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Ch. 17
DOUBLE JEOPARDY - COLLATERAL ESTOPPEL

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§17-1
Generally

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) The Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment.

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) The Double Jeopardy Clause consists of three separate constitutional protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense.

Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) Plea of guilty does not waive double jeopardy claim.

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy.

U.S. v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) A voluntary and counseled guilty plea to two offenses bars a subsequent double jeopardy claim that the two offenses have merged into a single offense. Where defendant pleaded guilty to two counts of conspiracy, he could not challenge either conviction on the ground that, in similar cases, the reviewing courts have held that only one conspiracy conviction may be entered. Compare, People v. Johnson, 200 Ill.App.3d 1018, 558 N.E.2d 607 (5th Dist. 1990).

Witte v. U.S., 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) Although double jeopardy protects defendant from being prosecuted or punished more than once for the same offense, a defendant is not "punished" when uncharged crimes are used to enhance the sentence on another offense, at least where the enhanced sentence is still within the range statutorily authorized for the offense. The Court implied, although it did not expressly state, that use of a separate offense to impose a sentence greater than would have been authorized for the unenhanced offense (i.e., extended term or habitual criminal) would preclude separate punishment.

Jones v. Thomas, 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989) Defendant was convicted of felony murder and attempted robbery. Consecutive sentences of life and 15 years were imposed, with the latter sentence to be served first. After defendant had served the lesser sentence, the trial court vacated the conviction and sentence for the attempted robbery under the rule that separate punishments may not be imposed for both felony murder and the underlying felony. The trial court also ordered that defendant be given credit against his life sentence for the time he served for the attempted robbery.

Defendant contended that once he completed the sentence on one offense, he could not

be required to serve any part of the sentence for the other offense.

Though defendant's initial convictions and sentences violated the double jeopardy principle against multiple punishments for the same offense imposed in a single proceeding, the remedy chosen by the trial court cured the violation. The "alteration of respondent's sentence to a single term for felony murder with credit for time served provided suitable protection of his double jeopardy rights."

People v. Placek, 184 Ill.2d 370, 704 N.E.2d 393 (1998) The double jeopardy clause "protects against three distinct abuses": (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after a conviction, and (3) multiple punishments for the same offense. Generally, double jeopardy does not bar a second trial where a new trial is granted on defendant's motion. In other words, a defendant cannot "by his own act avoid the jeopardy" of the first trial and then assert double jeopardy as a defense against a new trial.

Where defendant was convicted of theft, delivery of a controlled substance and possession of a controlled substance with intent to deliver, but the trial court granted defendant's motion for a new trial because the theft statute had been found unconstitutional a year before the trial, double jeopardy principles did not bar a retrial for the drug charges.

Basing a charge on an unconstitutional statute is not the type of prosecutorial "overreaching" which would bar a second trial. The prosecution had not realized that the statute had been declared unconstitutional, and at most the State was guilty of mere prosecutorial error.

People v. Knaff, 196 Ill.2d 460, 752 N.E.2d 1123 (2001) Neither constitutional nor statutory prohibitions against double jeopardy were violated by allowing the State to proceed on lesser included offenses, although the evidence on the charged offenses was insufficient to submit those charges to the jury and the State had dismissed the lesser included offenses before trial. Although an "acquittal" shields a defendant from further prosecution, whether an acquittal has been entered is determined not by mechanical rules but by whether the trial court's order contemplated that the prosecution against defendant would end. The trial court's ruling that there was insufficient evidence to instruct the jury on the charged offenses contemplated not that the prosecution would end, but that the case would proceed on lesser included offenses on which the State had presented a prima facie case. In addition, the purpose of the double jeopardy clause was protected, because defendant was subjected to only a single prosecution.

The State's decision to dismiss the lesser charges before trial did not require a different result. First, defendant was implicitly charged with the lesser included offenses whether or not those offenses were explicitly charged. Second, at the time of dismissal the prosecutor specifically informed the court and defense counsel that she would seek instructions on the lesser charges if the proof was insufficient on the greater charges.

People v. Ortiz, 196 Ill.2d 236, 752 N.E.2d 410 (2001) Neither double jeopardy nor the res judicata doctrine were violated where the Supreme Court issued a supervisory order directing the Appellate Court to vacate its reversal of defendant's conviction and reconsider the appeal. Because the Appellate Court's opinion lacked the concurrence of two judges where one of the members of the majority died before the opinion was filed, there was no valid decision to which double jeopardy or the res judicata doctrine could attach.

DuPage Fork Lift Service, Inc. v. Material Handling Services, Inc., 195 Ill.2d 71, 744 N.E.2d 845 (2001) Collateral estoppel doctrine applies to earlier determinations of fact and

law.

People v. Bone, 82 Ill.2d 282, 412 N.E.2d 444 (1980) Collateral estoppel and res judicata are doctrines which prohibit repetitive litigation and protect litigants from the burden of retrying an identical cause of action or issue with the same party.

Res judicata "operates as an absolute bar to a subsequent action where a prior judgment rests on the merits, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Collateral estoppel, on the other hand, "concludes those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

People v. Watts, 181 Ill.2d 133, 692 N.E.2d 315 (1998) Where the trial court held that the State had failed to prove an element of theft but convicted defendant of home repair fraud, the collateral estoppel doctrine barred retrial on home repair fraud after that conviction was reversed because the judge relied on an unconstitutional presumption. A retrial for home repair fraud would necessarily involve relitigation of an issue resolved in defendant's favor on the theft charge - whether defendant lacked intent to perform the work when he entered the contract.

People v. Franklin, 167 Ill.2d 1, 656 N.E.2d 750 (1995) After defendant's murder conviction and death sentence were affirmed on direct appeal, defendant filed a petition for post-conviction relief. In the petition, defendant claimed that the prosecution erroneously failed to correct misleading impressions concerning its principal witness's role in the offense and expectation of leniency in return for testifying. As part of his argument, defendant presented the court with the Appellate Court's opinion in a codefendant's appeal, awarding the codefendant a new trial on the same grounds defendant argued to the Supreme Court.

The collateral estoppel doctrine did not apply to the Appellate Court's ruling because defendant could not satisfy the "mutuality" requirement. In civil cases, collateral estoppel applies where the issue was resolved in an earlier case, the prior adjudication resulted in a final judgment, and the party against whom estoppel is asserted was either a party to the earlier case or in privity with a party. In criminal cases there is also a "mutuality requirement"; in other words, neither party may use a prior finding as an estoppel "unless both parties were bound by the prior judgment."

Although the mutuality doctrine has been abolished in civil cases, the Court found several reasons to maintain it in criminal cases. First, the prosecution's discovery rights are limited in criminal cases. In addition, evidentiary rules frequently prevent the State from presenting the evidence against all defendants in one trial, and evidence that is admissible against one defendant might be excluded or suppressed at the trial of another. Also, an acquittal of one defendant should not be given conclusive effect "in favor of a stranger to that trial," and there is a strong public interest in the accuracy of the result of every criminal trial. Finally, the mutuality requirement encourages defendants to raise their own claims rather than adopting a "wait-and-see" attitude in the hope that a codefendant will be successful on the same issue.

In re Nau, 153 Ill.2d 406, 607 N.E.2d 134 (1992) After being charged with the murder of his stepbrother, the respondent was twice found unfit to stand trial. He was then acquitted of the charge at the discharge hearing required for criminal defendants who are unlikely to regain

fitness within one year.

