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PROBLEMS IN IMPOSING EXTENDED-TERM SENTENCES UNDER SECTION 5-5-3.2(b)(2) OF THE UNIFIED CODE OF CORRECTIONS

BY IAIN D. JOHNSTON*

INTRODUCTION

Section 5-5-3.2(b)(2) of the Illinois Unified Code of Corrections ("The Code") allows a trial court to impose an extended-term sentence for any felony accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[1] Generally, the maximum sentence which may be imposed by a trial court is enumerated in section 5-8-1.[2] However, when certain aggravating factors are present, the trial court may impose an extended-term sentence. Although section 5-5-3.2(b)(2) allows for extended-terms for all felonies, section 5-8-1(a)(1)[3] and section 9-1(b)(7)[4] both contain the identical phrase, "exceptionally brutal or heinous behavior indicative of wanton cruelty." However, section 5-8-1(a)(1) provides for natural life imprisonment for a murder accompanied by such behavior[5] while Section 9-1(b)(7) provides for the death penalty for such behavior if the defendant was convicted of first degree murder, was 18 or older at the time of the offense and murdered an

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1. ILL. REV. STAT. ch. 38, para. 1005-5-3.2(b)(2) (1989). The statute permits but does not require the imposition of an extended-term sentence. *See* People v. Frey, 467 N.E.2d 302, 305 (Ill. App. Ct. 1984) (applying section 5-5-3.2(b)(1)). The imposition of an extended-term is discretionary. *See infra* text accompanying note 103. *See also* People v. Lighthall, 530 N.E.2d 81, 86 (Ill. App. Ct. 1988). Further, because the determination to impose an extended-term is a discretionary matter for the trial court, it need not be alleged in the charging instrument. *See* People v. Turner, 416 N.E.2d 1149, 1154 (Ill. App. Ct. 1981).
2. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1991).
3. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1) (1991).
4. ILL. REV. STAT. ch. 38, para. 9-1(b)(7) (1991).
5. Section 5-8-1(a)(1) provides the following:

> Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations . . . for first degree murder, . . . if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty . . . the court may sentence the defendant to a term of natural life imprisonment.

individual under the age of twelve.[6] This article will focus on section 5-5-3.2(b)(2) except in those areas when a comparison of the statutes helps explain an issue.

Part I discusses the general application of section 5-5-3.2(b)(2) in sentencing defendants convicted of felonies.[7] Part II enumerates factors that Illinois courts have considered in imposing extended-term sentences under section 5-5-3.2(b)(2).[8] The enumeration lists those factors which are appropriate and those that are questionable. The enumeration will also contrast cases which, although factually similar, reach different conclusions as to whether section 5-5-3.2(b)(2) is applicable. Because of the problems in applying section 5-5-3.2(b)(2), serious constitutional questions arise, and those constitutional issues will be analyzed in Part III.[9]

I. General Application

A. Statutory Scheme and Language

The statutory scheme used in imposing extended-term sentences for exceptionally brutal or heinous behavior indicative of wanton cruelty involves three sections of the Code. Generally, section 5-8-1 of the Code governs the length of a sentence for a defendant convicted of a felony.[10] This section prescribes the following sentencing guidelines for felonies:

> Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:
>
> (1) for first degree murder, (a) a term shall be not less than 20 years and not more than 60 years, or (b) if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment, or (c) if the defendant has previously been convicted of first degree murder under any state or

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ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1)(b) (1991).

Some courts, however, are not careful in distinguishing between sections 5-8-1(a)(1)(b) and 5-5-3.2(b)(2). *See, e.g.*, People v. Kuchan, 579 N.E.2d 1054, 1058 (Ill. App. Ct. 1991).

6. Section 9-1(b)(7) provides the following:

> A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if . . . the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.

ILL. REV. STAT. ch. 38, para. 9-1(b)(7) (1991).

7. *See infra* text accompanying note 10.

8. *See infra* text accompanying note 103.

9. *See infra* text accompanying note 196.

10. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1991).

> federal law or is found guilty of murdering more than one victim, the court shall sentence the defendant to a term of natural life imprisonment;
>
> (2) for a person adjudged a habitual criminal under Article 33B of the Criminal Code of 1961, as amended, the sentence shall be a term of natural life imprisonment.
>
> (3) except as otherwise provided in the statute defining the offense, for a Class X felony, the sentence shall be not less than 6 years and not more than 30 years;
>
> (4) for a Class 1 felony, the sentence shall be not less than 4 years and not more than 15 years;
>
> (5) for a Class 2 felony, the sentence shall be not less than 3 years and not more than 7 years;
>
> (6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years;
>
> (7) for a Class 4 felony, the sentence shall be not less than 1 year and not more than 3 years.[11]

However, section 5-5-3.2(b)(2) of the Code provides the following:

> The following factor may be considered by the court as [a] reason to impose an extended-term sentence under Section 5-8-2 upon any offender: . . . [w]hen a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[12]

Section 5-8-2 of the Code enumerates the length of extended-term sentences that a trial court can impose upon a defendant convicted of a felony when the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[13] This section provides for the following terms of imprisonment:

> A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following:
>
> (1) for first degree murder, a term shall be not less than 60 years and not more than 100 years;
>
> (2) for a Class X felony, a term shall be not less than 30 years and not more than 60 years;
>
> (3) for a Class 1 felony, a term shall be not less than 15 years and not more than 30 years;

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11. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1) - (7) (1991).

12. ILL. REV. STAT. ch. 38, para. 1005-5-3.2(b)(2) (1991). Although trial courts frequently find more than one factor allowing for the imposition of an extended-term sentence, if an appellate court finds that one factor exists for imposing an extended-term, it need not address a defendant's contention that the other statutory factor was improperly imposed. *See, e.g.*, People v. Benkowski, 575 N.E.2d 587, 591 (Ill. App. Ct. 1991); People v. Jackson, 460 N.E.2d 904, 907 (Ill. App. Ct. 1984); People v. Stanford, 452 N.E.2d 710, 718 (Ill. App. Ct. 1983).

13. ILL. REV. STAT. ch. 38, para. 1005-8-2 (1991).

(4) for a Class 2 felony, a term shall be not less than 7 years and not more than 14 years;

(5) for a Class 3 felony, a term shall not be less than 5 years and not more than 10 years;

(6) for a Class 4 felony, a term shall not be less than 3 years and not more than 6 years.[14]

Thus, when a defendant is convicted of a felony which the trial court finds to be accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, the allowable minimum sentence is the maximum sentence which could have been imposed if the aggravating factor were not present. The maximum sentence which can be imposed when the offense is found to be accompanied by exceptionally brutal or heinous behavior is twice as long as the minimum sentence.

The purpose of this type of extended-term sentence is to ensure that the punishment is appropriate, based on the particular circumstances of the case, and to ensure that society is protected from those individuals who demonstrate by their conduct their capacity for particularly brutal and heinous crimes which are indicative of wanton cruelty.[15] However, there is no requirement that the trial court find that defendants' characters and attitudes indicate that they are likely to commit similar crimes before the court may sentence these defendants to an extended-term of imprisonment under section 5-5-3.2(b)(2) of the Code.[16] Determining whether criminal acts rise to the level of exceptionally brutal or heinous thereby allowing the possibility of an extended-term sentence is not an easy, exact or gratifying task for any court.[17] Although trial judges need not recite the language of the statute when sentencing a defendant to an extended-term under section 5-5-3.2(b)(2),[18] they should, but are not required to, make clear and express statements of the factors that led them to impose an extended-term sentence.[19] The extended-term determination is based on the unique facts of each case

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14. ILL. REV. STAT. ch. 38, para. 1005-8-2(a)(1) - (6) (1991).

15. People v. Bedony, 527 N.E.2d 916, 920 (Ill. App. Ct. 1988). For a good discussion of sentencing, including imposing an extended-term sentence under section 5-5-3.2(b)(2), *see* Kenneth L. Gillis, SENTENCING, ILLINOIS CRIMINAL PROCEDURE 335-86 (R. Ruebner ed., 1987).

16. People v. Hickman, 492 N.E.2d 1041, 1049 (Ill. App. Ct. 1986).

17. People v. Kane, 489 N.E.2d 500, 502 (Ill. App. Ct. 1986).

18. People v. Lekas, 508 N.E.2d 221, 238 (Ill. App. Ct. 1987), *cert. denied*, 485 U.S. 942 (1988) ("However, this precise language need not be recited as a formal incantation to justify imposition of an extended-term sentence"); People v. Campbell, 467 N.E.2d 1112, 1132 (Ill. App. Ct. 1984), *cert. denied*, 471 U.S. 1136 (1985) (court's failure to parrot the language of the statute was not fatal to the extended-terms imposed, when the record showed the trial court considered the evidence indicated wanton conduct, and when the evidence does reflect such conduct).

19. People v. Lucien, 440 N.E.2d 899, 905 (Ill. App. Ct. 1982), *cert. denied*, 459 U.S. 1219 (1983).

and is done on a case-by-case analysis.[20]

In determining whether the defendant's conduct rises to the exceptionally brutal or heinous level, most courts start with the language of the statute.[21] Many courts have placed great emphasis on the word "exceptionally"[22] and when a court does so, the court has generally found that the behavior does not meet the statutory requirements.[23] In *People v. Andrews*,[24] the Illinois Supreme Court adopted the same definitions of "heinous" and "brutal" which were prescribed eight years earlier in *People v. LaPointe*.[25] The *La-Pointe* court defined the language used in section 5-8-1(a)(1)(b) of the Code.[26] Adopting the definitions of *Webster's Third New International Dictionary*, the *LaPointe* court defined "heinous" as "hatefully or shockingly evil: grossly bad: enormously and flagrantly criminal," and the *LaPointe* court defined "brutal" as "grossly ruthless, devoid of mercy or compassion: cruel and cold-

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20. People v. Sullivan, 538 N.E.2d 1376, 1380 (Ill. App. Ct. 1989); People v. Bedony, 527 N.E.2d 916, 920 (Ill. App. Ct. 1988); People v. Hickman, 492 N.E.2d 1041, 1049 (Ill. App. Ct. 1986); People v. McGee, 460 N.E.2d 843, 846 (Ill. App. Ct. 1984); People v. Strait, 451 N.E.2d 631, 634 (Ill. App. Ct. 1983); *see also* People v. Taylor, 518 N.E.2d 409, 412 (Ill. App. Ct. 1987); People v. Nester, 462 N.E.2d 1011, 1014 (Ill. App. Ct. 1984) (applying section 5-8-1(a)(1)(b) and imposing a sentence of natural life.)

21. *See* People v. LaPointe, 431 N.E.2d 344 (Ill. 1981) (defining "brutal" and "heinous" for imposing a sentence of natural life imprisonment under § 5-8-1(a)(1)(b)).

It would seem clear that the language of the statute requires a finding that the offense was accompanied by both brutal or heinous behavior which was also indicative of wanton cruelty. *See* People v. Palmer, No. 69991, slip op. at 25 (Ill. Mar. 12, 1992). However, it seems some courts do not carefully read the statutory language and blur the standard with a conjunctive interpretation. *See, e.g.*, People v. Amos, 488 N.E.2d 290, 297 (Ill. App. Ct. 1985) ("[The trial judge] can punish the offender by use of the extended-term provisions of the Unified Code of Corrections (ILL. REV. STAT. 1983, ch. 38, par. 1005-5-3.2(b)(2)) if the murder is exceptionally brutal *or* is indicative of wanton cruelty." (emphasis added)).

22. For examples of court's treatment of "exceptionally" see, People v. Anderson, 559 N.E.2d 267, 271 (Ill. App. Ct. 1990); People v. Fields, 555 N.E.2d 1136, 1140 (Ill. App. Ct. 1990); People v. Bedony, 527 N.E.2d 916, 920 (Ill. App. Ct. 1988); People v. Price, 511 N.E.2d 958, 963 (Ill. App. Ct. 1987); People v. Gil, 508 N.E.2d 309, 311 (Ill. App. Ct. 1987); People v. Holiday, 474 N.E.2d 1280, 1282 (Ill. App. Ct. 1985); People v. McGee, 460 N.E.2d 843, 846 (Ill. App. Ct. 1984); People v. Fieberg, 439 N.E.2d 543, 547 (Ill. App. Ct. 1982).

For a good discussion of the "exceptional" requirement under section 5-8-1(a)(1)(b), *see* People v. Hattery, 539 N.E.2d 368, 397 (Ill. App. Ct. 1989); People v. Isbell, 532 N.E.2d 964, 973 (Ill. App. Ct. 1988); People v. Nester, 462 N.E.2d 1011, 1014 (Ill. App. Ct. 1984).

23. Of the ten cases emphasizing the exceptional requirement, eight have reversed the trial court's sentence.

24. 548 N.E.2d 1025 (Ill. 1989).

25. 431 N.E.2d 344 (Ill. 1981).

