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STANDARDS OF REVIEW IN ILLINOIS CRIMINAL CASES: THE NEED FOR MAJOR REFORM

Timothy P. O'Neill*

I. INTRODUCTION

On June 19, 1992, the United States Supreme Court issued one of the most eagerly awaited opinions of the 1991 Term. The Court had granted certiorari in *Wright v. West*¹ to determine what should be the proper standard of review when a federal court decides a mixed question of law and fact in a habeas corpus petition from a state criminal judgment. Although the Court decided the case without reaching that issue², it was the latest in a growing list of recent cases in which the Supreme Court has faced a standard of review issue.³

The proper standard of review—that is, the proper degree of deference an appellate court owes to any aspect of the lower court's decision—is a threshold issue in an appellate decision. It should be the starting point for the resolution of each separate issue in an appeal. Yet appellate courts at both the state and federal level have often given insufficient attention to standards of review. Some opinions omit any discussion of a standard of review; others mention the subject only in the most perfunctory manner.

The Supreme Court's recent interest in standards of review is emblematic of a renewed interest in the subject. This is exhibited both in federal court decisions and in academic writing generally. Unfortunately, this ferment has not affected how Illinois appellate courts decide criminal appeals. Despite what is occurring in the federal courts, there has been almost no new debate or re-examination of the standards of review in criminal cases in Illinois.

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1. 112 S.Ct. 672 (1991).

2. The Court held that regardless of whether the sufficiency of the evidence was reviewed deferentially or *de novo*, the trial record contained more than enough evidence to support respondent's conviction. Therefore, it did not have to decide which is the proper standard. *Wright v. West*, 112 S.Ct. 2482 (1992).

3. See *infra* note 172.

This Article contends that such a change is long overdue. Part II provides a general overview of the area of standards of review. Part III discusses Illinois' use of standards of review in a variety of issues that regularly arise in criminal appeals. It will establish how often Illinois' position is at odds with the position of many federal courts. It will also pinpoint issues that currently spawn serious debate among federal circuits, and how Illinois has refused to even acknowledge these conflicts. Part IV will suggest two ways under current Illinois law in which parties raising certain issues in a criminal appeal may obtain a more favorable standard of review. Finally, in Part V this Article will recommend several ways Illinois courts—and Illinois advocates—can improve the way standards of review are used in this state's criminal appellate decisions.

II. STANDARDS OF REVIEW: AN OVERVIEW

As a general rule, a standard of review is the "degree of deference given by the reviewing court to the decision under review."⁴ It is the "power of the lens" through which an appellate court examines the decision of a particular issue in a case.⁵ It should be impossible to raise an issue in an appellate court without first establishing the appropriate standard of review. That is because, in a colloquial sense, the standard of review tells the appellate court "how wrong" the trial court must be before its decision may be overturned. For some issues, a finding that the trial court was "slightly wrong" will justify a reversal; for other issues, the trial court must be upheld unless it was "very wrong."

Theoretically, an appellant could win or lose a case based solely on the selection of the standard of review. Yet, according to at least one commentator, until recently standards of review were given short shrift by appellate judges and lawyers. Robert L. Byer contends that standards of review appeared "frequently . . . in the nature of boilerplate expressions which had the appearance of being used not to confine the boundaries of appellate review prior to deciding particular issues in the case, but rather as mechanistic incantations inserted to justify a predetermined result."⁶ The suspicion that standards of

4. Martha S. Davis and Steven A. Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 465 (1986).

5. Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. OF PITT. L.R. xvi, xvi (1987).

6. *Id.*

review actually mask a result-orientated jurisprudence has led some commentators to suggest that reviewing courts simply do as they please, and that the "rules governing judicial review have no more substance at the core than a seedless grape."⁷

Yet, there are signs that the legal community is beginning to take the area of standards of review more seriously. There is a growing literature in law journals.⁸ Additionally, as noted above, the United States Supreme Court has decided several major standard of review cases during the last decade.⁹ And, at least six federal circuits have adopted circuit rules specifically requiring all briefs to include the proper standard of review for each issue.¹⁰

Yet, perhaps the most encouraging sign has been the recent publication of a major two volume treatise on standards of review co-authored by Martha S. Davis and Steven Alan Childress.¹¹ The treatise is the culmination of years of work by these two scholars,¹² and is a welcome addition to the literature in both the civil and criminal areas.

Childress and Davis show that standards of review in criminal cases involve far more than arcane discussion differentiating questions of fact from questions of law; underlying these distinctions lies the

7. Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975).

8. See, e.g., Thomas S. Hall, *McClesky v. Zant: A Stricter Standard of Review for Abuse of the Writ of Habeas Corpus Involving Successive Federal Petitions*, 25 CREIGHTON L. REV. 233 (1991); Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231 (1991); Julie G. Hudson, *The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers*, 69 N.C. L. REV. 501 (1991); Richard L. Kirkpatrick, *Likelihood of Confusion Issues: The Federal Circuit's Standard of Review*, 40 AM. U. L. REV. 1221 (1991); Mark Ostrich, *ERISA Litigation: What To Do About Standards of Review?*, 38 LA. B.J. 327 (1991); Michael S. Beaver, *The Standard of Review in ERISA Benefits Denial Cases After Firestone Tie and Rubber Co. v. Bruch: Revolution on Deja Vu?*, 26 TORT & INS. L.J. 31 (1990); Christopher A. Considine, *Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach*, 75 CORNELL L. REV. 727 (1990).

9. See *Salve Regina College v. Russell*, 111 S.Ct. 1217 (1991); *Cooter & Gell v. Hartmarz Corp.*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Miller v. Fenton*, 474 U.S. 104 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

10. See 3d Cir. R. 21(h); 4th Cir. R. 28(c); 7th Cir. 28(k); 9th Cir. R. 13(b)(2)(A); 10th Cir. R. 28.2(c); 11th Cir. R. 28-2(h)(iii).

11. MARTHA S. DAVIS AND STEVEN A. CHILDRESS, *STANDARDS OF REVIEW* (John Wiley & Sons 1986).

12. See, e.g., Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S. DAKOTA L. REV. 468 (1988); Martha S. Davis & Steven Alan Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461 (1986); Steven Alan Childress, "Clearly Erroneous": *Judicial Review Over District Courts in the Eighth Circuit and Beyond*, 51 Mo. L. REV. 93 (1986); Steven Alan Childress, *Standards of Review in Eleventh Circuit Civil Appeals*, 9 NOVA L. REV. 257 (1985).

crucial question of *how power is allocated* among the decisionmakers in the criminal system:

What level of deference will the appellate court give to the judge, the jury, the prosecutor, and the defendant, and to the other participants in the process? Where are the boundaries that mark the extent of the power of the participants; or, perhaps more legalistically, in what area do those boundaries move about? Once these boundaries, or boundary areas, are defined, appeal becomes more predictable, and even the choice whether to appeal at all can be made more rationally.¹³

A. The Basic Distinctions: The Different Standards of Review for Questions of Law and Questions of Fact

For purposes of standards of review, decisions by judges are traditionally divided into two categories—questions of law and questions of fact.¹⁴

As to a question of law, an appellate court is free to substitute its own judgment in place of that of the trial court. That is, the appellate court owes absolutely no deference to the conclusion of the trial court; its only task is to formulate what it believes to be the correct answer. This is called “*de novo*” review.¹⁵

Several reasons have been advanced concerning why this is an appropriate power for appellate courts reviewing questions of law.¹⁶ First, it can be argued that deciding questions of law is the *raison d’etre* of appellate courts. Unlike the trial court, the appellate court is not burdened with the significant time commitments needed for hearing evidence and deciding facts. Second, generally three appellate judges are asked to decide legal issues in an appellate court case¹⁷ as opposed to only one judge in a trial setting. The use of “three heads instead of one” hopefully minimizes the opportunity for error.

On the other hand, the power of appellate courts is much more circumscribed when reviewing questions of fact. With factual issues, appellate courts can reject the findings of the trial court only if the

13. Davis and Childress, *supra* note 4, at 464.

14. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988).

15. DAVIS AND CHILDRESS, *supra* note 11, at § 15.2.

16. These reasons were articulated by the Ninth Circuit Court of Appeals in *United States v. McConney*, 728 F.2d 1195, 1201-02 (9th Cir. 1984) (en banc), *cert. denied*, 496 U.S. 824 (1984).

17. The obvious exceptions include review by a state supreme court and *en banc* review by a federal court of appeals.

findings are “clearly erroneous.”¹⁸ The United States Supreme Court has held that “[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹⁹ This is a far more deferential standard than *de novo* review. Davis and Childress note, “[o]n questions of fact, the reviewing court usually asks whether the decision is *reasonable*; on questions of law, it asks whether the decision is *correct*.”²⁰ Or, to put it another way, in reviewing a question of fact the issue is “not whether the trial level result is the better or best one but only whether it is a legally permissible one.”²¹

Again, reasons have been advanced why this more restricted review is proper for questions of fact.²² First, it is presumed that the trial judge is in a better position to sort out fact from fiction. The trial judge can both hear live evidence and evaluate the credibility of live witnesses—functions an appellate court cannot perform.²³ Second, the main function of an appellate court is to fashion a harmonious body of law to be used as precedent for future cases. Time spent in fact-finding would distract the court from this primary legal function.

B. What is a Question of Law? What is a Question of Fact?

What, then, is the difference between a “question of fact” and a “question of law”? A simple dichotomy can be suggested. One commentator has suggested that “facts” are those findings that “generally respond to inquiries about who, when, what, and where.”²⁴ Thus, whether a defendant drove her car through a red light is considered a question of fact.²⁵ Statements of “law,” on the other

18. See Fed. R. Civ. P. 52(a). Although this is a rule of civil procedure, the same standard is used for factual findings in criminal cases on issues other than guilt. *Hernandez v. New York*, 111 S.Ct. 1859, 1869 (1991).

19. *Pullman-Standard v. Swint*, 456 U.S. 273, 285 n.14 (1982) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

20. DAVIS & CHILDRESS, *supra* note 11, at § 7.5, p. 16 (emphasis in original).

21. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 999 (1986).

22. See *supra* note 16.

23. See Fed. R. Civ. P. 52(a) (“due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses”); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (“[trial judge] is usually in a superior position to appraise and weigh the evidence”), *rev'd on other grounds*, 401 U.S. 321 (1971).

24. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

25. This example was drawn from Louis, *supra* note 21.

hand, are “fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one *sub judice*.”²⁶ Thus, the particular duty a defendant owes to another while driving her vehicle on a public street is a question of law.²⁷

Yet, this crude example belies the difficulties inherent in drawing distinctions between fact and law. As recently as June of 1990, Justice O'Connor wrote that “[t]he [Supreme] Court has long noted the difficulty of distinguishing between legal and factual issues.”²⁸ In 1982, the Supreme Court remarked on the “vexing nature” of the fact/law distinction²⁹ and concluded that “[w]e yet know of . . . [no] rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”³⁰ One commentator has noted that “[‘law’ and ‘fact’ are] equally expansible and collapsible terms. . . . It is readily acknowledged that the term ‘law’ is indefinable. No less difficult to bound is the orbit of that companionate phantom ‘fact’.”³¹ Another states:

In truth, the distinction between ‘questions of law’ and ‘questions of fact’ . . . is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. . . . It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of ‘fact’; and when otherwise disposed, they say that it is a question of ‘law’.³²

Indeed, Henry P. Monaghan has challenged the entire concept of law and fact being a dichotomy, and instead refers to their “nodal quality” as representing “points of rest and relative stability on a continuum of experience.”³³

A growing trend challenges the traditional “two-step” view that courts *first* identify whether the issue is one of fact or law and *then* apply the proper standard of review. Monaghan contends that often

26. *Id.* (citing HENRY HART AND ALBERT SACKS, *The Legal Process* 374 (text. ed. 1958)).

27. *Id.*

28. *Cooter & Gell v. Hartman Corp.*, 496 U.S. 384, 395 (1990).

29. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (citing *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)).

30. *Id.*

31. Monaghan, *supra* note 24, at 233 n.24 (citing L. GREEN, *JUDGE AND JURY* 270 (1930)).

32. J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 55 (1927) (emphasis in original).

33. Monaghan, *supra* note 24, at 233.

the procedure is reversed; that is, the standard of review is selected based on which decisionmaker is better equipped to have a final say on a particular issue, and only then is the issue conveniently labeled one of “fact” or “law” to support the decision.³⁴ As Monaghan succinctly notes, the “real issue is not analytic, but allocative: what decisionmaker should decide the issue?”³⁵ No less an authority than the United States Supreme Court has agreed. In *Miller v. Fenton*,³⁶ the Court approvingly cited Monaghan’s observation and added that “[t]he fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”³⁷ As Judge Richard Posner has tersely stated, “‘law’ and ‘fact’ do not in legal discourse denote pre-existing things; they express policy-grounded legal conclusions.”³⁸

Thus, distinguishing law from fact is a daunting enough task for an appellate court. Yet an equally difficult chore faces an appellate court when it reviews those decisions reached by the trial court when it applied existing law to historical facts. An appellate court must decide how to review these “mixed questions of law and fact.”

C. What is a “Mixed Question of Law and Fact”?

The United States Supreme Court has defined “mixed questions of law and fact” as “[q]uestions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or

34. *Id.* at 237.

35. *Id.*

36. 474 U.S. 104 (1985).

37. *Id.* at 114.

38. *Weidner v. Thieret*, 866 F.2d 958, 961 (7th Cir. 1989). *See also* *United States v. Rutledge*, 900 F.2d 1127, 1128-29 (7th Cir.) (Posner, J.) (“[W]hether a confession is voluntary is not really a fact, but a characterization. . . . But merely to observe that voluntariness is not a fact does not answer the question whether the determination of voluntariness should be made by the trial judge, by the jury (if there is one), or by the appellate court.”), *cert. denied*, 111 S.Ct. 203 (1990); *Galowski v. Murphy*, 891 F.2d 629, 635 (7th Cir. 1989), *cert. denied*, 495 U.S. 921 (1990). In an earlier case, Judge Posner wrote:

The question whether a rule of law has been violated—a question that requires applying the rule to the facts—is normally treated as a question of fact (cite omitted) not because it is a question of fact (it isn’t) but as a way of expressing a decision to leave the answer to the trial judge or jury to make, subject only to limited appellate review.

Davenport v. DeRobertis, 844 F.2d 1310, 1311-12 (7th Cir.) (emphasis in original), *cert. denied*, 488 U.S. 908 (1988).

is not violated.”³⁹ The Ninth Circuit has described the decision of a mixed question as consisting of three steps: the establishment of the historical fact; the selection of the applicable rule of law; and the application of the law to the facts to determine whether or not the rule has been violated.⁴⁰ For example, in the situation alluded to earlier,⁴¹ whether a driver ran a red light is a question of fact, while the duty a driver owes the public is a question of law. Yet the ultimate determination whether running a red light constitutes negligence requires the application of law to fact and is thus a “mixed question of law and fact.”

D. What is the Standard of Review for a “Mixed Question of Law and Fact”?

As discussed above,⁴² the appropriate standards of review for questions of fact and questions of law are “clearly erroneous” and “*de novo*”, respectively. What, then, is the standard of review for a “mixed question of law and fact”?

The Supreme Court in *Pullman-Standard v. Swint*⁴³ alluded to this issue without deciding it, but noted that there was “substantial authority in the Circuits on both sides of [the] question” of whether a mixed question should be reviewed as a legal or factual question.⁴⁴

Of the circuits that use a *de novo* standard of review for mixed questions, perhaps the Ninth Circuit has provided the most careful analysis. In 1984, in *United States v. McConney*⁴⁵, the *en banc* court squarely confronted the issue of the proper standard of review for mixed questions. The court examined whether the decision on a mixed question was essentially factual—that is, whether it is founded on the application of the “fact-finding tribunal’s experience with the main-springs of human conduct,”⁴⁶ or essentially legal—that is, whether the decision concerned the “exercise [of] judgment about the values

39. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

40. *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

41. See *supra* notes 24-27 and accompanying text.

42. See *supra* notes 14-23 and accompanying text.

43. 456 U.S. 273 (1982).

44. *Pullman-Standard*, 456 U.S. at 289 n.19. The Court also noted its own decision provided “support” for the proposition that mixed questions are “independently reviewable” by an appellate court. *Id.* (citing *Bogardus v. Commissioner*, 302 U.S. 34, 39 (1937); *Helvering v. Tex-Penn Oil*, 300 U.S. 481, 491 (1937); *Helvering v. Rankin*, 295 U.S. 123, 131 (1935).

45. 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

46. *Id.* at 1199 (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960)).

that animate legal principles.”⁴⁷ The Ninth Circuit then concluded that, as a general rule,⁴⁸ deciding mixed questions requires legal judgment and, therefore, a *de novo* appellate standard is more appropriate. Other circuits also share this view.⁴⁹

Of the circuits that use a “clearly erroneous” standard for mixed questions, perhaps the Seventh Circuit has been most adamant about the need for deference to the trial court on such questions.⁵⁰ Other circuits hold similarly.⁵¹

Behind this split of authority lie several serious issues about the very nature and purpose of appellate courts. In deciding whether to exercise *de novo* or deferential review, Martin Louis has observed that an appellate court must consider “a host of interrelated factors involving the nature, importance, novelty, and technicality of the question, the relative abilities of the trial and appellate levels to answer it initially or permanently, and the type of trial level decision-maker involved.”⁵² Arguments in favor of *de novo* review of mixed questions stress the ability of an appellate court to establish a “decisional environment in which uniformity could flourish.”⁵³ Moreover, *de novo* review brings to the mixed question the advantage of collegial consideration of questions which is inherent in panel consideration of

47. *McConney*, 728 F.2d at 1202.

48. *Id.* at 1203. Exceptions to the “general predominance of factors favoring *de novo* review” include mixed questions in which the applicable legal standard provides for a strictly factual test, for example, state of mind or the question of negligence. See *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982); *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982) (holding that a retrial is barred only when conduct provoking the successful motion was “intended,” the Court noted that lower court findings on this matter merited deferential review); *Duberstein*, 363 U.S. at 289.

49. See *Hall v. Wainwright*, 805 F.2d 945, 947 (11th Cir. 1986); *United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 174 n.12 (3rd Cir. 1976); *Stafos v. Jarvis*, 477 F.2d 369, 372 (10th Cir. 1973); *Johnson v. Salisbury*, 448 F.2d 374, 377 (6th Cir. 1971).

50. Judges Posner and Easterbrook appear to have spearheaded the Seventh Circuit’s efforts in this area. See *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992); *United States v. McKinney*, 919 F.2d 405, 418-23 (7th Cir. 1990) (Posner, J., concurring); *United States v. Malin*, 908 F.2d 163, 169-70 (7th Cir. 1990) (Easterbrook, J., and Posner, J., concurring); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 930 (7th Cir. 1989) (en banc); *Hartford Accident and Indem. Co. v. Sullivan*, 846 F.2d 377 (7th Cir. 1988); *Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir. 1988); *Mucha v. King*, 792 F.2d 602 (7th Cir. 1986); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985). *But see* *Schuneman v. United States*, 783 F.2d 694 (7th Cir. 1986) (holding that mixed questions of law and fact are independently reviewed by an appellate court).

51. *Rogers v. Bates*, 431 F.2d 16, 18 (8th Cir. 1970); *Pennsylvania Casualty Co. v. McCoy*, 167 F.2d 132, 133 (5th Cir. 1948).

52. *Louis*, *supra* note 21, at 1026.

53. *Mars Steel Corp.*, 880 F.2d at 940 (concurring).

cases. The three-judge decisional process guarantees that the issue will be studied by people with "varied legal backgrounds and a circuit-wide vantage point."⁵⁴

Supporters of a deferential approach turn this argument around and ask "[w]hy should three judges redo the work of one?"⁵⁵ They criticize *de novo* review in such situations as "disruptive, time consuming, and potentially unconstitutional."⁵⁶ They contend that the trial judge is in as good as, if not a better, position to make such a fact-specific determination.⁵⁷

III. STANDARDS OF REVIEW USED BY ILLINOIS APPELLATE COURTS TO DECIDE CRIMINAL CASES

The various standards of review can be analogized to scalpels used by a surgeon. Subtle differences among scalpels make one type appropriate for certain medical procedures, yet totally inappropriate for others. To pursue the analogy, the "scalpel" selected by an appellate court judge should differ depending on the nature of the problem facing the court—a question of law, a question of fact, or a mixed question of law and fact.

A. The Review of Illinois Suppression Decisions

If most appellate courts wield their standards of review as scalpels, then in reviewing suppression motions in criminal cases, Illinois appellate courts use meat cleavers. Illinois courts are blind to the distinctions among the variety of issues which are spawned by suppression motions. In Illinois, a reviewing court will not disturb a circuit court's ruling on a motion to quash an arrest unless that finding is manifestly erroneous.⁵⁸ Nor will a reviewing court disturb a circuit court's ruling on a motion to suppress evidence unless it is

54. *Id.*

55. *Id.* at 933 (majority opinion).

56. *Louis, supra* note 21, at 1032.

57. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI L. REV. 1175, 1186 (1989) (criticizing United States Supreme Court's selection of Fourth Amendment cases "in which the question seems to be of no more general interest than whether, in *this* particular fact situation, pattern 3,445, the search was reasonable" and arguing that such "essentially factual determination[s]" should be left to the lower courts).

