Exemplary Project Screening and Validation Reports

Project Candidate:

ILLINOIS STATE'S ATTORNEYS ASSOCIATION
STATEWIDE PROSECUTOR'S APPELLATE ASSISTANCE SERVICE

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EXEMPLARY PROJECT VALIDATION REPORT

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STATEWIDE PROSECUTOR's
APPELLATE ASSISTANCE SERVICE

Illinois

Submitted to:

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U.S. Department of Justice
Law Enforcement Assistance Administration
National Institute of Law Enforcement
and Criminal Justice
Washington, D.C. 20531

December 1976

TABLE OF CONTENTS

1.0 INTRODUCTION

The statewide Prosecutors Appellate Assistance Service of Illinois offers aid to State's Attorneys in 101 of Illinois' 102 counties (Cook County excepted*) by preparing, filing and arguing criminal appellate briefs in Illinois' Intermediate Court of Appeals. The service which is currently used by prosecutors in 88 of the eligible 101 counties, also publishes a Uniform Complaint Book and Newsletter, and provides prosecutors with a "hot-line" service designed to give immediate assistance on matters of criminal law.

Prior to the inception of the appellate service, intermediate criminal appeals in Illinois were handled exclusively by State's Attorneys who were also responsible for all criminal trial work and had substantial civil responsibility in suits involving their respective counties. By 1973 a combination of factors including a substantial increase in the number of limited appeals at the intermediate level, increasing trial caseload and the establishment of a defense appellate service, gave rise to the need for greater time and expertise in the handling of appeals. The Service was founded, through the Illinois State's Attorney's Association, with the intent of upgrading the criminal justice system in Illinois by:

- providing a staff of attorneys whose only responsibility is the preparation and arguing criminal appeals for the state;
- alleviating the burden of appeal work on prosecutors allowing them to devote more time to trial litigation; and
- developing a reference bank to insure the uniform handling of appeals.

The Prosecutor's Assistance Service was visited on November 16-18 by an Abt staff member who was accompanied by Mr. Thomas Reilley, formerly with the Massachusetts Attorney General's Office and the Suffolk County (Massachusetts) District Attorney's Office.

This validation report incorporates information from the following sources:

- The Project's Exemplary Project submission materials and documents forwarded to the National Institute;

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* Since Cook County (Chicago) has its own Appellate Court District located in the same vicinity as the Cook County State's Attorney's Office (which has an institutionalized Appellate Bureau) Cook County has not required project services.

- On Site program observations;
- The Prosecutor's Appellate Service "Brief Bank;" and
- Interviews conducted on-site with the project's central and regional staff, representatives of the defense appellate service, the judiciary and various state prosecutors.

Appendix B contains a complete list of persons interviewed.

1.1 Criminal Justice Organization in Illinois

In order to understand the evolved need for and ultimate organization of the Appellate Service, this section presents a brief explanation of the Illinois Court and Prosecutorial Systems. The lower court and court of original jurisdiction is the Circuit Court established by Article 6 Section 1 of the Illinois Constitution. There are 21 circuits, 20 of which have multicounty responsibility (ranging from 2-12 counties per circuit with the exception of Cook County which is a separate circuit). However, there are 102 locations so that court is actually held in each county.

According to Illinois law, criminal defendants are entitled to an automatic right of appeal to all adverse decisions. These appeals, with the exception of those cases involving the death penalty or those which question the constitutionality of a statute are taken at the Intermediate Court of Appeals which sits in one site for each of its five regions. All cases are heard by three judge panels. There are two panels in each of the second, fourth, and fifth districts; one in the third; and five in the first (Cook County).

The court of last resort is the Illinois supreme court which consists of one Chief Justice and six associates who sit at the State Capitol in Springfield. Except for the issuing of writs the court has only appellate jurisdiction on cases from the intermediate appellate court and, in the limited circumstances mentioned above, from the circuit court.* The judicial system is shown in Figure 1.1.

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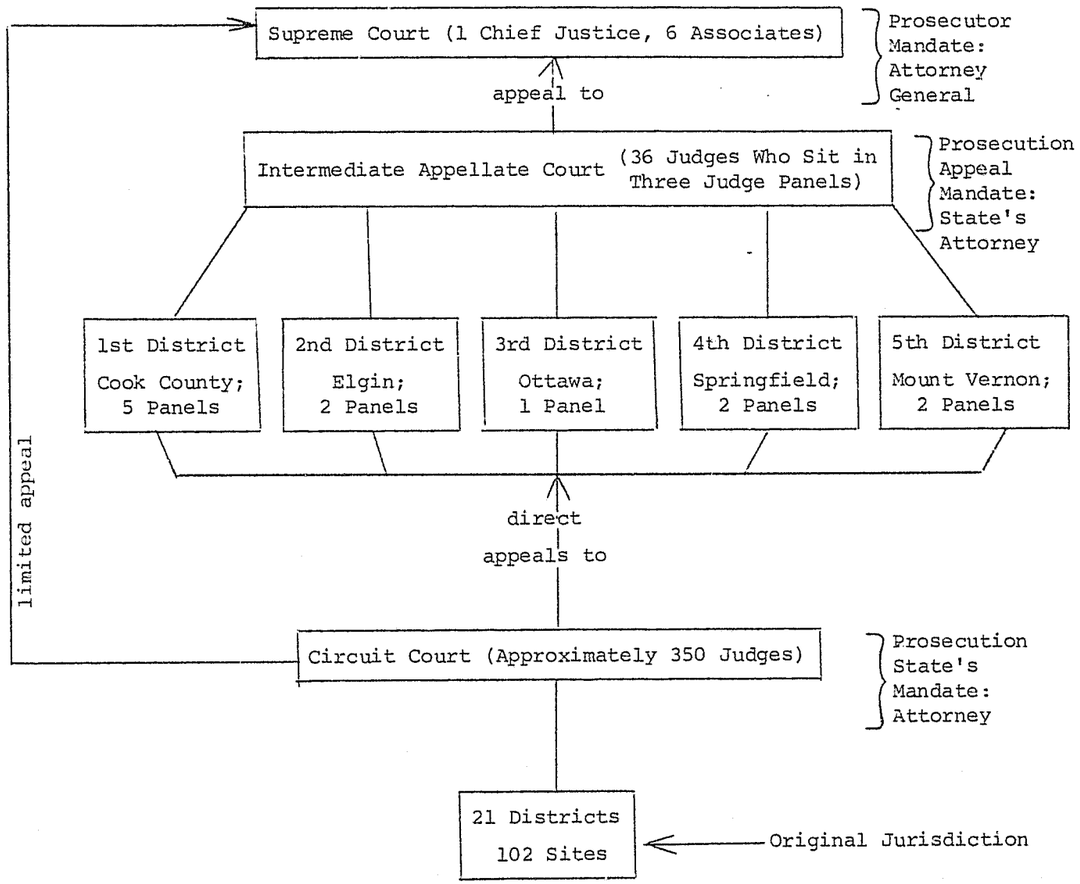
* The Illinois death penalty has recently been declared unconstitutional thereby limiting even further the direct appeal court from the circuit court.

FIGURE 1.1

Illinois Judicial System



Prosecution in Illinois is, for the most part, the mandate of the State's Attorneys. State's Attorney is a county-wide elective office (thus there are 102 State's Attorneys) with a six year appointment. Each State Attorney is responsible to the County Board of Supervisors who are responsible for the office budget, and, therefore staff. Staff varies greatly according to the size and need of the county. Many of the less populous downstate counties have only minimal staff (1 or 2 part-time assistants and a secretary). In fact, those Attorneys representing counties of less than 30,000 population are, by statute, allowed to maintain a private law practice in addition to their elected responsibilities. (This, of course, is accompanied by a statutorily imposed pay decrease to $26,000 from $42,500.) As noted in Section 1.0, State's Attorneys have both criminal and civil responsibilities. They are responsible for criminal prosecutions arising from offenses committed within their county as well as county civil litigation. The bulk of all criminal appeals are also the State's Attorneys' responsibility in the intermediate court with the Attorney General having responsibility at the supreme court level.

1.2 History and Development

As noted in Section 1.0, an appeal judgment is a constitutionally guaranteed right in Illinois.* The authority of the intermediate appellate court in handling these cases is also granted by the 1970 Constitution, (Rules of the Supreme Court, Chapter 110A.) However, prior to 1970, Section 603 of Chapter 110A, which now limits direct appeals from the circuit to the supreme court to death penalty cases and cases challenging the constitutionality of a state statute, was not so exclusionary. Rather, the former Rule 603 provided that an appeal would lie directly to the Illinois Supreme Court in all cases involving questions arising under the Illinois or U.S. Constitution. As a result the Illinois Supreme Court was forced to handle appeals in cases where such questions as motions to suppress, search and seizure, confessions, etc., were raised. Since the mandate for prosecuting the state's case at the supreme court level rested with the Attorney General this rule had the effect of limiting the burden on the State's Attorneys as well as the Intermediate Court of Appeals.

Despite the right to appeal and a statutory provision providing both counsel and trial transcipt to indigent defendents, in 1969 there was growing concern over the paucity and quality of the appeals taken. Court compensation for transcripts and defense services was not sufficiently competitive to entice the private defense bar and therefore the task had fallen to the public defenders. Unfortunately, the defenders were both overburdened with trial work and inexperienced in appellate work. Thus, in order to insure meaningful representation of indigent defendants on appeal the Illinois Law Enforcement Commission (ILEC) funded a three

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*Article VI, Section 4 and 6, Illinois Constitution, 1970.

year experimental project called the State Appellate Defenders (SAD). Briefly, the SAD performed a public defender function for indigent criminal appellants. After three years of ILEC funding, in 1972 the Bureau was fully institutionalized as a statutorily created separate state agency.* This not only had the effect of increasing the defense expertise above that of the prosecution, but, coupled with the changes implemented through the 1970 constitution, significantly increased the number of intermediate appellate court cases. Figure 1.2 illustrates the increase of both pending and disposed cases in the 2nd-5th appellate regions.

FIGURE 1.2**

	PENDING			DISPOSED		
	1969	Increase	1976	1969	Increase	1976
Second District	40	570%	268	62	361%	286
Third District	23	952%	242	28	882%	275
Fourth District	51	767%	442	49	522%	305
Fifth District	25	1268%	342	33	827%	306
Total:	139	831%	1294	172	581%	1172

In 1970, shortly after ILEC provided funds for defender appellate services, the Illinois State's Attorney's Association received an ILEC grant to identify specific problems in the criminal justice system and to implement programs in order to remedy those problems.

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* Illinois Revised Statute, Chapter 38, Section 208-1, et seq.

** It should however also be noted that once a notice of appeal has been filed and counsel has been appointed or retained on behalf of a defendant, the appeal may not be withdrawn without first filing in the reviewing court a brief, supported by authority, indicating that issued that could be raised on appeal are frivolous and without merit. (Anders v. California, 386 U.S. 738, 87 S. Ct. 1936 (1967). Thus, this chart is somewhat initiated. Nevertheless, the increase remains incredibly substantial.

Initially, an Executive Office was created and three model prosecutor offices were established in the following locations:

1. Elgin - Model District State's Attorneys Office

2. Bloomington - Model Circuit State's Attorneys Office

3. Cairo - Model State's Attorneys Support Unit

Only the Model District State's Attorneys office in Elgin devoted a substantial effort to the appellate area. Both the Bloomington and Cairo offices were created as trial assistance offices and, as a consequence, devoted the major part of their efforts to trial litigation.

During the life of the initial grant, the Illinois State's Attorneys Association took an active role in evaluating the progress of all its offices. An independent management consultant firm was employed to assist in the evaluation and submitted a report to the Illinois State's Attorneys Association. Expanding the project's appellate work to include all counties in the State was an area of need specifically noted in this report.

Immediately after the Report was filed with the Illinois State's Attorneys Association, all model offices began to devote substantial time to the preparation of appellate briefs for State's Attorneys. There were, however, a number of problems encountered:

- The offices were not adequately staffed to handle appeals statewide.

- With the exception of the Second District office, the Bloomington and Cairo offices were created on a judicial circuit geographic area rather than on a district appellate court basis.

- The Third Appellate Court District had no regionalized office within its area and had to look to the three existing offices outside of the Third District for assistance.