26. *Andrews*, 548 N.E.2d at 1031. *See* ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1)(b) (1991).

blooded."[27] The Illinois Supreme Court has recently defined "cruelty" as "something that causes pain or suffering" or "a disposition to inflict pain or suffering or to enjoy it being inflicted."[28] The supreme court has also stated the following about the term "wanton:"

> Ill will is not a necessary element of a wanton act. To constitute an act wanton, the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.[29]

Under these definitions, every offense should not be converted into an extraordinary offense subject to an extended-term sentence.[30]

B. Multiple Offenses

When a defendant is convicted of multiple offenses, the following three problems arise in applying an extended-term sentence under section 5-5-3.2(b)(2) of the Code: (1) the most serious offense rule,[31] (2) the *Evans* anomalous result,[32] and (3) multiple extended-terms.[33]

In *People v. Jordan*,[34] the Illinois Supreme Court held that section 5-8-2(a) allows a trial court to impose an extended-term sentence under section 5-5-3.2(b)(2) only for the offense within the most serious class of which the defendant was convicted.[35] In *Jordan*, following a bench trial, the defendant was sentenced to concurrent extended-terms of imprisonment of 60 years for felony murder by accountability and 14 years for kidnapping.[36] The defendant claimed that the extended-term for kidnapping was improper because kidnapping was of a lesser class than felony murder,

27. *Andrews*, 548 N.E.2d at 1031-32. Numerous appellate court cases had already adopted these definitions. *See id.* (citing numerous cases).

28. People v. Palmer, No. 69991, slip op. at 22 (Ill. March 12, 1992).

29. *Id.* at 22-23.

30. *See* People v. Evans, 429 N.E.2d 520, 525 (Ill. 1981). Almost all cases citing *Evans* for this proposition have found that the behavior did not warrant an extended-term and reversed or vacated the trial court's imposition of the sentence. *See* People v. Fields, 555 N.E.2d 1136, 1140 (Ill. App. Ct. 1990); People v. Green, 532 N.E.2d 442, 446 (Ill App. Ct. 1988); People v. Price, 511 N.E.2d 958, 963 (Ill. App. Ct. 1987); People v. Gil, 508 N.E.2d 309, 311 (Ill. App. Ct. 1987); People v. Thomas, 486 N.E.2d 1362, 1377 (Ill. App. Ct. 1986); People v. Matthews, 485 N.E.2d 403, 408 (Ill. App. Ct. 1985); People v. Killen, 435 N.E.2d 789, 791 (Ill. App. Ct. 1982). *But see* People v. Brown, 551 N.E.2d 1100, 1105 (Ill. App. Ct. 1990); People v. Johnson, 459 N.E.2d 1000, 1012 (Ill. App. Ct. 1984).

31. *See infra* text accompanying note 34.

32. *See infra* text accompanying note 42.

33. *See infra* text accompanying note 69.

34. 469 N.E.2d 569 (Ill. 1984).

35. *Jordan*, 469 N.E.2d at 575.

36. *Id.* at 571.

and section 5-8-2(a) limits extended-terms to only the most serious class of offense of which a defendant is convicted.[37] The *Jordan* court agreed and, relying on *People v. Evans*,[38] concluded, "[t]he plain language of section 5-8-2(a) requires that, when a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may only be imposed for the conviction within the most serious class and only if that offense was accompanied by brutal or heinous behavior."[39] This rule applies only when a defendant is convicted of more than one felony at the same time.[40] Therefore, under this rule, in showing that the defendant's behavior was exceptionally brutal or heinous indicative of wanton cruelty, the State may not rely on the nature of the defendant's actions which have resulted in lesser criminal actions.[41]

The most serious offense rule can lead to an anomalous result,

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37. *Id.* at 575.

38. 429 N.E.2d 520 (Ill. 1981).

39. *Jordan*, 469 N.E.2d at 575. *See* People v. Green, 568 N.E.2d 92, 101 (Ill. App. Ct. 1991) (extended-term sentence of 60 years' reduced to 30 year term); People v. Clemons, 534 N.E.2d 676, 680 (Ill. App. Ct. 1989) (defendant's sentence of 60 years' imprisonment reduced to 30 years because extended-term for robbery could not stand when defendant was also convicted of murder); People v. Redisi, 527 N.E.2d 684, 691 (Ill. App. Ct. 1988) (defendant convicted of residential burglary, aggravated battery and home invasion; thus, extended-term could not be imposed for offense of home invasion if exceptionally brutal or heinous behavior accompanied offense); People v. Yarbrough, 509 N.E.2d 747, 751 (Ill. App. Ct. 1987) (extended-term sentences for robbery, aggravated battery and residential burglary could not stand when defendant also convicted of home invasion and heinous battery); People v. Gil, 508 N.E.2d 309, 311 (Ill. App. Ct. 1987) (defendant convicted of voluntary manslaughter and concealment of homicidal death so extended sentence could only be imposed if exceptionally brutal or heinous acts accompanied the offense of voluntary manslaughter); People v. Matthews, 485 N.E.2d 403, 408 (Ill. App. Ct. 1985) (extended-term sentence for attempted rape could not stand when defendant was also convicted of deviate sexual assault). This principle is so well recognized that the state has even conceded to a trial court's error in imposing an extended-term. *See, e.g.*, People v. Kane, 489 N.E.2d 500, 503 (Ill. App. Ct. 1986) ("However, as the State concedes, the defendant's extended-term sentence for armed robbery must be vacated").

40. People v. Jones, 515 N.E.2d 175, 182 (Ill. App. Ct. 1987) ("Moreover, the 'class of the most serious offense of which he was convicted' language in section 5-8-2 cannot be construed to mean that the offense of which a defendant was ever or would ever be convicted").

41. People v. Gil, 508 N.E.2d 309, 311 (Ill. App. Ct. 1987) (state could not rely on defendant's actions in disposing of body for imposing an extended-term for voluntary manslaughter); People v. Holiday, 474 N.E.2d 1280, 1283 (Ill. App. Ct. 1985) ("To the extent the State attempts to rely on defendant's actions in shooting the other victims, actions for which he also received lesser criminal convictions, this reliance is improper, as it is the most serious offense which must be accompanied by exceptionally brutal or heinous behavior, and the State may not rely on the nature of defendant's actions which have resulted in other convictions").

described in *People v. Evans*.[42] The *Evans* anomaly occurs when a defendant is convicted of more than one felony of differing classes but the defendant's exceptionally brutal or heinous behavior accompanied one of the lesser felonies. Thus, a defendant who commits a felony accompanied by brutal or heinous behavior will be insulated from an extended-term sentence under section 5-5-3.2(b)(2) by the mere fortuity of also being convicted of another felony of a greater class which was not accompanied by such behavior.[43]

Two cases illustrate the *Evans* anomaly. In *People v. Smallwood*,[44] the Illinois Supreme Court held that the anomalous *Evans* result did not apply.[45] In *Smallwood*, the defendant was convicted of two counts of armed robbery and one count of aggravated battery, and the trial court sentenced him to an extended-term sentence of 50 years for one count of armed robbery, 30 years for the second count of armed robbery to run concurrently and 5 years' imprisonment for the aggravated battery conviction to run consecutively with the other sentences.[46] The defendant and another individual, each armed with a handgun, accosted two other men in a doorway.[47] The defendant announced that it was a holdup, fired a shot out the door to convince the victims that he was serious, and struck one of the victims over the left eye when the victim informed the defendant that they had no money.[48] The victims were ordered to lie down and, as they did, one victim took $2 and $42 worth of food stamps from his pocket and placed it in front of him.[49] The defendant picked up the food stamps and stated, "You don't think I'll shoot you." When the victim responded that he believed the defendant would shoot him, the defendant shot the victim in the right leg below the knee. As the victim said, "Don't shoot," the defendant shot him again through the left leg below the knee.[50] The defendant then said, "Don't tell anyone we did this to you," and fled.[51]

42. 429 N.E.2d 520 (Ill. 1981) (defendant convicted of voluntary manslaughter and aggravated battery and sentenced to an extended-term of 10 years for the voluntary manslaughter and five years for the aggravated battery).

43. *Evans*, 429 N.E.2d at 525. However, a trial court may still look to the exceptionally brutal or heinous behavior indicative of wanton cruelty in imposing a maximum non-extended sentence. *See infra* text accompanying note 98.

44. 464 N.E.2d 1049 (Ill. 1984).

45. *Smallwood*, 464 N.E.2d at 1052.

46. *Id.* at 1050.

47. *Id.*

48. *Id.*

49. *Id.* at 1050-51.

50. *Id.*

51. *Id.*

The defendant contended that because the armed robbery, the offense of the most serious class, was complete when he took the money from the victim, the exceptionally brutal or heinous behavior, the shooting, accompanied the aggravated battery, not the armed robbery. Thus, the defendant's sentence fell within the *Evans* anomaly.[52] In a strained opinion, the *Smallwood* court found that the armed robbery was not yet complete and, by emphasizing the aspect of the word "accompanied," found that the defendant did not fall within the anomaly.[53]

In *People v. Fieberg*,[54] the defendant was convicted of possession of burglary tools, attempted burglary, burglary, aggravated battery and robbery.[55] He was sentenced to three years imprisonment for possession of burglary tools, three years for attempted burglary, seven years for burglary, five years for aggravated battery and an extended-term of 14 years for robbery.[56] During a struggle with a police officer, the defendant maced the officer, which formed the basis of the conviction for aggravated battery, and the trial court relied upon this fact in sentencing the defendant to an extended-term.[57] The appellate court found that because robbery was the most serious offense of which the defendant was convicted, the behavior the trial court found to be exceptionally brutal and heinous, which took place during the aggravated battery, could not be considered in sentencing the defendant to an extended-term for the robbery. Thus, the *Evans* anomaly applied.[58]

The general principles of the most serious offense rule and the *Evans* anomaly does not apply when the defendant is sentenced to death[59] or a term of natural life imprisonment[60] in addition to an extended-term sentence for exceptionally brutal or heinous behavior indicative of wanton cruelty. In *People v. Neal*,[61] the Illinois Supreme Court held that an extended-term sentence for armed robbery was proper even though the defendant had also been sentenced to death for murder, a more serious class of offense.[62] The Illinois Supreme Court used the following reasoning:

> The statute authorizing extended-terms refers to and is bottomed on, in a sense, the maximum sentences 'authorized by Section 5-8-1,' to

52. *Id.* at 1051.
53. *Id.* at 1052.
54. 439 N.E.2d 543 (Ill. App. Ct. 1982).
55. *Fieberg*, 439 N.E.2d at 545.
56. *Id.*
57. *Id.* at 547.
58. *Id.* The court also found that the defendant's behavior was not exceptionally brutal or heinous indicative of wanton cruelty. *Id.* at 548.
59. People v. Neal, 489 N.E.2d 845, 855 (Ill. 1985).
60. People v. Young, 529 N.E.2d 497, 506 (Ill. 1988).
61. 489 N.E.2d 845 (Ill. 1985), *cert. denied*, 476 U.S. 1165 (1986).
62. *Neal*, 489 N.E.2d at 855.

which it refers. That section refers to *terms of imprisonment* and does not include capital sentences. Obviously a provision for an extended-term of imprisonment would not be applicable to a sentence of death.[63]

In *People v. Young*,[64] the court adopted the reasoning of *Neal* and held that the authorization in section 5-8-2[65] to impose an extended-term sentence in excess of the maximum sentence authorized in section 5-8-1[66] cannot apply to murder convictions for which a defendant has been sentenced to natural life imprisonment under section 5-8-1.[67] Thus, the *Young* court held that section 5-8-2 allows a trial court to impose an extended-term for the class of the most serious offense of which the defendant was convicted other than murder, even though the defendant was also separately sentenced to natural life imprisonment on the murder conviction.[68]

When a defendant is convicted of multiple offenses, a trial court may sentence a defendant to multiple extended-terms in certain circumstances. In *Jordan*, the Illinois Supreme Court rejected the argument that section 5-8-2(a) only allowed for an extended-term sentence for *the* most serious offense of which the defendant was convicted.[69] Instead, the court first emphasized the language of section 5-5-3.2(b)(2)[70] which allows for an extended-term to be imposed upon *any* felony of which a defendant is convicted if that offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[71] The Illinois Supreme Court then focused on the language of section 5-8-4(c)(2)[72] which provides that the aggregate of consecutive sentences shall not exceed the sum of the maximum terms authorized under the extended-term provision for the two most serious felonies involved.[73] Thus, multiple extended-term sentences may be imposed.[74]

In combining the most serious offense rule with the *Jordan* holding, for multiple extended-terms to be imposed, each of the offenses that is within the class of the most serious offense must be accompanied by brutal or heinous behavior indicative of wanton cruelty.[75] If extended-terms are imposed for multiple offenses and

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63. *Id.* at 855 (emphasis in original).
64. 529 N.E.2d 497 (Ill. 1988).
65. ILL. REV. STAT. ch. 38, para. 1005-8-2 (1991).
66. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1991).
67. *Young*, 529 N.E.2d at 505.
68. *Id.* at 506.
69. People v. Jordan, 469 N.E.2d 569, 576 (Ill. 1984).
70. ILL. REV. STAT. ch. 38, para. 1005-5-3.2(b)(2) (1991).
71. *Jordan*, 469 N.E.2d at 576.
72. ILL. REV. STAT. ch. 38, para. 1005-8-4(c)(2) (1991).
73. *Jordan*, 469 N.E.2d at 576.
74. *Id.*
75. People v. DeSimone, 439 N.E.2d 1311, 1318 (Ill. App. Ct. 1982) ("Extended term sentences may be imposed for more than one offense when all of-

the exceptionally brutal or heinous behavior does not accompany all the offenses, then the extended-terms for those offenses not accompanied by such behavior must be vacated[76] or the sentence must be reduced.[77] Furthermore, multiple extended-term sentences may be imposed consecutively[78] and an extended term may be imposed to run consecutively to a term of natural life.[79]

C. Mental State and Defenses

Although actions committed while defendants subjectively believe, albeit unreasonably, that they are acting in self-defense are not exceptionally brutal or heinous indicative of wanton cruelty,[80] actions resulting in a killing because of sudden and intense passion can be exceptionally brutal or heinous.[81] However, a trial court may not base a maximum commitment for a defendant found guilty but mentally ill on section 5-5-3.2(b)(2).[82]

In a bold statement, the Illinois Supreme Court noted, "In our opinion, actions committed under a subjective belief, albeit unreasonable, that the actions were in self-defense do not constitute wanton cruelty."[83] However, *Evans* has not been read as establishing a *per se* prohibition against the imposition of extended terms in every voluntary manslaughter case.[84] For example, the First District of

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fenses are within the class of the most serious offense, and all offenses are accompanied by brutal or heinous behavior indicative of wanton cruelty"); *see also* People v. Campbell, 467 N.E.2d 1112, 1132 (Ill. App. Ct. 1984), *cert. denied*, 471 U.S. 1136 (1985) (extended-terms for armed violence and armed robbery upheld because each offense was accompanied by brutal or heinous behavior).

