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Criminal Procedure

Ralph Ruebner*
Robert E. Davison**

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INTRODUCTION

This year's Survey article focuses on significant decisions of the United States Supreme Court and the Illinois Supreme Court during the survey period. It addresses both constitutional and statutory issues. What follows is a survey, not a catalogue of each case or each issue which the courts decided.

I. SEARCHES AND SEIZURES

A. The United States Supreme Court

1. Searches

During the 1988 Survey year, the United States Supreme Court decided three cases involving searches and seizures. The first case concerned an individual's expectation of privacy in garbage left for collection outside the curtilage of a home. In California v. Greenwood the Court upheld the warrantless search of the defendants' trash which they had left for collection at the curb in opaque plastic bags. Justice White's opinion for the Court applied the two part test developed in Katz v. United States. The Katz test first requires a

court to determine whether the individual had a subjective expectation of privacy in the item searched. If so, the court then decides if that expectation is one which society is prepared to recognize as reasonable.

Justice White conceded that the defendants may have had a subjective expectation of privacy in their trash, however, it was not one which society accepts as objectively reasonable. First, Justice White indicated it is "common knowledge" that garbage left at the curb is "readily accessible" to animals, children, scavengers, and snoops. Second, defendants placed their trash at the curb for the express purpose of turning it over to a third party, the trash collector. Thus, the defendants had "exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection." By defining the issue as "whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home," the Court left open the possibility of holding a search of garbage within the curtilage of a home unreasonable.

Justice Brennan, writing for himself and Justice Marshall in dissent, predicted that "society will be shocked" to learn of the majority's decision. Relying on cases holding warrantless searches of containers in the defendant's possession unreasonable, and a municipal ordinance requiring residents to dispose of their trash by leaving it on the curb for collection, Justice Brennan stated that "[a] trash bag, like any [other container], 'is a common repository for one's personal effects,' and, even more than many of them, is 'therefore . . . inevitably associated with the expectation of privacy.'"

2. Seizures

In Michigan v. Chesternut, the Court decided the question of whether police pursuit, without more, necessarily results in a "sei-

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3. 108 S. Ct. at 1628.
4. Id. at 1629 (citing Smith v. Maryland, 442 U.S. 735 (1979) (no reasonable expectation of privacy in the numbers dialed on a telephone because they are voluntarily conveyed to the telephone company)).
5. 108 S. Ct. at 1628.
6. Id. at 1632 (Brennan, J., dissenting).
8. 108 S. Ct. at 1634 (Brennan, J., dissenting) (citing United States v. Chadwick, 433 U.S. 1, 13 (1977)).
zure" of the individual pursued. In Chesternut, the Detroit police observed an individual flee as their marked cruiser approached the corner where he was standing. The police followed him around the corner and accelerated to catch up, driving alongside him for several seconds. While running, the defendant discarded several packets containing pills which the police recovered. The defendant stopped running after the police recovered the packets. He was then arrested and police found more contraband on his person. Justice Blackmun, writing for a unanimous Court, applied the test first suggested in United States v. Mendenhall and held that "the police conduct involved [in this case] would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent’s freedom of movement." Therefore, he was not in custody when he dropped the items. The Court did not decide the broader question of whether a police chase can ever result in a seizure under the fourth amendment. The Court also left open the question of whether flight alone gives the police reasonable suspicion to detain someone.

Justice Kennedy, writing for himself and Justice Scalia in a concurring opinion, stated that defendant’s "unprovoked flight gave the police ample cause to stop him." Justice Kennedy also indicated that fourth amendment protections are not implicated until the police conduct actually "achieves a restraining effect."

3. Independent Source Doctrine

In Murray v. United States the Supreme Court held that the "independent source" doctrine allows the admission of evidence seized during a legal search even if that evidence was also observed during a prior illegal search. Acting on an informant's tip, federal agents began watching Murray and several co-conspirators. The agents broke into defendants' warehouse and observed numerous burlap-wrapped bales of marijuana. They did not disturb the bales. The agents then obtained a search warrant for the warehouse,

10. 446 U.S. 544, 554 (1980) (Police have seized an individual "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").
12. Id. at 1981 (Kennedy, J., concurring).
13. Id.
however, they did not mention the prior entry nor rely on any observations made during the entry in their search warrant affidavit. The agents then reentered the warehouse and seized 270 bales of marijuana. Defendant Murray and others were arrested for conspiracy to possess and distribute illegal drugs.\(^{16}\) The district court denied a motion to suppress and the First Circuit affirmed.\(^{17}\)

In an opinion by Justice Scalia the Court extended the "independent source" doctrine from evidence which was not observed during the earlier illegal search,\(^{18}\) to evidence which was discovered during the illegal search. The Court reasoned that while the purpose of the exclusionary rule is to prevent the police from profiting from their illegal activity, it should not place them in a worse position than they otherwise would have occupied.\(^ {19}\) As long as the lawful search is genuinely independent of the earlier, illegal one, the "independent source" doctrine will apply.\(^ {20}\) The Court remanded for a determination of whether the agents would have sought a warrant if they had not earlier entered the warehouse.\(^ {21}\)

B. The Illinois Supreme Court

1. Staleness

In \textit{People v. Thompkins},\(^ {22}\) the Illinois Supreme Court addressed a novel search warrant staleness issue. The defendant challenged a search warrant which authorized the seizure of telephone extension cords, blood stains, and hair fibers in connection with a murder investigation. The warrant was issued almost three months after the crime was committed. The defendant claimed that "it [was] not reasonable to presume that the items sought in the search warrant" were in existence.\(^ {23}\) The Illinois Supreme Court rejected "an arbitrary

\begin{itemize}
\item \(^{16}\) 108 S. Ct. at 2532.
\item \(^{17}\) United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985).
\item \(^{18}\) See Segura v. United States, 468 U.S. 796 (1984) (cocaine and drug trafficking records admissible under "independent source" doctrine when not discovered by police during 19 hour stay in apartment prior to securing a warrant).
\item \(^{19}\) 108 S. Ct. at 2535.
\item \(^{20}\) \textit{id}.
\item \(^{21}\) \textit{id}. at 2536. Justice Marshall, writing for the dissent, argued that the majority's opinion will provide an incentive for police to make illegal, "confirmatory" searches to save themselves the trouble of getting a warrant if no evidence is present. \textit{id}. at 2538 (Marshall, J., dissenting). Justice Stevens wrote a brief dissenting opinion in which he reaffirmed his disagreement with Segura as providing an affirmative incentive for government agents to engage in unconstitutional violations. \textit{id}. at 2540 (Stevens, J., dissenting).
\item \(^{22}\) 121 Ill. 2d 401, 521 N.E.2d 38, \textit{cert. denied}, 109 S. Ct. 187 (1988).
\item \(^{23}\) \textit{id}. at 435, 521 N.E.2d at 52.
\end{itemize}
cutoff period expressed in days or weeks beyond which probable cause ceases to exist . . . .”24 Instead, the court adopted a case-by-case evaluation of probable cause. Relying on the Second Circuit approach in United States v. Beltempo,25 the Illinois Supreme Court stated:

[C]ourts have found other factors to be as important as the time element: "[These factors] include the nature of the object sought, its location on the premises and the state in which it was observed. The nature of the object would encompass such considerations as whether it is large or small, moveable or fixed, disposable or permanent and innocuous or incriminating. The location of an object on the premises would involve, for example, whether it was in plain sight on a table, locked in a safe, on a beam in a cellar or secreted behind a bricked-in wall. The state in which the object was seen is especially important today because modern technology and equipment have the sophisticated capacity to ascertain whether matter—in whatever form it may be—is present or even may have once been present. This technology can detect, for example, a blood stain on clothes, furniture or rug; a gas that evaporates; a solid that dissolves and disappears, or one that changes into a powder or a liquid that seeps into a fabric, or dust that is suspended in air and whose particles may later be found on the top ledge of a door. The inquiry with respect to probable cause in the case of an observation of an isolated incident should focus on all of the relevant circumstances, including the element of time lapse, to determine the probability of the continued existence of the object sought at the place where it was last seen. The overall approach should be one of flexibility and common sense.26

Applying the foregoing factors, the Illinois Supreme Court concluded that there was a fair probability that the items mentioned in the search warrant were still in existence. In reaching this conclusion the court stated:

A telephone cord is an article which could reasonably be expected to be kept in a home for extended periods, it is designed for long term use, likely to be functional, and not contraband or likely to be disposed of for any apparent reason. Furthermore, it is reasonable to believe that blood stains on a concrete floor which neither bleach

24. Id.
26. 121 Ill. 2d at 435-36, 521 N.E.2d at 52-53 (quoting United States v. Beltempo, 675 F.2d 472, 478 (2d Cir. 1982)).
nor acid could remove would still be detectable a few months later.\textsuperscript{27}

2. Probable Cause

In \textit{People v. Gacho}\textsuperscript{28} the Illinois Supreme Court, applying a liberal standard for determining probable cause for a warrantless arrest, affirmed the trial judge’s ruling denying a motion to quash the arrest. In \textit{Gacho}, the victim gave the first officer to arrive at the scene a name sounding similar to that of the defendant. When responding to other officer’s inquiries, he gave the proper pronunciation of the defendant’s name. The investigators later learned from the victim’s brother that the victim, who lived in the same area as the defendant, had gone with another person to the defendant’s house the night before. The police went to the address of the defendant’s residence, and when they saw a man who matched the defendant’s description, they arrested him. The court concluded that under these circumstances the collective information known to the investigators would warrant a person of reasonable caution in believing that the person arrested had committed the offense.\textsuperscript{29}

3. Exclusionary Rule

In \textit{People v. James},\textsuperscript{30} a divided Illinois Supreme Court expanded the impeachment exception to the exclusionary rule by allowing the impeachment of a defense witness’ testimony with a statement of the defendant which the trial court had previously suppressed under the fourth amendment.\textsuperscript{31} Prior to trial, the defendant, who was charged with murder and attempted murder, filed a motion to suppress statements which he had made to the police following his arrest. The trial judge granted the motion and suppressed the statements finding that there was no probable cause for the arrest and that the statements were the fruits of the unlawful arrest. At trial, the State’s eyewitnesses testified that the perpetrator had shoulder length reddish hair which was worn slicked-back “butter” style. The witnesses also made in-court identifications of the defendant whose hair was then black and worn in a natural style.\textsuperscript{32}

\textsuperscript{27} Id. at 436, 521 N.E.2d at 53 (citation omitted).
\textsuperscript{29} 122 Ill. 2d at 235, 522 N.E.2d at 1153.
\textsuperscript{31} U.S. \textit{CONST. amend IV}.
\textsuperscript{32} 123 Ill. 2d at 526-27, 528 N.E.2d at 724.
The principal defense witness at trial was Jewel Henderson, a friend of the defendant’s family. She testified that on the day of the shooting she had been with the defendant and that his hair was black. To “impeach” and to rebut her testimony, the prosecutor sought to introduce a previously suppressed statement of the defendant. The substance of the suppressed statement, which the trial judge admitted for impeachment, was introduced by the testimony of a police officer. It revealed that while in police custody on August 31, the defendant told the police that on the evening of August 30, the date of the shooting, his hair was long, combed back straight, and “reddish” in color. He also said that he went to his mother’s beauty parlor on August 31 to dye and curl his hair to change his appearance. Following the officer’s testimony, the trial judge orally instructed the jury that the testimony was “offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant’s hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.”

The defendant did not object to the instruction or offer an alternative instruction. At the close of the evidence, the trial judge refused the defense’s proffered jury instruction which explained that “the defendant’s statement could be considered only for purposes of determining the believability of the witness and could not be used as substantive evidence of the defendant’s guilt or innocence.”