The State filed a petition for involuntary commitment, and as part of its evidence argued that respondent had in fact committed the killing. In addition, at a hearing to continue respondent's hospitalization after the first commitment order expired, the State presented evidence that respondent had committed the murder and argued that he was guilty of the crime. On appeal, respondent claimed that because he had been acquitted of the criminal charge, the State was collaterally estopped making such an argument.

The collateral estoppel doctrine did not apply because the issues were not identical in both proceedings. Under Dowling v. U.S., 493 U.S. 342 (1990) and People v. Jackson, 149 Ill.2d 540, 599 N.E.2d 926 (1992), the State's failure to prove guilt beyond a reasonable doubt did not prohibit use of the same evidence at a subsequent proceeding involving a lesser burden of proof. At the discharge hearing, the issue was whether defendant was proven guilty beyond a reasonable doubt. At the commitment proceeding, by contrast, the issue was whether the State could establish by clear and convincing evidence that respondent was subject to involuntary commitment.

People v. DeJesus, 127 Ill.2d 486, 537 N.E.2d 800 (1989) The doctrine of res judicata applies when there is: (1) a final judgment on the merits, (2) identity of the cause of action in both an earlier and later suit, and (3) identity of parties in the two suits.

People v. Burrows, 172 Ill.2d 169, 665 N.E.2d 1319 (1996) A witness's recantation of his testimony against defendant could not be considered in post-conviction proceedings where the witness had previously recanted his testimony inculpating defendant, and the prior recantation had been considered by the Supreme Court on direct appeal. The res judicata doctrine applied to defendant's attempt to raise the recantation again in collateral proceedings.

People v. Carrillo, 164 Ill.2d 144, 646 N.E.2d 582 (1995) In 1979, Carrillo and Stacey agreed that Carrillo would break into an apartment that Stacey owned, to frighten the tenant into leaving. However, the tenant was shot and paralyzed during the break-in, and both defendants were tried for several offenses. Carrillo was convicted (as a principal) of attempt murder, home invasion, armed robbery, burglary, aggravated battery and armed violence. Stacey was convicted (as an accomplice) of home invasion and burglary, but was acquitted of attempt murder, armed robbery, aggravated battery, and armed violence.

Nine years after the offense, the tenant died of injuries sustained in the break-in. Defendants were then charged with "intentional and knowing" murder, "knowledge of the strong probability of death or great bodily harm" murder, and felony murder.

The murder charges alleging knowledge of the strong probability of death or great bodily harm could be brought against both defendants, since none of the previously prosecuted charges had involved that mental state.

Double jeopardy did not prohibit prosecution of the felony murder and intentional murder charges, even if the same mental states had been involved in the original prosecutions. Under Diaz v. U.S., 223 U.S. 442 (1912), a double jeopardy exception exists where, at the time of the original charges, the State could not proceed on more serious charges because additional facts necessary to sustain those charges had not yet occurred.

Finally, the collateral estoppel doctrine applied to the offenses of which Stacey was acquitted, but not to the offenses to which Carrillo pleaded guilty.

Carrillo argued that because he had previously pleaded guilty to attempt murder and

aggravated battery, collateral estoppel prohibited the relitigation of the issue of his intent. The collateral estoppel doctrine does not apply to guilty pleas, because such pleas do not "litigate issues." Furthermore, unlike an acquittal, a guilty plea does not foreclose prosecution of offenses arising out of the same conduct but requiring proof of additional elements. Finally, the Diaz exception to the double jeopardy rule also applies to the collateral estoppel doctrine; therefore, because the tenant had not yet died when Carrillo pleaded to the original charges, collateral estoppel did not bar prosecutions for more serious offenses after her death.

However, collateral estoppel clearly precludes relitigation of issues previously resolved in a defendant's favor. Because Stacey had been acquitted of armed robbery and attempt murder, the State could not subsequently prosecute her for intentional murder or felony murder based on armed robbery.

People v. Rothermel, 88 Ill.2d 541, 431 N.E.2d 378 (1982) The testimony presented at a prior trial may be used to establish that a subsequent prosecution is barred by double jeopardy.

People v. Nance, 189 Ill.2d 142, 724 N.E.2d 889 (2000) Collateral estoppel precluded the State from litigating in state courts the validity of a 1968 federal injunction prohibiting enforcement of the mob action statute.

People v. Gilliam, 172 Ill.2d 484, 670 N.E.2d 606 (1996) Generally, collateral estoppel bars rehearing of a motion to suppress in the same proceeding. However, the collateral estoppel doctrine does not apply where defendant shows "exceptional circumstances or any evidence in addition to that submitted upon the first hearing which had become available for submission in connection with the motion to suppress." To qualify for this exception, the additional matters must involve newly discovered evidence that was not available at the first suppression hearing.

People v. Jones, 219 Ill.2d 1, 845 N.E.2d 598 (2006) Where a cause is remanded for a new trial due to trial error, collateral estoppel bars relitigation of a pretrial ruling that was not raised on appeal, unless defendant offers additional evidence or there are special circumstances. Special circumstances include those in which the refusal to consider an issue would create a manifest injustice, such as where: (1) defendant was denied an opportunity to litigate the issue in the first appeal, (2) appellate review was precluded by an acquittal, or (3) denial of the motion to suppress could not have been raised on appeal because the statements which defendant sought to suppress were not used by the prosecution in the original trial.

Where defendant was clearly aware that two statements admitted at his first trial had been factors in his conviction, and could have appealed the denial of the motion to suppress in his first appeal, the failure to raise the issue warranted application of the collateral estoppel doctrine. Thus, upon remand defendant was precluded from relitigating the denial of the motion to suppress.

People v. Colon, 225 Ill.2d 125, 866 N.E.2d 207 (2007) Because probation revocation is governed by a lower standard of proof than a criminal trial, collateral estoppel does not preclude litigation of a probation revocation petition after defendant has been acquitted in a criminal trial based on the same conduct.

In re Christopher K., 217 Ill.2d 348, 841 N.E.2d 945 (2005) The "law-of-the-case" doctrine

does not prohibit the State from filing a motion for extended juvenile jurisdiction after a reviewing court has affirmed the trial court's denial of a motion for discretionary transfer for adult prosecution.

People v. Klepper, 234 Ill.2d 337, 917 N.E.2d 381 (2009)

Where defendant previously moved to dismiss the appeal on the ground that the trial court lacked authority to grant the State's motion to amend the order that was to be appealed, and that motion was denied, the denial became the law of the case. Thus, defendant could not renew the argument in his brief.

People v. Aleman, 281 Ill.App.3d 991, 667 N.E.2d 615 (1st Dist. 1996) The Illinois constitutional provision on double jeopardy (Art. I, §10) does not provide greater protection than the double jeopardy clause of the United States Constitution.

People v. Zegiel, 179 Ill.App.3d 649, 534 N.E.2d 664 (2d Dist. 1989) Collateral estoppel bars a party from relitigating an issue of ultimate fact which was decided in a valid, final judgment. A party asserting collateral estoppel must show that: (1) the issue previously adjudicated is identical to the question presented in the subsequent action, (2) a final judgment on the merits was entered in the prior case, and (3) the party against whom estoppel is directed was a party to the prior litigation.

People v. Rodriguez, 355 Ill.App.3d 290, 823 N.E.2d 224 (2d Dist. 2005) Although res judicata would ordinarily bar a claim that had been decided on direct appeal, fundamental fairness required that res judicata be relaxed where the law authorizing a conviction had changed.

People v. Moreno, 319 Ill.App.3d 445, 744 N.E.2d 906 (1st Dist. 2001) The State was not collaterally estopped from prosecuting defendant for the aggravated battery of her seven-month-old nephew, although in juvenile wardship proceedings involving defendant's own children it had been determined that the nephew's injuries had been inflicted accidentally. "Important public policy reasons" precluded application of the collateral estoppel doctrine.

