618. 29 Ill. App. 3d 327, 331, 330 N.E.2d 530, 533 (5th Dist. 1975). *See also* People v. Daughtery, 106 Ill. App. 2d 250, 245 N.E.2d 7 (1969) (4th Dist. 1969).

619. In People v. Bowlin, 133 Ill. App. 2d 837, 272 N.E.2d 282 (5th Dist. 1971), a pre-IUCC case, the court considered it clear error for the trial court to consider evidence of defendant's prior arrests which did not result in convictions. Arguably, *Bowlin* can be distinguished from *Simpson* in that the court in *Bowlin* apparently made a finding that the trial court had, in fact, considered the improper evidence while in *Simpson* no such determination could reasonably be made. In fact, in People v. Gant, 18 Ill. App. 3d 61, 309 N.E.2d 265 (1st Dist. 1974), the appellate court stated that it would ordinarily presume that a trial judge disregarded incompetent evidence, but the record here showed that the trial judge did allow his determination of the sentence to be affected by improper evidence. *Id.* at 66-67, 309 N.E.2d at 268. *See also* People v. Chellew, 20 Ill. App. 3d 963, 313 N.E.2d 284 (2d Dist. 1974), where in the court considered the issue of the validity of a sentence based, at least partially, on prior convictions which have been subsequently reversed or set aside. The trial court had considered upon sentencing defendant a prior conviction, which was subsequently reversed on appeal. The reviewing court remanded the case for reconsideration in light of the reversal of the prior conviction.

Scope of Hearing Inquiry. The enactment of the Unified Code of Corrections effected few changes in the actual scope of the sentencing hearing inquiry. Significantly, however, the IUCC requires presentation of a presentence report[620] and permits defendant to inspect the contents of that report.[621] Excepting these alterations in procedure, the traditional rule concerning the scope of a sentencing hearing remains unmodified:

> [t]he sentencing judge may look to the facts of the crime, and may search anywhere within reasonable bounds for other facts which tend to aggravate or mitigate the offense without being bound strictly by the rules of evidence which apply to the guilt finding process.[622]

However, since the sentencing hearing has been declared a critical stage in the criminal process wherein defendant must be extended fundamental rights of due process,[623] the trial court, in the exercise of its discretion, must insure the accuracy and propriety of materials considered.[624] The evidence, although not as strictly controlled as evidence admitted at trial, must relate to defendant, his character, his attitude, his rehabilitative potential, and the facts surrounding the crime for which he is sentenced, rather than superfluous matters such as whether public reaction to the sentence imposed will be favorable, or whether defendant's lifestyle might be termed "unconventional."[625]

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620. IUCC § 1005-3-1 (1975).

621. IUCC § 1005-3-4 (1975).

622. People v. Ramsey, 24 Ill. App. 3d 1038, 1041, 322 N.E.2d 547, 549 (2d Dist. 1975). The court also indicated that hearsay evidence was, additionally, within the scope of the sentencing hearing citing, People v. Dennis, 47 Ill. 2d 120, 135, 265 N.E.2d 385, 393 (1970); People v. Holmes, 12 Ill. App. 3d 713, 719, 298 N.E.2d 738, 742 (4th Dist. 1973).

623. Mempa v. Rhay, 389 U.S. 128 (1967).

624. People v. Ramsey, 24 Ill. App. 3d 1038, 1041, 322 N.E.2d 547, 549 (2d Dist. 1975). In addition, the *Ramsey* court stated that, under certain circumstances this may require that the materials which form a part of the judge's process of determining the sentence be made available to defendant and the sources of information also made available so that they may be subjected to cross-examination. *See also* People v. Crews, 38 Ill. 2d 331, 337, 231 N.E.2d 451, 454 (1967).

625. *See, e.g.*, People v. Powell, 27 Ill. App. 3d 834, 327 N.E.2d 32 (2d Dist. 1975) (abstract). There, following a conviction for robbery, defendant was sentenced to a term of imprisonment of not less than five nor more than 15 years. Among the matters considered by the trial court at the sentencing hearing was an 8½-year-old psychology report on defendant, apparently compiled when defendant was under exceptional stress. The appellate court vacated the sentence and remanded stating that the trial court had abused its discretion in relying on the report and in denying defendant an opportunity to present a new report.

In People v. Nance, 26 Ill. App. 3d 182, 324 N.E.2d 652 (5th Dist. 1975), defendant had been found guilty of aggravated battery by a jury and sentenced to one year. In vacating the sentence the appellate court noted that the trial judge had heard testimony, at sentencing,

Substantive Problems

Concurrent v. Consecutive Sentences. The Unified Code of Corrections provides specifically that all multiple terms of imprisonment shall run concurrently unless otherwise specified by the sentencing court.[626] The Code further restricts the imposition of consecutive sentences by requiring that the court determine from the totality of circumstances that a consecutive sentence is necessary to protect the public from additional criminal conduct by defendant.[627] Even where the court finds consecutive sentencing appropriate, the aggregate minimum and maximum terms cannot exceed twice the minimum and maximum terms authorized for the two most serious felonies involved.[628]

A further limitation placed on the use of the consecutive sentence is the requirement of definiteness of sentencing; if a court desires a sentence to run consecutively to a previously imposed sentence, the court must indicate with specificity the sentence or sentences to which it would be consecutive. In *People v. Logan*,[629] the court held that, "a sentence to commence in the future must be so certain that the termination of the first term and the commencement of the second must be ascertainable from the record without the necessity of construing or supplementing that record."[630]

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by two police officers. Neither officer had personal knowledge of defendant's crime or character. Their testimony concerned a recent increase in the type of crime defendant had been involved in and their opinion regarding the effect of strictly punishing defendant on police morale. The appellate court concluded that the effect of defendant's sentence on police efficiency and morale was clearly improper and beyond the scope of a sentencing inquiry.

See also People v. Rednour, 24 Ill. App. 3d 1072, 322 N.E.2d 492 (5th Dist. 1974), in which defendant had entered a plea of guilty to the charge of burglary. The *Rednour* court found that the trial court improperly considered two factors when making its sentencing determination. First, the trial court considered the public sentiment in relation to a recent increase in burglaries; none of these burglaries, however, had involved defendant. The appellate court found this consideration inappropriate, since it responded to the public's interest in stricter sentences rather than anything personal to defendant or his acts. Secondly, the trial court placed considerable emphasis on what it considered to be the unconventional lifestyle of the defendant. The appellate court noted that this, also, was improper since defendant's lifestyle was found to be neither illegal nor immoral.

626. IUCC § 1005-8-4(a) (1975).

627. IUCC § 1005-8-4(b) (1975). *See* People v. Talach, 19 Ill. App. 3d 189, 311 N.E.2d 319 (1st Dist. 1974); People v. Reno, 17 Ill. App. 3d 348, 308 N.E.2d 3 (1st Dist. 1974).

628. IUCC § 1005-8-4(c) (1975). *See* People v. Morgan, 59 Ill. 2d 276, 319 N.E.2d 764 (1974), where defendants appealed consecutive sentences for armed robbery imposed in addition to sentences for burglary and murder. The court found that the sentences imposed for armed robbery consecutive to 100-199 year sentences for murder violated the IUCC provision precluding aggregate minimum period of consecutive sentences from exceeding 28 years.

629. 23 Ill. App. 3d 41, 318 N.E.2d 94 (4th Dist. 1974).

630. *Id.* at 42, 318 N.E.2d at 96. The *Logan* trial court had merely indicated that its sentence would run consecutively to any defendant might be presently serving. The appellate court found this indefinite.

A final limitation on the application of consecutive sentences arises from plea negotiations. The trial court is required to inform the defendant, prior to the acceptance of a plea of guilty, as to the minimum and maximum terms he may be subjected to, including the possibility of a consecutive sentence.[631] However, in *People v. Davenport*,[632] the court appeared to require not literal, but substantial compliance with the requirements of Supreme Court Rule 402.[633] Apparently, based on the circumstances of the individual case, courts do not consider a failure to inform defendant of a possible consecutive sentence as anything more than technical error which does not require resentencing.

Mandatory Consecutive Sentences. Effective March 4, 1975, was a provision in the Unified Code of Corrections providing, in pertinent part, that a sentence for escape or attempted escape shall be served consecutive to the terms under which the defendant is held by the Department of Corrections.[634] In *People v. Nelson*,[635] the Fifth District Appellate Court found that this mandatory consecutive sentencing provision did not constitute an infringement of defendant's rights to equal protection. Defendant had argued that the mandatory provision could not be placed on one who escaped from the Department of Corrections after conviction and sentence when it was not also mandatory upon a convicted, but yet to be sentenced, defendant-escapee. The court in *Nelson* responded by pointing out that the separate classifications for mandatory and non-mandatory consecutive sentencing are presumed to be valid legislative classifications unless demonstrated to be inherently suspect and to constitute an infringement of a constitutionally protected interest.[636]

People v. Griffith[637] examined an additional aspect of mandatory consecutive sentencing provided for in the Code of Corrections.[638] Defendant, while on parole for a prior offense, entered a plea of guilty to forgery. On appeal defendant argued that the guilty plea

631. ILL. REV. STAT. ch. 110A, § 402 (1975).

632. 22 Ill. App. 3d 849, 318 N.E.2d 338 (1st Dist. 1974).

633. ILL. REV. STAT. ch. 110A, § 402 (1975).

634. IUCC § 1005-8-4(g) (1975).

635. 26 Ill. App. 3d 227, 324 N.E.2d 719 (5th Dist. 1975).

636. *Id.* at 230, N.E.2d at 721. The court went on to distinguish the presentence escapee from defendant escaping after sentencing. The court pointed out that in the former instance a final adjudication has not been reached while in the latter the escape is, in effect, from that final adjudication.

637. 26 Ill. App. 3d 405, 325 N.E.2d 392 (4th Dist. 1975).

638. IUCC § 1005-8-4(f) (1975), provides in pertinent part:

> A sentence of an offender committed to the Department of Corrections at the time of the commission of the offense shall be served consecutive to the sentence under which he is held by the Department of Corrections.

was invalid because the statutory provisions required the sentence on the forgery charges to run consecutively, but he was not informed of this fact upon entering his plea. The *Griffith* court distinguished the parolee from an individual in actual physical custody of the Department of Corrections for the purposes of determining mandatory consecutive sentencing. The court, in construing the statute, held that the term "committed" to the Department of Corrections in § 1005-8-4(f) means that the individual is in custody, confined, or held by the Department. Since a parolee is not included within this interpretation of the sentencing statute, he is not required to have been admonished as to the consecutive sentencing provisions during the guilty plea proceeding.[639]

Credit for Time Served. Pursuant to IUCC § 1005-8-7, a person is entitled to credit toward his sentence for any time served prior to sentencing on the offense, or any time confined in any jail or other state penal institution.[640] In *People ex rel. Bradley v. Davies*,[641] the court confronted the question whether an individual shall be given credit for time confined in another state while held there on an Illinois charge. The *Davies* court stated that the application of the statute, requiring the grant of credit for time served, was not limited to time spent while in custody in the particular jurisdiction, but applied to custody in any jurisdiction in connection with the offense charged or as a result of the offense for which the sentence is imposed. The court narrowed the requirements for the application of the credit provisions to custody.[642] The statutory language clearly makes no distinction between intrastate custody or custody in any other jurisdiction, but only conditions credit upon the fact of custody as a result of the offense for which the sentence was imposed.[643]