The Illinois State's Attorneys Association determined that the prosecutors in Illinois could be best served through the creation of a Statewide Appellate Assistance Service whose function would be the preparation, filing, and arguing of appellate briefs in the district appellate courts, exclusive of Cook County. The Association submitted a grant application in July 1974 and in August 1974 the project was funded through ILEC for a total of $603,615 for one year. A second grant award of $769,742

supported the project through September 30, 1976. A third grant for $475,000 has been received to carry the project through April 1977.

1.3 Organization and Operations

1.3.1 Administration

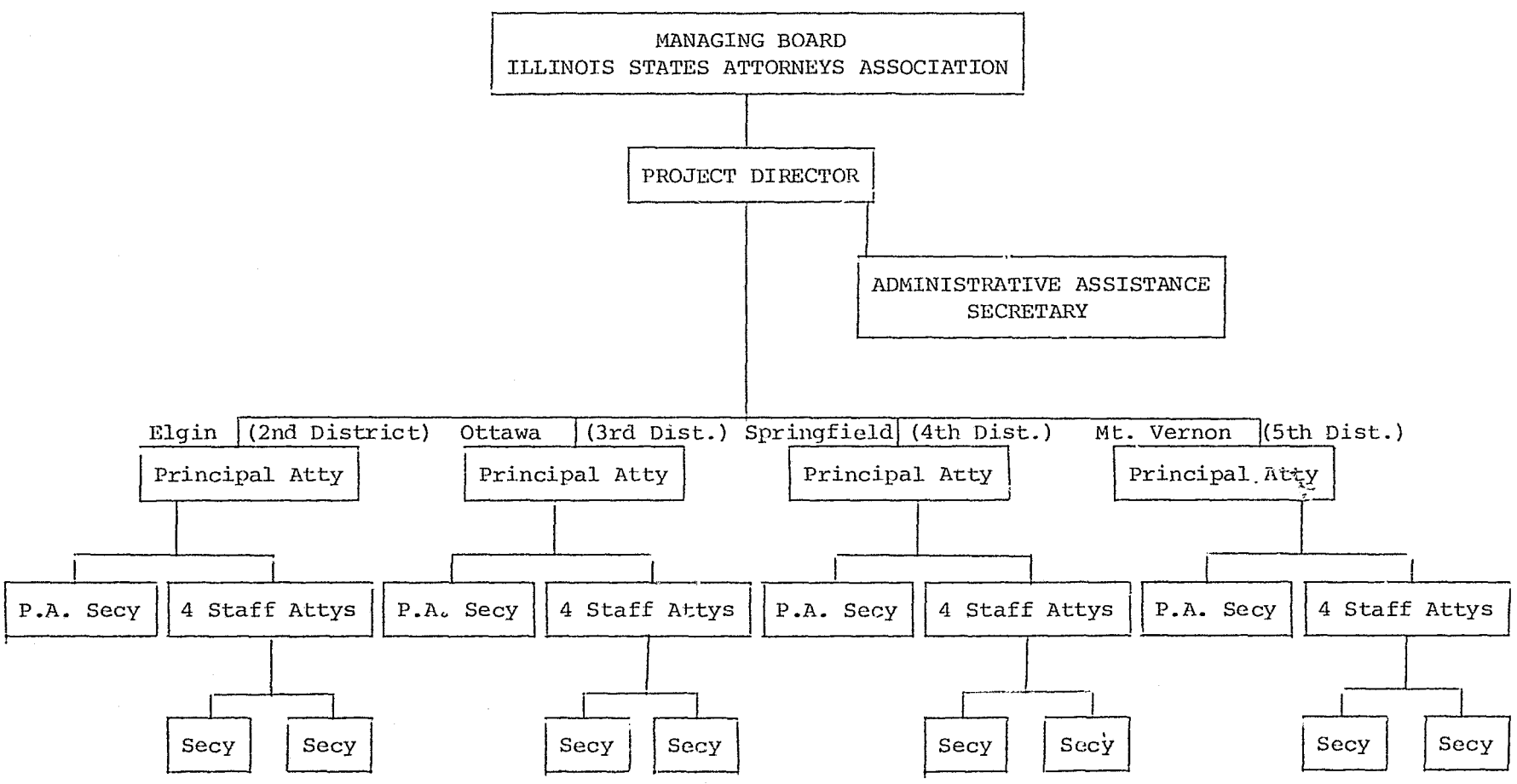
Figure 1.3.1 illustrates the organization of the Prosecutors Appellate Service. At the head is the Managing Board of the Illinois State's Attorneys Association, which serves in an advisory capacity to the Project Director (who was selected by the Managing Board). The Board is composed of eight members who are elected on a yearly basis, and two ex-officio members, the Chairman of ILEC and the President of the State's Attorneys Association. The project has four regional offices located at the site of the intermediate appellate court in Elgin (2nd district), Ottawa (3rd district), Springfield (4th district), and Mount Vernon (5th district). The Principal Attorneys who run each of the four offices are responsible to the Project Director and oversee a staff of four attorneys per office. (During part of the first year staffing was not uniform but based on expected regional usage. By year's end, the demand was great enough to expand all regional office staff to the present level.) The principal and staff attorneys are all full-time staff who do not engage in any other law practices.

1.3.2 Procedures

Upon notification that an appeal is being taken the State's Attorney contacts the Appellate Service officer in his district, forwarding the case file and notice of appeal. The Principal Attorney at the office receives the defendants appeal brief, reviews it and assigns it to one of the staff attorneys. The various staff attorneys have developed substantive areas of expertise and assignments are generally consistent with these areas. Often the more difficult cases (those which are either complex in the number of issues raised or those which are in unexplained areas) are handled by the Principal Attorney. Once a case is assigned, that attorney files an appearance at Appellate Court and begins to prepare a brief. (Because of differences in case complexity, attorneys are not assigned any fixed number of cases per month. However, over time, most staff attorneys handle an average of 3-4 cases per month.)

FIGURE 1.3.1

ORGANIZATION CHART OF STATEWIDE POSECUTOR'S APPELLATE ASSISTANCE SERVICE



The first task for a staff attorney preparing a brief is usually to contact the brief bank. Each regional office has a topic-heading index to all brief entries which is, of course, constantly updated. After locating the topic heading the attorney can reference the annotated index file to find reference to the brief, its number, the date, district, and the name of the attorney who prepared the brief. Most importantly, each card contains a brief summary of the major issue represented within the brief. Figure 1.3.2 presents copies of four such index cards. (The brief for case #74-372 which is indexed on chart 1.3.2 can be found in the appendix.) After preparing the brief the staff attorney will submit it to the Principal Attorney for review and submission to both the Project Director and the State's Attorney. Only when it has passed their review can the brief be presented at Appellate Court. There the brief will be filed and/or argued (a decision which is within the court's discretion). Oral arguments, if required, are performed by the attorney preparing the brief.

In addition to preparing and arguing appellate briefs, the Prosecutor's Appellate Service performs two other noteworthy tasks. First is the publication of the Uniform Complaint Book, a cross-index of all criminal violations and their code numbers complete with model complaint forms for each. The book, which has been distributed to over 1,000 State's Attorneys' offices and Police Departments, insures the filing of uniform errorless complaints. A copy of one complaint from the JCB can be found in the Appendix. Finally, the Prosecutor's Appellate Service offers a hotline service to participating State's Attorneys' offices, allowing them to contact either the Central or Regional Office for advice concerning substantive and/or procedural criminal law. By and large, the source for the advice is the brief bank.

Chart 1.3.3 presents a detailed breakdown of Prosecutor Appellate Service activities during the first two years of operation.

FIGURE 1.3.2

CONSTITUTIONALITY OF STATUTE (Cannabis & Controlled Sub.)

Penalty provision based on bulk weight as opposed to actual weight of drug.

DOWNING, JAMES #74-372 2nd

7/2/75 Winnebago Drucker

SEARCH & SEIZURE (Auto)

Officers who made legal stop and then observed liquid dripping from glove box had right to conduct warrantless search of shoe box.

CORRIGAN, KEVIN T. 74-TR-918 4th

9-23-75 Livingston Prall, G.

See also Reply Brief

JURY INSTRUCTIONS (Accomplice)

Ct properly exercised discretion in determining that accomplice instruction should be given where ct determined D's wife was an accomplice whose testimony implicated D.

LEE, DENNIS G. #13414 4th

8/12/76 Coles Levens, J.B.

AFFIRMATIVE DEFENSE (Insanity)

Quantum of proof necessary to raise Aff. defense of insanity is "reasonable doubt of defendant's sanity" not merely some evidence.

MASK, JOHN #74-302 5th

9/23/75 St. Clair Ehrmann, R.

FIGURE
1.3.3

	8/1/74 to 8/31/75	9/1/75 to 8/31/76
Briefs Prepared	458	623
Briefs Pending	265	123
Oral Arguments	154	293
Petition for Rehearing	9	19
Petition for Leave to Appeal	24	56
Motion to Remand/Confession of Error	22	14
Extraordinary Remedy (Mandamus)	2	4
Advice to State's Attorney	*	1246

*Statistics were not maintained

2.0 SELECTION CRITERIA

2.1 Measurability

The stated goals of the Prosecutor's Appellate Assistance Service concern the delivery of services to the local state's attorneys who are the project's immediate clients. Four such service goals, enumerated in the Exemplary Project Recommendation, can be paraphrased as follows:

1. Prepare, file, and argue criminal appellate briefs to assist local state's attorneys in meeting increased appellate caseloads.

2. Establish a reference bank for state's attorneys to assure uniform discussion of the issues.

3. Enable the state's attorneys to devote the resources of their offices to trial litigation.

4. Expeditiously file appellate briefs.

The first two of these goals can also be found in the project's grant application for FY 1977.

As service delivery goals, these can be directly measured by simple observations of the frequency with which the services are delivered. For example, project records show 458 briefs prepared in the first project year, 623 in the second. In a literal sense, then, there is no question about whether the services are being delivered. One must go on to ask two further questions about the services being delivered.

The first is whether those same services would have been provided, or provided as easily, in the absence of the project. Two kinds of evidence are available on this question. Of the 101 counties eligible for project services, eighty participated in 1975-76. An additional eight participated in 1974-75, but dropped out in the second year. Data on the 13 non-participating counties and the eight drop-outs are limited. There does not appear to be any centralized record source to which one can turn for information about their handling of appellate cases. A survey questionnaire sent to all 101 eligible counties provides some information for half of the non-participants, and asks participants to speculate about the actions their offices would be required to take if the Appellate Assistance Service went out of existence. Such responses must be interpreted with some caution, since they reflect some indeterminate amalgam of general respondent effect plus actual impact. The next section discusses such inferences as

may be drawn from these data. Some additional indirect evidence about the ability of the state's attorneys to handle the appellate caseload without the Appellate Assistance Service can be drawn from examining the time series of numbers of appellate cases filed before and during the project's existence.

A second and more difficult question deals with the quality of cases presented by the project. Once again, there are two available sources of evidence, both indirect. The survey asks users to indicate their assessment of the quality of services provided in several areas. A similar set of questions was directed to Justices of the Appellate Courts where project cases are heard, and to the Statewide Appellate defender and his five deputies. A second and more directly quantified measure of case quality can be derived from the record of decisions in cases handled by the project. The State's Attorneys did not maintain central statistics on these decisions before institution of the project, nor are they now readily available for non-participating counties. The Statewide Appellate Defender service does maintain data on decisions for its cases. These data provide only a rough estimate of the true measure, since the Statewide Appellate Defender's service does not cover exactly the same set of cases as the Statewide Appellate Prosecutor's service, and it is possible that the character of cases covered by the defender's service may have changed over time.

