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REASONABLE DOUBT REDUX: THE RETURN OF SUBSTANTIVE CRIMINAL APPELLATE REVIEW IN ILLINOIS

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INTRODUCTION

The shocking number of men on Illinois' death row recently exonerated has provoked a remarkable inquiry into the flaws in our criminal justice system. Into a debate over criminal justice once dominated by calls for harsher sentences, accelerated appeals, and the weakening of constitutional guarantees, serious consideration is being given—for nearly the first time—to the question of why our justice system so often permits the conviction of the innocent.[1] Courts, legislatures, and commissions are all pondering procedural reforms which might address some of the most common causes of wrongful conviction.[2]

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1. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (detailing cases of wrongfully convicted individuals who were eventually exonerated); George F. Will, *Innocent On Death Row*, WASH. POST, Apr. 6, 2000, at A23, *available in* 2000 WL 2295245 (noting that Scheck's book describes "true stories of blighted lives and justice traduced" by the conviction of innocent capital defendants and "should change the argument about capital punishment and other aspects of the criminal justice system. Conservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order").

2. *See, e.g.*, Ken Armstrong & Steve Mills, *String of Exonerations Spurs Legislative, Judicial Panels to Study Reforms*, CHI. TRIB., Nov. 16, 1999, at N8, *available in* 1999 WL 2932558 (noting that the "Illinois General Assembly and Illinois Supreme Court have . . . created four committees to study the death penalty"); Bob Chiarito, *House Panel Set to Consider Moratorium on Executions*, CHI. DAILY L. BULL., Jan. 26, 2000, at 3 (discussing a proposed bill "that would create an eight-member commission to study the law governing

However, one source of the wrongful conviction of the innocent—and a possible remedy to it—has been overlooked. Illinois courts of review have always had the power to reverse criminal convictions outright where the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt,"[3] and where the evidence does not leave the appellate court with an "abiding conviction of guilt."[4] Until the 1980's, Illinois courts exercised that power frequently—even if somewhat cautiously. Subsidiary rules and precedents which were applied to several categories of cases recognized as likely to involve the conviction of the innocent guided the courts in their exercise of that power. These categories included convictions based upon: (1) hearsay, (2) uncorroborated statements of the defendant, (3) accomplice testimony, (4) circumstantial evidence, (5) doubtful identification testimony, (6) conflicting or confusing testimony by multiple witnesses, (7) incredible testimony by a single witness, and (8) evidence marred by the failure either to call certain witnesses or to produce certain evidence. This article will show that for most of their history, the Illinois courts have frequently reversed convictions in all eight of these categories.

In the mid-1980's, however, the tide began to turn. First, in *People v. Collins*,[5] and then in *People v. Young*,[6] the Illinois Supreme Court—citing the United States Supreme Court *habeas* case of *Jackson v. Virginia*[7]—adopted additional language and standards which implied a far more deferential standard of substantive review. This additional language does not require the reviewing court to "'ask itself whether it believes that the evidence

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the death penalty and its administration"); Ryan Keith, *Task Force on Capital Cases Calls for Videotaping of Suspects*, CHI. TRIB., Mar. 16, 2000, at M6, *available in* 2000 WL 3646355 (summarizing proposed "legislation that would give defendants in capital cases more legal rights"); Steve Mills & Ken Armstrong, *Prosecutors Under Glare at Reform Hearing*, CHI. TRIB., Jan. 28, 2000, at N20, *available in* 2000 WL 3631173 (noting that during hearings on the reform of the Illinois death penalty system, it was suggested that an independent commission be formed "to investigate wrongful convictions"); Evan Osnos & David Heinzmann, *Death Penalty Remains an Option: Ryan's Execution Halt Won't Deter Prosecutors*, CHI. TRIB., Jan. 31, 2000, *available in* 2000 WL 3631835 (stating that Illinois Governor George Ryan "intends to postpone any executions by granting reprieves to Death Row inmates until a special panel can be created"); Maurice Possley & Ken Armstrong, *Revamp Urged in Handling of Capital Cases: Study Seeks Higher Attorney Standards*, CHI. TRIB., Nov. 4, 1999, at N1, *available in* 1999 WL 2928957 (describing efforts for the "[c]reation of a special capital litigation trial bar").

3. People v. Semenick, 195 N.E. 671, 672 (Ill. 1935).

4. People v. Ricili, 79 N.E.2d 509, 511 (Ill. 1948).

5. 478 N.E.2d 267, 276-77 (Ill. 1985). *Collins* involved accomplice testimony. *Id.* at 277.

6. 538 N.E.2d 453 (Ill. 1989).

7. 443 U.S. 307 (1979).

at trial established guilt beyond a reasonable doubt.'"[8] Instead, the relevant question is: "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[9]

Following the adoption of the "light most favorable" language from *Jackson*, the Illinois Supreme Court also began to discard the specialized standards for the determination of reasonable doubt which long prevailed both at trial and on appeal—most notably, the standards for circumstantial evidence and sex cases.[10] Even where the Illinois Supreme Court retained specialized standards, as in statement, accomplice, and identification cases, the court, distinguishing prior precedents, began to affirm in circumstances where it once would have reversed. And the number of convictions reversed by all Illinois reviewing courts on reasonable doubt grounds steadily dropped.

More recently, and perhaps in response to the large number of exonerees, Illinois courts have begun what may be a return to their traditional stricter scrutiny of criminal convictions. In the most striking case, the Illinois Supreme Court recently reversed outright the conviction of a man, Steven Smith, who had twice been condemned to death.[11]

This article has three purposes. First, it summarizes the rich tradition of Illinois precedents for the reversal of convictions based on reasonable doubt grounds. Second, it provides some guidance to the defense practitioner as to how to use this body of tradition to raise a reasonable doubt, particularly at trial. Last, this article argues that it is time for Illinois courts to reject *Jackson v. Virginia*, to readopt specialized standards of review, and to return to the most important function any appellate court can hope to perform: the protection of the innocent from wrongful conviction.

I. HEARSAY

A long line of Illinois cases hold that the prosecution cannot prove, beyond a reasonable doubt, an offense or an essential element of an offense through hearsay.[12] Indeed, the prosecution

8. *Id.* at 318 (quoting Woodby v. I.N.S., 385 U.S. 276, 282 (1966)).

9. *Id.* at 318-19. The *Young* court also cites this passage. *Young*, 538 N.E.2d at 473.

10. *See* People v. Schott, 582 N.E.2d 690, 695-97 (Ill. 1991) (abolishing the "clear and convincing or substantially corroborated" requirement in sex offenses); People v. Pintos, 549 N.E.2d 344, 346 (Ill. 1989) (abolishing "reasonable hypothesis of innocence" test for purely circumstantial evidence cases).

11. *See* People v. Smith, 708 N.E.2d 365 (Ill. 1999) (reversing the conviction of Steven Smith).

12. *See, e.g.*, People v. Lesure, 648 N.E.2d 1123, 1125 (Ill. App. Ct. 1995); People v. Hope, 387 N.E.2d 795, 799 (Ill. App. Ct. 1979); People v. Clark, 440

cannot prove a violation of probation through hearsay,[13] even though it only needs to show a probationary violation by a preponderance of the evidence—not beyond a reasonable doubt.

This rule holds even when there is no timely objection to the hearsay evidence and when the court has, therefore, properly admitted it. Although the trier of fact may consider and give "natural probative effect" to hearsay to which the defense has not objected,[14] this rule does not allow the prosecution to prove an offense or an element by hearsay alone. "Even when [hearsay] is received without objection and thus considered competent, hearsay evidence falls short of the proof necessary to deprive a man of his liberty."[15]

In order to assess whether the prosecution's case rests on hearsay, it is necessary to know what hearsay is. Illinois courts define hearsay as "testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter."[16] For example, John Smith, a witness at trial, testifies as to what Jane Doe, who is not a witness, said or wrote at some time prior to trial. The rationale behind the rule is that Jane's statements, untested by cross-examination, are not reliable enough to warrant consideration by the fact-finder.

While the general prohibition against hearsay is simple, its application can be complex because of the large number of hearsay exceptions. While the discussion of most of these exceptions is beyond the scope of this article, counsel should be aware of them and should be prepared to argue that they do not apply in a particular case.

A good example of a recent Illinois conviction reversed because it rested on hearsay is *People v. Lesure*.[17] In *Lesure*, the defendant was charged with unlawful use of weapons by a felon.[18] The trial court heard a motion to quash and suppress evidence simultaneously with the bench trial.[19] Although a court may admit hearsay evidence in a motion to quash and suppress, it cannot admit hearsay at trial. The evidence at trial was that an officer responded to a report of a man with a gun.[20] A man named Matthews met the officer and told him that someone named

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N.E.2d 387, 394 (Ill. App. Ct. 1982); People v. Deatherage, 461 N.E.2d 631, 634 (Ill. App. Ct. 1984).

13. *See, e.g.*, People v. Figueroa, 333 N.E.2d 586 (Ill. App. Ct. 1975); People v. Lewis, 329 N.E.2d 390, 394 (Ill. App. Ct. 1975).

14. People v. Williams, 563 N.E.2d 431, 437 (Ill. App. Ct. 1990).

15. *Lewis*, 329 N.E.2d at 393.

16. People v. Rogers, 411 N.E.2d 223, 226 (Ill. 1980).

17. 648 N.E.2d 1123 (Ill. App. Ct. 1995).

18. *Id.* at 1124.

19. *Id.*

20. *Id.*

"Ezell," who was driving a yellow Cadillac, had just pointed a rifle at him and threatened to kill him.[21] Apparently, the defense offered no objection to the officer's testimony concerning the out-of-court assertion. At the conclusion of the motion and trial, the trial judge granted the motion, suppressing the gun found in a neighbor's apartment, but nevertheless convicting the defendant.[22]

On appeal, the state argued, in part, that the court should uphold the conviction because Matthews' statement was admissible as an "excited utterance."[23] The appellate court rejected this conclusion, noting that there was no showing of an absence of time to fabricate.[24] Since the only other evidence of the defendant's unlawful use of weapons was his own statement, which is not sufficient under the *corpus delicti* rule,[25] the appellate court reversed the conviction.[26]

Another common situation is the attempt to prove ownership of stolen property via hearsay. For example, in *People v. Hope*,[27] the arresting officer found the defendant in a white, 1976 Oldsmobile 98.[28] Although agents of the alleged victim, Nortown Oldsmobile, testified that a 1976 Oldsmobile 98 had been stolen and later returned, the prosecution offered no direct evidence showing that the vehicle driven by the defendant was the one owned by Nortown Oldsmobile.[29] The officer testified that he had later been "informed" that the car driven by the defendant was owned by Nortown Oldsmobile.[30] The court found that this statement was hearsay and, therefore, insufficient to convict.[31]

A codefendant's statements are also hearsay, and, unless subject to some legally recognized exception, they cannot constitute proof beyond a reasonable doubt. For example, in *People v. Deatherage*,[32] the defendant was present while an undercover officer made a deal for cocaine with a codefendant.[33] When the undercover officer asked the codefendant about a further purchase, the codefendant said he would have to "go through that guy plus another guy," and the officer understood "that guy" to mean the defendant.[34]

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21. *Id.*
22. *Lesure*, 648 N.E.2d at 1125.
23. *Id.*
24. *Id.* at 1126.
25. *See infra* notes 82-119 and accompanying text.
26. *Lesure*, 648 N.E.2d at 1126.
27. 387 N.E.2d 795 (Ill. App. Ct. 1979).
28. *Id.* at 796.
29. *Id.*
30. *Id.* at 798-99.
31. *Id.* at 798.
32. 461 N.E.2d 631 (Ill. App. Ct. 1984).
33. *Id.* at 632.
34. *Id.* at 633.

The appellate court held that the trial court erred by admitting the codefendant's statements because they were hearsay.[35] Because there was no independent showing of a conspiracy between the defendant and the codefendant, the codefendant's statements were not admissible under the coconspirator exception to the hearsay rule.[36] Absent the codefendant's statements, the state's case rested on the mere presence of the defendant, which was insufficient to hold him accountable.[37]

Although the rule against conviction through hearsay evidence has not weakened, the hearsay rule itself has slowly been sapped by the Illinois Legislature's periodic enactment of new hearsay exceptions. These include the following sections of the Illinois Code of Criminal Procedure of 1963: 115-10, admitting prior statements of child witness in a prosecution for a sex crime;[38]

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35. *Id.*

36. *Id.* at 633-34.

37. *Deatherage*, 461 N.E.2d at 634.

38. 725 ILL. COMP. STAT. 5/115-10 (West 2000). This section reads as follows:

"§ 115-10. Certain hearsay exceptions.