76. *See* People v. Morgan, 492 N.E.2d 1303, 1320 (Ill. 1986) *cert. denied*, 479 U.S. 1101 (1987) (extended-terms for rape and aggravated kidnaping vacated because behavior accompanied murder, not rape and kidnaping).

77. People v. Green, 568 N.E.2d 92, 101 (Ill. App. Ct. 1991) (extended-term of 60 years' reduced to 30 year term pursuant to ILL. SUP. CT. R. 615(b)(4)); People v. Fields, 555 N.E.2d 1136, 1141 (Ill. App. Ct. 1990) (65 year extended-term reduced to 40 years pursuant to ILL. SUP. CT. R. 615(b)(4)); People v. Christy, 544 N.E.2d 88, 90 (Ill. App. Ct. 1989) (14 year extended-term reduced pursuant to Rule 615(b)(4) because offense was not of the most serious class).

ILL. SUP. CT. R. 615(b)(4) provides the following: "On appeal the reviewing court may: . . . reduce the punishment imposed by the trial court." ILL. REV. STAT. ch. 110A, para. 615(b)(4) (1991).

78. People v. Harris, 498 N.E.2d 621, 624 (Ill. App. Ct. 1986) (extended-terms of 60 years for home invasion and 60 years for rape to run consecutively); People v. Wrice, 488 N.E.2d 1313, 1317 (Ill. App. Ct. 1986) (multiple extended-terms of 60 years for rape and 40 years for deviate sexual assault to run consecutively were upheld when victim was repeatedly raped, beaten and burned); *see* People v. Roesler, 552 N.E.2d 1242, 1247 (Ill. App. Ct. 1990), *appeal denied*, 561 N.E.2d 702 (Ill. 1990) (three consecutive extended-terms of 60 years upheld).

79. People v. Waldron, 580 N.E.2d 549, 570 (Ill. App. Ct. 1991).

80. *Evans*, 87 Ill.2d at 88, 429 N.E.2d at 525.

81. People v. Lindsay, 550 N.E.2d 719, 723 (Ill. App. Ct. 1990).

82. *Palmer*, No. 69991, slip op. at 24.

83. *Evans*, 429 N.E.2d at 525.

84. People v. Pirrello, 565 N.E.2d 324, 327 (Ill. App. Ct. 1991).

the Appellate Court has held that a defendant can be sentenced to an extended term for voluntary manslaughter despite an unreasonable subjective belief that the defendant was acting in self-defense if the voluntary manslaughter was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[85] In *People v. Moore*,[86] the First District concluded that in *Evans* the court merely found that the defendant's behavior in that case was not brutal or heinous, thereby reading *Evans* as if the supreme court had never stated that a defendant's actions based on an unreasonable subjective belief of self-defense could not be wantonly cruel.[87]

However, in avoiding the propriety of the First District's interpretation of *Evans*, the Third District of the Appellate Court has refused to extend the supreme court's opinion to killings involving sudden and intense passion.[88] The Second District has similarly held that an extended-term sentence may be imposed under section 5-5-3.2(b)(2) when a voluntary manslaughter occurs under sudden and intense passion.[89]

The Illinois Supreme Court has recently held that a trial court may not base a maximum commitment period for an insanity acquittee on section 5-5-3.2(b)(2).[90] Focusing on the required mental state of wantonness, the supreme court stated that the "successful assertion of the insanity defense precludes a finding that the insanity acquittee have been conscious of his conduct such that the requisite finding that the insanity acquittee's offense be indicative of wanton cruelty can be made."[91] Thus, the mental state of a defendant being sentenced to an extended-term under section 5-5-3.2(b)(2) must be considered, and the court may not merely look to

85. People v. Moore, 513 N.E.2d 87, 90 (Ill. App. Ct. 1987) (defendant brutally beat a 14 year old boy who had broken into a home).

86. 513 N.E.2d 87 (Ill. App. Ct. 1989).

87. *Moore*, 513 N.E.2d at 90.

88. *Lindsay*, 550 N.E.2d at 723. *See People v. Kalec*, 440 N.E.2d 1254, 1257 (Ill. App. Ct. 1982); *see* People v. Kulpa, 430 N.E.2d 160, 169 (Ill. App. Ct. 1981) (upholding extended-term of eight years for aggravated battery when defendant was the aggressor and his actions were brutal and heinous); *see also Nester*, 462 N.E.2d at 1015 (applying section 5-8-1(a)(1) and holding a natural life term may be imposed when the incident leading to the brutal or heinous behavior began as a mutual fight).

89. *Pirrello*, 565 N.E.2d at 325 (defendant convicted of voluntary manslaughter for killing person suspected of killing defendant's former wife).

90. *Palmer*, No. 69991, slip op. at 17. *Palmer* effectively overruled People v. Winston, 548 N.E.2d 406 (Ill. App. Ct. 1989) and People v. Thomas, 522 N.E.2d 253 (Ill. App. Ct. 1988). Although not cited by the supreme court, at least two previous appellate court opinions had looked to the defendant's mental state to determine that a defendant's actions could not rise to the level of exceptionally brutal or heinous behavior indicative of wanton cruelty. *See* People v. Isbell, 532 N.E.2d 964, 974 (Ill. App. Ct. 1988); *Green*, 532 N.E.2d at 446.

91. *Palmer*, No. 69991, slip. op. at 24.

the exceptional brutality or heinousness of the offense.[92]

D. *Extended-Term Sentence Based on Accountability*

An extended-term sentence based on exceptionally brutal or heinous behavior indicative of wanton cruelty can be imposed on a defendant whose conviction was based upon an accountability theory.[93] In *Jordan*, the Illinois Supreme Court noted that section 5-5-3.2(b)(2) did not require that the defendant himself commit the brutal or heinous acts and concluded that the enhanced penalty of an extended-term sentence may be imposed upon a defendant found guilty upon an accountability theory.[94] The rationale for imposing an extended-term sentence on a defendant convicted upon an accountability theory is that when a trial court considers imposing an extended-term sentence under section 5-5-3.2(b)(2), the trial court's focus is on the offense committed rather than the nature of the defendant's participation.[95]

E. *Sequence of Considerations*

The various districts of the Illinois Appellate Court appear to be split as to whether a trial court should first consider factors in aggravation and mitigation and then determine if a defendant is eligible for an extended-term under section 5-5-3.2(b)(2) of the Code or whether a trial court should determine if an extended-term could be properly imposed and then consider factors in aggravation

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92. *Id.* at 24-25.

93. People v. Jordan, 469 N.E.2d 569, 580 (Ill. 1981) (defendant sentenced to extended-terms of 60 years for murder and 40 years for armed robbery when unarmed defendant participated in robbing a grocery store by restraining the employee); *see* People v. Dale, 545 N.E.2d 521, 539 (Ill. App. Ct. 1989) (60 year extended-term for murder imposed when defendant was not a passive observer); People v. Edens, 529 N.E.2d 617, 627 (Ill. App. Ct. 1988) (extended-term upheld when defendant helped plan robbery but did not shot victim); People v. Lekas, 508 N.E.2d 221, 238-39 (Ill. App. Ct. 1987) (extended-term of 45 years on murder conviction upheld although defendant was not trigger man). Further, a trial court can impose an extended-term on one defendant without imposing an extended-term on another defendant. People v. Smith, 557 N.E.2d 596, 610 (Ill App. Ct. 1990).

94. People v. Jordan, 469 N.E.2d 569, 580 (Ill. 1984).

95. People v. Rixie, 546 N.E.2d 52, 61 (Ill. App. Ct. 1990) (extended-term of 60 years for felony murder upheld when defendant and another stabbed victim numerous times); People v. Johnson, 476 N.E.2d 1321, 1325 (Ill. App. Ct. 1985) (extended-term for participation in rape and robbery although defendant did not kill victim); People v. Rogers, 461 N.E.2d 511, 517 (Ill. App. Ct. 1984) (extended-term of 65 years on murder conviction upheld although defendant only convicted as an accomplice); People v. Gray, 408 N.E.2d 1150, 1158 (Ill. App. Ct. 1980) (extended-term upheld when defendant found legally accountable for all offenses).

and mitigation. In *People v. Killen*,[96] the Fourth District of the Illinois Appellate Court held that a trial court could not look to section 5-5-3.2(b)(2) when imposing a nonextended-term sentence and stated, "In imposing a sentence, the court is to consider the factors in aggravation and mitigation, and then, and only then, may the court consider whether an extended-term sentence should be imposed because the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty."[97] However, the *Killen* holding that the trial court cannot consider brutal or heinous behavior in imposing a nonextended-term sentence has been recently overruled,[98] but the question as to the sequence of considerations has not been fully resolved.

Although by its very definition section 5-5-3.2(b)(2) is a factor in aggravation, this only begs the question because the problem involves the sequence of considerations. It would seem that either approach is appropriate if the trial court carefully distinguishes which facts are applicable to the finding of exceptionally brutal or heinous behavior and which facts are considered in aggravation and mitigation. What must be avoided is the blurring of the factors in mitigation and the factors in aggravation other than the exceptionally brutal or heinous behavior with the factors that show exceptionally brutal or heinous behavior. For example, the *People v. Bedony*[99] court found that the defendant's behavior was not exceptionally brutal or heinous and in doing so considered the defendant's family background, his education, his work record, his lack of drug or alcohol abuse, and his lack of criminal history.[100] Although these factors are appropriate considerations in imposing the length of the sentence, none of these factors in mitigation have anything to do with the offense committed, which is the focus of the trial court's determination in imposing an extended-term under section 5-5-3.2(b)(2),[101] and should not be considered in imposing an extended-term sentence. Therefore, the *People v. Angelly* court was correct when it stated, "Nor does it matter . . . that the court first determined whether defendant was eligible for extended-term provisions

96. 435 N.E.2d 789 (Ill. App. Ct. 1982) (trial court cannot consider exceptionally brutal or heinous behavior in sentencing a defendant to the maximum nonextended term).

97. *Killen*, 435 N.E.2d at 790.

98. People v. Compton, 550 N.E.2d 640, 643 (Ill. App. Ct. 1990); *see* People v. Willis, 569 N.E.2d 113, 119 (Ill. App. Ct. 1991); People v. Duncan, 553 N.E.2d 774, 776 (Ill. App. Ct. 1990); People v. Butts, 481 N.E.2d 987, 989 (Ill. App. Ct. 1985) (trial court can consider exceptionally brutal or heinous behavior when imposing defendant to maximum nonextended term).

99. 527 N.E.2d 916 (Ill. App. Ct. 1988) (defendant's extended-term for attempted murder reduced to 30 years when court found no exceptionally brutal or heinous behavior).

100. *Bedony*, 527 N.E.2d at 921.

101. *See supra* text accompanying note 93.

and then examined factors in aggravation and mitigation, as opposed to doing it in reverse order."[102] Under either approach, the court should only consider those factors appropriate to each determination.

F. Review of Extended-Term Sentences: Standard of Review and Waiver

An abuse of discretion standard of review is used to determine whether the trial court properly found that the defendant was eligible for an extended-term sentence pursuant to section 5-5-3.2(b)(2).[103] The same standard is used when determining whether a sentence imposed under section 5-5-3.2(b)(2) is excessive.[104] The rationale for applying this standard is that a trial judge, not a reviewing court, is in a superior position during trial and the sentencing hearing to consider and determine the punishment to be imposed.[105]

Although the general rule is that if a defendant fails to object at the time of sentencing to the imposition of an extended-term sentence pursuant to section 5-5-3.2(b)(2) and fails to raise the issue in a motion for a new trial, the defendant waives the issue on appeal,[106] several exceptions exist. First, if a motion for a new trial has been filed, heard and denied prior to the sentencing, then the

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102. People v. Angelly, 521 N.E.2d 306, 312 (Ill. App. Ct. 1988) (defendant sentenced to two extended-terms of 30 years for attempted murder and armed robbery to be served concurrently).