In the wardship proceeding, the ultimate issue was whether the minor children of defendant were abused due to defendant's involvement in the injury to her nephew. In the criminal proceeding, by contrast, the ultimate issue was whether defendant was criminally culpable for the injuries to the nephew. Application of the collateral estoppel doctrine would be inappropriate in light of the "very real" differences in the purposes and goals of the civil proceeding and the criminal proceeding. The juvenile proceeding did not afford the State a forum in which to litigate whether defendant was criminally culpable.

People v. Slywka, 365 Ill.App.3d 34, 847 N.E.2d 780 (1st Dist. 2006) Where as a juvenile defendant was acquitted of attempt murder, collateral estoppel precluded the State from charging him with intentional murder when the victim died eight years later. Where a valid, final judgment determines an issue of ultimate fact, the collateral estoppel doctrine bars the same parties from relitigating the issue in future proceedings.

The juvenile acquittal for attempt murder did not preclude a subsequent conviction for first degree murder based on knowledge of the strong probability of death or great bodily harm, however, because that state of mind had not been at issue in the attempt murder trial.

People v. Weilmuenster, 283 Ill.App.3d 613, 670 N.E.2d 802 (2d Dist. 1996) The collateral estoppel doctrine may not be applied against a criminal defendant where doing so would violate fundamental fairness, where "additional evidence is available" since the original hearing, or where there are "peculiar circumstances." See also, People v. Cannon, 293 Ill.App.3d 634, 688 N.E.2d 693 (1st Dist. 1997) (defendant's motion to suppress should have been reconsidered where there was newly discovered evidence that same officer had tortured other suspects to obtain statements).

Fundamental fairness would be violated by application of the collateral estoppel doctrine to preclude a Kane County judge from reviewing a Cook County finding that defendant had been granted only "use" immunity. First, since the cause was transferred to Kane County after the Cook County ruling, defendant had no reason to appeal the Cook County grant of immunity. Thus, application of collateral estoppel would insulate the Cook County finding from review.

Furthermore, the record showed that defendant was "induced to testify before the grand jury under what appeared to be coercive circumstances, in a proceeding where he was without the benefit of counsel." In addition, an Assistant Attorney General led defendant to believe that he did not need to consult an attorney before testifying. Under these circumstances, the Cook County proceeding was "essentially uncontested and lacked truly adversarial safeguards," and fundamental fairness precludes application of collateral estoppel.

Also, by failing to specifically raise res judicata or collateral estoppel in the trial court, the State waived any possible application of the doctrine on appeal.

People v. Rose, 384 Ill.App. 937, 894 N.E.2d 156 (2d Dist. 2008) The trial judge did not err by considering, at defendant's sentencing, evidence which had been suppressed in an unrelated case several years earlier. Collateral estoppel was inapplicable here because the ultimate issues of fact were not identical in the two cases. In the prior case, the issue was whether the Fourth Amendment was violated by a nonconsensual search of defendant's apartment. In the instant case, the issue is whether the testimony was admissible at sentencing as evidence of defendant's prior crimes.

People v. Barash, 325 Ill.App.3d 741, 759 N.E.2d 590 (3d Dist. 2001) 720 ILCS 550/13(b), which provides that "[a] conviction or acquittal, under the laws of the United States or of any State relating to Cannabis for the same act is a bar to prosecution in this State," was intended to prevent multiple prosecutions for cannabis violations based upon the same conduct. Identical elements are not required for convictions to be based on the same "act."

Because defendant's Arizona conviction for illegally conducting an enterprise was clearly based on the same act for which defendant was being prosecuted in Illinois, prosecution of the Illinois charges was barred.

People v. Batterman, 355 Ill.App.3d 766, 824 N.E.2d 314 (3d Dist. 2005) Defendant was separately charged in two counties with fleeing and eluding the police following a police chase that began in one county and ended in another. Defendant pled guilty to the charges in one county and then filed a motion to dismiss the charges in the other county based on double jeopardy. Dismissal was proper because defendant drove from one county to another without interruption in a single, continuous act that constituted only one offense.

People v. Brener, 357 Ill.App.3d 868, 830 N.E.2d 692 (2d Dist. 2005) A one-hour, nonstop, alcohol-impaired drive through three counties constituted a single act, without regard to the

time and distance which defendant drove. "[T]he prohibition of double jeopardy cannot be avoided by 'dividing a single crime into a series of temporal or spatial units.'"

The court rejected the argument that driving through three counties should be construed as multiple acts because a person was killed in one county. "Counties are not sovereign entities[,] but rather are subordinate government instrumentalities" that are equally subordinate to the State double-jeopardy prohibition. "[A]s equal, subordinate instrumentalities of Illinois, the counties must coordinate their efforts to prosecute an offender where that prosecution arises from the same act."

Because DUI is a lesser included offense of aggravated DUI, defendant's guilty plea to DUI in Winnebago County precluded a subsequent prosecution in Jo Davies County for aggravated DUI based on the same act of driving while intoxicated.

People v. Caban, 318 Ill.App.3d 1082, 743 N.E.2d 600 (1st Dist. 2001) A plea agreement which embodies a sentence that cannot legally be imposed is void ab initio and must be vacated. Because the trial court is required to vacate such a plea, double jeopardy principles do not preclude a trial. Furthermore, due process did not require that defendant receive the benefit of a plea bargain for an unauthorized sentence

People v. McCaskill, 298 Ill.App.3d 260, 698 N.E.2d 690 (5th Dist. 1998) Where the trial court entered an unauthorized order requiring an indigent defendant to provide pretrial community service as payment for appointed counsel, the fact that defendant performed part of the service did not preclude imposition of a sentence after a conviction was entered. The double jeopardy clause was inapplicable; the invalid work order could not be construed as "punishment" for an offense, but was instead an independent, unauthorized order.

Cumulative Digest Case Summaries **§17-1**

Bravo-Fernandez et al v. United States, ___ U. S. ___, 137 S.Ct. 352, ___ L.Ed.2d ___ 2016) (No. 15-537, 11/29/16)

1. U.S. Supreme Court double jeopardy precedent holds that once an issue has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in any future lawsuit. **Ashe v. Swenson**, 397 U. S. 436 (1970). The defendant has the burden to demonstrate that the issue which is sought to be relitigated was actually decided by a prior jury's verdict.

In **United States v. Powell**, 469 U. S. 57, the court held that the defendant could not meet this burden when the jury returned irreconcilably inconsistent verdicts on the issue in question. The **Powell** court stressed that the doctrine of issue preclusion is based on the presumption that the jury acted rationally in returning verdicts, and that such a presumption cannot be indulged where verdicts are irreconcilably inconsistent.

However, the **Powell** rule does not apply where the jury acquits on one count and is unable to reach a verdict on another count. **Yeager v. United States**, 557 U.S. 110 (2009). Under such circumstances, the acquittal has preclusive force because the hung count is not inconsistent with an acquittal on another count, but merely represents the jury's failure to decide anything concerning one count.

2. Defendants were indicted on federal charges of bribery, conspiracy to commit bribery, and traveling in furtherance of bribery. The only contested issue at trial was whether the offense of bribery had been committed, as there was a dispute whether the statute in question

covered defendants' conduct.

The jury acquitted defendants on the conspiracy and travel counts but convicted them of bribery. On appeal, the U.S. Court of Appeals vacated that conviction on the ground that the jury instructions permitted the jury to convict on a "gratuity" theory although the statute covered only "*quid pro quo*" bribery. The cause was remanded for retrial on the bribery charge.