(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, or a person who was an institutionalized severely or profoundly mentally retarded person . . .the following evidence shall be admitted as an exception to the hearsay rule:

(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child or institutionalized severely or profoundly mentally retarded person either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement; and

(3) In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later, but the statement may be admitted regardless of the age of the victim at the time of the proceeding.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the institutionalized severely or profoundly mentally retarded person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

115-10.1, admitting prior inconsistent sworn, written, or recorded statements of a witness testifying at trial;[39] and 115-10.2, admitting prior statements of a witness who refuses to obey a judicial order to testify.[40] But where a conviction rests only upon

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(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(e) Statements described in paragraphs (1) and (2) of subsection (a) shall not be excluded on the basis that they were obtained as a result of interviews conducted pursuant to a protocol adopted by a Child Advocacy Advisory Board as set forth in subsections (c), (d), and (e) of Section 3 of the Children's Advocacy Center Act or that an interviewer or witness to the interview was or is an employee, agent, or investigator of a State's Attorney's office."

Id.

39. 725 ILL. COMP. STAT. 5/115-10.1 (West 2000). This section reads as follows:

"§ 115-10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement—

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein."

Id.

40. 725 ILL. COMP. STAT. 5/115-10.2 (West 2000). This section reads as follows:

"§ 115-10.2. Admissibility of prior statements when witness refused to testify despite a court order to testify.

(a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as defined in subsection (c) and if the court determines that:

(1) the statement is offered as evidence of a material fact; and

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the

an out-of-court statement, which is later disavowed at trial, Illinois courts have struggled to determine whether proof beyond a reasonable doubt can rest solely upon evidence which was, until recently, considered hearsay. Illinois appellate courts continue to state that a disavowed section 115-10.1 statement, standing alone, can be sufficient to convict;[41] however, at least four appellate court decisions have found that defendants were not proven guilty beyond a reasonable doubt where the prosecution's case rested solely upon those recanted statements.[42]

For example, in *People v. Parker*,[43] the prosecution's case rested upon the prior recorded statements of three witnesses, each of whom recanted his testimony at trial.[44] These prior recorded statements all identified the defendant as the victim's killer.[45] The first witness, whom the defendant allegedly shot during the same incident, signed a written statement that he saw the defendant shoot him (the witness) and the deceased victim.[46] At trial, however, the witness testified that he did not actually see the shooter; instead, he claimed that, while in great pain and while in

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proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.

(c) Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.

(d) A declarant is not unavailable as a witness if exemption, refusal, claim or lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for purpose of preventing the witness from attending or testifying.

(e) Nothing in this Section shall render a prior statement inadmissible for purposes of impeachment because the statement was not recorded or otherwise fails to meet the criteria set forth in this Section."

Id.

41. *See* People v. Bailey, 638 N.E.2d 192, 200 (Ill. App. Ct. 1994) (rejecting the argument that "prior inconsistent statements alone are insufficient as a matter of law" to establish guilt beyond a reasonable doubt); People v. Curtis, 696 N.E.2d 372, 376-77 (Ill. App. Ct. 1998) (rejecting the proposition that "a recanted prior inconsistent statement admitted under section 115-10.1 of the Code is not sufficient to sustain a conviction," reasoning that to do so would be to accept "a now-discredited standard of appellate review in criminal cases that would shift depending upon the nature of the trial evidence"); People v. Zizzo, 703 N.E.2d 546, 551 (Ill. App. Ct. 1998) (rejecting the proposition that "a recanted prior inconsistent statement cannot support a criminal conviction").

42. *See generally* People v. Parker, 600 N.E.2d 529 (Ill. App. Ct. 1992); People v. Reyes, 638 N.E.2d 650 (Ill. App. Ct. 1993); People v. Arcos, 668 N.E.2d 1177 (Ill. App. Ct. 1996); People v. Brown, 709 N.E.2d 609 (Ill. App. Ct. 1999).

43. 600 N.E.2d 529 (Ill. App. Ct. 1992).

44. *Id.* at 530-33.

45. *Id.*

46. *Id.* at 530-31.

the hospital for treatment of the gunshot wound, he signed the statement just so the interrogating detective would leave his hospital room.[47] The second witness also signed a written statement that he saw the defendant kill the deceased victim, but at trial he said that he was not at the scene of the shooting and that he only signed the statement because the interrogating detectives told him he could be arrested for "withholding information."[48] The detective who took the second witness's statement denied the threat.[49] The third witness signed a written statement that he saw the defendant with a gun shortly after the shooting.[50] At trial, he claimed to be present near the scene and had seen the shooting, but he maintained that the defendant was indoors when the shooting began.[51] He claimed the detectives who took the statement beat him and threatened to put him in jail for "robbing the dead."[52] The detective who took the statement denied beating the witness but admitted to threatening to charge him with "robbing the dead."[53]

In a remarkable decision, the *Parker* court held that this evidence was insufficient to prove guilt beyond a reasonable doubt.[54] The court relied, in part, on two earlier cases, which reversed verdicts where witnesses severely impeached their testimony by prior inconsistent statements.[55] The court reasoned

47. *Id.* at 531.
48. *Parker*, 600 N.E.2d at 531-32.
49. *Id.* at 532.
50. *Id.*
51. *Id.* at 532-33.
52. *Id.*
53. *Parker*, 600 N.E.2d at 533.
54. *Id.* at 534-35.
55. *Id.* at 533-34 (citing People v. McCarthy, 430 N.E.2d 135 (Ill. App. Ct. 1981) & People v. Wise, 563 N.E.2d 1057 (Ill. App. Ct. 1990)). In *McCarthy*, the court found that discrepancies between the testimony of the State's witnesses raised a reasonable doubt concerning the charges against defendant, and therefore, the court held that the evidence was insufficient to support a conviction for aggravated battery. *McCarthy*, 430 N.E.2d at 138-39. In *Wise*, the victim testified at trial that the defendant grabbed him from behind in a "bear hug" while a second person, Jones, walked up to him, pulled his gold chain from around his neck and struck him in the eye. *Wise*, 563 N.E.2d at 1058. Before trial, the victim twice signed statements prepared by an investigator for the defense. *Id.* Both statements exonerated the defendant. *Id.* The second statement said that the defendant had not touched the victim before the chain was taken from him and that the defendant and Jones had started to fight each other after the chain was taken and the robbery was complete. *Id.* at 1059. The victim admitted to signing the statements, but claimed that he had only glanced at them and had signed them because he had been assured that if he did so, he would not be required to appear in court. *Id.* There is no indication that the signed statements were admitted into evidence under section 115-10.1. The appellate court reversed the defendant's conviction outright on the grounds that the witness's credibility as to the defendant's participation in the robbery had been severely impeached by the

that here, conversely, the only evidence linking the defendant to the murder—the three prior inconsistent statements—was "severely impeached by the witnesses' trial testimony," which "exculpated defendant and cast doubt on the authenticity of the statements."[56] In addition, while the interrogating detectives had denied the claims of coercion, the court noted that no "independent investigation" ever refuted the claims.[57] Finally, no additional evidence, physical or otherwise, corroborated the prior inconsistent statements to link the defendant to the charged murder.[58]

The appellate court has followed *Parker* at least three times. In *People v. Reyes*,[59] the chief evidence of the defendant's participation in and accountability for first degree murder consisted of the disavowed grand jury testimony of two witnesses, which the judge admitted under section 115-10.1. Each witness testified before the grand jury, in response to leading questions, that the defendant had indeed taken part in the beating.[60] At trial, however, both witnesses testified that although they were present when the beating started, they could not recall whether the defendant had participated.[61] One witness explained that she lied before the grand jury, and the second witness "assumed" that she must have misunderstood the prosecutor's questions.[62] One witness testified, without contradiction by the prosecution, that the prosecution had threatened to prosecute her if she did not

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evidence of the prior inconsistent statements, particularly given the lack of any corroborative evidence for the witness's trial testimony. *Id.* at 1059-60.

56. *Parker*, 600 N.E.2d at 534.

57. *Id.* This strange statement seems to have been prompted by the court's attempt to factually distinguish a prior case, *People v. McBounds*, 536 N.E.2d 1225 (Ill. App. Ct. 1989), where the court upheld a defendant's conviction, based at least partially on recanted section 115-10.1 statements. In *McBounds*, two witnesses, who originally implicated the defendant, McBounds, recanted their testimony at trial. 536 N.E.2d at 1228-29. Their prior signed written statements and, in the case of one of the witnesses, grand jury testimony were admitted at trial. *Id.* at 1232. One witness claimed that he had been beaten with a golf club by police before giving the statement. *Id.* at 1229. The second witness claimed that she had been drinking and had been held overnight by the police, who would not let her see her children before she signed the statement. *Id.* at 1228-29. The *McBounds* court found that the testimony of the witness who claimed to have been beaten with a golf club was admissible, despite the claim of coercion, because the trial judge had heard the testimony of an F.B.I. agent, who investigated the defendant's claim and apparently found it to lack merit. *Id.* at 1233.

58. *Id.* at 534. The court distinguished *McBounds* on the ground that in *McBounds*, "the prosecution's entire case did not rest on disavowed prior inconsistent statements." *Id.* at 534.

59. 638 N.E.2d 650 (Ill. App. Ct. 1993).

60. *Id.* at 651-52.

61. *Id.*

62. *Id.*

identify all of the participants in the beating.[63]

Citing *Parker*, the appellate court held that the witnesses' grand jury testimony was insufficient to refute their in-court denials and the defendant's own sworn denial of guilt.[64] The court found that the credibility of the witnesses' grand jury testimony was fatally weakened by: (1) their recantations at trial; (2) the fact that the grand jury statements consisted merely of "yes" and "no" answers to leading questions from the prosecution; and (3) the uncontradicted testimony of one witness that the prosecution had coerced her.[65]

In another case involving grand jury testimony, *People v. Arcos*,[66] the critical witness gave a written statement and grand jury testimony which identified the defendant as the perpetrator of the charged murder.[67] At trial, however, he recanted the prior testimony and written statements, saying that he had made the earlier statements while he was under the influence of narcotics, in fear for his life, and in return for a deal offered by the state.[68] He said that the police supplied him with all of the details of the crime contained within his statement.[69] Police officers took the stand to deny all of these claims.[70]

The appellate court found the witness' prior testimony and written statements insufficient to establish proof of guilt beyond a reasonable doubt. After rejecting the defendant's argument that *Parker* stood for the proposition that disavowed and uncorroborated statements under section 115-10.1, standing alone, could never establish proof beyond a reasonable doubt, the appellate court, nevertheless, found that the lack of corroboration in *Arcos* was critical. Because the trial court specifically stated that the witness testifying at trial had "absolutely no credibility,"[71] and relied instead upon several pieces of allegedly corroborative evidence, each bit of evidence had to be examined to determine whether it supported the conviction.[72] The appellate court found that none of the corroborative evidence actually corroborated the key point at issue—the identification of the defendant as the killer.[73] Narrowly interpreted, *Arcos* rests upon both the trial court's assessment of the witness as "absolutely" incredible and the witness's mistaken reliance upon corroboration that did not

63. *Id.* at 652.
64. *Reyes*, 638 N.E.2d at 653.
65. *Id.* at 653-54.
66. 668 N.E.2d 1177 (Ill. App. Ct. 1996).
67. *Id.*
68. *Id.* at 1179.
69. *Id.*
70. *Id.*
71. *Arcos*, 668 N.E.2d at 1179.
72. *Id.* at 1180.
73. *Id.* at 1180-81.

actually exist.

In a more recent decision, however, the appellate court has interpreted *Parker* more broadly, coming close to holding that uncorroborated and disavowed witness statements are not admissible to prove guilt beyond a reasonable doubt. In *People v. Brown*,[74] the only admissible eyewitness testimony supporting the prosecution's case of murder against the defendant consisted of a handwritten, section 115-10.1 statement given by the witness two years after the crime occurred.[75] At trial, the witness recanted the statement, claiming that he had been placed under "extreme pressure" by the police and prosecution, who threatened to charge him with a gun or drug offense.[76] The police and prosecutors, however, denied these claims. The court held, nonetheless, that the section 115-10.1 statement was insufficient to convince any rational person that the defendant had been proven guilty beyond a reasonable doubt.[77]

The court acknowledged prior cases, such as *People v. Curtis*,[78] which rejected the argument that a section 115-10.1 statement standing alone is insufficient to convict, but paraphrased them as stating that the "fact that a conviction is based *primarily* on recanted prior inconsistent statements does not as a matter of law mean that the conviction cannot be sustained."[79] The court went on to distinguish the section 115-10.1 statements on the ground that in all of these cases the state introduced additional physical evidence linking the defendant to the crime charged.[80] Citing the "particular circumstances" of the case—(1) the lapse of time between the event and the witness's statement, (2) the lack of corroborative evidence, and (3) even the witness's claim that he had feared being charged with a drug offense—the court found

74. 709 N.E.2d 609 (Ill. App. Ct. 1999).

