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PRAGMATICS OF PROCEDURE IN ILLINOIS CRIMINAL APPEALS

By GEORGE N. LEIGHTON*

I. INTRODUCTION

a. Scope and Definition

Appellate review of a criminal case in Illinois was at one time a luxury enjoyed by only a few. This is no longer true. Today, "[I]n all cases in which the defendant is convicted of a felony the trial court shall, at the time of imposing sentence, advise the defendant of his right to appeal, of his right, if indigent, to be furnished, without cost to him, with a transcript of the proceedings at his trial and with counsel on appeal." Recognition of these rights now makes review of Illinois criminal cases the rule rather than the exception. Indeed, it can be said that these rights represent the culmination of a long period of procedural evolution, manifesting improvement in Illinois adjective criminal law, and in addition imposing a responsibility on bench and bar.

It is the purpose of this article to trace, briefly, this procedural evolution of Illinois criminal law from its rudimentary state in 1818 to enactment of present provisions of the Illinois Su...

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2 The first statutory authorization in Illinois for review of a criminal case by writ of error was in 1826. ILL. LAWS, 2d Sess. 84 (Blackwell) (1826).
3 Illinois was admitted into the Union on Dec. 3, 1818 by a resolution of Congress, 3 Stat. 536 (1818). Prior to statehood, territorial laws were in effect. At its first session at Kaskaskia in 1812, the Legislative Council and House of Representatives of Illinois Territory passed "An Act Concerning the General Court." Section 5 provided that "the General Court shall take cognizance of Errors in Law only by writ of error on appeal," 25 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY 76 (1860), first printed by Matthew Duncan, Russelville, Ky. (1813). This enactment governing writ of error practice applied to civil cases only. Application of its provisions to criminal cases came later.
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The Supreme Court rules which codify the right of appeal. It is proposed that the practical aspects of appeals in criminal cases be described and explained in order to furnish a pragmatic guide to procedural rules presently governing Illinois criminal appeals.

b. Historical Background

History, in its own way, sheds light on the development of procedural remedies. It is understandable that in 1818 when Illinois became a state, there was no statutory provision for appellate review of criminal cases. Although the rules adopted by the supreme court, on organization in 1819, provided for proceedings in writs of error, reliance was placed on the common law for the court's power to review criminal cases.

As a curiosity, it is interesting to note that the first volume of Illinois Supreme Court reports contains a criminal case, Curtis v. People, decided as an "Appeal from Clinton," in which defendant is described as "appellant" and the state as "appellee." However, the most authoritative literature on the subject indicates that in 1828, when this case was decided, appeals in criminal cases were unknown in the English speaking world. This curiosity points to the confusion in practice, and the uncertainty of decision on the subject of appellate review of criminal cases which characterized the early stages of Illinois criminal law. Although the Illinois Legislature, in the years between 1818 and 1826, adopted statutes defining substantive offenses, it was not until 1826 that the first law expressly dealing with review of criminal cases was passed. Section 5, of this statute provided that, except in capital cases, a "writ of error shall lie in all criminal cases, from the final judgment of any of the circuit courts of this state, to the supreme court." Thus, despite the aberration which Curtis v. People represents, it became recognized in Illinois criminal law that review of a criminal conviction was by writ of error. Indeed, by way of case law the rule became inflexibly expressed that in Illinois there was no right of appeal in a crimi-

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5 "Some conceptions of the law owe their existing form almost exclusively to history. They are not to be understood except as historical growths. In the development of such principles, history is likely to predominate over logic or pure reason." B. CARDozo, The Nature of the Judicial Process 52 (1921).
6 R. VI and VII, 1 Ill. (Breese) xiii.
7 See, e.g., Whitesides v. People, 1 Ill. (Breese) 21 (1819).
8 1 Ill. (Breese) 256 (1828).
11 ILL. LAws, 2d Sess. 84 (Blackwell) (1826).
12 1 Ill. (Breese) 256 (1828).
nal case; the only mode of review was by writ of error.\(^\text{13}\)

The state of the law remained unchanged until 1959 when, for the first time, the device of proceeding by way of appeal became part of Illinois criminal procedure.\(^\text{14}\) From 1959 until 1963 there were two modes of review of a criminal case in Illinois, the appeal and the writ of error. In 1963 the legislature adopted section 121-2 of the criminal code which recast Illinois criminal review procedure by providing that, “All existing methods of review of criminal cases in this state are abolished. Hereafter the only method of review in criminal cases shall be by Notice of Appeal.”\(^\text{15}\)

The enactment of this statute, however, did not end the evolution of appellate review in Illinois criminal cases. Section 121-1 of chapter 38\(^\text{16}\) of the Illinois Revised Statutes stated: “Unless otherwise provided by rules of the supreme court this article shall govern review in all criminal cases.” Thus, all provisions of the procedural code of 1963 relating to review could be superseded by rule of the supreme court. The power of the supreme court to make rules governing court practice and procedure is inherent.\(^\text{17}\) Exercising this inherent power, the supreme court, in December, 1963, adopted rule 27,\(^\text{18}\) effective January 1, 1964, which superseded all provisions of article 121, except sections 121-5, 121-9 and 121-14.\(^\text{19}\) Rule 27 remained in force until Janu---

\(^\text{13}\) ... (Unless there is some statute expressly allowing it, no appeal, it is apprehended, will lie. A writ of error is the only mode by which the case can be brought before this court.” French v. People, 77 Ill. 531, 532 (1875).
\(^\text{15}\) ILL. REV. STAT. ch. 38, §121-2 (1965). This section was superseded and replaced in 1963 by Rule 27. The substance of this section is now contained in ILL. REV. STAT. ch. 110A, §602 (1967).
\(^\text{16}\) ILL. REV. STAT. ch. 38, §121-1 (1965).
\(^\text{17}\) Writing on the subject of Regulation of Judicial Procedure by Rules of Court, Dean Roscoe Pound traced the history of judicial rule-making power in English and American law. He said that “... (T)he power to govern procedure by general rules has been universally regarded as part of the judicial function and hence as an inherent power of courts of justice.” 10 ILL. L. REV. 172 (1915). The Illinois Supreme Court has held that it has inherent power to make rules governing practice in lower courts, independent of statutory authority. People v. Callopy, 358 Ill. 11, 14, 192 N.E. 634, 636 (1934); People v. Lobb, 17 Ill.2d 287, 299, 161 N.E.2d 325, 332 (1959). The United States Supreme Court has recognized this power in the Illinois judicial system. In Griffin v. Illinois, 351 U.S. 12 (1956), the Court said, “The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice.” Id. at 20.
\(^\text{18}\) ILL. REV. STAT. ch. 110, §101.27 (1965). Rule 27 was a compendium of most of the appeals sections of the Code of Criminal Procedure. Like the Code it was meant to provide a complete, simplified, and speedy procedure for review. The new rules are in great measure based on Rule 27, as Rule 27 was based on various Code sections.
\(^\text{19}\) Section 121-5 provided that the record on appeal was to be governed by supreme court rule. Section 121-9 codified the substantial error doctrine and enumerated the possible alternative methods by which an appellate court could deal with the cause on appeal. Section 121-14 dealt with the mandate of the reviewing court. ILL. REV. STAT. ch. 38, §§121-5, 121-9, 121-14 (1965).
ary 1, 1967, when the new Illinois Supreme Court rules$^{20}$ went into effect. Appeals in criminal cases in Illinois are now governed by rules 601 to 615 of the supreme court.$^{21}$ To emphasize this fact, the Illinois Legislature in 1967$^{22}$ repealed all appellate provisions of the code except section 121-13.$^{23}$ In view of this history the discussion in this article of procedure in Illinois criminal appeals will focus on an analysis of the new Illinois Supreme Court rules which now govern review of criminal cases.

II. THE PRAGMATICS OF PROCEDURE

a. Concepts of the Appeal

Before turning to a discussion of the procedural aspects of a criminal appeal, it is worth noting that the most important step in the process is the development of the theory for the appeal. No appeal of a criminal case can be effective without a firm conceptual base.$^{24}$

There are generally three types of situations in which a defense attorney is called upon to handle a criminal appeal. One situation, not the most common, occurs when counsel is retained in a criminal case at its inception. The second situation is that of the attorney called in after conviction. In such cases the appeal is usually an afterthought. Finally, the lawyer may be called in as a consultant to the trial lawyer. In this last situation, the task of formulating the conceptual basis of the appeal is not as difficult as in the second situation, because the trial lawyer can aid in this formulation. In any event, no matter which situation brings the practitioner to the case, the theory of the criminal appeal must be determined before any procedural step is taken. In making this determination, certain questions must be asked: Was there an illegally obtained confession? Was there a search that violated constitutional protections? Was there error in the admission of evidence? Was there prejudicial conduct either by court or counsel? Was there legal evidence to support the judgment of the trial court?

The attorney for the state may be a regular or special prosecutor or assistant attorney general. As one of the lawyers prosecuting, and called upon to appeal a trial court judgment when permissible, counsel for the state faces a situation similar to that

$^{20}$ ILL. REV. STAT. ch. 110A, §§1-752 (1967).
$^{22}$ Act 1462, H. B. 2345 [1967], 6 ILLINOIS LEGISLATIVE SERVICE 2592.
$^{23}$ The title of §121-13 is "Pauper Appeals." Those parts of the section not superseded by Rule 27 and the new rules deal with the amount to be allowed an indigent defendant's counsel for reimbursement of necessary expenditures in prosecuting the defendant's appeal.
of the lawyer for the defense. When called in as a consultant for the state, the lawyer must rely on the trial assistant. In any event, the inquiry must be: Was the trial judge's ruling correct?

The answers to these questions will furnish the conceptual basis for the appeal. They will ultimately form the issues to be presented for review.

b. The Notice of Appeal: Filing and Function

The first procedural step in a criminal appeal is the filing of a notice of appeal.\textsuperscript{25} Either the defendant, as a matter of right, or the state, in a limited number of cases, may appeal. The right of the state to appeal in a criminal case is limited to an appeal from an order or judgment having a substantive effect which results in dismissal of the charge for any of the grounds enumerated in section 114-1 of the Code;\textsuperscript{26} from an order arresting judgment because of a defective indictment, information or complaint; from a judgment quashing an arrest or search warrant; or from an order suppressing evidence.\textsuperscript{27} Where the state appeals, the defendant cannot be held in jail but the time during which an interlocutory appeal is processed is not taken into account in determining rights under section 103-5 of the Code,\textsuperscript{28} the section which guarantees a speedy trial.

 Appeals by defendants are only from final judgments.\textsuperscript{29} If

\textsuperscript{25} ILL. REV. STAT. ch. 110A, §606(a) (1967).

\textsuperscript{26} . . . [T]he court may dismiss the indictment, information, or complaint upon any of the following grounds:

1. The defendant has not been placed on trial in compliance with Section 103-5 of this Code;
2. The prosecution of the offense is barred by Sections 3-3 through 3-8 of . . . [ch. 38];
3. The defendant has received immunity from prosecution for the offense charged;
4. The indictment was returned by a Grand Jury which was improperly selected and which results in substantial injustice to the defendant;
5. The indictment was returned by a Grand Jury which acted contrary to Article 112 of this Code and which results in substantial injustice to the defendant;
6. The court in which the change has been filed does not have jurisdiction;
7. The county is an improper place of trial;
8. The charge does not state an offense;
9. The indictment is based solely upon the testimony of an incompetent witness;
10. The defendant is misnamed in the charge and the misnomer results in substantial injustice to the defendant.

\textsuperscript{27} ILL. REV. STAT. ch. 38, §114-1 (1967).

\textsuperscript{28} ILL. REV. STAT. ch. 110A, §604(a) (1967).