A more precise definition of "custody" was articulated in *People ex rel. Morrison v. Sielaff*.[644] Defendant contended he was to be given credit for time served while on bail as he was "in custody" within the meaning of the statute.[645] The court distinguished the definition of custody as applicable to habeas corpus provisions, a remedy for severe restraints of liberty, and determined that such

639. 26 Ill. App. 3d 405, 325 N.E.2d 392 (4th Dist. 1975).
640. IUCC § 1005-8-7 (1975).
641. 17 Ill. App. 3d 920, 309 N.E.2d 82 (4th Dist. 1974).
642. IUCC § 1005-8-7(b) (1975).
643. 17 Ill. App. 3d at 922, 309 N.E.2d at 84.
644. 58 Ill. 2d 91, 316 N.E.2d 769 (1974).
645. Defendant was specifically concerned with IUCC § 1005-8-7(b) (1975), and argued that the term custody should be broadly construed to include constraints other than actual confinement such as bail, citing Hensley v. Municipal Court, 411 U.S. 345 (1973). *Id.* at 92, 316 N.E.2d at 769.

broad interpretation was not authorized by the statute at issue. The court held that custody did not include the period of time one was released on bail, but applied only to the time during which one was actually and physically confined.[646]

Miscellaneous Sentencing Aspects

Dangerous Drug Abuse Act. The Dangerous Drug Abuse Act[647] was enacted in 1967 to provide the trial court with a sentencing alternative for those persons the court has reason to believe are drug addicts.[648] The Act allows sentencing to a term of probation, a condition of which is treatment for addiction.[649] Underlying the allowance of such alternative disposition is the public policy that certain addicts should receive diagnostic treatment and rehabilitative care so that they may be restored to society as useful citizens.[650]

People v. Dill[651] examined the question of when the Dangerous Drug Abuse Act must be considered by the court and the method by which such consideration must be reflected. The *Dill* court stated that the statute requires the trial court to consider the Act when the court has reason to believe that the individual convicted of a crime is an addict. Further, the court declared that when there is reason to believe defendant is an addict, the record must reflect that the judge in fact exercised his discretion. The trial judge must make a deliberate decision to impose sentence or other sanctions available to him under the Code of Corrections in lieu of invoking the provisions of the Dangerous Drug Abuse Act.[652]

While the court need not initiate an investigation into the possible addiction of defendant,[653] where a reasonable belief of addiction arises, the trial court is required to consider sentencing under the Act and that consideration must appear of record.[654] The degree of

646. *Id.* at 94, 316 N.E.2d at 771.

647. ILL. REV. STAT. ch. 91½, §§ 120.1 *et seq.* (1975).

648. The term "addict" is defined at ILL. REV. STAT. ch. 91½, § 120.3-3 (1975).

649. ILL. REV. STAT. ch. 91½, § 120.10 (1975).

650. *See* ILL. REV. STAT. ch. 91½, § 120.2 (1975), declaring the legislative intent of the Act.

651. 23 Ill. App. 3d 503, 319 N.E.2d 240 (4th Dist. 1974).

652. *Id.* at 506, 319 N.E.2d at 243. *See also* People v. Elsner, 27 Ill. App. 3d 957, 327 N.E.2d 592 (4th Dist. 1975), where the court answered the same question by remanding for a new sentencing hearing to cause the trial court to consider the Act. Justice Trapp dissented, arguing that the Act does not apply to a sentencing following a violation of probation.

653. *See, e.g.*, People v. Newlin, 31 Ill. App. 3d 735, 334 N.E.2d 349 (5th Dist. 1975); People v. Smith, 23 Ill. App. 3d 387, 319 N.E.2d 238 (4th Dist. 1974); People v. Robinson, 12 Ill. App. 3d 291, 297 N.E.2d 621 (5th Dist. 1973).

654. The burden has been placed on the courts to evaluate the use of the Dangerous Drug

evidence required to cause the trial court to consider the Act as a sentencing alternative is uncertain; apparently more than the testimony of defendant is required.[655]

Sentence Reduction and Review. Generally, a reviewing court hesitates to disturb a sentence imposed by the trial court since the court below is better able to determine an appropriate sentence.[656] It is well established in Illinois that where a sentence is claimed to be excessive, though within the statutory provisions, the sentence will not be disturbed unless found to be at a substantial variance from the underlying purpose of the laws.[657]

Despite the reluctance of the appellate courts to modify sentences, their power to modify and reduce a sentence is unquestioned.[658] The restraint shown by the reviewing courts is the result of a balancing of interests. The Illinois Supreme Court has admonished[659] the appellate courts to utilize the power granted them with considerable caution and circumspection; however, the Illinois Constitution provides, in essence, that the penalty shall be proportional to the nature of the offense.[660] Where the record fails to indicate considerations warranting the severity of the sentence imposed,[661] however, reviewing courts modify sentences to render them appropriate under the purposes of the IUCC.

Abuse Act, in relation to a particular defendant, once defendant has presented the issue to the court. Failure to indicate what, if any, effect defendant's possible qualification for sentencing under the Act has on a sentencing determination may result in a finding of plain error. People v. Stickler, 31 Ill. App. 3d 726, 334 N.E.2d 471 (5th Dist. 1975).

655. *See, e.g.*, People v. Belleville, 20 Ill. App. 3d 1088, 314 N.E.2d 35 (5th Dist. 1974); People v. Edwards, 29 Ill. App. 3d 625, 331 N.E.2d 342 (5th Dist. 1975).

656. People v. Sprinkle, 56 Ill. 2d 257, 307 N.E.2d 161 (1974).

657. *Id.* at 264, 307 N.E.2d at 164.

In People v. Morgan, 59 Ill. 2d 276, 319 N.E.2d 764 (1974), defendant was sentenced to a term of 20 to 60 years on approximately six counts of armed robbery and 100 to 199 years on a count of murder. These sentences were to be served concurrently. This determination was upheld on review, since the trial court had considered proper factors in sentencing defendant, *e.g.*, the viciousness of the crime and defendant's absence of remorse.

The proposed Walker Bill codifies procedures and considerations for appellate review of sentences. Under the proposed § 1005-10-2, the Bill recognizes reviewable issues, among which is the issue of whether a consecutive sentence has been legally invoked, *e.g.*, whether the requisite special circumstances are present. *See* IUCC § 1005-8-4 (1975).

The *Morgan* court, however, remanded for concurrent sentencing, not because the sentence was an abuse of discretion but because the sentence violated the provisions of § 1005-8-4(c) which states that, "[t]he aggregate minimum period of consecutive sentences shall not exceed twice the lowest minimum term authorized under Section 5-8-1 for the two most serious felonies involved." ILL. REV. STAT. ch. 38, § 1005-8-4(c) (1975).

658. ILL. REV. STAT. ch. 110A, § 615(b)(4) (1975).

659. *See* People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673 (1965).

660. ILL. CONST., art. I, § 11 (1970).

661. *See, e.g.*, People v. Nelson, 127 Ill. App. 2d 238, 262 N.E.2d 225 (1st Dist. 1970) (40 to 80 year sentence for armed robbery unwarranted, reduced to 12 to 20 years). *See also* People

ILLINOIS POST-CONVICTION HEARING ACT

The Act[662] is a statutory remedy available to any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under either the United States or Illinois Constitutions. The Act was established primarily to provide state prisoners with an expedient post-trial procedure, civil in nature, in which criminal convictions could be collaterally attacked. Apparently broad in scope, the Act has been severely limited in its applicability by the doctrines of waiver, res judicata, necessity for a substantial constitutional question and harmless error.[663]

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v. Dennis, 28 Ill. App. 3d 74, 328 N.E.2d 135 (1st Dist. 1975), where defendant, sentenced to 40 to 80 years after conviction by a jury of armed robbery, alleged that he had, in effect, been punished for exercising his right to a trial by jury. The basis for this allegation was that pursuant to a pre-trial conference the state had offered a two to six year term of imprisonment in exchange for defendant's guilty plea. Defendant contended that the disparity between the pre-trial offer and post-trial sentence "was tantamount to punishment for the exercise of his rights under the United States and Illinois Constitutions." 28 Ill. App. 3d at 76, 328 N.E.2d at 136. The appellate court agreed, stating:

> There is nothing in the record to indicate why the court found appropriate the imposition of an extremely harsh sentence after petitioner's jury trial. We can only conclude that the sentence of 40 to 80 years was imposed as punishment for his decision to reject the State's offer and chose instead a jury trial.

28 Ill. App. 3d at 78, 328 N.E.2d at 138.

A related issue concerning modification or reduction of sentence often raised on appeal is whether disparity in sentencing between co-defendants convicted of the same crime is proper. In People v. Schmidt, 25 Ill. App. 3d 1035, 324 N.E.2d 246 (3d Dist. 1975), defendant was sentenced to not less than three nor more than nine years based on his forgery conviction. Co-defendants in the case had either pleaded guilty and received probation or had not been prosecuted at all. The appellate court disagreed that such disparity in sentencing between co-defendants constituted a discriminatory denial of equal protection. The court stated that "[E]quality in sentencing is not required for all participants in the same criminal act. The sentences should be molded to fit the criminal as well as the crime." 25 Ill. App. 3d at 1037, 324 N.E.2d at 247. The court emphasized, particularly, facts in the record indicating that defendant had been the instigator of the crime and had a history of convictions for similar offenses.

In People v. Gregg, 13 Ill. App. 3d 242, 300 N.E.2d 494 (1st Dist. 1973), however, the court modified concurrent sentences for armed robbery where there was a significant disparity between the sentences given defendant and those given his co-defendant. The court noted that the only difference between defendant and his co-defendants was that the co-defendants pleaded guilty. Additionally, unlike the *Schmidt* case, defendant was only 20 years old, had a child to support and had no prior criminal record.

662. ILL. REV. STAT. ch. 38, §§ 122-1 *et seq.* (1975).

Initial procedures under § 122-1 provide:

> The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition. . .verified by affidavit.

Section 122-2 illustrates the substantive requirements which must be contained in the petition:

> The petition shall. . .clearly set forth the respects in which petitioner's constitutional rights were violated. . . [and] shall have attached thereto affidavits, records, or other evidence supporting its allegations. . . .

663. ILL. REV. STAT. ch. 38, § 122-1 (1975).

Petitioner must demonstrate by a preponderance of the evidence that he has been denied a constitutional right.[664] Supporting factual data must be introduced at the post-trial hearing; allegations of infringement of rights without sufficient factual corroboration cannot support a claim for relief. In reviewing the sufficiency of petition allegations, the trial court must

> . . . examine the petition with a view to determining whether the allegations of fact, liberally construed in favor of the petitioner, and taken as true, make a showing of imprisonment in violation of the Federal or State constitution.[665]

The purpose for a proceeding under the Act is to inquire into the constitutionality of the original conviction; it is intended neither to relitigate the guilt or innocence of the complaining party, nor to revive issues heard on a direct appeal.[666] The Act is rather intended to remedy any denial of substantive constitutional rights which may have occured during the criminal proceedings which led to petitioner's conviction and imprisonment.[667]

Where the trial record is insufficient to support a constitutional claim on direct appeal, the Act makes it possible for defendant to collaterally attack his conviction by introducing facts outside the record.[668] However, if defendant chooses to proceed through post-conviction petition rather than direct appeal, he forfeits the right to complain of trial errors of non-constitutional dimension. Both remedies may be pursued simultaneously; however, a decision on constitutional issues in either proceeding will be res judicata as to the other.