On remand, defendants claimed that the double jeopardy clause prohibited retrial because they had been acquitted of charges which were based on the bribery counts and the only issue had been whether the bribery had occurred. The court rejected this argument, concluding that unless the conviction was vacated due to an insufficiency in the evidence or trial error which could have caused the apparent inconsistency in the jury's verdicts, the **Powell** rule applied.

The court noted that the defense had the burden to show that the jury actually decided that defendants did not violate the statute, and found that it was impossible to carry this burden in light of the irreconcilably inconsistent verdicts. The fact that the conviction based on the guilty verdict was subsequently overturned due to instruction error did not establish a finding by the jury that defendants did not violate the statute, particularly where there was sufficient evidence on which a properly instructed jury could have voted to convict,. Therefore, the doctrine of issue preclusion did not apply to retrial of the count on which the conviction was vacated.

Yeager v. U.S., ___ U.S. ___, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009) (No. 08-67, 6/18/09)

1. Under **Ashe v. Swenson**, 397 U.S. 436 (1970), an issue of ultimate fact that has been determined by a valid and final judgment of acquittal cannot be relitigated in a second trial for a separate offense. To determine what issues the acquittal necessarily decided, courts should examine the entire record of the prior proceeding including the pleadings, evidence, charge, and other relevant material, to determine whether a rational jury could have grounded the acquittal on an issue other than that which the defendant seeks to foreclose from consideration in a second trial.

2. Where the defendant was acquitted of fraud in the first trial, but the jury could not reach a verdict on insider trading and money laundering counts, a second trial would be precluded only if the acquittal for wire fraud necessarily involved determination of an issue that was necessary to obtain a conviction on the remaining charges. The court stressed that only the issues required for the acquittal were in question – the jury's inability to reach a verdict on some counts is a "nonevent" in terms of precluding issues from being considered at the second trial. In other words, "the consideration of hung counts has no place in the issue-preclusion analysis."

3. Because the lower court did not consider whether the acquittal for fraud necessarily rested on an issue which would be required to convict at a second trial for inside trading and money laundering, the cause was remanded for further consideration.

People v. Hopkins, 235 Ill.2d 453, ___ N.E.2d ___ (2009) (No. 106683, 12/17/09)

Collateral estoppel bars relitigation of an issue which has been decided in a prior case, and applies when: (1) a party participates in two separate and consecutive cases arising from separate causes of action, and (2) some controlling fact or question material to determination of both causes has been adjudicated against that party in the former case by a court of competent jurisdiction. Collateral estoppel does not apply to multiple direct appeals after the cause has been remanded to the trial court – as there is but one cause of action.

Furthermore, the collateral estoppel doctrine requires a final judgment on the merits

in the prior adjudication. There is no final judgment where a single cause of action is considered at different stages of the appellate process. (See also **APPEAL**, §2-6(a) & **SEARCH & SEIZURE**, §§44-4(b), 44-6(d)).

(Defendant was represented by Assistant Defender Doug Hoff, Chicago.)

People v. Runge, 234 Ill.2d 68, 917 N.E.2d 940 (2009)

"Judicial estoppel" is an equitable doctrine which can be invoked where the party to be estopped: (1) has taken factually inconsistent positions in separate judicial or *quasi* judicial proceedings, (2) intended for the trier of fact to accept the truth of the facts alleged, and (3) succeeded in receiving some benefit in the first proceeding. The "judicial estoppel" doctrine does not apply where a change in a party's position is justified by new evidence which comes to light after the first proceeding was initiated. "[T]he justification for the implication of judicial estoppel is at best uncertain where a party changes its position after the previous proceedings due to the discovery of new evidence," because the party which changed its position did not act in bad faith.

The "judicial estoppel" doctrine did not apply where the State filed and then withdrew a sexually violent persons petition, and subsequently claimed in a capital murder trial that defendant was capable of conforming his conduct to the law. (See also **JURY**, §32-5(a)).

People v. Anderson, 2013 IL App (2d) 121346 (No. 2-12-1346, 10/3/13)

Collateral estoppel bars litigation of an issue that has been fairly and completely resolved in a prior proceeding. The prerequisites to applying collateral estoppel are: (1) an identity of issues; (2) a final judgment on the merits in the prior proceeding; and (3) that the party against whom estoppel is asserted was a party, or is in privity with a party, in the prior proceeding. Even where these criteria are met, collateral estoppel should not be applied unless it is clear that doing so would not be unfair to the party to be estopped.

Where the prior proceeding is a summary suspension of a defendant's driving privileges, there is a compelling policy reason against applying collateral estoppel. The legislature has directed that license suspension proceedings are to be swift and of limited scope. Giving suspension proceedings preclusive effect would undermine this legislative purpose. The practical effect would be to require live witness testimony rather than reliance on sworn police reports. The bar against reliance on collateral estoppel exists regardless of whether there was in fact a full and fair opportunity to litigate in the summary suspension proceeding, does not depend on the nature of the subsequent cause of action, and applies to both parties.

The circuit court rescinded the summary suspension of defendant's driving privileges, finding that there was no probable cause for defendant's arrest. In a prosecution of defendant for DUI, the court subsequently granted defendant's motion to quash arrest and suppress evidence on the ground that defendant's arrest was not supported by probable cause, based on the same evidence presented at the summary-suspension proceeding. After the motion was granted, the Appellate Court reversed the order of rescission, finding defendant's arrest was supported by probable cause.

On appeal from the order granting the motion to suppress, the Appellate Court refused to reverse the trial court's order granting the motion on the ground that the sole issue on the motion, probable cause to arrest, was decided adversely to defendant in the summary suspension appeal. The collateral estoppel doctrine was inapplicable where the prior action was a summary suspension proceeding. The Appellate Court did, however, find probable cause for defendant's arrest based on the testimony of the arresting officer at the hearing on the

motion to suppress.

People v. Brown, 2015 IL App (1st) 134049 (No. 1-13-4049, 6/22/15)

Defendant was prosecuted in separate trials on charges arising from a 2007 gun battle which defendant initiated with three persons. At the first trial, defendant was convicted of aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm for shooting at Terrell Spencer, and was also convicted of two counts of aggravated discharge of a firearm for shooting in the direction of Michael Dixon and Jarrett Swift. However, defendant was granted a directed verdict on charges of attempt murder, aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm relating to the shooting of Mycal Hunter, a bystander who was struck in the neck by a bullet. The trial court stated that there was insufficient evidence to show that defendant fired the shots which struck Hunter.

After the first trial was completed, Hunter died. Defendant was then tried for first degree murder based on two counts of knowing murder and five counts of felony murder predicated on the five felony convictions which he received in the first trial for offenses committed against Spencer, Dixon and Swift.

The court rejected arguments that double jeopardy and collateral estoppel barred a trial for murder after defendant was acquitted in the first trial of offenses against the same person.

1. The Illinois and Federal constitutions provide that no person shall be put twice in jeopardy for the same offense. In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. Entry of a directed verdict is an "acquittal" for double jeopardy purposes where the basis for the verdict is insufficient evidence to establish some or all of the essential elements of the crime.

Illinois statutory law also provides that a prosecution is barred if the defendant was formerly prosecuted for the same offense based on the same facts and the prior prosecution resulted in an acquittal or a determination that the evidence was insufficient to warrant a conviction. 720 ILCS 5/3-4(a)(1). A prosecution for a different offense is barred where a former prosecution was for an offense that involved the same conduct unless each prosecution requires proof of a fact not required for the other or "the offense was not consummated when the former trial began." 720 ILCS 5/3-4(b)(1).