\textsuperscript{29} ILL. REV. STAT. ch. 38, §103-5(a) (1966).
the final judgment of a circuit court involves a question arising under the Constitution of the United States or of this state, or if the appeal is by the defendant from a sentence in a capital case, it is taken directly to the supreme court as a matter of right.\textsuperscript{30} Appeals in all other criminal cases are to the appellate court.\textsuperscript{31}

Formerly, the process of choosing the proper reviewing court was hazardous. This is no longer so. Rule 612\textsuperscript{32} makes applicable to criminal cases rule 365, which provides that: “The taking of an appeal to either the supreme court or the appellate court shall not be deemed a waiver of the right to present any issue to the appropriate court.” Subsection (b) of rule 365 provides an easy method of transferring the case to the proper court on motion. Despite this ease of transfer, the decision as to whether the case should be appealed to the appellate court or directly to the supreme court is a task which frequently confronts the lawyer handling a criminal appeal. Often the problem is sharply presented when the prosecution gives rise to constitutional questions, since not every constitutional question will provide a ground for direct appeal to the supreme court. The constitutional question must be “fairly debatable” or “substantial.”\textsuperscript{33} A constitutional question is neither fairly debatable nor substantial if it has been decided by the supreme court. Because previously decided constitutional issues furnish no fairly debatable or substantial question, their disposal, as they arise in criminal cases, is relegated to the jurisdiction of the appellate courts. Thus, questions concerning search and seizure, confessions, and the

\begin{footnotesize}
\textsuperscript{31} Id. §612.
\textsuperscript{32} Id. §612.
\textsuperscript{33} The supreme court has repeatedly held that it will not consider or determine constitutional questions which are not essential to a decision of the case; and that it will not entertain an appeal on the ground that a constitutional question is involved unless it appears from the record that a fairly debatable constitutional question was urged in the trial court, was decided by that court, was preserved in the record and is assigned as error, and, importantly, that it will not entertain an appeal or writ of error for the purpose of passing on constitutional questions long settled.

The court has said that constitutional questions which are “neither fairly debatable nor substantial” are questions which “have been resolved so definitely that the court believes it is needless to do so again.” People v. Valentine, 60 Ill. App. 2d 339, 346-48, 208 N.E.2d 595, 599-600 (1965). See People v. Forsyth, 339 Ill. 381, 171 N.E. 561 (1930); People v. McGhee, 33 Ill.2d 302, 220 N.E.2d 205 (1966).
\end{footnotesize}
right to counsel, which have been the subject of prior supreme
court decisions, are neither "debatable" nor "substantial." It
is for the practitioner to examine the record on appeal and to
determine if there are constitutional issues which are fairly de-
batable or which present a substantial constitutional question.
Once a determination is made as to the court to which the ap-
peal is to be taken, whether review is sought by the state or by
the defendant, rule 606(d) provides that the form of the no-
tice of appeal shall be identical in both instances.

Perfection of the appeal is governed by rule 606, subparagraphs (a) and (b). In capital cases, the appeal is automatic
without requiring any action on the part of the defendant or his
counsel. Some will consider this a concession to one sentenced to
death; however, it was the public interest, not that of the de-
fendant, which was considered when this principle was made part
of Illinois criminal procedure.

In all cases, the appeal is perfected by filing a notice of ap-
peal with the clerk of the trial court. This notice may be signed
by the appellant or by his counsel. If, at the time of sentencing,
the defendant so requests in open court, the clerk must prepare,
sign, and file the notice for him. No step in the perfection of
the appeal, other than the filing of the notice, is jurisdictional.
This is a substantial change from the practice in writ of error
proceedings where timely approval of the bill of exceptions and
other details of docketing the transcript were jurisdictional.

The notice of appeal must be filed within 30 days from the
entry of the final order or judgment. If the appellant files a
motion for probation, a motion for a new trial, or a motion in

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34 In People v. Valentine, 60. Ill. App. 2d 339, 345, 208 N.E.2d 595, 599
(1965), the court stated:

... [C]riminal cases where the only issue is the constitutional right
of a citizen to be immune from an unreasonable search of his person and
seizure of his property, are being transferred to [the appellate court].

... Previously in cases of this kind, the Supreme Court has held that the
constitutional issues warranted direct appeal and required the retention
of jurisdiction.

35 ILL. REV. STAT. ch. 110A, §606(d) (1967).

36 These subsections provide that appeals shall be perfected by filing a
notice of appeal with the clerk of the trial court within 30 days from the
entry of judgment. ILL. REV. STAT. ch. 110A, §606(a) and (b) (1967).

37 The philosophy is expressed by the last section of the original statute: "It shall be the public policy of this State to expedite the review
of cases in which the death penalty has been imposed. ..." ILL. REV. STAT.
ch. 38, §121-12(e) (1965). The drafting committee expressed its opinion
in saying, "This section is ... designed to afford a speedy and complete
review in the Supreme Court of Illinois of every case where a sentence of
death is imposed." ILL. ANN. STAT. ch. 38, §121-12, Committee Comments
at 208 (Smith-Hurd 1964).

38 ILL. REV. STAT. ch. 110A, §606(a) (1967).

39 Id.

40 Id.

41 Thus, where a defendant, found guilty of driving under the influence
of intoxicating liquor on April 1, 1964, filed, and was denied a petition
in the nature of a writ of error coram nobis which raised only evidentiary
arrest of judgment, the time for filing the notice of appeal is 30 days after the court's ruling on the application. No reviewing court in this state has jurisdiction of an appeal after the expiration of 30 days from the entry of the final judgment or order.\(^\text{1}\) The only exception is found in rule 606(c), which provides for appeals within six months in cases qualifying for the dispensation contemplated by its terms.\(^\text{1}\)

It is well to bear in mind that draftsmanship of pleadings places no premium on originality. Therefore, when the prescribed form is furnished by a rule of court, or by a statute, it is wise for the practitioner to follow it exactly. Rule 605(b) furnishes the form of a notice of appeal. The entire paragraph is new, although generally it incorporates the essence of former rule 27(5)(b). The committee which drafted the new rules believed that the furnishing of a form would obviate many problems for the practitioner as well as for clerks who may be required to prepare notices of appeal.\(^\text{4}\)

Prior to January 1, 1967, rule 27(7)(b) permitted a notice of appeal to be filed after the expiration of 30 days, but within a period not exceeding 14 months from the entry of the order or judgment from which the appeal was sought, provided that an order was obtained from a reviewing court within 14 months.\(^\text{5}\) This provision was derived from section 121-4(c) of chapter 38. Rule 27(7)(b) was itself derived from section 76(1) of the Civil

questions, and did not question the validity of the information, he could not then file a notice of appeal from the denial of his petition. The appeal was not properly perfected and dismissal was proper. The defendant also urged that the state was estopped from questioning the propriety of his appeal since no attempt was made to dismiss the appeal. The court said, "... Failure to file a notice of appeal cannot be waived by agreement of the parties or by consent or by stipulation arising out of the conduct of either party." People v. Ilg, 60 Ill. App. 2d 295, 298-99, 210 N.E.2d 20, 22 (1965).\(^\text{4}\)

On the facts of People v. Nordstrom, 73 Ill. App. 2d 168, 177, 219 N.E.2d 151, 156 (1966), note 26 supra, the court said, "... [T]he defendant did not file notice of appeal in apt time to review his original judgment of guilt and... we cannot now review such judgment."\(^\text{4}\)

ILL. REV. STAT. ch. 110A, §606(c) (1967), entitled, "Leave to Appeal Within Six Months in Certain Cases," states in pertinent part as follows:

On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time... filed in the reviewing court within six months of the expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal... Thus, it is clear that a situation involving special circumstances or excusable neglect, such as the defendant being confined to a hospital bed and therefore being unable to act during the time in which he was obliged to file his notice of appeal, is well provided for under the Illinois rules. But see United States v. Robinson, 361 U.S. 220 (1960), a case arising under the federal rules of criminal procedure, in which it was held that the period for filing a notice of appeal could not be enlarged because of excusable neglect or special circumstances. See also Fallen v. United States, 378 U.S. 139 (1964) where this strict policy was somewhat relaxed. Finally, effective July 1, 1966, the federal rule was changed to allow district courts to extend the time for filing a notice of appeal upon a showing of excusable neglect. FED. R. CRIM. P. 37(a)(2).\(^\text{4}\)

42 ILL. REV. STAT. ch. 110A, §606(d) (1967).
43 ILL. REV. STAT. ch. 110, §101.27(7)(b) (1965).
Practice Act which contained similar requirements for appeals within one year in civil cases.

Rule 27 (7) (b), during the brief time in which it controlled late appeals, did not generate any case law clarifying the standards which an Illinois reviewing court would follow in determining whether “the failure to file notice of appeal within the 30-day period, or the failure to properly prosecute an appeal which was perfected within the 30-day period was not due to appellant’s culpable negligence.” In civil matters, however, cases under section 76(1) did produce decisions which may serve to guide the practitioner in the field of criminal law.

In Roy v. City of Springfield, the court held that “culpable,” within the context of this rule, means “blameable”, and one would be guilty of culpable negligence if he failed to exercise that degree of care required by the particular circumstances, which a man of ordinary prudence in the same situation and with equal experience would not have omitted. The burden is on the party who seeks relief under this rule to establish that the delay in taking the appeal was not due to his culpable negligence. In one case, Gearty v. L. Fish Furniture Co., the court held that lack of sufficient funds to perfect a regular appeal was an adequate ground for leave to appeal within one year.

Rule 606 (c) is new. Its language provides:

On motion supported by a showing of reasonable excuse for failure to file a notice of an appeal on time, accompanied by the proposed notice of appeal, filed in the reviewing court within six months of the expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice to the trial court for filing.

The implications of the change in phraseology from “not due to appellant’s culpable negligence” to “a showing of reasonable excuse for failure to file a notice of appeal on time” are not readily apparent. It would appear that the concept of reasonable excuse would allow greater liberality and latitude than would the concept of culpable negligence. In any event, the new rule is meant to provide an expeditious, inexpensive method for granting relief where there has been a failure to file an appeal within 30 days. It is only necessary that a motion be made in compliance with motion practice in the reviewing court, showing “reasonable excuse” for the failure to file the notice of appeal within the 30-day period. A motion of this sort should contain the facts which explain the failure to file, and should be supported by affidavit.

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40 ILL. REV. STAT. ch. 110, §76(1) (1965).
42 289 Ill. App. 538, 7 N.E.2d 493 (1937).
43 ILL. REV. STAT. ch. 110A, §606(c) (1967).
50 Id.
With regard to the service of copies of a notice of appeal, the new rules retain the practice provided by rule 27(5)(c), except that where the defendant is the appellant, it is now clear that a copy of the notice must be served on the state's attorney of the county in which the judgment was entered and on the attorney general. Where the state is appealing, a copy of the notice must be sent by the clerk to the defendant and his counsel. As was the case with rule 27(5)(c), derived from section 121-4(a) of the Code of Criminal Procedure, the new rules place on the clerk of the trial court the obligation of sending the copies of the notice of appeal.

This discussion of the notice of appeal, its function and form, would be incomplete without reference to rule 605 which now provides that the defendant be advised of his right to appeal, of his right to request the clerk to prepare and file a notice of appeal, and if he is indigent, of his right to be furnished, without cost to him, not only with a transcript of the proceedings at his trial but also with counsel on appeal. As originally adopted in 1967, the rule contained an exception in the case of a defendant who pleaded guilty. However, rule 605 has been amended to exclude the exception and make it applicable to all felony cases.

This rule is a salutary one. It comports with the purposes of rule 607 which governs appeals by indigent persons. In every felony case, then, the trial court must determine whether the defendant has counsel for his appeal. If he has no lawyer, and he is indigent and desires counsel for the appeal, the court must appoint an attorney for him. If there is a public defender in the county, the court is required to appoint the public defender, unless for good cause or in the court's discretion a lawyer other than the public defender should be appointed. Where the death penalty has been imposed, the court may appoint two attorneys to represent the appellant on appeal, one to be designated the responsible attorney and the other assistant attorney for the appeal.

As a result of rules 605 and 607 the problems which gave rise to Griffin v. Illinois, are no longer encountered. Rule 607(b) pro-

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51 Id. §605.
52 Id. §607(a),(b),(c) and (d).
53 Id. §607(a).
54 351 U.S. 12 (1956). In Griffin, the defendants were convicted of armed robbery. Alleging that they were without funds to pay for a certified copy of the record, including the stenographic transcript of the proceedings, they moved in the trial court that these documents be furnished to them without cost. Illinois law at that time gave every person convicted in a criminal trial a right of review by writ of error, but full, direct appellate review was available only if the appellate court was furnished with a bill of exceptions or report of the trial court proceedings, certified by the trial judge. The preparation of the necessary documents was impossible as a practical matter without the stenographic transcript of the proceedings. The trial court denied defendants' motion, whereupon the defendants filed
vides that where a defendant is sentenced to the penitentiary, or where the death sentence is imposed, an indigent defendant may petition the court for a report of the proceedings at his trial. The petition must be verified and must state the facts indicating that at the time of conviction, and at the time of filing the petition, the defendant lacked financial means to pay for the report. The sentencing judge, or in his absence, another judge, has the power to hold a hearing to determine whether the defendant is without financial means to pay for the report of the proceedings at his trial. Upon proper findings, the court will order the reporter to transcribe an original and copy of his notes. The original of the report must be certified by the reporter and filed with the clerk of the trial court. A copy must also be certified and delivered to the defendant without charge. The official court reporter is compensated as is provided by law for the compensation of reporters who prepare transcripts in other cases.