2.2 Goal Achievement

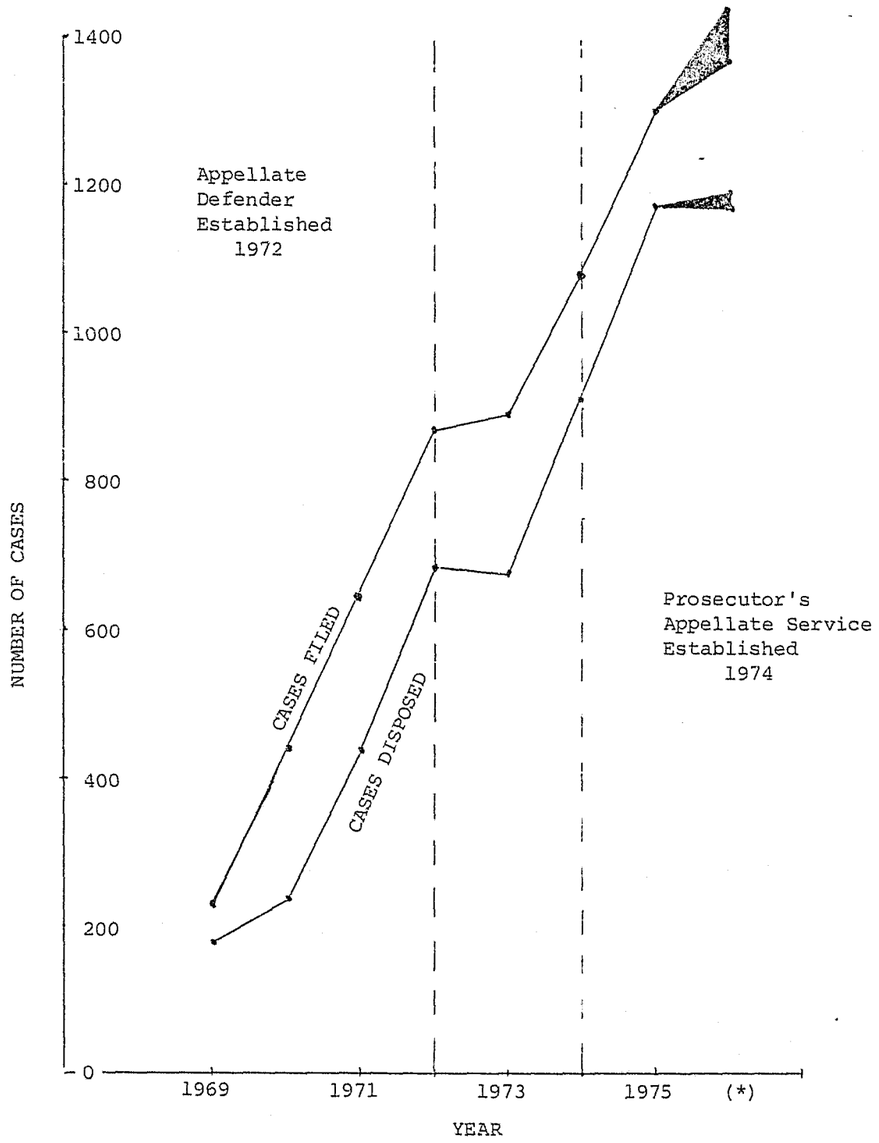
Briefs Prepared and Filed

Project statistics show 458 briefs prepared during the thirteen months from August 1974 through August 1975. Figure 1 shows the total number of appeals filed in the eligible districts (all of Illinois except Cook County) during the two project years and for several preceding years. The numbers in Figure 1 are not strictly comparable to project data, since they reflect a January - December year, while project records are based on a fiscal year ending in August. By using monthly approximations, however, it can be estimated that Appellate Assistance Project briefs were used in about 35 percent of the cases in the first year, and slightly more than 45 percent in the second year.

Sixty-four of the eighty counties who participated in the project during 1975-76 responded to the user survey. Sixty of these (94 percent) said that between 80 percent and 100 percent of their criminal appeals were prepared by the service. Three said the number was between 20 percent and

Figure 1

Appeals Filed and Disposed, 1969 - 1976



(*) 1976 estimated from 6 months data

50 percent, and one did not answer. Similar results prevailed for criminal appellate motions: 58 (91 percent) said 80-100 percent were prepared by the project; and petitions for leave to appeal: 48 (75 percent) said 80-100 percent were project prepared.

The same survey asks about user satisfaction with the project's work. In response to the question: *"The quality of work prepared for my office by the Appellate Service has been...,"* 92 percent (59) said *"excellent."* The remaining five users (8 percent) rated quality as *"good."* Even some of the dropouts (who responded) were enthusiastic. Two of the four said quality was *"excellent,"* one said it was *"good,"* and one expressed no opinion. Only two users said *"yes"* to the question: *"When criminal briefs or other legal documents are sent to you for approval, have you found it necessary to make substantial corrections or alterations?"* Both of these went on to add that such changes were made only infrequently.

Additional perceptions of the service's briefs are provided by the surveys of appellate justices (of whom 55 percent responded) and state appellate defenders (of whom 100 percent responded).* Responses from these groups are shown in Figure 2.

Cases Argued

In the project's first thirteen months 154 oral arguments were presented by project staff. In 1975-76 the number rose to 293. Of course not all briefs filed result in oral arguments. However, project staff attorneys presented oral arguments in virtually every case in which they prepared a brief--that did result in argument, and were present at the few remaining oral arguments presented by the State's Attorneys.

Figure 3 shows the opinions expressed about quality of oral argument by Appellate Justices and State Appellate Defenders. All the judges and one of the defenders found the service's performance better than average.

The State Appellate Defenders all indicated that they filed more than 80 percent of the appeals taken in their districts. In each of the four project districts they were opposed by the Prosecutor's Appellate Service in a majority of these appeals. In two districts, more than 80 percent of

* The project does not operate in District 1, however, the 1st District Appellate Defender prepares cases for Districts 3, 4, and 5, in which he deals with project cases. His responses are based on that experience.

Figure 2

Attitudes toward Appellate Briefs:
Appellate Justices and Defenders

The overall quality of legal documents prepared and filed in the Appellate Court by the Prosecutor's Appellate Service is:

	Excellent	Good	Average	Below Average	No Opinion
Justices	8	3	-	--	-
Defenders	-	3	1	1	-

How does the quality of legal documents prepared and filed in the appellate court by the Prosecutor's Appellate Service compare with those filed by individual State's Attorney offices:

	Much better	Better	About the same	Less	Much less	No Opinion
Justices	8	3	-	-	-	-
Defenders	1	1	2	1	-	-

Figure 3

Quality of Oral Argument:
Appellate Justices and Defenders

The overall quality of oral arguments presented in the appellate court by the Prosecutor's Appellate Service is:

	Excellent	Good	Average	Below Average	No Opinion
Justices	7	4	-	-	-
Defenders	-	1	3	1	-

How does the quality of oral arguments presented in the appellate court by the Prosecutor's Appellate Service compare with those of the individual State's Attorney offices:

	Much better	Better	About the same	Less	Much Less	No Opinion
Justices	7	4	-	-	-	-
Defenders	-	1	3	1	-	-

the cases had the Prosecutor's Appellate Service as opposing counsel. Thus statistics on the percent of relief achieved by the defenders have some bearing on the quality of cases filed and argued by the prosecutors.

Figure 4 shows the percent of reliefs granted in each of the last three fiscal years for cases appealed (and not withdrawn) by appellate defenders in the four eligible districts. Data for prior years are not comparable because of changes in accounting practices and in the character of the Appellate Defender's Service. The data may be somewhat misleading because (a) they include cases not prepared by the project, (b) they count relief on legal issues, which may not be the same as effective relief to defendants if there are multiple charges involved, and (c) they take no account of any case screening decisions which may be made before appeals are filed. Given these data, with their limitations, the strongest conclusion that can justifiably be drawn is that there does not appear to be much change in the ultimate success of appealed cases during the project years as compared to the preceding year.

The percent of relief for all cases argued by Appellate Defenders in the year ending June, 1975 is 45 percent. The most nearly comparable figure for cases handled by the Prosecutor's Appellate Service cover the year ending August 31, 1975. Of the 392 cases written by the project and decided before May 1, 1976, reversals or remands in whole or in part occurred in 98 instances, or 25 percent of the cases. Even allowing for the non-comparability of cases and periods, this would suggest that the quality of cases prepared by the service compares very favorably to that of other cases.

Uniform Discussion of Issues

No statistics have been compiled on use of the brief bank or its contribution to either uniformity or quality of cases. The project has prepared a Uniform Complaint Book showing model wording to be used in filing complaints. Ninety-two percent of the county attorneys responding to the project's survey said they used this handbook in preparing criminal charges. Twenty-five of the respondents (38 percent) said that the percentage of pre-trial dismissals had decreased since they started using the model complaints. (None reported an increase, 43 percent said it stayed the same, and 19 percent expressed no opinion.)

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* These data refer to cases in which the state was the appellate. In twelve cases where the state appealed, five were affirmed, four reversed and remanded, and three dismissed.

Figure 4

Percent of Relief:
Appeals Completed by State Appellate Defender's Office

		Pre-Project	During Project	
		July 1973-June 1974	July 1974-June 1975	July 1975-June 1976
District	2	23	33	26
	3	27	29	30
	4	40	52	36
	5	46	66	41
Weighted Average		33%	45%	33%

Note: "relief" means remanded or reversed in whole or in part, or sentence reduced.

Enabling State's Attorneys to Devote the Resources of Their Offices to Trial Litigation

As Figure 1 shows, there has been a sharp and steady growth in the annual volume of appeals. Three-quarters of the respondents to the project's survey report have felt the repercussions of this increase in their counties. (Six of the currently participating counties (9.4%) reported a decrease in appeals volume since 1974. Seven participants reported no change.) According to the survey, appeals caseloads had been handled by the State's Attorneys in 78 percent of the counties before the project began. Most of the remainder (23 percent) said any available Assistant State's Attorney would take the cases. Only three had full-time appellate attorneys, while five more had part-time appellate attorneys.

Asked to speculate about the effects of discontinuation of the service on their offices, the state's attorneys provided the following responses:

- additional attorneys	75%*
- additional secretaries	60%
- library/equipment expenses	57%
- travel expenses	82%
- overall budget increase	84%

Sixty of the 64 participating respondents said that *"since the creation of the Appellate Service /they had/ been able to devote more time and resources of /their/ office to other prosecutorial duties."* (Three said *"the same,"* and one did not answer.) Twenty-seven said their office had a backlog of criminal appeals prior to the inception of the project. Of these twenty-three (85 percent) said it had subsequently decreased. In addition, respondents volunteered the comments reproduced in Figure 5.

None of the ten non-participants or drop-outs reported a backlog in 1974; one of these ten reported an increase since then. In general, non-participating counties may be those whose appellate volume would be minimal in any case. The median size of the 21 counties was under 20,000 people in the 1970 census. This would suggest that the service is being used primarily in those areas where appeals would otherwise impose a significant burden on the local prosecutors.

* Percent of those who answered.

Figure 5

Comments by State's Attorneys

III. IMPACT ON PARTICIPATING STATE'S ATTORNEY OFFICES.

III-G. Since the creation of the Appellate Service, have you been able to devote more/less/same time and resources of your offices to other prosecutorial duties?

SECOND DISTRICT

More time.

Yes, we have been able to devote more time to the preparation of felony and serious misdemeanor cases and are better able to advise county officials as to their rights, duties and liabilities.

It would have been impossible to handle the routine business of the office this past year without the Appellate Service.

More time can be devoted to prosecutorial duties.

THIRD DISTRICT

The Appellate Service has removed a tremendous burden from my shoulders.

The record will show 300% more jury trials and a trial docket presently up to date.

FOURTH DISTRICT

I have been able to devote more time to the office and also to my family. I was reversed pro forma in about 4 cases because I just couldn't keep up.

Since the creation of this Service, considerable more time and resources have been devoted to other prosecutorial duties.

More time can be spent in the office.

I would have to have an assistant State's Attorney, at least on a temporary basis, in order to handle appellate work.

The Appellate Service has allowed this office more time to devote to the matters more ably handled by this office. Without this service our appeals would be processed in a very unprofessional manner because of lack of time to devote to preparation.

More time and resources are available for the increasing workload.

I can spend more time on county civil matters.

FOURTH DISTRICT CONT.

The creation of the Appellate Service has made it possible for me to better allot my time to daily problems and current cases in my office.

During 1974 it gave me more time since I had no assistant and the Appellate Services prepared all briefs. I still call them from time to time on appeals my office is handling for recent cases, etc.

Even traffic cases are being appealed. State's Attorney and one part time assistant with one secretary is all I have.

FIFTH DISTRICT

Am always behind in time and would be much further behind without the Appellate Services.

The Appellate Service has been a great help to our office.

The Appellate Service has saved this office untold hours, thereby freeing office to be better able to handle current criminal matters.

My appellate work was always done outside regular working hours.

Due to low appeal rate (less than 1 a year) it has little effect.

We would have to have one assistant full time for appeals. The cost would be approximately $10,000-$15,000 per year.