75. *Id.* at 621.

76. *Id.* at 615-16.

77. *Id.* at 615-17, 620.

78. 696 N.E.2d 372 (Ill. App. Ct. 1998).

79. *Brown*, 709 N.E.2d at 620.

80. *Id.* The court characterized *Zizzo* and *Curtis* as resting on physical evidence in addition to the disavowed section 115-10.1 statements. In *Zizzo*, the prosecution charged the defendant with felony theft for allegedly taking money from the victim's ATM account. People v. Zizzo, 703 N.E.2d 546, 547 (Ill. App. Ct. 1998). Her alleged accomplice's prior sworn testimony at his sentencing hearing, which he had repudiated at trial, was corroborated by the discovery on the victim's ATM file of the defendant's fingerprint. *Id.* at 551-52. The court considered this sufficient corroboration, even though the defendant might have innocently handled the victim's ATM file as part of her duties at the victim's bank. *Id.* at 552. In *Curtis*, the defendant's role in the charged shooting and wounding of the victim, which otherwise rested on recanted section 115-10.1 statements, was corroborated by the discovery of a gun in defendant's bedroom, which had fired the bullet recovered from the victim's leg. *Curtis*, 696 N.E.2d at 376.

that the witness's disavowed section 115-10.1 statement was insufficient to prove the defendant guilty beyond a reasonable doubt.[81]

The evolution of the appellate court's section 115-10.1—reasonable doubt jurisprudence thus illustrates the tension between the *Collins-Young* view of an appellate court's role, and the very real reluctance of scrupulous appellate court judges to affirm convictions where there is an obvious danger that an innocent person might be convicted. On the one hand, a literal reading of *Collins* and *Young* suggests that, if the appellate court is to always view the evidence in the "light most favorable to the prosecution," it should affirm the fact-finder's decision to disregard the witness's trial testimony and believe the prior statement instead, regardless of whether the prior statement is corroborated. This is the view expressed by Justice Robert Steigmann in *Curtis*. But if, on the other hand, the prior statement is in fact true, then the witness has almost by definition lied under oath at trial. Can the prior uncross-examined and uncorroborated statement of a perjurious witness, which would normally amount to hearsay, ever constitute proof beyond a reasonable doubt? Asked in this way, the question can, and should, answer itself.

II. DEFENDANT'S UNCORROBORATED STATEMENTS: THE CORPUS DELICTI RULE

The defendant's uncorroborated statements represent a second major category of evidence that will not suffice to prove an offense or an element of an offense. This rule is usually known by the short-hand phrase, the "corpus delicti rule." Aside from the constitutional rule that a conviction based upon an involuntary statement cannot stand, the corpus delicti rule is an appellate court's only substantive tool for guarding against wrongful convictions based upon unreliable statements. While Illinois courts continue to adhere to the rule, rejecting most prosecution attempts to limit or overrule it, the courts also tend to interpret it narrowly to the defendant's detriment.

Notwithstanding, the corpus delicti rule still stands as a necessary element of an offense:

> It is a basic concept in the criminal law that proof of a criminal offense involves the proof of two distinct propositions or facts beyond a reasonable doubt. First, that a crime was committed, and second, that it was committed by the person or persons charged. In other words, "the corpus delicti must be proved and the identity of the defendant as the guilty party established."[82]

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81. *Brown*, 709 N.E.2d at 620-21.

82. People v. Lambert, 472 N.E.2d 427, 428 (Ill. App. Ct. 1984) (quoting People v. Kirilenko, 115 N.E.2d 297 (Ill. 1953)).

However, "corpus delicti cannot be proved by defendant's confession alone."[83] Instead, there must be "either some independent evidence or corroborating evidence outside of the confession which tends to establish that a crime occurred."[84] The rationale of the rule is that "[e]xperience has shown that untrue confessions may be given to gain publicity, to shield another, to avoid apparent peril, or for other reasons, and because of this, the law demands corroborating proof that a crime did in fact occur before the individual is punished therefor."[85] When the prosecution charges two different offenses, it must present corroborating evidence for each offense.[86] The rule also applies, apparently, even when the defendant's statement does not result from custodial interrogation.[87]

While no cases directly address this issue, the state apparently must also independently corroborate for each element of each offense. For example, in *People v. Lesure*,[88] the defendant was charged with unlawful use of weapons by a felon.[89] The state adequately proved the element that the defendant was a felon by a stipulation to his prior conviction.[90] Because the court suppressed the gun in a simultaneous motion, the only evidence as to the unlawful use element was the defendant's admission to an officer that the gun belonged to him.[91] The court found that this was insufficient under the corpus delicti rule.[92]

The Illinois courts have recognized two major exceptions to the corpus delicti rule. First, the rule does not apply to proof of the defendant's age, where defendant's age is an element of the charged offense.[93] The rationale for this exception is that:

> [A]n admission of one's birth date is not subject to the peculiar perceptions or recollections of a defendant who is under the psychological pressures of an arrest . . . . It appears to be inherently more reliable than a statement of what one did, or saw, or heard, or thought because it is a statement of an immutable characteristic. [94]

Second, Illinois courts have held that the corpus delicti rule does not apply in probation revocation proceedings.[95] Nonetheless,

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83. *Id.*
84. *Id.*
85. People v. O'Neil, 165 N.E.2d 319, 321 (Ill. App. Ct. 1960).
86. People v. Kokoraleis, 501 N.E.2d 207, 226-27 (Ill. 1986).
87. *In re* D.A., 448 N.E.2d 1036, 1038 (Ill. App. Ct. 1983) (upholding defendant's conviction based upon telephone admission and letter to friend).
88. 648 N.E.2d 1123 (Ill. App. Ct. 1995).
89. *Id.* at 1124.
90. *Id.* at 1125.
91. *Id.* at 1124.
92. *Id.* at 1124-25.
93. People v. Dalton, 434 N.E.2d 1127, 1130-31 (Ill. App. Ct. 1982).
94. *Id.* at 1131.
95. People v. Woznick, 663 N.E.2d 1037, 1039 (Ill. App. Ct. 1996).

corpus delicti issues commonly concern areas such as proof of "force" or "penetration" for sexual offenses, "taking" for robbery, and "criminal responsibility" for arson.

A. Sexual Offenses

In two instances, courts have found that there was insufficient proof apart from the defendant's confession to sustain charges of sexual crimes. In *People v. Lambert*,[96] the defendant was charged with an act of indecent liberties with a four year old child. The child did not testify.[97] Although there was testimony that the defendant admitted to sucking the child's penis and rubbing his penis against the child's buttock, the only corroboration of the statement was the fact that the defendant had access to the child's sleeping quarters and that three weeks after the date of the charged offense the child's rectum appeared to a police officer to be "pinkish and swollen."[98] The court concluded that in the absence of medical testimony as to the cause of the child's condition, there was insufficient evidence to corroborate the confession.[99]

Similarly, in *People v. Kokoraleis*,[100] the defendant was charged with murder and rape. The police found the victim's body five months after her abduction and murder. Although her body was fully clothed, her pants were split "along the inseam from the back to front along the crotch."[101] Citing the time lapse between the murder and the discovery of the victim's body, the court concluded that the split inseam did not independently corroborate the defendant's confession to rape.[102] In many rape cases, however, Illinois courts have found that somewhat greater evidence of force or penetration will suffice to corroborate the defendant's confession.[103]

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96. 472 N.E.2d 427 (Ill. App. Ct. 1984).
97. *Id.* at 428.
98. *Id.* at 428-29.
99. *Id.* at 429.
100. 501 N.E.2d 207 (Ill. App. Ct. 1986).
101. *Id.* at 224-27.
102. *Id.* at 218.
103. *See* People v. Perfecto, 186 N.E.2d 258, 259 (Ill. 1962) (finding that defendant's confession to rape was corroborated by evidence of bodily injury to defendant and to victim); People v. Bounds, 662 N.E.2d 1168, 1185 (Ill. App. Ct. 1995) (finding that defendant's confession to aggravated criminal sexual assault and aggravated kidnapping of the victim was adequately corroborated by evidence of a scream heard by a neighbor at the time of the abduction, absence of all clothing except a T-shirt on the victim's body, contusions and abrasions on the victim's body, dilation of the victim's anus, and a broom handle smeared with feces); People v. Cloutier, 622 N.E.2d 774, 785 (Ill. App. Ct. 1993) (finding that defendant's confession admitting to nonconsensual intercourse was sufficiently corroborated by evidence of blood on the victim's genitalia consistent with intercourse during menses, nude condition of the

B. Armed Robbery

Cases involving armed robbery or attempted armed robbery present similar considerations. In the leading case of *People v. Lee*,[104] the prosecution charged the defendant with murder and attempted armed robbery.[105] The only corroborating evidence offered to substantiate the defendant's statement that he told the victim to give him money was the fact that the victim was shot by a stranger at 7:00 p.m.[106] The victim's own statements in the emergency room before his death only indicated that he had been beaten and shot but did not indicate that he had been the victim of an attempted armed robbery.[107] The court found that the confession of an attempted armed robbery was uncorroborated, and it reversed the lower court.[108]

C. Arson

Lastly, three reported cases have reversed for failure to prove criminal responsibility for arson.[109] In the leading case of *People v.*

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body, slight bruises and abrasions, as well as other crime evidence); People v. Darnell, 419 N.E.2d 384, 384 (Ill. App. Ct. 1981) (finding defendant's confession to rape corroborated by abrasions on the defendant's genitalia and the fact that the body of the victim was found, one day after the rape, with her shorts pulled down below her buttocks); People v. Lloyd, 660 N.E.2d 43, 48 (Ill. App. Ct. 1995) (finding defendant's confession to aggravated criminal sexual assault to be corroborated by the victim's shaken emotional condition upon reporting the incident to the police, injury to her head, and a belt wrapped around her neck, as well as properly admitted prior inconsistent statements of two defense witnesses, admitted as substantive evidence).

104. 502 N.E.2d 399 (Ill. App. Ct. 1996).

105. *Id.* at 405.

106. *Id.* at 413.

107. *Id.*

108. *Id.* However, in cases involving only slightly greater proof, it has been held that confessions of attempted armed robbery or armed robbery were sufficiently corroborated. *See* People v. Neal, 489 N.E.2d 845, 850 (Ill. 1985) (finding defendant's admission to armed robbery to be corroborated by evidence that the victim's bedroom had been ransacked and that the victim's purse was missing); People v. Willingham, 432 N.E.2d 861, 864-66 (Ill. 1982) (finding that the defendant's admission to attempted armed robbery, consisting of the statement that he accompanied codefendants to the scene of the murder after discussion of a possible armed robbery, was sufficiently corroborated by evidence of independent witnesses that defendant drove to the victim's apartment and was seen there shortly before the crime occurred); People v. Montes, 549 N.E.2d 700, 705-07 (Ill. App. Ct. 1990) (finding evidence that the victim was shot to death on a city street at 1 a.m., as confirmed by independent witnesses, the shooter fleeing immediately afterwards, sufficiently corroborated defendant's admission that he acted as a lookout during the attempted armed robbery); People v. Morando, 523 N.E.2d 1061, 1068 (Ill. App. Ct. 1988) (finding evidence that defendant displayed and offered to sell a ring resembling that worn by the victim on the day of her death sufficiently corroborated defendant's admission to armed robbery).

109. *See generally* People v. Lueder, 121 N.E. 743 (Ill. 1954); *In re* D.A., 448

Lueder,[110] the defendant's confession to the arson of a tool shed was supplemented only by the testimony of the owner of the tool shed that it had been gutted by fire.[111] In the absence of evidence that "some person willfully fired the building," the defendant's conviction was reversed.[112] Similarly, in *In re D.A.*,[113] the defendant admitted to setting a fire in a bathroom.[114] Although a fire investigator testified that the charged fire started in a second floor bathroom, he did not testify that the fire had been deliberately started or that the fire was of human origin, and the court reversed the defendant's conviction.[115] Finally, in *People v. Hougas*,[116] the defendant's confession of committing arson by burning a barn filled with hay was neither sufficiently corroborated by her presence in a house near the barn at the time the fire started, nor by the hostility between her and her husband which was alleged as the motive for the fire.[117] Again, the court relied on the absence of independent evidence that the fire had been willfully set.[118]

D. The Corpus Delecti Rule in Practice

The corpus delicti rule usually comes into play in one of two sets of circumstances: (1) the victim has been murdered and the defendant confesses both to the murder and to a second crime such as rape or robbery, or (2) the defendant confesses to a crime other than murder and the victim is, for whatever reason, not available to testify. Since both situations are by no means uncommon, the criminal defense attorney should be ready to argue corpus delicti at the motion for directed finding. Similarly, stipulations to other evidence which might independently tend to show the corpus delicti, such as medical records in a rape or battery case, should be avoided. In a jury trial, where an argument can be made that the non-confession evidence is incredible or insufficient, counsel may want to prepare a non-IPI instruction which will convey to the jury

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N.E.2d 1036 (Ill. App. Ct. 1983); People v. Hougas, 234 N.E.2d 63 (Ill. App. Ct. 1968).