The court held that §3-4(b)(1) embodies an exception to double jeopardy principles recognized in **Diaz v. United States**, 223 U.S. 442 (1912), where the United States Supreme Court found that a subsequent trial is permissible where at the time of the first trial, the prosecution could not have proceeded on the charge brought in the subsequent trial because additional facts necessary to sustain that charge had not yet occurred.

Because a murder prosecution cannot commence until the victim's death has occurred, the court concluded that the **Diaz** exception and §3-4(b)(1) applied. Thus, double jeopardy was not violated where defendant was prosecuted for murder after the decedent's death although he had been acquitted of related offenses at a trial which occurred while the decedent was still alive.

2. In a criminal context, collateral estoppel is a component of double jeopardy. The collateral estoppel doctrine holds that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a subsequent lawsuit. A party who seeks to invoke collateral estoppel must show that the issue was raised and litigated in a prior proceeding, determination of the issue was a critical and necessary part of the final judgment in that proceeding, and the issue sought to be precluded in the later trial is the same as the issue decided in the prior trial. Where the defendant claims

that a previous acquittal bars a subsequent prosecution for a related offense, the collateral estoppel rule requires a court to examine the record of the prior proceeding and determine whether a rational jury could have grounded its verdict on an issue other than the one which the defendant seeks to foreclose from consideration.

A directed verdict in favor of the defendant constitutes an "acquittal" where the verdict was based on a finding that there was insufficient evidence concerning an essential element of the crime. Thus, the directed verdict in the first trial has preclusive effect under the collateral estoppel doctrine to the extent that it represented a determination that there was insufficient evidence to sustain an element of a charged offense.

Because intent to kill is an element of attempt murder, the directed verdict on attempt murder in the first trial precluded relitigation concerning whether defendant intended to kill the decedent. Thus, in the second trial the State was estopped from prosecuting defendant for intentional first degree murder.

The acquittal for attempt murder did not preclude a subsequent prosecution for first degree murder based on knowledge that the shooting created a strong probability of death or great bodily harm. However, such charges could not be brought in the second trial because in the first trial, defendant was acquitted of charges (aggravated battery, aggravated battery of a firearm, and aggravated discharge of a firearm) which required a knowing mental state and which were directed toward Hunter. Because the acquittals on these offenses were based on the trial court's finding that there was insufficient evidence to show that defendant knowingly caused Hunter's injuries, the collateral estoppel doctrine precluded a subsequent prosecution for knowing murder.

However, the acquittals for attempt murder and offenses based on knowledge did not preclude a subsequent prosecution for felony murder predicated on the convictions obtained in the first trial against persons other than Hunter. Felony murder does not require a particular mental state, but only that the defendant was committing a forcible felony when he committed the acts which resulted in death. Furthermore, under the Illinois "proximate cause" theory, liability for felony murder attaches for any death which proximately results from unlawful activity initiated by the defendant, even if the killing was performed by the intended victim of the crime. Thus, where defendant was convicted of five felonies for initiating a shootout with individuals other than Hunter, and Hunter died in the course of those felonies, defendant could be prosecuted for felony murder whether or not he fired the shot which hit Hunter.

3. The court noted, however, that the single act of shooting Hunter could not support three separate felony murder convictions. The court vacated two counts of felony murder, affirmed the conviction for felony murder predicated on aggravated battery with a firearm directed against Spencer, and remanded the cause for re-sentencing.

People v. Cordero, 2012 IL App (2d) 101113 (No. 2-10-1113, 2/10/12)

The double jeopardy clause prohibits a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction, and multiple prosecutions for the same offense. However, double jeopardy protection is triggered only if there has been an event which terminates the original jeopardy from the first proceeding. The original jeopardy is not terminated where the jury fails to reach a verdict at the first trial, or the defendant is convicted but the trial court grants a new trial due to trial error:

> [W[here the trial court sets aside a conviction, based on trial error, double jeopardy does not bar retrying the defendant – regardless of whether the evidence at the first trial was legally

> sufficient. Whatever the strength of the evidence at the original trial, the new trial cannot put the defendant in jeopardy for a *second* time – for the simple reason that he is still in jeopardy for the *first* time.

Where the defendant was convicted of aggravated sexual assault, but the trial court granted defendant's post-trial motion and ordered a new trial, the original jeopardy was not terminated. Therefore, a new trial would not subject the defendant to double jeopardy even if the evidence at the first trial was legally insufficient. Therefore, the trial court properly denied defendant's motion to dismiss the charge on the ground that the evidence presented at the first trial was insufficient to satisfy the reasonable doubt standard.

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

The collateral estoppel doctrine bars relitigation of an issue already decided in a prior case. The doctrine has three requirements: (1) the court rendered a final judgment in the prior case; (2) the party against whom the estoppel is asserted was a party or in privity with a party in the prior case; and (3) the issue decided in the prior case is identical to the one represented in the instant case.

Erroneous judgments as well as correct ones are protected by the rule of collateral estoppel. The remedy for a legally incorrect or logically inconsistent decision is an appeal. The error, no matter how egregious, cannot be raised in a collateral proceeding.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

People v. Howard, 2014 IL App (1st) 122958 (No. 1-12-2958, 3/17/14)

1. The double jeopardy clause provides protection against: (1) a second prosecution after an acquittal; (2) a second prosecution after a conviction; and (3) multiple punishments for the same offense. If double jeopardy protection has attached, a defendant may not be subjected to a second prosecution after a court-decreed acquittal, even if the acquittal was based on erroneous grounds. Thus, double jeopardy has been held to prevent second prosecutions where acquittals were based on the court's mistaken understanding of the evidence necessary to sustain a conviction or the statute defining the requirements for a conviction.

2. Defendant was charged with unlawful possession of a controlled substance and four counts of unlawful use of a weapon for knowingly possessing firearms or firearm ammunition after having been convicted of a felony. (720 ILCS 5/24-1.1(a)). All of the UUW counts were based on the same prior felony conviction. Counts IV and VI were based on possession of a firearm, and Counts V and VII were based on possession of the ammunition inside that firearm.

Counts IV and V also contained a notice that, pursuant to 720 ILCS 5/24-1.1(e), the State would seek enhanced sentencing because at the time of the offense, defendant was on parole or mandatory supervised release. Section 24-1.1(e) provides that a violation of §24-1.1(a) by a person who is on parole or mandatary supervised release constitutes a Class 2 felony carrying a sentence of not less than two years or more than 14 years if a prison sentence is imposed.

At the end of the trial, the trial court entered an acquittal on Counts IV and V, finding that the State had failed to prove beyond a reasonable doubt that defendant was a parolee. At the sentencing hearing for the remaining counts, the State asked the trial judge to "revisit" the acquittal because defendant's status as a parolee was a sentencing enhancement that need not be proven at trial. The trial court agreed and "revised" its findings to enter convictions on all four UUW counts.

On appeal, the State conceded that double jeopardy principles prevented the trial court from "revisiting" the acquittals, and that the convictions on Counts IV and V must be vacated. The Appellate Court also concluded that on resentencing for the two counts of UUW on which the trial court had not entered acquittals, the trial court was precluded from imposing enhanced sentences based on defendant's parole status. The Appellate Court found that the trial court had acquitted defendant of the Class 2 offense of unlawful use of a weapon based on his status as a parolee, and that allowing the State to apply the same factor to the remaining counts would amount to a second prosecution even if the acquittal was based on a misunderstanding of the law.