58. *People v. Redd*, 553 N.E.2d 316, 322 (Ill. 1990); *People v. Gacho*, 522 N.E.2d 1146, 1152 (Ill.), *cert. denied*, 488 U.S. 910 (1988); *People v. Cabrera*, 508 N.E.2d 708, 712 (Ill.), *cert. denied*, 484 U.S. 929 (1987).

manifestly erroneous.⁵⁹ Findings by the circuit court on the question of voluntariness of a confession are not disturbed unless they are against the manifest weight of the evidence.⁶⁰ A trial court's ruling on a motion to suppress identification will not be disturbed unless manifestly erroneous.⁶¹

Moreover, Illinois courts refuse to distinguish between the diverse issues arising out of suppression hearings. The appellate courts totally defer to the trial court on factual determinations and witness credibility judgments.⁶² Yet, it offers the same deference to a trial court's determination of whether sufficient exigent circumstances exist to justify a warrantless search;⁶³ whether the "knock and announce" requirement should be excused in a particular case;⁶⁴ whether a warrantless search exceeded the permissible scope of a search incident to an arrest;⁶⁵ whether a defendant waived the presence of counsel at a lineup;⁶⁶ and even to whether a police officer from one municipality had jurisdiction to make an arrest in a different, unincorporated portion of the same county.⁶⁷ All of these decisions are reviewed under a "manifest error" standard.

Compare this to the standard used in several federal circuits which differentiate between legal and factual issues in suppression motion decisions. These courts review factual findings under a clearly erroneous standard and legal conclusions under a *de novo* standard.⁶⁸

59. *People v. Galvin*, 535 N.E.2d 837, 841 (Ill. 1989); *Redd*, 553 N.E.2d at 332 (citing *People v. Neal*, 486 N.E.2d 898, 899 (Ill. 1985); *People v. Clay*, 304 N.E.2d 280, 282 (Ill. 1973)).

60. *Redd*, 553 N.E.2d at 333. See also *People v. King*, 488 N.E.2d 949, 955 (Ill.), cert. denied, 479 U.S. 872 (1986); *People v. Davis*, 452 N.E.2d 525, 534 (Ill. 1983); *People v. Fauntleroy*, 586 N.E.2d 292, 307 (Ill. App. Ct. 1st Dist. 1991).

61. *People v. Garcia*, 454 N.E.2d 274, 279 (Ill. 1983).

62. *Redd*, 553 N.E.2d at 322. See *People v. Conner*, 401 N.E.2d 513, 516 (Ill. 1979); *People v. Henderson*, 210 N.E.2d 483, 485 (Ill. 1965).

63. *People v. Holloway*, 426 N.E.2d 871, 876 (Ill. 1981); *People v. Chambers*, 558 N.E.2d 274, 281 (Ill. App. Ct. 1st Dist. 1990).

64. *Conner*, 401 N.E.2d at 516.

65. *People v. Williams*, 311 N.E.2d 681, 685 (Ill.), cert. denied, 419 U.S. 1026 (1974).

66. *People v. Dailey*, 282 N.E.2d 129, 130 (Ill. 1972).

67. *People v. DeBlicke*, 537 N.E.2d 388, 393 (Ill. App. Ct. 2d Dist. 1989).

68. Federal Courts that appear to follow the view include the Second Circuit (*United States v. Osorio*, 949 F.2d 38, 40 (2d Cir. 1991)); Fifth Circuit (*United States v. Ibarra*, 948 F.2d 903, 906 (5th Cir. 1991); *United States v. Colin*, 928 F.2d 676, 677-78 (5th Cir. 1991)); Ninth Circuit (*United States v. Booker*, 952 F.2d 247, 249 (9th Cir. 1991); *United States v. Ramos*, 923 F.2d 1346, 1355 (9th Cir. 1991)); Tenth Circuit (*United States v. Evans*, 937 F.2d 1534, 1536-37 (10th Cir. 1991); *United States v. Morgan*, 936 F.2d 1561, 1565 (10th Cir. 1991), cert. denied, 112 S.Ct. 1190 (1992); *United States v. Jefferson*, 925 F.2d 1242, 1248-49 (10th Cir.), cert. denied, 112 S.Ct. 238 (1991)); and Eleventh Circuit (*United States v. Lynch*, 934 F.2d

Making such a distinction does not solve all appellate problems. It does not, for example, determine whether a particular problem facing the court is factual or legal.⁶⁹ What this distinction does recognize, however, is that trial courts are in a better position to make some, but not all, decisions relating to a suppression motion. The appellate court will thus defer to the trial court's decisions on certain issues even if the appellate court might have decided a particular issue differently.⁷⁰ These are designated as "factual findings" and will be reviewed under a "clearly erroneous" standard. On other issues, however, the appellate court will wish to ensure "consistent application"⁷¹ from one case to another. This will favor designating an issue as legal and subject to *de novo* review in order to allow an appellate court to establish such consistency.

This article's criticism of Illinois' approach to standards of review in the suppression context is not that Illinois is necessarily wrong on any particular issue, for example, whether "seizure" is a factual or legal issue.⁷² Rather, this article faults Illinois courts for refusing to understand that within the area of the suppression motion lies a myriad of issues which require careful and separate consideration concerning the proper standard of review. Illinois courts, by refusing

1226, 1232 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 885 (1992); *United States v. Ramos*, 933 F.2d 968, 972 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1269 (1992); *United States v. Garcia*, 890 F.2d 355, 358 (11th Cir. 1989)). *But see* *United States v. Morin*, 949 F.2d 297, 299 (10th Cir. 1991) ("clearly erroneous").

There appears to be a split of authority in the First Circuit. *Compare* *United States v. Sanchez*, 943 F.2d 110, 112 (1st Cir. 1991) ("clearly erroneous/*de novo*") with *United States v. Lanni*, 951 F.2d 440, 441 (1st Cir. 1991) ("clearly erroneous").

There also appears to be a split in the Seventh Circuit. *Compare* *United States v. Williams*, 945 F.2d 192, 195-96 (7th Cir. 1991) ("clearly erroneous/*de novo*") with *United States v. Sewell*, 942 F.2d 1209, 1211 (7th Cir. 1991) ("clearly erroneous"), *cert. denied*, 112 S.Ct. 1567 (1992), and *United States v. Wilson*, 938 F.2d 785, 788 (7th Cir. 1991) ("clearly erroneous"), *cert. denied*, 112 S.Ct. 946 (1992). Yet one Seventh Circuit case has described its "clearly erroneous" standard of review of suppression motion decisions as a "somewhat misleading shorthand" for the concept that factual findings are subject to "clearly erroneous" review while legal determinations are subject to "*de novo*" review. *United States v. Parker*, 936 F.2d 950, 953 n.1 (7th Cir. 1991).

The Eighth Circuit purports to use "clearly erroneous" review, but it also emphasizes that the decision of the district court will be reversed if it is based on an "erroneous interpretation of applicable law." *United States v. Gibson*, 928 F.2d 250, 253 (8th Cir. 1991).

69. *Compare* *United States v. Maragh*, 894 F.2d 415, 417 (D.C. Cir. 1990) (holding the issue of whether a "seizure" has occurred to be a legal one subject to *de novo* review) with *United States v. Dunigan*, 884 F.2d 1010, 1014 (7th Cir. 1989) (holding that "seizure" is a factual issue subject to "clearly erroneous" review).

70. *See* *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

71. *Maragh*, 894 F.2d at 418 (citing *Michigan v. Chesternut*, 486 U.S. 567, 571 (1988)).

72. *See supra* note 69.

to break "suppression motions" into factual and legal component parts, exhibit a shockingly simplistic, unsophisticated view of standards of review that is light years behind the federal system.⁷³

1. *Motions to Suppress Involuntary Confessions*

Consider, for example, Illinois' approach to reviewing a motion that challenges the voluntariness of a confession. For decades, Illinois courts have blithely held that "[f]indings by the circuit court on the question of the voluntariness of a confession will not be disturbed by a court of review unless they are against the manifest weight of the evidence."⁷⁴ Not surprisingly, Illinois has totally ignored important federal developments in this area.

Traditionally, the United State Supreme Court has reviewed the voluntariness of confessions in state court cases on direct appeal under a *de novo* standard.⁷⁵ In 1985, in *Miller v. Fenton*,⁷⁶ the Court held that when the issue of voluntariness of a confession in a state case is presented in a federal habeas corpus petition,⁷⁷ the state court's finding is not a fact presumed to be correct,⁷⁸ but is rather a legal question meriting independent, *de novo* review.⁷⁹ Although *Miller*

73. See *infra* note 163 and accompanying text.

74. *People v. Smith*, 561 N.E.2d 252, 263 (Ill. App. Ct. 4th Dist. 1990); *accord*, *People v. Scott*, 594 N.E.2d 217, 229 (Ill. 1992); *People v. Brownell*, 404 N.E.2d 181, 188 (Ill.), *cert. dismissed*, 449 U.S. 811 (1980); *People v. Stone*, 256 N.E.2d 803, 806 (Ill. 1970); *People v. Sims*, 173 N.E.2d 494, 498 (Ill. 1961), *cert. denied*, 369 U.S. 861 (1962); *People v. Gavurnik*, 117 N.E.2d 782, 784 (Ill. 1954); *People v. Scott*, 81 N.E.2d 426, 428 (Ill. 1948); *People v. Albers*, 195 N.E.2d 459, 462 (Ill. 1935); *People v. Everett*, 593 N.E.2d 664, 669 (Ill. App. Ct. 1st Dist. 1992); *People v. Anderson*, 587 N.E.2d 1050, 1055 (Ill. App. Ct. 3d Dist. 1992); *People v. Mendoza*, 567 N.E.2d 23, 35 (Ill. App. Ct. 2d Dist.), *appeal denied*, 575 N.E.2d 920 (Ill. 1991); *People v. Urioste*, 561 N.E.2d 471, 481 (Ill. App. Ct. 5th Dist. 1990), *appeal denied*, 567 N.E.2d 340 (Ill. 1991); see also cases cited *supra* note 60.

75. See, e.g., *Arizona v. Fulminante*, 111 S.Ct. 1246, 1252 (1991); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Haynes v. Washington*, 373 U.S. 503, 515 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

76. 474 U.S. 104 (1985).

77. 28 U.S.C. §2254.

78. See generally, 28 U.S.C. §2254(d) (providing that a federal court shall generally presume facts found by a state court to be correct in a habeas corpus proceeding).

