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RECENT DEVELOPMENTS IN ILLINOIS CRIMINAL CASE LAW

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Mr. Bellows summarizes and analyzes significant pre-trial and trial phase criminal law decisions put forth by the Illinois Supreme Court during the past year. The author limits the scope of his article to recent 1972-73 decisions, critically evaluating the Illinois Supreme Court's role in the Illinois judicial process. Concepts, such as the "totality of circumstances" test, are criticized for failing to establish a clear body of judicial precedent upon which appellate courts can rely in criminal law cases. Mr. Bellows suggests that the supreme court should be deciding questions of general importance, resolving conflicts between divisions of the appellate court, or exercising its supervisory authority.

SCOPE

A PREFATORY note is in order: this article concerns itself with the development of criminal case law in the past year. The phrase, "past year" is loosely defined as the beginning of the September, 1972 term of the Illinois Supreme Court to the end of the extended May, 1973 term. For purposes of this article "case law" is defined as cases decided by the Illinois Supreme Court during that period. Cases in the appellate court are not noted for reasons stated below.

When the framers of the 1870 Constitution permitted the legislature to create intermediate appellate courts in this state, they granted an appeal of right from the appellate to the supreme court.[1] The legislature, bowing to the inevitability of such appeals, provided for direct appeals to the supreme court in all felony cases.[2] The appellate courts became courts of review only as to misdemeanor convictions[3] and, until 1935, the opinions of the appellate court in all cases were treated as being only the law of the case, having no precedential value.[4] This law was changed by the General Assem-

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1. ILL. CONST. art. VI, § 11 (1870).
2. Ill. Laws [1877] § 8 at 76.
3. *Id.*
4. Ill. Laws [1877] § 17 at 78, *as amended*, Ill. Laws [1885] § 1 at 65.

bly in 1935,[5] and, although the appellate courts were not to have any significant appellate jurisdiction in criminal cases for almost another three decades, the seed was then planted for the chaotic condition in which the appellate court of today finds itself—confronted with too many cases and too little manpower to maintain an orderly and systematic control over the development of a significant body of criminal case law.

The judicial article of 1962 attempted to give to the supreme court a degree of discretionary control over its docket and thus permit it, in the same manner as the Supreme Court of the United States, to accept responsibility for the orderly development of case law.[6] Unfortunately, the 1962 judicial article provided for a direct appeal in all cases involving a construction of the Constitution of the United States or of the State of Illnois[7] and, as such, any criminal lawyer in a position to do so, would seize upon any opportunity to create constitutional questions. He of course would be aided by the mass of decisions coming out of the United States Supreme Court during the Warren years. Cases such as *Mapp*,[8] *Miranda*,[9] *Escobedo*,[10] *Brady*,[11] *Wade*,[12] *Gilbert*,[13] *Stovall*,[14] *Thompson*[15] and *Jackson*[16] made the job of the lawyer searching for a constitutional issue much easier and at the same time made the docket of the Illinois Supreme Court all the more difficult to control.

The appellate court of Illinois was not shielded from the onslaught of criminal cases, for while the Warren Court was deciding the cases cited above pertaining to substantive criminal questions, it was also deciding *Griffin*,[17] *Gideon*[18] and *Anders*,[19] giving to the

5. Ill. Laws [1935] § 1 at 696, *amending* Ill. Laws [1877] of 17 at 69.
6. ILL. CONST. art. VI, § 7 (1962 revision).
7. *Id.*
8. Mapp v. Ohio, 367 U.S. 643 (1961).
9. Miranda v. Arizona, 384 U.S. 436 (1966).
10. Escobedo v. Illinois, 378 U.S. 478 (1964).
11. Brady v. Maryland, 373 U.S. 83 (1963).
12. United States v. Wade, 388 U.S. 218 (1967).
13. Gilbert v. California, 388 U.S. 263 (1967).
14. Stovall v. Denno, 388 U.S. 293 (1967).
15. Thompson v. City of Louisville, 362 U.S. 199 (1960).
16. Jackson v. Denno, 378 U.S. 368 (1964).
17. Griffin v. Illinois, 351 U.S. 12 (1956).
18. Gideon v. Wainwright, 372 U.S. 335 (1963).

indigent rights to counsel and appeal never before afforded the accused in criminal cases, and also giving encouragement to criminal defendants to file appeals in cases that would previously never have been appealed.