During closing argument, the prosecutor stated to the jury during his rebuttal that the “case comes to you with five eyewitnesses, an admission that he changed his color—changed the color of his hair.” The defendant did not testify, and the jury found him guilty of murder and attempted murder. The Illinois Appellate Court reversed. Relying on the United States Supreme Court decision in United States v. Havens and a number of Illinois cases, the prosecutor argued that the appellate court had erred in reversing the convictions. The Illinois Supreme Court agreed. It reasoned that Walder v. United States, Harris v. New York, and United States v. Havens support a constitutional basis for an impeachment

33. Id. at 527-28, 528 N.E.2d at 725.
34. Id. at 528, 528 N.E.2d at 725.
35. Id.
exception to the exclusionary rule, stating that "[t]he laudable pur-
poses of the rule notwithstanding, it does not follow that defendants
may transform it into a shield for knowing perjury or intentional
misrepresentation." While the Illinois Supreme Court recognized
that in prior cases involving an impeachment exception it was the
defendant who had testified and that it was his testimony which had
been impeached with suppressed evidence, it found no problem in
extending the exception to the impeachment of a defense witness.
The court stated:

In our view, if a defendant is prohibited from using perjury by
way of a defense, it matters not from whose lips that perjury
comes. Just as a defendant may not directly perjure himself and
then hide behind the exclusionary rule, he also cannot be allowed
to use perjurious testimony through a biased defense witness, in
this case the principal defense witness, without affording the
prosecution an opportunity to challenge the veracity of that
testimony. 41

II. CONFESSIONS

A. Reinterrogation After Invocation Of Silence

In People v. Foster, 42 the Illinois Supreme Court addressed a
controversial question left open by the United States Supreme Court
in Michigan v. Mosley, 43 whether police officers may reinterrogate
an accused on the same crime after he invokes the fifth amendment
protection of silence. 44 In Mosley, the United States Supreme Court

40. 123 Ill. 2d at 535, 528 N.E.2d at 728.
41. Id. at 536, 528 N.E.2d at 729.
43. 423 U.S. 96 (1975).
44. In Foster, the defendant, Lloyd, Chapman, and Williams were taken to the Aurora,
Illinois, police station at approximately 2 a.m. Detective Martin and Sergeant Strover first
questioned Williams. She told them that it was the defendant who beat the victim using his
hands, feet, and a baseball bat. Martin and Strover then took the defendant from his lockup
cell at approximately 6:30 a.m. to a room in the investigation division of the station for
questioning. When Martin began to advise the defendant of his Miranda rights, the defendant
interrupted him and said: "I know she's dead. I have got nothing to say." Martin and
Strover then returned him to the lockup cell. At 9:30 a.m., Assistant State's Attorney Sullivan
arrived at the Aurora police station, and at his request, Investigators Needham and Tiegelman
brought the defendant to an interview room. Sullivan advised the defendant of his Miranda
rights, told him that Williams had given a statement implicating him in the murder, and said
they also spoke to Lloyd. The defendant stated that he understood his Miranda rights and
proceeded to tell Sullivan, Needham, and Tiegelman that he beat the victim to death. After
giving this oral statement, the defendant signed both a statement in which he waived his
Miranda rights and a typed confession. 119 Ill. 2d at 86, 518 N.E.2d at 89.
held that statements obtained from an accused who had previously expressed a desire to remain silent during police initiated renewed interrogation are admissible if the police had scrupulously honored the suspect’s right to cut off questioning.\textsuperscript{45} Mosley rejected the contention that \textit{Miranda v. Arizona}\textsuperscript{46} had established a per se ban on renewed interrogation after invocation of silence by the accused. However, the Mosley analysis involved renewed interrogation on another crime. Here, the Illinois Supreme Court was looking at renewed interrogation on the same crime. The Illinois Supreme Court concluded that the distinction was of no consequence. What matters is whether the accused’s right to remain silent was scrupulously honored by the police.\textsuperscript{47} The court stated: “That a defendant was later questioned regarding the same offense does not of itself mean that his rights under \textit{Miranda} were violated. There have been numerous decisions that this circumstance does not preclude a finding that an accused’s right to remain silent was ‘scrupulously honored.’”\textsuperscript{48}

B. Invocation Of Right To Counsel

In \textit{Arizona v. Roberson}\textsuperscript{49} the Supreme Court resolved a conflict among state courts and held that the police cannot reinterrogate a suspect who has requested counsel even when the second interrogation is by a different officer and concerns an unrelated investigation. In \textit{Edwards v. Arizona}\textsuperscript{50} the Court held that a suspect who has “expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”\textsuperscript{51} In Roberson, the defendant was arrested on April 16, 1985, at the scene of a just-completed burglary. Roberson, after being read his \textit{Miranda} rights, requested counsel before answering questions.\textsuperscript{52} This fact was recorded in the officer's written report. On April 19, 1985, a second officer, unaware of Roberson’s earlier

\textsuperscript{45} Mosley, 423 U.S. at 104.
\textsuperscript{46} 384 U.S. 436 (1966).
\textsuperscript{47} 119 Ill. 2d at 85-86, 518 N.E.2d at 89.
\textsuperscript{48} \textit{Id}. at 86-87, 518 N.E.2d at 89 (citations omitted).
\textsuperscript{49} 108 S. Ct. 2093 (1988).
\textsuperscript{50} 451 U.S. 477 (1981).
\textsuperscript{51} \textit{Id}. at 484-85.
\textsuperscript{52} 108 S. Ct. at 2096.
invocation of the right to counsel, informed him of his *Miranda* rights and interrogated him about a burglary which occurred on April 15, 1985. Roberson made an incriminating statement concerning the April 15th burglary which was suppressed at trial on the authority of *Edwards*. The suppression was affirmed on appeal.

Justice Stevens, writing for the majority, reasoned that the *Edwards* rule provides "clear and unequivocal guidelines" to the police. In addition, the "bright line" rule of *Edwards* is equally applicable when the reinterrogation involves a separate investigation because once a suspect has requested counsel, he has indicated that he is not competent to deal with the police without legal advice. Thus, a later decision at the authority's insistence to make a statement without counsel is the product of "inherently compelling pressures."  

Justice Stevens attached no significance to the fact that the officer who conducted the second interrogation did not know that Roberson had requested counsel. First, the *Edwards* rule focuses on the state of mind of the suspect, not the police. Second, custodial interrogation is conducted according to established procedures and those procedures must enable an officer to determine if the suspect has previously requested counsel.

Justice Kennedy, joined by Chief Justice Rehnquist in dissent, stated that a *per se* rule was unnecessary. Justice Kennedy argued that a rule which relies upon known and tested warnings to insure that a waiver is voluntary would be sufficient to protect a suspect's rights.

In *People v. Holland*, the Illinois Supreme Court examined a critical fifth amendment waiver of rights issue under *Miranda v. Arizona*, whether the defendant knowingly and intelligently waived his rights to silence and counsel where his interrogators, assistant state's attorneys and police officers, failed to inform him that an attorney wanted to confer with him prior to any interrogation or lineup.

The following facts are essential to an understanding of the court's analysis. The defendant was initially arrested and taken into

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53. *Id.*
54. *Id.* at 2096-97.
55. *Id.* at 2097-98.
56. *Id.* at 2101.
57. *Id.* at 2104 (Kennedy, J., dissenting).
custody by Schiller Park, Illinois, police officers for a number of motor vehicle code violations at approximately 8:00 a.m. on May 4, 1980. The Schiller Park police then contacted Detective John Meese of the Des Plaines police department regarding the arrest of the defendant. The defendant matched the description of an abduction offender who was sought by the Des Plaines police for kidnapping and rape. Meese asked that the defendant be photographed and held pending further investigation. Meese then obtained the defendant’s photograph from the Schiller Park police and presented it, along with six others, to the victim. After she identified the defendant as her assailant, Meese made arrangements to transport the defendant to the Des Plaines police station. Prior to moving the defendant, Meese spoke by telephone with Attorney Anthony Rocco, who represented himself as defendant’s attorney. Rocco asked to be notified if the defendant were to stand in a lineup. Meese telephoned Rocco later that afternoon and left a message that the defendant would be placed in a lineup. Meese then transported the defendant to the Des Plaines station. Upon arrival, Meese advised him of his Miranda rights. Two assistant state’s attorneys then interviewed the defendant. That interview, at which Meese was also present, began at approximately 2:05 p.m. on the afternoon of May 4.

An assistant state’s attorney advised the defendant of his Miranda rights. Holland indicated he understood his rights, agreed to talk, and proceeded to give a false exculpatory statement. The assistant state’s attorney then walked out of the interrogation room leaving the defendant alone with Detective Meese. At approximately 2:30 p.m., the same assistant state’s attorney reentered the interrogation room, advised the defendant of his Miranda rights, and Holland once again indicated he understood his rights. He then proceeded to give an incriminating statement. The assistant state’s attorney then left the room and spoke to the defendant’s attorney,

60. A Schiller Park police officer stopped the defendant’s vehicle because it did not have a rear license plate. The officer ordered a driver’s license check and learned that the defendant’s license had been revoked. While awaiting the results of the driver’s license check, the officer noticed that defendant’s car, clothing, and his physical appearance matched information which was contained in an abduction report relating to an occurrence in Des Plaines, Illinois, at approximately 6 a.m. on May 4, 1980. The defendant was arrested for improper vehicle registration, driving on a revoked license, and illegal transportation of alcohol and was transported to the Schiller Park police station. 121 Ill. 2d at 142-43, 520 N.E.2d at 272-73.

61. Id. at 143, 520 N.E.2d at 273.

62. Id. at 145, 520 N.E.2d at 274.
Anthony Rocco. Rocco wanted to know what charges would be filed but did not ask to be present during any interviews or interrogations. The assistant state's attorney was aware that Rocco had called the Des Plaines police station but was unaware of any request to speak with the defendant prior to any interrogation. At approximately 4:00 p.m., the assistant state's attorney informed Rocco of the charges against the defendant.  

The defendant's wife testified at the suppression hearing that around 8:30 a.m. on May 4, 1980, a Schiller Park officer notified her that her husband had been arrested for several traffic violations and that she should come to the station to post bond. Later that morning, she was informed that her husband was being held for Des Plaines police officers, who were preparing other charges against him. She was not told what charges were contemplated. She then contacted Attorney Rocco and requested that he represent her husband. She reached him around 1:00 p.m. During the afternoon, she spoke to him on several occasions. During each conversation, Rocco related his unsuccessful efforts to see her husband. She further testified that she met Rocco at the Des Plaines police station around 3:45 p.m. Shortly thereafter, Rocco was allowed to meet with the defendant.

The defendant testified that he had spoken to his wife by telephone around 8:30 a.m. on May 4, 1980, while held in the custody of the Schiller Park police. He told her to contact attorney Rocco to arrange for his release. Rocco did not testify but during his closing argument at the suppression hearing, he stated that he had talked to Detective Meese by telephone around 1:00 p.m. and specifically requested to talk to the defendant prior to any questioning. Rocco also argued that sometime between 1:00 and 3:00 p.m., he had made the same request of the assistant state's attorney who was in charge of the interrogation. Rocco concluded his argument by noting that he was not permitted to see the defendant until after Holland had given an incriminating statement and been placed in a lineup. The defendant argued to the Illinois Supreme Court that a Miranda waiver is invalid unless the suspect is first informed by his interrogators, prior to the interrogation, that his attorney requested

63. Id.
64. Id. at 146, 520 N.E.2d at 274.
65. Id.
66. Id. at 148, 520 N.E.2d at 274-75.
to speak to him. He urged the court to read the state constitutional privilege against self-incrimination, more broadly than the federal privilege, realizing that a claim under the fifth amendment to the United States Constitution would probably fail in light of the United States Supreme Court’s holding in Moran v. Burbine. In Burbine, the United States Supreme Court did not preclude the states from formulating more stringent standards under state law for evaluating a waiver of rights during police initiated custodial interrogation. The Illinois Supreme Court in a lock-step approach declined the invitation to apply a different standard under Illinois law. In applying the Burbine analysis, the court upheld the waiver here, reasoning:

Here, as in Burbine, a relative secured counsel for the suspect; the suspect was unaware that counsel had been retained; all communication between the police or prosecutors and the attorney was by telephone. . . . Applying Burbine, we hold that the defendant was given his Miranda rights at the Des Plaines police station, that he understood the nature of those rights, and that his Miranda waiver was valid despite the fact that he was not told that an attorney wanted to confer with him prior to any interrogation or lineup.

This analysis is wrong. Holland had asked his wife to contact his attorney and for counsel to arrange for his release. The conclusion of the court cannot be sustained under Burbine.

In People v. Thompkins, the defendant contended that statements which he had given the police were improperly introduced at his murder trial because they were obtained in violation of his fifth and sixth amendment rights. An attorney testified that following the

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68. 475 U.S. 412, 422-23 (1986). In Burbine, the Supreme Court concluded that a suspect’s knowing and intelligent waiver of his Miranda rights does not require knowledge that an attorney has been retained or information that the attorney has been in contact with the police or has attempted to see the suspect. The Court held that “[o]nce it is determined that a suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.”