The minor, but at times irritating, problem of filing fees in the case of indigent defendants is now governed by rule 607(c), which provides that if the defendant is represented by court appointed counsel, the clerk of the reviewing court shall docket the appeal without payment of fees. These provisions are new, but in effect they codify existing practice in Illinois courts of review.

In some instances the practitioner is consulted or retained after the time for filing the notice of appeal has passed. Rule 605 relating to this problem, is derived from the federal rules of criminal procedure, and cases construing the comparable federal rules are useful as guides to the proper construction of rule 605. In *Boruff v. United States*, the Court of Appeals for the Fifth Circuit held that the time which an indigent defendant had to file his notice of appeal did not begin to run until he was advised of his right to obtain a review of his conviction.

A petition under the Illinois Post-Conviction Hearing Act, alleging that there were obvious nonconstitutional errors in the trial entitling them to a reversal of their conviction on appeal; that the only impediment to full appellate review was their inability to procure a transcript; and that the refusal of the trial court to furnish the transcript solely because of defendants' poverty was a denial of due process and equal protection. The petition was dismissed and the Illinois Supreme Court affirmed. On certiorari, the United States Supreme Court vacated the Illinois Supreme Court judgment and remanded the cause, stating that although a state was not required to provide a right to appellate review at all, if it did grant such review it could not bar indigent defendants from attaining an effective review solely because the defendants were not financially able to submit a trial transcript.

55 ILL. REV. STAT. ch. 110A, §607(b) (1967).
56 Id.
57 Rule 605 provides that the trial court, at the time of sentencing a defendant, shall advise the defendant of his right to appeal and of his ancillary rights of having the clerk prepare and file a notice of appeal and of having appellate counsel and a copy of the trial transcript furnished him if he is indigent. ILL. REV. STAT. ch. 110A, §605 (1967).
58 310 F.2d 918 (5th Cir. 1962).
Since *Boruff*, it has been held that delivery of a notice of appeal to the guard in a penitentiary is sufficient compliance with the time requirement of a notice of appeal. Undoubtedly, Illinois courts will construe rule 605, along with other provisions governing appeals of indigents, in the same broad manner. The practitioner who is called in after conviction can thus rely on a liberal interpretation of rule 605, and of the accompanying provisions governing perfection of an appeal by an indigent, or by one who at the time of his sentence was not represented by counsel. It is worth noting, however, that this is a fertile field in which imagination and resourcefulness in preserving rights on appeal may be required.

c. The Record on Appeal: Designation, Preparation and Docketing

After the notice of appeal has been filed the next procedural step is the filing of a designation of those portions of the trial court record to be included in the record on appeal. Filing a designation, however, is not mandatory. Rule 608 (a) provides, *inter alia*, that “the appellant may file a designation.” Despite the permissive nature of these provisions, the filing of a designation is indicated. It is the practitioner who should determine the portions of the trial record which are to constitute the record on appeal. A copy of the designation must be served on the appellee. Thereafter, within seven days, the appellee must file a designation of any additional portions of the trial court record desired to be included in the record on appeal, and must serve a copy on the appellant. Under rule 608 (a), in lieu of designations, the parties may stipulate to the portions of the trial record which shall constitute the record on appeal. After receiving the designations, the clerk is required to prepare the record on appeal, consisting of originals or copies of the documents specified by the parties in their respective designations.

In the event no designation or stipulation is filed within the time required by rule 608 (a), and in all cases in which the death sentence is imposed, the clerk of the trial court must prepare the record on appeal and include the original or copies of the placita showing the title of the case, a certificate showing that a grand jury was impaneled, and if the prosecution was by indictment, a copy of the indictment or, if there was no indictment, a copy of the information or complaint, the transcript showing arraignment and plea, all motions and orders entered, the report of pro-

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61 Id.
62 Id.
63 Id.
ceedings, the instructions, if any, given and refused by the trial court, the verdict of the jury or finding of the court, the judgment and sentence, and the notice of appeal, if any. The rule makes it clear that for the purpose of determining what is properly before the reviewing court, there is no distinction between the common law record and the report of proceedings.

Lawyers familiar with the writ of error practice will note with appreciation that the present rules governing appeals place the burden of preparing the record on persons other than the appellant and his counsel, thereby eliminating many of the painful demands on defense counsel, which characterized review by writ of error. A good example is the rule governing the report of proceedings, formerly known as the bill of exceptions. Rule 608(b) provides that the report of proceedings "... shall be certified by the reporter or the trial judge and shall be filed in the trial court within 49 days after the filing of the notice of appeal, or, if a death sentence has been imposed, within 49 days from the date of the sentence." The report must be taken as true and correct unless shown otherwise and corrected in the manner permitted by rule 329. Responsibility for certification of the report of proceedings is thus placed on the official court reporter or the trial judge. No longer is it necessary for defense counsel to make periodic motions for extensions of time to file the report of proceedings.

Rule 608(c) requires that the record on appeal be filed in the reviewing court within 63 days from the date of filing of the notice of appeal in the trial court, or if a death sentence has been imposed, within 63 days from the date of sentencing. The rule contemplates a determination by the trial court of the time for filing the record in the reviewing court in cases involving multiple defendants where notices of appeal are filed on different dates. In any event, this cannot be more than 63 days from the date on which the last notice of appeal is filed. Where the time for filing the report is extended, the record on appeal must be filed within 14 days after expiration of the extended time. Under rule 608(d), provision is made for extensions of time, authorizing any judge of the trial or reviewing court to extend the time for filing the report of proceedings in the trial court or in the reviewing court. There is a savings clause that "... [a]n extension of time may also be granted by the judge on motion made within 35 days after expiration of the applicable time, supported by showings of reasonable excuse for failure to file the motion earlier."

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64 Id.
65 Id.
66 Id. §608(b).
67 Id. §608(c).
68 Id. §608(d).
It is important to note that in contrast with the requirements for filing the bill of exceptions under the writ of error practice, the filing of the report of proceedings is not jurisdictional. It is now contemplated that problems with regard to failure to file a report, whether caused by the clerk, the court reporter, or the trial judge, are to be solved by rulings which comport with the spirit of the new rules that criminal appeals, as in the case of civil appeals, shall be inexpensive and expeditious. It is expected that decisions of our reviewing courts construing the new rules will reflect flexibility, rather than rigidity, since today, in an Illinois criminal appeal, the only jurisdictional requirement is the filing of the notice.

Notwithstanding this liberality and this spirit, it is worth repeating that it is nothing more than the professional responsibility of the practitioner to supervise each procedural step in the preparation of the record on appeal and to assure that these steps are taken promptly, in accordance with all provisions of the rules. Proper disposition of a criminal appeal will be aided by this sense of duty on the part of the lawyer handling the appeal of a criminal case. The lawyer should make frequent contact with the trial judge, the clerk of the trial court and the official court reporter to assure that the requirements of the rules are met, thereby avoiding the burden imposed on court and counsel caused by motions and requests for extensions of time.

As a practical matter, once the notice of appeal and the designation are filed with the trial court clerk, nothing further is required of counsel handling the appeal but patience in awaiting preparation of the record for docketing in the reviewing court. On occasion, it may be necessary to obtain a stay of the trial court judgment in the reviewing court. Again, in contrast with the former writ of error practice,69 the requirement that a supersedeas issue only from the reviewing court has been abolished. Rule 609(a) provides that in cases where the death sentence is imposed, the execution shall await the final order of the supreme court. In cases of imprisonment or confinement, the judge of the trial court has the power to admit the defendant to bail pending appeal.70 In practice, the trial judge, on motion, will allow the

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69 According to the present rule, ILL. REV. STAT. ch. 110A, §609 (1967), and its immediate predecessor, ILL. REV. STAT. ch. 110, §101.27 (16) (1965), the stay of execution can be granted by either the trial court or the reviewing court. Before the adoption of these rules, ILL. REV. STAT. ch. 38, §121-6 (1963) provided: "... If an appeal is taken and the defendant is admitted to bail, sentence of imprisonment shall be stayed by the trial court." Prior to 1963, it was well established that only the reviewing court could by a supersedeas stay a sentence of imprisonment. People v. Klyczek, 307 Ill. 150, 157, 138 N.E. 275, 278 (1923). Thus, the procedure has evolved from that of the issuance of a stay by the reviewing court alone to issuance of a stay by either the trial or reviewing court.

70 ILL. REV. STAT. ch. 110A, §609(b) (1967).
defendant to remain at liberty either under the same or an increased bond. If the trial court stays the sentence or condition of confinement, and admits the defendant to bail, the stay is effective until the final order of the reviewing court. The trial court or the reviewing court can, on motion, for good cause, revoke the bail order, or can increase or decrease bail as circumstances may require.\(^7\)

In this connection it should be observed that in 1967, chapter 38, section 121-6 was amended to provide that no defendant convicted of a forcible felony shall be allowed bail on appeal.\(^7\) A trial judge of the Circuit Court of Cook County has declared this amendment unconstitutional and the cause is now pending in the supreme court on a petition for writ of mandamus filed by the state's attorney of Cook County.\(^7\) Ultimate resolution of this question must await the opinion of the supreme court in these proceedings.

In any event, it is important to recognize that by means of a simple oral motion the power of the trial court to stay execution of sentence of imprisonment can be invoked. It is the present public policy of this state in criminal appeals that, in proper cases, stays of execution be granted in the trial court without the necessity of an application in the reviewing court. Rule 609(c) reflects the philosophy of present rules governing criminal appeals, leaving to the discretion of the trial judge the question of stay of sentence pending resolution of the appeal. Stay bonds in all cases are subject to review on motion supported by affidavits.

In the reviewing court, motions in criminal appeals are governed by rule 361.\(^7\) One exception is pointed out in rule 610 which provides that whenever an extension of time in a criminal case is sought it must be supported by an affidavit showing the date on which counsel on appeal was engaged or appointed to prosecute the review, the date on which the complete record was filed in the reviewing court, including the number of previous extensions obtained by order of the reviewing court, and finally, the reasons for the requested extension. Rule 610 is intended to discourage continuances in reviewing courts; its express objective "is the achievement of prompt preparation and disposition of criminal cases in the reviewing courts, and motions for extensions of time are looked upon with disfavor."\(^7\) This point

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\(^1\) Id.
\(^7\) Act 1453, H.B. 2046 [1967], 6 ILLINOIS LEGISLATIVE SERVICE 2579.
\(^7\) Rule 610, ILL. REV. STAT. ch. 110A, §610 (1967), provides that, except as noted, the procedure governing motions in civil appeals, Rule 361, ILL. REV. STAT. ch. 110A, §361 (1967), is applicable in criminal appeals.
\(^7\) ILL. REV. STAT. ch. 110A, §610 (1967).
should be remembered by any lawyer preparing the appeal of a criminal case.

Consistent with the provision making the appeal the only method of review of a criminal case, and making criminal appeals comparable to appeals in civil cases, rule 612 now makes applicable to criminal cases many of the rules of procedure which govern civil appeals. Some of these rules are new to the process of review of criminal cases. For example, rule 309, which applies to the dismissal of appeals by the trial court in civil cases, likewise applies to a criminal case; thus, before a case is docketed in the reviewing court, the trial court may dismiss the appeal or any portion thereof on motion, by stipulation of the parties, or where the time to file the record in the reviewing court has expired. As in civil cases, appeals from the appellate to the supreme court are now uniformly governed by rules 315, 316, 317, and 318.