The Illinois Constitution of 1970 made changes more sweeping than the judicial article of 1962, and greatly limited the right of direct review by the supreme court.[20] The supreme court responded by transferring to the appellate court a large number of cases from its docket. It also embarked upon a policy of limiting its grants of leave to appeal in criminal cases so that its docket presently contains a disproportionately small number of criminal cases as compared to the number of criminal cases on the dockets of the appellate court.

This state of affairs has drastically overburdened the appellate court system. This has resulted in a situation in which the judges of the appellate court, try as they will, cannot keep track of what one another are doing, and cannot maintain the orderly progression of the criminal case law.

The Illinois courts must develop a system whereby an appellate court opinion is to be regarded as the law of the case only and not as a binding precedent. A step in this direction has been taken by the adoption of Supreme Court Rule 23,[21] but a more logical step

19. Anders v. California, 386 U.S. 738 (1967).

20. ILL. CONST. art. VI, § 4.

21. ILL. SUP. CT. R. 23. Memorandum Opinions by the Appellate Court.
Signed memorandum opinions may be used in affirming a judgment when the Appellate Court determines that no error of law appears, that an opinion would have no precedential value, and that any one or more of the following circumstances exists and is dispositive of the case:
(a) That a judgment in a civil case is not against the manifest weight of the evidence;
(b) That a judgment in a civil case entered upon allowance of a motion for directed verdict or for judgment notwithstanding the verdict should be affirmed because all of the evidence, when viewed in the light most favorable to the appellant, so overwhelmingly favors the appellee that no contrary verdict based on that evidence could ever stand (Pedrick v. Peoria & Eastern R. R. Co., (1967) 37 Ill.2d 494 [229 N.E.2d 504]);
(c) That in a criminal case the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt;
(d) That the decision of an administrative body or agency reviewed under the provisions of the Administrative Review Act and confirmed by the circuit court is not against the manifest weight of the evidence.

would be the adoption of a rule similar to Rule 28 of the United States Court of Appeals for the Seventh Circuit.[22] By such a

In the memorandum opinion the Appellate Court shall state at least the following: the court from which the appeal comes; the nature of the proceedings below, *i.e.*, bench trial, jury trial. administrative review, etc.; the nature of the case, *e.g.*, personal injury or contract suit; and such other matters as in the judgment of the court are necessary for an understanding of the case. . . .

22. 7TH CIR. R. 28. Publication of Opinions.

Policy

It is the policy of this circuit to reduce the proliferation of published opinions.

Publication

The Court may dispose of an appeal (1) by an order or (2) by an opinion, which may be signed or per curiam.

Orders shall not be published and opinions shall be published.

"Published" or "publication" means:

(1) Printing the opinion as a slip opinion;
(2) Distributing the printed slip opinion to all federal judges within circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;
(3) Permitting publication by legal publishing companies as they see fit; and
(4) Unlimited citation as precedent.

Unpublished orders:

(1) Shall be typewritten and reproduced by copying machine;
(2) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and shall be available to the public on the same basis as any other pleading in the case;
(3) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;
(4) Shall not be cited as precedent (a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose, except to support a claim of res judicata, collateral estoppel or law of the case.

Guidelines for Method of Disposition

Published opinions:

Shall be filed in signed or per curiam form in appeals which

(1) Establish a new or change an existing rule of law;
(2) Involve an issue of continuing public interest;
(3) Criticize or question existing law; or
(4) Constitute a significant and non-duplicative contribution to legal literature.
(a) by a historical review of law;
(b) by describing legislative history; or
(c) by resolving or creating a conflict in the law.