110. 121 N.E.2d 743 (Ill. 1954).

111. *Id.* at 744.

112. *Id.* at 745.

113. 448 N.E.2d 1036 (Ill. App. Ct. 1983).

114. *Id.* at 1038.

115. *Id.* at 1039.

116. 234 N.E.2d 63 (Ill. App. Ct. 1968).

117. *Id.* at 65-66.

118. *Id.* at 66. *But see* People v. O'Neil, 165 N.E.2d 319 (Ill. 1960) (finding that the confession was corroborated by the defendant's attempt to break into the building some days after the fire, detailed confirmation of where he stated that the fire had been set, and by his attempt to commit suicide while in custody).

the essence of the corpus delicti rule.[119]

III. ACCOMPLICE TESTIMONY

Unlike hearsay or the uncorroborated statements of a defendant, the testimony of an accomplice, even if uncorroborated, can sustain a conviction. Illinois has long adhered to the common law rule that uncorroborated accomplice testimony may be "sufficient to warrant a conviction if it satisfied the jury beyond a reasonable doubt."[120] However, Illinois courts have frequently expressed their dissatisfaction with convictions resting upon accomplice testimony. The classic statement of Illinois' position with respect to the "nagging problem of the weight which is to be accorded to the uncorroborated testimony of accomplice witnesses,"[121] is found in *People v. Hermens*:

> It is . . . universally recognized that such testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution which must always be taken into consideration . . . . [I]t is not regarded with favor, is discredited by the law, should be weighed with care, is subject to grave suspicion, should be viewed with distrust, and . . . it should be scrutinized carefully and acted upon with caution. . . . This court has also said that where it appears the witness has hopes of reward from the prosecution, his testimony should not be accepted *unless it carries with it the absolute conviction of its truth.*
>
> It is therefore apparent, from the regard of the courts for this type of evidence, that material corroboration or direct contradiction [of the suspect accomplice testimony] are entitled to considerable weight.[122]

Given the perceived infirmities of accomplice testimony and the rule that, in order to be accepted, accomplice testimony must carry with it "the absolute conviction of truth," it is not surprising that courts have reversed a large number of accomplice-based convictions.[123] Indeed, in the recent case of *In re D.R.S.*,[124] the

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119. For example, the jury might be instructed that, "You have before you evidence that the defendant made a statement. The law requires that there must be some evidence, independent of the defendant's statement, demonstrating that each crime charged in the indictment occurred. In determining whether a crime occurred, you may consider any evidence apart from the statement which corroborates, or supports, the facts contained in the statement."

120. People v. Hermens, 125 N.E.2d 500, 504 (Ill. 1955).

121. People v. Price, 316 N.E.2d 289, 294 (Ill. App. Ct. 1974).

122. *Hermans*, 125 N.E.2d at 504-05 (emphasis added).

123. For sampling of the numerous cases reversed because of failure to establish an absolute truth in an accomplice witness's testimony, *see* People v. Ash, 468 N.E.2d 1153, 1156 (Ill. 1984); *In re* Brown, 374 N.E.2d 209, 210 (Ill. 1978); People v. Bugg, 176 N.E. 717, 719 (Ill. 1931); People v. Harvey, 152 N.E.

court asked: "Is it possible . . . to presume a defendant to be innocent, view an admitted criminal's testimony with the utmost suspicion, and still find a defendant guilty beyond a reasonable doubt based solely upon the uncorroborated testimony of a criminal?"[125] After surveying the case law, the court concluded that in only three instances had the Illinois Supreme Court affirmed convictions on accomplice testimony that was "even close" to being uncorroborated.[126] Nevertheless, the Illinois Supreme Court continues to state the general rule that uncorroborated accomplice testimony can suffice for conviction, most recently in *People v. Rivera*.[127]

Corroboration, however, remains important in determining whether a court will uphold an accomplice-based conviction. In the context of accomplice testimony, "corroboration" means corroboration as to the accomplice's identification of the defendant as a perpetrator, and not merely corroboration that a crime occurred.[128] In a large number of accomplice testimony reversals, the courts characterize the accomplice's testimony as wholly or partially uncorroborated.[129] Conversely, cases affirming accomplice-based convictions often emphasize the existence of corroboration.

Accomplice testimony often creates weaknesses in the prosecution's ability to establish the corpus delicti for a variety of reasons. Courts frequently cite to contradiction of an accomplice's testimony, either by other accomplices or by the defendant

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147, 149 (Ill. 1926); People v. Hudson, 173 N.E. 278, 279 (Ill. 1930); People v. Newell, 469 N.E.2d 1375, 1377-78 (Ill. 1984); People v. Rendas, 9 N.E.2d 237, 242-43 (Ill. 1937); People v. Williams, 357 N.E.2d 525, 529-30 (Ill. 1976); People v. Wilson, 362 N.E.2d 291, 292 (Ill. 1977); *In re* D.R.S., 643 N.E.2d 839, 843 (Ill. App. Ct. 1994); People v. Gnat, 519 N.E.2d 497, 499-500 (Ill. App. Ct. 1988); People v. Kiel, 394 N.E.2d 883, 887 (Ill. App. Ct. 1979); People v. Marshall, 326 N.E.2d 246, 250-51 (Ill. App. Ct. 1975); People v. Mostafa, 274 N.E.2d 846, 860-61 (Ill. App. Ct. 1971); People v. Price, 316 N.E.2d 289, 294-97 (Ill. App. Ct. 1974); People v. Savory, 379 N.E.2d 372, 373-74 (Ill. App. Ct. 1978); People v. Seymour, 368 N.E.2d 1018 (Ill. App. Ct. 1977).

124. 643 N.E.2d at 843.

125. *Id.*

126. *Id.* at 843-44.

127. 652 N.E.2d 307, 311 (Ill. 1995).

128. *Ash*, 468 N.E.2d at 1157; *In re* D.R.S., 643 N.E.2d at 843: *Williams*, 357 N.E.2d at 530; *Wilson*, 362 N.E.2d at 293.

129. *See, e.g.*, People v. Jimerson, 535 N.E.2d 889, 903-04 (Ill. 1989) (finding that a properly admitted prior consistent statement and defendant's flight corroborated the accomplice witness's testimony); People v. Kubat, 447 N.E.2d 247, 260 (Ill. 1983) (finding that other witnesses who placed defendant together with accomplice on the day of the crime corroborated the accomplice's testimony); *Rivera*, 652 N.E.2d at 311-12 (prior inconsistent testimony of defense witness, also an accomplice, identifying defendant as participant, corroborated state's accomplice witness).

himself, as raising a reasonable doubt.[130] Courts have also been prone to reverse where the accomplice's testimony was contravened by evidence of the defendant's good character.[131] Similarly, the suspicion which normally attaches to the testimony of the accomplice may be heightened by additional factors. Although most accomplices testify in return for some consideration from the prosecution, courts have been suspicious of accomplice testimony which is given in return for immunity from prosecution[132] or for permission to plead to reduced charges,[133] dismissal of charges,[134] a reduction in a sentence already imposed,[135] or executive clemency resulting in an immediate release from prison.[136] Lesser consideration, such as a promise to recommend probation, may also be important.[137] Evidence of the accomplice's addiction or intoxication may also detract from his credibility.[138] Lastly, many cases have emphasized prior

130. *See* People v. Hermens, 125 N.E.2d 500, 505 (Ill. 1955) (finding that the testimony of an accomplice testifying for prosecution was contradicted by a second accomplice and by the defendant); People v. Newell, 469 N.E.2d 1375, 1378 (Ill. 1984) (stating that in a situation in which one accomplice implicates the defendant for the prosecution and two other accomplices exonerate the defendant, then "with no corroboration of either view, we simply cannot say that there has been proof of guilt beyond a reasonable doubt"); People v. Marshall, 326 N.E.2d 246, 249 (Ill. App. Ct. 1975) (finding the inculpatory testimony of one accomplice contradicted by a second accomplice, called by the defense, who stated that defendant did not participate in the burglary). However, in *Rivera,* the court distinguished *Newell,* calling it a "very fact-specific case." *Rivera*, 652 N.E.2d at 311.

131. *See, e.g.*, *Mostafa*, 274 N.E.2d at 861; *Price,* 316 N.E.2d at 296; *Rendas*, 9 N.E.2d at 242.

132. *See In re* D.R.S., 643 N.E.2d at 844 (granting immunity from prosecution for all liability for burglary and theft); People v. Kiel, 394 N.E.2d 883, 884 (Ill. App. Ct. 1979) (granting immunity from prosecution for conspiracy to commit murder); People v. Seymour, 368 N.E.2d 1018, 1020 (Ill. App. Ct. 1977) (dismissing unrelated charges in exchange for testifying); *Newell*, 469 N.E.2d at 471 (granting immunity from prosecution for burglary); *Wilson*, 362 N.E.2d at 292-93 (granting immunity from prosecution for armed robbery).

133. *See Marshall*, 326 N.E.2d at 248 (reducing charge from murder to involuntary manslaughter); *Price*, 316 N.E.2d at 291 (reducing charge from murder to armed robbery).

134. *See Ash*, 468 N.E.2d at 1155-56 (dismissing the home invasion and unlawful restraint charge against accomplice); *Mostafa*, 274 N.E.2d at 852 (dismissing the murder charge against accomplice).

135. *Mostafa*, 274 N.E.2d at 852-53 (reducing the 40 to 75 year sentences against two accomplices to murder to 15 to 30 years in exchange for testimony against the defendant).

136. *Williams*, 357 N.E.2d at 528 (granting executive clemency to an accomplice serving a 15 to 30 year prison term).

137. *See Gnat*, 519 N.E.2d at 498 (promising to recommend probation or minimal punishment).

138. *See id.* at 499 (noting that the accomplice witness was a periodic cocaine and marijuana user); *Kiel*, 394 N.E.2d at 886 (stating that the witness had

inconsistent statements or recantations of the accomplice witness.[139]

Where accomplice testimony is substantially corroborated, or where other circumstances dictate a jury trial, it is incumbent upon trial counsel to tender the standard Illinois Pattern Instruction on accomplice testimony.[140] This instruction tells the jury that the testimony of an accomplice witness "is subject to suspicion and should be considered by you with caution."[141] A failure to tender the instruction has recently resulted in a finding that defense counsel did not give effective assistance.[142]

Moreover, in order to have a right to the instruction, defendant need not prove, beyond a reasonable doubt, that the witness is guilty of the crime charged, nor is it required that the accomplice witness have been indicted or arrested. All the defendant must show is that the evidence at trial establishes probable cause to believe that the witness has participated in the crime charged.[143] Where the witness, rather than the defendant, could have been the person responsible for the crime, the defendant is entitled to have the accomplice-witness instruction given to the jury.[144] In particular, if a witness admits presence at the scene of the crime—and thus, could have been indicted either as a principal or under a theory of accountability—but denies involvement, then a defendant is entitled to the instruction.[145]

IV. CIRCUMSTANTIAL EVIDENCE

At one time, cases resting on purely circumstantial evidence were evaluated under a special standard, both at trial and on

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used so much mescaline at the time of the occurrence that it was "'burning out'" his brain); *Marshall*, 326 N.E.2d at 250 (noting that the witness was an unemployed heroin addict).

139. *In re* Brown, 374 N.E.2d at 210 (noting that the witness originally stated that either the defendant or an unidentified second person was the shooter); *Kiel*, 394 N.E.2d at 887 (stating that the witness testified under oath at a preliminary hearing that he had no memory of the charged event); *Price*, 316 N.E.2d at 296 (noting that the witness admitted that he failed to tell the police "all the truth"); *Seymour*, 368 N.E.2d at 1020 (noting that witnesses denied the truth of prior inculpatory statements at the probation revocation hearing); *Williams*, 357 N.E.2d at 529 (stating that the witness admitted testifying falsely at his own trial and giving false statement to prosecutor).