In a more pragmatic vein, rule 323 (c), which in civil cases makes provision for those cases in which there is no verbatim transcript of the trial proceedings, is now applicable to criminal trials. This rule codifies what was once known as "a bystanders' bill of exceptions." Since court reporters are now a part of every felony trial the occasions for application of this rule are exceptional instances which might occur only in misdemeanor prosecutions. When these exceptional circumstances arise, a report of the proceedings may be proposed by an appellant from his recollection of the events of the trial court. Although such cases, occurring rarely, present serious problems to trial judges, a reading of rule 323 (c) makes it clear that in criminal cases where a verbatim transcript of the evidence is not available, the appellant may propose a report from the best available sources, including his memory. A copy of the proposed report must be served within seven days after the notice of appeal is filed. Within 21 days, any party may serve proposed amendments. Within seven days thereafter, the appellant is required to present the proposed report or reports, including any amendments thereto, to the trial judge for settlement and approval. It is mandatory that "the court, holding hearings if necessary, shall promptly settle, certify and order filed an accurate report of proceedings." This rule seems to indicate that in those cases where the verbatim transcript is not available, the trial court must settle, certify and order filed an accurate report. This is a departure from established case law on this subject.

\[^{10}\] Id. §323 (c).
\[^{11}\] Id.
\[^{12}\] Id.
\[^{13}\] Rule 323 (c) had its origin in former Rule 36, ILL. REV. STAT. ch. 110, §101.36 (1965). When it was prepared, Rule 36 was said to be in part,
With regard to preparation and certification of the record on appeal, it is well to recall that when review of criminal cases was by writ of error, Illinois statutes and court rules were devoid of detail. Now, details are prescribed; for example, the new rules governing criminal appeals require the clerk of the trial court to number the pages of the record in a particular manner. The clerk’s mandatory record, or what is sometimes called “the common law record,” must be numbered by placing a letter “C” before the record page number to designate that portion of the record. Experience, upon which rule 324 is based, has shown this practice to be a convenient one. Usually, as lawyers acquainted with appeals are aware, the bill of exceptions or report of proceedings is numbered consecutively while the clerk’s mandatory or common law record is not numbered. If, as formerly required by rule 36 (2) (a), the clerk must “number the pages consecutively,” the result would follow that the entire record on appeal must be renumbered. There are practitioners who believe that a more orderly procedure would be to number the pages of the record on appeal consecutively, beginning with the placita and ending with the certificate of the clerk. However, the method provided by rule 324 appears to be the better one. In other words, experience of long standing has found codification in the new rule.

After the record on appeal is prepared and certified by the clerk, its transmission to the reviewing court depends on existing practice. In some judicial districts, the clerk of the trial court, upon payment of his fee, delivers the record to the appellant’s counsel. In other districts, the clerk sends the record to the re-
viewing court. The rigidity of these practices has been relaxed by rule 325 which provides that the clerk deliver the record to the appellant for transmission.83 If the appellant is an indigent defendant "no fee need be paid to the clerk of the trial court."84

Possession of the record on appeal initiates the practitioner's actual labor in the appellate process. The lawyer who handles a criminal appeal efficiently will make certain that the record is prepared and certified promptly. Rule 608 (c) requires the record to be filed in the reviewing court within 63 days of the date on which the notice of appeal is filed in the trial court, or if a death sentence has been imposed, within 63 days of the date of sentencing.85 Extensions of time for filing the record may be obtained pursuant to subdivision (d) of the rule. It is a common failing among lawyers handling appeals to wait until the last day to file the record in the reviewing court. This is a mistake. The practitioner should use as much of the filing time as possible in familiarizing himself with the content of the record and developing the concepts or ideas underlying the appeal. The new rules make this possible by providing in rule 325 that, in order to facilitate completion of the work on the appeal, the record itself need not be filed in the reviewing court. Instead, at the request of any party, the clerk of the trial court is required to deliver to the appellant a certificate that the record has been prepared and certified in the form required for transmission to the reviewing court.86 A filing of the certificate as provided by rule 325 meets the requirements of rule 608 (c) with regard to timely docketing of the appeal.87

These provisions of rule 325 are new. Formerly, writ of error practice required that the transcript be docketed in the reviewing court, after which, on request of a party, the transcript was returned by the clerk of the reviewing court to the clerk of the trial court. At one time this rule was invoked by a motion supported by affidavit of suggestions which invariably stated that plaintiff in error or his counsel needed the transcript in order to prepare the abstract of the record. Rule 325 makes unnecessary much of the tedious detail once required in preparing the review of a criminal case in Illinois. Now, if the record on appeal is promptly prepared and certified by the clerk, it can be delivered to counsel for the appellant who can utilize the filing time to facilitate work on the appeal. Because it is no longer necessary that the record be filed in the reviewing court and

84 Id. §612(e).
85 Id. §608(c).
86 Id. §325.
then withdrawn for the purpose of duplication, the practitioner has additional time in which to work on the appeal.

The docketing of the appeal, whether by filing the record on appeal or the certificate provided by rule 325, is subject to the requirement that notice be given to the appellee, stating the docket number and the date of filing. This practice is new. It represents an improvement over former practice under writ of error when the state did not receive notice of a review until service of the abstract and brief.

All comments to this point apply only to the handling of the complete record on appeal when it is prepared and certified. As every practitioner knows, there are cases in which preliminary relief must be obtained in the reviewing court before the full record on appeal is prepared and certified. For example, a motion may be necessary in the reviewing court to obtain bail pending review. A motion to modify an excessive appeal bond set by the trial court may be the subject of an application for relief before the record on appeal is ready. Other situations may arise; for these rule 328 provides for use of a short record when a party seeks preliminary or temporary relief from the reviewing court. In such cases, the rule provides that the application shall be accompanied by a short record containing sufficient matter to show an appealable order or judgment, by a notice of appeal filed and served in the proper time "and any other matter necessary to the application made." The short record may be authenticated by a certificate of the trial court clerk, or by the affidavit of the attorney or party filing it.

This latter provision of rule 328 is new. However, it manifests the flexibility which is intended to characterize criminal appeals generally. By allowing the short record to be authenticated by the appellant or his attorney, instances of an emergency nature can be handled with relative ease. It is believed that there is no real risk of improper short records being presented to reviewing courts. It is contemplated that any abuse of the privileges of rule 328 will be rectified by the reviewing court which has power to punish by contempt any injury to the parties involved, or any gross violation of the rules of court.

Finally, with regard to both the complete and the short

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90 Id. §328.
91 Id.
91 Violation of the supreme court rules are within the enunciated rule that the power to punish for contempt encompasses all acts calculated to impede, embarrass, or obstruct the court in the due administration of justice. People v. Gilbert, 281 Ill. 618, 180 N.E. 199 (1931); People v. Hathaway, 27 Ill.2d 615, 618, 180 N.E.2d 332, 334 (1963). Thus, where an attorney filed papers with the clerk of the court contrary to an order of court, his conduct was contemptuous. People v. Andalman, 346 Ill. 149, 178 N.E. 412 (1931).
record, the practitioner may rely on rule 329 which provides that material omissions, inaccuracies or improper authentication may be corrected by stipulation or by the trial court "either before or after the record is transmitted to the reviewing court."92 It is the function of the trial court to settle all controversies concerning the record so that it may conform to the truth. It is contemplated that if any controversy concerning accuracy of the record occurs in the reviewing court, that court, under its motion practice, shall have the power to resolve such questions.93 Usually, resolution of these questions will eliminate preliminary procedural matters concerning the record. The practitioner must then turn to the first important part of a criminal appeal: the duplication of the record on appeal.

d. **Duplication of the Record: Excerpts or Abstract**

Upon obtaining possession of the record on appeal, the practitioner must first ascertain whether it has been properly prepared, certified in accordance with rule 324, and properly numbered. In view of the mandatory language of rule 324 that, "[t]he clerk shall number the pages that precede the report of proceedings,"94 the record should be returned to the clerk in the event that any step in its preparation, certification and pagination has been omitted. Upon being satisfied that the record on appeal is in order, the practitioner, even if he is familiar with the case, should read it in order to understand the events which transpired in the trial court in the context of the appeal. Without this basic understanding, it is impossible to prepare an adequate duplication of the record on appeal.

An understanding of the contents of the record is important; consequently, the abstract or excerpts from the record should be prepared first. This step usually aids most practitioners in getting a better understanding of the contents of the record and the issues inherent in the case. Rule 342 governs the duplication of the record.95 It provides for two methods: excerpts from the record and abstract. Subparagraph (a) of this rule introduces into Illinois criminal appeal procedure a new concept in the duplication of the record on appeal. This is called excerpts from record. This practice differs materially from that which prevailed when criminal cases were reviewed only by writ of error. At that time, the use of an abstract of the record was the only form of duplication. Because of their novelty, excerpts from record, as a method of record duplication, deserve special explanation as well as evaluation.

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93 Id.
94 Id. §324.
95 Id. §342.
Excerpts from record are exactly what the phrase implies. They consist of extracted portions of the record essential for judges of the reviewing court to read in order to decide the issues presented. Excerpts from record are simple to prepare; all that is necessary is a determination of the portions of the record on appeal which must be excerpted. Rule 342(a) requires that the appellant serve on the appellee and file in the reviewing court, no later than the day his brief is due, a designation of the excerpts from the record on appeal to be duplicated.96 These excerpts must include at least the judgment or order appealed from and the notice of appeal. Exhibits which cannot be feasibly and economically duplicated need not be included in the excerpts.

Upon being served with the appellant's brief and his designation of record excerpts, the appellee must file its designation of any additional excerpts from the record deemed essential for the judges of the reviewing court to read.97 Additional designations made necessary by the appellee's brief or designation may be filed by the appellant. The parties may, by stipulation, avoid the necessity of filing designations and may agree in writing as to those portions of the record to be excerpted.98

Within 14 days after the appellee's brief is due, the appellant, in accordance with the rules, is required to prepare and file the excerpts from record designated by the parties, unless, by stipulation they agree otherwise. Instead of having the excerpts prepared either by a printer or other private service, the appellant may, within seven days after the due date of the appellee's brief, request the clerk of the reviewing court to prepare and file the excerpts upon payment of charges in accordance with rates determined by administrative order of the reviewing court. If the parties agree on a narrative statement or other abbreviation of any evidence or portion of the record on appeal, the appellant may substitute such abbreviated material. For the purposes of preparing the excerpts from record, the appellant's attorney is specifically given the authority, under rule 342(b), to "unbind the record on appeal, but he shall promptly restore it to its original form."99

There is no question, in the mind of this writer, that excerpts from record represent a vast improvement over abstracts of record. Excerpts from record are exact duplicates of portions of the record. Except for the reading necessary to choose essential parts of the record on appeal, no other work is required.

96 Id. §342(a).
97 Id.
98 Id.
99 Id. §342(b).
An abstract of the record, on the other hand, is prepared by a partisan lawyer urging a particular theory of the case. Unfortunately, the zeal of the advocate interferes with accuracy in transposing the record content into narration, a feature essential to an abstract. Sometimes, the same unfortunate result is reached by neglect or mistake. As a consequence, it is known that on occasion the abstract is unreliable.\textsuperscript{100} In addition, preparation of an abstract takes time. Therefore, the committee which drafted the new supreme court rules concluded that time and costs can be significantly reduced and accuracy substantially increased by the use of excerpts of record rather than the abstract.\textsuperscript{101} Lawyers of experience will agree that there is perhaps no work more tedious in handling an appeal, civil or criminal, than the preparation of an abstract of record.\textsuperscript{102} This drudgery is now abolished by the provisions of rule 342(a), where excerpts instead of abstracts are used in criminal appeals.

Because an excerpt of record is not a summation, it differs from an abstract in the mechanics of pagination. If excerpts from record are printed, the lowest or opening page number of the record on appeal should appear on the upper left-hand margin and the highest or closing number on the lower right-hand corner of each pair of pages. Reproduction or duplication may be by any method permitted by rule 344(b).\textsuperscript{103} The important point to note is that when reproduction is in facsimile, the pagination of the excerpts should conform to that of the record on appeal.

Rule 342(d) requires that the excerpts from record be preceded by a complete table of contents.\textsuperscript{104} This table must make references to the record on appeal and must be arranged in the same sequence to show the omitted portions. In this way the pages of the entire record will appear in the table of contents. The table of contents must describe each document, order or exhibit as, for example, the complaint, the judgment, or the notice of appeal. The rule requires that excerpts include the dates when pleadings were filed or orders entered. As was the case with abstracts, the names of all witnesses and the pages where

\textsuperscript{100} For example, in a recent case, in reviewing and affirming a conviction for manslaughter, the Appellate Court for the Second District complained about the abstract submitted by the defendant: "We have read the abstract, briefs and arguments which were filed in this case and it was necessary for us to go to the record to determine just what took place at the trial." People v. Davidson, 82 Ill. App. 2d 245, 247, 225 N.E.2d 727, 728 (1967).