121 Ill. 2d at 152, 520 N.E.2d at 277 (citation omitted).
69. Burbine, 475 U.S. at 428.
70. 121 Ill. 2d at 153, 520 N.E.2d at 277-78.
71. Id.
defendant’s arrest, he was contacted by the defendant’s wife about representing him. The attorney telephoned the defendant at the police station and instructed him to refrain from making any statements to the authorities. The attorney was never retained as counsel for the defendant.\textsuperscript{73}

The Illinois Supreme Court held that the defendant’s sixth amendment right to counsel had not attached at the time of the interrogation because formal adversary judicial proceedings had not been initiated against him. The defendant had not been indicted at the time; only a complaint for preliminary examination charging him with murder had been issued. “The complaint did not constitute a formal commitment by the People to prosecute [the] defendant.”\textsuperscript{74}

The supreme court also held that the defendant did not invoke his fifth amendment right to counsel merely by “speaking with an attorney whom he wished to retain after having received the Miranda warnings.”\textsuperscript{75} The record showed that the defendant acknowledged his understanding of each of his rights and that he then freely spoke to the police. The court concluded that the defendant “unequivocally waived his right to remain silent and to have the assistance of counsel.”\textsuperscript{76}

In \textit{People v. Enoch},\textsuperscript{77} the court examined a claim that the defendant’s statements were the product of an impermissible police interrogation after he had invoked the right to counsel. Following

\textsuperscript{73} Investigator Houlihan and another investigator interrogated the defendant on March 18, 1981, while he was in the lockup area next to the preliminary hearing courtroom awaiting his initial court appearance and bond hearing. The defendant was advised of his Miranda rights, acknowledged his understanding, and elected to proceed with the interrogation without the assistance of counsel. The interrogation lasted approximately 1 1/2 hours. The defendant admitted participating in the shootings, gave details of the incident, and expressed a desire to give a statement to assistant state’s attorney Perry. Perry was summoned but then the defendant refused to make a statement because he had just spoken by telephone with his attorney, George Howard, and was advised not to make any statements. George Howard was contacted by the defendant’s wife on March 17, 1981, regarding the representation of the defendant. Howard telephoned the defendant at the Cook County sheriff’s police department, briefly spoke with him, and instructed him not to make any statements. Howard was never retained as the defendant’s attorney, nor did he ever file an appearance on the defendant’s behalf in the case. The defendant testified that he understood the Miranda rights given to him and that he knew that he had the right to have an attorney present. He told the officer that he would not make any statements because his attorney would arrive shortly and any deals would be worked out with his attorney. The defendant specifically denied giving a statement to the investigators. \textit{Id.} at 431-32, 521 N.E.2d at 50-51.

\textsuperscript{74} 121 Ill. 2d at 433, 521 N.E.2d at 51.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} at 434, 521 N.E.2d at 52.

the defendant’s arrest, he was given *Miranda* warnings. He said he wanted an attorney. A police officer then explained the procedure for getting an attorney and told the defendant that he would be taken to the county jail and booked for murder. The defendant asked whose murder was in question, and an officer replied the murder of Kay Burns. Another officer told him that they had a witness who had seen him leave her apartment. The defendant then said “Oh no, not Kay Burns,” and added that he had walked her to within a block of her apartment on the night in question.\(^7\) The trial judge held that the defendant’s statements were voluntary and not the product of police interrogation. On appeal, emphasizing the testimony of one police officer that the defendant was told that a witness had seen him leave the victim’s apartment, the defendant claimed that his statements were the result of police interrogation. The supreme court found that the trial judge’s finding was not contrary to the manifest weight of the evidence. The court stated that “informing the defendant that he was being booked for the murder of Kay Burns was clearly a police action ‘normally attendant to arrest and custody’”\(^9\) and therefore not interrogation.\(^9\)

Whether the defendant invoked his right to counsel under *Miranda*,\(^8\) and whether he subsequently waived that right were questions raised in an unusual setting in *People v. St. Pierre.*\(^8\) Initially, it is important to note that police officers had advised the murder defendant of his fifth amendment rights three times. At no time did he ask for an attorney, and he was willing to give a statement. He was stopped, however, and told to wait for the arrival of an assistant state’s attorney. Subsequently the assistant state’s attorney admonished the defendant of his rights.\(^8\) The defendant made a request

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\(^7\) *Id.* at 192, 522 N.E.2d at 1133.

\(^7\) *Id.* at 193-94, 522 N.E.2d at 1133.


\(^8\) 122 Ill. 2d 95, 522 N.E.2d 61 (1988).

\(^8\) The record, reprinted below, sets forth the conversation between the assistant state’s attorney and the defendant.

Q. [By Assistant State’s Attorney Leiberman] Robert, I’ll call you Bobbie, all right?


Q. Bobbie, I want to tell you that you have the right to remain silent. Do you understand that right?

A. Yes.

Q. You understand that anything you say can and will be used against you in a court of law?

A. Yes.

Q. Do you understand that you have a right to talk to a lawyer and have him
for counsel and then gave a statement admitting to acts concerning

A. Yes.
Q. Do you understand that if you cannot afford to hire a lawyer, one will be appointed by the court to represent you before any questioning?
A. Yes.
Q. Do you wish one?
A. Yes.
Q. Would you like to speak to a lawyer now?
A. No, no, after, that comes after, right?
Q. You could have a lawyer if you want one.
A. No, that's okay.
Q. So you prefer to talk to us now, today, without a lawyer being present?
A. Yes.
Q. Do you understand each of the above rights I have just read to you?
A. Yes.
Q. You want to make a statement to us today about what happened over at 9151 Karlov?
A. No.
Q. No, you don't want to talk to us?
A. Oh, yeah, I want to tell you about it, you know.
Q. Understanding each of these rights, do you want to talk to us now?
A. Yes.
Q. Why don't you tell me what happened from the very beginning?
A. Well, I met Barry in a bar with Sandy and we talked.
Q. Before we go any further, there seems to be a little confusion as to a couple of your rights. I think it's best that we go over them again. Do you understand that you have a right to have a lawyer with you and to talk to you before we have this interview, and you have the right to have him present during this interview. Do you understand that?
A. I can have him here, and he can help me out?
Q. It's your choice.
A. Yeah.
Q. Do you understand that? Do you want to have one here now?
A. Yes.
Q. Does that mean you do not want to give a statement without a lawyer being here? Are you confused as to that?
A. Yeah. I don't know what you guys want.
Q. It's whatever you want to tell us, whatever you want to do. Do you want to give a statement today?
A. Oh, yeah, today.
Q. Supposedly there is no lawyer in the room with us. If you want, you can have a lawyer here with you, your own lawyer that can talk to you about anything you might want to talk to us about. Do you understand that?
A. Yeah.
Q. Do you want to have a lawyer in the room here today when you make a statement, or do you prefer to make a statement now without a lawyer?
A. Which is quicker?
Q. It would be quicker if you gave a statement now, but, however, if you want a lawyer, we will wait and get a lawyer for you.
A. No, no. I do not want a lawyer.
Q. I just want to make it clear. You know you have a right to have an attorney present with you?
A. Yeah.
Q. Do you understand all of those rights I have advised you of?
A. Yes.

Id. at 107-09, 522 N.E.2d at 66-67.
the deaths of the victims. The Illinois Supreme Court found that the defendant had "clearly invoked" his right to counsel when the assistant state's attorney had asked him "whether he wished to talk to an attorney and have him present with him before and while he was being questioned, [and] the defendant responded 'Yes.'" The defendant's response was clear and unequivocal and constituted an invocation of counsel under Smith v. Illinois. The defendant's conduct which preceded his encounter with the assistant state's attorney neither diluted his unambiguous invocation of the right to counsel, nor did his subsequent willingness to make a statement without counsel detract from his unambiguous invocation. The Illinois Supreme Court reasoned that "statements by an accused following a clear request for counsel . . . are irrelevant in determining whether there has been an effective invocation of that right." The court concluded that the defendant did not waive his right to counsel, since "he did not initiate further discussion following his request for counsel." This conclusion is correct under Edwards v. Arizona and Oregon v. Bradshaw. The total picture of the admonishment procedure shows that the defendant was confused, and it cannot be said that he knowingly and intelligently waived his constitutional rights.

III. CONFRONTATION OF WITNESSES

A. The United States Supreme Court

The Supreme Court decided three cases during the Survey year concerning a defendant's rights under the confrontation clause. In Coy v. Iowa the Court held that placing a screen between a child sexual assault victim and the accused in court violated the defendant's right to confrontation. Defendant Coy was arrested for sexually assaulting two 13 year old girls. During the trial a screen was

83. Id. at 109, 522 N.E.2d at 67.
84. Id. at 110-11, 522 N.E.2d at 67
85. Id. at 111, 522 N.E.2d at 67.
87. 122 Ill. 2d at 111, 522 N.E.2d at 67.
88. Id. at 112, 522 N.E.2d at 68.
89. Id. at 113, 522 N.E.2d at 68.
92. 122 Ill. 2d at 113, 522 N.E.2d at 68.
94. Id. at 2799.
placed between the girls while testifying and the accused. The courtroom lights where adjusted so the defendant could see the witness, but the witness could not see him.\textsuperscript{95} The Iowa Supreme Court rejected a challenge based on violation of both the confrontation clause and due process.\textsuperscript{96}

Justice Scalia, in an opinion “embellished with references to and quotations from antiquity,” held that the “irreducible literal meaning of the clause” guaranteed “a right to \textit{meet face to face} all those who appear and give evidence at trial.”\textsuperscript{97} Justice Scalia recognized that “face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but . . . it may [also] confound and undo the false accuser, or reveal the child coached by a malevolent adult.”\textsuperscript{98}

The Court left open the question whether any exceptions exist to this right. The Court also held that the harmless error rule applies to such violations and remanded for a determination of whether the error was harmless beyond a reasonable doubt.\textsuperscript{99} Justice Blackmun, joined by the Chief Justice in dissent, agreed that the confrontation clause provides “a preference for face-to-face confrontation at trial.”\textsuperscript{100} Nevertheless, this preference must “occasionally give way to considerations of public policy and the necessities of the case.”\textsuperscript{101} Recognizing the potentially serious consequences of forcing a child to testify in front of the defendant, Justice Blackmun stated that a state may properly consider the protection of a child an important public policy which outweighs the preference for having the defendant within the witness’ sight while the witness testifies.\textsuperscript{102}

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\textsuperscript{95} Id. This procedure was authorized by a recently enacted Iowa Statute. \textit{Iowa Code} § 910 A. 14 (1987).
\textsuperscript{96} 397 N.W.2d 730 (Iowa 1986). The Iowa Supreme Court held that there was no violation of the confrontation clause because defendant’s ability to cross-examine the witnesses was not impaired by the screen. In addition, the court rejected the due process argument on the ground that the screening procedure was not inherently prejudicial.
\textsuperscript{97} 108 S. Ct. at 2803 (emphasis in original).
\textsuperscript{98} \textit{Id.} at 2802. Because the defendant’s right to confrontation was violated the Court found it unnecessary to decide his due process claim. \textit{Id.} at 2803.
\textsuperscript{99} \textit{Id.} at 2803. Justice O’Connor filed a concurring opinion with Justice White to note that the decision does not doom the “efforts of State legislatures to protect child witnesses [because many of the procedures] involve testimony in the presence of the defendant.” \textit{Id.} at 2804 (O’Connor, J., concurring).
\textsuperscript{100} \textit{Id.} at 2808 (Blackmun, J., dissenting).
\textsuperscript{101} \textit{Id.} (quoting \textit{Ohio v. Roberts}, 448 U.S. 56, 64 (1980)).
\textsuperscript{102} \textit{Id.} at 2809. The dissent also rejected the due process challenge because the screening device “did not brand [defendant] . . . with an unmistakable mark of guilt.” \textit{Id.} at 2810.
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In *United States v. Owens*\textsuperscript{103} the Supreme Court held that the confrontation clause is not violated when a witness is unable to recall the basis for his prior, out-of-court identification of the defendant. In *Owens*, John Foster, a correctional counselor at the federal prison in Lompoc, California, was attacked and brutally beaten in the head with a metal pipe on April 12, 1982.\textsuperscript{104} On May 5, 1982, while recuperating in the hospital, Foster identified the defendant as his attacker from an array of photographs. At trial eighteen months later, Foster testified he recalled identifying Owens on May 5, 1982, but admitted he could not remember seeing his attacker. The Ninth Circuit reversed defendant’s conviction based on a confrontation clause challenge\textsuperscript{105} and the Supreme Court granted *certiorari* to resolve a split among the circuits.

In an opinion by Justice Scalia, the Court declared that “the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”\textsuperscript{106} Justice Scalia argued that the defendant could cross-examine Foster to bring out such matters as bias, his lack of care and attentiveness, or the very fact that he has a bad memory. Such an opportunity, the Court held, is sufficient to satisfy the confrontation clause.\textsuperscript{107}

Justice Brennan, writing for the dissent, argued that unlike the situation where a witness can identify his attacker at trial but cannot remember the basis for the identification,\textsuperscript{108} a prior identification without any basis is not self-impeaching.\textsuperscript{109} “Foster’s inability in December of 1983 to remember the events of April 1982 in no way impugned or otherwise cast doubt upon the accuracy or trustworthiness of his memory in May 1982 . . . .”\textsuperscript{110} The dissent concluded that Foster’s memory loss precluded any meaningful cross-examination and thus should have barred the admission of the prior identification.