The court stressed that it was not deciding whether the defendant's parole status is an "element" of Class 2 unlawful use of a weapon and, if so, whether that element must be proven at trial. Instead, the basis of the holding was that once the trial court entered an acquittal due to the State's failure to satisfy the reasonable doubt standard, the State was precluded from revisiting that issue for related counts of UUW on which acquittals had not been entered.

(Defendant was represented by Assistant Defender Michael Gomez, Chicago.)

People v. Jackson, 2015 IL App (1st) 123695 (No. 1-12-3695, 7/27/15)

In a bench trial, defendant was found guilty of first degree murder, but mentally ill. On appeal, the Appellate Court reversed the conviction and remanded for a new trial because the trial court abandoned its role as a neutral arbiter by adopting a prosecutorial role when questioning an expert witness and by relying on matters based on private knowledge that was outside the record. On remand, defendant argued that double jeopardy and collateral estoppel principles limited the State to seeking a finding of guilty but mentally ill. The trial court rejected defendant's argument, and he filed an interlocutory appeal.

The Appellate Court rejected defendant's argument.

1. The double jeopardy clauses of the United States and Illinois constitutions prohibit placing a person twice in jeopardy for the same offense. Double jeopardy principles prohibit a retrial for the purpose of affording the prosecution an opportunity to supply evidence which it failed to produce in the first proceeding.

Thus, where the evidence at trial was insufficient to sustain a conviction, the State is barred by double jeopardy from retrying the defendant. However, double jeopardy does not prohibit the retrial of a defendant whose conviction is set aside because of an error in the proceedings leading to the conviction. The court noted that in his initial appeal defendant did not challenge the sufficiency of the evidence.

A criminal defendant who raises an insanity defense and who is found guilty of the offense beyond a reasonable doubt, but who fails to prove that he was insane, may be found guilty but mentally ill if he proves by a preponderance of the evidence that he had a mental illness. A person found guilty but mentally ill is subject to any sentence which could have been imposed on a defendant convicted of the same offense without a finding of mental illness. However, DOC is required to make periodic examinations and provide adequate treatment of defendant's mental illness. In other words, an offender found guilty but mentally ill is no less guilty than one who is simply found guilty, but DOC has additional responsibilities concerning the mental illness.

The court concluded that where the first conviction was reversed based on trial errors and not due to insufficiency of evidence, the double jeopardy clause does not preclude the State from seeking a guilty verdict on retrial.

2. The doctrine of collateral estoppel precludes relitigation of issues that were resolved in an earlier case. The doctrine applies when: (1) a party participates in two separate

proceedings arising on different causes of action, and (2) some controlling fact or question material to the determination of both causes was adjudicated against that party in the former case. The collateral estoppel doctrine applies only where a final judgment was rendered in the prior case, the party against whom estoppel is asserted was a party or in privity with a party in the prior case, and the issue decided in the prior case was identical to the issue presented in the instant case.

The court concluded that the doctrine of collateral estoppel does not apply here because there was only one cause of action - the murder of a particular person - and because the prosecution is ongoing and there has not been a final adjudication on the merits.

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113, 2010 WL 2675047 (1st Dist. 2010)

Collateral estoppel is a bar to relitigation of a claim only where there is a mutuality of parties. The defendants could not use a prior judicial finding against the State where the finding was entered in a post-conviction proceeding and the defendants were not a party to that proceeding.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Ventsias, 2014 IL App (3d) 130275 (No. 3-13-0275, 7/1/14)

1. Double jeopardy precludes a second prosecution for the same offense after an acquittal or conviction. This protection only applies if the defendant was placed in jeopardy during the earlier proceedings, which depends on the point at which jeopardy attached. In a guilty plea proceeding, jeopardy attaches when the trial court accepts the guilty plea, and only attaches to the offenses to which defendant pled guilty. Additionally, double jeopardy does not bar reprosecution of a pled charge if the plea proceeding is later terminated for a proper reason.

2. Here, a jury convicted defendant of predatory criminal sexual assault, but acquitted him of aggravated criminal sexual abuse. On appeal, his conviction was reversed and remanded for a new trial. Prior to the new trial, the State and defendant entered a plea agreement where in exchange for defendant's guilty plea to the abuse charge, the State would nol pros the assault charge.

The court accepted defendant's plea after admonishing him that his reprosecution on the abuse charge would have been barred by double jeopardy. Pursuant to the plea agreement, the State nol-prossed the assault charge. But prior to sentencing, the court expressed concerns about the propriety of defendant pleading guilty to the abuse charge. In response, the State moved to vacate the guilty plea. At a hearing on the State's motion, defendant said he no longer wanted to plead guilty. The court vacated the plea and reinstated the assault charge. Following a trial, defendant was convicted of the assault charge.

3. On appeal, defendant argued that double jeopardy barred his second trial on the assault charge. Defendant argued that jeopardy had attached to and he had been acquitted of the assault charge when the State nol-prossed the charge after defendant pled guilty to the abuse charge. Defendant further argued that the trial court improperly vacated the guilty plea to the abuse charge since defendant validly waived his double jeopardy rights to that charge.

4. The Appellate Court rejected defendant's arguments and held that double jeopardy did not bar retrial on the assault charge. Jeopardy never attached to the assault charge at the plea hearing because defendant never pled guilty to that charge. Instead, the State simply nol-prossed that charge.

Even if jeopardy had attached to the assault charge, the trial court properly vacated the plea when it realized defendant could not enter a valid plea to the abuse charge since he

had been acquitted of that charge. A defendant cannot validly waive the double jeopardy bar on reprosecution following an acquittal.

Defendant's conviction on the assault charge was affirmed.

People v. Villafuerte-Medrano, 2012 IL App (2d) 110773 (No. 2-11-0773, 12/19/12)

1. An order is "void" if entered by a court which lacks jurisdiction or which exceeds its jurisdiction by entering an order beyond its inherent power. An order is void only where jurisdiction is lacking.

By contrast, an order erroneously entered by a court which has jurisdiction is merely "voidable." Once jurisdiction is acquired, it is not lost because the court makes a mistake in determining the facts, the law, or both.

2. Where the court has subject matter and personal jurisdiction, it is not divested of jurisdiction because it accepts a guilty plea which violates double jeopardy. Thus, a conviction based on such a plea is voidable rather than void. To raise a double jeopardy challenge to such a plea, the defendant is required to file a timely motion to withdraw the plea. Otherwise, the entry of the guilty plea waives the double jeopardy challenge.

3. The court acknowledged that under federal constitutional law, a guilty plea does not waive a double jeopardy challenge where the double jeopardy violation can be established on the face of the charge. The court concluded that even in that case, however, the defendant must preserve the issue on appeal. In other words, a court may not review a double jeopardy claim that has not been preserved for appeal.

Thus, the conviction based on defendant's guilty plea was voidable rather than void. Because defendant failed to file a timely motion to withdraw the plea, the court could not consider the claim that the conviction violated double jeopardy.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Wright, 2013 IL App (4th) 110822 (No. 4-11-0822, 4/17/13)

Collateral estoppel, or issue preclusion, prevents relitigation of issues of law or fact that have been previously litigated and decided in an action involving the same parties or their privies.

On direct appeal, the Appellate Court found that the trial court's isolated mention of an invalid aggravating factor was not plain error because defendant's sentencing hearing was fair despite the error.