\textsuperscript{101} Committee Comments, ILL. ANN. STAT. ch. 110A, §342 (Smith-Hurd Supp. 1967).

\textsuperscript{102} Rall, Tone & Stern, Obsequies for the Abstract of Record, 54 ILL. B.J. 780, 791 (1966).

\textsuperscript{103} ILL. REV. STAT. ch. 110A, §344(b) (1967).

\textsuperscript{104} Id. §342(d).
direct, cross, and redirect examination begins should be shown.\textsuperscript{105} As to any particular item, the page number of those portions of the record not excerpted must be enclosed in parentheses.

It is worth noting, however, that rule 342 does not eliminate abstracts of the record. Subparagraph (e) of the rule provides:

The appellant may elect to file an abstract of the record of appeal in lieu of the excerpts from record, in which event the abstract shall be filed with his brief and the following provisions shall be applicable instead of paragraphs (a) through (d) of this rule...\textsuperscript{106}

The rule further provides that abstracts must have the pages of record on the margin, and must contain a complete index, alphabetically arranged and otherwise conforming to the requirements of excerpts from record. If the record on appeal contains evidence, the abstract must contain a condensed narrative which will present its substance clearly and concisely.\textsuperscript{107} In accordance with the practice existing before rule 342 was adopted, matters in the record on appeal, not necessary for a full understanding of the question presented for decision, are not to be abstracted. The abstract need only be sufficient to present fully every error relied upon. Finally, provision is made, as in proceedings in writs of error, for the filing of an additional abstract by the appellee at the time he files his brief.

It is obvious that under the present rules the practitioner can use either excerpts from record or an abstract. If excerpts are chosen only one document will represent the duplicated record. This is an improvement over abstracts which always resulted in one copy of the duplicate record for the defendant and one for the state. The use of abstracts sometimes required reviewing court judges to read four documents — two briefs and two abstracts of record.\textsuperscript{108}

This discussion leads to the observation that in criminal appeals in which questions of reasonable doubt are raised, it may be that excerpts from record will not be considered an effective method of duplicating the record on appeal. This view originates from the fact that in cases where it is claimed that the evidence does not prove the defendant guilty beyond a reasonable doubt, all evidence has to be excerpted. This may be the entire record on appeal. The same requirement is present in a case where the claim of error concerns instructions or prejudicial argument. To this writer, the answer seems to be that the designation of excerpts which amount to a duplication of the entire record is easier to prepare than an abstract of record that requires laborious narrative summarization of the testimony.

\textsuperscript{105} Id.
\textsuperscript{106} Id. §342(e).
\textsuperscript{107} Id.
\textsuperscript{108} Rall, Tone & Stern, Obsequies for the Abstract of Record, 54 ILL. B.J. 780, 783 (1966).
The development of procedural rules in Illinois will no doubt be toward adoption of the practice now followed in the United States Supreme Court in those cases where certiorari is granted indigents. In that court, in such instances, the clerk duplicates the record as in his judgment seems necessary to facilitate disposition of the case. In Illinois courts of review, most appeals are made by indigents, and the cost of duplicating the record is ultimately paid from public funds. It may be that rule 342(h) may require amendment or construction to provide that the clerk of the reviewing court shall prepare the excerpts of record in all indigent appeals. Such a provision would expedite criminal appeals and lessen the burden of lawyers representing indigent appellants. Clearly this would be more consistent with the constitutional command that, “The supreme court shall provide by rule for expeditious and inexpensive appeals.” It should be observed that this constitutional mandate is not intended to benefit only those who can claim indigency.

In cases brought to the supreme court from an appellate court, the excerpts from record or abstract on file may be used without change, and may stand as excerpts or abstract in the supreme court. Parties may file additional excerpts or additional abstracts if they so desire. The clerk of the appellate court is required to provide the appellant with copies of the excerpts from record or abstracts, to the extent practicable. Finally, subparagraph (i) of rule 342 makes provision for excusing excerpts or abstracts. Frequently in criminal cases, questions to be presented can be argued without duplication of the record. By resorting to motion practice in the reviewing court, counsel can make application for leave to proceed only on the record or other documents on file. Although such motions are not granted as a matter of course, application should be made in a proper case.

The function of excerpts will undoubtedly be construed to be similar to that of abstracts of record. It has long been the law in Illinois that the abstract of record is a pleading in the reviewing court. The abstract or the excerpts should be sufficient to present fully every error relied upon as a ground of appeal. Omission of a vital part of the trial court record may be fatal, despite the liberal provisions of rule 342(g) which emphasizes that the entire record on appeal, whether or not contained in the excerpts or the abstract, is available to the review-

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109 In practice, Rule 26 of the United States Supreme Court is modified by Rule 53.
110 ILL. CONST. art. VI, § 7.
111 ILL. REV. STAT. ch. 110A, §315(d) (1967).
112 People v. Parker, 345 Ill. 181, 177 N.E. 727 (1931); Harris v. Annunzio, 411 Ill. 124, 103 N.E.2d 477 (1952).
113 ILL. REV. STAT ch. 110A, §342(a) (1967).
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ing court for examination or reference. Counsel should be aware of decisions such as *Placher v. Streepy* and *Husted v. Thompson-Haywood Chemical Co.*, in which the court held that omission of essential portions of the record is a defect fatal to the appeal. If, for example, complaint is made of the giving or refusal of instructions, all instructions given or refused must be included in the abstract or excerpts. Where the defendant complains of a prosecutor's closing argument, but the abstract does not contain all arguments of counsel, including the objections and rulings thereon, the supreme court has refused to consider the alleged prejudicial error. Illinois reviewing court judges have repeatedly stated that they will not search the record in order to reverse a lower court's decision when the abstract fails to sufficiently present every error relied upon for reversal. It is the duty of the party prosecuting an appeal to include in his abstract or excerpts all evidence essential to the disposition of contentions urged and the reviewing court will not search the record for the purpose of overcoming deficiencies in the abstract or the excerpts. Briefly, an abstract or excerpts must possess two virtues: completeness and candor.

Upon completion of the abstract or excerpts from record, the practitioner may begin preparation of the brief on appeal.

e. *The Brief and Written Argument*

After the record on appeal has been carefully studied, and the concepts and ideas supporting the appeal determined, the writing of an effective and persuasive brief is perhaps the highest form of the lawyer's art. Under rule 341 which now governs both civil and criminal appeals, a brief in an Illinois criminal case may consist of eight subdivisions if it is an appeal directly to the supreme court; it may consist of at least six subdivisions

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116 In a recent case, the Appellate Court for the Second District pointed to the reason for this requirement. After having been convicted of armed robbery, the defendant contended on appeal that it was error for the trial court to refuse to give three of his instructions. There were 18 instructions given in all, but only four were abstracted. The court said:

This point cannot be considered by this court since the defendant failed to abstract all of the instructions given in the cause. Our courts have uniformly held that error cannot be predicated upon the giving, refusal or modification of instructions unless all the instructions are set out in the abstract, for the reason that there may have been other instructions given which cured the errors complained of.

118 People v. Mattei, 381 Ill. 21, 24, 44 N.E.2d 576, 578 (1942); People v. Wolff, 19 Ill.2d 318, 329, 167 N.E.2d 197, 203, cert. denied, 364 U.S. 874 (1960).
120 Id. §341(e).
if the appeal is to an appellate court.\footnote{Id.}{121} Where, on direct appeal
to the supreme court, there is presented for determination a con-
stitutional question, or there is involved the construction or
validity of a statute, constitutional provision, treaty, ordinance
or regulation, rule 341 (e), subparagraphs (3) and (4), require
inclusion of a brief statement under the heading, “Jurisdiction,”
which states the jurisdictional grounds for appeal to the supreme
court. It is also necessary to include a statement under the
heading, “Statutes Involved,” where, in an appeal to the supreme
court, there is involved a question concerning the construction or
validity of a statute, constitutional provision, treaty, ordinance or
regulation.\footnote{Id. §341(e).}{122} Attorneys experienced in practicing in the federal
courts will recognize that under the new rules, an Illinois crim-
nal case brief comes to resemble closely the appearance of a brief
in one of the United States courts of appeal.

An effective and persuasive brief is one that succinctly states
the point to be made. It is no accident of language that the word,
“brief,” is used to describe this essential tool of advocacy. Both
the substance and mechanical requirements of the brief are im-
portant.

Rule 341 (a) limits both appellant and appellee to a brief of
75 pages if printed, or 100 pages if not printed. The appellant’s
reply brief must not be longer than 20 pages if printed, or 27
pages if not printed.\footnote{Id. §341(a).}{123} The cover of a brief must contain the
case number in the reviewing court, the title of that court, the
name of the court from which the case is brought, and the name
of the case as it appeared in the trial court. In the cover of the
brief, each party may be described in terms of his status in the
trial court and the reviewing court, as, for example, “plaintiff-
appellant.” The cover must also contain the name of the trial
judge entering the judgment, the individual names and addresses
of the attorneys filing the brief, and if desired, the names of their
law firms. In the brief itself, the party must be referred to by
his designation in the trial court, for example, “the people,” “the
state,” or “defendant.” The words appellant, appellee, peti-
tioner or respondent are here omitted. Rule 341 (c) further pro-
vides that the parties may be described “by using actual names
or descriptive terms.”\footnote{Id. §341(c).}{124} Citation of cases must be by title to
the page of the volume on which the case begins or to pages from
which any pertinent matter cited to the court appears. The
rule warns that it is not sufficient to rely on the expressions
“supra” or “infra.”\footnote{Id. §341(d).}{125} In citations of Illinois cases, references

\begin{footnotes}
\item[121] Id.
\item[122] Id. §341(e) (3) and (4).
\item[123] Id. §341(a).
\item[124] Id. §341(c).
\item[125] Id. §341(d).
\end{footnotes}
must be to the official report, although citation to the unofficial report may be added. In practice, citations to the unofficial report are omitted. If an opinion is quoted in the brief, it may be cited from either the official or the unofficial report. Cases from other jurisdictions must include the date of decision. If only the unofficial or national reporter system is cited, the name of the court rendering the decision must be given. Citation of text books must include the date of publication and the edition. The court prefers that citation of Illinois laws be to the Illinois revised statutes. Where appropriate, citation may be made to session laws. If the brief is for the appellant, it must contain an introductory paragraph which need not be numbered or captioned. Rule 341 (e) (1) serves to illustrate what it is that the court seeks in these introductory words: a brief statement of what the case is about. Following the introductory paragraph, a statement must be made of the issue or issues presented for review. This statement should be succinct and should tell the court the exact issue or question involved. As previously indicated a brief of a direct appeal to the supreme court, or an appeal taken as a matter of right from an appellate court, must conform to rule 341 (e) (3), which requires a brief statement under the heading “Jurisdiction,” stating the jurisdictional grounds for the appeal. Where an appeal involves questions concerning the construction or validity of a statute, constitutional provision, treaty, ordinance or regulation, the pertinent provisions must be stated verbatim in the brief under an appropriate heading, such as, “Statutes Involved.” It should be observed that, with the exception of what are sometimes called “white collar crimes,” it is rare that an Illinois criminal appeal will require extensive quotation from statutes. In any event, the rule provides that if the statutory provisions involved are lengthy, a citation to the statutory source is sufficient. In this instance, the pertinent text must be included in an appendix.

It is next necessary to include a summary statement entitled “Points and Authorities,” with citation of the cases relied upon for authority, or distinguished. The rule requires that the cases “be cited as near as may be in the order of their importance.” This marks a change from the previous requirement that the three cases upon which the most reliance is placed must be cited first under each point. The next statement which must be included in the brief is the statement of facts, which must contain

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126 Id.
127 *Id.* §341 (e) (3).
128 *Id.* §341 (e) (4).
129 *Id.* §341 (e) (5).
the factual details necessary to an understanding of the case, without argument or comment, but with appropriate references to the pages of the record on appeal. For example, the method of record references shall be (R.C. 9) or (R. 9) where duplication of the record is by excerpts from record, or (A. 15), if the abstract method is used.