Much more.

With the qualification that without the Prosecutor's Appellate Service we would have been required to assign briefs to other assistant State's Attorneys or hire an additional appellate attorney.

There is no way one can do appellate work in this office because of space and quiet work area shortage. Also, too many interruptions!

Expeditious Filing of Briefs

State's Attorneys were asked, *"Since the Prosecutor's Appellate Service has prepared criminal briefs for my county, the number of extensions of time requested on behalf of the State's Attorney has: ..."* One reported an increase, 42 (81 percent of respondents) said they had decreased, and nine (17 percent) saw no change. (Twenty-two had no opinion or did not answer.)

Appellate Justices and Defenders were asked a similar question. The results (Figure 6) show no reported increases.

Figure 6

Perceptions of Extensions of Time:
Appellate Justices and Defenders

In cases where the Prosecutor's Appellate Service has filed an appearance on behalf of the State's Attorney, the number of extensions of time and their duration, compared to cases handled exclusively by the State's Attorney offices has:

	Increased	Decreased	Remained the Same	No Opinion
Justices	-	10	-	1
Defenders	-	3	2	-

In addition, ten of the eleven justices agreed that the effect of "*the Prosecutor's Appellate Service . . . in expediting the disposition of criminal appellate matters in the district appellate court*" had been favorable. (The eleventh expressed no opinion.) All eleven justices said the service had "*an impact on reducing the time between oral argument and the final disposition of the case,*" and that it had "*assisted the Court. . . in reducing the backlog of appellate cases.*"

Summary of Goal Achievement

1. The Prosecutor's Appellate Service has substantially relieved participating counties of the burden of appellate case preparation and presentation. Most counties reported that 80 to 100% of their appellate work was done by the service.

2. Client State's Attorneys express considerable satisfaction with the service. 92% rated work quality as excellent.

3. There is some limited evidence that project lawyers may be winning more cases than would otherwide have been possible. 75% of project cases were affirmed in 1974-75, compared with 55% of all cases appealed in the project area.

4. Reductions in the number of delays requested by the state were noted by a majority of justices (10 to 1), defenders (3 to 2), and participating state's attorneys (42 to 10).

2.3 Efficiency

Over a two year period, the project has expended $1,373,357, allocated as follows:

Grant 1464:

(August, 1974 - August, 1975)

Federal	-	$509,844
State	-	32,491
Local	-	31,280
		$573,615 (cash)
		30,000 (in-kind)
Total	-	$603,615

Grant 1877:

(September, 1975 - August, 1976)

Federal	-	$500,786
State	-	27,821
Local	-	241,135
Total	-	$769,742

A. One Time Expenditures:

$20,000 (approximate)

B. Annual Operating Costs:

$770,000 (approximate)

Grant 1464:		Grant 1877:	
Personnel:	$451,548	Personnel:	$484,661
Equipment:	35,064	Equipment:	12,082
Consultant:	1,800	Consultant:	4,587
Other Contractual:	78,231	Other Contractual:	67,511
Travel:	7,689	Travel:	10,041
Commodities:	28,783	Commodities:	44,200
Construction:	500	Construction:	--------
Other Costs:	------	Other Costs:	6,240
Total:	$603,615	Total:	$769,742

As shown, federal funds through ILEC have remained fairly constant through the two years although the percent they contribute to the total has changed from approximately 90 percent in the first year to 65 percent in the second. This change is largely a result of two factors. First, as noted in Section 1.3 the original program expectation for personnel needs was conservative and did not respond to the extraordinary demand for program services (note that $134,100 of 163,000 increase from year one to year two is devoted to personnel). Second, by shifting a greater burden to the counties the project was able to develop a greater index of the initial demand for project services. Thus, during year one counties were asked (by presentation from State's Attorneys to their County Board of Supervisors) to contribute either $400, $800, or $1600, depending upon population, for program participation. However, during year two, counties were asked to contribute nearly ten times that amount. This resulted in a net loss of only nine counties some of which returned during the course of the year. There is, therefore, no doubt that the service has the overwhelming support of both the State's Attorneys and for the most part, their respective county governments.

No direct comparison of costs with local appellate case preparation is possible both because the records of local prosecutors do not allow such calculation, and because the project's cases may differ in character from those argued locally. The project has completed a cost-per-brief figure, which substantially overstates actual costs, since it allows no credit for non-case-related activities such as consultation with local state's attorneys or preparation of publications. Nor does it include staff time spent in oral arguments. In 1974-75 this figure was $1,252, of which client counties supplied an average of $68 (5.4 percent). In the second project year, average costs were $1192, with the county share increased to $370 (31 percent). Section 121-13 of Chapter 38, Illinois Revised Statutes, 1975, allows for reimbursement of $1500 per case for counsel representing indigent defendants on appeal.

2.4 Replicability

It is evident that the Illinois Prosecutor's Appellate Assistance Service performs a necessary function in the administration of criminal justice in Illinois. What remains is the issue of whether or not such a service can be transferred to other jurisdictions. In order to answer that question, the following issues must be addressed:

- Does the jurisdiction have an intermediate court of appeals?
- Who has the responsibility for presenting the case on appeal?
- Does the agency presenting the case on appeal have an institutional appellate procedure?
- Does the agency presenting the appeal have access to a centralized data bank for appellate briefs?

In order to present a discussion of these issues during the week of December 6, 1976, Abt Associates staff conducted an informal telephone survey of the Attorney General's offices in the 47 remaining continental states. The discussion that follows incorporates the information gathered during the survey, supported by material from "The National Survey of Court Organization".*

Appellate Courts

All states have some form of appellate procedure, although some have only trial courts and a single court of last resort. However, as illustrated in Figure 7, only 23 of the remaining 47 states have an intermediate appellate court. Typically the absence of an intermediate appellate court is facilitated by the presence of a hierarchy of lower courts of original, jurisdiction in which adverse decisions are handled by trials de novo rather than appeals. As a result, the number of cases that ultimately reach the highest court and are argued in appellate form is less than in those states where all adverse decisions result in appeals. Still, some appeal work is necessary in any event and the number of remaining states with intermediate courts (23) is not insignificant, and does not appear to be a bar to replication. Furthermore, Figure 7 illustrates that in all but seven states appellate courts of any nature have but one site, a fact that argues strongly in favor of some centralization of appellate prosecution.

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* NCJISS, 1973 and 1975 Supplement.

Figure 7

State	Intermediate Appellate Court	No. of Court Systems	No. of Sites	Prosecutorial Mandate on Appeal
Alabama	Court of Criminal Appeals	1	1	Attorney General
Arizona	Court of Appeals	1	2	Attorney General
Arkansas	None	-	-	Attorney General
California	Court of Appeals	1	5	Attorney General
Colorado	Court of Appeals	1	1	Attorney General
Connecticut	None	-	-	Local D.A.
Delaware	None	-	-	Attorney General[f]
Florida	Court of Appeals	1	4	Attorney General
Georgia	Court of Appeals	1	1	Local D.A.
Idaho	None	-	-	Attorney General
Indiana	Court of Appeals	1	1	Attorney General
Iowa	Court of Appeals[a]	1	1	Attorney General
Kansas	Court of Appeals[b]	1	NA	Local D.A.
Kentucky	Court of Appeals[c]	1	1	Attorney General
Louisiana	None	-	-	Local D.A.
Maine	None	-	-	Local D.A.
Maryland	Court of Special Appeals	1	1	Attorney General
Massachusetts	Court of Appeals	1	1	Local D.A.
Michigan	Court of Appeals	1	1	Local D.A.[g]
Minnesota	None	-	-	Local D.A.[h]
Mississippi	None	-	-	Attorney General
Missouri	Court of Appeals	1	3	Attorney General
Montana	None	-	-	Attorney General
Nebraska	None	-	-	Attorney General
Nevada	None	-	-	Local D.A.
New Hampshire	None	-	-	Attorney General
New Jersey	Appellate Division of Superior Court	1	1	Attorney General[i]
New Mexico	Court of Appeals	1	1	Attorney General
New York	Appellate Division of Superior Court	1	4	Local D.A.

Figure 7 (cont'd)

State	Intermediate Appellate Court	No. of Court Systems	No. of Sites	Prosecutorial Mandate
North Carolina	Court of Appeals	1	1	Attorney General
North Dakota	None	-	-	Local D.A.
Ohio	Court of Appeals	1	11[e]	Local D.A.
Oklahoma	None	-	-	Attorney General
Oregon	Court of Appeals	1	1	Attorney General[j]
Pennsylvania	Superior Court	1	1	Local D.A.
Rhode Island	None	-	-	Attorney General
South Carolina	None	-	-	Attorney General
South Dakota	None	-	-	Attorney General
Tennessee	Court of Criminal Appeals	1	1	Attorney General
Texas	None	-	-	Local D.A.
Utah	None	-	-	Attorney General
Vermont	None	-	-	Local D.A.
Virginia	None	-	-	Attorney General
Washington	Court of Appeals	1	3	Local D.A.
West Virginia	None	-	-	Attorney General
Wisconsin	None[d]	-	-	Attorney General
Wyoming	None	-	-	Attorney General

a Established 11/76.

b To be established 1/77.

c Established 7/76.

d Existing campaign to establish intermediate court of appeals.

e There are 88 available locations but only 11 are sitting at any one time.

f All state prosecutors are members of the Attorney General's Office. The original prosecutor--who is part of the attorney general's office--handles the cases at appeal.

g Except in small counties for which the Attorney General's Office handles the appeals.

h Except in small counties for which the Attorney General office handles the appeal (i.e., in 82 of the state's 87 counties).

i Except in Essex County (Newark) where the local D.A.'s office handles the appeal.

j Except in three small counties where the local D.A.'s office handles the appeal.

NA: Not Available.

Appellate Mandate

Figure 7 makes it clear that Illinois is the exception rather than rule in this regard. In 31 of 49 states the appellate mandate rests with the Attorney General's Office (which is centralized and generally located at the same site as the appellate court), rather than the local prosecutor. In examining only the 23 states with intermediate appellate procedures, the situation remains the same; only eight empower the local prosecutor to handle the appeal. Thus, if centralization and uniformity were the only goals, there might be some reservation regarding replicability as it would be limited to only eight states. However, the Appellate Service in Illinois also addresses quality in appellate work. For this goal it matters little who handles the appeals; the question remains--do they do it well?

Institutionalized Appellate Procedures and Record Retrieval

Figure 8 notes the appellate organization and record retrieval systems within the 15 states where there are intermediate appellate courts and the mandate rests with the Attorney General. Although information cannot be gathered regarding the central brief quality, institutionalized bureaus might imply some expertise. However, only five of the fifteen states (Colorado, Florida, Indiana, Iowa, Missouri) have separate appellate bureaus where appeals are their exculsive responsibility. On the other hand, all states have some form of record retrieval although five admitted they were not particularly systematic. None of the states are currently devoting the manpower employed by the Appellate Service but this seems largely a personnel matter and not one of system replicability.

Although it was not feasible to contact all the local prosecutors in states where they have appeal responsibility, efforts were made to contact a representative portion. Ultimately contact was made with at least one prosecutor in each state. Most indicated that while their offices had assigned appeal work to designated staff, they were usually the most inexperienced attorneys who would move into other areas in three to six months. All approved of the Illinois Appellate Service design and indicated that it would alleviate a great burden.

In sum, the generalizability of the project is somewhat limited due to the small number of states that share a similar appellate structure. Furthermore, there is some chance that the service in Illinois will move to the Attorney General's Office which will have the effect of adding to the staff and creating a situation similar to that already in existence in many states.

Figure 8

State	Appellate Responsibility within Attorney General's Office	Record Retrieval
Alabama	25 attorneys chiefly involved with criminal appeals.	For past 15 years, reports of cases & holdings are indexed. Also, six month summaries are distributed.
Arizona	Two divisions (Phoenix and Tucson). In Phoenix only: five attorneys--3 criminal 1 workman's comp 1 juvenile	Only docket book
California	Four offices for five districts. In Sacramento office: 40 attorneys to some extent involved with Criminal Appeals. Majority of work is in Criminal Appeals. In state, approximately 170-175 attorneys.	Non-computerized indexed brief bank.
Colorado	Six attorneys exclusively in criminal appeals. Five attorneys half in criminal appeals; and half in civil appeals. Separate Bureau.	Decision bank, indexed. Brief bank, not indexed.
Florida	Four districts. In capital district: nine attorneys involved with appeals, i.e., separate appellate division.	Record system.
Indiana	Eleven attorneys who exclusively handled criminal appeals. Separate Division.	Computerized record system--names, numbers, and staff. Now working on a brief bank indexed by issue.
Iowa	Four attorneys involved with criminal appeals. Four are involved with criminal appeals c. 50%. Separate division.	Brief file but not indexed, i.e., no retrieval system but one's own memory.