79. *Miller v. Fenton* holds that the issue of voluntariness of a confession "is a matter for independent federal determination." 474 U.S. at 112. It could be contended that *Miller* provides for a *de novo* determination by the federal district court, but that review of that determination by the federal court of appeals need only be under the "clearly erroneous" standard. See Keith R. Dolliver, *Voluntariness of Confessions in Habeas Proceedings: The Proper Standard for Appellate Review*, 57 U.Chi. L. Rev. 141 (1990) (federal appellate courts should treat federal district court findings of voluntariness of confessions in a §2254 petition as a finding of fact under F.R.C.P. 52(a) and should then review it under a "clearly erroneous"

concerned a §2254 state habeas corpus case, federal courts of appeal have subsequently applied that holding to direct federal appeals as well. Thus, in a federal criminal case, a federal district court's ruling on a voluntariness of confession issue is reviewed *de novo* on direct review by the federal court of appeals.⁸⁰ Lower federal courts have focused on *Miller's* observation that "the voluntariness of a confession has always had a uniquely legal dimension."⁸¹

Despite this ferment in the area, the Illinois Supreme Court has *never* discussed the possible effect of *Miller v. Fenton* on its standard of review in voluntariness of confession cases. The only two Illinois appellate court cases to discuss whether *Miller v. Fenton* supports a change in the standard of review in this area both summarily rejected the idea without any analysis.⁸²

2. *Motions to Suppress Statements Based Upon Miranda Violations*

a. The Standard for Reviewing a Finding of "Custodial Interrogation"

*Miranda v. Arizona*⁸³ deals only with "the admissibility of statements obtained from an individual who is subjected to custodial police interrogation."⁸⁴ Custodial interrogation is "questioning initiated by [a] law enforcement officer after a person has been taken into custody

standard); *Sotelo v. Indiana State Prison*, 850 F.2d 1244, 1253 (7th Cir. 1988) (Easterbrook, J. concurring) (same). However, the federal courts of appeal are unanimous that *Miller v. Fenton* requires *de novo* review of such an issue at *both* the federal district *and* federal court of appeals levels. *Sotelo v. Indiana State Prison*, 850 F.2d 1244 (7th Cir. 1988); *Green v. Scully*, 850 F.2d 894, 900 (2d Cir. 1988); *Miller v. Fenton*, 796 F.2d 598, 601 (3rd Cir. 1986).

80. See, e.g., *United States v. Matthews*, 942 F.2d 779, 782 (10th Cir. 1991); *United States v. Wilson*, 894 F.2d 1043 (9th Cir. 1990); *United States v. Shaw*, 894 F.2d 689 (5th Cir. 1990); *United States v. Alvarado*, 882 F.2d 645, 649 (2d Cir. 1989); *United States v. Raymer*, 876 F.2d 383 (5th Cir. 1989); *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988); *United States v. Crespo de Llano*, 830 F.2d 1532, 1541 n.2 (9th Cir. 1987); *United States v. Wolf*, 813 F.2d 970, 974 (9th Cir. 1987); *United States v. Hawkins*, 823 F.2d 1020 (7th Cir. 1987); *United States v. Pelton*, 835 F.2d 1067, 1072 (4th Cir. 1987); *United States v. Fraction*, 795 F.2d 12, 14 (3d Cir. 1986). *But see* Comment, *supra* note 79 (contending that *Miller* does not mandate *de novo* standard on direct review of voluntariness of confession issue in a federal criminal case); *United States v. Arango*, 853 F.2d 818, 824 (11th Cir. 1988) (using "clearly erroneous" standard).

81. *Miller*, 474 U.S. at 116.

82. *People v. Abernathy*, 545 N.E.2d 201, 212 (Ill. App. Ct. 1st Dist. 1989); *People v. Fisher*, 523 N.E.2d 1119 (Ill. App. Ct. 1st Dist. 1988).

83. 384 U.S. 436 (1966).

84. *Id.* at 439.

or otherwise deprived of his freedom of action in any significant way.”⁸⁵

Perhaps the best reason why a finding of “custodial interrogation” should be considered a legal issue subject to *de novo* review was expressed by former Judge Arlin Adams who wrote:

‘Custodial interrogation’ is a legal term of art central to *Miranda* jurisprudence, and a decision whether or not ‘custodial interrogation’ occurred is a matter of law to be determined in accordance with the policies underlying the *Miranda* rule. The legal nature of the determination is evidenced by the numerous Supreme Court decisions deciding whether certain facts constitute “custody” or “interrogation.” (Cite omitted). Accordingly, an appellate court is free to re-examine the trial court’s legal conclusion as to the applicability of the *Miranda* rule. The standard of appellate review does not change simply because the legal determination in a *Miranda* situation depends on the particular facts of each case.⁸⁶

Compare this thoughtful approach to that used by the Illinois Supreme Court in *People v. Brown*.⁸⁷ In deciding whether “custodial interrogation” occurred in that case, the supreme court noted the various factors that need to be weighed and then stated:

As a result of this process, [Illinois appellate] courts have understandably arrived at contradictory conclusions regarding the effect of certain facts (citation omitted). However, when reviewing the trial court’s ruling on a motion to suppress, a court of review should not disturb the court’s finding unless it is manifestly erroneous.⁸⁸

Consider the court’s reasoning. From its apparent lament that Illinois appellate courts have arrived at “contradictory conclu-

85. *Id.* at 444.

86. *United States v. Mesa*, 638 F.2d 582, 591 n.3 (3rd Cir. 1980) (Adams, J., concurring). See also *United States v. Calisto*, 838 F.2d 711, 717-18 (3rd Cir. 1988).

There appears to be a split of authority in the Seventh Circuit. Compare *United States v. Hocking*, 860 F.2d 769, 772 (7th Cir. 1988) (“*de novo*”) with *United States v. Fazio*, 914 F.2d 950, 955 (7th Cir. 1990) (questioning *Hocking*) and *United States v. Levy*, 955 F.2d 1098, 1103 n.5 (7th Cir. 1992) (finding *Hocking* “inconsistent with our existing case law” and applying “clearly erroneous” standard).

The Ninth Circuit finds the question to be essentially factual and thus applies a “clearly erroneous” standard. *United States v. Poole*, 806 F.2d 853 (9th Cir. 1986), amending 794 F.2d 462 (9th Cir. 1986).

87. 554 N.E.2d 216 (Ill. 1990).

88. *Id.*

sions," one might conclude that the court would consider adopting a *de novo* standard in order to insure "consistent application"⁸⁹ of the law. Yet, the court engages in no discussion of what should be the appropriate standard of review; indeed, it does not even characterize the issue as being legal, factual, or a mixed question. Instead, it merely concludes *without any analysis* that "manifestly erroneous" is the standard for reviewing a trial court's decision concerning "custodial interrogation."⁹⁰

No case could better epitomize the Illinois approach to the issue of standards of review. Indeed, it really is not even an "issue" in the eyes of Illinois courts. More often than not, the standard of review is determined by a tired citation, *sans* discussion or analysis.

1) Is There "Custody"?

In determining whether there is "custody" pursuant to the meaning of *Miranda*, the United States Supreme Court's numerous opinions on the issue would suggest that it is a legal question.⁹¹ While several circuits have characterized this issue as either a question of law or a mixed question of fact and law,⁹² Illinois courts have expressly characterized the issue as a question of fact and have applied a manifestly erroneous standard of review.⁹³

2) Is There "Interrogation"?

Any doubt that the issue of "interrogation" requires *de novo* review would appear to have been resolved by the United States

89. See *supra* note 16 and accompanying text.

90. *Brown*, 554 N.E.2d at 220.

91. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420 (1984); *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Orozco v. Texas*, 394 U.S. 325 (1965).

92. See, e.g., *Cobb v. Perini*, 832 F.2d 342, 346 (6th Cir. 1987) (expressly characterizing the issue as legal); *United States v. Griffin*, 922 F.2d 1343, 1347-48 (8th Cir. 1990) (characterizing the issue as a mixed question of law and fact and applying a clearly erroneous standard); *United States v. Torkington*, 874 F.2d 1441, 1445 (11th Cir. 1989) (characterizing the issue as a mixed question of law and fact and applying *de novo* review); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (mixed law and fact and applying clearly erroneous standard).

93. *People v. Gorman*, 565 N.E.2d 1349, 1355 (Ill. App. Ct. 4th Dist. 1991); *People v. Lucy*, 562 N.E.2d 1158, 1163-64 (Ill. App. Ct. 5th Dist. 1990). See also, *People v. Brown*, 554 N.E.2d 216 (Ill. 1990) (applying a manifestly erroneous standard without characterizing the issue); *People v. Foster*, 552 N.E.2d 1112, 1125 (Ill. App. Ct. 5th Dist. 1990) (characterizing the issue as a question of fact); cf. *United States v. Gregory*, 891 F.2d 732, 735 (9th Cir. 1989) (question of fact); *United States v. Lanni*, 951 F.2d 440, 443 (1st Cir. 1991) ("clearly erroneous" standard).

Supreme Court's recent decision in *Pennsylvania v. Muniz*.⁹⁴ Yet, even as early as the Court's decision in *Rhode Island v. Innis*⁹⁵ in 1980, the Court appeared to view "interrogation" as a legal issue. Nevertheless, in 1988 the Illinois Supreme Court held that the issue of what constitutes interrogation under *Miranda* was to be reviewed under a manifestly erroneous standard.⁹⁶

b. The Standard for Reviewing the Adequacy of *Miranda* Warnings

The Ninth Circuit has held that whether a defendant has been given adequate *Miranda* warnings is a question of law to be reviewed *de novo* by an appellate court.⁹⁷ Judge Fletcher noted: "De novo review is appropriate because the adequacy of *Miranda* warnings involves application of a legal standard to a set of facts, which 'require[s] the consideration of legal concepts and involves the exercise of judgment about the values underlying legal principles.'"⁹⁸

Certainly, the United States Supreme Court's treatment of this issue would indicate that it is essentially a legal, rather than factual, question.⁹⁹ Nevertheless, the Illinois Supreme Court, with no analysis, has steadfastly treated this issue as a question of fact subject to a "manifestly erroneous" review.¹⁰⁰

94. 496 U.S. 582 (1990) (deciding interrogation issue without apparently according deference to lower court finding).

95. 446 U.S. 291 (1980) (deciding interrogation issue without apparently according deference to lower court finding).

96. *People v. Enoch*, 522 N.E.2d 1124, 1133 (Ill. 1988). Note that Justice Simon in dissent contended it was a legal issue and that the majority had "abdicated its judicial responsibility" by not resolving the issue. *Id.* at 1138.

97. *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989); *Territory of Guam v. Snaer*, 758 F.2d 1341, 1342 n.1 (9th Cir. 1985); *United States v. Noti*, 731 F.2d 610, 614 (9th Cir. 1984). The Eighth Circuit agrees. *United States v. Caldwell*, 954 F.2d 496, 501 (8th Cir. 1992).

98. *United States v. Doe*, 819 F.2d 206, 210 n.1 (9th Cir. 1985) (Fletcher, J., concurring) (quoting *United States v. McConney*, 728 F.2d 1195, (9th Cir.) (en banc), *modifying* 787 F.2d 1290 (9th Cir. 1985) and 764 F.2d 695 (9th Cir. 1985)).