The brief must next contain the argument, which must expound the contentions on appeal and give the reasons in support of such contentions, with citation of authorities. The pages of the record containing the factual or procedural bases for the contention must be given. In cases involving constitutional questions for appeal directly from a circuit court to the supreme court, rule 302 (b) requires that the argument on the constitutional question precede all other portions of the appellant's brief. Practitioners are admonished that, "Evidence shall not be copied at length, but reference shall be made to the pages of record on appeal, excerpts or abstract where the evidence may be found." The court, in rule 341 (e) (7), cautions the attorney that he should not cite numerous authorities in support of the same point because this is looked upon with disfavor. As a matter of some importance, it should be remembered that points not argued are waived and cannot be raised in a reply brief, in argument, or on petition for rehearing. Finally, a short conclusion, stating the precise relief which the party seeks in the reviewing court, completes the brief. In an appeal to the appellate court, or where there is not involved a constitutional question, or one concerning statutory construction, the two headings required by rule 341 (e), subparagraphs (3) and (4), are eliminated. In these cases, the brief is shorter, and usually consists of the introductory paragraph, statements of the issues, the points and authorities, the facts, the argument and the conclusion.

The brief of an appellee need include only a statement of points and authorities, an argument and a conclusion. If, however, the appellee deems unsatisfactory any presentation by the appellant in his brief, the appellee may raise this matter in the brief filed. Generally, the areas most frequently involved in this disagreement are the statement of issues and the statement of facts.

This, then, completes the description of the basic requirements of a brief in the appeal of an Illinois criminal case today. The next problem it is necessary to consider is that of the substance and content of the brief. What is an effective brief?

In listing the essentials of an effective appellate brief, Fred-

131 ILL. REV. STAT. ch. 110A, §341 (e) (7) (1967).
132 Id.
133 Id. §341 (f).
erick Bernays Wiener in his recent book discusses nine "really essential features," which he says are indispensable in a well-written brief. This list of essential elements begins with the admonition that rules of court be obeyed, and closes with the advice that the brief convey the impression that the lawyer is convinced of the justice of his client's cause. "The real test of whether a brief has been effective — the ordeal by fire — is whether it wins the appeal."135

The most fruitful way for the practitioner to pass this test in writing a brief is for him to begin with the statement of facts. This practice requires that earlier parts of the brief such as the introductory paragraph and the points and authorities be disregarded at this stage. It will become apparent to attorneys of even limited experience that every part of a brief depends on the facts.136 Thus, it is important that a persuasive and effective statement of facts be prepared first.

In preparing the statement of facts, it is best to begin with a description of the events in the same order in which they actually occurred. This description should be in a narrative vein; it is still true that, "all the world loves a story."137 Although the statement should be free of argument and editorial slant, it should be arranged to create the desired impressions. For example, if, in the order of events, there is some fact favorable to the appellant, it should be included at a psychologically impressive point. By the same token, if, in the appellee's brief, a statement of facts is found necessary, and there is a fact which points to the heinousness of the appellant's crime, that fact should be told in a manner which will effectively bring attention to this quality of the crime. In this area of briefwriting, a lawyer's masterful use of words can assert itself. And, it is here that the lawyer's art finds expression.

After the statement of facts is completed, the argument which will logically flow from it can be written. In some cases, the argument can be written before the points and authorities have been completed. If the points have been outlined, the argument should follow after each point. The cases cited should be given after an argumentative sentence or paragraph. In a well-written argument, the words of an opinion relied upon for authority may be paraphrased or quoted as running parts of the argument. In this way a continuity will flow through the exposition. Where an extended quotation is necessary, it

135 Id. at 125.
136 Id. at 44, 129.
137 This may well be a paraphrase from KELLY, SCOTTISH PROVERBS 55 (1721).
should be indented and single-spaced. This sort of plagiarism, although a license among lawyers, should be kept to a minimum. If this is done, the argument will have the easy flow of a well-written appellate court opinion.

After the statement of facts and the argument are completed, it is surprising how easy it is to write a clear introductory paragraph and a lucid statement of the issue or issues presented for review. In preparing the statement of issue or issues, it is worth noting that subparagraph (2) of rule 314(e) has eliminated the requirement that the theory of the case be given in an early paragraph of the brief. This change was found necessary because lawyers tended to present too lengthy a statement of the theory of the case. Reviewing courts desire a brief statement of the issue. There is no need for elaboration of the legal question. All that is required is sufficient information to give the reviewing court a general idea of what the case involves.

Next to the statement of facts, perhaps the most difficult part of a criminal appeal brief is the drafting of the statement of points and authorities. This portion of the brief requires a succinct, argumentative but concise legal statement of the point involved. The point should be stated concretely, not abstractly. It should pertain to the case on appeal. Ordinarily, this involves taking the basic facts and distilling from them the crucial legal issue, with a statement calling the attention of the reviewing court to the error which must be corrected by the appeal. It is this writer's view that next to a clear, persuasive and succinct statement of facts, the preparation of accurate but argumentative points and authorities requires the greatest amount of legal talent. It is worth every effort because it is this part of the brief that tells the reviewing court the point on which the judgment on appeal will rest.

There are criminal cases which, despite the ability of the appellate lawyer, cannot be won. There are cases which, despite the ineptitude of the lawyer, cannot be lost. Between these two extremes are the vast number of cases which will be won or lost depending on the competency of the attorney in framing an adequate, effective and persuasive brief.

f. Filing of the Brief and Duplicated Record

In addition to a working knowledge of the rules governing the form and content of the brief on appeal, it is necessary that

139 That the court does not want a prolix statement at this point is demonstrated by a reading of the examples provided in the rule. Ill. Rev. Stat. ch. 110A, §341(e)(2) (1967).
the practitioner know the provisions of rules 343 and 344. These rules govern the time for filing and serving briefs, the number of copies to be filed and served, and the form and method of reproducing and duplicating briefs, excerpts from record or abstract.

The time for filing both the appellant's and the appellee's briefs has been changed from 30 days to 35 days. The time after filing of the appellee's brief within which the reply brief of appellant must be filed is now 14 days, a change from the earlier provision of 10 days. This period is consistent with the policy of using a multiple of seven days to fix the time periods under the new supreme court rules. Rule 343 (b) provides that the reviewing court, or a judge of that court, either sua sponte or on motion of a party supported by an affidavit showing good cause, may extend or shorten the time allowed to any party to file a brief.

If the case is one of those happy occasions in which the lawyer on appeal represents a financially able client, rule 344 (a) governs the number of copies required to be filed and served. These details have not been changed. In an appeal to the appellate court, nine copies of the brief, and the excerpts from record or abstract, should be filed. If the appeal is to the supreme court, 15 copies of each of these documents must be filed with proof of service.

Rule 344 (b) permits duplication of briefs, abstracts or excerpts from record "by any printing, duplication, or copying process that provides a clear image." If printing is used, it must be on paper 6 3/4 inches by 10 inches, in type not smaller than 11 point. If not printed, the brief must be legibly and neatly reproduced on paper 8 1/2 inches by 11 inches, securely bound on the left-hand side. The typed material must not exceed more than 6 inches by 8 1/2 inches on a typewritten page. Excerpts from records may conform to the requirements for briefs or may consist of reproductions by any method permitted by the rules.

The provisions of the rules governing colors of covers have not been changed. Subparagraph (d) requires that the cover of the appellant's brief shall be white and his excerpts from record or abstract gray. The cover of the appellee's brief shall be light blue, that of the appellant's reply brief, light yellow, and of the reply brief of the appellee, light red. The petition for rehearing is required to have a light green cover. When the appeal is by an indigent person, rule 607 (d) is controlling and most of the

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143 Id. §§344 (d).
g. The Oral Argument

After the record on appeal has been duplicated, either by excerpts from record or abstract, and the brief has been filed, the next important step in the appeal is the oral argument. Despite its long acceptance as a description of the oral presentation of the case in a reviewing court, the word "argument," though apt, does not really explain this phase of a criminal case appeal. The oral presentation of a case to a court of appeal, sometimes called the oral argument, should be an intelligent conversation between advocate and court. It is the height of professional achievement for the lawyer. For the court, it is often, though not always, a necessity, because the printed word, no matter how brilliantly done, lacks the capacity to convey those human values so essential to an understanding of the case. Unfortunately, there prevails today the opinion that the quality of oral argument on appeal has deteriorated. Despite this view, it seems clear that the issues of a case on appeal are better presented when supplemented and reinforced by effective oral argument. Therefore, its preparation and presentation are important.

Since 1934 in the Illinois Supreme Court, and subsequently in the appellate courts, the time limit on oral argument has been 30 minutes for each party, unless specially extended, with an additional ten minutes strictly confined to rebuttal by the appellant. These limitations are now embodied in rule 352(b). If the cause is argued on one side only, the time limit is 20 minutes. Intention to argue the case orally must be expressed by a statement printed on the bottom of the brief cover. Rule 352(2) makes it clear that no party may argue orally unless he has filed a brief as required by the rules. Where the intention to argue orally is not expressed by a printed statement on the brief cover, a request for leave to present an oral argument may be made by a motion in conformance with motion practice in the reviewing court. Such requests are usually granted.

Owen Rall, an able appellate counsel, has said in his inimitable style, "In preparing and delivering an oral argument, the first, imperative and all-important point is that to be effective an oral argument must be..."

144 Id. § 607(d).
147 ILL. REV. STAT. ch. 110A, § 352(b) (1967).
argument must be oral.\textsuperscript{148} This seems to state the obvious, but the habit of lawyers reading to reviewing courts has been so pronounced that the court in rule 352 (c) admonishes that, “Reading at length from the record, briefs, or authorities cited will not be permitted.”\textsuperscript{149}

For the lawyer who is well prepared, who knows the record on appeal and the legal points in the brief, the oral argument is a challenge. It is the opportunity to meet the court face to face and supplement the written brief with emphasis placed on carefully chosen points. It is important that the practitioner thoroughly review the case before oral argument. He should adopt and cultivate a natural but forceful style of oral presentation. He should select a salient feature of the case and phrase his opening statement so as to focus the attention of the court on the crucial error which requires reversal for the appellant or, if he represents the appellee, on the crucial point which supports the judgment below. The salient feature of a case depends on its facts and the legal questions preserved for review. Quite often, the case on appeal will turn on this procedural phase.

III. THE CAUSE ON APPEAL

a. Notice of Plain Errors

It is on submission of the cause, either with or without oral argument, that the powers of the reviewing court begin to operate on the final judgment of the trial court. As a practical matter, therefore, it is necessary that these powers be considered at the outset of a criminal appeal. The importance of this fact will be appreciated when it is recalled that it is a requirement of Illinois appellate practice that the brief of a party should contain a “short conclusion stating the precise relief sought.”\textsuperscript{150} It seems undeniable that a clear understanding of the nature and extent of reviewing court powers is essential before a short conclusion of the precise relief sought can be stated. The extent of these powers can be seen in the provisions of rule 615,\textsuperscript{151} a rule which has its origin in section 121-9 of the 1963 Code of Procedure.\textsuperscript{152}

Under subparagraph (a) of rule 615, Illinois reviewing courts can notice plain errors or defects which affect substantial rights, even though these were not brought to the attention of the trial court.\textsuperscript{153} This compels the conclusion that matters

\textsuperscript{149} ILL. REV. STAT. ch. 110A, §352 (c) (1967).
\textsuperscript{150} Id. §341 (e) (8).
\textsuperscript{151} Id. §615.
\textsuperscript{152} ILL. REV. STAT. ch. 38, §121-9 (1965).
\textsuperscript{153} ILL. REV. STAT. ch. 110A, §615 (a) (1967).
which have no effect on substantial rights are to be disregarded. Although this concept is new as a matter of court rule or statutory enactment, the provisions of rule 615(a) are consistent with existing case law. In a series of cases decided before 1963, the Supreme Court of Illinois established the principle that on writ of error, notice would be taken of prejudicial errors which affect the right of a defendant to a fair trial. The court held that this would be done even though no objection was made and the error was not called to the attention of the trial court. Thus, section 121-9 of the 1963 code carried with it the history establishing in Illinois law and practice the principles expressed in the statute and now contained in rule 615(a).

A word of caution is in order. No trial lawyer should substitute reliance on the liberal provisions of rule 615(a) for prompt and effective objections. It is still essential, and is a mark of professional responsibility, that the trial lawyer specifically call to the attention of the trial court the claimed error, and preserve the trial court's ruling for review. On the other hand, where the lawyer who did not conduct the defense is called upon to handle a criminal appeal after conviction, he need not abandon a plain error or defect because it was not brought to the attention of the trial court. It is in such instances that the liberality of rule 615(a) is useful.