Figure 8 (cont'd)

State	Appellate Responsibility within Attorney General's Office	Record Retrieval
Kentucky	18-20 attorneys who devote approximately 80% to criminal appeals.	A poor brief bank. A new brief bank is being put in; it will be indexed.
Maryland	Ten attorneys exclusively in criminal appeals.	Bound brief bank indexed. Now being put on microfilm.
Missouri	In three districts. In capital office: Ten full-time in criminal appeals. Separate Bureau. Above do mostly appeals. Only new attorneys (2) do exclusively appeals.	Have access to computer containing all Missouri cases--but limited use due to cost. (Supreme Court has computer and they charge for its use.) Mostly, just use books.
New Jersey	40 attorneys in criminal appeals division.	Brief bank, indexed. At capital, a terminal hookup to the West Publishing Co.'s Key Digest System.
New Mexico	Five attorneys who are 85-90% in criminal appeals.	Non-computerized brief bank, indexed. Are now trying to computerize it.
North Carolina	A General Office of 70-80 attorneys. No special appellate staff.	Brief bank, indexed.
Oregon	Six attorneys who deal with criminal appeals 90% of time.	Brief bank, not well indexed. "Human Memory" approach used.
Tennessee	Ten attorneys in criminal appeals, but they do other things as well. Mainly criminal appeals. One senior attorney exclusively in criminal appeals.	Brief bank, indexed.

2.5 Accessibility

Project staff at both the central and regional office were more than willing to discuss and demonstrate their operations and procedures throughout the site visit. In addition, representatives from the judiciary, Defenders Program, and State's Attorneys cooperated in discussing their practices and sharing their impressions of the project. All indicated a willingness to continue to do so in the future with responsible persons interested in the project.

Future Funding

At the present time the project is funded through April 1977. However, the Managing Board of the Illinois State's Attorneys Association is currently preparing a position paper for submission to the Illinois Law Enforcement Commission and to the General Assembly regarding its plans for institutionalizing this Program. The Illinois State's Attorneys Association intends to submit legislation during the 1977 term of the Illinois General Assembly.

Nevertheless future funding is not yet guaranteed. Proposals to be submitted to the legislature include three alternatives. One is to statutorily create a separate agency, the Appellate Service, much like the statutorily created Appellate Defenders. The second is to put the Appellate Service under the already created but minimally funded Illinois Prosecutors Advisory Council. The third alternative is to amend the existing Chapter 14, §34 of the Illinois Constitution, Duties of the Attorney General, to include intermediate appellate as well as Supreme Court prosecutional responsibilities.

3.0 STRENGTHS AND WEAKNESSES

3.1 Strengths

- The project has substantially relieved the burden of appellate work from Illinois' State's Attorneys who have expressed considerable satisfaction with the Service.
- By providing assistance in brief preparation and argument, and developing the brief bank and Uniform Complaint Book, the project has insured a consistent discussion and presentation of criminal appeals and charges, thus greatly improving the administration of justice in Illinois.
- The project appears to have been instrumental in reducing the number of delays requested by the State.
- There is some evidence that the project has improved the State's results on appeal.

3.2 Weaknesses

- The Project future funding beyond April 1977 has not yet been resolved.
- The generalizability of project services may be limited in view of the small number of states with a comparable appellate court structure.

Appendices

Appendix A

Exemplary Project Recommendation
and Letter of Support

Exemplary Project Recommendation

I. Project Description

1. Name of the Program
   Illinois State's Attorneys Association
   Statewide Prosecutor's Appellate Assistance Service

2. Type of Program (ROR, burglary prevention, etc.)
   Regionalized appellate brief writing program for Illinois prosecutors in intermediate appellate court

3. Name of Area or Community served
   State of Illinois, exclusive of Cook County
   (a) Approximate total population of area or community served
   5,759,100
   (b) Target subset of this population served by the project (if appropriate)

No. Served	Period	Population

4. Administering Agency (give full title and address)
   Illinois State's Attorneys Association
   35 Fountain Square Plaza, Suite 301
   Elgin, Illinois 60120

   (a) Project Director (name and phone number; address only if different from 4 above.)
   Charles D. Sheehy, Jr.
   (312) 697-7040

   (b) Individual responsible for day to day program operations (name and phone number)
   Same as Above

5. Funding Agency(s) and Grant Number (agency name and address, staff contact and phone number)
   Illinois Law Enforcement Commission
   Robert Schuwerk, Courts Coordinator
   120 South Riverside Drive
   Chicago, Illinois 60606
   (312) 454-1560

   Grant 1464 and 1877

6. Project Duration (give date project began rather than date LEAA funding, if any, began)
   Grant 1464 - August 1, 1974 to August 31, 1975
   Grant 1877 - September 1, 1975 to August 31, 1976

OMB approved: 43-R0578

PROJECT DESCRIPTION CONTINUED

7. Project Operating Costs:

Grant 1464: (August, 1974 - August, 1975)		Grant 1877: (September, 1975 - August, 1976)	
Federal	- $509,844	Federal	- $500,786
State	- $ 32,491	State	- $ 27,821
Local	- $ 31,280	County	- $241,135
	$573,615 (cash)	Total	- $769,742
	30,000 (in-kind)		
Total	- $603,615		

A. One Time Expenditures:

$20,000 (approximate)

B. Annual Operating Costs:

$770,000 (approximate)

Grant 1464:		Grant 1877:	
Personnel:	$451,548	Personnel:	$585,661
Equipment:	$ 35,064	Equipment:	$ 12,082
Consultant:	$ 1,800	Consultant:	$ 4,587
Other Contractual:	$ 78,231	Other Contractual:	$ 67,511
Travel:	$ 7,689	Travel:	$ 10,041
Commodities:	$ 28,783	Commodities:	$ 44,200
Construction:	$ 500	Construction:	$ -----
Other Costs:	$ ------	Other Costs:	$ 6,240
Total:	$603,615	Total:	$769,742

8. Evaluation Costs:

None

9. Continuation:

At the present time a grant application is being prepared for one additional year of funding through the Illinois Law Enforcement Commission. However, the Managing Board of the Illinois State's Attorneys Association is currently preparing a position paper for submission to the Illinois Law Enforcement Commission and to the General Assembly regarding its plans for institutionalizing this Program. The Illinois State's Attorneys Association intends to submit legislation during the 1977 term of the Illinois General Assembly.

ATTACHMENT A

II. Program Review Memorandum:

1. Project Summary

The primary function of the Statewide Prosecutor's Appellate Assistance Service is to prepare, file and argue criminal appellate briefs in the intermediate appellate court for all Illinois State's Attorneys exclusive of Cook County.

The Illinois State's Attorneys Association, Statewide Appellate Assistance Service consists of four regional offices located at the site of the intermediate district appellate courts in Elgin, Ottawa, Springfield and Mt. Vernon, Illinois. Each regional office is supervised by a Principal Attorney who oversees a staff of four lawyers and three secretaries. The Principal Attorneys answer directly to the Director, who is responsible for coordinating and administering all grant activities as defined by the Managing Board of the Illinois State's Attorneys Association.

Additionally, the Appellate office maintains a Brief Bank as a ready reference service to the State's Attorneys who seek advice on matters concerning substantive and procedural criminal law, prepares and distributes the Illinois Uniform Complaint Book together with the Statewide Prosecutor's Appellate Assistance Service Newsletter and performs related functions established by the Illinois State's Attorneys Association.

In order to participate in the Program, county boards must pass a resolution indicating their support of the Appellate Assistance Service as well as appropriating a specified dollar amount for the continuation of the Program. (The amount of money to be pledged by a county is established by the Managing Board of the Illinois State's Attorneys Association and is based on population)

2. Criteria Achievement:

A. Goal Achievement:

Goal:

Establish a regional, yet centralized, appellate office under the control of local State's Attorneys to prepare and argue criminal briefs in the intermediate appellate court in order to assist the local State's Attorney in meeting the ever increasing appellate caseload in the reviewing court.

Measures:

The Managing Board of the Illinois State's Attorneys Association created the Statewide Prosecutor's Appellate Assistance Service in August, 1974.

Outcome:

Four district offices were created at the site of the intermediate appellate court in Elgin, Ottawa, Springfield and Mt. Vernon, Illinois. Each office is staffed by 5 attorneys and 3 secretaries.

A Principal Attorney was selected by a committee of State's Attorneys in each of the four appellate court districts. The Principal Attorney's responsibility was to oversee the operation of each regional office. The Principal Attorneys answer directly to the Project Director, who in turn, is responsible to the Managing Board of the Illinois State's Attorneys Association.

A reporting system was established so that each Principal Attorney would regularly communicate with the Project Director regarding workloads, office activities and the approach to be adopted in addressing legal issues. Office manuals and a reporting system have been created to insure uniformity in all regional offices despite the diverse locations.

Each brief prepared by the district office is submitted to the State's Attorney in the county where the case originated for his approval, prior to the case being filed in the Appellate Court. This method properly insures the State's Attorney will maintain control over his/her case. All briefs are submitted to the Project Director who records each issue and files the case in a uniform Brief Bank for future reference by staff attorneys and local prosecutors.

Goal:

Enable State's Attorney to devote resources of his office to trial litigation.

Measure:

Hire full-time prosecutors to prepare appellate briefs on behalf of a number of local State's Attorneys rather than require each State's Attorney to prepare individual cases.

Outcome:

Creation of a professional, highly qualified staff of attorneys, experts in the field of criminal appellate litigation, who are able to expeditiously prepare a large number of quality briefs in the Appellate Court.

Goal:

Assure a uniform discussion of the issues in the reviewing court and coordinate a uniform approach to legal issues among the 101 prosecutor offices exclusive of Cook County.

Measure:

In Illinois, most State's Attorney offices do not maintain a separate appellate staff. Since the State's Attorney in Illinois has the responsibility of preparing and arguing appellate briefs in the intermediate appellate court, there was no assurance that prosecutors would uniformly argue identical legal issues. The establishment of a regional, centrally coordinated appellate office in effect unified all State's Attorney offices in Illinois since each Principal Attorney and the Project Director constantly monitor each brief so that legal issues are discussed in a uniform manner in the reviewing court.

Outcome:

A uniform system of brief writing and approach to legal issues in the reviewing court has been established through the Appellate Assistance Service.

Goal:

Attempt to enhance criminal justice system in Illinois by expeditiously filing appellate briefs in the reviewing court.

Measure:

From 1969 to 1975 the number of pending cases in the intermediate appellate courts, exclusive of Cook County, increased from 139 to 1,171, an overall increase of some 742%. Creation of a full time staff of prosecuting attorneys was necessary to meet this increase of cases in the appellate court.

Outcome:

During the first year of operation, the Appellate Services prepared 458 briefs; 154 oral arguments, 9 petitions for rehearing, 24 petitions for leave to appeal, 8 motions to dismiss, 22 confessions of error, 1 amicus curiae brief, 2 mandamus actions, 2 stipulated dispositions and 1 writ of certiorari to the United States Supreme Court. From September 1, 1975 through May 31, 1976 the Appellate Services prepared 449 briefs, 241 oral arguments, 15 petitions for rehearing, 36 petitions for leave to appeal, 11 confessions of error, 3 mandamus.

Recent figures acquired from the Administrative Office of the Illinois Courts indicate that in 1975 the Second District Appellate Court, for the first time in recent years, was able to gain in currency, i.e. it disposed of 22 more criminal cases in 1975 than were filed during the year.

B. Replicability:

1. The problem areas addressed by this Program are of universal concern to prosecutors in the United States. Prosecutor offices are continually confronted with a growing backlog of cases in both the trial and appellate courts and generally they have limited resources to cope with these pressing problems.

   By joining together and consolidating their efforts in the intermediate Appellate Court, Illinois prosecutors have succeeded in creating a staff of full time prosecutors who expeditiously prepare, file and argue criminal appellate briefs for a limited financial investment by the participating county.