99. *See Duckworth v. Eagan*, 492 U.S. 195 (1989) (deciding the adequacy of the warnings issue without apparently according the lower court findings any deference); *California v. Prysock*, 453 U.S. 355 (1981) (same).

100. *People v. Martin*, 466 N.E.2d 228, 234 (Ill. 1984); *People v. Burbank*, 291 N.E.2d 161, 164 (Ill. 1972). One Illinois Appellate Court decision has treated this issue as a question of law subject to *de novo* review. *People v. Williams*, 464 N.E.2d 1176, 1177 (Ill. App. Ct. 1st Dist. 1984). The *Williams* court neither engaged in analysis nor acknowledged the line of Illinois Supreme Court cases to the contrary.

c. The Standard for Reviewing the Adequacy of a Waiver of *Miranda*

There is a lively split among the federal circuits concerning the proper standard for reviewing the adequacy of a *Miranda* waiver.

When the Supreme Court in *Miller v. Fenton*¹⁰¹ held that the question of voluntariness of a confession used in a state court trial is subject to *de novo* federal review,¹⁰² it expressly left open the question of whether a federal habeas court must extend a presumption of correctness to a state court's findings on the validity of a defendant's *Miranda* waiver.¹⁰³ Several circuits have explicitly faced this issue and have held that this is a factual determination to which the habeas court owes deference.¹⁰⁴ Several circuits have held that, even on direct review, the validity of a *Miranda* waiver is a factual question to be reviewed under a clearly erroneous standard.¹⁰⁵

Other circuits have held to the contrary. Both the District of Columbia and the Fifth Circuits have ruled that the validity of a *Miranda* waiver is a legal question which an appellate court should review under a *de novo* standard.¹⁰⁶

All of this has been lost on Illinois courts. They have continued to invoke the "manifest error" standard without the slightest indication that any debatable issue exists.¹⁰⁷

101. 474 U.S. 104 (1985).

102. *Id.* at 115.

103. *Id.* at 108 n.3.

104. *Mikel v. Thieret*, 887 F.2d 733, 739 (7th Cir. 1989); *Quadrini v. Clusen*, 864 F.2d 577, 582 (7th Cir. 1989); *Perri v. Director*, 817 F.2d 448, 451 (7th Cir. 1987); *Ahmad v. Redman*, 782 F.2d 409, 412-13 (3rd Cir.), *cert. denied*, 479 U.S. 831 (1986). The Ninth Circuit holds that the inquiry made by a federal court regarding the validity of a *Miranda* waiver made by a state defendant has "two distinct dimensions." *Collazo v. Estelle*, 940 F.2d 411, 415-16 (9th Cir. 1991). The waiver must have been made both "voluntar[ily]" and with "full awareness." *Collazo* holds that the "voluntary" prong is reviewed *de novo*, while the "awareness" prong is reviewed for "clear error." *Id.*

105. See *United States v. Clark*, 943 F.2d 775, 783 (7th Cir. 1991); *United States v. Ingram*, 839 F.2d 1327, 1329 (8th Cir. 1988); *United States v. Wauneka*, 842 F.2d 1083, 1087 (9th Cir. 1988); *United States v. Ricks*, 817 F.2d 692, 697 (11th Cir. 1987); *United States v. Doe*, 819 F.2d 206, 208-09 (9th Cir. 1985); *United States v. Ashby*, 771 F.2d 392, 395 (8th Cir. 1985); *United States v. Vera*, 701 F.2d 1349, 1364 (11th Cir. 1983); *United States v. Dougherty*, 810 F.2d 763, 773 (8th Cir. 1981).

106. *United States v. Raymer*, 876 F.2d 383, 386 (5th Cir. 1989); *United States v. Yunis*, 859 F.2d 953, 957-8 (D.C. Cir. 1988); *United v. Poole*, 495 F.2d 115 (D.C. Cir. 1974). There appears to be a split of authority in the Second Circuit. Compare *United States v. Villegas*, 928 F.2d 512, 518 (2d Cir. 1991) ("*de novo*") with *United States v. Williams*, 936 F.2d 698, 701 (2d Cir. 1991) (district court's finding of waiver must be upheld if "any reasonable view of the evidence supports it"; findings of fact binding unless "clearly erroneous").

107. See *People v. Reid*, 554 N.E.2d 174, 187-88 (Ill. 1990); *People v. Franklin*, 545 N.E.2d

3. *Motions to Suppress Evidence*

a. *Reviewing a Finding of Probable Cause*

In a motion to quash an arrest or to suppress the fruits of a search, the question is often whether or not "probable cause" was established.¹⁰⁸

In the federal system, the United States Supreme Court in *Illinois v. Gates*¹⁰⁹ clearly established that courts must give deference to a magistrate's decision that probable cause exists and a warrant should issue. *Gates* held that so long as the magistrate had a "substantial basis" for his decision that probable cause existed, a reviewing court should defer to that decision.¹¹⁰ *Gates* specifically held that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review."¹¹¹ Federal courts thus use this deferential standard in determining whether a warrant is supported by probable cause.¹¹²

346, 350 (Ill. App. Ct. 1st Dist. 1989); *People v. Bernasco*, 562 N.E.2d 958, 966 (Ill. 1990); *People v. Woidtke*, 587 N.E.2d 1101, 1111 (Ill. App. Ct. 5th Dist. 1992).

108. "Probable cause" is required before the police either obtain an arrest warrant or make a warrantless arrest. "Probable cause" to arrest exists when "the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). "Probable cause" to search exists when, under the "totality of circumstances," there is a "fair probability" that contraband or evidence of a crime would be found. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

109. 462 U.S. 213 (1983)

110. *Id.* at 236.

111. *Id.*

112. At least one circuit has likened this degree of deference to the "clearly erroneous" test. *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988); *United States v. McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986). However, Judge Posner and Judge Easterbrook believe that "substantial basis" review is more stringent than "clearly erroneous" review. Consequently, they have advocated the adoption of the latter test in these circumstances. *United States v. McKinney*, 919 F.2d 405, 418-23 (7th Cir. 1990) (Posner, J., concurring); *United States v. Malin*, 908 F.2d 163, 169-70 (7th Cir. 1990) (Easterbrook, J., concurring, with Posner, J., joining), *cert. denied*, 111 S.Ct. 534 (1990).

There are numerous federal cases which use the *Gates* standard to review the probable cause determination made in a search warrant. *See, e.g.*, *United States v. Barnes*, 909 F.2d 1059, 1068 (7th Cir. 1990); *United States v. Bowling*, 900 F.2d 926, 930 (6th Cir. 1990); *United States v. Martin*, 833 F.2d 752, 754 (8th Cir. 1987); *United States v. Elliott*, 893 F.2d 220, 222 (9th Cir. 1990). Although *Gates* was concerned with search warrants, the same principle has also been applied to arrest warrants. *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988); *St. John v. Justman*, 771 F.2d 445, 448 (10th Cir. 1985).

Note that the district court will be the first court to use the "substantial basis" test at the motion to suppress when reviewing the magistrate's decision to issue the warrant. Several circuits have held that the circuit court owes no particular deference to the district court's

Yet federal circuits have closely divided on what standard of review should be used to review the issue of probable cause when no warrant was involved. Some circuits review probable cause in this situation under a "clearly erroneous" standard of review.¹¹³ Other circuits find "probable cause" to be essentially a legal question. Therefore, they employ a *de novo* standard when considering probable cause in a warrantless situation.¹¹⁴

Again, contrast these approaches with Illinois. The Illinois Supreme Court has adopted the *Gates* standard of review for probable cause in warrant situations and has simply equated it with its long-used "manifestly erroneous" standard.¹¹⁵ Yet, the issue of whether a more stringent standard should be used in a warrantless situation—the issue that has created such a division in the federal circuits—has never been alluded to in the Illinois Supreme Court. It continues to use its boiler-plate "manifestly erroneous" standard without an iota of analysis.¹¹⁶

b. Issues Arising in Cases with Warrants

1) The Standard for Reviewing Whether a Warrant has Sufficient "Particularity"

The Fourth Amendment provides that a warrant must "particularly describ[e] the place to be searched and the persons or things to be seized."¹¹⁷ The purpose of this clause is to confine police

application of the test. In other words, whether a "substantial basis" existed is a question that the circuit court may review *de novo*. *United States v. Lamon*, 930 F.2d 1183, 1187 (7th Cir. 1991); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988). *See also* *Matter of Trinity Indus., Inc.* 898 F.2d 1049, 1050 (5th Cir. 1990).

113. *United States v. Morgan*, 936 F.2d 1561, 1569 (10th Cir. 1991); *United States v. Williams*, 949 F.2d 220, 221 (6th Cir. 1991); *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1508 (6th Cir. 1988); *United States v. Woolbright*, 831 F.2d 1390, 1393 (8th Cir. 1987).

114. *United States v. Cooper*, 949 F.2d 737, 744 (5th Cir. 1991); *United States v. Dunn*, 935 F.2d 1053, 1057 (9th Cir. 1991); *United States v. Patrick*, 899 F.2d 169, 171 (2d Cir. 1990).

The Seventh Circuit "has verbalized conflicting standards of review" on this issue. *See United States v. Holifield*, 956 F.2d 665, 667 (7th Cir. 1992) (collecting cases).

115. *People v. Tisler*, 469 N.E.2d 147, 158 (Ill. 1984).

116. *People v. Williams*, 588 N.E.2d 983, 995 (Ill. 1991); *People v. Evans*, 530 N.E.2d 1360, 1368 (Ill. 1988); *People v. Foster*, 518 N.E.2d 82, 87 (Ill. 1987); *People v. Cabrera*, 508 N.E.2d 708, 712 (Ill. 1987). *See also* *People v. Hunley*, 545 N.E.2d 188, 194 (Ill. App. Ct. 1st Dist. 1989).

117. U.S. CONST. amend. IV.

activity in order to prevent general searches.¹¹⁸ There is federal authority that this is a legal issue requiring *de novo* review.¹¹⁹ Illinois courts, however, appear to have dealt with this issue without articulating any standard of review.¹²⁰

2) The Standard for Reviewing a Trial Judge's Decision to Deny a *Franks* Hearing

In *Franks v. Delaware*,¹²¹ the Supreme Court held that in certain limited situations a defendant may obtain a hearing in order to challenge the veracity of a warrant affidavit. To obtain such a hearing, a defendant must make a "substantial preliminary showing" that the affiant has intentionally or recklessly included a false, material statement in the affidavit.¹²²

Several federal circuits hold that the standard of review when reviewing a trial court's denial of a *Franks* hearing is a deferential, "clearly erroneous" one.¹²³ Yet, at least one circuit has held that this is an essentially legal decision meriting *de novo* review.¹²⁴ The Illinois Supreme Court, in upholding a trial court's denial of a *Franks* hearing, does not even articulate a standard of review.¹²⁵

3) The Standard for Reviewing a Trial Judge's Ruling on the "Good Faith Exception"

In *United States v. Leon*,¹²⁶ the Supreme Court held that even if an affidavit on which a warrant was based was insufficient to

118. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

119. *United States v. Schmidt*, 947 F.2d 362, 371 (9th Cir. 1991); *United States v. Gahagan*, 865 F.2d 1490, 1496 (6th Cir. 1989); *United States v. McLaughlin*, 851 F.2d 283, 285 (9th Cir. 1988); *United States v. Fannin*, 817 F.2d 1379, 1381 (9th Cir. 1987); *United States v. McClintock*, 748 F.2d 1278, 1282 (9th Cir. 1984).