It is possible to distill from the decided cases the test which our reviewing courts apply in determining when plain errors will be noticed. Generally, if the prejudicial error arises from some affirmative act of the prosecution or of the court, it will be noticed on review even if no objection is made. The point seems to be that it is unfair to subject a defendant to affirmative conduct depriving him of a fair trial and in addition to hold him

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154 In a 1911 case involving a homicide of particular brutality and treachery, and which has been called a landmark decision, Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. L. Rev. 289, 320 (1964), the Illinois Supreme Court ruled that the failure of defense counsel to properly make objections to prejudicial evidence would not preclude the court from examining the record on its own motion. People v. Blevins, 251 Ill. 381, 96 N.E. 214 (1911). See also People v. Nowak, 372 Ill. 381, 24 N.E.2d 50 (1939); People v. Bradley, 30 Ill.2d 597, 198 N.E.2d 809 (1964); People v. Baldwin, 278 Ill. App. 327 (1935), aff'd 289 Ill. App. 126, 6 N.E.2d 904 (1937).

155 Thus, in a recent case, defendant was found guilty of murder after a bench trial and was sentenced to life imprisonment. Relying on Escobedo v. Illinois, 378 U.S. 478 (1964), he contended on appeal that a written confession and testimony relating to a prior oral confession were inadmissible because he had not been advised of his right to counsel and his right to remain silent. The state argued that defendant could not raise the issue of the admissibility of his confession because he failed to make timely objection to its admission at trial. The court said, "It is well settled that objections to the admission of evidence not made in the trial court will not be considered on appeal. This rule applies equally to confessions. . . ." People v. Carter, 76 Ill. App. 2d 323, 324-25, 222 N.E.2d 91, 92 (1966). See also People v. Craig, 75 Ill. App. 2d 29, 221 N.E.2d 86 (1966); People v. Mamoella, 85 Ill. App. 2d 240, 229 N.E.2d 320 (1967).
responsible for calling this plain and evident fact to the attention of the trial judge. For example, prejudicial final argument that departs from the record so as to inject into the trial matters extraneous to the issue is plain error that affects the rights of an accused.\textsuperscript{156} Cross-examination which injects into the record, that is, brings to the attention of a jury, evidence otherwise not admissible is also plain error.\textsuperscript{157} The admission into evidence at trial of a confession obtained at a preliminary hearing, as a result of the judge’s questioning, where the accused did not have counsel and was not advised of his privilege against self-incrimination, will be noted as plain error.\textsuperscript{158} These examples serve to illustrate the type of case in which our reviewing courts will notice plain errors or defects which affect substantial rights of a defendant. It is expected that rule 615(a) will be construed in the light of the history that preceded inclusion by rule of the plain error doctrine into our law of appellate procedure.\textsuperscript{159}

b. \textit{Powers of the Reviewing Courts}

Under the old error practice in a criminal case, Illinois reviewing courts had the power to affirm, reverse, or reverse and remand the judgment of the trial court.\textsuperscript{160} Now, on appeal, under rule 615(b) (1), reviewing courts have the power to “reverse, affirm, or modify the judgment or order from which the appeal is taken.”\textsuperscript{161} Prior to the adoption of section 121-9 of the code of 1963, it was generally believed that a court of review in Illinois did not have the power to modify the trial court judgment in a criminal case.\textsuperscript{162} Although this was never a completely accurate statement of the law, our supreme and appellate courts in criminal cases prior to 1963 did not modify sentences in criminal cases. Plainly, prior to 1963, there was no statute or court rule in Illinois which authorized a reviewing court in a criminal case to modify the judgment of conviction or the sentence imposed.\textsuperscript{163} Section 121-9 of the 1963 code, however, expressly

\textsuperscript{156} People v. Moore, 9 Ill.2d 224, 137 N.E.2d 246 (1956); People v. Fort, 14 Ill.2d 491, 153 N.E.2d 26 (1958); People v. Morgan, 20 Ill.2d 437, 170 N.E.2d 529 (1960); People v. Romero, 36 Ill.2d 315, 223 N.E.2d 121 (1967).


\textsuperscript{158} People v. Jackson, 23 Ill.2d 263, 178 N.E.2d 310 (1961).

\textsuperscript{159} Compare People v. Blevins, 251 Ill. 381, 96 N.E. 214 (1911) with the recent cases of People v. Smith, 74 Ill. App. 2d 458, 221 N.E.2d 68 (1966) and People v. Butler, 78 Ill. App. 2d 479, 223 N.E.2d 431 (1967).


\textsuperscript{161} Ill. Rev. Stat. ch. 110A, §315(b) (1) (1967).


\textsuperscript{163} For example, there was no rule of court governing this subject and the Illinois Revised Statutes ch. 38, §§776, 779 (1963), made only a sketchy reference to the powers of the reviewing court.
provided that on an appeal of a criminal case the reviewing court may "reverse, affirm or modify the judgment or order from which the appeal is taken." Now subparagraph (b) (2) of rule 615 gives the reviewing court power to set aside, affirm or modify any or all proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken. Clearly, these provisions broaden the power of Illinois courts in the review of a criminal case.

What is more important, however, is the innovation introduced by subparagraphs (b) (3) and (4) of section 121-9, provisions which today are rule 615 (b) (3) and (4). This rule, for the first time in the history of Illinois law of criminal procedure, gives reviewing courts power to reduce the degree of the offense for which the appellant is convicted or reduce the punishment imposed by the trial court. The grant of this power is salutary and has worked well. The instances in which the provisions of the new rule have been applied indicate that our reviewing courts have been careful about using this extension of power. Thus, in cases where the trial court has imposed a sentence within the statutory limit of punishment, our supreme and appellate courts, despite their new powers, have shown an inclination to withhold interference with the exercise of trial court discretion. Even where the reviewing court believed that the sentence was unduly harsh, it has declined to substitute its views for those of the trial court. For instance, the 45-year sentence of a defendant convicted of rape did not appear to the supreme court to be a departure from fundamental law, its spirit and purpose, or so manifestly excessive as to justify invoking the court's power to reduce or modify the sentence. In refusing to use its discretion, the court stated that its power to reduce sentences, where the circumstances warrant, should be applied with considerable caution and circumspection because ordinarily the trial judge has a superior opportunity to make sound determinations concerning the punishment to be imposed.

One interesting development in this field has been evolu-

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164 ILL. REV. STAT. ch. 38, §121-9(b) (1) (1965).
165 ILL. REV. STAT. ch. 110A, §615(b) (3) (4) (1967).
166 Thus, where a defendant, sentenced to three to six years upon a plea of guilty to a charge of robbery, asked for a reduction of sentence, the appellate court refused to exercise its power to reduce the punishment imposed by the trial court in the absence of substantial reasons for doing so. In refusing to use its discretion, the court stated that if the sentence was "... within the statutory limits, as in the case at bar, it should not be changed because a reviewing court would have imposed a different penalty, or for mere judicial clemency." People v. Burks, 68 Ill. App. 2d 275, 282, 215 N.E.2d 144, 147 (1966). See also People v. Valentine, 60 Ill. App. 2d 339, 208 N.E.2d 595 (1965).
168 People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673 (1965).
169 Id. at 424, 211 N.E.2d at 677.
tation of the doctrine that because reviewing courts under rule 615(b)(3) and (4) have the power to reduce the degree of the offense or to reduce the punishment imposed, a hearing in aggravation and mitigation must be conducted by the trial court. Thus, where a defendant after conviction asks for a hearing in mitigation, or requests the court to order a pre-sentence investigation, the trial court, before imposition of sentence, must conduct a mitigation hearing, thereby giving the defendant an opportunity to bring to the court’s attention matters favorable to himself which he believes will aid the court in imposing a proper sentence. This requirement is now mandatory because the reviewing courts have the power to reduce the degree of the offense charged or to reduce the punishment imposed. Without evidence admitted at a hearing in mitigation, or at least the opportunity to offer such evidence, a court on appeal will not be able to exercise its powers under the rule. A record which shows no opportunity to hear evidence in mitigation will require remandment of the cause with directions to vacate the sentence and afford the defendant such a hearing prior to determination of punishment and imposition of sentence.

Rule 615, giving reviewing courts statutory powers to notice plain errors or defects affecting substantial rights, and to reduce the degree of the offense charged or the punishment im-

171 The Appellate Court for the Fifth District has discussed the relationship between the hearing in mitigation and aggravation and reviewing court power to reduce a sentence:
Confronted with [a] range of permissible punishment the determination of the penalty to be imposed is extremely difficult. The court must strive to render a judgment which will adequately punish the defendant for his misconduct, safeguard the public from further offenses, and reform and rehabilitate the offender into a useful member of society. In order to select an appropriate sentence, it is essential that the court be in possession of the fullest possible information concerning the defendant's life and characteristics (citation omitted). To that end, the Criminal Code contains the following provisions:

‘Mitigation and Aggravation.
For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense.’ Ch. 38, §1-7(g).

‘The provisions of Sections 1-7(g) . . . must be considered in the light of the power conferred upon the reviewing court to reduce a sentence. It is essential that a court so empowered have knowledge of the defendant's moral character, life, family, occupation and criminal record. That it was the legislative intent that this information be obtained in all cases seems apparent from the language, which states that the court 'shall also hear and receive evidence'; but as to its use, the court 'may consider such evidence.'
posed, give to appeals in Illinois criminal cases a significance which cannot be overlooked by any lawyer handling the review of a criminal case. The cause on appeal under rule 615 runs the entire gamut of review of plain errors or defects, modification of the judgment or order, setting aside, affirming or modifying any or all proceedings subsequent to or dependent upon the judgment, reducing the degree of the offense or the punishment imposed and, finally, reversing without remand, or reversing and remanding for a new trial.

In connection with the power to remand the case, the practitioner should bear in mind that sometimes it may be strategically wise, in specifying as “the precise relief sought,” a remand of the cause for a limited reason. For example, the lawyer representing the state may detect a weakness in the factual bases, either because the trial judge made no finding on a crucial point, or the findings are not adequate. Or, a defendant seeking reversal may be entitled only to a hearing to determine probable cause for arrest or search. The point is that under the wide powers given reviewing courts by rule 615 there is latitude for maneuvering by both parties to a criminal appeal. It is within this latitude that the true talents of the lawyer on appeal, as the attorney either for the state or for the defendant, become apparent.

c. Mandate of the Reviewing Court

After a reviewing court decides the case on appeal, it issues a mandate to the trial court. This mandate expresses the judgment of the reviewing court and proscribes the power of the trial court. It is generally said that a trial court has no jurisdiction over a cause, following conclusion of an appeal, except as directed in the mandate of the reviewing court. Thus, where the mandate directs that the cause is remanded with directions to impose a proper sentence in accordance with law, the trial court has no jurisdiction to grant probation.

In Illinois criminal cases the force of a mandate of the reviewing court is governed by rule 613. Where the appellant appeals a death sentence and the supreme court affirms, the court in its mandate will set the date of execution. In practice this is done in the opinion, and the actual date for execution is set for a Friday, well in advance, so as to enable the defendant to

178 For a recent example of remand limited to a specific factual determination, see People v. Tate, 38 Ill.2d 184, 230 N.E.2d 697 (1967).
177 The custom of executing death sentences on Fridays has a curious religious twist. It is generally believed that death sentences are carried out on Fridays because Christ, according to most New Testament scholars, was crucified on that day of the week.
seek certiorari from the United States Supreme Court, or to seek commutation of the death sentence from the governor. After these post-mandate procedural steps are taken, or the time for taking them has expired, a certified copy of the order of execution is sufficient authority for the execution of the appellant on the date specified by the supreme court. On the other hand, if the appeal results in a reversal or modification of the death sentence, the mandate of the supreme court will direct the trial court as to the proper manner in which to proceed. Generally, it is understood in Illinois that the reversal of a trial court judgment of conviction, standing alone, completely overturns the case and the appellant cannot be retried. This is peculiar to Illinois practice.

In all cases in which the sentence is other than death, the reviewing court by its mandate shall direct the lower court as to the manner in which to proceed. The mandate must be obeyed. In cases where the appellant is serving the sentence imposed and the judgment is reversed, it is “the duty of the imprisoning officer to release appellant from custody forthwith upon receiving a certified copy of the mandate of the reviewing court.” If there is a reversal and remand of the cause for a new trial, and the appellant is serving the sentence imposed, he must be returned to the trial court by the imprisoning officer upon receipt of a certified copy of the mandate. Rule 613(d) provides:

In any case in which, pending appeal, an appellant serves any portion of the sentence imposed in the trial court and the judgment of the trial court is reversed by a reviewing court and a new trial ordered, the appellant shall be given credit in any subsequent sentence for the time served pending appeal.