Effect of Prior Proceedings

Issues litigated, and issues which should have been litigated, at

664. *See, e.g.*, People v. Meeks, 27 Ill. App. 3d 144, 326 N.E.2d 413 (1st Dist. 1975) (defendant convicted of narcotics possession not advised of his constitutional right to persist in a not guilty plea and demand a jury trial). *See also* People v. Meredith, 21 Ill. App. 3d 305, 314 N.E.2d 612 (5th Dist. 1974); People v. Ashley, 34 Ill. 2d 402, 216 N.E.2d 126 (1966); People v. Sadeghzadeh, 17 Ill. App. 3d 601, 308 N.E.2d 304 (1st Dist. 1974); People v. Gulley, 27 Ill. App. 3d 560, 327 N.E.2d 68 (2d Dist. 1975).

665. People v. Crislip, 20 Ill. App. 3d 175, 177, 312 N.E.2d 830, 832 (5th Dist. 1974). Defendant convicted in a burglary case appealed, contending that his guilty plea was not freely given but had been coerced by threats from the sheriff's department. The court held that defendant was entitled to an evidentiary hearing to present facts not present in the record despite the fact that defendant had asserted at trial that the plea was voluntary.

666. People v. Jaros, 27 Ill. App. 3d 44, 325 N.E.2d 715 (2d Dist. 1975).

667. People v. Sadeghzadeh, 17 Ill. App. 3d 601, 308 N.E.2d 304 (1st Dist. 1974); People v. Fleming, 23 Ill. App. 3d 221, 318 N.E.2d 518 (2d Dist. 1974) (failure to provide defendant notice of his right to appeal did not raise a substantial constitutional question).

668. People v. Murrell, 60 Ill. 2d 287, 326 N.E.2d 762 (1975).

trial are dismissed from the post-conviction hearing. Further, the court will not consider issues fully reviewed on direct appeal. Such prior proceedings bar reconsideration of previously litigated issues under the doctrines of waiver and res judicata.[669]

Res Judicata. For purposes of the Post-Conviction Hearing Act, the doctrine of res judicata includes not only all issues which were raised in a prior proceeding, but also all issues which could have been raised.[670]

Waiver. The doctrines of waiver and res judicata are related for purposes of the Post-Conviction Hearing Act. Any issue which was or should have been raised is deemed waived and thereby is res judicata.[671]

Exceptions to the Doctrines of Waiver and Res Judicata. The concept of fundamental fairness tempers blanket application of the doctrines of waiver and res judicata. For example, a retroactive change in the law upon which a conviction was based will allow a petitioner to raise an issue for the first time in a post-conviction proceeding.[672] However, a petitioner may not challenge the validity of the statute under which he was convicted initially in a post-conviction proceeding.[673]

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669. *See, e.g.*, People v. Smith, 22 Ill. App. 3d 661, 318 N.E.2d 350 (1st Dist. 1974); People v. Hill, 39 Ill. 2d 61, 233 N.E.2d 546 (1968).

670. *See, e.g.*, People v. Adams, 52 Ill. 2d 224, 287 N.E.2d 695 (1972) (defendant not permitted to introduce new evidence regarding his mental capacity in a post-conviction proceeding when such evidence could have been made available at trial); People v. Gonzales, 9 Ill. App. 3d 661, 292 N.E.2d 765 (4th Dist. 1973); People v. Jones, 24 Ill. App. 3d 1052, 322 N.E.2d 579 (5th Dist. 1974).

In People v. Smith, 22 Ill. App. 3d 661, 318 N.E.2d 350 (1st Dist. 1974), the Illinois Supreme Court on direct appeal considered and rejected the following claims of petitioner: the denial of a motion to suppress evidence illegally seized, the sufficiency of the jury instructions, and the denial of the right to a speedy trial. In a post-conviction petition filed after the reviewing court's decision, petitioner alleged that the issues had not been properly presented in his pro se brief. The post-conviction hearing court disagreed and dismissed the petition rather than give further consideration to previously litigated claims.

671. *See, e.g.*, People v. Ureste, 28 Ill. App. 3d 97, 327 N.E.2d 333 (3d Dist. 1975). Petitioner alleged for the first time in his post-conviction petition that adverse publicity had prejudiced his right to a fair trial. Neither contention had been raised either at trial or on direct appeal. Since all the allegations contained in the post-conviction petition were available for presentation in the earlier proceedings, the court found the issues had been waived and were res judicata. *See also* People v. Lampson, 24 Ill. App. 3d 578, 321 N.E.2d 516 (3d Dist. 1974); City of Chicago v. Robinson, 32 Ill. App. 3d 149, 336 N.E.2d 158 (1st Dist. 1975); People v. Smeathers, 26 Ill. App. 3d 1027, 325 N.E.2d 411 (2d Dist. 1975).

672. People v. Sarelli, 55 Ill. 2d 169, 302 N.E.2d 317 (1973). Defendant had been convicted of the unlawful sale of marijuana. On appeal he had questioned the sufficiency of the evidence but not the constitutionality of the stautute, which was later found to be unconstitutional. The court found that fundamental fairness required that defendant's conviction be set aside.

673. *See* People v. Grammer, 24 Ill. App. 3d 648, 321 N.E.2d 735 (3d Dist. 1974). In that case, defendant, convicted of aggravated incest, alleged for the first time in his post-

Another exception to the waiver and res judicata doctrines is the claim of incompetency of counsel, an extenuating circumstance which may permit a petitioner another opportunity to present meritorious arguments in a post-conviction petition. Although generally any issue not raised in the initial post-conviction proceeding is unavailable on appeal or in a subsequent post-conviction petition, the courts abate the rule where it can be demonstrated that petitioner was not represented by competent counsel.[674]

Other Remedies. If petitioner is prevented from raising meritorious claims of constitutional violations under the Post-Conviction Hearing Act, he may pursue his contentions by means of a writ of habeas corpus, once exhaustion of remedies within the statutory language[675] can be shown.

The Requirement of an Evidentiary Hearing

When a petition sets forth a prima facie claim of a violation cognizable under the act, *i.e.*, a claim not barred by the doctrines of waiver or res judicata, the trial judge is empowered to afford the petitioner an evidentiary hearing[676] or to dismiss the petition on the merits if the allegations therein are refuted by the record in the original proceedings.[677] Generally, a trial court may dismiss a post-

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conviction petition that the statute defining the offense denied him equal protection of the law. In support of his argument the defendant cited People v. Sarelli, 55 Ill. 2d 169, 302 N.E.2d 317 (1973), wherein petitioner was permitted to attack the statute on which his conviction was based because it had been held unconstitutional in a subsequent proceeding. The court refused to entertain Grammer's claim, distinguishing *Sarelli* because in that case Sarelli had collaterally attacked a statute actually declared unconstitutional. In *Grammer*, petitioner asked that the court declare the statute unconstitutional, and then overturn his conviction as based on an unconstitutional law. The court refused to do so, fearing that the ultimate result of such a decision would threaten the finality of all convictions.

674. *See* People v. Slaughter, 39 Ill. 2d 278, 235 N.E.2d 566 (1968); People v. Edgeworth, 30 Ill. App. 3d 289, 332 N.E.2d 716 (5th Dist. 1975); People v. Wallace, 24 Ill. App. 3d 195, 320 N.E.2d 428 (5th Dist. 1974); People v. Bain, 24 Ill. App. 3d 282, 320 N.E.2d 426 (5th Dist. 1974).

675. 28 U.S.C. § 2254 (1970). *See* United States *ex rel.* Bracey v. Petrelli, 356 F. Supp. 699 (N.D. Ill. 1973).

676. *See* People v. Crislip, 20 Ill. App. 3d 175, 312 N.E.2d 830 (5th Dist. 1974); People v. Thomas, 38 Ill. 2d 321, 231 N.E.2d 436 (1967), where the court held that a previous determination on a direct appeal restricted to the record made at trial did not preclude defendant from raising the claim in a post-conviction petition that he was represented by incompetent counsel, and that his plea of guilty was the result of intimidation and misrepresentation of counsel. Such allegations depended for proof on facts not in the record. *Contra* People v. Harris, 50 Ill. 2d 31, 276 N.E.2d 327 (1971).

677. *See, e.g.*, People v. Spicer, 47 Ill. 2d 114, 264 N.E.2d 181 (1970) (defendant convicted on a guilty plea to a burglary charge had no valid claim where the record showed that the plea was given intelligently and voluntarily); People v. Compton, 21 Ill. App. 3d 255, 314 N.E.2d 615 (2d Dist. 1974) (defendant's petition for post-conviction relief failed to show that defendant's guilty plea was a result of coercion); People v. Good, 18 Ill. App. 3d 374, 309

conviction petition on the basis of the trial record. However, where the petition is based upon matters collateral to the record, and the transcript does not negate the petitioner's contentions, petitioner is entitled to an evidentiary hearing. Conversely, where the record clearly rebuts petitioner's contentions, the court will not afford petitioner a hearing, but will dismiss his claim as frivolous.

The cases do not strictly adhere to these general rules, but rather are divided on the issue of whether an evidentiary hearing is required to determine the validity of a claim which the record appears to refute. In *People v. Crislip*,[678] petitioner appealed the dismissal of his post-conviction petition without the benefit of an evidentiary hearing. His allegation that his guilty plea was not made freely and voluntarily was refuted by evidence appearing in the record. The court held that a collateral attack based on allegations of a coerced plea could not be estopped by the doctrine of res judicata as the purpose of the post-conviction proceeding was to determine the validity of defendant's conviction. Here, the petitioner was entitled to an evidentiary hearing to prove the verity of his claim.[679] The courts, however, are not unanimous in this view.[680]

Contrary to *Crislip*, the court in *People v. Spicer*[681] found that where the record left no doubt that defendant had entered a guilty plea with full understanding of the consequences and without coercion, a hearing was not in order.

Apparently, where the record is silent or not sufficiently contradictory to petitioner's allegations, an evidentiary hearing must be held; while the cases differ on ordering an evidentiary hearing where the claim appears to be refuted by the record, *Spicer* rather than *Crislip*, represents the majority view.

Statute of Limitations

The time limit within which to file a post-conviction petition

N.E.2d 648 (1st Dist. 1974) (defendant's claim dismissed as nonmeritorious where the record showed clearly that the defendant's guilty plea was freely made and his waiver of a jury trial was fully understood).

678. 20 Ill. App. 3d 175, 312 N.E.2d 830 (5th Dist. 1974).

679. *See* People v. Airmers, 34 Ill. 2d 222, 215 N.E.2d 225 (1966); People v. Wegner, 40 Ill. 2d 28, 237 N.E.2d 486 (1968).

680. *See, e.g.*, People v. Good, 18 Ill. App. 3d 374, 309 N.E.2d 648 (1st Dist. 1974); People v. Jenkins, 14 Ill. App. 3d 405, 302 N.E.2d 677 (1at Dist. 1973); People v. Valadez, 17 Ill. App. 3d 499, 308 N.E.2d 253 (1st Dist. 1974).

681. 47 Ill. 2d 114, 264 N.E.2d 181 (1970). *See also* People v. Brown, 21 Ill. App. 3d 996, 316 N.E.2d 198 (4th Dist. 1974); *contra* People v. Dunn, 13 Ill. App. 3d 72, 299 N.E.2d 762 (5th Dist. 1973) (petitioner's allegations considered a substantial question and not sufficiently controverted by the record).

begins to run when a defendant is sentenced.[682] The original post-conviction hearing act in Illinois contained a five-year statute of limitations. However, in 1965 section 122-1[683] was amended to allow a petitioner 20 years within which to file for post-conviction relief. This 20-year period is not applicable to a petitioner who can fall within a statutory exception:

> No proceedings under this Article shall be commenced more than 20 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.[684]

While this language appears to offer a reprieve, petitioner bears the heavy burden of proving no culpable negligence by a preponderance of the evidence.