140. Ill. Pattern Jury Instr. (Crim.) 3.17 (4th Ed. West 2000).

141. *Id.*

142. *See* People v. Campbell, 657 N.E.2d 87, 90-92 (Ill. App. Ct. 1995).

143. *See* People v. Henderson, 568 N.E.2d 1234, 1261 (Ill. 1991) (noting standard for receiving this jury instruction).

144. *See* People v. Montgomery, 626 N.E.2d 1254, 1260 (Ill. App. Ct. 1993) (finding that because the accomplice could have been responsible for the crime that the court should have given the accomplice-witness jury instruction).

145. *See* People v. Lewis, 609 N.E.2d 673, 676 (Ill. App. Ct. 1992) (finding the defendant entitled to the accomplice-witness instruction).

appeal. Under this special standard, the prosecution was required to show that every reasonable hypothesis of innocence had been excluded,[146] and that there was a "reasonable and moral certainty that the accused had committed the offense."[147]

In the late 1980's, however, the Illinois Supreme Court abolished the reasonable hypothesis test, first at the trial level[148] and then on appeal.[149] Henceforward, cases resting on circumstantial evidence alone were to be evaluated with what the court called the "reasonable doubt," or the *Collins-Young* test. The following sections discuss three common types of circumstantial evidence: (1) opportunity, (2) flight, and (3) fingerprints.

A Opportunity

The general rule is that opportunity alone is not sufficient to sustain a conviction unless the prosecution proves beyond a reasonable doubt that only the defendant, and no one else, had the opportunity to commit the crime.[150] For example, in *People v. Dowaliby*, a case which received a great deal of notorious publicity, the defendant was accused of murdering his daughter.[151] Her strangled body was found in a thicket or brush some distance from the home that the defendant shared with his wife and mother.[152] The court reversed the defendant's conviction, finding that the prosecution failed to prove that only the defendant had the opportunity to commit the crime.[153] The court noted that the defendant's wife or mother had an equally good opportunity to commit the crime, and it hypothesized that an intruder could have committed the crime.[154]

Another case which turned strongly upon the issue of opportunity is *People v. Holsapple*.[155] In that case, the defendant left a tavern with the victim at around 12:15 a.m.[156] The victim

146. *See, e.g.*, People v. Garrett, 339 N.E.2d 753, 759 (Ill. 1976) (reiterating that where a conviction rests solely on circumstantial evidence, guilt must be established so as to "exclude every other reasonable hypothesis").

147. People v. Mitchell, 375 N.E.2d 531, 533 (Ill. App. Ct. 1978).

148. People v. Bryant, 499 N.E.2d 413, 419-20 (Ill. 1986) (holding that the "reasonable theory of innocence" jury instruction should not be used at trial).

149. People v. Pintos, 549 N.E.2d 344, 348 (Ill. 1989) (holding that based on *Bryant*, the "reasonable theory of innocence" standard should not be used for appeals).

150. *See* People v. Dowaliby, 582 N.E.2d 1243, 1249 (Ill. App. Ct. 1991) (maintaining that opportunity alone is insufficient to sustain a conviction); People v. Jenkins, 452 N.E.2d 867, 873 (1983) (holding that opportunity alone is not sufficient).

151. *Dowaliby*, 582 N.E.2d at 1249.

152. *Id.* at 1246.

153. *Id.* at 1250.

154. *Id.* at 1249.

155. 333 N.E.2d 683 (Ill. App. Ct. 1975).

156. *Id.* at 685.

was found murdered in her home forty-one hours later.[157] There was evidence that the victim argued with an unidentified man around 2:30 a.m.,[158] and the medical evidence established that she died no more than twenty-four hours afterwards.[159] Although some circumstantial evidence suggested that the defendant was in the victim's home sometime during that period, the court concluded that the evidence did not adequately exclude the reasonable hypothesis that someone else murdered her.[160]

B. Flight, Concealment, Etc.

1. Flight

The general rule is that flight from the scene of the crime may have some probative value as showing the defendant's consciousness of guilt; "[h]owever, flight from the scene of the crime is not sufficient in itself to sustain a conviction."[161] Moreover, the probative value of evidence of flight is conditioned upon the flight bearing some reasonable relationship to the defendant's consciousness of guilt.[162]

In a number of cases, courts have reversed convictions despite evidence of flight, often finding that there was a reasonable alternative explanation for the defendant's conduct. For example, in *People v. Gomez*,[163] the defendant traveled to Kenosha, Wisconsin shortly after the murder of his landlady and later went to Texas.[164] While in Wisconsin, however, the defendant voluntarily contacted the police for help on another matter and voluntarily returned to Illinois to answer questions, as well as to provide hair, fingerprints, and blood samples.[165] In Texas, the defendant remained within a few miles of the Mexican border, making no attempt to leave the United States even after he learned that there was a warrant for his arrest.[166] The court

157. *Id.* at 686.
158. *Id.* at 687.
159. *Id.* at 688.
160. *Holsapple*, 333 N.E.2d. at 694.
161. People v. LaGardo, 376 N.E.2d 62, 64 (Ill. App. Ct. 1978) (noting the general rule concerning flight from the crime scene).
162. *See* People v. Herbert, 196 N.E. 821, 825 (Ill. 1935) (defining the nature of flight as "not merely a leaving, but a leaving or concealment under a consciousness of guilt and for the purpose of evading arrest"); People v. Cokely, 360 N.E.2d 545, 547 (Ill. App. Ct. 1977) (maintaining that circumstantial evidence of flight must bear a reasonable relationship to the defendant's consciousness of guilt); *LaGardo*, 376 N.E.2d at 64 (maintaining that the flight must be reasonably related to a consciousness of guilt).
163. 574 N.E.2d 822 (Ill. App. Ct. 1991).
164. *Id.* at 825, 829.
165. *Id.* at 825-26.
166. *Id.* at 825.

concluded that evidence of flight was "improbable" and reversed.[167]

2. Concealment

Similar considerations apply to circumstantial evidence of concealment or false statements to police. For example, in *People v. Garrett*,[168] where the issue was whether the defendant shot his lover or whether she committed suicide, the Illinois Supreme Court found that the defendant's acts of leaving the scene of death and hiding the shotgun were "equally consistent with the hypothesis that these were the actions of an innocent man acting in panic."[169] Similarly, in *People v. Ware*,[170] the defendant's false denial to the police that he had ever been to the murder victim's apartment did not "clearly evidence his knowledge of guilt,"[171] because defendant's roommate, the actual killer, may have confessed to the defendant and the defendant "may have feared guilt by association."[172]

C. Fingerprints

A special problem is presented by fingerprint evidence. The general rule is that to sustain a conviction based solely on fingerprint evidence, the defendant's fingerprints "must have been found in the immediate vicinity of the crime under such circumstances as to establish beyond a reasonable doubt that the fingerprints were impressed at the time the crime was committed."[173]

In three reported cases, prosecutorial failure to prove beyond a reasonable doubt that the impression of the defendants' fingerprints occurred during commission of the crime charged resulted in reversals of the convictions. In the first case, *People v. Donahue*,[174] the decedent was found suffocated in her apartment.[175] The court noted that "[h]er head was covered with plastic bags which were tied around her neck with two cords. One of the cords

167. *Id.* at 829-30.
168. 339 N.E.2d 753 (Ill. 1975).
169. *Id.* at 763.
170. 402 N.E.2d 762, (Ill. App. Ct. 1980).
171. *Id.* at 768.
172. *Id.* at 768-69.
173. People v. Rhodes, 422 N.E.2d 605, 608 (Ill. 1981). *See also* People v. Malmenato, 150 N.E.2d 806, 812 (Ill. 1958) (noting that several burglary tools bearing defendant's fingerprints in the immediate vicinity was sufficient for a jury determination of the issue); People v. Taylor, 204 N.E.2d 734, 736 (Ill. 1965) (noting the rule that the fingerprint evidence must be of such a type that the presence of the prints could not be "explained by public accessibility of the place . . . and the possibility that the prints were made at a time other than when the offense occurred").
174. 365 N.E.2d 710 (Ill. App. Ct. 1977).
175. *Id.* at 711.

was attached to a steam iron."[176] The defendant's fingerprint was found on the bottom of the steam iron.[177] The decedent's sister, however, testified for the defense that the week before the murder, the victim had entertained a man at her apartment who "looked similar" to the defendant.[178] The court found that the prosecution's case failed to prove more than a probability that the defendant had been in the decedent's apartment.[179] The court concluded that the prosecution failed to establish beyond a reasonable doubt that the defendant committed the murder.[180]

Similarly, in *People v. Gomez*,[181] the police found the defendant's fingerprint on an open kitchen drawer, which had apparently been ransacked at the time the victim, the defendant's landlady, was murdered.[182] However, the defendant testified that he had entered the kitchen twice before to pay his rent to the victim.[183] Although the police found the defendant's fingerprint twelve feet from the area in which the victim had allowed tenants to stand while paying their rent, the court noted that some tenants would sometimes stand outside that area.[184] The court concluded that the fingerprint, even when considered in combination with other physical evidence and evidence of the defendant's flight, was insufficient to prove the defendant's guilt beyond a reasonable doubt.[185]

The third case reversing for failure to prove temporal and physical proximity of the defendant's fingerprint, *People v. Ware*,[186] turned upon the issue of accountability.[187] Prior to trial, the defendant's codefendant, who was also his roommate, pled guilty to the murders and armed robberies of the two victims.[188] The circumstantial evidence against the defendant included his fingerprint on a glass found at the victims' apartment, the scene of the murders.[189] Other evidence established that the fingerprint must have been placed no earlier than several hours before the murders took place.[190] Despite additional evidence that a witness saw the defendant outside the victim's apartment building close to

176. *Id.*
177. *Id.*
178. *Id.* at 711-12.
179. *Donahue*, 365 N.E.2d at 712.
180. *Id.*
181. 574 N.E.2d 822 (Ill. App. Ct. 1991).
182. *Id.* at 824.
183. *Id.* at 827.
184. *Id.* at 827-28.
185. *Id.* at 829-30.
186. 402 N.E.2d 762 (Ill. App. Ct. 1980).
187. *Id.* at 769.
188. *Id.* at 763, 768.
189. *Id.* at 766-67.
190. *Id.*

the time of the murders and the fact that the defendant falsely told the police that he had never been to the apartment building, the court nonetheless concluded that the defendant had not been proven guilty beyond a reasonable doubt.[191] The prosecution could "not exclude the possibility" that the defendant had left the apartment before the murders were committed, and the remaining evidence was too slight to establish that he had acted as a lookout for the actual killer.[192]

Where there is no evidence that the defendant has ever been to the scene of the crime, the prosecution can apparently establish temporal and physical proximity without scientific proof of the age of the fingerprint. For example, in each of the three burglary cases consolidated for appeal in *People v. Rhodes*,[193] the Illinois Supreme Court found that the fingerprint evidence, standing alone, was sufficient to establish the defendant's guilt.[194] In two of the cases,[195] the defendants' fingerprints were found on shards of window glass, the windows having been broken at the time of entry.[196] In one of these two cases, there was no evidence that the State tested the print for age, but the owner of the house neither knew the defendant nor gave him permission to enter.[197] In the other, there was testimony that the presence of body "oil" on the fingerprint demonstrated it was fresh.[198] Although the defendant lived in the neighborhood, the court rejected as unreasonable the possibility that he could have walked up to the window, forty feet from the public sidewalk and innocently left his fingerprint.[199]

Finally, in a third case, a fingerprint technician discovered the defendant's fingerprint on a clock radio,[200] which had apparently been moved from its usual position during the burglary.[201] The court found proof beyond a reasonable doubt despite the prosecution's failure to show "whether the clock radio was new or used when the victim got it, how long it had been since the clock radio was last outside the dwelling, or who might have touched it when removed from the dwelling."[202]

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191. *Ware*, 402 N.E.2d at 769.

192. *Id.* at 768. The court later concluded that while this "evidence 'creates a strong suspicion that the defendant may have been connected with the offenses, . . . [it] does not establish his guilt beyond a reasonable doubt.'" *Id.* at 769 (quoting People v. Ivy, 386 N.E.2d 323, 326 (Ill. 1979)).

193. 422 N.E.2d 605 (Ill. 1981).

194. *Id.* at 608-09.

195. The Illinois Supreme Court identifies these two cases as "cause No. 53585, *In re* P.W." and "cause No. 53331, People v. Rhodes." *Id.*

196. *Id.*

197. *Id.* at 609 (discussing "cause No. 53331, People v. Rhodes").