103. People v. Andrews, 548 N.E.2d 1025, 1031 (Ill. 1989) (behavior during robbery not exceptionally brutal or heinous). Because the determination to impose an extended-term is a discretionary matter for the trial court, it need not be alleged in the charging instrument. *See* People v. Turner, 416 N.E.2d 1149, 1154 (Ill. App. Ct. 1980).

104. *Andrews*, 548 N.E.2d at 1031.

105. People v. Cabrera, 508 N.E.2d 708, 716 (Ill. 1987) (extended-term of 60 years for murder not an abuse of discretion); People v. Roesler, 552 N.E.2d 1242, 1247 (Ill. App. Ct. 1990) (three consecutive extended-term sentences of 60 years' for two counts of rape and one count of deviate sexual criminal assault upheld because "[a] reviewing court must give great deference to the trial court's determination and will not modify or vacate a sentence absent abuse of discretion."); People v. Smith, 520 N.E.2d 841, 846 (Ill. App. Ct. 1988) (two extended-terms of 55 years to run concurrently for attempted murder and armed robbery not abuse of discretion).

People v. James, 514 N.E.2d 998, 1004 (Ill. 1987), is a good example of how deferential a reviewing court can be when determining that the trial court did not abuse its discretion in finding that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. In *James*, the supreme court stated, "We do not think this determination should be set aside simply because we may have, if we were the sentencing judge and had an opportunity to assess these same sentencing factors, arrived at a different determination." *Id.*

106. People v. Neal, 489 N.E.2d 845, 855 (Ill. 1985); *see also* People v. Sperow, 525 N.E.2d 223, 232 (Ill. App. Ct. 1988) (defendant improperly contended for first time on appeal that trial court considered improper factor in sentencing);

issue is not waived because the defendant is under no duty to file a post-sentencing motion asking for a new sentencing hearing to preserve the alleged error.[107] Second, although a defendant fails to object at the sentencing hearing, the error may be preserved under the plain error doctrine.[108] Finally, although courts previously found that failure to challenge the constitutionality of section 5-5-3.2(b)(2) in the trial court waives the issue,[109] pursuant to *People v. Bryant*,[110] the constitutionality of section 5-5-3.2(b)(2) can be raised at any time.[111]

II. Factors in Imposing Extended-terms Under Section 5-5-3.2(b)(2)

Several factors have been considered in determining when a defendant's offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, thereby allowing for the imposition of an extended-term under section 5-5-3.2(b)(2). Those factors[112] include the following: the relationship of the de-

People v. Morrison, 484 N.E.2d 329, 340 (Ill. App. Ct. 1985) (issue waived on appeal for failure to object and raise issue in post-trial motion).

107. People v. Redisi, 527 N.E.2d 684, 691 (Ill. App. Ct. 1988) (allowing defendant to raise for first time correctness of imposing extended-term on appeal).

However, if a defendant pleads guilty and only wishes to raise the issue of the appropriateness of the sentence imposed, the defendant must file a written motion to reconsider sentence in the trial court and failure to do so results in dismissal of the appeal because the appellate court lacks jurisdiction. People v. Wallace, 570 N.E.2d 334, 335 (Ill. 1991); *see also* People v. Ishmon, 572 N.E.2d 383, 385 (Ill. App. Ct. 1991) ("We conclude, therefore, that defendant's filing of a Rule 604(d) motion to withdraw his guilty plea, which did not raise any sentencing issues, cannot act to meet the jurisdictional requirement of a motion to reconsider sentence.").

108. People v. Martin, 519 N.E.2d 884, 886 (Ill. 1988); People v. Lighthall, 530 N.E.2d 81, 84 (Ill. App. Ct. 1988); People v. Redisi, 527 N.E.2d 684, 691 (Ill. App. Ct. 1988); *cf.* People v. Chandler, 578 N.E.2d 155, 157 (Ill. App. Ct. 1991) (defendant failed to object to the class X sentence at sentencing hearing or post-trial motion, but this did not waive the issue); People v. Washington, 552 N.E.2d 1067, 1072 (Ill. App. Ct. 1990) (holding that when the State attempts to sentence a defendant as a repeat offender thereby requiring defendant to be sentences as a Class X offender, the issue is one of the sufficiency of the evidence and therefore is not waived).

109. People v. Cartalino, 444 N.E.2d 662, 673 (Ill. App. Ct. 1982); People v. Clark, 429 N.E.2d 1255, 1261 (Ill. App. Ct. 1981); People v. Smith, 418 N.E.2d 172, 178 (Ill. App. Ct. 1981).

110. 539 N.E.2d 1221 (Ill. 1989).

111. People v. Hernandez, 562 N.E.2d 219, 228 (Ill. App. Ct. 1990) (defendant's argument that § 5-5-3.2(6)(2) violated Eighth Amendment could be raised for first time on appeal); People v. Page, 550 N.E.2d 248, 251 (Ill. App. Ct. 1990) (defendant could raise on review the issue of the constitutionality of § 5-5-3.2(b)(2) and whether it violated the Fourteenth Amendment).

112. Although I have attempted to compile all the factors courts have considered, this enumeration may not be an exclusive list of factors which courts have considered as showing exceptionally brutal or heinous behavior because under the facts of each case, the courts focus on what they determine to be indicative

fendant to the victim;[113] the helpless nature of the victim;[114] the lack of remorse shown by the defendant;[115] the emotional trauma inflicted upon the victim;[116] the premeditation of the offense;[117] the torture involved;[118] and the force employed in committing the felony.[119] Although courts have considered the defendant's prior criminal record in determining whether an offense was exceptionally brutal or heinous, consideration of this factor is improper.[120] Finally, courts cannot consider an element of the offense as a factor in determining if an extended-term may be imposed.[121]

A. *Relationship*

As a factor in finding a defendant's behavior exceptionally brutal or heinous, several courts consider the relationship of the defendant to the victim of the offense. The fact that the victim was a friend or acquaintance has been found to be a factor showing exceptionally brutal or heinous behavior indicative of wanton cruelty.[122] Similarly, an offense committed against a family member has also been found to be a factor in showing exceptionally brutal or heinous behavior.[123]

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of wanton cruelty. For example, a few courts have found that the place where the felony took place to be an appropriate factor in showing brutal or heinous behavior. *See* People v. Bishop, 534 N.E.2d 401, 404 (Ill. App. Ct. 1989); People v. McGee, 460 N.E.2d 843, 847 (Ill. App. Ct. 1984); People v. Beamon, 572 N.E.2d 1011, 1017 (Ill. App. Ct. 1991).

113. *See infra* text accompanying note 122.
114. *See infra* text accompanying note 124.
115. *See infra* text accompanying note 139.
116. *See infra* text accompanying note 149.
117. *See infra* text accompanying note 159.
118. *See infra* text accompanying note 175.
119. *See infra* text accompanying note 180.
120. *See infra* text accompanying note 184.
121. *See infra* text accompanying note 193.

122. *See, e.g.*, People v. Kuchan, 579 N.E.2d 1054, 1059 (Ill. App. Ct. 1991) (defendant choked pregnant wife to death); People v. Angelly, 521 N.E.2d 306, 312 (Ill. App. Ct. 1988) (attempted murder and robbery of longtime acquaintance); People v. Holiday, 474 N.E.2d 1280, 1283 (Ill. App. Ct. 1985) (murder, armed robbery and aggravated battery of "gambling buddies"); People v. Sias, 415 N.E.2d 618, 624-25 (Ill. App. Ct. 1980) (aggravated battery of victim defendant knew for two years). *See also* People v. Duncan, 553 N.E.2d 774, 776 (Ill. App. Ct. 1990) (36 year nonextended term imposed for murder of girlfriend).

123. *See* People v. Clemons, 534 N.E.2d 676, 680 (Ill. App. Ct. 1989) (murder and armed robbery of father); People v. Franklin, 512 N.E.2d 40, 44 (Ill. App. Ct. 1987) ("In the case at bar, it was not an abuse of discretion for the trial judge to conclude that Franklin's killing of her defenseless child was wanton and exceptionally brutal behavior and thus to impose an extended-term sentence"); People v. Williams, 480 N.E.2d 205, 210 (Ill. App. Ct. 1985) (murder of niece); People v. Cox, 446 N.E.2d 1280, 1282 (Ill. App. Ct. 1983) ("there could be no doubt that all the defendant's harmful actions were purposefully and directly aimed at her own child"); *see also* People v. Nelson, 565 N.E.2d 123, 129 (Ill. App. Ct. 1990) (murder of stepson, applying section 5-8-1(a)(1)); People v. Barkauskas, 497 N.E.2d 1183, 1192 (Ill. App. Ct. 1986) (murder of wife, applying section 5-8-

B. Helpless Nature of Victim

Courts recognize the helpless nature of the victim as a factor in determining whether exceptionally brutal or heinous behavior exists.[124] Included in this category is age. Courts have found that the fact that offenses were committed against not only children[125] but also elderly individuals[126] is a factor in showing brutal or heinous behavior. Because age is a separate aggravating factor under different sections of the Code,[127] courts must be careful not to mix the age of the victim as a separate aggravating factor under those sections with age as a factor in finding exceptionally brutal or heinous

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1(a)(1)); People v. Hudson, 420 N.E.2d 271, 274 (Ill. App. Ct. 1981) (murder of family members, applying § 5-8-1(a)(1)).

124. *But see infra* text accompanying notes 236-243 (discussing the new trend in the case law such as People v. Andrews, 548 N.E.2d 1025 (Ill. 1989), which recognized that many victims are defenseless).

125. *See* People v. McDonald, 545 N.E.2d 819, 823-24 (Ill. App. Ct. 1989) (60 year extended-term imposed for murder of child); People v. Freeman, 538 N.E.2d 681, 684 (Ill. App. Ct. 1989) (60 year extended-term imposed for aggravated criminal sexual assault of five-year-old); People v. Franklin, 512 N.E.2d 40, 44 (Ill. App. Ct. 1987) (eight year extended-term imposed for murder of three-year-old); People v. Williams, 480 N.E.2d 205, 210 (Ill. App. Ct. 1985) (50 year extended-term imposed for murder of 13-year-old); People v. Strait, 451 N.E.2d 631, 634 (Ill. App. Ct. 1983) (60 year extended-term imposed for rape of six-year-old); People v. Cox, 446 N.E.2d 1280, 1282 (Ill. App. Ct. 1983) (10 year extended-term sentence for involuntary manslaughter of four-year-old); People v. Turner, 416 NE.2d 1149, 1155 (Ill. App. Ct. 1980) (rape and deviate sexual assault of 19 year-old).

A few courts have also focused on the age of the offender in finding that the offense was not brutal or heinous. *See Freeman* 538 N.E.2d at 684; People v. Olesch, 492 N.E.2d 1381, 1391 (Ill. App. Ct. 1986) (defendant 27 years old at time of sentencing for rape and deviate sexual assault). The propriety of focusing on the age of the defendant is questionable if done so to determine whether the offense was accompanied by exceptionally brutal or heinous behavior; however, the age of the offender is a proper consideration as a general factor in mitigation. Again, the separate consideration of specific factors is the important aspect. *See supra* text accompanying note 99.

126. People v. Beamon, 572 N.E.2d 1011, 1017 (Ill. App. Ct. 1991); *see* People v. Brown, 540 N.E.2d 500, 505 (Ill. App. Ct. 1989) (two 50-year, concurrent, extended-term sentences imposed for offenses on 69-year-old woman); People v. Smith, 520 N.E.2d 841, 846 (Ill. App. Ct. 1989) (55-year extended-term imposed for attempted murder and armed robbery of 68-year-old); People v. Yarbrough, 509 N.E.2d 747, 750 (Ill. App. Ct. 1987) (extended-term for offense committed against elderly woman); People v. Lekas, 508 N.E.2d 221, 238-39 (Ill. App. Ct. 1987) (45 year extended-term imposed for murder of elderly individual); People v. Harris, 498 N.E.2d 621, 624 (Ill. App. Ct. 1986) (extended-term of 60 years imposed for home invasion and rape of 79-year-old woman); *see also* People v. Butts, 481 N.E.2d 987, 989 (Ill. App. Ct. 1985) (maximum nonextended-term imposed when offense against elderly man was found to be brutal and heinous).

127. Sections 5-5-3.2(b)(4)(i) and (ii) provide the following:

> The following factors may be considered by the court as reasons to impose an extended-term sentence under Section 5-8-2 upon any offender: When a defendant is convicted of any felony committed against: (i) a person under 12 years of age at the time of the offense; (ii) a person 60 years of age or older at the time of the offense.