120. *People v. Rixie*, 546 N.E.2d 52, 58-59 (Ill. App. Ct. 2d Dist. 1989); *People v. Allbritton*, 502 N.E.2d 83, 85 (Ill. App. Ct. 3d Dist. 1986); *People v. Raicevich*, 377 N.E.2d 1266, 1270 (Ill. App. Ct. 3d Dist. 1978); *People v. Mitchell*, 377 N.E.2d 1073, 1076 (Ill. App. Ct. 1st Dist. 1978).

121. 438 U.S. 154 (1978).

122. *Id.* at 155-56, 171-72.

123. *United States v. Pace*, 898 F.2d 1218, 1226-27 (7th Cir. 1990); *United States v. Rumney*, 867 F.2d 714, 720 (1st Cir. 1989); *United States v. Cancela*, 812 F.2d 1340, 1343 (11th Cir. 1987); *United States v. Mastroianni*, 749 F.2d 900, 909-10 (1st Cir. 1984).

124. *United States v. Tedford*, 875 F.2d 446, 448 (5th Cir. 1989); *United States v. Whitworth*, 856 F.2d 1268, 1280 (9th Cir. 1988); *United States v. Johns*, 851 F.2d 1131, 1133 (9th Cir. 1988).

125. *People v. Eyler*, 549 N.E.2d 268, 282 (Ill. 1989) (holding only that the trial court's denial of a *Franks* hearing was "not erroneous").

126. 468 U.S. 897 (1984).

establish probable cause, evidence seized pursuant to the warrant could nevertheless be introduced in the prosecution's case-in-chief. This could occur if the evidence was obtained by law enforcement officers acting in objectively reasonable reliance on a search warrant that had been issued by a detached and neutral magistrate.¹²⁷

Federal circuit courts have faced the issue of the appropriate standard of review in examining a district court's decision as to whether or not an officer acted in objective good faith. The Fifth Circuit analogized the question to one of "good faith" qualified immunity from civil rights actions brought under 42 U.S.C. § 1983.¹²⁸ In that area, the Supreme Court held the issue to be an "essentially legal question."¹²⁹ So, too, the Fifth Circuit found the "good faith" issue in *Leon* to be a legal question meriting *de novo* review.¹³⁰ Other circuits facing the issue have also opted for *de novo* review.¹³¹ Illinois courts do not appear to have articulated a standard of review on this question.¹³²

c. Issues Arising in Cases Without Warrants

1) The Standard for Reviewing Whether "Exigent Circumstances" Will Excuse a Warrant

As a general rule, probable cause alone will not justify a search or seizure; there must also be a warrant.¹³³ One exception to the warrant requirement is the existence of exigent circumstances. Exigent circumstances are factors which "militate against delay and

127. *Id.* at 924-26.

128. *United States v. Maggitt*, 778 F.2d 1029, 1034-35 (5th Cir. 1985).

129. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

130. *Maggitt*, 778 F.2d at 1034-35. *See also* *United States v. McKnight*, 953 F.2d 898, 905 (5th Cir. 1992).

131. *United States v. Bowling*, 900 F.2d 926, 930 (6th Cir. 1990); *United States v. Corral-Corral*, 899 F.2d 927, 928 (10th Cir. 1990); *United States v. Freitas*, 856 F.2d 1425, 1428 (9th Cir. 1988); *United States v. Leary*, 846 F.2d 592, 606 (10th Cir. 1988); *United States v. Fama*, 758 F.2d 834, 837 (2d Cir. 1985); *United States v. Accardo*, 749 F.2d 1477, 1481 (11th Cir. 1985); *United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984); *United States v. Sager*, 743 F.2d 1261, 1265 (8th Cir. 1984).

132. *People v. Bohan*, 511 N.E.2d 1384 (Ill. App. Ct. 2d Dist. 1987); *People v. Rehkopf*, 506 N.E.2d 435 (Ill. App. Ct. 2d Dist. 1987); *People v. Stewart*, 473 N.E.2d 1227 (Ill. 1984).

133. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (stating that "the police must, whenever practicable, obtain advance judicial approval of search and seizures through the warrant procedure, . . . [and] in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." *Id.* at 20.

justif[y] the officer's decision to proceed without a warrant."¹³⁴ Courts have, from time to time, established factors which justify acting without a warrant.¹³⁵

The majority of federal circuits that have squarely addressed the question find the proper standard of review to be *de novo* because of the legal analysis required.¹³⁶ Although there is conflict in the cases, a 1981 Illinois Supreme Court case that has never been overruled holds that the issue is reviewed under a "manifestly erroneous" standard.¹³⁷

4. Seizures

One of the most litigated issues at criminal trials concerns the constitutionality of seizures. If a defendant has been improperly seized, then the evidence recovered pursuant to that seizure must be suppressed.¹³⁸ Consequently, it is crucial to determine the proper standard of review for a seizure issue. Again, while the federal courts have recently conducted a lively debate on these issues, Illinois courts show no awareness of these issues.

a. Did a "Seizure" Occur?

Not every contact between a police officer and a citizen constitutes a "seizure" under the Fourth Amendment. As the United States Supreme Court recently stated:

134. *People v. White*, 512 N.E.2d 677, 685 (Ill. 1987) citing *People v. Abney*, 407 N.E.2d 543 (Ill. 1980).

135. For a representative list, see, e.g., *People v. Spicer*, 516 N.E.2d 491, 496-97 (Ill. App. Ct. 1st Dist. 1987).

136. The circuits using the *de novo* standard include the Sixth Circuit (*United States v. Straughter*, 950 F.2d 1223, 1230 (6th Cir. 1991) and *United States v. Sangineto-Niranda*, 859 F.2d 1501, 1512 (6th Cir. 1988)); Ninth Circuit (*United States v. Sarkissian*, 841 F.2d 959, 962 (9th Cir. 1988) and *United States v. Andersson*, 813 F.2d 1450, 1454-55 (9th Cir. 1987)); and Tenth Circuit (*United States v. Stewart*, 867 F.2d 581, 584 (10th Cir. 1989) and *United States v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986)).

Those circuits choosing "clearly erroneous" review include the Second Circuit (*United States v. Atherton*, 936 F.2d 728, 732 (2d Cir. 1991) and *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990) (*en banc*)) and Fifth Circuit (*United States v. Vasquez*, 953 F.2d 176, 179 (5th Cir. 1992)).

The First Circuit reviews a lower court's finding of exigency to determine whether it is "proper." *United States v. Beltran*, 917 F.2d 641, 642 (1st Cir. 1990).

137. *People v. Holloway*, 426 N.E.2d 871, 877 (Ill. 1981). See also *People v. Chambers*, 558 N.E.2d 274, 281 (Ill. App. Ct. 1st Dist. 1990). But see, *People v. Foskey*, 554 N.E.2d 192, 197 (Ill. 1990) (stating in dictum that the issue should be reviewed *de novo* if neither the facts nor credibility of the witnesses is questioned); *People v. Abney*, 407 N.E.2d 543, 547 (Ill. 1980).

138. See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963).

[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.¹³⁹

In making this determination, courts have considered a variety of factors.¹⁴⁰

Federal courts have engaged in sophisticated analyses of the proper standard of review on this issue. Some courts have emphasized the essentially fact-bound nature of the decision and thus have supported a "clearly erroneous" standard; others have stressed that the objective nature of the inquiry involves more of a legal judgment that requires *de novo* review to ensure consistency.¹⁴¹ Illinois courts have taken no part in this national legal debate. Without any analysis, they simply continue to use the "manifestly erroneous" standard.¹⁴²

b. If a "Seizure" Occurred, Was it Lawful?

If there is no "seizure," then the Fourth Amendment is not implicated. If, however, a court characterizes police activity as a

139. *Florida v. Bostick*, 111 S.Ct. 2382, 2389 (1991).

140. One court identified some of the relevant factors as "the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room." *United States v. Hooper*, 935 F.2d 484, 491 (2d Cir. 1991) (quoting *United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990)).

141. Three circuits will uphold a district court's decision unless it is clearly erroneous: Fourth Circuit (*United States v. Wilson*, 953 F.2d 116, 121 (4th Cir. 1991)); Fifth Circuit (*United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1099 (5th Cir. 1991)); Sixth Circuit (*United States v. Taylor*, 956 F.2d 572, 576 (6th Cir. 1992) (*en banc*)).

Three circuits use a *de novo* standard of review: District of Columbia Circuit (*United States v. Jordan*, 951 F.2d 1278, 1281 (D.C. Cir. 1991)); Second Circuit (*United States v. Springer*, 946 F.2d 1012, 1015 (2d Cir. 1991)); Eighth Circuit (*United States v. McKines*, 933 F.2d 1412, 1424-26 (8th Cir. 1991) (*en banc*)).

The Ninth Circuit appears split. *Compare* *Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987) (*de novo*) with *United States v. Erwin*, 803 F.2d 1505, 1508 (9th Cir. 1986) ("clearly erroneous").

For cogent arguments on this close issue, compare *United States v. Maragh*, 894 F.2d 415, 417-18 (D.C. Cir. 1990) (*de novo*) and *United States v. McKines*, 933 F.2d 1412, 1424-26 (8th Cir. 1991) (*en banc*) (*de novo*) with *United States v. Maragh*, 894 F.2d 415, 422 (D.C. Cir. 1990) (Mikva, J., dissenting) ("clearly erroneous") and *United States v. McKines*, 933 F.2d 1412, 1419-22 (8th Cir. 1991) (*en banc*) (Beam, J., dissenting) ("clearly erroneous").

142. *People v. Redd*, 553 N.E.2d 316, 332 (Ill. 1990); *People v. Murray*, 560 N.E.2d 309, 311 (Ill. 1990); *People v. Salome*, 559 N.E.2d 1129, 1133 (Ill. App. Ct. 4th Dist. 1990).