2. Each phase of the Program has been thoroughly documented so as to permit a general understanding of the Project's methodology and operation. (See: Secretary Handbook and Manual, Employee's Manual, Annual Report and other documenation attached hereto.)

3. The Project's success is based on three principal criteria:

   (a) The concept as it was originated by the Managing Board of the Illinois State's Attorneys Association was sound and workable since it was based on a common need of local prosecutors.

   (b) A total commitment by staff to the goals of the Program and,

   (c) The continued acceptance and support of the Program by Illinois prosecutors.

4. The Appellate Assistance Program, although based on a multi-office operation does not have any specific limitations either in terms of office size or geographic area served. The procedures employed by the Appellate Assistance Services can be utilized by any appellate office in terms of correct procedures to be followed in receiving, preparing and filing appellate court briefs.

C. Measurability:

1. The Appellate Assistance Project has been functioning since August, 1974.

2. The Appellate Assistance Services has never been evaluated. However, in December, 1972 the consultant firm of Cresap, McCormick and Paget evaluated a program which was then under the auspices of the Executive Director of the Illinois State's Attorneys Association, the precursor to the Appellate Assistance Service Program. (A copy of that report is attached hereto)

D. Efficiency:

1. There is documented evidence that the Project has been cost beneficial to Illinois prosecutors. During the first year of operation (August, 1974 to August, 1975) the total cost per brief was approximately $1,252.18, of which only $68.29 was taxed directly to the participating county. During this grant year the total cost per brief through May, 1976 has been $1,191.93. The total cost per county being $369.50.

It should be pointed out that in computing cost per brief, the Appellate Assistance Services assumes that 100 percent of staff time is directed to preparing, filing and arguing appellate court briefs. However, a substantial amount of time and effort is expended on other matters such as preparing and publishing the Illinois Uniform Complaint Book, the Statewide Prosecutor's Appellate Assistance Service Newsletter, advising State's Attorneys on matters of substantive and procedural law. It should also be noted that the Illinois General Assembly revised Chapter 38, Section 121-12 in 1975 to provide for a fee of up to $1,500 for each appeal handled by private counsel for indigent persons. This fee is taxed by the reviewing court directly against the county where the offense originated.

In computing the cost per brief the Appellate Assistance Services does not take into account such other matters as petitions for rehearing, petitions for leave to appeal, confessions of error, amicus briefs, extraordinary remedies and other like documents. If those manuscripts were considered, the total cost per brief filed during the 1974-1975 grant year totals $1,088.24. During the 1975-1976 grant year through May, 1976 the total cost per manuscript is $1,041.20.

2. At the time the Project was created, the Illinois State's Attorneys Association determined that the Appellate Assistance Service was the most efficient means of addressing this problem. At the present time, the Managing Board of the Illinois State's Attorneys Association is in the process of preparing a position paper with respect to the Appellate Assistance Service Program wherein it expects to develop a number of alternative procedures that might be followed if the concept of the Appellate Services is not acceptable to the General Assembly in Illinois.

E. Accessibility

1. The Illinois State's Attorneys Association is anxious to have this Project submitted for evaluation, looks favorably upon publicity and encourages visitation by anyone interested in pursuing the merits of the Program.

2. It is reasonably certain that the Project will continue for at least one additional year after August, 1976.

3. Outstanding Features:

The most outstanding features of the Program are:

A. The regionalization of local prosecutor's criminal appellate work so that overall cost efficiency and appellate excellence can be achieved in the intermediate reviewing court.

B. The ability of local prosecutors to continue to control their appellate cases.

C. Capability of the Appellate Assistance Services to present a uniform approach to legal issues to the reviewing court.

D. The creation of a statewide Brief Bank for use by local prosecutors in preparing legal memoranda and solving everyday legal problems.

E. The coordination and unification of 101 State's Attorneys in Illinois.

4. Weaknesses:

The principal weaknesses of the Program are:

A. Continued uncertainty of acquiring funds for the Program. At the present time the Program depends upon monies prorated between federal, state and county government for operating expenses. However, this weakness would be solved if the Program were institutionalized.

B. All brief processing and Brief Bank procedures are currently performed manually. Computerization and automation of these facets of the Program would most likely serve to expedite preparation of the brief and the maintenance of the Brief Bank system. (Note that at the present time the Managing Board of the Illinois State's Attorneys Association is investigating the computerization of the Appellate Assistance Service Program)

5. Degree of Support:

During its first year of operation, 88 out of 101 counties participated in the Program. During its first year, the Appellate Assistance Service had a total budget of some $573,615 (cash) of which $31,280 cash or 5% was obtained from the participating counties. (Note: $30,000 was required as in-kind match) During the current grant year the total budget is $769,742, of which $241,135 or 31% is presently required from the participating counties. Even though there was a substantial increase in the amount of dollars needed from the participating counties during the current grant year, 80 counties are presently participating in the Appellate Assistance Services.

ATTACHMENT B

ILLINOIS LAW ENFORCEMENT COMMISSION

120 SOUTH RIVERSIDE PLAZA
CHICAGO, ILLINOIS 60606
312/454-1560

July 7, 1976

Model Program Development Division
Office of Technology Transfer
National Institute of Law Enforcement
and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice
Washington, D. C. 20531

To Whom It May Concern:

I endorse the application of the Illinois State's Attorneys Association's Statewide Prosecutors Appellate Assistance Service Project for "exemplary project" status without reservation. In my nearly three years of service as courts planner for the Illinois Law Enforcement Commission, I have not seen any other project which combines economical administration and professional service delivery to such a high degree as does this one.

By and large the Association's submission speaks for itself in terms of the project's objectives and accomplishments. I would just add a few words on the one aspect of its work not stressed in that document: its provision of "hot line" services to prosecutors faced with novel problems in the trial of criminal cases. At present the project responds to nearly 100 requests per month of that nature. While it is difficult to measure the impact of that aspect of the project's activities, its potential for improving the quality of prosecutorial efforts at the trial level and, ultimately, reducing the number of meritorious appeals by defendants, would seem significant.

This project represents an innovative and highly effective response to the especially vexing problems placed on small, geographically scattered prosecutors' offices by appellate litigation. It is making a highly valuable contribution to the criminal justice system of the State which, in my judgment, could be replicated profitably in many jurisdictions.

Sincerely,

Robert Schuwerk

Robert Schuwerk
Courts Specialist and Staff Counsel

RS:fo

Appendix B

Schedule

SCHEDULE

TUESDAY

10:00 - 12:00 - Director's Office

12:00 - 1:00 - Lunch

1:00 - 2:00 - Director's Office

2:00 - 4:30 - Meet with Participating State's Attorneys and ILEC Representative

4:30 - 5:00 - Director's Office

WEDNESDAY

10:00 - 12:00 - Meet with State Appellate Defender

12:00 - 1:00 - Lunch

1:00 - 4:30 - Meet with Second District Office Staff

4:30 - 5:00 - Director's Office

THURSDAY

10:00 - 12:00 - Oral Arguments - Second District Appellate Court

12:00 - 1:00 - Lunch

1:00 - 2:00 - Meet with Appellate Court Justices (Second District)

NO. 74-372

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JAMES HARRISON DOWNING, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of the 17th Judicial Circuit Winnebago County, Illinois Honorable Robert C. Gill Judge Presiding

BRIEF AND ARGUMENT FOR APPELLEE

Philip G. Reinhard
State's Attorney
Winnebago County
Rockford, Illinois 61105
(815) 987-3160

Edward N. Morris
Principal Attorney
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ORAL ARGUMENT REQUESTED

ISSUES PRESENTED FOR REVIEW

1. Whether Illinois Revised Statutes, Chapter 56½, Sections 704 and 1402 deprive the defendant of his rights of due process and equal protection under the law?

2. Whether the trial court erred in denying defendant's motion to suppress evidence?

3. Whether the crimes of possession of cannabis and possession of a controlled substance constitute two separate offenses for which two separate convictions may be entered thereon?

POINTS AND AUTHORITIES

I

SECTIONS 704 AND 1402, CHAPTER 56½, ILLINOIS REVISED STATUTES, 1973, DO NOT VIOLATE THE DEFENDANT'S RIGHTS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

Ill. Rev. Stats., 1973, Ch. 56½, Sec. 704

Ill. Rev. Stats., 1973, Ch. 56½, Sec. 1402

People v. Horton, 15 Ill. App.3d 51, 303 N.E.2d 534 (5th Dist., 1973)

People v. Tiffin, 16 Ill. App.3d 367, 306 N.E.2d 325 (4th Dist., 1974)

People v. Pickett, 54 Ill.2d 280, 296 N.E.2d 856 (1973)

People v. Campbell, 16 Ill. App.3d 851, 307 N.E.2d 395 (3rd Dist., 1974)

People v. Kline, 16 Ill. App.3d 1017, 307 N.E.2d 398 (3rd Dist., 1974)

People v. Peterson, 16 Ill. App.3d 1025, 307 N.E.2d 405 (3rd Dist., 1974)

Lindsey v. Normet, 405 U.S. 56, 70, 92 S. Ct. 862, 31 L. Ed.2d 36, 48

People v. Sherman, 9 Ill. App.3d 547, 291 N.E.2d 865 (2nd Dist., 1973)

City of Chicago v. Vokes, 28 Ill.2d 475, 193 N.E.2d 40 (1963)

Ill. Rev. Stats., 1973, Ch. 56½, Sec. 1100

II

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

McCray v. Illinois, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed.2d 52 (1967)

Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960)

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964)

People v. Portis, 4 Ill. App.3d 333, 280 N.E.2d 712 (1st Dist., 1972)

People v. Durr, 28 Ill.2d 308, 192 N.E.2d 379 (1963)

People v. McFadden, 32 Ill.2d 101, 203 N.E.2d 888 (1965)

Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed.2d 327 (1959)

People v. Fleming, 33 Ill.2d 431, 211 N.E.2d 677 (1966)

People v. Atkins, 82 Ill. App.2d 477, 227 N.E.2d 129 (1st Dist., 1967)

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, __ L. Ed.2d __ (1969)

People v. Lawrence, 133 Ill. App.2d 542, 273 N.E.2d 637 (1971)

People v. Williams, 36 Ill.2d 505, 224 N.E.2d 225 (1967)

People v. McNeil, 123 Ill. App.2d 285, 260 N.E.2d 82 (1st Dist., 1970)

People v. Nettles, 34 Ill.2d 52, 213 N.E.2d 536 (1966)

People v. Ranson, 4 Ill. App.3d 953, 282 N.E.2d 462 (1st Dist., 1972)

People v. Freeman, 34 Ill.2d 362, 215 N.E.2d 206 (1966)

People v. McClellan, 34 Ill.2d 572, 218 N.E.2d 97 (1966)

People v. Mack, 12 Ill.2d 151, 145 N.E.2d 609 (1957)

III

THE CRIMES OF POSSESSION OF CANNABIS AND POSSESSION OF A CONTROLLED SUBSTANCE CONSTITUTE TWO SEPARATE OFFENSES FOR WHICH TWO SEPARATE CONVICTIONS MAY BE ENTERED THEREON.

Ill. Rev. Stats., 1973, Ch. 56½, Sec. 704

Ill. Rev. Stats., 1973, Ch. 56½, Sec. 1402

People v. Porter, 13 Ill. App.3d 893, 300 N.E.2d 814 (3rd Dist., 1973)

People v. Ike, 7 Ill. App.3d 75, 286 N.E.2d 391 (5th Dist., 1971)

People v. Bush, 11 Ill. App.3d 31, 295 N.E.2d 548 (1st Dist., 1973)

People v. Johnson, 44 Ill.2d 463, 256 N.E.2d 343 (1970)

People v. Holliman, 22 Ill. App.3d 95, 316 N.E.2d 812 (2nd Dist., 1974)

People v. Williams, ___ Ill.2d ___, ___ N.E 2d ___ (No. 44031, January 30, 1975)

STATEMENT OF THE CASE

James Downing was charged and convicted of the offenses of possession of cannabis of more than 10 grams but not more than 30 grams and possession of more than 30 grams of LSD. He was sentenced only for his conviction of possession of LSD to a term of imprisonment of 4 to 8 years. In his motion for a new trial he did not raise the question of the constitutionality of the two statutes under which he was convicted, Sections 704 and 1402, Chapter 56½, Illinois Revised Statutes, 1973.