ILL. REV. STAT. ch. 38, paras. 1005-5-3.2(b)(4)(i),(ii) (1991).

behavior, thereby committing double enhancement.[128] While several courts have been careful in distinguishing age as a separate aggravating factor,[129] other courts have not been so careful.[130]

Also included in this category is the "left for dead" factor. Leaving or abandoning victims so that the victims are unable to protect themselves or survive has been considered to be a factor which shows exceptionally brutal or heinous behavior indicative of wanton cruelty.[131] This "left for dead" factor is perplexing because, in most instances, such as murder, attempted murder or manslaughter, it would seem very unlikely for the defendant to attempt to render aid to the victim.[132] Similar to the "left for dead" factor, the fact that the victim was bound or gagged has been considered an appropriate factor in determining exceptionally brutal or heinous behavior.[133]

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128. *See* People v. Hobbs, 427 N.E.2d 558 (Ill. 1981); People v. Gray, 460 N.E.2d 354, 356 (Ill. App. Ct. 1984).

129. People v. Benkowski, 575 N.E.2d 587, 591 (Ill. App. Ct. 1991); People v. Yarbrough, 509 N.E.2d 747, 750 (Ill. App. Ct. 1987); People v. Lekas, 508 N.E.2d 221, 238 (Ill. App. Ct. 1987).

130. People v. Bell, 577 N.E.2d 1228, 1249 (Ill. App. Ct. 1991); People v. Beamon, 572 N.E.2d 1011, 1017 (Ill. App. Ct. 1991); People v. Brown, 540 N.E.2d 569, 505 (Ill. App. Ct. 1989); People v. Freeman, 538 N.E.2d 681, 684 (Ill. App. Ct. 1989); People v. Smith, 520 N.E.2d 841, 846 (Ill. App. Ct. 1989).

131. People v. Stewart, 577 N.E.2d 527, 528 (Ill. App. Ct. 1991); People v. Harvey, 571 N.E.2d 1186, 1188 (Ill. App. Ct. 1991) ("The bodies of [the victims] were left in the field."); People v. Barfield, 543 N.E.2d 812, 819 (Ill. App. Ct. 1989) ("[D]efendant made no attempt to help the victim."); People v. Angelly, 521 N.E.2d 306, 312 (Ill. App. Ct. 1988) (dropped victim off in an isolated area with little chance for getting help); People v. Smith, 520 N.E.2d 841, 846 (Ill. App. Ct. 1989) ("leaving him for dead"); People v. Hickman, 492 N.E.2d 1041, 1049 (Ill. App. Ct. 1986) (defendant repeatedly checked victim's body in an attempt to determine whether she was dead and not in an attempt to administer aid to her); *see* People v. Nester, 462 N.E.2d 1011, 1015 (Ill. App. Ct. 1984) (applying § 5-8-1(a)(1) and stating "Here, defendant simply walked away from the victim after inflicting the knife wound and made no attempt to help him."); *see also* People v. Yarbrough, 509 N.E.2d 747, 750 (Ill. App. Ct. 1987) (refusing to help victim after throwing caustic substance in victim's face). *Cf.* People v. Waldron, 580 N.E.2d 549, 570 (Ill. App. Ct. 1991) (defendant prevented another person from aiding victim); People v Kuchan, 579 N.E.2d 1054, 1059 (Ill. App. Ct. 1991) (after choking pregnant wife to death, defendant left body in bathroom for over three days while he "partied with cocaine"). *But see* People v. Gil, 508 N.E.2d 309, 311 (Ill. App. Ct. 1987) (prevented individual from calling for help and waited for victim to die but no extended-term imposed).

132. *But see* People v. Cox, 446 N.E.2d 1280 (Ill. App. Ct. 1983) (mother convicted of involuntary manslaughter brought the victim to the hospital; yet, the court still found under the totality of the circumstances that the behavior was exceptionally brutal and heinous).

133. People v. Williams, 581 N.E.2d 228, 236 (Ill. App. Ct. 1991) (defendant kept victim bound and taped for several hours); People v. Rixie, 546 N.E.2d 52, 61 (Ill. App. Ct. 1990) (victim bound and gagged); People v. Dale, 545 N.E.2d 521, 539 (Ill. App. Ct. 1989) (cord used to tie victim); People v. Brown, 540 N.E.2d 500, 505 (Ill. App. Ct. 1989) (victim bound at feet and hands); People v. Lekas, 508 N.E.2d 221, 238 (Ill. App. Ct. 1987) (victim bound and gagged); People v. Wilson, 485 N.E.2d 1264, 1274 (Ill. App. Ct. 1985) (victims were tied up); People

Finally, other factors which have been considered as showing brutal or heinous behavior because of the helpless nature of the victim are the fact that the victim begs for mercy,[134] is unarmed,[135] intoxicated,[136] mentally handicapped[137] or does not provoke the offense.[138]

C. *Lack of Remorse*

In *People v. LaPointe*,[139] the Illinois Supreme Court affirmed the imposition of a natural life sentence under section 5-8-1(a)(1)[140] for a murder which was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. In that case, the Illinois Supreme Court found that the defendant's callous attitude and complete lack of remorse, shown by wearing a tee shirt which stated "Elmhurst Executioner" following the arrest and while be-

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v. Rogers, 461 N.E.2d 511, 517 (Ill. App. Ct. 1984) (victim bound); People v. Piontkowski, 397 N.E.2d 36, 37 (Ill. App. Ct. 1979) (employees of store which defendant robbed were tied up). *Piontkowski* is probably not good law today for at least two reasons: first, it did not apply the recognized definitions of "brutal" and "heinous" and second, it clearly conflicts with the new trend of case law shown by *Andrews*. *See infra* text accompanying note 234.

134. People v. Harvey, 571 N.E.2d 1186, 1188 (Ill. App. Ct. 1991) (victim pleaded with defendants not to hurt her); People v. Angelly, 521 N.E.2d 306, 312 (Ill. App. Ct. 1988) (victim repeatedly begged for mercy); People v. Buford, 533 N.E.2d 472, 480 (Ill. App. Ct. 1988) (victim cried "Oh, no" right before defendant shot); *see also* People v. Sullivan, 538 N.E.2d 1376, 1379 (Ill. App. Ct. 1989) (applying § 5-8-1(a)(1) when defendant ignored all pleas for mercy while shooting victim in back).

135. People v. Bishop, 534 N.E.2d 401, 404 (Ill. App. Ct. 1989) ("senseless and brutal murder of an innocent and unarmed citizen"); People v. McGee, 460 N.E.2d 843, 847 (Ill. App. Ct. 1984) (unarmed victim); People v. Kulpa, 430 N.E.2d 164, 169 (Ill. App. Ct. 1981) (unarmed victim). This factor standing alone is very questionable because, again, most victims are unarmed. This factor would seem appropriate only when the circumstances showed that both parties were violent or when there was a mutual fight.

136. People v. Cain, 525 N.E.2d 1194, 1200 (Ill. App. Ct. 1988) (victim intoxicated and unable to defend himself); People v. Strait, 451 N.E.2d 631, 634 (Ill. App. Ct. 1983) (defendant got victim intoxicated before rape).

137. People v. Franklin, 512 N.E.2d 40, 44 (Ill. App. Ct. 1987) (finding that victim was "slow" made "the crime appear to be more cruel").

138. People v. Edens, 529 N.E.2d 617, 625 (Ill. App. Ct. 1988) (victim did not provoke shooting during armed robbery); People v. Johnson, 513 N.E.2d 852, 859 (Ill. App. Ct. 1987) (defendant robbed three men at gunpoint and then shot victim without provocation); People v. McGee, 460 N.E.2d 843, 847 (Ill. App. Ct. 1984) (no immediate provocation); People v. Grady, 438 N.E.2d 608, 614 (Ill. App. Ct. 1982) (unprovoked attack); *see also* People v. Daniel, 548 N.E.2d 354, 363 (Ill. App. Ct. 1989); People v. Nester, 462 N.E.2d 1011, 1015 (Ill. App. Ct. 1984) (applying § 5-8-1(a)(1) and finding that victim came to aid of woman whom defendant was beating). *But see* People v. Bedony, 527 N.E.2d 916, 920-21 (Ill. App. Ct. 1988) (no finding of brutal or heinous behavior); People v. Kane, 489 N.E.2d 500, 503 (Ill. App. Ct. 1986) (not finding brutal or heinous behavior even though murder was unprovoked).

139. 431 N.E.2d 344 (Ill. 1981).

140. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1) (1991).

ing held in the county jail, indicated that the sentence was appropriate.[141]

In imposing an extended-term sentence under section 5-5-3.2(b)(2) of the Code, the Illinois Supreme Court again found that remorse is an appropriate consideration,[142] and might, in fact, require that a trial court make a determination that the defendant lacked remorse before an extended-term may be imposed.[143] Generally, if a defendant is remorseful for the offense, the courts have found that the behavior did not rise to the level of exceptionally brutal or heinous.[144] When a defendant is not remorseful for the offense, the courts have generally found that the imposition of an extended-term was appropriate.[145] However, a defendant can show remorse and still be sentenced to an extended-term sentence under section 5-5-3.2(b)(2),[146] particularly if the defendant shows remorse not for the offense but for being apprehended,[147] or if the defendant shows remorse but the trial court does not believe the defendant.[148]

141. People v. LaPointe, 431 N.E.2d 344, 353 (Ill. 1981). *See also* People v. Nelson, 571 N.E.2d 879, 886 (Ill. App. Ct. 1990) (natural life term upheld when applying § 5-8-1(a)(1) when court found no remorse because defendant asked police, "Is the sucker . . . dead yet?").

142. People v. Andrews, 548 N.E.2d 1025, 1032 (Ill. 1989).

143. *See* People v. Curtis, 566 N.E.2d 324, 326 (Ill. App. Ct. 1990) (appellate court reversed and remanded with directions that the trial court consider the lack of remorse of the defendant, if any, in light of the *Andrews* decision). *See infra* text accompanying note 235.

144. People v. Andrews, 548 N.E.2d 1025, 1032 (Ill. 1989); People v. Verser, 558 N.E.2d 226, 233 (Ill. App. Ct. 1990); People v. Green, 532 N.E.2d 442, 446 (Ill. App. Ct. 1988); People v. Price, 511 N.E.2d 958, 964 (Ill. App. Ct. 1987); People v. Kane, 489 N.E.2d 500, 503 (Ill. App. Ct. 1986).

145. *See, e.g.*, People v. Pirrello, 565 N.E.2d 324, 330 (Ill. App. Ct. 1991); People v. Barfield, 543 N.E.2d 812, 819 (Ill. App. Ct. 1991); People v. Edens, 529 N.E.2d 617, 627 (Ill. App. Ct. 1988); People v. Johnson, 513 N.E.2d 852, 859 (Ill. App. Ct. 1987); *see also* People v. Daniel, 548 N.E.2d 354, 363 (Ill. App. Ct. 1989); People v. Sullivan, 538 N.E.2d 1376, 1379 (Ill. App. Ct. 1989); People v. Taylor, 518 N.E.2d 409, 413 (Ill. App. Ct. 1987); People v. Nester, 462 N.E.2d 1011, 1015 (Ill. App. Ct. 1984) (applying § 5-8-1(a)(1)).

The court should be careful, however, because when defendants protest their innocence, they will probably not admit that they are sorry but may still be remorseful for what happened to the victim. *See* People v. Buchanan, 570 N.E.2d 344, 357 (Ill. App. Ct. 1991). *But see* People v. Ward, 499 N.E.2d 422, 426 (Ill. 1986) (under some circumstances, a continued protestation of innocence and the lack of remorse may convey a strong message to a trial judge that the defendant is a liar).

146. People v. Bishop, 534 N.E.2d 401, 404 (Ill. App. Ct. 1989).

147. People v. Hickman, 492 N.E.2d 1041, 1049 (Ill. App. Ct. 1986); *cf.* People v. McDade, 579 N.E.2d 1173, 1183 (Ill. App. Ct. 1991) (expression of remorse was "somewhat ambivalent").

148. People v. Waldron, 580 N.E.2d 549, 570 (Ill. App. Ct. 1991) (crimes commited by defendant indicated a total lack of conscience or response, in the court's opinion); People v. Benkowski, 575 N.E.2d 587, 591 (Ill. App. Ct. 1991); People v. McGee, 460 N.E.2d 843, 847 (Ill. App. Ct. 1984) (trial court in superior position; however, trial court must still act within discretion).

D. Threats and Emotional Trauma

In imposing an extended-term under section 5-5-3.2(b)(2), several courts focus on the defendants' threats against the victims[149] and the emotional trauma resulting from the offenses[150] or the threats.[151] Courts are permitted to consider mental suffering in imposing an extended-term sentence because "[c]ommon experience teaches that the subjective pain of mental injury often exceeds that of physical injury, and the intangible scars may be as lasting."[152]

However, threats and emotional trauma are murky factors in imposing extended-terms, particularly in cases involving sexual offenses. For example, in *People v. Jackson*,[153] the court upheld the imposition of an extended-term based on an emotional trauma, finding that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. In *Jackson*, the defendant pleaded guilty to one count of rape[154] based on the following facts. After making a call at a public phone booth, the defendant grabbed the victim by the arm and forced her into a parking lot. The defendant pulled down his pants and ordered the victim to perform oral sex. When she refused, the defendant slapped her and then she engaged in oral sex. When the victim screamed, the defendant slapped her, pulled her into an alley and forced her to perform oral sex. He then brought the victim to the front porch of a building and raped her. The defendant then took her around the back of the building, where he again raped the victim.[155]

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149. *See* People v. Willaims, 581 N.E.2d 228, 236 (Ill. App. Ct. 1991) (victim threatened and terrorized for several hours); People v. Angelly, 521 N.E.2d 306, 312 (Ill. App. Ct. 1988) (defendant told victim that if victim told anybody about the offense, he would kill him); People v. Jones, 515 N.E.2d 166, 175 (Ill. App. Ct. 1987) (threatened to kill victims and their families and burn down their businesses); People v. Campbell, 467 N.E.2d 1112, 1133 (Ill. App. Ct. 1984) (defendant would "blow [them] away" if victims did not do what they were told); People v. Turner, 416 N.E.2d 1149, 1155 (Ill. App. Ct. 1980) (victim repeatedly threatened with death).