Grounds for Relief

The Right to Effective Counsel. Incompetence of counsel is an issue of substantial constitutional dimension and is cognizable in a post-conviction proceeding; however, a petitioner raising such claims must demonstrate actual incompetence in the lack of diligent performance of counsel's obligations at trial which resulted in substantial prejudice to petitioner. It is further required that petitioner show that the case would have been decided otherwise were it not for such dereliction of counsel's duty.[685] Mere allegations of incompetence without factual support will not suffice.

Trial tactics and strategy are not reviewable notwithstanding that other attorneys might have acted differently.[686] The courts have refused to sustain complaints where: counsel refused to raise claims he considered frivolous on appeal or in a post-conviction proceeding;[687] counsel maintained as attorney for defense after motions to withdraw were refused for lack of apparent grounds;[688] and record

682. *See* People v. Rose, 43 Ill. 2d 273, 253 N.E.2d 456 (1969).

683. ILL. REV. STAT. ch. 38, § 122-1 (1975).

684. ILL. REV. STAT. ch. 38, § 122-1 (1975). Application of the statute, as amended, is not retroactive, People v. Harrison, 32 Ill. App. 3d 641, 336 N.E.2d 143 (1st Dist. 1975).

685. People v. Woods, 10 Ill. App. 3d 6, 293 N.E.2d 633 (1st Dist. 1973).

686. *See, e.g.*, People v. Stokes, 21 Ill. App. 3d 754, 316 N.E.2d 127 (1st Dist. 1974), where the court found that the alleged incompetency of trial counsel was simply counsel's trial strategy so that defendant's guilty plea was not made without full understanding). *See also* People v. Scarponi, 17 Ill. App. 3d 824, 308 N.E.2d 632 (4th Dist. 1974) (no prior manifestation of displeasure and no showing of incompetence in the record where defense counsel had asked leave to withdraw because of disagreement with defendant's wife).

687. *See* People v. Stokes, 21 Ill. App. 3d 754, 316 N.E.2d 127 (1st Dist. 1974). *See also* People v. Wesley, 30 Ill. 2d 131, 195 N.E.2d 708 (1964); People v. Robinson, 21 Ill. 2d 30, 171 N.E.2d 11 (1961).

688. *See, e.g*, People v. Pierce, 21 Ill. App. 3d 705, 315 N.E.2d 572 (1st Dist. 1974); People

of proceedings fails to demonstrate indolence or resulting harm.[689]

Conversely, where the actions of trial counsel deprived petitioner of his right to appeal cognizable issues[690] or, where a conflict of interest hinders trial counsel's effective performance and a request for withdrawal is denied,[691] petitioner's right to effective assistance of counsel is violated. Convictions obtained under these circumstances cannot stand.

Each petitioner is entitled to a fair and full opportunity to present his grievances during post-conviction proceedings with the aid of effective counsel. Supreme Court Rule 651,[692] the codification of the Illinois Supreme Court's decision in *People v. Slaughter*,[693] provides:

> . . . if the trial court determines that petitioner is indigent, it shall order that a transcript of the record . . . be prepared . . . and shall appoint counsel. . . .[694]

The duties of counsel as delineated in the Post-Conviction Hearing Act and Rule 651 include: (1) consultation with the prisoner either in person or by mail; (2) examination of the trial record in order to determine whether any constitutional violations have occurred; (3) ascertaining the basis of the grievance alleged by the prisoner in his pro se petition;[695] (4) amending the pro se petition to conform to acceptable legal standards and adequately represent the constitutional contentions of the prisoner.

Under the criteria of Rule 651, and as stated in *Slaughter*, dismissal of a petition prepared without benefit of effective counsel is not res judicata, and may be attacked on appeal or in a subsequent post-conviction proceeding. Fundamental fairness requires that petitioner be afforded the benefit of counsel to place his grievances in proper legal form; indeed, the Act itself includes provisions for appointed counsel on the theory that many petitions filed by prisoners would be prepared without aid of counsel.[696] A conviction rendered

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v. McKinney, 25 Ill. App. 3d 586, 323 N.E.2d 478 (1st Dist. 1975).

689. *See* People v. Scarponi, 17 Ill. App. 3d 824, 308 N.E.2d 632 (4th Dist. 1974).

690. *See* People v. Edgeworth, 30 Ill. App. 3d 289, 332 N.E.2d 716 (1st Dist. 1975).

691. People v. Wallace, 24 Ill. App. 3d 195, 320 N.E.2d 428 (5th Dist. 1974); People v. Bain, 24 Ill. App. 3d 282, 320 N.E.2d 426 (5th Dist. 1974).

692. ILL. REV. STAT. ch. 110A, § 651(c) (1975).

693. 39 Ill. 2d 278, 235 N.E.2d 566 (1968).

694. ILL. REV. STAT. ch. 110A, § 651(c) (1975).

695. *See, e.g.*, People v. Williams, 23 Ill. App. 3d 988, 320 N.E.2d 411 (1st Dist. 1974); People v. Slaughter, 39 Ill. 2d 278, 235 N.E.2d 566 (1968); People v. Seidler, 18 Ill. App. 3d 705, 310 N.E.2d 421 (5th Dist. 1974).

696. *See* People v. Williams, 23 Ill. App. 3d 988, 320 N.E.2d 411 (1st Dist. 1974); People v. Dean, 28 Ill. App. 3d 196, 328 N.E.2d 130 (1st Dist. 1975). In *Williams*, the court held that petitioner's failure to allege indigence or request the appointment of counsel to represent him

without representation by effective counsel or a post-conviction petition dismissed by reason of legal insufficiency where Rule 651 is not complied with will be reversed.

Guilty Pleas. A guilty plea, in order to meet the constitutional requirements of due process, must be intelligent and voluntary;[697] in addition, the record must clearly indicate that the plea was made freely and intelligently.[698]

Where the record reflects that the trial judge has ascertained from defendant that his plea is freely given and that he fully understand the nature of the offense with which he is charged and the possible consequences of that offense, it is deemed adequate to rebut allegations of a constitutional infringement.[699] Where the standard established in *Boykin v. Alabama*[700]—the requirement that a guilty plea withstands review only where the record affirmatively shows that the defendant who pleaded guilty entered his plea knowingly and voluntarily—is met, a petition alleging a constitutionally invalid guilty plea will not be considered. In regard to other related procedures in connection with a plea of guilty, the violation alleged must be a substantial constitutional violation. Here, as with other areas of alleged violation, merely describing a procedural or statutory violation in constitutional terms will not serve to bring the allegations within the provisions of the Act.[701] Where the petitioner alleges infringement of rights based on statutes or on rules of common

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in his post-conviction proceeding did not relieve the court of its duty to ascertain whether the petitioner desired assistance, where the record established that he had previously qualified as an indigent. *See also* People v. Dye, 50 Ill. 2d 49, 277 N.E.2d 133 (1971).

697. People v. Reeves, 50 Ill. 2d 28, 276 N.E.2d 318 (1971).

698. This dual requirement was established in Boykin v. Alabama, 395 U.S. 238 (1969) and Brady v. United States, 397 U.S. 742 (1970). On the basis of this rule, petitioner in People v. Meredith, 21 Ill. App. 3d 305, 314 N.E.2d 612 (5th Dist. 1974) successfully secured reversal of his conviction for possession of narcotics. Petitioner claimed that he had not been advised of his right to persist in a plea of not guilty; the record failed to disclose that his guilty plea was voluntary or that he understood the consequences of his actions. The mere statement of defense counsel that defendant wished to withdraw his not guilty plea and enter a guilty plea in its place was found insufficient to show that defendant understood the nature of the charge.

699. *See, e.g.*, People v. Brown, 21 Ill. App. 3d 996, 316 N.E.2d 198 (4th Dist. 1974). *See also* People v. Lawrence, 26 Ill. App. 3d 685, 325 N.E.2d 363 (1st Dist. 1975); People v. Wolfe, 27 Ill. App. 3d 551, 327 N.E.2d 416 (1st Dist. 1975).

700. 395 U.S. 238 (1969).

701. *See* People v. Barr, 14 Ill. App. 3d 742, 303 N.E.2d 202 (1st Dist. 1973), where petitioner claimed that the court had not complied with Supreme Court Rule 402 and that, as a result, his conviction should be quashed. Specifically, petitioner alleged that the court had not ascertained whether he understood the charge against him, a claim which was clearly rebutted by the record, and the consequences of his plea. The court held that the petition must allege violations of constitutional magnitude in order to come within the scope of the Post-Conviction Hearing Act. *See also* People v. Turner, 25 Ill. App. 3d 847, 323 N.E.2d 371 (3d Dist. 1975).

law, the Act offers no relief.[702]

Excessiveness of Sentence. Generally, a claim that an excessive sentence has been imposed is not cognizable under the Post-Conviction Hearing Act.[703] Any sentence within the proscribed statutory limits, although perhaps reviewable on appeal, raises no constitutional issue.[704] Claims regarding disparity of sentences among co-defendants,[705] receipt of a minimum sentence of more than one-third the statutory maximum,[706] and severity of sentence disproportionate to the seriousness of the offense[707] have been held insufficient to raise an issue within the scope of the Act. Remedy for such violations lies in a direct appeal.

However, where the courts find that an excessive sentence was imposed as a punishment for the exercise of substantive constitutional rights, post-conviction relief is granted.[708]

Sufficiency and Admissibility of the Evidence. Questions concerning the sufficiency of the evidence[709] or the failure to establish guilt beyond a reasonable doubt,[710] while proper issues for appeal, are not of the constitutional nature required to invoke a post-conviction proceeding under the Act. Only under exceptional circumstances will the court consent to review the record when petitioner challenges the sufficiency of the evidence. Such circumstances were present in *People v. Garrett*,[711] where defendant was prevented from presenting evidence supporting his theory that the victim had committed suicide. The court stated:

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702. *See* People v. Cox, 53 Ill. 2d 101, 291 N.E.2d 1 (1972), which held that failure to advise defendant of his right to appeal is insufficient grounds for post-conviction relief; People v. French, 46 Ill. 2d 104, 262 N.E.2d 901 (1970), where the same result was reached with regard to statutory requirements implementing defendant's guarantees to a speedy trial.

703. *See, e.g.*, People v. Ballinger, 53 Ill. 2d 388, 292 N.E.2d 400 (1973); People v. Null, 13 Ill. App. 3d 60, 299 N.E.2d 792 (4th Dist. 1973); People v. Hanks, 28 Ill. App. 3d 586, 328 N.E.2d 601 (4th Dist. 1975).

704. *See, e.g.*, People v. Ballinger, 53 Ill. 2d 388, 292 N.E.2d 400 (1973); People v. Seidler, 18 Ill. App. 3d 705, 310 N.E.2d 421 (5th Dist. 1974).

705. *See* People v. Hudson, 14 Ill. App. 3d 708, 303 N.E.2d 185 (1st Dist. 1973).

706. *See* People v. Holman, 12 Ill. App. 3d 307, 297 N.E.2d 752 (3d Dist. 1973).

707. *See* People v. Nixon, 17 Ill. App. 3d 112, 308 N.E.2d 17 (1st Dist. 1974).

708. *See, e.g.*, People v. Dennis, 28 Ill. App. 3d 74, 328 N.E.2d 135 (1st Dist. 1975), where petitioner contended that the trial court had imposed an unduly harsh sentence because of petitioner's refusal to plea bargain with the State's Attorney. Petitioner had been offered a sentence of two to six years in return for guilty plea, but had insisted on exercising his right to a trial by jury. Upon conviction by the jury, the court imposed a sentence of 40 to 80 years. The post-conviction court held that under the circumstances, the trial court's actions were tantamount to punishment imposed on defendant for the exercise of his constitutional rights and remanded for modification of sentence.