The evidence presented at trial against the defendant consisted essentially of the testimony of Police Officer Richard McMahon, who arrested the defendant, and the testimony of V. S. Vasan, a chemist for the Illinois Crime Laboratory at Joliet, who tested the substances found in the defendant's possession.

Officer McMahon, on the basis of information received from an informant, together with Detective Bishop, stopped the vehicle in which the defendant was a passenger, asked him to step out of the vehicle and searched him. Officer McMahon found a plastic bag rolled up in the defendant's left sleeve. This bag contained 11.45 grams of cannabis (R 58) and 35.07 grams of positively identified LSD. (R 63)

V. S. Vasan testified that he weighed the cannabis contained in the bag and that it weighed 11.45 grams. He also conducted a qualitative analysis of the substance from which he determined that the substance was cannabis. He also weighed the tablets contained in six other

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1 OF 2

smaller bags, which were all within the larger plastic bag in defendant's possession. (R 61) Vasan weighed the individual tablets and ran qualitative tests on five tablets from each of these six bags. (R 60-61) He determined the substance to be LSD. Tests were also run on five other bags also contained within the larger bag in the defendant's possession and these bags were found to contain preliminary LSD; however, these were not conclusive tests and these five bags were not admitted into evidence against the defendant. Vasan testified that on the basis of the random sampling of the tablets contained in the six bags positively shown to contain LSD, he could conclusively state that all of the tablets within each of these six bags, contained LSD. (R 71)

As stated previously, the apprehension of the defendant resulted from information supplied by an informant. This informant called the narcotics investigator, Michael Smith, at approximately 6:10 p.m. on October 5, 1973, and stated that there was a 1962 green and blue car with the trunk tied down with a rope and with some rear end damage in the Reed Avenue - 11th Street area; that there were two persons in the vehicle, Gary DuSavage and James Downing; that Downing had tried to sell him some LSD and he had observed this LSD in a plastic bag rolled up in Downing's left arm shirt sleeve. Police Officer Smith testified at the hearing on defendant's motion to suppress that this informant had given information in the past which had led to arrests and convictions on at least three occasions. (MS* 9) Some of these convictions related to narcotics and others involved burglaries. (MS 10)

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* Record at Hearing Motion to Suppress.

He further testified that these arrests and convictions had been within the past two years and were still going on. (MS 10)

On cross-examination, Officer Smith testified that altogether the informant had given information that led to arrests and convictions on approximately 6 or 7 different occasions and that 3 of these convictions involved burglaries. (MS 13) At this point in the cross-examination, the defendant's attorney asked Officer Smith whether he could identify the arrests and convictions which resulted from information supplied by the informant. The assistant state's attorney objected to the disclosure of these convictions on the grounds that their identity would tend to reveal the informant. The court sustained the assistant state's attorney's objection and the defendant's attorney asked no further questions of Officer Smith.

Detective McMahon testified that Deputy Smith called him and relayed to him the information supplied by the informant. Detectives McMahon and Bishop then immediately drove to the Reed and 11th Street area where they observed a green Chevrolet with the trunk tied down and with two occupants. (MS 18) Detective McMahon searched the defendant and found a plastic bag later discovered to be LSD and cannabis in the defendant's left hand shirt sleeve which was rolled up.

ARGUMENT

I

SECTIONS 704 AND 1402, CHAPTER 56½, ILLINOIS REVISED STATUTES, 1973, DO NOT VIOLATE THE DEFENDANT'S RIGHTS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

Defendant contends in his appeal that Secs. 704 and 1402, Ch. 56½, Ill. Rev. Stat., 1973, are unconstitutional because the penalties prescribed under these sections are classified according to the total weight of the substance containing the illegal drug rather than according to the weight of the drug itself. Defendant concedes at page 12 of his brief that the State has the power to prohibit the illicit possession and distribution of LSD and marijuana. He also concedes that there is a rational basis for classifying the penalties for such possession or distribution according to the amount of drug found in the possession of the accused. However, according to the defendant's argument, there is no rational basis for classifying the penalties according to the total weight of the substance containing the drug rather than the weight of the drug itself.

In response to this contention, the People first observe that the defendant has not preserved this issue in his motion for new trial. (C 79) Issues raised on appeal which are not specified in a motion for new trial are waived and cannot be urged as a ground for reversal on review. People v. Horton, 15 Ill. App.3d 51, 303 N.E.2d 534 (5th Dist., 1973); People v. Tiffin, 16 Ill. App.3d 367, 306 N.E.2d 325 (4th Dist., 1974) This rule of waiver applies equally to constitutional

questions. People v. Pickett, 54 Ill.2d 280, 296 N.E.2d 856 (1973) The court will only disregard this rule of waiver in cases where the evidence is closely balanced. People v. Tiffin, cited supra.

Consequently, in this case, since the defendant has not properly preserved this point for review and since the evidence of guilt is overwhelming, this court should refuse to consider the constitutionality of Sections 1402 and 704.

Additionally, in this case, the defendant is foreclosed from raising this issue because he has made no showing that he has been aggrieved or injured by the statutes in question. The test of whether the defendant has proper standing to challenge the statutes involved is whether the defendant has shown that the weight of any material, substance or ingredient other than the controlled substance was involved and that the weight of such non-controlled substance would thereby expose the defendant to the higher penalty. People v. Campbell, 16 Ill. App.3d 851, 307 N.E.2d 395 (3rd Dist., 1974); People v. Kline, 16 Ill. App.3d 1017, 307 N.E.2d 398 (3rd Dist.,1974); and People v. Peterson, 16 Ill. App.3d 1025, 307 N.E.2d 405 (3rd Dist., 1974)

Although the defendant contends that the classification schemes of Sections 704 and 1402 have great significance in his case, the facts set forth in his brief do not support this conclusion. (See page 12 of defendant's brief) Defendant states that the chemist who tested the substances found in the defendant's possession only analyzed five percent of the total number of tablets which he stated contained LSD. The total number of tablets admitted into evidence against the defen-

dant weighed 35.07 grams. (R 63) The People are uncertain of how this testimony concerning the qualitative analysis conducted by the chemist, V. A. Vasan, relates to the precise issue raised by him in this appeal. This testimony would only be relevant if the defendant was disputing the reliability of the random sampling technique used in testing substances for LSD. This testimony in no way bears on the question of the amount of inert or non-controlled substance contained in the tablets tested by Dr. Vasan. In fact, nowhere in the record is there any evidence establishing the weight of any substance other than LSD in the tablets tested.

Even assuming, arguendo, that the defendant has properly raised and preserved this point for review, his constitutional attack on Sections 1402 and 704 cannot succeed. The test of whether a classification scheme created and enacted by the legislature meets the constitutional requirements of due process and equal protection is whether the challenged classification can be supported on any rational basis. Stated in another way, "equal protection will be offended 'only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective , Lindsey v. Normet, 405 U.S. 56, 70, 92 S.Ct. 862, 31 L. Ed.2d 36, 48.'" People v. Sherman, 9 Ill. App.3d 547, 291 N.E.2d 865 (2nd Dist., 1973) Likewise, as stated in City of Chicago v. Vokes, 28 Ill.2d 475, 193 N.E.2d 40 (1963):

> The reasonableness of a police regulation is not necessarily what is best but what is thoroughly appropriate under all circumstances, and in like manner, a classification which has some reasonable basis is not unconstitutional because it is not made with mathematical nicety or because in practice it results in some inequality.

Judged by this standard, Sections 704 and 1402 meet the constitutional requirements of due process and equal protection.

The purpose of the graduated penalties under these sections, with the severity of the punishment increasing according to the amount of controlled substance possessed, is to punish the large scale traffickers in controlled substances who, through their distribution network, can affect large numbers of persons. As stated in Section 1100, Chapter 56½, Illinois Revised Statutes, 1973:

> It is not the intent of the General Assembly to treat the unlawful user or occasional petty distributor of controlled substances with the same severity as the large-scale, unlawful purveyers and traffickers of controlled substances. To this end, guidelines have been provided, along with the wide latitude in sentencing discretion, to enable the sentencing court to order penalties in each case which are appropriate for the purposes of this Act.

Concomitant with this expressed intent, the legislature has prescribed that possession of 30 grams or more of a substance containing LSD is a Class One felony and the possession of any other amount of a controlled substance is a Class Three felony. Generally, the difference between the penalty for possession of 10 grams or less of cannabis and possession of more than 10 grams but not more than 30 grams of cannabis is the difference between a Class B and a Class A misdemeanor, respectively.

The purpose of this extrapolation is to impress on this court the objective sought by the legislature in enacting this classification scheme and the compelling nature of the State's interest in controlling

the distribution of controlled substances in Illinois. The only realistic and effective way of classifying the possession of controlled substances according to amount is by defining the amount possessed according to the bulk weight of the substance containing the drug.

This is so because of the enormous obstacles which presently exist to quantitative analysis of cannabis and LSD, not in pure form. For example, under present scientific methodology, the only way of quantitatively analyzing marijuana when it is contained within another substance, such as, in defendant's example, a cake or brownie, is to physically separate the marijuana from the cake substance. It would take weeks to perform such a procedure on one sample. The obstacles to quantitative analysis are equally as great with respect to LSD. In these cases, it is extremely difficult to quantify the amount of LSD in a tablet because the amount of LSD is usually quite small and the instruments used to measure these amounts are not capable of the precision necessary to quantify these amounts with scientific accuracy. These procedures, too, would take a great length of time.

In view of the enormous number of drug cases prosecuted every year and in view of the limitations of manpower and physical space, it can be seen that it would be impossible to effectively process drug samples submitted to the crime laboratories for analysis and at the same time preserve the defendant's right to a speedy trial. In summary, quantitative analysis, other than by weighing the total substance, is realistically impossible. The only feasible way

presently available for weighing a controlled substance, such as LSD, is by weighing the aggregate amount.

In balancing the compelling state interest in controlling the large-scale distribution and trafficking in drugs with the small degree of imprecision in testing procedures, the state's interest surely outweighs the latter.

Additionally, if this court would accept the argument made by the defendant in this case, then, the only acceptable statute would be one providing for a uniform penalty in all cases of possession and delivery, regardless of the amount possessed. Such an outcome would present other social and legal problems. In order to set the penalties high enough to deter the large-scale distrbutors, the small offenders would be excessively punished, in violation of Section 11, Article I, Illinois Constitution, 1970. If penalties are set low to take into account the small offender, the societal interest in preventing the large-scale distribution of drugs would be frustrated.

II

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

At the hearing on the motion to suppress the cannabis and LSD seized by the police, defendant's counsel cross-examined Michael Smith, the narcotics investigator who received information from an unidentified informant, which resulted in the arrest and search of the defendant. During this cross-examination, Smith was asked to identify other arrests and convictions resulting from information supplied by this unnamed informant. The People objected to this question on the grounds that by naming specific arrests and convictions the identity of the informant would be revealed. (MS 13) The trial court sustained this objection on this ground. (MS 14)

The basis of defendant's second point on appeal is that the trial court committed reversible error in refusing to allow defendant's counsel to obtain the names of persons arrested and convictions resulting from information supplied by the informant. Defendant's argument appears to be that even though the disclosure of this information might have revealed the identity of the informer, the court's evidentiary ruling was reversible error because in prohibiting this testimony, the trial court prevented the State from meeting its burden of proof. (Appellant's Brief at page 20) Accord-

ing to defendant's argument, once the defendant has shown that he was behaving in a lawful way at the time of his arrest, the burden shifts to the People to show probable cause for the arrest and search incidental to the arrest. Under defendant's analysis, then, when the court refused to allow disclosure of particular arrests and convictions, it thereby prevented the People from establishing the reliability of their informant, and consequently, probable cause for the arrest and search.

Defendant's convoluted analysis illuminates the central weakness in his argument: he does not, and cannot, show how he has been prejudiced by the trial court's ruling. Thus, if as he states, this information was necessary in order to prove the reliability of the informant, it is not the defendant who has been damaged, but the People, who have the burden of proving the informant's reliability. The only colorable allegation the defendant makes of personal prejudice to him is that the informer's reliability was not proven by the People. However, the question of the informer's reliability is completely separate and distinct from the question of whether the identity of the informer or information leading to the identity of the informer should be disclosed at a hearing on a motion to suppress, unless, one can say that the identity of the informer or the arrests or convictions which he has participated in are essential to prove his reliability.