\textsuperscript{103} 108 S. Ct. 838 (1988).
\textsuperscript{104} Id. at 840-41.
\textsuperscript{105} 789 F.2d 750 (9th Cir. 1986), rev’d, 108 S. Ct. 838 (1988). The Ninth Circuit also held that the admission of the prior identification violated Federal Rule of Evidence 802 although this violation was harmless error.
\textsuperscript{106} 108 S. Ct. at 842 (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985)).
\textsuperscript{107} Id. at 842-43.
\textsuperscript{108} In Delaware v. Fensterer, 474 U.S. 15 (1985) (per curiam) an expert witness was allowed to testify and give his opinion at trial although he could not recall the basis for that opinion. The dissent argued that in *Fensterer* the witness’ memory loss was self-impeaching.
\textsuperscript{109} 108 S. Ct. at 848 (Brennan, J., dissenting).
\textsuperscript{110} Id.
In Olden v. Kentucky\textsuperscript{111} the Court held, in a \textit{per curiam} opinion, that a trial court’s refusal to allow a black defendant in a rape, kidnapping and sodomy trial to cross-examine the white complainant concerning her cohabitation with a black boyfriend violated the defendant’s sixth amendment right to confrontation. The complainant, Starla Mathews, alleged she was kidnapped and raped by the defendant after he lured her into his car by telling her a friend of hers had been in an automobile accident.\textsuperscript{112} Defendant argued consent and that Mathews invented the story to protect her relationship with her boyfriend after he saw her leaving Olden’s car.\textsuperscript{113} The jury convicted defendant of sodomy but acquitted him of kidnapping and rape.\textsuperscript{114}

While the proposed cross-examination of the complainant was outside the state’s rape-shield statute,\textsuperscript{115} the Kentucky Court of Appeals believed that revealing Mathews’ interracial relationship would prejudice the jury against her. The court held this danger outweighed defendant’s right to effective cross-examination.\textsuperscript{116}

The Supreme Court stated that the limitation imposed on defendant’s right to cross-examination was beyond reason. “Speculation as to the effect of the jurors’ racial biases [could not] justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Mathews’ testimony.”\textsuperscript{117} The Court held that, because Mathews’ testimony was “crucial to the prosecution’s case,” they could not conclude beyond a reasonable doubt that the restriction of defendant’s right to cross-examination was harmless error.\textsuperscript{118} The impact of \textit{Olden} on the future of rape shield laws is uncertain. The Court may have taken the opportunity to summarily reverse defendant’s conviction because of the particularly compelling facts. On the other hand, it is possible the Court is indicating rules of evidence cannot be used mechanically to prevent a criminal defendant from presenting highly relevant evidence in his defense.

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112. \textit{Id.} at 481. Mathews changed her story several times. Originally she told police she had been raped by four men. Later she claimed it was only two men. At trial, she testified defendant was the only rapist. In addition, she testified at trial that defendant threatened her with a knife, however, she had not previously stated defendant had been armed. \textit{Id.}
113. 109 S. Ct. at 481-82.
114. \textit{Id.} at 482.
115. \textit{Id.} (citing KY. REV. STAT. ANN. § 510.145 (Michie/Bobbs-Merrill 1985)).
116. 109 S. Ct. at 483.
117. \textit{Id.} at 483.
118. \textit{Id.} at 484.
\end{flushleft}
B. The Illinois Supreme Court

A significant sixth amendment confrontation of witnesses issue and a related Bruton\textsuperscript{119} redaction issue were raised in two related cases, \textit{People v. Cruz}\textsuperscript{120} and \textit{People v. Hernandez}.\textsuperscript{121} Cruz and Hernandez were jointly tried before a jury and convicted of murder and several other offenses. A third defendant was also tried at the joint trial, but the jury could not reach a verdict as to him. Following separate sentencing hearings, Cruz and Hernandez each received a death sentence. In separate appeals, the supreme court held that both defendants were denied fair trials because their out-of-court statements were introduced at the joint trial. Although the statements of Cruz and Hernandez were redacted to eliminate the names of the codefendants, and in place of such names the terms “friends” and “named individuals” were used, the supreme court found that the redactions were insufficient. The court pointed out that the prosecution called certain witnesses for the sole purpose of showing that the three codefendants were friends, and in closing argument, the prosecutor implied that the friendship of the defendants allowed the jury to consider the statements against the other defendants.

In \textit{Cruz}, the court said:

In light of the prosecution’s evidence relating solely to the friendship of the codefendants . . ., as well as its attempts during closing argument to lead the jury to connect defendant with Hernandez’ statements, we find a deliberate and constitutionally unacceptable attempt by the prosecution to circumvent the strictures of Bruton and the confrontation clause.\textsuperscript{122}

In \textit{Hernandez}, the court said: “The defendant here was plainly incriminated by the reference to ‘friends’ not only because of the State’s repetitive attempts to establish friendship but also by the prosecutor’s closing argument, in which he linked the ‘friends’ evidence to admissions made by Cruz and the defendant.”\textsuperscript{123}

The Illinois Supreme Court concluded that the use of the term “friends” in the statements was “thinly veiled,” constituted obvious

\begin{footnotes}
\item[119.] Bruton v. United States, 391 U.S. 123 (1968) (sixth amendment right to confrontation is violated when prosecutor offers the out-of-court statements of a nontestifying codefendant which inculpate the defendant).
\item[120.] 121 Ill. 2d 321, 521 N.E.2d 18, \textit{cert. denied}, 109 S. Ct. 177 (1988).
\item[121.] 121 Ill. 2d 293, 521 N.E.2d 25, \textit{cert. denied}, 109 S. Ct. 177 (1988).
\item[122.] \textit{Cruz}, 121 Ill. 2d at 333, 521 N.E.2d at 23-24.
\item[123.] \textit{Hernandez}, 121 Ill. 2d at 313, 521 N.E.2d at 34.
\end{footnotes}
references to the codefendants, and that "it would be unrealistic in
the extreme to expect a jury to ignore the clear import of the
[codefendant's] statements, despite their redaction."124

The supreme court also noted that the prosecutor brought out
the fact that the statements had been redacted. In Cruz the court
stated:

Informing jurors that statements have been redacted can itself be
grounds for a mistrial and, in this case, put the jurors on notice
that the testimony was being edited to protect someone involved
in the trial, encouraging them to speculate as to the missing
names.125

In Hernandez the court stated:

On notice that the defendants' admissions were being edited, it was
not difficult for the jurors to recognize the connection between the
prosecutors' repeated elicitation of testimony that the three
defendants were friends, and the use of "friends" in testimony
regarding statements made by Cruz and the defendant.126

Because the evidence against the defendants was not overwhelming,
albeit limiting instructions were given, the use of the statements was
not harmless error.

IV. PRE-TRIAL IDENTIFICATION

In People v. Williams,127 the Illinois Supreme Court reviewed a
jury verdict finding the defendant guilty of rape and armed robbery.
On appeal the defendant challenged police station identification
procedures. The facts of the case show that the victim was attacked
in the hallway of an apartment building. The assailant put a knife
to her throat, threatened to kill her, and pushed her into a laundry
room. He then blindfolded, tied, and raped her. A friend of the
victim called the police when she failed to appear. The defendant
was arrested later in the apartment building. Shortly thereafter the
victim was taken to the police station where she identified the
defendant's photograph on an identification card as the person who
had attacked her. She subsequently made line-up and in-court identi-
fications of the defendant. The defendant contended that the

124. Cruz, 121 Ill. 2d at 332, 521 N.E.2d at 23.
125. Id. at 334, 521 N.E.2d at 24 (citation omitted).
126. Hernandez, 121 Ill. 2d at 316, 521 N.E.2d at 36.
victim's viewing of his identification card at the police station was a suggestive procedure which tainted her later identifications of him.

The supreme court rejected the challenge finding that the victim's identification of the defendant from his photograph was reliable. The court pointed to various factors which existed in this case: the victim viewed her attacker in good lighting conditions, saw his face for several seconds, and looked at the photograph within an hour and a half after the incident. The court further noted that there was "little, if any, prompting" of the victim to make an identification. "The only suggestion of that came in testimony that a police officer showed the card to the victim and asked her if she recognized the person in the photograph."128

V. RIGHT TO COUNSEL

A. At Psychiatric Evaluations

In Satterwhite v. Texas129 the Supreme Court held that the harmless error rule applies to violations of an accused's right to consult with counsel before submitting to psychiatric evaluations to determine future dangerousness in capital cases.130 On March 15, 1979, John Satterwhite was charged with murdering Mary Francis Davis during a robbery.131 Satterwhite was appointed counsel sometime between his indictment on April 4th and his arraignment on April 13th. On May 3, 1979, Dr. James P. Grigson,132 a psychiatrist, examined Satterwhite and found he has "a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence."133 Satterwhite's counsel was not notified of the examination and Dr. Grigson testified at Satterwhite's capital sentencing hearing over defense counsel's objection. Satterwhite was sentenced to death. The Texas Court of Criminal Appeals held that defendant's sixth amendment rights were violated but concluded "the error was harmless because a reasonable jury would have found

128. Id. at 414, 515 N.E.2d at 1233.
130. In Estelle v. Smith, 451 U.S. 454 (1981), the Court first recognized that defendants charged with capital crimes have a sixth amendment right to consult with counsel prior to submitting to psychiatric examinations to determine their future dangerousness.
131. 108 S. Ct. at 1795.
132. Interestingly, the controversy in Estelle v. Smith also centered on the testimony of Dr. Grigson. Id. at 1796.
133. Id. at 1795.
the properly admitted evidence sufficient to sentence Satterwhite to death.\textsuperscript{134}

The Court, in an opinion authored by Justice O’Connor, agreed Satterwhite’s sixth amendment rights were violated. Justice O’Connor distinguished prior cases holding the harmless error rule does not apply to sixth amendment violations on the ground that the errors in those cases “‘contaminated the entire criminal proceeding.’”\textsuperscript{135} In contrast, the deprivation of the right to counsel in this case was limited to the admission of Dr. Grigson’s testimony. The Court reversed because they could not say beyond a reasonable doubt that Dr. Grigson’s expert testimony . . . did not influence the sentencing jury.\textsuperscript{136}

Justice Marshall, writing a concurring opinion, argued that because of the inherent moral judgment a capital sentencing jury makes, combined with their substantial discretion, the harmless error rule should not apply at capital sentencing hearings.\textsuperscript{137} Nevertheless, Justice Marshall stated that assuming it does apply to some constitutional errors at capital sentencing hearings, it should never apply to a violation of \textit{Estelle v. Smith}.\textsuperscript{138}

Justice Marshall reached this conclusion by reasoning that the potential for actual prejudice from such a violation is very great. Additionally, it is almost impossible to measure the degree of prejudice arising from the failure to notify counsel of a psychiatric examination. These factors, together with the heightened concern for accuracy in capital cases, require a \textit{per se} rule of reversal for violations of \textit{Estelle}.\textsuperscript{139}

\section*{B. Effectiveness Of Representation}

In \textit{People v. Emerson},\textsuperscript{140} the defendant was convicted by a jury of murder, attempted murder, aggravated arson, and two counts of armed robbery and sentenced by the same jury to death. On appeal he claimed that his attorney rendered ineffective representation.\textsuperscript{141}

\begin{thebibliography}{99}
\bibitem{134} 726 S.W.2d 81, 92-93 (Tex. Crim. App. 1986).
\bibitem{136} 108 S. Ct. at 1799.
\bibitem{137} \textit{Id.} at 1801 (Marshall, J., concurring).
\bibitem{138} \textit{Id}.
\bibitem{139} \textit{Id.} at 1802.
\bibitem{141} To sustain such a claim under the sixth amendment to the United States Constitution,
The defendant complained, *inter alia*, that counsel in closing argument had conceded his guilt for the murder charge.\(^{142}\) The defendant argued that the jurors could have construed counsel’s statement, “I can still look you in the eye with all this evidence and say this. That I don’t believe that two people went into that place that night with the idea to commit an armed robbery,” to mean that counsel was unable to say that he did not believe that his client was guilty of murder.\(^{143}\) The defendant also argued that the jurors may have construed counsel’s statement at the end of the argument, that “all” he was asking the jurors to do was to acquit the defendant of the armed robbery counts, to mean that counsel was conceding his client’s guilt for the other offenses, including the murder charge. The Illinois Supreme Court rejected his claim because counsel’s argument did not constitute “a direct, unequivocal concession of the defendant’s guilt of the primary charge against him . . . .”\(^{144}\)

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142. In closing argument at trial, counsel told the jurors:

Ladies and gentlemen, this case has become bizarre, in and out. A state of confusion during this trial as I suppose you can tell due to the fact that my client and I have disagreement—disagreements about how the case should be tried. And, of course, as you heard, the testimony of his brother that you heard a few moments ago was something that no one heard, including myself and his [i.e., Jackson’s] own lawyer until the time he took the stand and gave it. But as long as this man’s life is in my hands, I’m going to do my best to save his life.