150. People v. Timmons, 469 N.E.2d 646, 652 (Ill. App. Ct. 1984); People v. Hamilton, 401 N.E.2d 318, 323 (Ill. App. Ct. 1980) (severe emotional trauma to the victim). *But see* People v. Redisi, 527 N.E.2d 684, 692 (Ill. App. Ct. 1988) (acknowledging that emotional trauma was an appropriate factor to consider, stated that emotional trauma alone may not be enough to establish that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty).

151. People v. Clark, 429 N.E.2d 1255, 1263 (Ill. App. Ct. 1981) (court focused on "the threat of death, with its concomitant mental anguish," as a significant factor).

152. *Id.*

153. 460 N.E.2d 904 (Ill. App. Ct. 1984).

154. *Jackson*, 460 N.E.2d at 906.

155. *Id.* at 907.

However, in *People v. Killen*,[156] the court found that the deviate sexual assault was not accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty even though the court recognized that the victim suffered deep emotional scars. In *Killen*, the victim was a clerk at a convenience store. At about 4 a.m., the defendant entered the store, came up from behind the victim and stuck something in her back which she thought was a knife. After forcing her to give him the money in the cash register, the defendant ordered her into the storage room where the defendant told her to disrobe. The defendant then ordered her to bend over and he attempted to penetrate her but was unable to do so. The defendant then forced her to perform oral sex. The defendant then again attempted to have intercourse with her but was unable to penetrate her. The defendant then had her perform oral sex again. The defendant threatened to cut her if she did not comply. After completion of oral sex, the defendant fled from the store via an emergency door.[157]

Therefore, two courts reached opposite conclusions as to whether the offense was exceptionally brutal or heinous so as to impose an extended-term despite the similar facts. These contradictory findings exemplify the random nature in applying section 5-5-3.2(b)(2). These cases are factually almost identical yet the courts reached opposite conclusions. This result raises serious questions as to whether section 5-5-3.2(b)(2) is unconstitutionally vague.[158]

E. Premeditation

Premeditation is an appropriate factor for courts to consider in determining whether an offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[159] Generally, if the offense was premeditated, then it will be characterized as exceptionally brutal or heinous.[160] If the offense is not premeditated, then it will not be characterized as brutal or heinous.[161] An extended-term may be imposed based on premeditation even though the defendant disputes that the offense was

156. 435 N.E.2d 789 (Ill. App. Ct. 1982).

157. *Killen*, 435 N.E.2d at 789-90.

158. *See infra* text accompanying note 205.

159. *See* People v. LaPointe, 431 N.E.2d 344, 353 (Ill. 1981) (defendant told third-party that he would kill a cab driver).

160. *See infra* note 163.

161. People v. Andrews, 548 N.E.2d 1025, 1032 (Ill. 1989); People v. Isbell, 532 N.E.2d 964, 973 (Ill. App. Ct. 1988); People v. Thomas, 486 N.E.2d 1362, 1378 (Ill. App. Ct. 1985) (although robbery was planned, premeditation factor was diminished because defendants were unable to complete robbery when they realized that the victim was dead). *But see* People v. Bedony, 527 N.E.2d 916, 920-21 (Ill. App. Ct. 1988) (premeditated but not found to be brutal or heinous).

premeditated.[162]

Premeditation is shown in two ways. Premeditation can exist in the classic sense, such as when the defendant has planned a course of action.[163] For example, in *People v. Curtis*,[164] the court held that an extended-term was proper because of the premeditation involved. In *Curtis*, the defendants, for no logical reason, decided to shoot a police officer. The defendants placed a prank phone call to lure the officer to the area, hid and waited for the officer to arrive and, when the officer arrived, the defendant shot him.[165] Premeditation can also exist when the defendant's actions are calculated but not planned in any particular manner.[166] For example, in *People v. McGee*,[167] the court found defendant's actions to be premeditated when during a fight, although initially unarmed, defendant was handed a rifle, and he used the rifle to shoot the victim.[168]

Constitutional questions again arise as to the validity of section 5-5-3.2(b)(2) because courts faced with similar facts showing premeditation can readily reach opposite conclusions as to whether an extended-term sentence may be imposed. In *People v. Bishop*,[169] the court found that an extended-term was appropriate under section 5-5-3.2(b)(2) because premeditation was shown by the following facts. The defendant and co-defendant decided to "make some 'fast money' " by robbing somebody at an elevated train station. The de-

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162. People v. McGee, 460 N.E.2d 843, 846 (Ill. App. Ct. 1984).

163. *See* People v. Benkowski, 575 N.E.2d 587, 590-91 (Ill. App. Ct. 1991); People v. Brown, 551 N.E.2d 1100, 1106 (Ill. App. Ct. 1990) (defendant kept gun in car to use if officer ever stopped him and when one did, defendant shot the officer); People v. Fyke, 546 N.E.2d 1101, 1107 (Ill. App. Ct. 1989) (planned murder of rival drug dealer); People v. Barfield, 543 N.E.2d 812, 819 (Ill. App. Ct. 1989) (planned robbery of victim); People v. Pena, 528 N.E.2d 325, 329 (Ill. App. Ct. 1988) (planned murder of rival gang member); People v. Hickman, 492 N.E.2d 1041, 1049 (Ill. App. Ct. 1986) (defendant repeatedly told co-workers that he was going to turn-the-town-on-its-ear, they would have something to talk about, defendant had Plan A and Plan B); People v. Sias, 415 N.E.2d 618, 624-25 (Ill. App. Ct. 1981) (defendant waited for and shot co-worker for reporting poor work performance).

164. 546 N.E.2d 624 (Ill. App. Ct. 1989).

165. *Curtis*, 546 N.E.2d at 630. Although this decision was reversed on the appeal after remand in People v. Curtis, 566 N.E.2d 324 (Ill. App. Ct. 1990), the court reaffirmed its finding that premeditation made the offense exceptionally brutal or heinous indicative of wanton cruelty.

166. See People v. Johnson, 513 N.E.2d 852, 859 (Ill. App. Ct. 1987) and People v. Nester, 462 N.E.2d 1011, 1015 (1984) in which the court, in upholding a sentence of natural life imprisonment pursuant to § 5-8-1(a)(1), found that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty because during a fight, as the victim was falling to the ground, the defendant fatally stabbed the victim. *See also Pirrello*, 565 N.E.2d at 330 (Reinhard, J., specially concurring.).

167. 460 N.E.2d 843 (Ill. App. Ct. 1984).

168. *Id.* at 846.

169. 534 N.E.2d 401 (Ill. App. Ct. 1989).

fendant showed the co-defendant a revolver, which was eventually used. During the robbery, the defendant placed the revolver against the head of the victim and shot her.[170] In affirming the imposition of the extended-term, the *Bishop* court noted the fact that the defendants conspired to rob an unsuspecting victim showed that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[171]

However, in *People v. Kane*,[172] the court held that the offense was not accompanied by exceptionally brutal or heinous behavior resulting from premeditation despite the following facts. In that case, the defendant and co-defendant talked about robbing a taxicab driver and killing some rival street gang members. The defendants took a gun, entered a cab, announced a "stickup," shot the driver in the neck, took the driver's money and fled.[173] The *Kane* court found that the behavior was not exceptionally brutal or heinous to warrant and extended-term.[174] Although the defendant in *Kane* showed some remorse, that one distinguishing factor is minor in comparison to the factual similarities of these cases.

F. Torture

Although an offense need not involve torture or infliction of unnecessary pain to rise to the level of exceptionally brutal or heinous,[175] extended-terms may be imposed if the court finds that the offense was torturous.[176] For example, in *People v. Wrice*,[177] the court upheld the imposition of a 60-year extended-term for rape and a 40-year extended-term for deviate sexual assault based on "the torture-like conduct engaged in by the defendant."[178] In that case, the victim was repeatedly raped, beaten and burned. There were over 100 bruises on the victim's body and 20% of the victim's body had been burned with an iron.[179] Clearly, an extended-term

170. *Id.* at 402.
171. *Id.* at 404.
172. 489 N.E.2d 500 (Ill. App. Ct. 1986).
173. *Id.* at 501.
174. *Id.* at 502. *Cf.* People v. Page, 550 N.E.2d 248, 252 (Ill. App. Ct. 1990) (court declined to follow *Kane* in case of premeditated murder of limousine driver by firing two shots at close range to back of head).
175. People v. Abernathy, 545 N.E.2d 201, 217 (Ill. App. Ct. 1989); *see* People v. LaPointe, 431 N.E.2d 344, 353 (Ill. 1981). *But see* People v. Lucas, 548 N.E.2d 1003, 1022 (Ill. 1989) (Illinois Supreme Court, in applying § 9-1(b)(7), found that the death penalty was not appropriate because the murder was not premeditated, prolonged or torturous). *See infra* note 207.
176. People v. Isbell, 532 N.E.2d 964, 973 (Ill. App. Ct. 1988); People v. Bedony, 527 N.E.2d 916, 920 (Ill. App. Ct. 1988); People v. Nester, 462 N.E.2d 1011, 1014 (Ill. App. Ct. 1984).
177. 488 N.E.2d 1313 (Ill. App. Ct. 1986).
178. *Id.* at 1317.
179. *Id.*

sentence may be imposed under section 5-5-3.2(b)(2) when the offense involves torture.

G. Force Employed in Committing Felony

A trial court may consider the amount and type of force employed and the manner in which the offense was completed in imposing an extended-term sentence.[180] However, when a court considers this factor, courts generally do so in a very inarticulate way. For example, courts have mentioned that it reviewed the file, particularly photographs of the victim and found that an extended-term was appropriate.[181]

One way in which courts articulate how a felony rises to the level of exceptionally brutal or heinous behavior indicative of wanton cruelty is to emphasize the number of wounds the victim received.[182] Although a large number of wounds can show exceptionally brutal or heinous behavior allowing for the imposition of an extended-term, a single act or wound may be sufficient to allow a trial court to impose an extended-term section 5-5-

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180. *See* People v. Torry, 571 N.E.2d 827, 835-36 (Ill. App. Ct. 1991) (while stabbing victim, defendant used such force that handle of knife broke); People v. Harvey, 568 N.E.2d 381, 387 (Ill. App. Ct. 1991) (defendant stated that he beat the deceased until her head sounded like a hollow watermelon); People v. Pirrello, 565 N.E.2d 324, 330 (Ill. App. Ct. 1991) (excessive firepower unleashed on victim when "shot blew most of [victim's] head off"); People v. Cain, 525 N.E.2d 1194, 1200 (Ill. App. Ct. 1988) (merciless beating with substantial injuries); People v. Sperow, 525 N.E.2d 223, 232 (Ill. App. Ct. 1988) (victim murdered when defendant crushed head with 24 pound block of concrete); People v. Hall, 518 N.E.2d 275, 282 (Ill. App. Ct. 1988) (victim brutally beaten and then thrown to death head first down elevator shaft); People v. Winston, 435 N.E.2d 1327, 1388 (Ill. App. Ct. 1982) (victim repeatedly beaten with ashtray until unconscious and then strangled to death).

Exceptionally brutal or heinous behavior allowing for the imposition of an extended-term can occur after the victim is dead. *See* People v. Grady, 438 N.E.2d 608, 614 (Ill. App. Ct. 1982) (defendant kicked victim after shooting him); People v. Schlemm, 402 N.E.2d 810, 818 (Ill. App. Ct. 1980) (concealing corpse shows brutal and heinous behavior); *see also* People v. Nelson, 571 N.E.2d 879, 886 (Ill. App. Ct. 1991) (natural life term imposed under § 5-8-1(a)(1) when after firing one shot at close range in victim's head, defendant kicked victim).

181. People v. Cabrera, 508 N.E.2d 708, 717 (Ill. 1987); *Sperow*, 525 N.E.2d at 232; People v. Sperow, 525 N.E.2d 223, 232 (Ill. App. Ct. 1988). This inability to articulate why an offense rises to the level of exceptionally brutal or heinous indicative of wanton cruelty again raises constitutional questions. *See infra* text accompanying note 222.

182. *See* People v. Hernandez, 562 N.E.2d 219, 221 (Ill. App. Ct. 1990) (victim stabbed 89 times); People v. Lindsay, 550 N.E.2d 719, 723 (Ill. App. Ct. 1990) (repeated beatings to head); People v. Rixie, 546 N.E.2d 52, 61 (Ill. App. Ct. 1989) (victim stabbed between 40 and 50 times); People v. Wrice, 488 N.E.2d 1313, 1370 (Ill. App. Ct. 1986). (over 100 bruises on victim); People v. Grady, 438 N.E.2d 608, 614 (Ill. App. Ct. 1982); People v. Kulpa, 430 N.E.2d 164, 167 (Ill. App. Ct. 1981) (victim stabbed and slashed 26 times).