That finding collaterally estopped defendant from claiming in a post-conviction petition that trial and appellate counsel were ineffective for failing to preserve and fully brief the error. Defendant could succeed on those claims only if counsels' deficient performance caused him prejudice. Defendant suffered no prejudice if his sentencing hearing was fair.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Young, 2013 IL App (1st) 111733 (No. 1-11-1733, 12/6/13)

In 2004, defendant entered fully negotiated guilty pleas to first degree murder and attempt murder and received negotiated consecutive sentences of 25 and 10 years. In 2011, defendant's post-conviction petition alleging ineffective assistance of trial counsel was denied after a third-stage hearing. On appeal, defendant argued for the first time that his sentences were void because they did not include the mandatory statutory firearm enhancement of 20 years for personally discharging a firearm or 25 years to natural life if great bodily harm resulted from discharging a firearm. Defendant argued that he should be allowed to withdraw

his plea and plead anew.

The court concluded that defendant was estopped from challenging the sentence because it had been freely negotiated and provided him with a benefit in that he received a far lower sentence than was required under the law. The court also stressed that the State would be disadvantaged at a trial by the passage of time and the possible unavailability of witnesses to testify.

The doctrine of judicial estoppel applies where a party takes inconsistent positions in separate judicial or quasi-judicial proceedings, intended that the trier of fact accept the truth of the facts alleged at the prior hearing, and succeeded in asserting the first position and consequently receiving some benefit. The court acknowledged that Illinois courts have never applied judicial estoppel where criminal defendants entered a fully negotiated plea agreement and then challenged the sentence as too lenient. However, courts from other jurisdictions have recognized that the State is prejudiced under similar circumstances where a guilty plea is vacated years after it was entered, and have estopped defendants from enjoying the benefits of a negotiated plea agreement while challenging its validity.

Here, defendant voluntarily entered a plea calling for negotiated sentences totaling 35 years, and nearly ten years later claimed that the sentences should have been at least 76 years. The court concluded that the doctrine of judicial estoppel applied because the State could not be restored to its original position in that witnesses may have become unavailable for trial. The court also noted that defendant did not allege that any fraud or misrepresentation had occurred in the original plea agreement.

The court concluded:

> Defendant has not cited, nor has our research disclosed an Illinois case in which a defendant has been permitted to withdraw his plea entered nearly a decade earlier and some 13 years after the offenses occurred, because the sentence was not harsh enough. It defies logic to suggest that defendant actually wants to serve a longer prison sentence than the improper sentence he received. . . . Rather, defendant . . . is using the improper sentence as a vehicle to withdraw his guilty plea, 10 years after its entry, and go to trial. Defendant's belated challenge could harm the State because it might endure hardship if forced to prosecute the case, given the passage of time and the recollection of witnesses.

The order denying the post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

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§17-2
When Jeopardy Attaches

Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978) Jeopardy, as applicable to the States, attaches when the jury is impaneled and sworn. In nonjury trials, jeopardy does not attach until the first witness is sworn.

People v. Bellmyer, 199 Ill.2d 529, 771 N.E.2d 391 (2002) Jeopardy attaches in a jury trial

once the jury has been impaneled and sworn. In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. Jeopardy attaches on a guilty plea when the plea is accepted by the trial court.

A stipulated bench trial is tantamount to a guilty plea if defendant stipulates not only to the evidence, but also to its sufficiency to convict. A stipulated bench trial is not tantamount to a guilty plea where defendant presents a defense. Where the parties stipulated to the evidence on insanity, but contested whether the evidence was sufficient to prove an insanity defense, jeopardy attached at the time that the stipulations were presented to the judge.

People v. Hurlbert, 41 Ill.App.3d 300, 354 N.E.2d 652 (4th Dist. 1976) Defendant was indicted for aggravated battery and, after the jury was sworn, moved to dismiss the indictment because it failed to allege physical harm. The trial judge found that although the indictment was not sufficient to charge aggravated battery, it was sufficient to charge simple battery. The judge ordered the State to proceed with trial on that charge.

After the State's motion to amend the indictment was denied, the prosecutor refused to present any evidence and said he would file a notice of appeal. The trial judge then dismissed both counts of the indictment on the ground that the State had failed to proceed.

Defendant was subsequently reindicted, but that indictment was dismissed on the basis of double jeopardy.

The dismissal was affirmed. Jeopardy had attached at the first trial when the jury was sworn and the discharge was not because of "manifest necessity."

Cumulative Digest Case Summaries **§17-2**

Martinez v. Illinois, ___ U.S. ___, ___ S.Ct. ___, ___ L.E2d ___ (2014) (No. 13-5967, 5/27/14)

1. For purposes of the double jeopardy clause, jeopardy attaches when the jury is empaneled and sworn. **Crist v. Bretz,** 437 U.S. 28 (1978). The Illinois Supreme Court erred by finding that jeopardy attaches with the swearing of the jury only if, based on the facts of the particular case, the defendant is "at risk of conviction." Instead, **Bretz** established a "bright-line" which precludes the sort of case-by-case approach adopted by the Illinois Supreme Court.

Thus, at defendant's trial for aggravated battery and mob action, jeopardy attached when the jury was sworn although the State refused to make an opening statement or present witnesses.

2. Once jeopardy has attached, the entry of an acquittal implicates the double jeopardy clause and bars a second trial. An "acquittal" is defined as any ruling that the prosecution's evidence is insufficient to establish criminal liability for an offense. Whether a defendant has been acquitted is determined not by the form of the judge's action, but by whether the ruling, whatever its label, represents a resolution of some or all of the factual elements of the crime.

After obtaining several continuances to find two witnesses, the prosecution declined to participate in defendant's trial. Defense counsel moved for directed findings of not guilty on both counts, and the trial court granted the motion. Under these circumstances, the ruling constituted a "textbook acquittal" because it was "a finding that the State's evidence [could not] support a conviction." Because an acquittal was entered after jeopardy had attached, a second trial was barred.

This result did not change because the State informed the court before the jury was sworn (but after *voir dire*) that it did not intend to participate in the trial. The trial judge had

repeatedly granted continuances so the State could attempt to find its witnesses, and on the day of trial conducted *voir dire* but delayed swearing the jury to give the State more time. Furthermore, before the jury was sworn the trial judge told the prosecutor that the State could move to dismiss the case, which would not have implicated the double jeopardy clause. Instead, the State participated in the selection of jurors, failed to seek dismissal before the jury was sworn, and elected not to participate in the trial. Under these circumstances, fairness to the prosecution and the public does not require modification of the bright-line rule that jeopardy attaches when the jury is sworn.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Martinez, 2013 IL 113475 (No. 113475, 4/18/13)

To trigger the protections of the double jeopardy clause, there must first be an attachment of jeopardy. Generally, in a jury trial, jeopardy attaches when a jury is empaneled and sworn. But in assessing whether jeopardy has attached, rules should not be applied mechanically when the interests they protect are not endangered and when their mechanical application would frustrate society's interest in enforcing its criminal laws. The overriding inquiry should be whether the defendant was actually in danger or at risk of being found guilty of any offense.

The State participated in jury selection after the court denied the State's oral motion for a continuance of the trial because two of its witnesses were not present. Before the jury was sworn, the State presented a written motion for a continuance. When the court denied that motion, the State indicated it would not participate any further in the proceedings. The jury was sworn, the State declined to present any evidence, and the court granted the defense motion for a directed acquittal.

Under the "unique set of facts presented here," the Illinois Supreme Court held that jeopardy did not attach when the jury was sworn. Defendant was never at risk of a conviction when the State indicated it would not participate before the jury was sworn. The defendant's interest in retaining a chosen jury was not implicated where there was no trial to be completed by that tribunal. Because defendant was not placed in jeopardy, there was no true acquittal.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Cabrera, 402 Ill.App.3d 440, 932 N.E.2d 528 (1st Dist. 2010)

The double jeopardy clause bars a second prosecution for the same offense after conviction, as well as multiple punishments for the same offense.