709. *See* People v. Smith, 22 Ill. App. 3d 661, 318 N.E.2d 350 (1st Dist. 1974).

710. *See* People v. Christeson, 10 Ill. App. 3d 214, 293 N.E.2d 138 (4th Dist. 1973).

711. 26 Ill. App. 3d 786, 326 N.E.2d 143 (1st Dist. 1975).

> [C]ertain allegations set forth in the post-conviction pleading, if proved, could amount to a substantial showing that defendant's constitutional rights were violated at his trial. . .[F]undamental fairness requires that defendant be entitled an opportunity to prove such allegations because, if proved, fundamental fairness would in turn require a new trial.[712]
>
> While extraordinary situations may invoke the protections of the Act, failure to object to the admissibility of the evidence, to request preliminary hearings, or to move for the suppression of evidence are not of themselves proper claims for relief, but may lend support to an allegation of incompetency of counsel.[713]

Nature of the Offense, Requirement of Imprisonment and Mootness

Section 122-1 of the Illinois Post-Conviction Hearing Act provides that a remedy is available to "[a]ny person imprisoned in the penitentiary. . ." The courts originally interpreted this provision to allow only persons convicted of serious crimes and incarcerated in the penitentiary this remedy.[714] The Act was not interpreted to include misdemeanants or persons in county jails. This construction was overruled by the Supreme Court of Illinois in *People v. Warr*,[715] where the court ordered that

> . . .a remedy be provided by which one who has been convicted of a misdemeanor may raise questions as to the constitutional validity of the procedures employed in obtaining his conviction.[716]
>
> A defendant convicted of a misdemeanor may now allege substantial violation of his constitutional rights, resulting in his conviction, in a post-conviction proceeding. Requirements in such a proceeding include:
>
> (1) the defendant need not be imprisoned;
> (2) the proceeding shall be commenced within four months after rendition of final judgment if judgment was entered upon a plea of guilty and within six months after the rendition of final judgment following a trial upon a plea of not guilty;
> (3) counsel need not be appointed to represent an indigent defendant if the trial judge, after examination of the petition, enters an order finding that the record in the case, read in conjunction with the defendant's petition and the responsive pleading of the prosecution, if any, conclusively shows that the defendant is entitled to

712. Id. at 802, 326 N.E.2d at 155.
713. *See, e.g.*, People v. Holmes, 17 Ill. App. 3d 102, 307 N.E.2d 776 (1st Dist. 1974).
714. *See* People v. Dale, 406 Ill. 238, 92 N.E.2d 761 (1950).
715. 54 Ill. 2d 487, 298 N.E.2d 164 (1973).
716. *Id.* at 492, 298 N.E.2d at 166.

no relief.[717] Although the Act requires that defendant be imprisoned in order to secure post-conviction relief, it is not so narrowly construed as to preclude relief in every case where the petition is not completed before the prison term terminates[718] or petitioner is released or paroled.[719] A petition under such circumstances is not moot, since such a conviction can be used to impeach defendant if he should be a participant in subsequent litigation.

Proper Designation of the Remedy

A pro se petition for a writ of habeas corpus may, under appropriate circumstances, be considered by the trial court as a request for relief under the Illinois Post-Conviction Hearing Act.[720] The court will not prevent a petitioner from asserting his constitutional grievances under the Act due to mere defects in form. A petition can be amended with the assistance of counsel, appointed by the court. Substantial defects, however, merit dismissal; these include failure to raise issues of constitutional magnitude[721] or filing a petition for habeas corpus relief in a court which lacks jurisdiction. In the latter case, the writ cannot be used as a basis for post-conviction relief because such proceedings must be commenced in the court where the original conviction was entered.[722]

PRISONERS' RIGHTS

The Assertion of Prisoners' Rights Under Section 1983

The major vehicle for the affirmative assertion of prisoners' rights has been a suit under 42 U.S.C. § 1983.[723] The advantage of section 1983 over alternative federal remedies, such as habeas corpus,[724] has

717. *Id.* at 493, 298 N.E.2d at 167. *See also* People v. Davis, 39 Ill. 2d 325, 235 N.E.2d 634 (1968); People v. Murrell, 60 Ill. 2d 287, 326 N.E.2d 762 (1975).

718. *See* People v. Davis, 39 Ill. 2d 325, 235 N.E.2d 634 (1968).

719. *See* People v. Smalley, 33 Ill. App. 3d 677, 338 N.E.2d 193 (2d Dist. 1975).

720. *See, e.g.*, People *ex rel.* Palmer v. Twomey, 53 Ill. 2d 479, 292 N.E.2d 379 (1973); People *ex rel.* Berlin v. Twomey, 27 Ill. App. 3d 1074, 328 N.E.2d 58 (1st Dist. 1975). Where appointed counsel failed to amend the pro se petition for a writ of habeas corpus so that it may be entertained as a petition for post-conviction relief under the Act, the court in People v. Moore 26 Ill. App. 3d 156, 325 N.E.2d 42 (5th Dist. 1975), held the trial court was in error for not treating the petition as such. Petitioner had claimed that the state had failed to disclose to his trial counsel a statement signed by a prosecution witness which was essential to an effective cross-examination. The cause was reversed and remanded with instructions to amend the insufficient petition and proceed with the petitioner's claim as a request for post-conviction relief.

721. *See, e.g.*, People v. Crislip, 20 Ill. App. 3d 175, 312 N.E.2d 830 (5th Dist. 1974).

722. *See, e.g* ., People *ex rel.* McGuire v. Sympson, 20 Ill. App. 3d 139, 312 N.E.2d 854 (5th Dist. 1974).

723. 42 U.S.C. § 1983 (1970) [hereinafter referred to as section 1983].

724. 28 U.S.C. § 2254 (1970).

been derived from the fact that exhaustion of state administrative and judicial remedies, required in habeas corpus actions,[725] has heretofore not been required prior to the commencement of an action under section 1983.[726] Recent developments in the law suggest that both the ability of prisoners to bypass state remedies prior to section 1983 actions, and the availability of section 1983 as a remedy to prisoners in general, may be seriously limited in the future.

The seminal decision involving the necessity of exhaustion of state court remedies prior to a suit under section 1983 is *Monroe v. Pape*,[727] in which the United States Supreme Court held that the exhaustion of state judicial remedies is not a prerequisite to a section 1983 action.[728] In *McNeese v. Board of Education*,[729] the Court expanded *Monroe*, holding that exhaustion of state administrative remedies is not required prior to an action under section 1983. Since *McNeese* a consistent line of precedents has emerged, similarly declaring that exhaustion was not required in section 1983 suits.[730]

In response to these precedents courts have been confronted by what both courts and commentators have termed a virtual flood of prisoners' rights litigation.[731] The resulting burden was discussed in a lengthy opinion by the Fourth Circuit Court of Appeals in *McCray v. Burrell*.[732] The court concluded that despite clear policy arguments in favor of requiring prisoners to seek state remedies prior to commencement of federal actions under section 1983, the consistent line of Supreme Court precedents prevented any court, other than the Supreme Court itself, from so holding. The Supreme Court has granted certiorari in *McCray*, and the case is now pending before the Court. The granting of certiorari in *McCray*, in light of other recent Supreme Court precedents limiting the scope of section 1983,[733]

725. 28 U.S.C. § 2254 (b) (1970).

726. Ellis v. Dyson, 421 U.S. 426 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Damico v. California, 389 U.S. 416 (1967) (per curiam); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

727. 365 U.S. 167 (1961).

728. *Id.* at 183.

729. 373 U.S. 668 (1963).

730. Despite this clear line of precedents, one commentator has recently found that a percentage of cases filed in the Northern District of Illinois continue to be dismissed for failure to exhaust state remedies. Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. Section 1983: A Statistical Survey In The Northern District of Illinois*, 6 LOY. U. CHI. L.J. 527, 534 (1975) [hereinafter cited as Bailey].

731. McCray v. Burrell, 516 F.2d 357, 360 (4th Cir. 1975) (per curiam), *cert. granted*, 423 U.S. 923.

The proposition that prisoners' claims under section 1983 present an intolerable burden for the federal courts is questioned in Bailey, *supra* note 730, at 544-45.

732. 516 F.2d 357 (4th Cir. 1975).

733. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the Court refused to enjoin enforce-

clearly raises the possibility that section 1983 may be severely limited as a vehicle for the assertion of prisoners' rights, and that prisoners will be required to seek state relief in the first instance.

Recent limitations on the scope of issues cognizable under section 1983 present further difficulties for the prisoner-plantiff. In *Wilwording v. Swenson*[734] petitioners challenged the living conditions and disciplinary measures in the Missouri state penitentiary via a writ of habeas corpus. The writ was dismissed in an opinion by the district court, upheld on appeal, on the ground that the petitioners had failed to comply with the exhaustion requirements of 28 U.S.C. section 2254.[735] The Supreme Court reversed, holding that the exhaustion requirements of section 2254 need not be met since the writ could be read as stating a valid claim under section 1983.[736] Moreover, in the course of so holding, the Court specifically stated that the issues raised in petitioners' pleadings relating to living conditions and disciplinary procedures were cognizable under section 2254.[737] Thus, *Wilwording* apparently defines a broad range of grievances for which prisoners had alternative federal remedies: a suit under section 1983 or a writ under section 2254.

The Supreme Court, in *Preiser v. Rodriguez*,[738] once more construed the relationship between section 2254 and section 1983. In *Preiser*, the prisoner-plaintiffs alleged wrongful deprivation of their good time in state disciplinary proceedings and sued under section 1983 to compel restoration of their good time credits. The Court held that since restoration of good time credits would entitle the prisoners to immediate release, their suit was a challenge to the "very fact or duration of [their] physical imprisonment," and therefore cognizable only under habeas corpus.[739] It is important to note that the

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ment of an Ohio public nuisance statute in state court. The state court had entered judgment enjoining the nuisance and appellant, rather than appealing, sought injunctive relief in the federal district court. The Court's decision was not founded on 28 U.S.C. § 2283 (1974); the Court explicitily reaffirmed its decision in Mitchum v. Foster, 407 U.S. 225 (1972) that 42 U.S.C. § 1983 (1970) contains an expressly authorized congressional exception to 28 U.S.C. § 2283 (1974). 420 U.S. at 594 n.1. Instead the Court found that the principles of equity and comity enunciated in Younger v. Harris, 401 U.S. 37 (1971) forbade the issuance of federal relief while state remedies remain available. The extension of *Younger*, which forbade federal courts from enjoining pending state *criminal* actions, to state *civil* actions, evidences a clear preference on the part of the current Supreme Court for resolution of disputes in state proceedings in the first instance, and suggests that the principles of "equity and comity" defined in *Younger* will render section 1983 a much more limited remedy in the future.

734. 404 U.S. 249 (1971).

735. 22 U.S.C. § 2254 (1970) [hereinafter referred to as section 2254].

736. 404 U.S. at 251.

737. *Id.*

738. 411 U.S. 475 (1973).

739. *Id.* at 500.

Court did not, however, hold that where habeas corpus relief is available, it constitutes the exclusive federal remedy. Instead the Court specifically noted that challenges to prison conditions, traditionally cognizable under section 1983, may also be cognizable under habeas corpus, and relegated to future decisions the definition of the limit of habeas corpus as an alternative to section 1983 relief.