198. *Rhodes*, 422 N.E.2d. at 607 (discussing *In re* P.W.).

199. *Id.* at 608.

200. *Id.* at 607 (discussing cause No. 53560, People v. Van Zant)..

201. *Id.* at 609.

202. *Id.* (Simon, J., dissenting). *Cf.* People v. Reno, 336 N.E.2d 36, 39 (Ill.

In cases comparable to *Donahue*, defense counsel may want to advise the client to opt for a jury trial. Any failure by the police to test the fingerprint for age or to prove a secure chain of custody for the object upon which the fingerprint was found represents avenues for creating a reasonable doubt in the mind of the jury. In addition, counsel may also want to submit an instruction to the court which would instruct the jury that to find the defendant guilty, the prosecution must prove beyond a reasonable doubt that the fingerprints were found in the immediate vicinity of the crime and were impressed at the time the crime was committed.

V. WEAK, UNCERTAIN, OR DOUBTFUL IDENTIFICATION

Aside from accomplice cases, the prosecution's failure to prove that the defendant has been adequately identified as the perpetrator constitutes the basis for most reasonable doubt reversals. Courts have recognized that "[o]f all the factors that account for the conviction of the innocent, the fallibility of eye-witness identification ranks at the top, far above all the others."[203] The general rule is that a conviction cannot be sustained if the witness's identification of the defendant is "vague, doubtful and uncertain"[204] and if there is no corroborating evidence connecting the defendant with the crime.[205]

The often quoted case of *Neil v. Biggers*[206] described five factors to be considered in evaluating the reliability of an identification: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation.[207] Illinois courts utilize the same factors when determining whether the identity of the accused has been proven beyond a reasonable doubt.[208]

App. Ct. 1975) (finding that chain of custody evidence showed that defendant's fingerprint could only have been placed on the cigarette package taken from the victim during the two and a half hour period in which the murder occurred).

203. People v. Gardner, 221 N.E.2d 232, 236 (Ill. 1966) (citing Fred Inbau, *Book Review*, 57 J. CRIM. L. CRIMINOLOGY. & P.S. 376).

204. People v. Cullotta, 207 N.E.2d 444, 446 (Ill. 1965).

205. *See* People v. White, 372 N.E.2d 691, 692 (Ill. App. Ct. 1978) (holding that an uncorroborated identification fails to adequately connect the defendant to the crime).

206. 409 U.S. 188 (1972).

207. *Id.* at 199-200.

208. *See, e.g.*, People v. Rodriguez, 728 N.E.2d 695, 707 (Ill. App. Ct. 2000) (applying Biggers factors and finding that identification was insufficient to prove guilt beyond a reasonable doubt because of contradiction by independent witness).

Moreover, Illinois courts instruct juries that they may consider these factors during deliberation.[209] Finally, the courts recognize that other factors, such as the difficulty of making cross-racial identifications, may also be important to the jury's determination of positive identification.[210]

A. Opportunity to View

Courts frequently find that a witness did not have an adequate opportunity to view the perpetrator of a crime under a number of circumstances: (1) where the witness had little or no time to view the perpetrator or the perpetrator's face,[211] (2) where the lighting or other conditions for viewing were poor,[212] or (3)

209. Ill. Pattern Jury Instr. (Crim.) 315 (West 2000) (Circumstances of Identification).

210. *See* People v. Tisdel, 739 N.E.2d 31, 43 (Ill. App. Ct. 2000) (noting relevancy of expert witnesses' proposed testimony on identification, which included information about the unreliability of cross-racial identification).

211. *See Cullotta*, 207 N.E.2d at 446 (finding that officers had only a "fleeting view" of the profiles of the perpetrators as the officers drove by in their patrol cars); People v. McGee, 173 N.E.2d 434, 436 (Ill. 1961) (finding that no witness of the crime had more than a "fleeting view" of the perpetrator, and one witness only saw the perpetrator in profile for a "couple of seconds"); People v. Betts, 243 N.E.2d 282, 283 (Ill. App. Ct. 1968) (noting that the witness saw the driver of the speeding car for a total of fifteen to twenty seconds divided into three intervals); People v. Ephraim, 273 N.E.2d 225, 231 (Ill. App. Ct. 1971) (finding that the witness had a limited view of the perpetrator seen in rear seat of speeding car); People v. Hughes, 376 N.E.2d 372, 373 (1978) (finding that the witness did not have an adequate opportunity to view the assailants because it was for an unspecified period of time ten minutes prior to the robbery and because the witness could not see their faces during the robbery); People v. Laurenson, 268 N.E.2d 183, 185 (Ill. App. Ct. 1971) (noting that the witness had "but a fleeting glance" at the robber); People v. McKibben, 321 N.E.2d 362, 365 (Ill. App. Ct. 1974) (noting that the witness only had "some seconds" to view assailant); People v. Reed, 243 N.E.2d 628, 629 (Ill. App. Ct. 1968) (holding that the lack of evidence as to how long the complainant viewed the perpetrator of the armed robbery amounted to an inadequate opportunity to view); People v. Reese, 303 N.E.2d 814, 817 (Ill. App. Ct. 1973) (holding that because the witness saw the assailant's face for only a "few seconds" as he walked two to three feet, there was an inadequate opportunity to view); People v. Thompson, 257 N.E.2d 197, 198 (Ill. App. Ct. 1970) (finding that the witness saw the perpetrator "for about ten seconds").

212. *See Betts*, 243 N.E.2d at 284 (stating that the witness's view of the offender through the windshields of two cars on a sunny day was inadequate); People v. Broome, 264 N.E.2d 772, 774 (Ill. App. Ct. 1970) (finding witness who viewed the offender at night, in the pouring rain, to have an inadequate opportunity to view); *Cullotta*, 207 N.E.2d at 445-46 (finding that witness' view of defendant was inadequate when made from passing patrol cars between 2:30 and 4:30 a.m. while it was snowing); *Ephraim*, 273 N.E.2d at 226, 227, 231 (maintaining that the witnesses claimed to have seen defendant, through two windshields, in back seat of moving car at about 10:00 or 10:30 p.m. on a September night); *Hughes*, 308 N.E.2d at 141 (noting that the witness admitted that the lighting at the street corner where he saw the perpetrator was "not good"); *Hughes*, 376 N.E.2d at 373 (finding inadequate

where the witness's eyesight was impaired.[213]

Careful scrutiny of the witness's opportunity to view the perpetrator is the most obvious way to establish reasonable doubt at the trial level. For this reason, well-prepared defense counsel will want to bring in evidence to persuade the trier of fact that there was inadequate opportunity to view. Scene photographs, measurements of distance, maps, and proof of weather conditions and time of day are all important in establishing that the witness may not have possessed an adequate opportunity to view the perpetrator.

B. Witness's Degree of Attention

The witness's degree of attention to the perpetrator's face or features is an extremely ambiguous factor. Some courts have held that when the witness views the offender shortly before the offense—rather than during it—and has no particular reason to note the offender's features, the witness's lack of close attention will diminish the reliability of the identification.[214] Similarly, scientific studies of identification tend to show that identifications made under stressful or difficult circumstances, such as those present in most violent crimes, are less—not more—reliable than those made by witnesses who have no particular reason to memorize a person's features.[215] At the trial level, cross-

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opportunity to view when witness saw robbers through store window at 8:00 p.m. on a February evening); *Laurenson*, 268 N.E.2d at 184-85 (stating that the witness saw the driver of the car used in robbery at 11:00 p.m.); *McGee*, 173 N.E.2d at 435 (stating that kitchen window where offender was seen at 2:45 a.m. was illuminated only by a "night light" of unknown wattage); *McKibben*, 321 N.E.2d at 365 (finding that the vestibule of the building was illuminated only by 50 or 60 watt bulb, but the basement, where crime occurred, and the stairs to basement were unlighted); *Reed*, 243 N.E.2d at 629 (stating that the witness viewed the offender at 8:45 p.m. in January); *Reese*, 303 N.E.2d at 817-18 (stating that the witness saw the attacker's face in the vestibule where no electric lights were on and which was illuminated only by daylight streaming through glass-paneled door).

213. *See Broome*, 264 N.E.2d at 774 (stating that the witness was not wearing his eyeglasses at the time that he saw the offender); *McKibben*, 321 N.E.2d at 364 (stating that the witness was blind in one eye).

214. *See Reese*, 303 N.E.2d at 817 (stating that the witness saw assailant's face for only a "few seconds" prior to a rape); *White*, 372 N.E.2d at 692 (Ill. App. Ct. 1978) (noting that the witness, a hotel clerk, stated that when he first saw robbers when they entered hotel, "he assumed . . . they were looking for rooms and had no reason to look at them carefully").

215. *See, e.g.*, ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (3d ed. 1997); GARY L. WELLS & ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 1 (1984); Elizabeth Loftus & D. Fishman, *Expert Psychological Testimony on Eyewitness Identification*, 4 LAW & PSYCHOL. REV. 87-103 (1978); June E. Chance & Alvin G. Goldstein, *Other-Race Effect and Eyewitness Identification, in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153 (Siegfried L.

examination designed to show that the witness's attention was really drawn to something else, such as the weapon drawn or displayed during a violent crime, is often helpful in diminishing the importance of the "close attention" factor.

C. Accuracy of the Witness' Prior Description

In a significant number of cases, appellate courts have reversed based upon discrepancies between the witness's description of the offender and the defendant's actual appearance.[216] Thus, the witness's failure to notice significant features of the perpetrator's face, hair, or clothing, have contributed to appellate reversal.[217] When the witness knew the defendant before the crime, the discrepancy can also support an argument that the witness is lying.

Moreover, discrepancies between a prior description and the defendant's appearance will support an argument that the witness is honestly mistaken as to the perpetrator's identity. However, where some, but not all, of the details identified by the witness match the defendant's actual appearance, defense counsel must make a strategic decision whether to bring out the description at all. There is a danger that admission of part of a prior description is likely to lead to admission of the entire description under the doctrine of completeness.[218] Where the majority of the description's

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Sporer et al. eds., 1996); Platz & Hosch, *Cross-Race/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988); Lindsey et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations*, 66 J. APPLIED SOC. PSYCHOL. 79 (1981); Roy S. Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330 (1969).

216. *See* People v. Barney, 208 N.E.2d 378, 378-79 (Ill. App. Ct. 1965) (stating that the witness described the offender as 26 years old, five feet, six inches tall, 170 pounds, with stooped posture, while defendant was actually 35 years old, five feet, eleven inches tall, 210-220 pounds, with erect posture); People v. Ford, 553 N.E.2d 33, 35 (Ill. App. Ct. 1990) (noting that the witness described the perpetrator as 38 years old, five feet, nine inches tall, and weighing 165 pounds, while defendant was actually 31 years old, five feet, seven inches tall, and weighed 140 pounds); *Reese*, 303 N.E.2d at 818 (stating that the witness described the offender as being 29 years old, five feet, nine inches tall, and weighing 145 pounds, while defendant was actually 17 years old, six feet, two inches tall, and weighed 155-65 pounds).

217. *See* People v. Byas, 453 N.E.2d 1141, 1145 (Ill. App. Ct. 1983) (stating that the defendant had a hairless chest and stomach); *Ford*, 553 N.E.2d at 36 (noting that the defendant had severe scarring on the left side of his face and body); People v. King, 295 N.E.2d 258, 260 (Ill. App. Ct. 1969) (stating that the defendant had a heavy mustache); *Laurenson*, 268 N.E.2d at 184-85 (noting that defendant had tattoos on his left arm).

218. The doctrine of completeness is defined by BLACK'S LAW DICTIONARY as the "[r]ule of evidence which permits further use of a document to explain portion of document already in evidence." BLACK'S LAW DICTIONARY 285 (6th ed. 1990). *See also*_People v. Olinger, 493 N.E.2d 579 (1986) (discussing the

details jibe with the defendant's features, it may be wiser to object to the admission of any prior description as hearsay, rather to elicit minor inconsistencies.

D Level of Certainty

The witness's level of certainty at the identification confrontation is rarely an issue, either at the trial or the appellate level. At trial, in open court, the witness will usually identify the defendant quite readily.[219] A witness's demeanor during a pre-accusation identification procedure, where a suspect has no right to counsel, is usually witnessed only by police officers, who have little incentive to record uncertainty or hesitation. However, appellate courts have reversed based upon uncertainty in only a limited number of cases.[220]

Although the certainty of witness identification factor of the *Biggers* test may be difficult to attack, certain defense tactics may prove successful. Perhaps the best way to counter in-court identifications is to emphasize both the contrived and ritualistic quality of the identification. To weaken a lineup or photo-array identification, defense counsel may wish to emphasize the lack of impartial witnesses who can vouch for the identifying witness's level of certainty at any pretrial identification procedure.