Although formerly, the purpose served by this provision was often accomplished in practice, it is now clear that the question of sentence credit for time served pending appeal is not a matter of discretion, but a matter of right. Most likely, the provisions of this subparagraph are retroactive in the same manner and for the same reasons that the supreme court retroactively applied section 119-3 of chapter 38, a statute which provides for sentence credit for time served while awaiting trial.
IV. BEYOND THE INITIAL APPEAL

a. Appeal as of Right

It is now the accepted rule in Illinois that every defendant in a criminal case is entitled to one appeal as a constitutional right. Under the present structure of reviewing courts, appeals in criminal cases are to the appellate court, except “... in cases involving a question arising under the constitution of the United States or of this state, and appeals by the defendant from sentence in capital cases...” Because most appeals are to an intermediate court of review, (i.e. the appellate court, which is below the Supreme Court of Illinois and the Supreme Court of the United States), there always exists the possibility of further review after an adverse judgment in the initial appeal.

If the appeal is taken by the state, and the effect of the judgment in the appellate court is to dismiss the indictment, the state, under the provisions of rule 612(b), can seek further review in the supreme court. This principle was established in the case of People v. Blanchett. It is also conceivable that a judgment of an appellate court may have the effect of quashing an arrest warrant or suppressing evidence. In such a case, since the state would have had a right of appeal if an order were entered in the trial court, a petition for leave to appeal may be filed by the state. The procedure is governed by rule 315, now applicable to criminal cases. For the state, however, the scope of further review from an adverse judgment of an appellate court is as narrow as its right of appeal proscribed by rule 604(a).

If the appeal is made by the defendant, further review may be sought in the Supreme Court of Illinois from an adverse appellate court judgment in accordance with rule 612(b), which makes applicable to criminal appeals rules 315, 316, 317 and 318. Because the scope of possible review by a defendant has been extended, it is worth noting in detail the provisions of these rules.

An appeal may be taken from the appellate court to the supreme court as a matter of right in any case where a question under the Constitution of the United States or of this state arises for the first time, as a result of the action of the appellate court. This right of appeal is governed by rule 317. It is significant that the rule operates only “in and as a result of the action of the
When resort is made to rule 317, an appeal is initiated by the filing of a petition in the form prescribed by rule 315 which governs petitions for leave to appeal, except that the petition is entitled "Petition for Appeal as a Matter of Right." In the alternative, a petition for appealing as a matter of right may pray for grant of petition for leave to appeal as provided in rule 315. In the petition the appellant must urge the ground for appeal to the supreme court as a matter of right; he may, in the alternative, argue the reasons why the petition for leave to appeal should be allowed as a matter of sound judicial discretion. In all respects, other than those stated in rule 317, appeals as a matter of right are governed by the same procedure as is provided in rule 315 governing petitions for leave to appeal. If the court grants the petition under rule 317, excerpts from record or abstracts and briefs must be filed as is required in the case of appeal by leave under rule 315. Therefore, after an adverse judgment in the appellate court, or after action in the appellate court raising a constitutional question for the first time, the procedures as defined in rule 317, and as governed by rule 315, must be followed.

b. Certificate of Importance

Where disposition of an appeal involves a question of such importance that it should be decided by the supreme court, rule 316 provides that the appellant may apply to the appellate court for a certificate of importance. This application is by a petition which may be part of the petition for a rehearing, or may be filed separately within 14 days after denial of the petition for rehearing, or within 14 days after entry of the judgment in the appellate court. In cases in which a petition for rehearing is not filed, the application for the certificate of importance may be filed within the time provided in rule 316. It is important to observe that an application for a certificate of importance does not extend the time for filing a petition for leave to appeal to the supreme court. Therefore, the practitioner who is seeking a certificate of importance from the appellate court must keep in mind that the petition for leave to appeal must be filed within the time provided for in rule 315, even though the application for a certificate of importance is made to the appellate court. If both procedures are pursued, i.e. leave to appeal and certificate of importance, the time limitations of both Rule 315 and Rule 316 must be complied with concurrently and not consecutively. ILL REV. STAT. ch. 110A, §§315, 316 (1967).
that court will transmit to the clerk of the supreme court the record on appeal filed in the appellate court, together with a certified copy of the appellate court record, the opinion of the court, and the certificate of importance. The appellate court in some instances may require a bond as a condition for granting a certificate of importance. The record of the appellate court must be transmitted to the clerk of the supreme court not later than 14 days from the date the certificate of importance is granted. Excerpts from records, abstracts and briefs must be filed in accordance with the rules governing appeals generally.194

c. Leave To Appeal

Any defendant who has appealed to the appellate court and has received an adverse judgment, or the state, within the limitations of its right to appeal, may petition the supreme court for leave to appeal under the provisions of rule 315. The granting of such petition is a matter of sound judicial discretion. The supreme court in subparagraph (a) of the rule, has spelled out some of the factors which will be considered in deciding whether to grant the petition for leave to appeal. These are:

. . . [T]he general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.195

It is worth noting that rule 315(a) of the Supreme Court of Illinois is similar to rule 19 of the Supreme Court of the United States196 governing considerations by which that court will accept review by certiorari. As is the case with the granting of the writ of certiorari in the Supreme Court of the United States, the grant of a petition for leave to appeal in the Supreme Court of Illinois is entirely discretionary, with the grant tested by the factors which the court has said it will consider.

The entire procedure governing applications for leave to appeal from an appellate court to the supreme court is defined in the remainder of the provisions of rule 315, subparagraphs (b) to (h), inclusive.197 The application is made by a petition which must be filed in the supreme court within 56 days after the entry of the judgment appealed from, if no petition for a rehearing is filed; or if a petition for rehearing is filed in the appellate court, the petition for leave to appeal must be filed within 35 days after denial of rehearing, or the entry of the judgment on rehearing.

The petition must follow the form required by rule 315(b).

194 Id. §316.
195 Id. §315 (a).
196 U.S. Supreme Court Rule 19.
197 ILL. REV. STAT. ch. 110A, §315 (b) through (h) (1967).
To the petition there must be attached a copy of the opinion of the appellate court. The petition must be duplicated, served and filed in accordance with the requirements for briefs. Thus, rule 344 controls this aspect of the petition for leave to appeal. Upon filing of the petition, the clerk of the appellate court, at the request of either the petitioner or the clerk of the supreme court, must transmit the record on appeal as it was filed in the appellate court, together with a certified copy of the appellate court record. When the petition is filed in duplicate, the only other items necessary to be filed in the supreme court are eight copies of the abstract or excerpts, if available.198

The state may, but need not file an answer to the petition.199 If an answer is filed, it shall be docketed with the clerk within 14 days after the petition is filed, or within such further time as the supreme court or a judge of that court may grant, providing the application for the extension is made within the 14-day period. The answer must be served and proof of service filed with the clerk. The answer must set forth, briefly, the reasons why the petition should not be granted. In form, the answer of the state should parallel, to the extent appropriate, the form required for the petition, except, that the first four items set forth in rule 315(b) are omitted from the answer unless the state deems those portions of the petition inadequate, making necessary a presentation of these items by the state. The petition, and the answer, must be duplicated, served and filed in accordance with the requirements for briefs. No reply is allowed to the answer filed by the state.

After filing, the petition must await the ruling of the supreme court. If leave is not granted, all papers which were certified from the appellate court, to the extent available, must be returned to the appellate court forthwith by the clerk of the supreme court. Denial of the petition terminates available appellate remedy under Illinois law. If there is a federal question involved in the case which will support an application for writ of certiorari to the Illinois reviewing court from the Supreme Court of the United States, application should be made in compliance with the applicable rules.

On the other hand, if the petition is granted, and the necessary number of copies has not already been filed, the petitioner, who then becomes the appellant, must file 15 copies of the excerpts from the record or abstract which were filed in the appellate court.200 These documents must be filed within the time for the filing of the appellant's brief. Either the petitioner or

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198 Id. §315(d).
199 Id. §315(e).
200 Id. §315(f).
the clerk of the supreme court may request of the appellate court clerk, at the expense of the petitioner, unless he is indigent, that the record on appeal as filed in the appellate court be transmitted to the supreme court, if this has not already been done. The petitioner and the state may allow the petition or the answer to stand as the brief in the supreme court, or may file further briefs as allowed by motion practice. Any briefs filed must conform to the requirements of rule 343. Oral argument may be requested as provided for in rule 352(a), or by motion practice.

Preparation of a petition for leave to appeal requires a drafting technique different from that required for the preparation of a brief. A petition for leave to appeal should be short and succinct. Preferably, it should never be more than ten pages in length, and may be either printed or typewritten. It should tell the supreme court why its discretionary jurisdiction should be exercised. The committee which prepared rule 315 has stated:

... The Court desires such petitions to be short documents that will enable it to decide whether to entertain the appeal. If such petitions were as long as full briefs on the merits, the purpose of the preliminary sifting procedure would be in substantial part defeated. It is expected that usually ten or fifteen pages will suffice and that more than twenty or twenty-five pages will seldom be necessary.201

The provisions stating that the petition and the answer need no longer be printed is a convenience to practitioners. As long as they are reproduced in clear and legible form, they meet the requirements of the rule with regard to duplication.202 It is important to bear in mind that at the time the petition is filed, it is not necessary that the record on appeal or the appellate court record be filed. The filing of the record will await request of the supreme court clerk or one of the parties. If the petition conforms to the rules, is succinct and precise, the petition alone, together with the minimum two copies of the excerpts or abstract is sufficient. These may be followed later by additional copies of the excerpts or abstract, or if sufficient copies are available, the eight copies required by the rule may be filed with the petition. It will be seen from this brief discussion that a petition for leave to appeal is simple to draft and duplicate and devoid of any cumbersome detail. It is, however, an important phase of Illinois appellate procedure, and resort to the petition may be necessary if

201 Committee Comments, ILL. ANN. STAT. ch. 110A, §315 (Smith-Hurd 1967).
202 ILL. REV. STAT. ch. 110A, §§315(c), 344(b) (1967).
state post-conviction remedies are to be exhausted prior to the invocation of federal jurisdiction. 203

V. SUMMARY AND CONCLUSION

Today in Illinois, every defendant in a criminal case can appeal his conviction, either directly to the supreme court in specified cases, or to the appellate court in all other cases. In a limited number of situations, the state can appeal from an adverse order or judgment. These rights have evolved from a period when they were non-existent to their present status, where they are guaranteed by the constitution, implemented by statute and administered by new rules of the Supreme Court of Illinois, rules which in themselves have the force of statutory enactments.

These rules govern review of criminal cases from the notice of appeal, which is the only jurisdictional requirement, to the mandate, which is the ultimate act of the reviewing court. They reflect the public policy of this state that in the review of a criminal case both the financially able and the indigent defendant shall have access to its highest courts. This public policy finds expression in the constitutional command that appeals be made expeditious and inexpensive. In obedience to this command, the new rules make applicable to criminal appeals many procedural concepts which heretofore have been limited to civil cases. The appeal as the exclusive mode of review is the most important innovation. The use of the clerk's certificate as a substitute for filing the record, the new practice permitting excerpts from record instead of abstracts, the details governing form and content of briefs are innovations which have removed from the field of criminal appeals the aura that it is an esoteric aspect of law practice.

Despite the fact that simplicity is a characteristic of the new rules, it is important that there be faithful compliance with their provisions from the beginning of a criminal appeal to its termination. Indeed, experienced lawyers have observed that for the review of a case, obedience to court rules is the cardinal virtue. The attorney for the defendant or for the state, who adds to this virtue an understanding of the pragmatics of Illinois procedure in criminal appeals as discussed in this article, will have no difficulty in effectively presenting his client's cause to Illinois reviewing courts.

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203 Where it is claimed that a federal constitutional question was decided by the intermediate state court, and there is a procedure for discretionary review in the highest state court, a petition for writ of certiorari from the Supreme Court of the United States cannot be filed until the state procedure is invoked and review denied. Stern & Grossman, Supreme Court Practice 88-90 (3rd ed. 1962); Stratton v. Stratton, 239 U.S. 55 (1915); Matthews v. Huwe, 269 U.S. 262 (1926).