Left unsettled in *Preiser* is the question whether claims which challenge the duration of a prisoner's confinement are cognizable under section 1983 where the prisoner, even if successful in his challenge, will not be entitled to immediate release. The Seventh Circuit Court of Appeals recently considered this question in *Carroll v. Sielaff*,[740] reversing a district court determination that jurisdiction was lacking under section 1983. In *Carroll*, the prisoners alleged loss of opportunity to earn compensatory good time. The district court had held that since the prisoners' claim challenged the fact or duration of confinement their claim was cognizable, in light of *Preiser*, only through habeas corpus. The appellate court held that claims challenging the fact or duration of confinement are limited to habeas corpus under *Preiser* only where the prisoners will be entitled to immediate release if successful,[741] and found that the prisoners' claim stated a valid claim under section 1983. Apparently, prisoners in the Seventh Circuit may presently attack denials of good time, or other measures which affect the duration of their confinement, through an action under section 1983, so long as they will not, if successful, be entitled to immediate release.

First Amendment Claims

In *Procunier v. Martinez*,[742] the United States Supreme Court defined the standard by which prison regulations affecting prisoners' first amendment rights are to be judged. This two-part test recapitulated criteria previously advanced in *United States v. O'Brien*,[743] requiring that the regulation in question further a substantial governmental interest, and that the restriction on first amendment rights be no greater than necessary to protect the governmental interest involved.[744] Arguably this standard affords prisoners greater

740. 514 F.2d 415 (7th Cir. 1975).

741. *Id.* at 416.

742. 416 U.S. 396 (1974).

743. 391 U.S. 367 (1968).

744. Procunier v. Martinez, 416 U.S. 396 (1974). *See* Note, 63 GEO. L.J. 331, 627 (1974) and Comment, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. U. L. REV. 352, 360 n.24 (1975) for a discussion of interpretation

first amendment protections than they have heretofore enjoyed in the Seventh Circuit.[745]

The Court's opinion in *Martinez* was greatly influenced by the fact that the restrictions involved necessarily restricted the first amendment rights of non-prisoners to communicate with prisoners as well as the first amendment rights of prisoners themselves.[746] Thus, it is difficult to predict how *Martinez* will affect the ability of prison officials to read inmates' mail,[747] regulate mass mailings, or otherwise restrict the first amendment rights of prisoners themselves.[748]

In *Pell v. Procunier*,[749] prisoners and media representatives challenged a state regulation prohibiting press interviews with specific prison inmates. The district court ruled that the prison officials had failed to show the necessity of a total ban on prison interviews in order to protect the state's admittedly substantial interest in prison security.[750] The state thus failed to meet the second step of the test announced in *Martinez*. However, in deciding *Procunier*, the Su-

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problems caused by the Supreme Court's substitution of the *O'Brien* test's "essential" with "generally necessary."

745. *See, e.g.*, Morales v. Schmidt, 494 F.2d 85 (7th Cir. 1974), where the court required that the state demonstrate only that the regulation or practice is reasonably and necessarily related to the advancement of a justifiable purpose of imprisonment, *Id.* at 87; although, as Judge (now Justice) Stevens' concurring opinion explained, the court would place a heavier burden on the state when it acted on an ad hoc basis than when it attempted to implement a carefully drawn regulation. *Id.* at 87-88.

746. The intimate relationship between the first amendment rights of prisoners and the right of the public to ascertain prison conditions has been described in the following language:

> In so concluding, we rely primarily on the fact that the condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear.

Nolan v. Fitzpatrick, 451 F.2d 545, 547-48 (1st Cir. 1971).

747. New York may be eliminating some of the problems created by *Martinez*. The state's Correction Commission, headed by an attorney who is a long-time critic of the prison system, has proposed new rules. Among them is a censorship rule which would ban any reading of a prisoner's mail without a court-granted search warrant. Incoming mail could be opened and inspected for contraband but could not be read without a search warrant. *See* Chicago Tribune, Feb. 3, 1976. *Compare* ILL. REV. STAT. ch. 38, § 1003-7-2(d) (1975), which allows an inmate to send and receive an unlimited number of uncensored letters, but places almost total discretion in the prison director to allow mail to be opened and read.

748. It is also difficult to predict the effect *Martinez* will have on prisoners' first amendment claims relating to religious worship, since such claims have been regarded as relating to "preferred" freedoms, entitled to special protection. *See* Cruz v. Beto, 405 U.S. 319 (1972); Weaver v. Pate, 390 F.2d 145, 146 (7th Cir. 1968).

749. 417 U.S. 817 (1974).

750. Hillery v. Procunier, 364 F. Supp. 196, 202-03 (N.D. Cal. 1973).

preme Court significantly amended *Martinez*, by announcing an alternative means test:

> In order properly to evaluate the constitutionality of § 415.071, we think that the regulation cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison.[751]

Since the Court found two alternative means of communication available to prisoners, it held the regulation involved not violative of the prisoners' first amendment rights.[752]

At least one commentator has argued that the alternative means test announced in *Procunier* will prove so pervasive that the first amendment protections announced in *Martinez* will be extinguished entirely.[753] *Procunier* may signal a return to the "hands-off" policy by which courts leave prisoners' rights entirely in the hands of prison authorities.[754] While the decision in *Procunier* undoubtedly modifies existing law in the Seventh Circuit, it is doubtful that *Procunier* will be interpreted by the Seventh Circuit as requiring significant retrenchment. In *LaBatt v. Twomey*,[755] for example, decided after *Procunier*, the court held that a prisoner who alleged that he had been excluded from a selective release process because he had exercised his first amendment right to criticize the warden and prison administration stated a valid claim under section 1983.[756]

Access to Courts

In *Adams v. Carlson*,[757] the Seventh Circuit Court of Appeals

751. Pell v. Procunier, 417 U.S. 817, 823 (1974).

752. One of the alternatives was the right to communicate by mail, for which the Court cited *Martinez*. The Court's reliance on *Martinez* may be ill-founded since *Martinez* was not based exclusively on prisoners' first amendment rights.

753. *See* Comment, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. U.L. REV. 352, 365 (1975).

754. The "hands-off" policy is vividly illustrated by the decision in Brown v. Wainwright, 419 F.2d 1308 (5th Cir. 1969). *Brown* was an action by a state prisoner under 42 U.S.C. § 1983 to enjoin prison mail censors from removing stamps from the prisoner's outgoing mail. The Fifth Circuit, in dismissing the action, held that no federal rights were involved as the problem could be considered a mere property theft, not remediable under § 1983. The Supreme Court of the United States abandoned the "hands-off" policy, and the wide discretion it invested in prison administrators to regulate prison life, in Cruz v. Beto, 405, U.S. 319 (1972).

755. 513 F.2d 641 (7th Cir. 1975).

756. *See generally* Bach v. Illinois, 504 F.2d 1100 (7th Cir. 1974), *cert. denied sub nom.*, Bensinger v. Bach, 418 U.S. 910 (1974), in which the Seventh Circuit held that a prisoner's allegations of prison officials' harassment by interfering with his mail raised serious constitutional questions and should not have been dismissed.

757. 488 F.2d 619 (7th Cir. 1973).

recognized as fundamental the right of prisoners to unfettered access to courts.[758] Since *Adams* a consistent line of precedents has upheld prisoners' rights of access to courts in a wide variety of contexts. Thus, it has been held that a prisoner has a right to be present during the inspection of legal mail addressed to him,[759] and that a prisoner who alleged that his trial transcript had been seized by prison guards stated a cause of action for interference with his right of access to courts.[760] In *Black v. Brown*,[761] the court found the dismissal of a prisoner's claim improper when he alleged that he had been denied access to courts while in isolation and segregation in that he was not allowed to use pen or pencil, could not use the prison library, and was denied use of legal materials and the assistance of other inmates.[762]

The outer limit of a prisoner's right of access to courts in the Seventh Circuit is illustrated by *Bach v. Coughlin*.[763] In *Bach*, a prisoner claimed that his right of access was denied by a postal regulation which allowed prisoners to send three one-ounce letters to an attorney per week free of charge, but required prisoners to pay postage for any letters mailed beyond this limitation. The court found that the prison regulation involved was a reasonable attempt to balance the prisoner's right to use mails with legitimate budgetary considerations. The court also noted that the three free letters prisoners were permitted each week rendered entirely speculative the prisoner's allegation that the regulation prejudiced the prisoner's position in judicial proceedings, and therefore upheld the dismissal of the prisoner's action.[764]

In *Adams v. Carlson*,[765] the court construed prison conditions which restricted face-to-face conversations between prisoners and their attorneys. The prison attorney-prisoner consultation room had been altered by the construction of a glass partition, necessitating that prisoners and attorneys converse by telephone and that guards carry legal documents to inmates by hand. The court declined to

758. The constitutional basis of a prisoner's right of access to courts appears uncertain. *See* Wolff v. McDonnell, 418 U.S. 539, 575-76 (1974), in which the Court alternatively discusses the first, sixth and fourteenth amendments as providing the constitutional underpinning for right of access to courts.

759. Bach v. Illinois, 504 F.2d 1100, 1102-03 (7th Cir. 1974), *cert. denied sub nom.*, Bensinger v. Bach, 418 U.S. 910 (1974).

760. Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975).

761. 513 F.2d 652 (7th Cir. 1975).

762. *Id.* at 655.

763. 508 F.2d 303 (7th Cir. 1974).

764. *Id.* at 308.

765. 488 F.2d 619 (7th Cir. 1973).

rule that the partition constituted a per se violation of the prisoner's fundamental right of access, finding instead that the prison officials had failed to demonstrate sufficient justification for the intrusion posed by the partition.[766] However, the court's opinion leaves little doubt that any infringement or interference in the relationship between a prisoner and his attorney will be strictly construed. The basis of the court's opinion was that the prisoner's right to consult freely with his attorney is entitled to special protection, since all the rights which a prisoner may retain would be rendered illusory unless the prisoner is permitted unfettered access to his attorneys.[767]

Clearly, the *Adams* opinion represents a major vindication of the right of prisoners to consult freely and privately with their attorneys.[768]

Fourth Amendment Rights

In *Bonner v. Coughlin*,[769] the Seventh Circuit held that "a prisoner enjoys the protection of the Fourth Amendment against unreasonable searches, at least to some minimal extent."[770] The prisoner in *Bonner* alleged that his constitutionally protected rights were infringed by a shakedown search of his cell, conducted without a warrant, probable cause, or his consent, which resulted in the loss of his trial transcript. The court found that the prisoner's complaint stated a valid cause of action, and that at trial the defendants were required to demonstrate the reasonableness of the search within the ambit of the fourth amendment.[771] However, the fourth amendment protection defined in *Bonner* is minimal. The court declined to decide "whether the mere existence of a prison regulation authorizing random shakedowns would be sufficient to overcome a prisoner's Fourth Amendment attack,"[772] or whether additional circumstances would be required to render the search reasonable. Thus *Bonner* provides prisoners with, at best, a diluted fourth amendment pro-

766. *Id.* at 631.

767. *Id.* at 630.

768. Also of interest may be the approach taken recently in California, where attorneys brought a civil rights action against state correction officials, alleging that prison practices interfered with their right to practice their profession. Keker v. Procunier, 398 F. Supp. 756 (E.D. Cal. 1975). The court held that the attorneys had stated a claim in allegations that prison practices required attorneys to meet with their clients in a hot interview room separated by a glass partition, communicate via telephone, and be subject to constant surveillance by guards.

769. 517 F.2d 1311 (7th Cir. 1975).

770. *Id.* at 1317.