Certainly, disclosure of the identity of the informer is not necessary in order to prove his reliability. McCray v. Illinois, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed.2d 52 (1967); Jones v. United

States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960) and Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964) Nor, are the names and numbers of particular arrests and convictions, resulting from information supplied by an informer, necessary to prove the informer's reliability. People v. Portis, 4 Ill. App.3d 333, 280 N.E.2d 712 (1st Dist., 1972)

The only issue, then, in this case, is whether the search of the defendant, incident to arrest, was proper. It is well recognized that a search of the person without a warrant is proper, and the evidence found is admissible, if the search is incident to a lawful arrest. And the lawfulness of an arrest without a warrant depends, in turn, upon whether the police officer "has reasonable grounds for believing that the person to be arrested has committd the criminal offense." People v. Durr, 28 Ill.2d 308, 192 N.E.2d 379 (1963) and People v. McFadden, 32 Ill.2d 101, 203 N.E.2d 888 (1965)

It is also well established that reasonable grounds for believing that a person has committed a criminal offense may be found in information furnished by an informer if the reliability of the informer has been previously established or independently corroborated. People v. Durr, supra; People v. McFadden, supra; Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed.2d 327 (1959); and McCray v. Illinois, 386 U.S. 300, 87 S. ct. 1056, 18 L. Ed.2d 52 (1967) In the case at bar, the reliability of the informer was established and his information independently corroborated.

Draper v. United States, cited supra, exemplifies the meaning of the "independent corroboration" test. There, the informant told

the police that Draper would return to Denver from Chicago, by train, on the morning of either September 8 or 9, that he would be carrying "a tan zipper bag" and three ounces of heroin and that he habitually "walked real fast." He also provided a physical description of Draper. On the morning of September 9, police saw a person, having the exact physical attributes and wearing the precise clothing described by the informant, alight from an incoming Chicago train and start walking "fast" toward the exit. This person was carrying a tan zipper bag. The police officers stopped and searched this man and discovered heroin clutched in his left hand.

The United States Supreme Court held that because the information supplied by the informant was subsequently verified by the arresting officer's personal observation and the informant's information had been found accurate and reliable in the past, probable cause existed. Draper v. United States, supra, 79 S. Ct. at 333. In Illinois, the efficacy of this principle of law is illustrated by the decisions of People v. McFadden, 32 Ill.2d 101, 203 N.E.2d 888 (1965); People v. Fleming, 33 Ill.2d 431, 211 N.E.2d 677 (1966); and People v. Atkins, 82 Ill. App.2d 477, 227 N.E.2d 129 (1st Dist., 1967)

When the independent verification of the informant's tip is coupled with the informant's representation that he gained his information from personal observation, an even stronger case is presented for crediting the hearsay information and acting upon it. See Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, ___ L. Ed.2d ___ (1969)

Under the circumstances of this case, Officer Smith, who knew the informant and received the information relating to this cause from him, testified at the motion to suppress that this informant called him at approximately 6:10 p.m. on October 5, 1973 and stated that there was a 1962 green and blue car with the trunk tied down with a rope and with some rear end damage in the Reed Avenue - 11th Street area; that there were two persons in the vehicle, Gary DuSavage and James Downing, the defendant; that Downing had tried to sell the informant some LSD and the informant had observed this LSD in a plastic bag, rolled up in Downing's left shirt sleeve.

Upon receiving this information, Officer Smith relayed it to Detective McMahon, who immediately drove to the Reed and 11th Street area where he observed a green Chevy with its trunk tied down with rope and occupied by two persons, one being the defendant. (MS 18) He and his partner, Detective Bishop, stopped the automobile and conducted a search of the defendant. Detective McMahon found LSD and cannabis in a plastic bag rolled up in defendant's left shirt sleeve. (MS 18)

Thus, in this case, the arrest and search were based on the informant's personal observation and contact with the defendant and upon the police officers' independent verification of the informant's detailed description of the vehicle in which the defendant was riding and the location of the vehicle and the items seized.

Furthermore, the past reliability of the informant was proven by the testimony of Officer Smith who stated on direct examination

that information given by the informant had lead to arrests and convictions. Some of these convictions related to narcotics and others involved burglaries. (MS 10 and 13)

Although there is some ambiguity in the record concerning the number and types of convictions effected by the informant, this lack of clarity does not defeat the People's showing of probable cause for the arrest and search.

First of all, there is no technical requirement that the People prove that the informant's tips have resulted in convictions. People v. Lawrence, 133 Ill. App.2d 542, 273 N.E.2d 637 (1971) Indeed, it has been held that it is sufficient if the police officer can state that the informant's information has been proved correct or reliable in the past. People v. Lawrence, cited supra; Draper v. United States, supra, 89 S. Ct. at 333; People v. Williams, 36 Ill.2d 505, 224 N.E.2d 225 (1967); People v. McNeil, 123 Ill. App.2d 285, 260 N.E.2d 82 (1st Dist., 1970); People v. Durr, cited supra; and People v. McFadden, cited supra.

Moreover, it has been held that the informer's reliability has been adequately shown even though the police officer, who testifies concerning the informer's reliability, does not state the precise number of arrests and convictions resulting from the informant's tip, or is uncertain as to the precise number. In People v. Nettles, 34 Ill.2d 52 (1966), the officer testified that information he had received from the informer had resulted in "possibly two or three convictions." In People v. Atkins, 82 Ill. App.2d 477, 227 N.E.2d

129 (1st Dist., 1967) the officer stated that the informer had supplied information on more than twenty occasions in the past and that arrests and convictions had resulted. Similarly, in People v. Ranson, 4 Ill. App.3d 953, 282 N.E.2d 462 (1st Dist., 1972) the complainant for a search warrant stated that the informer had given the complainant information in the past which resulted in convictions and arrests. In all of these cases, the appellate court affirmed the lawfulness of the arrest and search on the basis of the hearsay information.

Also, when the trial court sustained the People's objection to disclosure of the identity of these arrests and convictions, defendant conducted no further cross-examination of Officer Smith. Inasmuch as the defendant's counsel would not cross-examine Officer Smith more extensively about his testimony concerning prior arrests and convictions resulting from the informant's tip, he cannot be heard to complain in this appeal that the informer's reliability was not adequately established. People v. Nettles, supra, 213 N.E.2d at 538.

Since, the ambiguity of the officer's testimony only affects his credibility and since Smith's credibility was a matter for the trial court's determination, People v. Nettles, supra, 213 N.E.2d at 538 and People v. Freeman, 34 Ill.2d 362, 215 N.E.2d 206 (1966), and in view of the fact that the informant's tip was independently verified the police officers, the trial court did not abuse its discretion in denying the motion to suppress.

Defendant cites People v. McClellan, 34 Ill.2d 572, 218 N.E.2d 97 (1966) as controlling this case. It is distinguishable. There, the only information supplied by the informer was the comment, "That dude is dirty," as he passed by a police car. The only evidence offered by the People to establish the informant's reliability was that the police made three separate arrests based on information supplied by the informant. The Illinois Supreme Court held that this was not enough. However, in the case at bar, unlike McClellan, the informant's tip, based on personal observation, was independently verified by the police and his past reliability was established by other convictions resulting from tips supplied by him to the police.

In summary, inasmuch as the People adequately established the reliability of the informant in this case, the trial court did not err in refusing to allow Officer Smith to divulge names and numbers of arrests and convictions resulting from the informant's tips. Secondly, although not crucial to this case, the court appropriately sustained the People's objection on this question because of the possibility that this information would reveal the identity of the informer. The defendant has no right in a motion to suppress evidence, where the informant did not participate or witness the crime or assist in setting up its commission, to disclosure of the informant's identity. People v. Nettles, 34 Ill.2d 52, 213 N.E.2d 536 (1966); People v. Mack, 12 Ill.2d 151, 145 N.E.2d 609 (1957); People v. Durr, 28 Ill.2d 308, 192 N.E.2d 379 (1963); McCray v. Illinois, supra.

III

THE CRIMES OF POSSESSION OF CANNABIS AND POSSESSION OF A CONTROLLED SUBSTANCE CONSTITUTE TWO SEPARATE OFFENSES FOR WHICH TWO SEPARATE CONVICTIONS MAY BE ENTERED THEREON.

Defendant concludes that, because cannabis and LSD were found together in defendant's left arm sleeve at the same time, defendant's possession of them constitutes only one offense, and hence, his conviction for the lesser offense must be reversed.

Although the defendant was found in possession of both marijuana and LSD at the same time, clearly, under Illinois law, they constitute separate offenses having different elements. The intent, the drug, and the penalties are different for these two offenses. The offense of possession of cannabis, Ill. Rev. Stats., 1973, Ch. 56½, Sec. 704, requires a person to knowingly possess cannabis and classifies the offense as a Class A misdemeanor, where the person possesses more than 10 grams but not more than 30 grams. The crime of possession of LSD, a controlled substance, Ill. Rev. Stats., 1973, Ch. 56½, Sec. 1402, requires a person to knowingly possess a controlled substance and classifies the offense as a Class One felony, where the possession is 30 grams or more.

Where two closely related acts of the defendant constitute two separate and distinct offenses involving different elements of proof, convictions on each are proper. People v. Porter, 13 Ill. App.3d

893, 300 N.E.2d 814 (3rd Dist., 1973); People v. Ike, 7 Ill. App.3d 75, 286 N.E.2d 391 (5th Dist., 1971); People v. Bush, 11 Ill. App.3d 31, 295 N.E.2d 548 (1st Dist., 1973); People v. Johnson, 44 Ill.2d 463, 256 N.E.2d 343 (1970) Since the offenses of possession of marijuana and possession of LSD, a controlled substance, are distinct offenses, requiring entirely different elements of proof, separate convictions for each offense may be entered thereon.

Cases cited by the defendant are distinguishable. People v. Holliman, 22 Ill. App.3d 95, 316 N.E.2d 812 (2nd Dist., 1974), is a case where the defendant was convicted of both possession and sale of heroin. Since possession is a lesser included offense of the sale of heroin, the court vacated the lesser conviction. In this case, possession of cannabis is not a lesser included offense of possession of a controlled substance.

Defendant also cites the recent Illinois Supreme Court decision of People v. Williams, ___ Ill.2d ___, ___ N.E.2d ___ (No. 44031, January 30, 1975) in which the defendant was convicted of burglary, armed robbery and murder. In determining whether all three convictions could stand, the court adopted the test of whether these crimes were independently motivated. The court held that the defendant could not be convicted of both burglary and armed robbery since the purpose of the unlawful entry was robbery but, it did uphold the separate conviction for murder because, at least part of the reason for killing the householder, was to avoid injury or apprehension. Similarly, in the case at bar, the possession of cannabis and the possession of LSD were independently motivated since the intent was to possess two separate and dissimilar substances.

CONCLUSION

For the foregoing reasons, the People respectfully request this court to affirm the convictions and sentences entered against the defendant in this cause.

Respectfully submitted,

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Appendix D
Sample Complaint
Form

UNLAWFUL DELIVERY OF
SUBSTANCE REPRESENTED
TO BE CONTROLLED SUBSTANCE

CHAPTER: 56½ SECTION: 1404

The Eighteenth Judicial Circuit Court
Du Page County, Wheaton, Illinois

STATE OF ILLINOIS
COUNTY OF DU PAGE
CITY OF WHEATON

COMPLAINT

PEOPLE VS.
Alanzo Smith

In the name and by the authority of the People of the State of Illinois, Detective John Jacobs, hereinafter called the complainant, on oath charges that at or about the hour of 3:00 P. M. on or about the 1st day of June 19 76 in said County and State Alanzo Smith, hereinafter called the defendant committed the offense of UNLAWFUL DELIVERY* OF SUBSTANCE REPRESENTED TO BE A CONTROLLED SUBSTANCE in violation of SECTION 1404 of CHAPTER 56½ of the Illinois Revised Statutes of said State, in that the said defendant knowingly and unlawfully delivered* to John O'Brien a substance which he represented to John O'Brien to be a controlled substance, heroin.**

*or possess with the intent to deliver
**any controlled substance

Felony (Class 3) Must be Set by Judge

CHARGE: BOND:

CASE AUTHORITY: People v. Chambers, 21 Ill. App. 3d 771, 316 N.E. 2d 101 (1st Dist., 1974) upheld the constitutionality of Section 1404.

316

END