Unpublished orders:

(1) May be oral and delivered from the bench, which shall be re-

rule, the appellate court would itself have a means of controlling its opinion workload, if not its case workload, thus enabling its judges to make "significant and non-duplicative contribution[s] to legal literature."[23] Until such time, it would not be possible for any survey of the developments of the criminal case law to consider appellate court cases. This article will therefore concern itself only with the cases decided by the Supreme Court of Illinois.

RECENT CASES: DISCUSSED AND ANALYZED

Taking the cases in the natural progression of a criminal proceeding, we first come to three cases pertaining to preliminary hearings and indictments. In *People v. Hopkins*,[24] the defendant contended that the indictment was invalid because it was based upon "incompetent testimony," *i.e.*, the hearsay testimony of the investigating police officer. This contention was founded upon language con-

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corded by the Clerk of the Court, or in writing with only, or little more than, the judgment rendered, in appeals which

(a) are frivolous or

(b) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(i) a controlling statute or decision determines the appeals;

(ii) issues are factual only and judgment appealed from is supported by evidence;

(iii) order appealed from is nonappealable or this Court lacks jurisdiction or appellant lacks standing to sue; or

(2) May be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(a) are not frivolous but

(b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

Responsibility for Determining Whether Disposition is to be by Order or Opinion

The determination to dispose of an appeal by unpublished order or published opinion shall be made by a majority of the panel rendering the decision.

The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

23. *Id.*

24. 53 Ill. 2d 452, 292 N.E.2d 418 (1973).

tained in the earlier case of *People v. Duncan*,[25] in which it was said

> that courts will not inquire into proceedings before the grand jury for the purpose of determining whether the evidence heard by that body was sufficient to support the indictment, unless all the witnesses were incompetent or all the testimony upon which the indictment was found was incompetent.[26]

While the supreme court does not discuss it, the Code of Criminal Procedure of 1963 provides for the dismissal of an indictment where "the indictment is based solely upon the testimony of an incompetent witness."[27] In *Hopkins*, the court rejected this contention and reaffirmed the rule it had set forth in *People v. Jones*[28] that incompetent testimony before a grand jury is only that testimony given by a witness disqualified by law (such as complete mental derangement), and, therefore, if the witness is competent, his testimony before the grand jury is competent.[29]

Having decided that question, the court was faced, later in the year, with two more troublesome cases involving the right to preliminary hearing: *People v. Kent*,[30] and *People v. Hendrix*.[31] In *Kent*, the trial court dismissed an indictment charging the defendant with the crime of armed robbery. Prior to the indictment, a trial court judge had found no probable cause. Although the record was not clear on the point, the supreme court concluded that the order of dismissal was based upon a construction of article I, section 7 of the 1970 Constitution of the State of Illinois[32] that would have pro-

25. 261 Ill. 339, 103 N.E. 1043 (1913).
26. *Id.* at 343, 103 N.E. at 1045.
27. ILL. REV. STAT. ch. 38, § 114-1(9) (1971).
28. 19 Ill. 2d 37, 166 N.E.2d 1 (1960).
29. 53 Ill. 2d 452, 456, 292 N.E.2d 418, 420 (1973).
30. 54 Ill. 2d 161, 295 N.E.2d 710 (1972).
31. 54 Ill. 2d 165, 295 N.E.2d 724 (1973).
32. Section 7. INDICTMENT AND PRELIMINARY HEARING
No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use.
No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has

hibited an indictment after a finding of no probable cause. The court examined the history of that section in the Constitutional Convention and concluded:

> In our opinion the language of the constitutional provision, as well as the history of its evolution, negates any thought that its purpose was to attach finality to a finding of no probable cause, or to establish mutually exclusive procedures so that grand jury proceedings would be barred if an accused had been discharged upon preliminary hearing.[33]