3.2(b)(2).[183]

H. Prior Criminal History

It has been stated that "In determining whether an extended-term should be given, the trial court should look at the nature of the offense committed as well as the defendant's prior criminal record."[184] Although courts have looked to a defendant's prior criminal activity or lack of it as a factor in determining whether an extended-term could be imposed[185] or not imposed,[186] this practice is clearly wrong.[187] It appears that the Illinois Supreme Court might have even required that trial courts examine a defendant's prior criminal history in determining whether to impose an extended-term under section 5-5-3.2(b)(2).[188] The focus of imposing an extended-term under section 5-5-3.2(b)(2) is on the offense the defendant was convicted of committing. The clear language of the statute states specifically that *"the offense"* be accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.[189] Further, in finding that an extended-term sentence may be imposed based upon accountability, the courts have stated that the focus is on the offense committed and not the defendant's participation.[190] The focus in imposing an extended-term should not be on the defendant's prior criminal record, because the record has nothing to do with the offense for which the defendant is convicted. Also, it has been held that the purpose of section 5-5-3.2(b)(2) is not intended to punish recidivist defendants[191] which is precisely what a trial court does when it considers prior criminal history. Therefore, although courts have considered a defendant's prior criminal

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183. People v. Barfield, 543 N.E.2d 812, 819 (Ill. App. Ct. 1989) (one gunshot wound found to be brutal and heinous); People v. Hickman, 492 N.E.2d 1041, 1049 (Ill. App. Ct. 1986) (same); People v. McGee, 460 N.E.2d 843, 847 (Ill. App. Ct. 1984) (same).

184. People v. Sias, 415 N.E.2d 618, 624 (Ill. App. Ct. 1981) (extended-term upheld based on, among other things, defendant's prior record).

185. *See* People v. Edens, 529 N.E.2d 617, 624-25 (Ill App. Ct. 1988); People v. Johnson, 513 N.E.2d 852, 859 (Ill. App. Ct. 1987); *see also* People v. Whitlock, 528 N.E.2d 1371, 1391 (Ill. App. Ct. 1988); People v. LaPointe, 431 N.E.2d 344, 353 (Ill. 1981).

186. People v. Andrews, 548 N.E.2d 1025, 1032 (Ill. 1989); People v. Green, 532 N.E.2d 442, 446 (Ill. App. Ct. 1988); People v. Bedony, 527 N.E.2d 916, 921 (Ill. App. Ct. 1988); People v. Olesch, 492 N.E.2d 1381, 1391 (Ill. App. Ct. 1986).

187. *See* People v. Anderson, 559 N.E.2d 267, 270 (Ill. App. Ct. 1990).

188. *See* People v. Curtis, 566 N.E.2d 324, 326 (Ill. App. Ct. 1990) (court reversed and remanded with directions to the trial court that it should consider the defendant's prior criminal history in light of the supreme court's decision in *Andrews*, 548 N.E.2d 1025 (Ill. 1989)).

189. *See* People v. Pirrello, 565 N.E.2d 324, 330-31 (Ill. App. Ct. 1991) (Reinhard, J., specially concurring).

190. *See supra* text accompanying note 94.

191. People v. Jones, 515 N.E.2d 166, 175 (Ill. App. Ct. 1987).

record or lack of one in determining the propriety of an extended-term sentence under section 5-5-3.2(b)(2), this consideration is improper. However, once the trial court finds that the offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty, the trial court can then consider prior criminal history in determining the length of the extended term.[192]

I. Elements of the Offense

A trial court may not rely on an element inherent in the offense for which the defendant was convicted as a factor to show exceptionally brutal or heinous behavior indicative of wanton cruelty.[193] Section 5-5-3.2(b)(2) is to focus attention upon the exceptionally violent aspects of certain crimes, not otherwise inherent in the prohibited conduct.[194] For example, a trial court cannot consider the element of force or threat of force in determining that rape or deviate sexual assault is exceptionally brutal or heinous.[195] However, even if the trial court errs and looks to an element inherent in the offense, such as considering the victim's death as a factor in sentencing a defendant for a murder conviction, that error may not require remandment for resentencing.[196] Further, the trial court can consider the amount of force employed in determining that the offense was accompanied by exceptionally brutal or heinous behavior.[197] The trial court also need not ignore certain facts

192. People v. Pirrello, 565 N.E.2d 324, 331 (Ill. App. Ct. 1991) (Reinhard, J., specially concurring).

193. People v. Green, 532 N.E.2d 442, 446 (Ill. App. Ct. 1988); People v. Reynolds, 451 N.E.2d 1003, 1007 (Ill. App. Ct. 1983) ("It would seem that any armed robbery, either expressly or impliedly, carries with it a threat that a weapon will be used if the victim does not comply with the demands of the robber. This factor does not necessarily support a finding that the behavior is exceptionally brutal or heinous.").

194. People v. Clark, 429 N.E.2d 1255, 1262 (Ill. App. Ct. 1981).

195. People v. Olesch, 492 N.E.2d 1381, 1391 (Ill. App. Ct. 1986).

196. People v. Green, 568 N.E.2d 92, 101 (Ill. App. Ct. 1991) (extended-term sentence of 60 years for murder conviction upheld even though trial court erred in considering death as an aggravating factor in imposing sentence under § 5-5-3.2(b)(2)).

197. *See supra* text accompanying note 180; *see also* People v. Cain, 525 N.E.2d 1194, 1200 (Ill. App. Ct. 1988); People v. Sperow, 525 N.E.2d 223, 232 (Ill. App. Ct. 1988); *see generally* People v. Saldivar, 497 N.E.2d 1138 (Ill. 1986) (impermissible for a trial court to impose a more severe sentence on the ground that the defendant caused the victim serious bodily harm, i.e., death, because death is inherent in the offense of voluntary manslaughter). For a list of *Saldivar*'s application, *see* People v. Johnson, 564 N.E.2d 913, 917 (Ill. App. Ct. 1990). Furthermore, in People v. Furguson, 547 N.E.2d 429, 433 (Ill. 1989), the court stated that "Generally, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense, absent a clear legislative intent to accomplish the result." *Id.*

At least one commentator has expressed that in sentencing defendants this area is confusing and difficult to apply. *See* Patricia Hartmann, *Factors in Ag-*

which constitute an element of the offense if the element overlaps with facts showing brutal or heinous behavior. For example, the trial court need not ignore facts which provide the basis for a conviction for heinous battery in imposing an extended-term.[198]

In *People v. Olesch*,[199] the court concluded that the trial court must have considered the element of force and held that an extended-term sentence was improper under section 5-5-3.2(b)(2) because the offense was not exceptionally brutal or heinous. In *Olesch*, the defendant grabbed the victim around the neck as she walked down the street and threatened to kill the victim if she screamed. The defendant told the victim that he was carrying a knife. The defendant forced the victim down a back stairwell at the rear of a house. The defendant then raped the victim and forced her to perform oral sex. The defendant then raped a second time and again forced the victim to perform oral sex.[200] The *Olesch* court found that the offense was not accompanied by exceptionally brutal or heinous behavior and therefore reduced the extended-term.[201]

However, in *People v. Busija*,[202] the court found that the offense was exceptionally brutal or heinous based on the following facts. After the victim parked her car and entered her apartment building, the victim entered the elevator at the same time as the defendant. The defendant exited the elevator at the same floor with the victim and then grabbed her and demanded money. The victim gave the defendant $30 and he ordered her to go outside. The defendant then forced the victim down a stairwell and led her to a parking lot, where he forced her to perform oral sex. The defendant then attempted to rape her. The defendant then placed the victim face down and ordered her to count to one hundred as he departed.[203] The court found that the trial court did not err in sentencing the victim based on the " 'exceptionally brutal and heinous' nature of the attack."[204]

Again, when two different courts are faced with similar facts, the courts reached opposite conclusions as to whether the offense was accompanied by exceptionally brutal or heinous behavior.

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gravation and Mitigation: A Trap for the Sentencing Judge?, 33 DEPAUL L. REV. 357, 364-67 (1984).

198. People v. Yarbrough, 509 N.E.2d 747, 750 (Ill. App. Ct. 1987); *see also* People v. Pena, 528 N.E.2d 325, 329 (Ill. App. Ct. 1988).

199. 492 N.E.2d 1381 (Ill. App. Ct. 1986).

200. *Olesch*, 492 N.E.2d at 1384.

201. *Id.* at 1391.

202. 509 N.E.2d 168 (Ill. App. Ct. 1986).

203. *Id.* at 170.

204. *Id.* at 173.

III. THE CONSTITUTIONALITY OF SECTION 5-5-3.2(b)(2)

The constitutionality of section 5-5-3.2(b)(2) has been challenged several times. However, on each occasion, section 5-5-3.2(b)(2) has been upheld.[205] The phrase "exceptionally brutal or heinous behavior indicative of wanton cruelty" has also been upheld as used in section 5-8-1(a)(1)(b)[206] and section 9-1(b)(7).[207] Further, the sentencing scheme allowing a trial court to impose either an extended-term sentence under section 5-5-3.2(b)(2) upon any felony conviction, including murder, accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or, under section 5-8-1(a)(1), for a term of natural life, as opposed to an extended-term, for murder accompanied by the same type of behavior has also been upheld as not violating the defendant's equal protection rights.[208]

Although section 5-5-3.2(b)(2) has not been found to be unconstitutionally vague, many courts' analyses are cursory[209] or simply

205. Peeples v. Greer, 566 F. Supp. 580, 589 (N.D. Ill. 1983).

206. People v. LaPointe, 431 N.E.2d 344, 352 (Ill. App. Ct. 1981); *see also* People v. Rainge, 570 N.E.2d 431, 446 (Ill. App. Ct. 1991); People v. Barnhill, 543 N.E.2d 1374, 1380 (Ill. App. Ct. 1989); People v. Merchel, 414 N.E.2d 808, 811 (Ill. App. Ct. 1980); People v. Nobles, 404 N.E.2d 330, 335 (Ill. App. Ct. 1980). It has also been upheld against claims that the statute violates the Illinois Constitution because it fails to consider rehabilitative potential as required under Article I, section 11. People v. Bartik, 418 N.E.2d 1108, 1114 (Ill. App. Ct. 1981).

207. People v. Odle, 538 N.E.2d 428 (Ill. 1989).

In People v. Lucas, 548 N.E.2d 1003 (Ill. 1989), the Illinois Supreme Court limited the imposition of the death penalty under § 9-1(b)(7) to those cases involving death that was premeditated, prolonged or tortuous. *Id.* at 1022-23. Therefore, because the decedent was suffocated immediately after other injuries were inflicted, the murder was not prolonged; thus, the death penalty was vacated. *Id.* at 1023.

The conclusion that to impose a death penalty under this section requires a finding of premeditation or prolonged or tortuous behavior conflicts with the holding in *LaPointe* which expressly rejected this contention. However, in the former, capital punishment is involved; therefore, it appears that the supreme Court was giving the statute a limited construction thereby saving it from Eighth Amendment challenges. *See* Lewis v. Jeffers, 110 S. Ct. 3092 (1990); Walton v. Arizona, 110 S. Ct. 3047 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). Thus, the same statutory language, namely, "exceptionally brutal or heinous behavior indicative of wanton cruelty," means two different things depending on the punishment allowed by the statute.

Further, *Maynard*, *supra*, has been held to be applicable only to capital cases, and, therefore, is of no use when challenging the constitutionality of § 5-5-3.2(b)(2), People v. Page, 550 N.E.2d 248, 251 (Ill. App. Ct. 1990), or § 5-8-1(a)(1)(b), *Barnhill*, 543 N.E.2d at 1380.

208. People v. Abernathy, 545 N.E.2d 201, 218 (Ill. App. Ct. 1989); People v. Whitlock, 528 N.E.2d 1371, 1391 (Ill. App. Ct. 1988); People v. Cartalino, 444 N.E.2d 662, 673 (Ill. App. Ct. 1982).

209. People v. Cooper, 483 N.E.2d 309, 316 (Ill. App. Ct. 1985); People v. Smith, 418 N.E.2d 172, 178 (Ill. App. Ct. 1981).

rely on precedent without much discussion.[210] "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications."[211] The test for determining whether a statute violates due process of law on the grounds of vagueness is whether the terms are so ill-defined that the ultimate meaning rests on the opinions of the trier of fact rather than any objective criteria or facts,[212] or if a person of common intelligence must speculate as to its meaning.[213] To satisfy the requirements of due process, mathematical certainty is not required.[214] However, a statute's prohibitions must be sufficiently definite when measured by common understanding and practice.[215] In considering a vagueness challenge to a statute, absent a contrary legislative intent, a court will assume the words used in a statute retain their ordinary and popularly understood meanings.[216] Section 5-5-3.2(b)(2) violates the due process clause of the Fourteenth Amendment[217] under this standard for three reasons.