771. *Id.*

772. *Id.*

tection.[773] Moreover, the *Bonner* holding is an especially weak precedent for prisoners since the seizure of a court transcript arguably interferes with the prisoner's right to court access; however, the court has also recently recognized that a prisoner's allegation of unlawful appropriation of non-legal property states a valid cause of action.[774]

Eighth Amendment Rights

In order to establish a violation of the eighth amendment's protection against cruel and unusual punishment, a prisoner must show either "that the actions of the defendant intentionally inflicted excessive or grossly severe punishment . . . or that conditions so harsh as to shock the general conscience were knowingly maintained."[775] Prisoners have had difficulty meeting these standards.[776] While a complaint which alleged repeated and unjustified brutal beatings by guards was held to state a claim under section 1983,[777] it is clear that a single punch in the face or conduct which is not shocking or brutal will be dismissed.[778] Assaults which do not meet the shocking

773. We are certain that, whatever the level of the prisoner's Fourth Amendment protection, it does not rise to that possessed by the unincarcerated members of society.

Id.

774. Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975). *See also* Butler v. Bensinger, 377 F. Supp. 870, 875 (N.D. Ill. 1974).

775. La Batt v. Twomey, 513 F.2d 641, 648 (7th Cir. 1975); Thomas v. Pate, 493 F.2d 151, 159-60 (7th Cir. 1974), *vacated and remanded sub nom.*, Cannon v. Thomas, 419 U.S. 813 (1974).

776. Juveniles, as might be expected, fare better than adults. In Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974), the court held that beating juveniles with a faternity paddle was cruel and unusual punishment. The court also held that administration of intramuscular tranquilizers without adequate medical guidance and without attempting alternatives short of drugs constituted cruel and unusual punishment.

Perhaps the greatest deviation from treatment afforded adults is the view that juvenile offenders have a constitutional right to rehabilitation rather than punishment. Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974). Recently, a federal district judge in New York barred several forms of punishment employed at a special maximum security institution for delinquent teen-age boys in Goshen, New York. Reiterating that delinquents have a constitutional right to rehabilitation, the judge enjoined the use of long periods of isolation, the injection of theorazine or other tranquilizing drugs as a punitive device, and the practice of physically restraining by plastic straps for hours at a time. *See* N.Y. Times, Feb. 15, 1976, § 1, at 31, col. 1.

Illinois has also taken some notable steps in reforming treatment of juvenile offenders. Paul Jans, a sociologist and former director of Chicago's Hull House, has started a work camp in Chillicothe, Ill., which is used as a last resort before juveniles are sent to reformatories. So far, the camp seems to be successful. *See* Chicago Tribune, Feb. 15, 1976, § 1, at 20, col. 1. *See also* ILL. REV. STAT. ch. 38, §§ 1003-9 *et seq.* (1975) and ILL. REV. STAT. ch. 38, §§ 1003-10 *et seq.* (1975).

777. Butler v. Bensinger, 377 F. Supp. 870, 878 (N.D. Ill. 1974).

778. Sheffey v. Greer, 391 F. Supp. 1044 (E.D. Ill. 1975).

or brutal test are considered matters for internal prison discipline and actionable, if at all, in state courts.[779]

Punishment disproportionate to the offense with which a prisoner is charged may be the basis for an eighth amendment claim. In *Adams v. Carlson*,[780] the court held that confinement of prisoners in very restrictive conditions of segregation for 16 months, as punishment for participation in a work stoppage, violated the eighth amendment. However, in *LaBatt v. Twomey*,[781] the court noted that while the conditions of isolation were such as might at some point shock the nation's collective conscience, nine days in such conditions did not. Prisoners may, however, be able to distinguish the holding in *LaBatt* in the future, since the conditions involved resulted from an emergency situation which the court recognized would necessarily result in a deprivation of prisoners' rights and privileges.

McCray v. Burrell[782] may provide the Supreme Court with an opportunity to again address the question of cruel and unusual punishment. McCray brought two suits, one against Smith, a prison guard, and one against Burrell, the captain in charge of guards. Two incidents of isolated confinement were involved. The district court

779. However, the Seventh Circuit recently held, in Black v. Brown, 513 F.2d 652 (7th Cir. 1975), that the district court had improperly dismissed a claim which alleged cruel and unusual conditions in punitive isolation. The prisoner in *Black* alleged that his cell was infested with cockroaches; that he was denied soap, hot water, showers, and materials with which to clean his cell; that the toilet was filthy and covered with excrement; that no furniture was provided; and that because food was shoved through rusty bars, rust got in the food and made him ill.

Usually, prisoners complain of assaults by guards. However, the Massachusetts Supreme Court recently ruled that a prisoner has the right to use force in aiding a fellow inmate whom he reasonably believes to be the victim of an illegal attack, even if the attack is by prison guards. The unanimous ruling overturned the conviction of a prisoner who was sentenced to 8-10 years for stabbing a prison guard during a riot at Concord Reformatory in October, 1972. *See also* ILL. REV. STAT. ch. 38, § 1003-8-7(b) (1975) which places limits on prison disciplinary measures.

Tangential to prisoners' eighth amendment claims are claims based on the refusal to provide essential medical care. *See* Bailey, *supra* note 730, at 538-39. Illinois courts have required that a prisoner's allegations of denial of medical care be scrutinized for the following factors: (1) the prisoner's symptoms evidenced a serious injury or disease; (2) the potential for harm caused by delay or denial of care was substantial; (3) such harm did result. Butler v. Bensinger, 377 F. Supp. 870, 876 (N.D. Ill. 1974). However, in a recent case the Seventh Circuit did not specifically allude to these factors. In LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975), the court found summary judgment improperly granted when a prisoner alleged he was denied medical treatment for a known allergy. The court found material questions of fact existing as to whether prison officials knew of the prisoner's health problem and whether medical treatment had been provided him.

780. 368 F. Supp. 1050 (E.D. Ill. 1973).

781. 513 F.2d 641 (7th Cir. 1975).

782. 516 F.2d 357 (4th Cir. 1975).

found that neither confinement was intended as a punishment, but rather for mental observation and as a precaution against the fear that McCray would harm himself.[783] The appellate court accepted these findings and considered the argument that the eighth amendment might not apply since the confinements were not intended as punishment. Nevertheless, the court found the prisoner's confinements subject to the restrictions of the eighth amendment because his original confinement to prison and to the custody of the jailers, who had the power to isolate him, were punishment for criminal conduct.[784] In McCray's suit against Smith, who had placed him naked in isolated confinement, the court held that while the conditions of the cell did not per se constitute a violation of the eighth amendment, the failure to immediately contact a psychologist/psychiatrist and to have McCray examined within 24 hours of his confinement, as dictated by an administrative rule, violated the eighth amendment. In the suit against Burrell, the court found two violations of the eighth amendment. One was similar to that in *Smith*—the failure to follow administrative orders; the other was based on cell conditions, which included a lack of any furniture, bedding or sink, and the lack of any toilet except a filthy hole in the floor. The prisoner had also been denied all articles of personal hygiene.[785]

The eighth amendment issue raised in *McCray* presents several questions which the Supreme Court may clarify in its opinion: (1) the current viability of the "hands-off" doctrine in prison affairs; (2) the standard to be used in evaluating prison conditions for eighth amendment violations;[786] and (3) the effect in prisoners' rights litigation of the failure of prison officials to follow established prison regulations.

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783. 367 F. Supp. 1191, 1216 (D. Md. 1973).

784. 516 F.2d at 367.

785. *Id.* at 368-69. The dissent of Judge Field in *McCray* found the majority's decision an "incredible and unjustified judicial intrusion" into prison authorities' right to maintain order and discipline in prison. *Id.* at 372. Furthermore the judge warned that the majority's decision would encourage prisoners to flaunt prison authority and to "clog the docket of the district court with more frivolous litigation." *Id.* at 374-75. This dissent typifies the currently pervasive displeasure regarding prisoners' rights litigation. *See generally* Bergesen and Hoerger, *Judicial Misconceptions and the "Hidden Agenda" in Prisoners' Rights Litigation*, 14 SANTA CLARA LAW. 747 (1974).

786. The majority in *McCray* advanced a two-step test for the evaluation of claims alleging violations of the eighth amendment:

> First, are the conditions of punishment sufficiently "shocking" that they amount to "cruel and unusual" punishment? Second, does the punishment constitute some rational means to reach a permissible end or is it, instead, arbitrary, unreasonable or unnecessary?

516 F.2d at 368 (citations omitted).

Requirements of Due Process

Probation Revocation. In *Gagnon v. Scarpelli*,[787] the United States Supreme Court set forth minimum due process rights to be accorded prisoners in probation revocation proceedings. The Court held that the probationer is entitled to preliminary and final hearings, notice of alleged violations, disclosure of adverse evidence, and the opportunity to be heard, to present witnesses, and to confront and cross-examine the witnesses against him.[788] In addition to the rights delineated in *Scarpelli*, Illinois law gives the probationer the right to counsel during the revocation hearing.[789] The burden of proof is on the state to demonstrate, by a preponderance of the evidence, that the prisoner has violated probation.[790] Thus hearsay evidence alone is insufficient to support a revocation order.[791]

In Illinois a probationer may waive his right to be present and to confront witnesses at a pre-revocation or revocation hearing. In *People v. Hunt*,[792] for instance, the defendant, while free on bond, failed to appear at a pre-revocation (preliminary) hearing. The defendant's probation was subsequently revoked at a probation hearing. The court found that where a defendant voluntarily absented himself from the courtroom he could claim no benefit from his absence, and shall be deemed to have waived his right to be present at the hearing conducted in his absence.[793]

Parole Revocation. Minimum due process requirements for parole revocation were established in the leading case of *Morrissey v. Brewer*.[794] The *Morrissey* Court found that the revocation of parole constitutes a "grievous loss" to which the due process protections apply.[795] The Court held that the parolee is entitled to a hearing in the nature of a preliminary hearing, before someone other than the parole officer involved, to determine if there are reasonable grounds to revoke parole.[796] The Court further held that the parolee is entitled to a hearing, if he desires it, prior to a final decision of the parole authority, at which time he can present evidence that miti-

787. 411 U.S. 778 (1973).
788. *Id.* at 786.
789. ILL. REV. STAT. ch. 38, § 1005-6-4(c) (1975). *See* People v. McGee, 30 Ill. App. 3d 382, 332 N.E.2d 481 (1975).
790. ILL. REV. STAT. ch. 38, § 1005-6-4(c) (1975). *See* People v. Lewis, 28 Ill. App. 3d 777, 329 N.E.2d 390 (1975).
791. People v. Figueroa, 30 Ill. App. 3d 656, 333 N.E.2d 586 (1975) (per curiam).
792. 29 Ill. App. 3d 416, 330 N.E.2d 883 (1975).
793. *Id.* at 421.
794. 408 U.S. 471 (1972).
795. *Id.* at 482.
796. *Id.* at 485-86.

gating circumstances were present.[797] The *Morrissey* Court declined the opportunity to decide whether a parolee is entitled to counsel at the parole hearing.[798]

Illinois law currently provides only that a parolee is entitled to notice of the charges against him, to be present and answer the parole violation charge, and to present witnesses in his own behalf.[799] Recently the Seventh Circuit held that a parolee who is incarcerated for a subsequent offense and subject to an outstanding parole violation warrant is entitled to a timely hearing at which he may present mitigating circumstances.[800] The ex parte review of a parolee's file and the information supplied by the state prison warden were held insufficient to satisfy the requirements of the fourteenth amendment.[801]