“seizure,” the next question is whether the seizure was reasonable under the Fourth Amendment. There are two questions: 1) is there a seizure? and 2) if so, is it reasonable? Because these are two separate questions, a court may utilize two different standards of review. For example, in *United States v. Wilson* the Fourth Circuit used a “clearly erroneous” standard of review in considering the district court’s finding that a seizure had occurred.¹⁴³ Yet, once it affirmed the district court’s finding that a seizure had occurred, it used a *de novo* standard in determining whether the seizure was legal.¹⁴⁴ As Judge Abner Mikva of the United States Court of Appeals for the District of Columbia expressed it, “The factual question of whether a seizure has occurred should not be confused with the legal conclusion of whether the seizure was lawful.”¹⁴⁵ Several courts have recognized the propriety of applying a *de novo* standard of review to the issue of legality of a seizure.¹⁴⁶

Illinois courts do not appear to recognize a distinction between these two very different questions. These courts paint all issues arising out of a Fourth Amendment suppression hearing with a “manifestly erroneous” brush.¹⁴⁷

c. The Standard for Reviewing a Warrantless Seizure Under the “Plain View” Doctrine

The “plain view” doctrine allows the police to make a warrantless seizure of an object if the police are lawfully in the place where the item is located and if the object’s incriminating character is “immediately apparent.”¹⁴⁸ The Supreme Court has not explicitly adopted a standard of review on this issue. However, in *Horton v. California*¹⁴⁹ the court stressed the “objective standards of conduct”¹⁵⁰ necessary in analyzing this issue, which might suggest the need for uniformity through *de novo* review. At least one circuit has held that *de novo* is the proper standard of review.¹⁵¹

143. 953 F.2d 116, 121 (4th Cir. 1991).

144. *Id.* at 124.

145. *Maragh*, 894 F.2d at 420 (Mikva, J., dissenting).

146. In addition to *United States v. Wilson*, 953 F.2d 116, 124 (4th Cir. 1991), see *United States v. Mines*, 883 F.2d 801, 803 (9th Cir. 1989); *United States v. Campbell*, 843 F.2d 1089, 1092 (8th Cir. 1988); *United States v. Ibarra*, 955 F.2d 1405, 1409 (10th Cir. 1992).

147. See cases cited *supra* note 142.

148. *Horton v. California*, 496 U.S. 128 (1990).

149. *Id.*

150. *Id.*

151. *United States v. Disla*, 805 F.2d 1340, 1346 (9th Cir. 1986); *United States v. Merriweather*, 777 F.2d 503, 505 (9th Cir. 1985).

Illinois, with no discussion, uses the "manifestly erroneous" standard.¹⁵²

B. The Standard for Reviewing a Claim of Ineffective Assistance of Counsel

Here, the United States Supreme Court has been quite clear in characterizing this question as a mixed question of law and fact.¹⁵³ Consequently, there is ample federal authority for reviewing this issue *de novo*.¹⁵⁴ However, at least one Illinois court, with no discussion, has used a "manifestly erroneous" standard.¹⁵⁵

C. The Standard for Reviewing the Waiver of the Right to Counsel

The United States Supreme Court appears to view the issue of waiver of counsel as a mixed question of law and fact. The Court in *Brewer v. Williams*¹⁵⁶ characterized the issue of the waiver of counsel as "not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires 'application of constitutional principles to the facts as found. . .'"¹⁵⁷ Consequently, there are federal courts that review the issue *de novo*.¹⁵⁸ However, Illinois courts merely determine whether the manifest weight of the evidence supports the trial court's determination.¹⁵⁹

D. The Standard of Review for Determining Whether a Defense Attorney Labored Under a Conflict of Interest

The United States Supreme Court has held that the ultimate issue of whether a defense lawyer engaged in multiple representation

152. *People v. Wilson*, 506 N.E.2d 571 (Ill. 1987).

153. *Strickland v. Washington*, 466 U.S. 668, 697-98 (1984).

154. *Fields v. Attorney Gen. of Md.*, 956 F.2d 1290, 1297 n.18 (4th Cir. 1992); *Reese v. Fulcomer*, 946 F.2d 247, 253-54 (3d Cir. 1991); *United States v. Elias*, 937 F.2d 1514, 1520 (10th Cir. 1991); *Crowe v. Sowders*, 864 F.2d 430, 433 (6th Cir. 1989); *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1251 (9th Cir. 1989); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989).

155. *People v. Brandon*, 510 N.E.2d 1005, 1013 (Ill. App. Ct. 1st Dist. 1987).

156. 430 U.S. 387 (1977).

157. *Id.* at 403.

158. *See, e.g., United States v. Burson*, 952 F.2d 1196, 1199 (10th Cir. 1991); *see also Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir. 1986).

159. *E.g., People v. Smith*, 414 N.E.2d 1281, 1289-90 (Ill. App. Ct. 2d Dist. 1980) (applying manifest weight standard to question of whether the defendant knowingly and voluntarily waived his sixth amendment right to counsel); *People v. Beamer*, 376 N.E.2d 368, 371 (Ill. App. Ct. 2d Dist. 1978) (holding that the trial court's finding that the defendant knowingly and voluntarily waived his fifth amendment right to counsel was not against the manifest weight of the evidence).

constituting a conflict of interest is a mixed question of law and fact.¹⁶⁰ There is federal authority for application of a *de novo* standard of review.¹⁶¹ Illinois courts do not seem to have articulated a standard of review for this issue.¹⁶²

The preceding list is by no means exhaustive.¹⁶³ And again, the point is not that Illinois is necessarily wrong on every issue. The problem is that Illinois courts *refuse to acknowledge* the conflicts involving standards of review in criminal cases. Moreover, by refusing to acknowledge the conflicts, they also avoid providing principled reasons for the positions they hold. Illinois courts have for years abdicated their responsibility in this key area of the law.

IV. TWO WAYS TO AVOID APPLICATION OF ILLINOIS' "MANIFESTLY ERRONEOUS" STANDARD OF REVIEW ON SUPPRESSION MOTION DECISIONS

As illustrated above, a party challenging a trial court's ruling on a suppression motion faces a difficult task on appeal. Illinois severely limits the review of all aspects of a suppression decision; an appellate court must accept all parts of the ruling below unless there is "manifest error."

160. *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980).

161. There is dispute among the current members of the United States Supreme Court as to whether the Court has determined that *de novo* review is appropriate for deciding the issue in the context of a federal habeas corpus petition from a state court conviction. See *Wright v. West*, 112 S.Ct. 2482 (1992).

At least two federal circuits use *de novo* review for the ultimate legal determination: the Tenth Circuit (*United States v. Sutar Roofing, Inc.*, 897 F.2d 469, 480 (10th Cir. 1990)) and the Third Circuit (*United States v. Gambino*, 864 F.2d 1064, 1071 n.3 (3d Cir. 1988)).

162. See, e.g., *People v. Williams*, 563 N.E.2d 431 (Ill. 1990); *People v. Ruiz*, 547 N.E.2d 170 (Ill. 1989); *People v. Spreitzer*, 525 N.E.2d 30 (Ill. 1988).

163. Other examples of Illinois being at odds with federal courts on a standard of review include whether evidence is sufficiently attenuated from an illegal search or seizure to be considered "untainted" (compare *United States v. Johns*, 891 F.2d 243, 244 (9th Cir. 1989) (mixed question; *de novo*) with *People v. Lekas*, 508 N.E.2d 221, 238 (Ill. App. Ct. 1st Dist. 1987)); the propriety of a Terry stop (compare *United States v. Webb*, 950 F.2d 226, 229 (5th Cir. 1991) (*de novo*) and *United States v. Franco-Munoz*, 952 F.2d 1055, 1056 (9th Cir. 1991) (*de novo*) with *People v. Galvin*, 535 N.E.2d 837, 843 (Ill. 1989) (manifestly erroneous); sufficiency of the indictment (compare *United States v. Shelton*, 937 F.2d 140, 142 (5th Cir. 1991) (*de novo*) and *Frank v. United States*, 914 F.2d 828, 830 (7th Cir. 1990) (*de novo*) with *People v. Thingvold*, 584 N.E.2d 89, 91 (Ill. 1991) (standard applied depends on when the defendant first challenges the indictment or information)).

Illinois advocates should carefully read Justice O'Connor's concurring opinion in *Wright*, 112 S.Ct. at 2493. Her opinion catalogs numerous habeas corpus decisions of the United States Supreme Court dealing with a variety of issues all of which, she avers, used a *de novo* standard of review. Her opinion would support an argument that a particular issue is a mixed question of law and fact which Illinois should choose to review with a *de novo* standard.

Yet there is hope for an appellant. There are two ways a party appealing an adverse decision on a suppression motion can obtain a more favorable *de novo* standard of review.

A. If the Party Challenging a Lower Court's Decision on a Suppression Motion Does Not Challenge Either the Credibility or the Testimony of the Prevailing Party's Witnesses, the Lower Court's Decision is Subject to *De Novo* Review

There is authority in Illinois that an appellate court will review a lower court's suppression motion decision *de novo* if the substance of the testimony itself is not challenged. For example, in *In re D.G.*¹⁶⁴ the appellant challenged the trial court's finding that probable cause supported his arrest. Although conceding that usually the standard of review for a suppression motion is "manifestly erroneous," the Illinois Supreme Court found this case to be different because "where neither the facts nor credibility of the witnesses is contested, the issue of whether probable cause exists is a legal question which a reviewing court may consider *de novo*."¹⁶⁵ The Illinois Supreme Court has ruled similarly in at least two other cases.¹⁶⁶ The Appellate Court has likewise recognized this exception.¹⁶⁷

Two points merit discussion. The first is why so few cases use the exception. It would not seem rare for a party challenging a suppression decision to be willing to argue that, even if the facts were viewed in the least favorable light, the court below simply made a legal error. The paucity of such cases might reflect the general lack of interest Illinois courts (and perhaps lawyers) seem to have in standards of review in criminal cases.

164. 581 N.E.2d 648 (Ill. 1991).

165. *Id.* at 649.

166. *People v. Foskey*, 554 N.E.2d 192, 197 (Ill. 1990) (exigent circumstances); *People v. Abney*, 407 N.E.2d 543, 547 (Ill. 1980) (exigent circumstances).

167. *People v. Galdine*, 571 N.E.2d 182, 187 (Ill. App. Ct. 2d Dist. 1991) (warrantless search); *People v. Froio*, 555 N.E.2d 770, 773 (Ill. App. Ct. 2d Dist. 1990) (*Terry* stop); *People v. Graves*, 553 N.E. 2d 810, 812 (Ill. App. Ct. 2d Dist. 1990) (seizure).

There is some ambiguity both in these cases and in those cited in notes 155-56, *supra*, concerning *which party* is not "contesting" the facts and credibility of the witnesses. One court has specifically applied the exception when it was the defendant who did not challenge any of the testimony. *People v. Ocon*, 581 N.E.2d 892, 894 (Ill. App. Ct. 1991). There are cases, however, that have applied the *de novo* standard after finding that the *trial court* found the facts were undisputed. *People v. Clark*, 494 N.E.2d 166, 168 (Ill. App. Ct. 3d Dist. 1986); *People v. Sain*, 461 N.E.2d 1043, 1046 (Ill. App. Ct. 2d Dist. 1984).