Some months later in *Hendrix*, the court had before it the same constitutional provision and the question of whether it prohibited the return of an indictment prior to a preliminary hearing. This time the court was not as unanimous, with Justice Goldenhersh specially concurring and Justice Ward dissenting. The court seems to hold in *Hendrix* that an indictment may not be dismissed even though the defendant was not initially charged by indictment and was not granted a preliminary hearing prior to the return of the indictment. Justice Ward took issue with the majority for its unsatisfactory treatment of the problem of enforcing the right to preliminary hearing. The majority opinion states that "[W]hat is a prompt preliminary hearing must, of course, depend upon an appraisal of all the relevant circumstances. . . ."[34] It thus leaves the lower courts with no standards to apply. The supreme court's refusal to adopt clear standards for the granting of the constitutional right to a prompt preliminary hearing is an unnecessary adherence to the doctrine of judicial restraint. The result will be that the courts of the State of Illinois will be left in a quandry until a definitive body of law is developed on a case by case basis, or until the supreme court, having tired of treating the problem case by case, will exercise its supervisory powers and announce definite standards —as the Supreme Court of the United States did in *Miranda v. Arizona*[35] after several decades of spending much judicial time in determining voluntariness of confessions under the totality of circumstances rule.[36]

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been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.

33. 54 Ill. 2d 161, 163-64, 295 N.E.2d 710, 712 (1972).

34. 54 Ill. 2d 165, 169, 295 N.E.2d 724, 727 (1973).

35. 384 U.S. 436 (1966).

36. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

The majority opinion leaves unanswered the question implicitly raised by Justice Ward when he states:

> Provision for this hearing would, among other purposes, serve to avoid having an accused held in custody or, less grievously, under bond without a judicial hearing for an indefinite time, only to have a grand jury later conclude that there was not adequate evidence to indict. Assuring this prompt hearing would be of particular importance in counties where grand juries are only intermittently in session and where weeks may elapse before the evidence against an accused is presented to the grand jury for its decision as to whether it is sufficient for an indictment.[37]

We therefore must wait for future cases to give some clear indication as to when the denial of a preliminary hearing is prejudicial.

Also on the subject of indictments is *People v. Jones*,[38] in which the defendant had been convicted of the crime of armed robbery. In that case, the State's Attorney, on the morning of trial, moved to amend the indictment by substituting the name, "Delbert R. Mundy" for "Charles Mundy" and the motion was granted over defendant's objection. On appeal, the appellate court reversed,[39] holding:

> When, as here, the indictment is amended to change the name of the victim from one person to another entirely different person, such is more than correcting a formal defect. It is a matter of substance and it is not within the scope of section 111-5 of ch. 38 Ill. Rev. Stat. 1969.[40]

A vigorous dissent questioned the reversal.[41] The supreme court granted the State's petition for leave to appeal and reversed the appellate court, saying:

> [T]he particular facts in this case demonstrate the amendment of the victim's first name to be a mere formality. Where, as here, no hint of surprise or prejudice to the defendant is shown, allowance of such an amendment is not error.[42]

A question which goes unanswered by either the majority or dissenting opinions of the appellate court or the opinion of the supreme court is whether the grand jury intended to indict the defendant for the robbery of Charles Mundy or whether the grand jury intended to indict the defendant for the robbery of Delbert Mundy.

37. 54 Ill. 2d 165, 170-71, 295 N.E.2d 724, 727 (1973) (Ward J., dissenting).
38. 53 Ill. 2d 460, 292 N.E.2d 361 (1973).
39. 4 Ill. App. 3d 870, 282 N.E.2d 23 (1972).
40. *Id.* at 872, 282 N.E.2d at 25.
41. *Id.* at 872-76, 282 N.E.2d at 25-27.
42. 53 Ill. 2d 460, 465, 292 N.E.2d 361, 363 (1973).

The reports do not show whether the minutes of the proceedings before the grand jury were available and therefore we do not know what evidence was before the grand jury.