E. Lapse of Time

Although there is no time limit beyond which an identification will cease to be reliable, a substantial length of time between the charged occurrence and the witness's identification diminishes the reliability of the identification.[221] Additionally, a particularly suggestive identification procedure may also support a

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doctrine of completeness in Illinois).

219. *See Ford*, 553 N.E.2d at 35 (noting that witness's certainty of identification at trial is not conclusive as to the certainty of his initial description).

220. *See Byas*, 453 N.E.2d at 1144-45 (stating that the witness was unable to identify defendant at lineup after twenty minutes of viewing and eventually said that defendant "looked most similar" to her assailant, and the witness similarly hesitated at the preliminary hearing); *Ford*, 553 N.E.2d at 36 (noting that no evidence was introduced as to officer's level of certainty when viewing single photograph of defendant); *White*, 372 N.E.2d at 692 (stating that the witness identified the defendant on direct examination but admitted on cross-examination that he had "some doubt" that defendant was one of the perpetrators, and the witness also failed to pick defendant's picture out of a photo-array).

221. *See Barney*, 208 N.E.2d at 379 (noting the six month lapse between the crime and the witness's identification); *Ford*, 553 N.E.2d at 36 (noting that one year had elapsed between the undercover narcotics buy and the defendant's arrest); *Reese*, 303 N.E.2d at 818 (stating that there was a two month separation between the incident and the identification).

finding of reasonable doubt.[222] If an identification procedure can is particularly suggestive, it is sometimes better not to file a pretrial motion to suppress the procedure; instead, defense counsel may want to attack the suggestiveness of the entire procedure, itself, which can be a powerful source of reasonable doubt.

Defense counsel must take into account the most recent identification case considered by the Illinois Supreme Court, *People v. Slim*.[223] Although that case affirmed the defendant's conviction, it contains a number of peculiar facts which limit its applicability. In *Slim*, the witness, a victim of an armed robbery, identified the defendant twice—once at an apparently proper lineup and once in court.[224] There was no dispute that the victim had a good opportunity to view the offender at the time of the crime.[225] The defendant was also driving the victim's car when the police arrested him eleven days after the crime.[226]

The defendant in *Slim* argued that the identification was fatally weakened by three factors: (1) the victim's failure to notice several of the defendant's facial features, including the braces on his teeth and his "unusually" thick lips; (2) a discrepancy between the victim's initial description of the defendant's height and weight and the defendant's actual height and weight; and (3) the eleven days separating the commission of the crime from the lineup identification of the defendant.[227] The court, however, disagreed. The victim's failure to notice the braces and thick lips was unimportant because a "witness is not expected or required to distinguish individual and separate features of a suspect in making an identification" but can instead give a "general description based on the total impression the accused's appearance made."[228] The claimed discrepancy in height and weight might have been significant—five feet, three inches and 135 pounds in an initial description to the police, as opposed to an estimate by the

222. People v. Gardner, 221 N.E.2d 232, 233 (Ill. 1966) (stating that the witness identified the defendant at a one person show-up at the hospital); People v. Jefferson, 182 N.E.2d 1, 3 (Ill. 1962) (stating that the witness identified defendant in a two-person showup at the police station); *Laurenson*, 268 N.E.2d at 184-85 (stating that the witness was shown three photographs, one of defendant and two of men who had already been identified as perpetrators, and the witness was also present in the preliminary hearing courtroom when the defendant was called and he appeared in handcuffs); *McKibben*, 321 N.E.2d at 366 (noting that the witness was shown one photograph of defendant by the police officer who told the witness that officer was investigating the charged crime).

223. 537 N.E.2d 317 (Ill. 1989).

224. *Id.* at 318.

225. *Id.*

226. *Id.*

227. *Id.* at 319.

228. *Slim*, 537 N.E.2d at 320.

defendant's father of five feet nine inches and 165 pounds.[229] However, no actual measurement of the defendant was made, and another defense witness estimated the defendant's height at five feet two inches.[230] But the most important fact relied upon by the court was the corroboration between the identification and the defendant's presence in the victim's car.[231] In cases lacking such corroboration, *Slim* is of limited significance.

VI. STATE'S FAILURE TO CALL WITNESSES OR TO INTRODUCE EVIDENCE

The failure of the prosecution either to introduce possible evidence, to perform feasible tests, or to call available witnesses forms one of the more powerful arguments for acquittal at trial, particularly in a case argued to a jury. In certain egregious cases, these gaps in the state's evidence have resulted in reversal on appeal.

Illinois courts are not entirely clear as to whether, and under what circumstances, the prosecution's failure to call an available witness will give rise to an inference that the testimony of the missing witness would have been damaging to the state's case. The greater number of cases recognizing this inference involve confidential informants. For example, in the leading case of *People v. Strong*,[232] the Illinois Supreme Court held that the state's unexplained failure to produce a confidential informant to rebut the defendant's defense of entrapment would "give rise to an inference against the State," even though the state was not obligated to call the informant.[233] A number of entrapment cases involving informers have followed the decision in *Strong*.[234] Still, in a number of entrapment-informer cases, the courts have held that the defendant was entitled to the adverse inference but that the state's other evidence sufficiently proved the defendant's guilt beyond a reasonable doubt.[235]

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229. *Id.* at 318.
230. *Id.*
231. *Id.* at 322-23.
232. 172 N.E.2d 765 (Ill. 1961).
233. *Id.* at 768.
234. *See* People v. Dollen, 290 N.E.2d 879, 882 (Ill. 1972) (holding that the adverse inference supported a finding that the state had failed to disprove entrapment where the state claimed that the informer had "disappeared," but refused to provide defense with records related to him); People v. Poulos, 554 N.E.2d 448, 454 (Ill. 1990) (holding that the adverse inference supported a finding that the state had failed to disprove entrapment).
235. *See, e.g.*, People v. Cross, 396 N.E.2d 812, 817 (Ill. 1979) (holding that the state's evidence was sufficient to find defendant guilty notwithstanding defendant's entitlement to the adverse inference); People v. Gonzales, 260 N.E.2d 234, 239 (Ill. 1970) (stating the same proposition); People v. Tipton, 401 N.E.2d 528, 533 (Ill. 1980) (stating the same proposition).

Although one court has asserted that *Poulos* limited the holding in *Strong* to entrapment cases,[236] this is not true. The court, in *Poulos*, merely stated that the adverse inference is "particularly significant," where, as in *Poulos*, "the State fails to establish beyond a reasonable doubt that the defendant was predisposed" to commit the charged offense.[237] Moreover, in a case involving a confidential informant in which no entrapment defense was raised,[238] the court held that the prosecution's failure to produce the informant, who had allegedly witnessed an undercover narcotics buy, gave rise, together with other factors, to a reasonable doubt of guilt.[239]

Indeed, although Illinois courts appear particularly ready to draw an adverse inference against the prosecution when the missing state witness is a confidential informant who might, but does not, rebut an entrapment defense, the adverse inference has been applied in other instances as well. For example, in *People v. Smith*,[240] the court discussed the circumstances under which the prosecution's failure to call an occurrence witness would support an adverse inference.[241] In *Smith*, the prosecution based its case upon the circumstantial evidence of a single witness who initially told the police that he knew nothing, but who later said that he saw the defendants dragging the victim towards the alley where the victim's lifeless body was eventually found.[242] The defense impeached the witness with evidence of his prior inconsistent statement and with evidence that he had consumed ten drinks of alcohol on the night in question.[243] He also testified that the defendants and the victim were followed to the alley by a crowd of people, numbering approximately eighteen.[244] Since the record showed that the state knew the names and addresses of many of these other potential witnesses, they were available—yet missing—state witnesses.[245] Given the weaknesses in the testimony of the single occurrence witness, the "totality of the circumstances" warranted the invocation of the adverse inference.[246] The *Smith* court distinguished other cases in which no adverse inference was drawn because, in those other cases, the testimony of the witness or witnesses actually called was "clear

236. *See* People v. Ayala, 567 N.E.2d 450, 457 (Ill. App. Ct. 1990).
237. *Poulos*, 554 N.E.2d at 453.
238. People v. Johnson, 548 N.E.2d 433 (Ill. App. Ct. 1989).
239. *Id.* at 436.
240. 278 N.E.2d 551 (Ill. App. Ct. 1971).
241. *Id.* at 552-53.
242. *Id.*
243. *Id.* at 553.
244. *Id.*
245. *Smith*, 278 N.E.2d at 553.
246. *Id.*

and convincing" and "complete in all respects."[247]

Similarly, in *People v. DiVito*,[248] the complaining witness testified that he had been robbed by two men.[249] Although the police found the defendant's fingerprint on a metal box, which had been moved during the robbery, the complaining witness did not identify the defendant as the robber.[250] The defendant testified that he had been lured into the apartment by the complaining witness, who made immoral advances towards him.[251] The prosecution also did not call a friend of the complaining witness, who was also present during the robbery.[252] The court held that the unexplained failure to call the friend gave rise to an adverse inference.[253]

Other courts, however, have held that the adverse inference is limited to circumstances in which the state fails to call a witness who possesses "unique knowledge of a crucial disputed issue of fact," or where the state has caused the absence of the witness.[254]

The prosecution's failure to present physical evidence can also give rise to a reasonable doubt, particularly where the prosecution also fails to have such evidence analyzed and preserved. While the failure to present physical evidence is a point more often urged to a jury than to a judge, even appellate courts have occasionally relied upon the absence of potential physical evidence to support outright reversals.[255]

In jury cases of this kind, defense counsel should necessarily request the court to instruct the jury that the prosecution's failure to present available evidence will give rise to an inference that the

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247. *Id.* (quoting People v. Graham, 262 N.E.2d 243 (Ill. App. Ct. 1970)). *Accord Johnson*, 548 N.E.2d at 436 (noting that the prosecution failed to explain the absence of eleven of twelve officers who had allegedly witnessed drug transaction as part of surveillance team); People v. Villalobos, 368 N.E.2d 556, 557 (Ill. App. Ct. 1977) (noting that the prosecution called only one of six potential occurrence witnesses).

248. People v. DiVito, 214 N.E.2d 320 (Ill. App. Ct. 1966).

249. *Id.* at 321.

250. *Id.*

251. *Id.*

252. *Id.* at 322.

253. *DiVito*, 214 N.E.2d at 322.

254. People v. Zenner, 406 N.E.2d 27, 31 (Ill. App. Ct. 1980) (citing People v. Williams, 240 N.E.2d 580 (Ill. 1968) (state sent informer out of jurisdiction before trial)).

255. *See, e.g.*, People v. Garrett, 339 N.E.2d 753, 762 (Ill. 1976) (reversing because prosecution failed to perform nitrate test on the hands of the deceased which might have shown whether she had committed suicide); People v. Mitchell, 375 N.E.2d 531, 533 (Ill. App. Ct. 1978) (reversing because police failed to test, for fingerprints, screwdriver found near the scene of criminal damage to property alleged to have been committed by the defendant); People v. Moore, 287 N.E.2d 130, 133 (Ill. App. Ct. 1972) (reversing because items at scene of rape were dusted for fingerprints but there was no evidence that defendant's fingerprints had been found).

missing evidence would not have favored the prosecution's case. In *People v. Danielly*,[256] the court held that where potential physical evidence had been lost through the prosecution's negligence, the jury should have been instructed that they could draw an inference that the "true fact is against the state's interest."[257] However, whether the Illinois Pattern Instruction Committee will eventually adopt this instruction or will extend it to missing live witnesses has not yet been resolved. In the meantime, it is always possible to argue such inferences, relying particularly upon the circumstantial evidence instruction which courts commonly give.