I can still look you in the eye with all this evidence and say this. That I don’t believe that two people went into that place that night with the idea to commit an armed robbery. And there’s a difference between just a simple murder and felony murder. I know it sounds terrible, but in our law, there’s a difference between when a man commits murder and when a man commits murder in the course of a felony.

... If you have any doubts about the counts of armed robbery which will be submitted to you in this case with respect to Dennis Emerson, please, at this point, find him not guilty of armed robbery. It does make a difference. And as I say, I don’t think that two men planning to go into a saloon, a tavern in this particular area and planning to commit a robbery, planning to take the weekend proceeds —

122 Ill. 2d at 428-29, 522 N.E.2d at 1115-16.

143. *Id.* at 429, 522 N.E.2d at 1116.

144. *Id.* at 430, 522 N.E.2d at 1116.
In *People v. Pegram*, the Illinois Supreme Court reversed an armed robbery conviction and ordered a new trial where counsel failed to tender a compulsion instruction to the jury. The defendant testified that he had been forced at gun point to participate in the robbery. The court explained:

This testimony certainly satisfied the requirement that a defendant, to raise an affirmative defense, “must present some evidence thereon.” The principal contested issue here was whether the defendant had been forced, under threat of immediate harm, to participate in the robbery. Yet, no jury instruction given addressed the issue raised by the defense evidence: whether Pegram acted under compulsion, reasonably believing he was in fear of immediate bodily harm or death during the armed robbery. On this record it cannot be said that the jury, not having been instructed on the defense of compulsion, knew that the defendant’s testimony concerning his fears of immediate harm and being forced by the two masked men to do the described acts could provide a defense to the charge of robbery. The jury was not informed that the prosecution had the burden of proving beyond reasonable doubt, not only the elements of armed robbery, but also that Pegram was not compelled in his conduct.

Applying the *Strickland* standard for assessing the effectiveness of counsel’s representation, the court concluded that the failure to tender appropriate jury instructions actually prejudiced the defense and thereby denied the defendant a fair trial.

C. Conflict Of Interests

In *People v. Banks*, a consolidated appeal, the Illinois Supreme Court considered whether a criminal defendant is entitled to

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146. *Id.* at 173, 529 N.E.2d at 509 (citation omitted).
148. 124 Ill. 2d at 174, 529 N.E.2d at 509-10.
149. 121 Ill. 2d 36, 520 N.E.2d 617 (1987). Banks was convicted in the circuit court of Cook County of murder and multiple counts of attempted murder, attempted armed robbery, and aggravated battery. On appeal, he was represented by the Cook County Public Defender’s office. The appellate court reversed the attempted murder convictions but affirmed his conviction on all other charges. Banks filed a *pro se* post-conviction petition, alleging ineffective assistance of appellate counsel, and requested the appointment of counsel other than the public defender. The request was denied and the trial judge appointed an assistant Cook County public defender to represent him.

Blakes was convicted in the circuit court of Peoria County of unlawful use of weapons.
the appointment of an attorney other than a public defender in challenging the effectiveness of trial or appellate representation rendered by an attorney from the same public defender office. The defendants argued that a per se conflict of interest exists if an assistant public defender claims in a post-trial motion, on appeal, or in post-conviction proceedings that another assistant public defender previously rendered ineffective assistance of counsel, reasoning that the successor public defender would per se labor under divided and conflicting interests—loyalty to his client versus loyalty to the public defender office. The court rejected the per se approach, opting instead for a case-by-case review for the presence or absence of an actual conflict of interest. The court stated:

[It] is not clear to us that where an assistant public defender asserts the incompetency of another assistant, the reputation of the whole office is negatively impacted. To the contrary, it can be equally argued that a positive image is fostered where an office aggressively pursues allegations made against some of its members. More importantly, however, a per se rule would require us to presume that public defenders would allow any office allegiances to interfere with their foremost obligation to their clients. In our view, it is erroneous to assume that public defenders have such an allegiance and are unable to subordinate it to the interests of their clients.

In rejecting a per se test, the court overruled its own precedents, People v. Smith and People v. Terry, and adopted the rationale of People v. Robinson.

Prior to closing arguments, he informed the judge that he did not believe that the assistant public defender assigned to his case was affording him adequate representation. At the defendant's request, the court discharged counsel and appointed another assistant public defender to represent him in post-trial proceedings. Counsel then filed a motion for a new trial, alleging that former counsel rendered ineffective assistance. On appeal, the defendant argued that post-trial counsel had a conflict of interest because he asserted the incompetency of another assistant public defender from the same office.

DuQuaine was convicted of murder in the circuit court of Cook County. The Cook County Public Defender represented the defendant on appeal, and the appellate court affirmed his conviction in an unpublished order. The defendant subsequently filed a pro se post-conviction petition alleging ineffective assistance of appellate counsel. The Cook County Public Defender was appointed to represent the defendant in post-conviction proceedings, and the court granted the State's motion to dismiss without an evidentiary hearing.

150. Id. at 44, 520 N.E.2d at 621.
151. Id. at 43, 520 N.E.2d at 620.
152. 37 Ill. 2d 622, 230 N.E.2d 169 (1967).
154. 79 Ill. 2d 147, 402 N.E.2d 157 (1979) (no per se conflict of interest for separate assistant public defenders of the same office to represent codefendants who have antagonistic defenses).
In *People v. Jones*, the Illinois Supreme Court addressed a sixth amendment right to conflict-free representation claim arising out of joint representation of codefendants. The court first inquired under *Holloway* whether the potential conflict had been brought to the attention of the trial judge. The court concluded that counsel did not sufficiently advance a conflict of interest claim. The court next examined the issue under the *Cuyler* standard to determine whether an actual conflict of interest existed which adversely affected counsel's representation. The court concluded that the mutually inculpatory pretrial statements of the jointly represented defendants created an actual conflict of interests which denied one of the defendants the constitutional right to counsel. Although one defendant had testified at trial, repudiated his prior statement as a product of coercion, and claimed that neither he nor the codefendant were involved in the offense, the other defendant did not testify. There was no way in which the testifying defendant's counsel could effectively deal with the inculpatory statement of the non-testifying defendant.

Another interesting conflict of interests issue arose in *People v. Spreitzer*. Following a bench trial, the defendant was convicted of murder and aggravated kidnapping. A sentencing hearing was held before a jury and a sentence of death was imposed. The defendant contended on appeal that his trial counsel, an assistant public defender, had a *per se* conflict of interest. The conflict claim was predicated on the fact that the public defender of the county was...

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155. 121 Ill. 2d 21, 520 N.E.2d 325 (1988).
157. The court stated:

> [T]he issue of a conflict was first raised *sua sponte* by the trial court after Jones' statement was read into evidence by an assistant State's Attorney. During the ensuing bench discussion, defense counsel acknowledged that he had not previously recognized the "gravity of the conflict in the statements." Defense counsel went on to state that at that point he "had only planned on putting on one" defendant to testify. As the trial proceeded only Jones testified, and he repudiated his earlier statement inculpating Harris and gave testimony corroborating Harris' exculpatory post-arrest statement. At the close of the People's case, the court invited defense counsel to move for mistrial if they thought a conflict was present. When proceedings resumed the next day, defense counsel moved for mistrial, but based the motion largely on certain surprise testimony of the victim. While the conflict issue was obliquely referred to, counsel failed to articulate the nature of the conflict, and the motion for mistrial was denied.

formerly a prosecutor who had been involved in the decision to charge the defendant in this case. The defendant argued that the public defender and his assistants were therefore disqualified from representing him. The supreme court reviewed its previous decisions regarding conflict of interests and held that there was no conflict here.

The court said that it would be "ludicrous" to disqualify a public defender's office from handling cases which were initiated at a time when the public defender was employed as an assistant state's attorney. The court went on to say:

[T]he asserted disjunction between [the assistant defender's] duty to her client and her supposedly conflicting loyalty to [the public defender] is extremely speculative and remote. We are asked to believe that [the assistant defender] would refrain from zealously representing her client because such representation might embarrass [the public defender] in some way. But [the public defender's] tie to the prosecution, a tie which was itself fairly tenuous, would be counterbalanced by his present status as the public defender. Presumably he was more interested in winning cases currently assigned to his office than in protecting the integrity of the decisions he had made when he was a prosecutor. Moreover, the subliminal reluctance felt by the prosecutor-turned-defense counsel in Kester towards attacking his own personal decisions would not apply to [the assistant in this case], who would not have to attack anything she had personally done.  

Did counsel have a conflict of interest in representing a murder defendant in guilty pleas proceedings when he had previously represented one of the victims and her parents? In People v. Hillenbrand, the Illinois Supreme Court said no. The defendant was charged with the June 29, 1970, murder of his former girlfriend, who was the mother of his daughter, and a male companion who had spent the night with her. The defendant then retained the services of an attorney, one Edward Rashid, and subsequently plead guilty on October 19, 1970. Rashid had previously prepared personal and business income tax returns for the parents of the deceased girlfriend, Patricia Pence. She and the defendant had operated a restaurant, and Rashid prepared their tax returns. Rashid also represented Patricia's father in a marriage dissolution action against his wife.

161. Id. at 22, 525 N.E.2d at 38 (emphasis in original).
162. 121 Ill. 2d 537, 521 N.E.2d 900 (1988).
however, that representation had concluded prior to the murders. Rashid also represented Patricia’s father on a gambling charge prior to the murders. Rashid did not receive large fees from Patricia or her parents, and he volunteered to represent the defendant on the murder charges without a fee.\textsuperscript{163}

The court first addressed the question whether counsel had a contemporaneous conflicting professional commitment to another. This inquiry is essential in determining whether the defendant had received undivided loyalty of counsel and effective representation as guaranteed by the sixth amendment to the United States Constitution. The court concluded that counsel \textquotedblleft did not have a contemporaneous professional commitment to [Patricia and her parents] that created a conflict of interest in his representation of the defendant.\textquotedblright\textsuperscript{164}

The court next examined the defendant’s claim that Rashid had a financial interest in retaining the favor of the victim’s parents. It rejected the contention because there was no evidence that they still owed Rashid legal fees. In the absence of such evidence, the court concluded, the relationship was not active or ongoing.\textsuperscript{165} Moreover, counsel volunteered to represent the defendant without a fee. Under these circumstances, the court concluded \textquotedblleft [i]t would be unreasonable to believe that Rashid would volunteer to represent Hillenbrand if he was concerned about currying the Pences’ favor for future business.\textquotedblright\textsuperscript{166}

D. Waiver

In \textit{Patterson v. Illinois},\textsuperscript{167} the Supreme Court, in a five-four decision, resolved a split among lower courts and decided a question

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} at 542-44, 521 N.E.2d at 901-02.
\item \textsuperscript{164} \textit{Id.} at 545, 521 N.E.2d at 903. Rashid had died in 1976. The 1983 testimony of Rashid’s former bookkeeper established that Rashid regularly represented the Pences from 1965 to early 1970. He had also represented Patricia Pence on tax matters in connection with the restaurant, but that representation was concluded long before the murders. Rashid was not on retainer for the Pences, he had concluded all of his services prior to representing the defendant on these charges, he was not the only attorney the Pences consulted, and he derived little of his income from representation of the Pences.
\item \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 546-47, 521 N.E.2d at 903-04.
\item \textsuperscript{166} \textit{Id.} at 547, 521 N.E.2d at 904.
\item \textsuperscript{167} 108 S. Ct. 2389 (1988).
\end{itemize}
it had previously left open. In Patterson, the defendant, a member of the Vice Lords street gang, was arrested and charged with battery and mob action. The defendant was informed of his Miranda rights, waived them, and made incriminating statements. Three days later the defendant and two others were indicted for the murder of a rival gang member. After being informed of the indictment the defendant asked why a fourth gang member was omitted from the indictments. The defendant was informed of his Miranda rights again and validly waived them. The defendant then made two inculpatory statements which were used against him at trial.

On appeal the defendant argued that the Miranda warnings did not adequately inform him of his sixth amendment right to counsel, thus his waiver was not "voluntary, knowing, and intelligent." The Illinois Supreme Court affirmed, holding that the Miranda warnings were sufficient to make defendant aware of his sixth amendment right to counsel during post-indictment questioning.

Justice White, writing for the majority, reasoned that the Miranda warnings served to make defendant aware of his sixth amendment right to counsel during questioning, and the consequences of a decision to waive that right during questioning. The Court indicated that defendant was unable to indicate with precision what additional information should have been provided. Justice White examined the functions a lawyer serves at post-indictment questioning and stated that the "State's decision to . . . commence formal adversary proceedings against the accused does not substantially increase the value of counsel to the accused at questioning . . . ."