Neither court adequately answers the question of what evidence must be shown to prove the intention of the grand jury. If the evidence before the grand jury clearly indicated that the victim of the crime had been Charles Mundy, whom the record shows was the son of Delbert Mundy, then the amendment of the indictment which changed the charge to the robbery of Delbert would be a denial of the defendant's right to indictment by grand jury.

While the supreme court apparently came to the right conclusion in this particular case, one must wonder whether it has left open, for the misuse by the prosecutor, the provision in the Code of Criminal Procedure permitting amendments of indictments for "formal defects."

We now come to a series of cases deciding the constitutional right to speedy trial,[43] and its legislative implementation sometimes known as the "Four Term" or the 120 Day Act.[44] On January 26, 1973, the supreme court handed down two opinions on the 120 Day Law which are difficult to resolve: *People v. Aughinbaugh*,[45] and *People v. Zuniga*.[46]

In *Aughinbaugh*, the court reversed the conviction of a defendant who had been placed on trial within a sixty day extension of the 120 Day Law. This trial ended in a mistrial and after the defendant had

43. The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article I, § 8 of the Illinois Constitution provides:

> In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to meet the witnesses face to face and to have process to compel the attendance of witnesses in his behalf; and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

44. ILL. REV. STAT. ch. 38, § 103-5 (1971).

45. 53 Ill. 2d 442, 292 N.E.2d 406 (1973).

46. 53 Ill. 2d 550, 293 N.E.2d 595 (1973).

objected to being tried before the same venire, the case was continued from November 22, 1967, until December 4, 1967, when the venire was available. The case was then continued from time to time either on motion of the State, or by order of the court, until April 2, 1968, when selection of the jury commenced. Although the jury was finally selected on April 3, 1968, opening statements were not made until April 8th, and the case then proceeded to trial.

On April 2, 1968, the defendant had filed a petition for discharge under the 120 Day Law claiming that more than 132 days had passed between the declaration of mistrial on November 22, 1967, and the date of commencement of selection of the jury. The 120 Day Act contention of the defendant was rejected by the court. However, in an unusual application of the constitutional rights to speedy trial, the court held:

> In this case, the defendant was incarcerated for the maximum statutory term of 180 days, without dilatory action on his part, prior to his November retrial; in addition to the period between venires, another 120 days elapsed before the State was prepared to begin jury selection. Viewing the circumstances of this case in their entirety, we find this unexplained delay clearly unreasonable.[47]

Contrast *Aughinbaugh* with *Zuniga*. In *Zuniga* the defendant was charged with the crime of attempt to murder and murder. He was arrested on October 17, 1966, and arraigned on October 28, 1966. On that date, his cases were assigned to a trial judge who continued them to November 28th. On November 7th, he made a motion to have his cases advanced from November 28th, to November 7th, and filed a petition for substitution of judges which was allowed. On the same day the presiding judge reassigned the cases to another judge for trial who continued them to January 3, 1967. The cases were continued from time to time until February 24, 1967, when the State filed a petition for an extension of time for 60 days for the purpose of securing the presence of a witness whom it claimed was unavailable. The trial court granted an extension of time to April 12, 1967. On April 10, 1967, the cases were called and the State moved to consolidate both indictments for trial, over an objection by the defendant. The defendant also moved to be discharged because he had not been brought to trial within 120 days and that motion was also denied. The State elected to try

47. 53 Ill. 2d 442, 447, 292 N.E.2d 406, 408 (1973).

the indictment charging the attempt to murder first, and on April 10th proceeded with the trial of that case, which resulted in a verdict of guilty on April 20th. None of the continuances had been granted on motion of the defendant. The murder case was reassigned to another judge and continued to April 27, 1967. The trial court denied the defendant's motion to dismiss the murder indictment because he had not been brought to trial within 120 days. Trial apparently commenced on April 12, 1967, and the defendant was thereafter found guilty of murder.