Disciplinary Proceedings. In *Wolff v. McDonnell*,[802] the Supreme Court announced minimum due process requirements for prison disciplinary proceedings. The *Wolff* Court required: (1) that the prisoner be given written notice of the charges against him at least 24 hours prior to the disciplinary hearing; (2) that the fact-finder prepare a written statement detailing the evidence relied on at the hearing and the reasons for any disciplinary actions taken; (3) that a written record of the disciplinary proceedings be kept; and (4) that the prisoner be allowed to call witnesses and present documentary evidence in his own behalf unless the prison authorities believe that doing so would interfere with the prison's security or correctional goals.[803] Notably, the *Wolff* Court did not require that prisoners be allowed counsel or that they be afforded the opportunity to confront and cross-examine their accusers.[804]

The Court in *Wolff* did not attempt to delineate between those activities of prison authorities which are of sufficient impact to prisoners to require due process protection and those of less impact than required for consideration under the fourteenth amendment. This question remains unsettled.[805] In *Fano v. Meachum*,[806] for in-

797. *Id.* at 488.
798. *Id.* at 489.
799. ILL. REV. STAT. ch. 38, §§ 1003-3-9(d)-(e) (1975).
800. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).
801. *Id.* at 637-38.
802. 418 U.S. 539 (1974).
803. *Id.* at 564-65.
804. *Id.* at 567-68.
805. The problem of defining the due process rights to which prisoners are entitled is by no means limited to disciplinary proceedings, probation and parole. Pineda v. Shane, Civil No. 75 C 393 (N.D. Ill. 1975), a case currently pending in the district court, illustrates the scope of the problem. The class action plaintiffs in *Pineda* challenge the procedure whereby prisoners are transferred to and incarcerated in the Menard Psychiatric Center, a division of

stance, the court considered "whether the detriment worked by an intrastate transfer from a medium-security institution to a maximum security prison is serious enough to trigger the application of due process protections."[807] The court held that the prisoners' interest affected by the transfer constituted a liberty interest, and was thus entitled to due process protection.[808] Similarly, in *Clutchette v. Procunier*,[809] the Ninth Circuit considered whether deprivation of a prison "privilege" requires due process protection. The court found that "[a]ny deprivation of the small store of 'privileges'

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the Illinois Department of Corrections. The plaintiffs allege that prior to placement in Menard the prisoners are forced to undergo a summary psychological examination conducted by a psychiatrist employed by the Department of Corrections. They contend that at no time are they given an opportunity to challenge the findings of the psychiatrist. The defendants argue that "[i]t is unreasonable to require that a court intervene at each instance where a prisoner's rights are incidentally affected by considered administrative decisions." Defendants Motion to Dismiss or Alternatively For Summary Judgment at 7, Pineda v. Shane, Civil No. 75 C 393 (N.D. Ill. 1975).

806. 520 F.2d 374 (1st Cir. 1975), *rev'd sub nom.*, Meachum v. Fano, 96 S. Ct. 2532 (1976). The Court held that the due process clause does not entitle a prisoner to a hearing on a intradepartmental transfer absent state law or evidence of disciplinary purposes.

807. 520 F.2d at 377-78. By so framing the issue, it appears that the court is considering the seriousness of the deprivation in its determination of whether due process applies. The Supreme Court recently reaffirmed the principle in Goss v. Lopez, 419 U.S. 565, 575-76 (1975), that due process adjudication is a two-step process and that in determining whether due process applies, one looks not to the weight but to the nature of the interests at stake. However, many courts continue to address prison disciplinary issues in terms of whether the prisoner has suffered a "grievous loss." *See, e.g.*, Aikens v. Lash, 514 F.2d 55, 57 n.5 (7th Cir. 1975), *vacated per curiam*, 96 S. Ct. 1721 (1976). *Goss* seems to make clear that the Supreme Court has abandoned the "grievous loss" standard it applied in cases prior to Board of Regents v. Roth, 408 U.S. 564 (1972). *See also* Comment, *Constitutional Law—Goss v. Lopez: Much Ado About Nothing or The Tempest*, 7 LOY. U. CHI. L.J. 193 (1976).

808. Although the prisoner-plaintiffs had been given a hearing, the prisoners were not informed of the dates and places of the alleged offenses nor of the evidence supporting the charges. The district court had ruled that the prisoners must be provided at least a summary of the information behind the charges. In so ruling the district court had relied on a prison regulation for a maximum security prison within the state which provided due process protection. The appellate court affirmed:

> . . . [h]aving chosen to extend the protections of section 11.4(h) to inmates at the maximum-security institution . . . defendants may not, even in the exercise of the discretion recognized in *Wolff*, deny similar procedures to inmates at . . . a medium-security prison.

520 F.2d at 380.

The dissent in *Fano* recognized no protected interest of the prisoners to be involved and thus thought due process protection was not required. The realities of the state-prisoner relationship were such, the dissent argued, that classifying changes in the confinement of prisoners as a liberty interest would only lead to unwise intrusions into the management of prisons. *Id.* at 381. The dissent did suggest that an adverse use of the fact of transfer in any future parole proceedings be enjoined unless the charges on which transfer was based were established in a manner satisfying due process. *Id.* at 382.

809. 497 F.2d 809 (9th Cir. 1974), *on rehearing*, 510 F.2d 613 (9th Cir. 1974), *rev'd sub nom.* Baxter v. Palmigiano, 96 S. Ct. 1651 (1976).

accorded a confined or relatively confined group causes a far greater sense of loss than a similar deprivation in a free setting . . ."[810] The court therefore held that before a prisoner could lose his prison "privileges," he must be provided, at a minimum: (1) a notice of the prison authorities' intent to withdraw his privileges; (2) a statement of the grounds for removal, which must be forthcoming at a reasonable time prior to the proposed disciplinary action; and (3) the opportunity to respond before such discipline is imposed.[811]

The Supreme Court granted certiorari in *Clutchette*, and the case is currently pending before the Court. In addition to the appellate court's holding that the deprivation of a prison privilege requires due process protection, at least two other holdings by the Ninth Circuit in *Clutchette* are controversial, and could provoke consideration by the Supreme Court. The appellate court, while recognizing that *Wolff* did not demand that prisoners be accorded the right to confront and cross-examine witnesses against them, nevertheless held that when a prisoner who faces serious sanctions[812] requests these rights and is denied them, prison authorities must provide the prisoner with, and enter into the record, an explanation for their refusal. Failure to do so, or the entry into the record of reasons other than those objectives recognized in *Wolff* as legitimate, would be considered prima facie evidence of abuse of discretion.[813] Secondly, the *Clutchette* court interpreted *Wolff* as requiring that a prisoner has a right to counsel or counsel-substitute "whenever a prisoner subjected to disciplinary proceedings is unable competently to handle his case without help."[814]

The Seventh Circuit confronted many of the *Clutchette* issues in *Aikens v. Lash*,[815] where the prisoners challenged the procedures under which they were traneferred, for disciplinary reasons, from a medium security institution to a maximum security prison. The appellate court held that a prisoner subject to a disciplinary transfer hearing, if already confined in segregation, and thus unable to col-

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810. *Id.* at 615.

811. *Id.*

812. The *Clutchette* court specifically excluded a proceeding for an infraction that would also be a crime. 510 F.2d at 616. The Ninth Circuit is in conflict with the First Circuit in determining whether double jeopardy or denial of the privilege against self-incrimination is involved when prosecution is based on conduct which is also the subject of disciplinary proceedings. *See* Fano v. Meachum, 520 F.2d 374, 376 n.1 (1st Cir. 1975).

813. 510 F.2d at 616.

814. *Id.*

815. 514 F.2d 55 (7th Cir. 1975), *vacated per curiam*, 96 S. Ct. 1721 (1976). *See also* Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975) (allegation of transfer without hearing states a valid claim under section 1983).

lect information to prepare his case, was entitled to lay counsel. The court also ruled, as had *Clutchette*, that the denial of a prisoner's request for cross-examination necessitated a written record explaining the denial. Finally, the court affirmed the district court's requirement that a written statement of findings of fact and conclusions be made available to the prisoner after the hearing.[816]

Other recent cases indicate that the analysis of prisoners' fourteenth amendment claims will be similar to that advanced by the Supreme Court in *Wolff*. In *Bickham v. Cannon*,[817] for instance, the prisoner challenged the procedure whereby prisoners held on a minimum security farm were immediately removed and placed in administrative isolation pending a hearing in all cases in which the violation report charged unauthorized possession of property. The court, in evaluating the prisoner's claim, did not merely evaluate the nature of the prisoner's interest involved. Instead, the court balanced the nature of the prisoner's interest involved against the reasonableness of the procedures employed by the prison authorities, and held that in view of the competing interests involved the procedures employed were eminently reasonable and satisfied the requirements of due procsss.[818]

Defense of Immunity

McCray v. Burrell[819] presents the Supreme Court with an opportunity to determine the scope of immunity afforded prison officials from damages. The appellate court disagreed with the district court's apparent conclusion that because prison officials seemingly complied with the substance of written regulations and with the "normal operating procedure," they were immune from damages.[820] The court held that the immunity defense placed the burden of proof on prison officials to demonstrate that "they had a good faith belief in the legality of what they did."[821] The good faith defense

816. *Id.* at 59-61. ILL. REV. STAT. ch. 38, § 1003-8-7 (e)(5) and new regulations of the Illinois Department of Corrections, if enforced, may moot some of the problems. *See* Burbank v. Twomey, 520 F.2d 746, 747n.6 (7th Cir. 1975).

817. 516 F.2d 885 (7th Cir. 1975).

818. *Id.* at 886. *Compare* Madison v. Sielaff, 393 F. Supp. 788 (N.D. Ill. 1975), in which a prisoner alleged that the summary denial of his request to be allowed to work on an honor farm violated his constitutional rights. The court held that the denial of the request was not "such a significant deprivation of liberty" as to raise a constitutional claim. *Id.* at 789. The court never reached the balancing of interests mandated in *Wolff*, but instead reverted to the "grievous loss" standard.

819. 516 F.2d 357 (4th Cir. 1975).

820. *Id.* at 370.

821. *Id.*

seems more vague than the most recent test enunciated by the Supreme Court in *Wood v. Strickland*;[822] whether "good faith" is determined by an objective or a subjective test remains unclear.[823]

The Seventh Circuit has applied *Wood* to the issue of prison officials' immunity. In *Knell v. Bensinger*,[824] the court found that since there had been no subjective bad faith in the officials' actions and that since it had been reasonable, in the light of the then-existing legal precedent, for officials to deny prisoners in isolation access to courts, the officials were immune from damages.[825] Given the confusing and shifting state of the law in prisoners' rights cases, it would not be surprising if most prison officials are found immune from damages unless the prisoner can prove intentional harm.[826]

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822. 420 U.S. 308 (1975).

823. However, the *McCray* court, in an addendum, stated that its opinion was consistent with that of the Supreme Court in *Wood*. McCray v. Burrell, 516 F.2d 357, 372 (4th Cir. 1975). *Wood* was a section 1983 action filed by two expelled high school students who sought damages against school board members for infringement of their constitutional rights. The test enunciated in *Wood* is *both* objective and subjective. First, the official must act with subjective good faith in his action. Second, the official must act in accordance with "basic, unquestioned constitutional rights. . . ." Wood v. Strickland, 420 U.S. 308, 321-22 (1975).

824. 522 F.2d 720 (7th Cir. 1975).

825. *Id.* at 725.

826. The Seventh Circuit has refused to dismiss a complaint seeking damages where a prisoner alleged several instances of unjustified beatings. Thomas v. Pate, 516 F.2d 889 (7th Cir.), *cert. denied*, 423 U.S. 877 (1975).