First, as has been shown throughout Part II, courts confronted with similar facts have reached different conclusions as to whether the offense rises to the level which allows a trial judge to impose an extended-term sentence.[218]

Second, when a court is confronted with facts which show that, under the factors enumerated above, an extended-term is appropri-

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210. *Page*, 550 N.E.2d at 251; People v. Fyke, 546 N.E.2d 1101, 1108 (Ill. App. Ct. 1989); People v. Johnson, 459 N.E.2d 1000, 1013 (Ill. App. Ct. 1984); People v. Kulpa, 430 N.E.2d 164, 169 (Ill. App. Ct. 1981).

211. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-98 (1982).

212. People v. LaPointe, 431 N.E.2d 344, 352 (Ill. 1981); People v. Clark, 429 N.E.2d 1255, 1262 (Ill. App. Ct. 1981). Both cases cite to People v. Pembrock, 342 N.E.2d 28, 30 (Ill. 1976).

213. People v. Turner, 416 N.E.2d 1149, 1155 (Ill. App. Ct. 1981) (citing Lanyetta v. New Jersey, 306 U.S. 451, 453 (1939) and Connelley v. General Construction Co., 269 U.S. 385 (1926)).

214. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

215. United States v. Petrillo, 332 U.S. 1 (1947); People v. Wawczak, 486 N.E.2d 911, 913 (Ill. 1985).

216. People v. Fabing, 570 N.E.2d 329, 332 (Ill. 1991) (defining "life threatening reptile").

217. The statute does not violate the Eighth Amendment's vagueness aspect because that only applies to capital cases, unless the proportionality of the sentence is challenged. *See* People v. Hernandez, 562 N.E.2d 219, 228 (Ill. App. Ct. 1990); People v. Brown, 551 N.E.2d 1100, 1109 (Ill. App. Ct. 1990); People v. Peeples, 539 N.E.2d 1376, 1379 (Ill. App. Ct. 1989); *see also* Peeples v. Greer, 739 F.2d 262, 265 (N.D. Ill. 1984).

The "Fourteenth Amendment" is capitalized in this article to give it the respect it deserves. *See* Lawrence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825 n.2 (1989); Clifford S. Fishman, *Police Trespass and the Fourth Amendment: A Wall in Need of Mending*, 22 J. MARSHALL L. REV. 795 n.3 (1989).

218. *See supra* text accompanying notes 153-157, 169-174 and 199-204.

ate, a court may find that the offense does not rise to the level of exceptionally brutal or heinous. However, when confronted with facts showing none of the factors listed above, a court may find that an extended-term is appropriate. For example, in *People v. Bedony*,[219] the court found that the defendant's conviction for attempted murder was not exceptionally brutal or heinous indicative of wanton cruelty even though the court found the following: the defendant's actions were premeditated; the defendant beat the victim on the head; the defendant forced the victim to lay down on the floor; and the defendant shot the victim and left him for dead.[220] However, in *People v. Johnson*,[221] during an attempted armed robbery, when the defendant drew his gun, one of the victims in the store told the defendant, "You can get hurt playing like that." The defendant then shot the victim, who eventually died from the wound. The court upheld an extended-term sentence under section 5-5-3.2(b)(2).[222] Thus, even with recognized factors showing exceptionally brutal or heinous behavior indicative of wanton cruelty, the decision to apply an extended-term appears to rest on the whims of judges rather than any objective criteria.

Third, the vagueness of section 5-5-3.2(b)(2) is also shown by several courts' failure to articulate why an offense rises to the level of exceptionally brutal or heinous behavior indicative of wanton cruelty. Weak analyses pervade appellate court decisions[223] and even an Illinois Supreme Court decision.[224] For example, in *People v. Freeman*,[225] the court merely gave the following analysis of why the offense was accompanied by exceptionally brutal or heinous behavior:

> A fair consideration of this issue shows that the trial court did not abuse its discretion. The victim's death resulted from exceptionally

219. 527 N.E.2d 916 (Ill. App. Ct. 1988).

220. *Bedony*, 527 N.E.2d at 920.

221. 459 N.E.2d 1000 (Ill. App. Ct. 1984).

222. *Johnson*, 459 N.E.2d at 1013; *see also* People v. Morrison, 484 N.E.2d 329, 340-41 (Ill. App. Ct. 1985) (no recognized factor showing exceptionally brutal or heinous behavior indicative of wanton cruelty was present).

223. *See, e.g.*, People v. Kendall, 572 N.E.2d 363, 367 (Ill. App. Ct. 1991) ("In light of the brutality of the crime and defendant's limited rehabilitative potential, we conclude that defendant's 35-year sentence was not an abuse of discretion.").

224. People v. Cabrera, 508 N.E.2d 708, 717 (Ill. 1987), *cert. denied*, 484 U.S. 929 (1987). In that case the court stated:

> "We have reviewed the trial court's sentencing of the defendant; the testimony of Dr. Teas regarding the autopsy of the victim, including the cause of death; the photographs of the victim; and the scene of the crime. On this record it cannot be said that the trial court abused discretion in imposing an extended-term sentence of 60 years for this brutal murder for gain." This analysis tells the readers very little except that if they saw the pictures of the victim, they too would find that an extended term was appropriate.

225. 538 N.E.2d 681 (Ill. App. Ct. 1989).

> brutal and heinous behavior indicative of wanton cruelty. The court heard testimony on the severity of the crime, the victim's age, and the defendant's age and potential for rehabilitation. The trial court's comments during sentencing indicate that it considered the aggravating and mitigating circumstances.[226]

Similarly, in *People v. Peterson*,[227] the court merely stated the following:

> Defendant also suggests that the trial court abused its discretion when it sentenced her to an extended-term of 50 years' incarceration. The offense committed here was accompanied by exceptionally brutal and heinous behavior . . . We cannot conclude that the trial court abused its discretion in imposing the sentence.[228]

Also, in *People v. Morrison*,[229] the court only offered the following reasoning why the extended-term was proper.

> In the case at bar, we find that the trial court had sufficient informational and legal bases to support the imposition of extended-term sentences where the court found that the offenses were accompanied by exceptionally heinous and brutal behavior.[230]

While the terms of the statute may have been defined, merely defining the terms does not give any more guidance as to when the behavior allows the imposition of an extended-term. Further, the emphasis on the "exceptional" nature of the crime does not help explain when the statute is applicable.[231] The court's "I know it when I see it"[232] standard is exemplified in *People v. Olesch*,[233] in which the trial court stated, "[I]f that isn't brutal and heinous and wanton cruelty, then I suppose there is no such definition for the words heinous, brutal and wanton."[234] However, the appellate

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226. *Freeman*, 538 N.E.2d at 684.

227. 525 N.E.2d 946 (Ill. App. Ct. 1988).

228. *Peterson*, 525 N.E.2d at 950. For other cases with similarly weak analysis, see also People v. Bishop, 534 N.E.2d 401, 404 (Ill. App. Ct. 1989); People v. Cole, 522 N.E.2d 635, 643 (Ill. App. Ct. 1988) (applying § 5-8-1(a)(1)); People v. Busija, 509 N.E.2d 168, 173 (Ill. App. Ct. 1986); People v. Gray, 408 N.E.2d 1150, 1158 (Ill. App. Ct. 1980).

229. 484 N.E.2d 329 (Ill. App. Ct. 1985).

230. *Morrison*, 484 N.E.2d at 340.

231. *See* Maynard v. Cartwright, 486 U.S. 356, 364 (1988). In *Maynard*, the United States Supreme Court stated:

> The State's contention that the addition of the word 'especially' somehow guides the jury's discretion, even if the term 'heinous,' does not, is untenable. To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'

Id. at 364.

232. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart J., concurring). In *Jacobellis*, Justice Stewart, as well as the rest of the Supreme Court, was struggling with defining obscenity.

233. 492 N.E.2d 1381 (Ill. App. Ct. 1986).

234. *Id.* at 1391.

court reversed, finding that the offense did not rise to the level necessary to impose an extended-term.[235] Certainly, if appellate judges and trial judges, hopefully people of common intelligence, are so divided as to when an offense rises to this level, there is much speculation as to the meaning of the statute. Thus, despite the case law to the contrary, section 5-5-3.2(b)(2) is vague and violates the Fourteenth Amendment.

However, a statute can be saved from challenges of vagueness if a court gives the statute a limited construction.[236] The Illinois Supreme Court may have saved any new vagueness challenge of section 5-5-3.2(b)(2) by giving the statute a limited construction in *People v. Andrews*.[237] In *Andrews*, the Illinois Supreme Court rejected the State's argument that an extended-term may be imposed for a murder conviction in which the defendant shot a defenseless victim during an armed robbery when the defendant could have achieved his goal without killing the victim. In *Andrews*, the defendant entered a car that had exited from the Eisenhower Expressway and which was stopped at a light. The defendant shot the driver in the right temple at close range and ordered the victim's girlfriend to give him all her money. The victim died as a result of the wound.[238] The Illinois Supreme Court, finding that an extended-term was improper, stated the following:

> Although the victim was defenseless and the defendant could have achieved his goal of robbing the victim and the victim's girlfriend without killing the victim, every single murder is by nature unnecessary; section 5-5-3.2(b)(2), however, requires that the murder be "exceptionally" brutal or heinous. All murders are brutal and heinous to a certain degree. Moreover, many murdered robbery victims are defenseless when killed. Section 5-8-2, however, allowing for extended-term sentences, "was not intended to convert every offense into an extraordinary offense subject to an extended-term sentence." *People v. Evans* (1981), 87 Ill.2d 77, 88-89.[239]

The decision in *Andrews* appears to be an attempt by the Illinois Supreme Court to control the use of section 5-5-3.2(b)(2). Although some courts may hesitate to find *Andrews* to be a "new trend" or "new law,"[240] other courts have followed the new trend.

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235. *Id.*

236. *See* Lewis v. Jeffers, 110 S. Ct. 3092 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (New Hampshire Supreme Court gave limiting construction of state's breach of peace statute to save it from violating First Amendment); People v. Wawczak, 486 N.E.2d 911, 913 (Ill. 1985); *see also* People v. Lang, 498 N.E.2d 1105, 1127 (Ill. 1986) (defining "mentally ill").

237. 548 N.E.2d 1025 (Ill. 1989).

238. *Andrews*, 548 N.E.2d at 1032.

239. *Id.*

240. People v. Pirrello, 565 N.E.2d 324, 329 (Ill. 1991).

In *People v. Anderson*,[241] the Third District of the Illinois Appellate Court found that an extended-term for murder was improper under section 5-5-3.2(b)(2). In that case, the defendant interviewed the victim for a painting contract. When the defendant tried to touch the victim, she pushed him to the floor and a gun fell from the defendant's pocket. As the two struggled for the gun, the victim was shot twice in the neck.[242] Relying on *Andrews*, the court found that generally all murders by definition are brutal and heinous to some extent but the extended-term provision of section 5-5-3.2(b)(2) was intended to apply to murders that go beyond the mere infliction of death.[243] Whether this "new trend" in limiting the use of section 5-5-3.2(b)(2) continues and diminishes the ability to challenge the statute on grounds of vagueness is for the Illinois courts to decide.

Therefore, although section 5-5-3.2(b)(2) has been upheld under assertions that it is vague in violation of the Fourteenth Amendment, the questionable history of its application, shown by courts reaching conflicting conclusions as to the propriety of applying the statute upon similar facts and by the court's inability to articulate why certain offenses rise to the level of exceptionally brutal or heinous behavior indicative of wanton cruelty, shows that the statute is vague. However, if a new trend evolves a limited construction in imposing extended-term sentences under section 5-5-3.2(b)(2), the statute may be properly saved from assertions that it violates due process.

CONCLUSION

Although the words of section 5-5-3.2(b)(2) have been defined and given their ordinary meaning, the language of the statute prevents any discernable standard for determining when it should be imposed. Although several factors can be distilled from over a decade of case law, there would appear to be no agreement as to what facts may show that a felony conviction is deserving of an extended sentence. What strikes one judge as being an appropriate factor may strike another as not. No objective criteria exist to determine when a felony rises to the level of exceptionally brutal or heinous behavior indicative of wanton cruelty. Most courts appear to rely

241. 559 N.E.2d 267 (Ill. App. Ct. 1990); *see also Pirrello*, 565 N.E.2d at 330 (Reinhard, J., specially concurring); People v. Fields, 555 N.E.2d 1136, 1140 (Ill. App. Ct. 1990) ("[W]e feel compelled to find that the defendant's conduct was not exceptionally brutal or heinous in light of *People v. Andrews* (1989), 132 Ill. 2d 451, 548 N.E.2d 1025.").

242. *Anderson*, 559 N.E.2d at 269.

243. *Id.* at 271. However, this case could be narrowly construed as merely reiterating that the elements of the offenses may not be used as an aggravating factor but the court did not cite any cases which stand for that proposition. *See supra* text accompanying note 191.

on a gut reaction to the individual facts of each case to determine if an extended-term is appropriate. If no gut reaction occurs, then no extended-term may be imposed. However, if a gut reaction occurs, then the imposition of the extended-term is rationalized by applying a variety of recognized factors. Hopefully, a new trend is developing which will construe section 5-5-3.2(b)(2) in a way that is consistent with due process. Although that trend appears to be starting, the decision to apply the statute in an objective and structured manner ultimately rests with the Illinois courts.