Two problems faced the supreme court in *Zuniga.* One was the question of whether the motion for substitution of judges tolled the running of the 120 Day Act and the other question was whether the State had 120 days after the conclusion of the trial for attempt to murder to place the defendant on trial on the other indictment charging murder.

The court had little trouble with the first question and held in keeping with prior cases that a motion for substitution of judges is a delay occasioned by the accused and waives the right to be tried within the statutory period.

The second question was a bit more troublesome and required construction of chapter 38, Illinois Revised Statutes, section 103-5(e) prior to its 1967 amendment.[48] Citing *People v. Olbrot,*[49] the court ruled that the State had 120 days following the verdict in the attempt to murder trial within which to bring the defendant to trial on the murder charge. It appeared that the verdict on the attempt to murder charge was returned on April 20, 1967. On April 27th, on the motion of the defendant, the murder case was continued to May 8th, and on May 8th, again on motion of the defendant, the case was continued to May 22nd. Then, a series of continuances not occasioned by the defendant brought the case to September 18th, and on September 18th the cause was continued on motion of the defendant to September 25th, on which date the trial of the murder indictment began.

Whereas in *Aughinbaugh* under circumstances quite similar, the court did not adhere to the 120 Day Act, in *Zuniga,* the court rigidly

48. ILL. REV. STAT. ch. 38, § 103-5(e) (1965).

49. 49 Ill. 2d 216, 274 N.E.2d 73 (1971), *cert. denied,* 406 U.S. 924 (1972).

adhered to the 120 Day Act. One senses that in *Aughinbaugh*, the court was strongly influenced by the fact that the crime had been committed in 1961, the defendant had been arrested early in 1962, trial, conviction, and a reversal for new trial occurred in 1967, and oral argument was not heard until 1972.

For whatever reasons, the supreme court in these cases has again turned to a totality of circumstances test which leaves it, the lower courts, and the bar floundering when trying to read some definitive rules into its decisions.

Also dealing with the right to a speedy trial is *City of Chicago v. Wisniewski*.[50] In this case, the supreme court was presented with the contention of the defendant, who had been convicted of disorderly conduct under the Municipal Code of Chicago and fined the sum of $100, that he had been denied his right to a speedy trial under section 103-5(b) of the Code of Criminal Procedure. The supreme court, while holding that section 103-5(b) is not applicable, nonetheless construed a speedy trial provision from section 1-2-9 of chapter 24 of the Illinois Revised Statutes, the Municipal Code. That section provides: "Every person arrested upon a warrant, without unnecessary delay, shall be taken before the proper officer for trial." Under this section, the supreme court determined that the delay of 28 months between arrest and trial, the first eleven of which were attributable to the defendant, was excessive, and the record indicated no justification for the delay.

Three cases were decided during this past year on the question of identification: *People v. Lee*,[51] *People v. Jackson*,[52] and *People v. King*.[53] Based on the evidence in the two cases, neither *Lee* nor *Jackson* is capable of resolution. Once again, we have the court making its own visceral determinations of whether the defendant was properly identified or not. It is worth noting, however, that the court in *Lee* did make one statement concerning the burden of proof of an identification. The court stated that once there is a determination that improperly suggestive methods were used in bringing about that identification, the State must prove by clear and convinc-

50. 54 Ill. 2d 149, 295 N.E.2d 453 (1973).
51. 54 Ill. 2d 111, 295 N.E.2d 449 (1973).
52. 54 Ill. 2d 143, 295 N.E.2d 462 (1973).
53. 54 Ill. 2d 291, 296 N.E.2d 731 (1973).

ing evidence that the in-court identifications had an origin independent of the improperly suggestive method. The court does not, however, help us in determining what methods are improperly suggestive. In *Jackson*, the court determined that the methods used in obtaining an identification of the defendant by the complaining witness were unnecessarily suggestive but reverted again to its totality of circumstances test and decided that the complaining witness did have sufficient time during the commission of the robbery to observe the defendant.