169. 108 S. Ct. at 2392.
170. Id. at 2392-93. The defendant was orally informed of his rights by Officer Michael Greshan, read them, and then initialled each of the five warnings and signed the waiver form. Assistant state's attorney George Smith later reviewed this procedure with the defendant and then repeated the entire procedure a second time.
171. Id.
172. 116 Ill. 2d 290, 507 N.E.2d 843 (1987). The Illinois Supreme Court followed its earlier decision in People v. Owens, 102 Ill. 2d 88, 464 N.E.2d 261, cert. denied, 469 U.S. 963 (1984), where it held that the Miranda warnings were sufficient to make an accused aware of his sixth amendment right to counsel during post-indictment questioning. The Illinois Supreme Court's decision in Patterson was discussed in last year's Survey. See Schroeder, Criminal Procedure, 12 S. Ill. U.L.J. 839, 882-83 (1988).
173. 108 S. Ct. at 2395.
174. Id. at 2396 n.7.
175. Id. at 2398.
Justice Stevens, writing for three dissenters, discussed the many cases emphasizing the significance of the formal commencement of adversary proceedings. Justice Stevens argued that the Miranda warnings do not advise a defendant that a lawyer might examine the indictment for legal sufficiency, be more skillful than the accused at plea bargaining, or explain the nature of the charges against him. Justice Blackmun filed a separate dissent reasoning that Edwards v. Arizona should apply and that after a defendant has been indicted he cannot be questioned by the authorities unless he initiates the conversation. The majority refuted this analysis by arguing that "preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of Edwards . . . not barring an accused from making an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone."

In People v. Johnson, the defendant represented himself at a jury trial, was convicted of four counts of murder, and received a sentence of death. Initially the defendant had retained counsel but this attorney was allowed to withdraw and the public defender was appointed. The defendant was first satisfied with this appointment but on the eve of trial he requested other counsel from outside the county. This request was denied and the defendant stated that he would not accept the public defender as his attorney, that he would not represent himself, and that he would absent himself from the proceedings. Ultimately, the defendant chose to represent himself. On appeal, the defendant contended that his waiver of counsel was invalid—was not knowingly and intelligently made—because the trial judge had failed to properly advise him of the minimum sentence as is required by Illinois Supreme Court Rule 401(a).

177. Id. at 2403.
179. 108 S. Ct. at 2399 (Blackmun, J., dissenting).
180. Id. at 2394 (emphasis in original).
182. Illinois Supreme Court Rule 401(a) provides in pertinent part:
(a) Waiver of counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, addressing the defendant personally in open court,
that the judge did not tell him that because of a previous murder conviction he faced a mandatory minimum sentence of natural life upon conviction. The Illinois Supreme Court rejected his contention finding that there was substantial compliance with Rule 401(a) and that the defendant was not prejudiced by this omission.\textsuperscript{183} The court reasoned that the judge had admonished the defendant that he could be incarcerated for "a number of years" and that he might receive a death sentence. Furthermore, the defendant reviewed voir dire questions which had been drafted by his attorney which made reference to life imprisonment, and he was present when the prosecution objected to the questions on grounds that life imprisonment was a mandatory sentence. Lastly, the court noted that the defendant was "no stranger to criminal proceedings" and standby counsel was appointed.\textsuperscript{184}

VI. SUBSTITUTION OF JUDGE

A. Defense

In \textit{People v. Walker},\textsuperscript{185} the Illinois Supreme Court upheld the constitutionality of the automatic substitution of judge provision of the Criminal Procedure Code.\textsuperscript{186} At issue was whether the statute violated the separation of powers clause\textsuperscript{187} of the Illinois Constitution. First, the court recognized the importance of this right in ensuring a fair trial for the criminally accused. The court stated:

\begin{itemize}
  \item informing him of and determining that he understands the following:
    \begin{itemize}
      \item the nature of the charge;
      \item the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
      \item that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.
    \end{itemize}
\end{itemize}

\textsuperscript{183} ILL. S. CT. R. 401(a), ILL. REV. STAT. ch. 110A, ¶ 401(a) (1987).
\textsuperscript{184} Id. at 132-33, 518 N.E.2d at 106-107.
\textsuperscript{185} 119 Ill. 2d at 465, 519 N.E.2d 890 (1988).
\textsuperscript{186} ILL. REV. STAT. ch. 38, ¶ 114-5(a) (1987):

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

\textsuperscript{187} ILL. CONST. art. II, § 1.
For the past 114 years, Illinois law has protected the constitutional right to a fair and impartial trial in criminal cases by providing for the substitution of a judge who is allegedly prejudiced against a defendant. Although the procedure for invoking the protections of the automatic-substitution-of-judge statute has varied over time, the prophylactic purpose of the statute has remained the same: this court has consistently held that the statute vests criminal defendants with the "absolute right" to have an assigned trial judge substituted upon a timely written motion containing a good-faith allegation that the judge is prejudiced. The vigor with which this court has upheld the basic constitutional right to a trial before a fair and impartial judge is reflected in this court's long held view that the provisions of the automatic-substitution-of-judge statute should be construed liberally "to promote rather than defeat," substitution, and its willingness to find reversible error where the statute is not so construed.188

The automatic substitution of judge provision, concluded the court, represents the public policy of this state, expressed by the legislature, that "a defendant should be able to avoid having his liberty, and perhaps even his life, hang in balance before a judge whose impartiality he in good faith questions."189 This provision of the code does not conflict with any supreme court rule or "unduly invade[ ] the inherent authority of the judiciary."190

In People v. Jones,191 the Illinois Supreme Court held that the automatic substitution of judge section192 of the Criminal Procedure Code does not allow a defendant charged with a capital crime to file two separate motions for substitution of judge. The statute contemplates that the defendant may name one or two judges as prejudiced in a single motion.193 The court rejected the defendant's contention that an accused cannot make a meaningful use of the two-judge option provided by section 114-5(a) unless he already knows the identity of the first two judges to whom the case would otherwise be assigned.

The automatic substitution of judge provision was also reviewed by the Illinois Supreme Court in People v. Emerson.194 Emerson's

188. 119 Ill. 2d at 470-71, 519 N.E.2d at 891 (citations omitted).
189. Id. at 480, 519 N.E.2d at 895.
190. Id. at 482, 519 N.E.2d at 897.
193. 123 Ill. 2d at 401-02, 528 N.E.2d at 654-55.
murder and other convictions, as well as his death penalty, had been previously reversed and remanded by the supreme court. On remand to the circuit court, the case was placed on the trial call of the same judge who had presided at the first trial. The defendant filed a motion for automatic substitution of judge within ten days after the case had been placed on the trial call following the remand. The trial judge denied the motion holding that the case on remand was not a new case and that it had been on his call since before the first trial. The Illinois Supreme Court agreed with the trial judge and held that for purposes of section 114-5(a), the remand of the case was a continuation of the original proceedings. Therefore, the defendant was not entitled to an automatic substitution of judge under section 114-5(a).

B. Prosecution

In People v. Williams, the Illinois Supreme Court upheld the constitutionality of a new law which grants prosecutors the right to substitute a judge on grounds of prejudice. The court rejected the defendant's claim that the legislation conflicts with Illinois Supreme Court Rule 21(b). The defendant argued that section 114-5(c) interferes with the right of the chief judge of each circuit to provide for the assignment of judges by giving the prosecution a veto power over any assignments made. The court reasoned that since section 114-5(c) "may be utilized only after assignment of the case to a particular judge," it does not conflict with Rule 21(b). The court also found that the legislation did not violate separation of powers principles. It does not impermissibly infringe on the role of the judicial branch. Lastly, the court held that a defendant cannot complain of the state's substitution right on due process grounds reasoning that an accused "does not have the right . . . to have his case heard by a particular judge."
Can a prosecutor walk away from an agreed plea agreement? Apparently so, says the Illinois Supreme Court. In People v. Navarroli, the defendant was charged with unlawful possession of cocaine with intent to deliver (a Class X offense) and unlawful possession of cocaine (a Class I offense). Plea negotiations were held between the defendant and the state's attorney, and subsequently the defendant moved to compel the state's attorney to carry out the terms of a purported plea agreement. The defendant claimed that under the terms of the plea agreement he had acted as an informant in several drug investigations in exchange for the prosecutor's promise to reduce the charges and agree to a sentence of probation and a fine. The defendant alleged that after he had assisted law enforcement officials the state's attorney refused to reduce the charges against him. The prosecutor denied the existence of the agreement and its terms. An evidentiary hearing was held. The circuit court found the evidence conflicting but determined that an agreement had been made and that the defendant had fully performed his obligations under the agreement.

The Illinois Appellate Court reversed, finding that even if a plea agreement had existed, Navarroli was not entitled to specific performance. The court reasoned that the defendant was not deprived of his liberty or any constitutionally protected interest in reliance on the agreement. The Illinois Appellate Court also concluded that the circuit court had improperly applied a subjective test to determine the terms of the agreement.

The supreme court found it unnecessary to determine whether a plea agreement in fact existed reasoning that the defendant was not deprived of due process. In reaching this conclusion, the court

203. Id. at 519, 521 N.E.2d at 892.
204. The trial judge explained:
Whether or not the prosecution made a specific promise the defendant said it did, the reasonable inference is that the defendant believed so, and that such belief was not unreasonable under these circumstances. To preserve the sanctity of justice, the defendant must prevail. The defendant is entitled to receive probation and a fine. The reduction of the charge, the length and terms of the probation whether or not accompanied by incarceration and the amount of the fine are left to the parties and to the sentencing judge, should the defendant, in fact, plead guilty.
121 Ill. 2d at 520, 521 N.E.2d at 892.
206. Id. at 470, 497 N.E.2d at 131.
207. 121 Ill. 2d at 522, 521 N.E.2d at 893.
stated that "[t]he defendant has not entered a plea of guilty in reliance on the proposed plea agreement. He cannot say he was deprived of liberty by virtue of the State's refusal to abide by the terms of the claimed plea agreement. The defendant still has the option of pleading not guilty and proceeding to trial." The court concluded that the defendant's right to a fair trial remained "unimpaired," and therefore he was not entitled to specific performance of the agreement.

VIII. JURISDICTION

In *People v. Caruso*, the Illinois Supreme Court held that Illinois authorities had jurisdiction to charge the defendant with child abduction for detaining his children in the State of Ohio in violation of an Illinois court order which had granted custody to his former wife. The defendant contended that Illinois lacked jurisdiction because his conduct was committed in Ohio. The Illinois Supreme Court determined that Illinois properly asserted criminal jurisdiction over the defendant's conduct since the charge was based on an omission to perform a duty imposed by the law of Illinois.

IX. SPEEDY TRIAL

The effect of a nol-prossed charge for lack of venue on the defendant's statutory right to a speedy trial was considered in *People v. Goins*. The defendant was taken into custody on July 7, 1983, in Kane County, Illinois. An indictment was returned against him in Kane County for residential burglary on the prosecutor's belief that the burglarized residence was in Kane County. It was later discovered that the residence was located in DuPage County. The defendant was charged in DuPage County with residential burglary on November 22, 1983. On November 30, 1983, the Kane County charge was nol-prossed, and the defendant was transferred to the DuPage County jail. On February 23, 1984, prior to his trial in DuPage County, the defendant moved for a speedy trial discharge.

208. Id. at 524, 521 N.E.2d at 894.
209. Id. at 529, 521 N.E.2d at 896.
211. 119 Ill. 2d at 384, 519 N.E.2d at 443.
212. 119 Ill. 2d 259, 518 N.E.2d 1014 (1988).
The trial judge denied the motion, finding that the speedy trial term had commenced on November 30, 1983, the date on which the circuit court of DuPage County first had jurisdiction to try the defendant for the offense. The defendant was convicted of the offense.

The Illinois Supreme Court reversed. The court agreed with the defendant’s contention that the speedy trial term had commenced on the date he was taken into custody in Kane County, since he was in custody for the same offense for which he was subsequently charged and convicted in DuPage County. The court reviewed the statutory language “shall be tried by the court having jurisdiction within 120 days” and concluded that this language means “jurisdiction” and not “venue.” Therefore, the “circuit court of Kane County had acquired jurisdiction, though there was no proper venue.”

The State contended that even if the circuit court of Kane County had jurisdiction, the speedy trial term did not begin to run until the proceedings in Kane County had ended on November 30, 1983. The State argued that a defendant subject to prosecution in different counties for different offenses is not considered to be in the custody of the second county until the proceedings in the first county are terminated. The supreme court rejected this contention, finding that the charges in Kane County and in DuPage County were not for separate and distinct offenses. The court stated:

Here it is clear that the Kane and DuPage County indictments charge the defendant with the identical offense. The DuPage County indictment does not allege a separate offense but simply cures the venue defect in the Kane County indictment. To charge the defendant with the State’s delay in ascertaining the county where the alleged offense was committed would circumvent the protection which the speedy-trial statute was designed to provide.