Second, it might be asked *why* Illinois has chosen to carve out this small “*de novo*” exception in this particular category of cases. Illinois, as discussed earlier, generally uses a “manifestly erroneous” standard on all issues, both factual and legal, involved at a suppression hearing.¹⁶⁸ It thus gives trial courts a substantial amount of leeway in their decisions. The choice to exercise *de novo* review is a choice to bring more uniformity to an area of law.¹⁶⁹ It is difficult to understand why this one particular category of suppression cases—those in which neither the facts nor credibility of the witnesses is contested—should be a better candidate for *de novo* review than any other category. There is no guarantee, of course, that a case with no factual dispute will contain a legal issue which requires any large-scale uniformity. Moreover, an appellate court *always* has the power to eliminate any factual dispute in a case. It could, for example, simply review the evidence in the light most favorable to the prevailing party below¹⁷⁰ and then decide the legal issue *de novo*. Or it could adopt the “*clearly erroneous/de novo*” standard used by several federal circuits—that is, review factual findings made at a suppression hearing under a clearly erroneous standard and review all legal issues under a *de novo* standard.¹⁷¹

The exception lacks a principled rationale. Nevertheless, it is “good law” in Illinois. A party challenging the propriety of a suppression court’s ruling should seriously consider explicitly telling the appellate court that it is challenging neither the facts nor the credibility of the witnesses at the hearing; thus, pursuant to Illinois Supreme Court authority, the appellate court should exercise *de novo* review.

B. *De Novo* Review May Be Proper when the Trial Court Decides a Suppression Motion Without Properly Stating its Findings of Fact and Law

There is a second possible way to obtain *de novo* review of the decision of a suppression motion. The Illinois Code of Criminal Procedure provides that an order granting or denying a suppression

168. See *supra* notes 58-67 and accompanying text.

169. See *supra* notes 14-23 and accompanying text.

170. Compare the standard for reviewing sufficiency of the evidence claims in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

171. See *supra* note 68 and accompanying text.

motion should state the findings of fact and conclusions of law upon which the order is based.¹⁷² A problem arises when an appellate court is faced with a decision without these required findings.

There is a line of authority in Illinois which holds that in such a situation testimony supporting the trial court's decision should be accepted unless clearly unreasonable. However, the appellate court owes no deference to the trial court's legal determinations and can review those findings *de novo*. Several Illinois Supreme Court cases support this rule.¹⁷³

Thus, a second strategy for obtaining *de novo* review is for the appellant to contend that the trial court has not complied with Section 114-12(e) of the Illinois Revised Statutes.

V. TWO STRATEGIES FOR THE FUTURE

A. Convincing Illinois Courts to Recognize "Mixed Questions of Law and Fact"

If Illinois appellate courts are ever going to adopt better calibrated, more sophisticated standards of review in criminal cases, they will need Illinois criminal appellate lawyers to begin raising better standard of review issues. Perhaps the single most important task for appellate lawyers is to urge Illinois courts to begin to recognize that "grey area" between legal and factual issues, the "mixed question of law and fact."

The standard of review for "mixed question of law and fact" is one of the most hotly contested issues now being argued in federal courts. As noted in the Introduction, during this past term the United States Supreme Court granted certiorari in *Wright v. West*¹⁷⁴ to decide the proper standard of review for mixed questions presented in a federal habeas petition from a state court judgment.

172. ILL. REV. STAT. ch. 38, § 114-12(e)(1991).

173. *People v. Clark*, 440 N.E.2d 869, 871 (Ill. 1982); *People v. DeMorrow*, 320 N.E.2d 1, 5-6 (Ill. 1974); *People v. Haskell*, 241 N.E.2d 430, 433 (Ill. 1968), *overruled on other grounds*, *People v. Nunn*, 304 N.E. 2d 81 (Ill. 1973).

This line of authority appears distinguishable from another set of cases in which the trial court's factual findings were criticized for not being "more specific." *People v. Brown*, 554 N.E.2d 216, 220 (Ill. 1990); *People v. Winters*, 454 N.E.2d 299 (Ill. 1983). In these cases, the Supreme Court either found that the evidence supported the trial court's decision (*see Brown*, 554 N.E.2d at 220) or presumed that the trial court credited only the testimony that supported its ruling (*see Winters*, 454 N.E.2d at 303).

174. 112 S.Ct 2482 (1992).

Although the Supreme Court decided the case without reaching that issue, dictum throughout the Court's several opinions showed that the justices were badly split on the question.¹⁷⁵ A recent law review article discussing what should be the proper standard of review for mixed questions stated that this issue has created a "troublesome and divisive conflict among the federal circuits."¹⁷⁶

A LEXIS search of recent federal cases shows how frequently the "mixed question" concept arises. According to LEXIS, during a recent eighteen month period the phrases "mixed question of law and fact" and "mixed question of fact and law" can be found in 588 federal cases.¹⁷⁷ During that same period those phrases appear in only four Illinois cases.¹⁷⁸ In fact, a search of the *entire Illinois case law database* revealed that those phrases have been used in only 174 Illinois cases, both civil and criminal.¹⁷⁹

It is astonishing how seldom Illinois courts ever refer to a "mixed question." Illinois cases can be found referring to issues such as the following as "mixed questions": probable cause to arrest;¹⁸⁰ probable cause to search;¹⁸¹ and jury impartiality.¹⁸² But even on those rare occasions when an issue is characterized as a "mixed question," the decisions rarely recognize that this might have an impact in the area of standard of review.¹⁸³

175. Chief Justice Rehnquist, Justice Thomas, and Justice Scalia contended that the court had never squarely decided whether mixed questions in a state habeas corpus case should be reviewed *de novo*. *Wright*, 112 S.Ct. at 2489 n.6 (Thomas, J., announcing judgment of the court) (decided June 19, 1992). On the other hand, Justices O'Connor, Blackmun, and Stevens said the court had long ago held that *de novo* was the proper standard of review. *Id.* at 2493 (O'Connor, J., concurring in the judgment). Justice Kennedy agreed with O'Connor, Blackmun, and Stevens. *Id.* at 2498 (Kennedy, J., concurring in the judgment). Justices Souter and White did not reach the issue even in dictum. *See Id.* at 2493 (White, J., concurring in the judgment); *Id.* at 2500 (Souter, J., concurring in the judgment).

176. Evan Tsen Lee, *Principled Decision Making And The Proper Role Of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S.CAL. L.REV. 235, 235 (1991).

177. LEXIS search conducted July 2, 1992, under "GENFED" and "CURRNT."

178. LEXIS search conducted July 2, 1992, for Illinois cases decided after 1990.

179. LEXIS search conducted July 2, 1992.

180. *See, e.g., In re D.G.*, 581 N.E.2d at 649; *People v. Lee*, 502 N.E.2d 399, 404 (Ill. App. Ct. 1st Dist. 1986); *People v. Strauser*, 496 N.E.2d 1131, 1133 (Ill. App. Ct. 1st Dist. 1986); *People v. Eyler*, 477 N.E.2d 774, 779 (Ill. App. Ct. 2d Dist. 1985); *People v. Loftus*, 444 N.E.2d 834, 837 (Ill. App. Ct. 4th Dist. 1983); *People v. Lippert*, 432 N.E.2d 605, 607 (Ill. 1982); *People v. Exum*, 47 N.E.2d 56, 60 (Ill. 1943); *People v. Duchant*, 19 N.E.2d 590, 592 (Ill. 1939).

181. *People v. McClanahan*, 547 N.E.2d 681, 685 (Ill. App. Ct. 4th Dist. 1989).

182. *People v. Taylor*, 462 N.E.2d 478, 484 (Ill. 1984).

183. *See, e.g., In re D.G.*, 581 N.E.2d at 649 (finding probable cause to arrest to be a mixed question but, in dictum and with no analysis, accepting "manifestly erroneous" as the

Recognizing the concept of the "mixed question of law and fact" would constitute an important step for the review of criminal cases in Illinois appellate courts. Because it is so frequently used in other jurisdictions,¹⁸⁴ it is imperative that Illinois courts also utilize it.

B. Revision of Supreme Court Rule 341

The blame for the sorry state of standards of review in Illinois criminal cases does not rest solely with the judiciary. Appellate lawyers must also accept part of the responsibility. Advocates on both sides must raise and develop standard of review issues to aid courts in their decisions.

Merely encouraging advocates to raise standard of review issues is not enough. Instead, it should be mandatory that every issue in every brief must include the proper standard of review. Language similar to the following from the Ninth Circuit's rules¹⁸⁵ should be added to Illinois Supreme Court Rule 341:¹⁸⁶ "[W]ith respect to each contention raised on appeal, each party shall identify the proper standard of review on appeal at the outset of the discussion of that contention. (*E.g.*, "abuse of discretion," "clearly erroneous," "substantial evidence in the record as a whole," "de novo review.").

In those cases where the standard of review is not clear, this point should be raised and discussed by both sides. In this way, Illinois would develop a dialogue on standards of review.

Of course, discussions in the parties' briefs would be futile if they were ignored by the appellate court. Thus, all appellate courts in Illinois should agree to begin *each issue* in *each case* with a discussion of the appropriate standard of review. Again, the Ninth Circuit proves an appropriate model. In every published opinion,

usual standard of review); *People v. Strauser*, 496 N.E.2d at 1133-34 (applying "manifestly erroneous" standard of review to "mixed question of law and fact" of probable cause to arrest using no special analysis). *But see* *People v. Taylor*, 462 N.E.2d 478, 484 (Ill. 1984) (relying on United States Supreme Court authority to hold that mixed question of "jury impartiality" was subject to independent evaluation by an appellate court).

184. For a useful list, see Justice O'Connor's recent concurring opinion in *Wright*, 112 S.Ct. at 2493 (O'Connor, J., concurring).

185. Rules of the United States Court of Appeals for the Ninth Circuit, Rule 13(b)(2)A.

186. The new language should become the second and third sentences of Illinois Supreme Court Rule 341(e)(7). ILL. REV. STAT. ch. 110A, ¶ 341(e)(7)(1991). It will also apply to briefs filed by appellees and other parties by operation of Illinois Supreme Court Rule 341(f). ILL. REV. STAT. ch. 110A, ¶ 341(f)(1991).

the standard of review for each issue is precisely set out.¹⁸⁷

Thus, by both requiring advocates to raise standard of review issues and courts to decide such issues, Illinois criminal appellate decisions will be greatly improved.

VI. CONCLUSION

Illinois advocates and judges have for too long ignored the area of standards of review in criminal appellate decisions. It is time not only to distinguish factual questions from legal questions, but also to recognize that numerous issues are "mixed questions of law and fact" requiring separate, special consideration. It is time for both Illinois appellate courts and Illinois appellate advocates to begin this task.

187. See, e.g., *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (see section entitled "Standard of Review").