In *King*, the supreme court arrived at the novel conclusion that the unnecessarily suggestive identification was proper because it took place during the trial and in the presence of the jury, who, said the court, "were in a position to determine the weight to be given the fact that the defendant was wearing glasses in the court room, the difficulty of the witness with the English language and all other attendant circumstances."[54]

In *United States v. Wade*,[55] the United States Supreme Court held that a criminal suspect cannot be subjected to a post-indictment identification proceeding in the absence of his counsel without violating the sixth amendment.[56] In *Gilbert v. California*,[57] the Court again dealt with a situation of a post-indictment identification where the suspect was not represented by counsel. The Court held that in-court testimony by a witness that he identified the defendant at a post-indictment lineup is per se inadmissible where the defendant lacked counsel at the lineup. These cases were rcently modified by *Kirby v. Illinois*,[58] where the Court held them applicable only in situations in which the defendant is under indictment, declining to extend their rulings to an in-custody, pre-indictment situation. The only identification case that seems to have any validity at all is that of *Stovall v. Denno*,[59] where the Court held that in a

54. *Id.* at 299, 296 N.E.2d at 736.

55. 388 U.S. 218 (1967).

56. A subsequent courtroom identification which takes place where the defendant was not represented by counsel is inadmissible unless (1) the government can prove by clear and convincing evidence that there was an independent basis for the in court identification, or (2) the admission of the courtroom identification was harmless error.

57. 388 U.S. 263 (1967).

58. 406 U.S. 682 (1972).

59. 388 U.S. 293 (1967).

pre-indictment lineup, where no right to counsel attaches, any counsel attaches, any claimed violation of due process of law in the conduct of an identification confrontation depends upon the totality of the circumstances surrounding the procedure.

How much of *Stovall* is presently intact in Illinois is open to serious question in light of the *Lee*, *Jackson* and *King* decisions. The problem in these Illinois identification cases is not necessarily with their dispositions but with the fact that once again the Illinois Supreme Court is not carrying out its role in the judicial process. By its own rules, the supreme court should be deciding questions of general importance, resolving conflicts between divisions of the appellate court, or exercising its supervisory authority. Instead, the court is busily concerning itself with cases remaining on its docket which should be transferred to the appellate court, or is granting leave to appeal in situations where there has been a dissent in the appellate court. It would seem that in the area of identifications, the court ought perhaps to disengage itself and let the appellate courts develop a body of law and then possibly the supreme court could, after the passage of some time, re-examine the question in light of the problems encountered by the appellate court.

The Warren Court was, in spite of the criticism leveled at it, on the way to developing a distinct body of law that could be applied by lower courts without much difficulty. The rules of *Wade* and *Gilbert* were salutary in this respect. It is doubtful whether *Wade* and *Gilbert,* even if applied to the pre-adversary stage of the proceedings, would have resulted in any less number of identifications than are now obtained without the presence of a lawyer. The fact remains that regardless of the merits of the rule of *Wade* and *Gilbert,* the lower courts were given guide lines that could be followed.

While the Supreme Court of the United States has, in the last year or so, reverted in constitutional cases to a totality of circumstances rule, such a rule is not necessary for the Supreme Court of Illinois, which is a common law court that does not have to reach the constitutional issues presented. The Supreme Court of Illinois also is a court that is entrusted with great supervisory and administrative powers. Admittedly, the Supreme Court of Illinois has not had the time to develop a tradition in the manner of the Supreme Court of

the United States for determining which cases are worthy of a grant of discretionary review and which cases are not. This lack of tradition, however, should not prevent the court, in those cases which it does decide, from fulfilling its function in a judicial system centered around the concept of stare decisis of marking the paths which the lower courts are to trod.