X. JURY SELECTION

A. Peremptory Challenges

A number of Batson issues have been considered by the Illinois Supreme Court before. However, in People v. Holland, an inter-

214. 119 Ill. 2d at 265, 518 N.E.2d at 1016-17.
215. Id. at 267, 518 N.E.2d at 1017-18.
esting standing question was raised. Can a Caucasian defendant challenge the prosecutor's peremptory challenges excusing two prospective jurors who were black? The supreme court said no on the ground that he lacks standing to object. "Since [the] defendant is white and the excluded prospective jurors are black, he is unable to show that members of his race have been excluded impermissibly. Thus, he is unable to establish the threshold element of a prima facie Batson violation."\(^\text{218}\)

B. Witherspoon

In *People v. Emerson*,\(^\text{219}\) the Illinois Supreme Court addressed a Witherspoon\(^\text{220}\) issue. The defendant was convicted by a jury of murder, attempted murder, aggravated arson, and two counts of armed robbery. A sentencing hearing was held before the jury and a sentence of death was imposed. In upholding the death sentence, the court held that the trial judge did not improperly exclude a certain juror in violation of *Witherspoon*.

During jury selection, the trial judge initially asked a group of prospective jurors whether they would not consider the death penalty under any circumstances. Several of them, including a Mr. Witvoet, responded affirmatively. The judge then asked Mr. Witvoet why he was against the death penalty and Witvoet replied: "Bible says, 'Thou shalt not kill.' It doesn't say any ifs, ands or buts." Later, when it was Mr. Witvoet's turn for individual examination, the following exchange occurred:

Judge: "You're one of the gentlemen that said under no circumstances could you possibly impose a death penalty, is that correct?"

Witvoet: "Right."

Judge: "Okay. You're excused."

The supreme court held that the trial judge was justified in concluding from the responses that Witvoet's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror . . . ."\(^\text{222}\)

\(^{218}\) *Id.* at 157, 520 N.E.2d at 279.


\(^{221}\) *Id.* at 437-38, 522 N.E.2d at 1120.

\(^{222}\) *Id.* at 438, 522 N.E.2d at 1120.
XI. SENTENCING

A. Death Penalty

The authority of a prosecutor to seek the death penalty was challenged in *People v. Foster*. Prior to trial, the defendant filed a motion alleging that the state's attorney abused his discretion in seeking the death penalty. The defendant claimed that the death penalty had not been sought in other cases, albeit the defendants were eligible for the death penalty, and the facts in those cases were as egregious as in his case. Additionally, the defendant sought to subpoena the state's attorney and have him produce a list of his murder cases in which the death penalty could have been sought. Finally, the defendant claimed that the state's attorney had sent a letter to a newspaper in 1982 criticizing a jury's acquittal of the defendant on a prior burglary charge. The letter, the defendant argued, was evidence that the state's attorney was improperly motivated by the acquittal to seek the death penalty in the present prosecution. The trial judge denied the defendant's motion. The supreme court held that the trial judge did not err in quashing the subpoena and rejected the defendant's contention. The court stated:

[W]e cannot conclude that the prosecutor's decision to seek the death penalty was based on circumstances other than the presence of a statutory aggravating factor and the likelihood that the sentencing authority would consider imposition of a death sentence. Given the extreme heinousness of the beating and the sexual assault, it cannot be convincingly argued that the prosecutor abused discretion in asking for the death penalty.

In *People v. Crews*, the Illinois Supreme Court held that the imposition of the death penalty on a defendant who is found guilty but mentally ill (GBMI) does not offend the constitutional ban against cruel and unusual punishment. The court reasoned that a "GBMI offender is able to appreciate the wrongfulness of his behavior and is able to conform his conduct to the requirements of law . . . and [as to him] deterrence and retribution remain valid considerations in his punishment."
An interesting eligibility question was raised in *People ex rel. Daley v. Strayhorn*. On August 31, 1980, the defendant stabbed and killed his victim in Chicago. He then went to Rhode Island where, on January 2, 1982, he murdered again. He was found guilty of second degree murder by a Rhode Island trial court, sentenced to imprisonment, and then extradited to Illinois. Following a bench trial in the circuit court of Cook County in 1986, the defendant was found guilty of the 1980 murder. The trial judge refused to hold a death penalty hearing, reasoning that the Illinois murder had preceded the Rhode Island murder, and that if the defendant had been tried first in Illinois he would not have been eligible for the death penalty. The judge then imposed a forty year sentence. The State sought a writ of mandamus.

The Illinois Supreme Court held that the trial judge erred in refusing to hold a death penalty hearing. Relying on *People v. Guest*, the court rejected the defendant’s due process claim. The court held that it is the sequence of convictions, not the sequence of the murders, which determines whether the multiple-murder aggravating factor applies. Since the Rhode Island murder conviction preceded the Illinois conviction, the defendant was eligible for the death penalty under section 9-1(b)(3). The supreme court also rejected the defense claim that the defendant was not eligible for the death penalty because the prior murder conviction arose in a state which did not have a death penalty. "Section 9-1(b)(3) requires substantial similarity between our murder statute [Ch. 38, Sec. 9-1] and the murder statute of another State, not the penalties that may be imposed by the other State upon a conviction of murder." The court also compared the Illinois murder statute with the Rhode Island murder statute and concluded that they are substantially similar.

Once again the Illinois Supreme Court upheld the constitutionality of the death penalty statute. In *People v. Britz* it said "'[t]his court declines to alter our previous holding that the death penalty statute contains adequate safeguards.'"
In *People v. Johnson*, the Illinois Supreme Court affirmed the death sentence and rejected a number of challenges. On the issue of waiver of counsel, the court held that the defendant's pre-trial waiver of counsel was operative through the sentencing hearing. "Since the facts in this case do not reveal any change in circumstances which might trigger the necessity to admonish defendant anew [at the sentencing stage], his alleged waiver of counsel prior to trial was operative throughout the subsequent proceedings."

The court noted that the trial judge, prior to trial, specifically advised the defendant that he was entitled to counsel "at all stages of the proceeding," there was nothing in the record to suggest that the defendant's pre-trial waiver was only intended as a waiver of counsel during the guilt stage, the defendant had been previously convicted of murder and sentenced to death in another case while represented by counsel, and the fact that he had standby counsel during the proceedings. This, the court concluded, "belies any claim that he was unaware of his right to counsel."

In *People v. Davis*, the Illinois Supreme Court rejected the claim of a black defendant that his death sentence for the murder of a white person was unconstitutional. In his post-conviction petition, the defendant had alleged that the victim's race made it more likely that he would receive a death sentence. Relying on the Gross study, he argued that "a suspect accused of killing a white victim in Illinois is four times more likely to receive the death penalty than is a suspect accused of killing a black victim, even after pertinent nonracial variables have been taken into account." Following the analysis of the United States Supreme Court in *McCleskey v. Kemp*, the Illinois Supreme Court held that even if the methodology of the Gross study were sound, the defendant failed to articulate a constitutional claim.

While the rules of evidence may be relaxed in a death sentence hearing, totally unreliable evidence cannot be introduced against the

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237. *Id.* at 147, 518 N.E.2d at 113.
238. *Id.* at 145-46, 518 N.E.2d at 112.
241. 119 Ill. 2d at 65, 518 N.E.2d at 80.
defendant. In People v. Rogers, the prosecutor, over objection, introduced the tape-recorded confessions of two nontestifying co-defendants at the second phase of the sentencing hearing. In these confessions, the codefendants admitted a limited role in the planning and commission of the crimes and said that the idea to rob and kill the victim originated strictly with the defendant. They also claimed that they attempted to discourage the defendant from committing the crimes. Following the lead of the United States Supreme Court in Lee v. Illinois, the Illinois Supreme Court labeled the accomplices' confessions presumptively unreliable. In this case, the court concluded, the "unreliability is particularly strong ... ." The court remanded the case to the circuit court to conduct a new second phase of the death sentencing hearing.

The use of victim impact statements in a death sentence hearing was challenged in People v. Simms. The Illinois Supreme Court followed the lead of the United States Supreme Court in Booth v. Maryland in finding constitutional error. At the sentencing hearing which was held before the trial judge without a jury, four members of the victim's family testified as to their "grief and deep sense of loss." The victim's husband testified about his "shattered dreams and his concerns over raising his three children without their mother." The victim's parents "expressed how desperately they missed their daughter and how painful it was to hear their grandchildren ask 'Na Na, where is my mommie?'"

The Illinois Supreme Court stated:

The victim impact evidence in this case is simply too powerful for a human sentencer to ignore. More explicitly, the trial judge admitted that the impact on the victim's family was a consideration in his sentencing decision. Under Booth, admitting this type of evidence at a capital sentencing hearing clearly violates the defendant's eighth amendment rights.

244. Id. at 520, 528 N.E.2d at 683.
246. 123 Ill. 2d at 521, 528 N.E.2d at 683.
247. Id. at 523, 528 N.E.2d at 684.
248. 121 Ill. 2d 259, 520 N.E.2d 308 (1988).
249. 107 S. Ct. 2529 (1987) (introduction of victim impact statements at death sentencing hearing violates the eighth amendment proscription against cruel and unusual punishment).
250. 121 Ill. 2d at 272, 520 N.E.2d at 314.
251. Id. 272-73, 520 N.E.2d at 314.
Although the claim was not raised in the post-sentencing motion, the introduction of the evidence was plain error.  

B. Sentence Factors

In People v. Martin, the Illinois Supreme Court addressed an important question concerning sentencing factors. The defendant was convicted of involuntary manslaughter and sentenced to five years imprisonment. In imposing sentence, the trial judge considered in aggravation that "in committing the felony the defendant inflicted serious bodily injury to another resulting in death." The supreme court held that the trial judge's consideration of this factor constituted plain error. The court reasoned that since the legislature took the victim's death into account when it set the range of permissible penalties for the crime, it was improper to consider it again as a justification for imposing a greater penalty.

In People v. Young, the Illinois Supreme Court held that on a remand for reconsideration of a natural life sentence the defendant is not entitled to a supplemental presentence report.

C. Probation

An unusual "credit" issue was addressed by the Illinois Supreme Court in People v. Williams. The defendant was sentenced to probation. With less than three months remaining on the sentence, the prosecutor filed a petition to revoke. About eight months later, following a hearing, the petition was dismissed. The defendant then requested the trial judge to find that the probation term had expired. The trial judge found that ch. 38, section 1005-6-4(a)(3) barred credit for time served by a defendant on probation during the pendency of a revocation petition, but held that this section was "completely unfair" and unconstitutional. The State appealed. The Illinois Supreme Court held that the trial judge misconstrued section 1005-6-4(a)(3). The court held that this section does not bar credit for time served on probation after the filing and service of a revocation petition.

252. Id. at 272, 520 N.E.2d at 314.
254. Id. at 461, 519 N.E.2d at 888.
255. Id. at 460, 519 N.E.2d at 887.
256. 124 Ill. 2d 147, 529 N.E.2d 497 (1988).
257. Id. at 153-57, 529 N.E.2d at 499-502.
259. Id. at 25, 518 N.E.2d at 136.
petition. The court reasoned that it would be anomalous to find probation tolled for purposes of giving credit while requiring a defendant to continue to comply with the conditions of his probation. Thus, when probation is not revoked, as in this case, the defendant is automatically entitled to credit for the time he had served on probation after the summons for revocation issued. If probation is revoked, the defendant is entitled to such credit, unless the trial judge orders otherwise.

D. Parole

In *Faheem-El v. Klincar*, the Illinois Supreme Court held that the parole term for persons who were sentenced between January 1, 1973, and February 1, 1978, to indeterminate sentences runs until the expiration date of the maximum sentence imposed. Additionally, such persons are subject to a mandatory parole term after the maximum sentence is satisfied.

XII. POST-CONVICTION HEARING ACT

A. Summary Dismissal

In *People v. Porter*, the Illinois Supreme Court upheld the validity of the summary dismissal provision of the Post Conviction Hearing Act, which permits a post-conviction judge to dismiss a "frivolous" or "patently without merit" petition without the appointment of counsel. The court rejected equal protection, due process, and separation of powers challenges in finding the statute constitutional.