VII. CREDIBILITY OF A SINGLE WITNESS

The Everest of criminal appellate wins is the reversal based upon an appellate court finding that a witness's testimony is so incredible that it cannot support a conviction. The general rule is that the credibility of witnesses is a matter for the trier of fact, whether judge or jury.[258] The trier of fact may resolve conflicts or inconsistencies in the evidence,[259] determine the weight to be given to the testimony of the witnesses, and make reasonable inferences.[260] The appellate court will not "retry" the defendant, substitute its own judgment for that of the fact-finder, or reverse merely because the evidence is conflicting.[261] However, where testimony is contrary to the laws of nature or universal human experience, the reviewing court is not bound to believe it.[262] The reviewing court is entitled to conclude, in the appropriate case, that the state's evidence is so improbable, unsatisfactory, or confusing, that it raises a reasonable doubt of the defendant's guilt.[263]

Frequently, obvious defects in witness credibility constitute the basis for many reasonable doubt reversals. Such witness credibility defects often involve facts such as intoxication at the time of the event,[264] drug addiction,[265] a criminal record,[266] or prior

256. 653 N.E.2d 866 (Ill. App. Ct. 1995).
257. *Id.* at 873 (citing Arizona v. Youngblood, 488 U.S. 51, 59 (1988)).
258. People v. Ellis, 384 N.E.2d 331, 334 (Ill. 1988).
259. People v. Sanchez, 503 N.E.2d 277, 285 (Ill. 1997).
260. People v. Akis, 347 N.E.2d 733, 734 (Ill. 1976).
261. People v. Collins, 478 N.E.2d 267, 277 (Ill. 1985); People v. Novotny, 244 N.E.2d 182, 188 (Ill. 1969).
262. People v. Coulson, 149 N.E.2d 96, 99 (Ill. 1958).
263. *See* Mannen v. Norris, 170 N.E. 273, 274-75 (Ill. 1930).
264. People v. Butler, 190 N.E.2d 800, 802 (Ill. 1963) (finding that each of two witnesses had ten to fifteen shots of whiskey or vodka at the time of occurrence); *Coulson*, 149 N.E.2d at 97 (noting that the witness had a couple of beers and two shots on the night in question); People v. Pellegrino, 196 N.E.2d 670, 671 (Ill. 1964) (noting that the witness was in the fourth week of a seven week period of drunkenness); People v. Villalobos, 368 N.E.2d 556, 559 (Ill.

inconsistent statements.[267]

More subtle arguments for reasonable doubt on appeal have turned on the appellate court's perception that the defendant's alleged actions were so stupid or unreasonable as to raise a strong doubt. For example, in *People v. Coulson*,[268] the court found unbelievable the witness's testimony that five robbers voluntarily accompanied him to his home on the vague promise of more money, and then permitted him to go inside alone, trusting that he would keep his promise not to call the police.[269] Incredible or unbelievable activity by witnesses has also led to reversal.[270]

Even though the law provides that the testimony of a police officer should not be afforded more or less credibility than that of another witness, appellate reversals based upon a finding of police incredibility are exceedingly rare. They are not, however, non-existent. In *People v. Warren*,[271] for example, a police officer testified that he stopped a car for a minor traffic violation.[272] After the stop, he saw the defendant sitting on the passenger side in the rear of the car with a bag of crushed green plant matter open between his feet.[273] The police then found a second bag of cannabis under the front seat.[274] The defendant testified that one bag was recovered after police removed the back seat, and that he saw no second bag.[275] The appellate court reversed outright, relying partially upon the trial judge's own expressed skepticism that anyone would be so stupid as to leave a bag of marijuana lying open in plain view.[276]

App. Ct. 1977) (finding that the witness was a "heavy drinker" who had consumed six to eight beers and several shots of whiskey at the time of the occurrence, and he may not have been sober at time he testified).

265. *McKibben*, 321 N.E.2d at 364 (noting that both prosecution witnesses were drug addicts).

266. *Villalobos*, 368 N.E.2d at 559 (noting that the witness had record for burglary, conspiracy, and arson).

267. *Coulson*, 149 N.E.2d at 99 (stating that the presence of the other two men was not mentioned until police searched defendant's car and failed to find money or a gun); *Pellegrino*, 196 N.E.2d at 672 (stating that the witness had previously accused two other persons of having perpetrated charged crime); *Villalobos*, 368 N.E.2d at 558-60 (maintaining that the witness testified at trial that he saw only a "shining object" in defendant's hands, whereas at preliminary hearing he said he saw a knife with a five to six inch blade).

268. 149 N.E.2d 96 (Ill. 1958).

269. *Id.* at 99.

270. *See, e.g.*, *Butler*, 190 N.E.2d at 800-01 (stating that the witnesses claimed that they entered apartment of two transvestites because they were "afraid").

271. 353 N.E.2d 250 (Ill. App. Ct. 1976).

272. *Id.* at 251.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Warren*, 353 N.E.2d at 252.

Similarly, in *People v. Quintana*,[277] a police officer testified that from a distance of twenty feet, at night, he could see the defendant throw two packages, each one of which was two by three inches in size.[278] He testified that he could tell that the packages were of the type customarily used by sellers of marijuana.[279] The defendant testified that the officer first stopped a group of five or six other men, and the officer then appeared to look around the area of the earlier stop with a flashlight.[280] The appellate court, reversing outright, relied upon three facts: (1) the testimony of the chemist that the packages were not of the type customarily used to package marijuana; (2) the trial judge's skepticism about the officer's testimony at an earlier motion; and (3) evidence from both sides that the officer had repeatedly arrested the defendant in the past—each time without probable cause and each time for the expressed purpose of inducing the defendant to become the officer's informer.[281]

VIII. CONFLICTING TESTIMONY BY MULTIPLE WITNESSES

Historically, Illinois courts have also reversed, although less frequently, based upon serious conflicts in the testimony of multiple witnesses. In the leading Illinois Supreme Court case of *People v. Jefferson*,[282] for example, the victim of an armed robbery testified that he was unable to identify the defendant as one of the robbers.[283] Two other prosecution witnesses, each of whom had a poorer opportunity to view the robber, contradicted the victim and identified the defendant.[284] Their testimony, however, was weakened by a suggestive identification procedure.[285] The defendant presented uncontradicted alibi evidence, as well as testimony by a second witness that the first witness had committed the robbery together with two other men, neither of whom was the defendant.[286] The Illinois Supreme Court concluded that the contradiction between the victim's failure positively to identify the defendant and the suspect identifications of the two other prosecution witnesses were sufficient to justify outright reversal.[287]

Following *Jefferson*, the appellate court reversed a number of

277. 234 N.E.2d 406 (Ill. App. Ct. 1968).
278. *Id.* at 407-08.
279. *Id.* at 407.
280. *Id.*
281. *Id.* at 408-09.
282. 182 N.E.2d 1 (Ill. 1962).
283. *Id.* at 1-2.
284. *Id.* at 2.
285. *Id.* at 3.
286. *Id.*
287. *Jefferson*, 182 N.E.2d at 3.

convictions based upon discrepancies between the testimony of multiple witnesses, even when the contradictions involved less critical issues of fact. For example, in *People v. Hughes*,[288] two witnesses identified the defendant as the murderer.[289] One of the two identifying witnesses, however, denied that the second witness was present during the murder.[290] This contradiction, when combined with several other weaknesses in the testimony of each of the two identifying witnesses, established a reasonable doubt upon which the appellate court reversed.[291] Similarly, in *People v. Broome*,[292] the state's witnesses contradicted each other as to the time when a burglary had taken place.[293] The court concluded that this contradiction, combined with internal weaknesses in the testimony of each witness, was "substantial" and "significant," enough to create a reasonable doubt.[294] Similar contradictions have been significant in cases where other factors also fatally weakened the prosecution's case.[295]

Several years prior to the adoption of the *Collins-Young* "light most favorable" language, however, the Illinois Supreme Court considerably weakened the power of this method of establishing reasonable doubt on appeal. In *People v. Yarbrough*,[296] a witness, who claimed that he was able to view his assailant for twenty-five or thirty seconds, identified the defendant.[297] A second prosecution witness testified that the first witness remained on the floor throughout the robbery and therefore lacked any opportunity to view the defendant.[298] The Illinois Supreme Court concluded simply that the jury "obviously preferred" the testimony of one witness, whose testimony, judged by itself, could be found credible.[299]

Following *Yarbrough*, matters remained unchanged until the recent Illinois Supreme Court reversal in the death penalty case of *People v. Smith*.[300] The defendant was originally convicted of the

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288. 308 N.E.2d 137 (Ill. App. Ct. 1974).
289. *Id.* at 141.
290. *Id.* at 140.
291. *Id.* at 141-42.
292. 264 N.E.2d 772 (Ill. App. Ct. 1970).
293. *Id.* at 773.
294. *Id.*
295. *See Butler*, 190 N.E.2d at 801 (stating that the prosecution witnesses contradicted each other as to the location of the jacket from which money was stolen and whether the victim left the room where the theft occurred); *McKibben*, 321 N.E.2d at 364 (stating that one prosecution witness testified that she and another prosecution witness had taken heroin the night of the murder, a fact which the other witness denied).
296. 367 N.E.2d 666 (Ill. 1977).
297. *Id.* at 667.
298. *Id.* at 668.
299. *Id.*
300. 708 N.E.2d 365 (Ill. 1999).

murder of a prison warden, Virdeen Willis, Jr., who was shot while leaving a bar.[301] In the Illinois Supreme Court's initial review of the case, it found the evidence to be close, but also sufficient to convict, and it reversed on the grounds of trial error.[302] At the retrial, as at the first trial, the defendant's conviction rested upon the testimony of a single eyewitness, Debrah Carraway. Debrah Carraway did not tell anyone that she was an eyewitness until two days after the murder, when she went to the police station to see her sister, Ronda, who the police were questioning.[303] In both trials the defense established that Debrah Carraway had a motive to falsely implicate the defendant because the police also suspected her sister's boyfriend.[304]

At the second trial, however, other witnesses also contradicted Debrah Carraway's testimony as to some of the key facts of the event.[305] The "most glaring" deficiency in her testimony involved the number of people present when Willis was shot.[306] Three witnesses, the bartender and Willis's two companions, all testified that Willis had left the bar with the companions and was shot just after leaving.[307] Willis, however, testified that he had left the bar alone, followed by the defendant, and was alone when shot.[308] Moreover, the bartender's testimony contradicted Carroway's testimony that the defendant followed Willis out.[309] The bartender testified that he saw the defendant leave the bar several minutes *before* Willis.[310] The state's argument at trial that the defendant could have waited in the vestibule was not a reasonable inference, as there was no evidence that Willis's two companions had passed someone in the vestibule or that the vestibule was an area in which someone could hide.[311] The defendant was also "repeatedly impeached" with a signed statement she had given to a defense investigator, admitting, contrary to her testimony at trial, that she had used drugs everyday during the time of the murder, had been looking for drugs on that day, and had seen one of the other possible witnesses to the crime being beaten by the police.[312]

In a striking decision, the Illinois Supreme Court held that, even judged in the light most favorable to the state, the evidence

301. *Id.* at 366-67.
302. People v. Smith, 565 N.E.2d 900, 905, 917 (Ill. 1990).
303. *Smith*, 708 N.E.2d at 371.
304. *Id.*.
305. *Smith*, 708 N.E.2d at 370.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Smith*, 708 N.E.2d at 370.
311. *Id.*
312. *Id.* at 370-71.

was not sufficient to prove the defendant guilty beyond a reasonable doubt.[313] In a passage resonating to the current mood of dismay at the prospect that innocent men might be put to death, the court said:

> What is involved here is the standard of proof which is applicable to all crimes. That is to say, conviction beyond a reasonable doubt. Whether the crime charged be trespass, shoplifting, armed robbery, or murder, the test is the same. The burden of meeting this standard falls solely on the prosecution. If it fails to meet this burden, a defendant is entitled to a finding of not guilty. No defendant is required to prove his innocence.
>
> While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof. While there are those who may criticize courts for turning criminals loose, courts have a duty to ensure that all citizens receive those rights which are applicable equally to every citizen who may find himself charged with a crime, whatever the crime and whatever the circumstances. When the State cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a defendant where the State has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim. No citizen would be safe from prosecution under such a standard.[314]

Although *Smith* paid lip service to the "light most favorable" standard, the case clearly represents a return to a more nuanced and stringent approach to the review of criminal convictions. After all, in the "light most favorable" to the prosecution, the defendant had hid in the vestibule. The witnesses who contradicted Debrah Carraway were mistaken, and the deficiencies in Carraway's testimony were all available to the triers of fact, who judged her credibility and did not, evidently, find it wanting. *Smith* represents a clear signal to the appellate courts that they can and should return to the traditional standard of review.

CONCLUSION

This article demonstrates that Illinois appellate courts can perform a key role in protecting the innocent from wrongful convictions. Any appellate court worth its salt will always defer to the trier of fact in circumstances in which a case depends, in critical measure, on demeanor evidence not available in a cold

313. *Id.* at 366, 369.
314. *Id.* at 371.

record. However, appellate courts can maintain the Illinois tradition of developing rules and precedents applicable to different types of evidence and then examining challenged convictions in light of those rules and precedents, without giving up deference to the findings of the trial courts. Vigilant juries and judges are the first line of defense against wrongful conviction; skeptical and intelligent appellate courts are the second. It is high time that courts in Illinois returned to these principles.