Ours is a system of justice under the law and law pre-supposes some certainty. The lower courts, the litigants, and the lawyers who must advise clients, require certainty, not a fuzzy theoretical concept such as "totality of circumstances." The lawyer who must advise a client as to the probabilities of a conviction and a certain set of circumstances should not be placed in a position where he must tell his client that the identification by the complaining witness may or may not be admitted in evidence depending upon which judge views the "totality of circumstances," or at a higher level, how a division of the appellate court, or at a still higher level, how the Supreme Court of Illinois happens to view that totality on the day that the case is argued.

Concepts, such as "totality of circumstances," make business for lawyers, but the purpose of a criminal justice system is not to provide employment for lawyers at the expense of the defendant who must endure the torture of not knowing his ultimate fate until enough judges have haggled over the "totality of the circumstances."

Proceeding with the cases decided this last year, one finds the court more sure of itself when not confronted with the constitutional issues. For example, in *People v. Dollen*,[60] the court reaffirmed prior decisions, holding: "If defendant presents some evidence to raise the issue of entrapment, 'the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.' "[61] Lest, however, the reader think that the court has at last mastered its doubts, let him read on to the end of the opinion where he will find the court backing away from its clear language and saying:

60. 53 Ill. 2d 280, 290 N.E.2d 879 (1972). *See* Note, *People v. Dollen and United States v. Russell: New Developments in the Defense of Entrapment in Illinois and Federal Courts*, 23 DEPAUL L. REV. 570 (1973).

61. *Id.* at 284, 290 N.E.2d at 881.

> We do not imply that any law enforcement official was involved in a plan to place the narcotics in the vehicle, but we believe that the totality [that word again] of the evidence was sufficient to indicate that [the informer], acting independently, may have deposited the package so as to result in its detection by defendant, thus establishing the possibility of entrapment.[62]

Oh, that the supreme court could write an opinion in a criminal case without using the word totality. In *People v. Strother*,[63] the court ruled that the defendant was denied a fair trial because the trial judge would not permit counsel for the defendant to examine the arm of the informer witness to determine whether he had recently used narcotics.

In another case worthy of note, *People v. Norwood*,[64] the court carved out an exception to section 2-8 of the Juvenile Court Act which provides:

> The records of law enforcement officers concerning all boys under 17 and all girls under 18 must be maintained separate from the records of arrests and may not be open to public inspection or their contents disclosed to the public except by order of the court or when the institution of criminal proceedings has been permitted under Section 2-7 or such a person has been convicted of a crime and is the subject of a pre-sentence investigation or proceedings on an application for probation.[65]

This section, the court stated,

> is not to be construed as prohibiting access to the records of juvenile delinquents when those records are sought in order to impeach the credibility of the juvenile as a witness by showing a possible motive for testifying falsely. The terms of the statute show that the prohibition against disclosure is not absolute, and as Wigmore pointed out, 'It would be a blunder of policy to construe these statutes as forbidding the use of such proceedings to affect the credibility of a juvenile when appearing as a witness in another court.'[66]

CONCLUSION

Clearly the past year has not been one marked by judicial activism on the part of the Illinois Supreme Court in the criminal law area. The court has constantly failed to take advantage of opportunities

62. *Id.* at 284, 290 N.E.2d at 882.
63. 53 Ill. 2d 95, 290 N.E.2d 201 (1972).
64. 54 Ill. 2d 253, 257, 296 N.E.2d 852, 854 (1973).
65. ILL. REV. STAT. ch. 37, § 702-8(3) (1971).
66. 54 Ill. 2d at 257, 296 N.E.2d at 854 (citation omitted).

to establish clear precedents and guidelines for the overburdened appellate courts to follow in deciding criminal cases. Instead, reliance on such vague tests as the "totality of circumstances" has placed the lower courts in a judicial limbo. As a result, both the public and the criminal defendant must spend needless time, money and human resources to administer a system of criminal justice. Only with a more clearly defined body of judicial precedent set forth by the Illinois Supreme Court can the more idealistic goals of a criminal justice be achieved.