B. Successive Petitions

May a defendant file successive post-conviction petitions? In *People v. Free*, the Illinois Supreme Court answered no. But this is not an ironclad rule. If the defendant can demonstrate that the

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263. 122 Ill. 2d at 78, 521 N.E.2d at 1163.
264. Id. at 74-78, 521 N.E.2d at 1161-63.
265. Id. at 73, 521 N.E.2d at 1160-61.
proceedings on the original petition were "fundamentally deficient," the successive petition may be litigated.267

C. Limitation Period

In People v. Bates,268 the Illinois Supreme Court held that the shorter ten year limitation period269 for filing a post-conviction petition is to be applied retroactively. In this case, the defendant was convicted of murder in 1972. At that time the limitation period for filing a post-conviction petition was twenty years. In February 1984, the defendant filed a post-conviction petition which was dismissed by the trial judge because it had not been filed within the ten year limitation period. The supreme court upheld the dismissal of the petition, stating that the shortened limitation period "should apply retroactively to the defendant's petition."270

D. Discovery

In People ex rel. Daley v. Fitzgerald,271 the Illinois Supreme Court addressed a significant question of first impression concerning the availability of discovery depositions in post-conviction proceedings. Larry Davis filed a post-conviction petition in the circuit court of Cook County. His attorney then issued subpoenas for the taking of discovery depositions of a number of individuals who were involved in the original criminal proceeding. Notices of depositions were given to the state's attorney. After the first deposition had been taken, the prosecutor moved to quash the remaining subpoenas. The post-conviction judge denied the motion, ruling that civil discovery procedures apply to post-conviction proceedings and that the state's attorney had failed to show cause to quash the subpoenas. On reconsideration of the ruling, the judge ruled that "the taking of discovery depositions in a post-conviction proceeding was discretionary."272 The judge granted Davis leave to take the depositions of two other witnesses who had been subpoenaed and allowed the state's attorney's motion to quash the subpoenas for the remaining witnesses.

267. Id. at 376, 522 N.E.2d at 1188.
268. 124 Ill. 2d 81, 529 N.E.2d 227 (1988).
270. 124 Ill. 2d at 86, 529 N.E.2d at 229.
272. Id. at 178, 526 N.E.2d at 132.
The Illinois Supreme Court upheld the rulings of the post-conviction judge and rejected the state’s attorney’s contention that the judge had exceeded his authority in ordering discovery depositions. The prosecutor argued that a post-conviction judge may authorize the taking of evidence depositions but not discovery depositions. The supreme court concluded that "the taking of discovery depositions in post-conviction proceedings is not a matter governed by our rules respecting discovery in criminal or civil actions and that the trial judge in this case acted within his inherent authority in permitting the discovery depositions to be taken." The court recognized that the statute is silent on the availability of discovery depositions. The court also noted that it had previously promulgated rules of discovery for civil and criminal litigation but concluded that these rules do not pertain to post-conviction litigation. The court reasoned that post-conviction proceedings are sui generis. "Neither authorized nor prohibited by rule or statute, the discovery order entered here was, we believe, within the trial judge's inherent authority."

The court elaborated:

Because post-conviction proceedings afford only limited review, and because there would exist in those proceedings a potential for abuse of the discovery process, we caution that a circuit judge should exercise the inherent authority to allow the taking of discovery depositions only after a hearing, on motion of a party, for good cause shown. In deciding whether to permit the taking of a discovery deposition, the circuit judge should consider, among other relevant circumstances, the issues presented in the post-conviction petition, the scope of the discovery sought, the length of time between the conviction and the post-conviction proceeding, the burden that the deposition would impose on the opposing party and on the witness, and the availability of the desired evidence through other sources.

The court concluded that in this case the post-conviction judge had correctly evaluated the requests for discovery depositions. Since the

273. Id. at 178-79, 526 N.E.2d at 133 (relying on Ill. Rev. Stat. ch. 38, ¶ 122-6 (1985) and People v. Rose, 48 Ill. 2d 300, 268 N.E.2d 700 (1971)).
274. Id. at 179, 526 N.E.2d at 133.
275. Id.
276. Id. at 180, 526 N.E.2d at 133-34 (107 Ill. 2d Rules 201-22 (civil) and Rules 411-15 (criminal)).
277. Id. at 180, 526 N.E.2d at 134.
278. Id. at 181, 526 N.E.2d at 134.
279. Id. at 183, 526 N.E.2d at 135.
280. Id. at 183-84, 526 N.E.2d at 135.
judge had “exercised his discretion in allowing [two] depositions while denying the others, we will not interfere . . . with his decision.” 281

XIII. Appeals

In People v. Wilk, 282 the Illinois Supreme Court addressed the requirement of Illinois Supreme Court Rule 604(d) 283 as a condition for an appeal from a guilty plea. Each of the defendants in this consolidated case was represented by counsel, pleaded guilty, and sought to appeal by filing a notice of appeal without first filing a motion to withdraw the plea. The Illinois Appellate Court, in each case, dismissed the appeal for failure to comply with Rule 604(d). The defendants contended in the supreme court that their attorneys’ failure to comply with Rule 604(d) constituted ineffective assistance of counsel and that the appellate court, rather than dismiss the appeals, should have granted their requests for remand to the trial court for an opportunity to file a motion to withdraw the pleas. The supreme court rejected this approach reasoning that “the rules adopted by this court concerning criminal defendants and guilty pleas are in fact rules of procedure and not suggestions.” 284 The court stated that “Rule 604(d) establishes a condition precedent for an appeal from a defendant’s plea of guilty.” 285 The appellate court therefore properly dismissed the appeals. The court further held that the appropriate remedy for the defendants lies under the Post-Conviction Hearing Act. The court stated:

Under the circumstances such as those involved in these cases in a post-conviction petition, the defendant pro se needs only to allege a violation of his sixth amendment right to effective assistance of counsel, due to the attorney’s failure to preserve appeal rights, and allege whatever grounds he or she would have had to withdraw his or her plea of guilty had a proper motion to withdraw been filed

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281. Id. at 184, 526 N.E.2d at 135.
282. 124 Ill. 2d 93, 529 N.E.2d 218 (1988).
283. Illinois Supreme Court Rule 604(d) provides:
   Appeal by Defendant From a Judgment Entered Upon a Plea of Guilty. No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to withdraw his plea of guilty and vacate the judgment. The motion shall be in writing and shall state the grounds therefor.
107 Ill. 2d R. 604(d).
284. 124 Ill. 2d at 103, 529 N.E.2d at 221.
285. Id. at 105, 529 N.E.2d at 222.
by defendant's counsel prior to the filing of a notice of appeal. At the hearing on the post-conviction petition, the two-pronged test laid down in *Strickland v. Washington* [466 U.S. 668 (1984)] will apply to determine if in fact the defendant has been deprived of effective assistance of counsel.  

### XIV. MISCELLANEOUS ISSUES

#### A. Preservation of Evidence

In *Arizona v. Youngblood* the Supreme Court addressed the duty of the police to preserve evidence that may be useful to a criminal defendant. The defendant was arrested for the sexual assault of a ten year old boy. The police refrigerated the evidence collected with a "sexual assault kit," but failed to refrigerate the victim's semen-stained clothing. Thus, neither the criminologist for the State nor the defense's expert witness could determine the attacker's blood group from the semen stains. The trial court instructed the jury that if they found the State had destroyed or lost evidence, they might "infer that the true fact is against the State's interest." The jury convicted the defendant of child molestation, sexual assault, and kidnapping. The Arizona Court of Appeals reversed, holding that "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process."  

The Supreme Court, in a divided opinion, reversed. Chief Justice Rehnquist, writing for the majority, held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Chief Justice Rehnquist stated:

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286. *Id.* at 107-08, 529 N.E.2d at 223.
288. *Id.* at 335.
289. *Id.* at 334.
291. 109 S. Ct. at 337. Justice Stevens concurred in the judgment, stating that there may be cases where, not withstanding the good or bad faith of the police, the loss or destruction of evidence may be so critical to the defense as to "make a criminal trial fundamentally unfair." *Id.* at 339 (Stevens, J., concurring in judgment). However, this was not such a case because the jury was instructed that they could consider the lost evidence against the State. *Id.*
We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. 292

The Chief Justice distinguished *Brady v. Maryland*, 293 which held that the good or bad faith of the State is irrelevant when the State fails to disclose to the defendant material exculpatory evidence, on the ground that *Youngblood* involved no more than "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 294

**B. Entrapment**

In *Mathews v. United States* 295 the Supreme Court resolved a split among the circuit courts and held that a defendant in a federal criminal prosecution can raise an entrapment defense although he denies one or more elements of the crime. The defendant, an employee of the Small Business Administration in Milwaukee, Wisconsin, was charged with accepting a gratuity in exchange for an official act. 296 The district court refused to allow defendant to raise the defense of entrapment because he refused to admit all the elements of the offense charged. The Seventh Circuit affirmed, stating that the defense of entrapment is "inconsistent per se with the defense that the defendant never had the requisite criminal intent." 297

The Supreme Court reversed, drawing an analogy to civil cases where a party can raise inconsistent claims or defenses. Chief Justice

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292. *Id.*
294. 109 S. Ct. at 337. Justice Blackmun, writing for the dissent, was joined by Justices Brennan and Marshall. Justice Blackmun stated that "where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime." *Id.* at 343 (Blackmun, J., dissenting). Applying this standard to the facts of the instant case, the dissent concluded that the "failure of the prosecution to preserve this evidence deprived [Youngblood] of a fair trial." *Id.* at 345.
296. *Id.* at 885.
Rehnquist, writing for the Court, held that “even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.”

Justice White, joined by Justice Blackmun in dissent, stated that because entrapment is only available to a defendant who has committed all the elements of a proscribed offense, when the defendant denies one or more of the elements of the offense entrapment is a proper defense only if the accused is lying. Justice White argued that the increased risk of perjury and possible confusion among juries were sufficient reasons to prevent a defendant who denies committing the offense from raising an entrapment defense.

C. Sanction for Discovery Violations

In *Taylor v. Illinois*, the Supreme Court held that the exclusion of a defense witness from testifying as a sanction for violation of a pretrial discovery request is not absolutely prohibited by the compulsory process clause of the sixth amendment. Defendant Taylor was convicted of attempted murder. Prior to trial defendant’s attorney had named four possible witnesses in response to the prosecution’s discovery request. On the first day of trial the defense counsel amended his answer by adding the names of two other possible witnesses. On the second day defense counsel once again attempted to amend his answer and add the names of two witnesses. Counsel stated that “he had just been informed [of these witnesses] and that they had probably seen the ‘entire incident.’”

Upon cross-examination during an offer of proof, one witness testified that defense counsel had visited him at home the week before the trial began. The trial court excluded the witness’ testimony as a sanction for the “willful violation of the [discovery] rules.” The court also stated he had “a great deal of doubt as to the

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298. 108 S. Ct. at 886. Justice Brennan, while concurring in the Court’s opinion, reiterated his belief that the entrapment defense should focus solely on the government’s conduct. *Id.* at 888-89 (Brennan, J., concurring). Justice Scalia, in a second concurring opinion, argued that the entrapment defense will rarely be genuinely inconsistent with the defense on the merits. However, when genuine inconsistency exists it will be “self-penalizing.” *Id.* at 889 (Scalia, J., concurring).

299. *Id.* at 890-91 (White, J., dissenting).

300. *Id.* at 891-92.


302. *Id.* at 649.

303. *Id.*
veracity [of this witness]." "304 The exclusion of the witness was affirmed on appeal as within the discretion of the trial court. 305

In an opinion authored by Justice Stevens, the Supreme Court began by dismissing the State's argument that the compulsory process clause only guarantees a defendant's right to subpoena witnesses and does not apply to rulings on admissibility of evidence. 306 Justice Stevens stated that "[t]he right to compel a witness' presence . . . could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact." 307

The Court then turned to the defendant's argument that the sixth amendment prohibits the exclusion of the testimony of a surprise witness. Justice Stevens noted that "[d]iscovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." 308 The Court then quoted United States v. Nobles 309 for the proposition that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversary system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." 310 The Court concluded by stating that defense counsel's conduct harmed the "integrity of the judicial process itself" and that the instant case fit into that category of willful misconduct which justifies the severest sanction. 311

Justice Brennan, joined by Justices Marshall and Blackmun, dissented. Justice Brennan argued that excluding evidence distorts the truth seeking process discovery is intended to serve. 312 When the client is not personally responsible for the discovery violation, al-

304. Id. at 650.
306. 108 S. Ct. at 651-52.
307. Id. at 652.
308. Id. at 653-54. Justice Stevens noted that the compulsory process clause differs from other sixth amendment rights because it is entirely dependent on the defendant's initiative.
309. 422 U.S. 225 (1975) (testimony of defendant's expert witness properly excluded as a sanction for refusing to permit discovery of a "highly relevant" report).
310. 108 S. Ct. at 654.
311. Id. at 656.
312. Id. at 658-59 (Brennan, J., dissenting). Addressing a procedural issue, Justice Brennan concluded that defendant had waived his constitutional claims by not raising them in his motion for a new trial. However, because Illinois courts can disregard a procedural default in exceptional cases, the failure of the state court to exercise that power does not bar review in the Supreme Court. Williams v. Georgia, 349 U.S. 375, 383-84 (1955).
ternative sanctions directed at the attorney are much more effective in deterring willful violations of discovery rules.\textsuperscript{313} Moreover, granting the prosecution a continuance and allowing the prosecutor to comment on the witness concealment can correct any adverse impact the discovery violation had on the truthseeking process.\textsuperscript{314}

\textsuperscript{313} 108 S. Ct. at 664-65.
\textsuperscript{314} Id. at 664.