The court accepted defendant's negotiated plea of guilty to a charge of armed robbery and the prosecution nol-prosed the remaining counts. Before the court imposed the agreed sentence, the court *sua sponte* vacated the plea, over defendant's objection, when the defendant indicated that he was innocent. The defendant was subsequently tried and convicted on all counts and received a term of imprisonment substantially greater than his agreed sentence. On direct appeal, the Appellate Court found that the circuit court did not err in vacating the plea due to defendant's claim of innocence. Defendant then filed a post-conviction petition alleging a double jeopardy violation occurred when he was tried following his guilty plea.

1. The Appellate Court held that reinstatement of the nolled charges was not barred by double jeopardy as jeopardy attached at the plea hearing only to the charge to which defendant pleaded guilty.

2. With respect to the armed robbery charge, the Appellate Court agreed that jeopardy attached when the court accepted defendant's plea of guilty. Defendant's guilty plea did not

bar his subsequent trial, however, because jeopardy did not terminate. The court recognized that application of the principle of continuing jeopardy to a guilty plea hearing was an issue of first impression. Citing 720 ILCS 5/3-4(a)(3), the court held that a prosecution is not barred if a former prosecution terminated properly. Because courts may reject a guilty plea where a defendant claims innocence, courts can exercise sound discretion to reject a guilty plea where a defendant claims innocence. Because termination of the guilty plea proceeding was proper, double jeopardy did not bar the subsequent prosecution of defendant.

The court affirmed the dismissal of the post-conviction petition.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Guillen, 2014 IL App (2d) 131216 (No. 2-13-1216, 11/25/14)

The trial court was in the process of accepting defendant's guilty plea and determining what sentence to impose (more or less at the same time), when the State decided that it had charged the wrong offense. The court allowed the State to *nolle pros* the current charges over defendant's objection.

When the State brought new charges, defendant moved to dismiss them on double jeopardy grounds, arguing before a new judge that the prior judge had implicitly accepted the guilty plea by discussing sentencing factors and thus jeopardy had attached. The new judge agreed and dismissed the charges.

The State appealed the trial court's dismissal. Defendant was not represented by counsel on appeal and filed no appellate brief responding to the State's arguments. The Appellate Court agreed that it could nonetheless consider the merits of the appeal, but split three ways on the rationale for doing so with no controlling opinion. The court decided 2-1 to reverse the trial court, again with no controlling opinion.

In **First Capitol Mortgage Corp. v. Talandis Construction Corp.**, 63 Ill. 2d 128 (1976), the Supreme Court set out three options available to the reviewing court when an appellee does not file a brief: (1) the court may, if justice requires, serve as an advocate for the appellee and search the record for reasons to affirm the judgment being appealed; (2) the court may decide the case on the merits if the record is simple and the issues easily decided even without an appellee's brief; or (3) the court may reverse the judgment below if the appellant's brief demonstrates *prima facie* reversible error and the record supports the appellant's contentions.

1. Justice Schostok delivered the judgment of the court reversing the trial court. Writing for herself alone, she selected the second **Talandis** option and determined that the trial court had improperly dismissed the charges on double jeopardy grounds.

Double jeopardy is violated by a second proceeding when the defendant was placed in jeopardy during the first proceeding and the first proceeding was improperly terminated. When the State *nol prosses* charges, a second prosecution is permitted if the *nol pros* occurred before jeopardy attached. If the *nol pros* occurs after jeopardy has attached, the *nol pros* generally acts as an acquittal that bars further prosecution.

In a guilty plea, jeopardy attaches when the court accepts the plea, but Illinois law has not clearly defined the point when a guilty plea has been accepted. In particular, the Illinois Supreme Court has not decided whether a trial court has accepted a plea when it has begun to accept the plea but then vacates the plea during the same hearing.

Substantial authority from other jurisdictions, however, suggests that a plea is accepted only when the trial court unconditionally accepts the plea. Thus, a trial court may vacate a guilty plea if it becomes aware of facts counseling against the plea, so long as the plea has not been accepted in a final and unconditional manner.

Based on these principles, Justice Schostok found that jeopardy had not attached when the State *nol prossed* the charges. Although defendant indicated that he wished to plead guilty, and the court admonished him about some of the consequences of his plea and began considering sentencing matters, other aspects of plea acceptance were not present here. The parties still had not agreed on the minimum punishment defendant faced and the State had not presented a factual basis. The plea hearing thus had not concluded when the State *nol prossed* the charges. Any acceptance of the plea was preliminary rather than unconditional.

Even if jeopardy had attached, the prosecution was not improperly terminated. During the plea hearing, both the State and the court realized that defendant had been improperly charged. The State's decision to *nol pros* the charges thus was not for an improper purpose and the court could properly terminate the plea proceedings, vacate the plea, and grant the State's motion without violating double jeopardy.

The trial court's dismissal of the charges was reversed.

2. Justice Zenoff agreed with the judgment reversing the trial court, but disagreed with Justice Schostok's use of the second **Talandis** option. Instead, Justice Zenoff selected the third **Talandis** option and determined that the appellant's brief showed *prima facie* reversible error.

The State argued that Supreme Court Rule 402 requires the trial court to comply certain formalities before accepting a plea. The record showed that the court did not comply with those formalities and thus the State argued that the trial had not yet accepted defendant's plea. Justice Zenoff found that this argument made a *prima facie* showing that no double jeopardy violation occurred here. Under the third **Talandis** option, that was enough to reverse the trial court's dismissal.

3. Justice Hudson dissented from the judgment reversing the trial court. He selected the first **Talandis** option and, acting as an advocate for defendant, would have found that the trial court properly dismissed the charges on double jeopardy grounds. The record showed that the trial court was beginning to pronounce sentence and therefore had already accepted the guilty plea. Jeopardy had thus attached and the trial court properly dismissed the new charges on double jeopardy grounds.

People v. Martinez, 2011 IL App (2d) 100498 (No. 2-10-0498, 10/5/11)

Whether jeopardy attached is decided based on whether defendant was placed at risk of a determination of guilt, not by mechanical application of a rule of thumb, such as whether the jury was empaneled and sworn. Jeopardy does not attach even where evidence is produced if the evidence does not inculpate the defendant.

The "acquittal" entered by the trial court was in fact a dismissal. A jury was sworn and given preliminary instructions. But before the jury was sworn, the State unsuccessfully moved for a continuance, and indicated that it would not participate in the trial as its material witnesses were absent. The court ultimately granted the defense motion for a directed finding after no evidence was presented. As there was no risk of a determination of guilt, jeopardy had not attached.

It was irrelevant that the State reneged on its agreement to the court's proposal that the jury be selected and that the State then decide, before the jury was sworn, whether to dismiss the charges or proceed with the prosecution, or that the State never moved to *nol-pros* the charges. Nor did it matter that the court did not intend that a sham trial occur. It only matters that the trial proceedings had not matured to the point that defendant was at risk of a conviction because no witnesses were sworn and the State presented no evidence.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Palen, 2016 IL App (4th) 140228 (No. 4-14-0228, 9/30/16)

1. For purposes of the double jeopardy clause, jeopardy attaches when the accused has been arraigned and the jury impaneled and sworn. Once jeopardy has attached, the defendant has a right to have his fate decided by the particular jury which has been selected. This right may be denied only where the ends of justice would be defeated by continuing the trial.

The parties selected eight jurors on the first day of proceedings. The trial court administered the oath to these eight jurors and continued the cause until the next day. The parties expected to select four jurors and two alternates the next day, but during the night the father of one of the prosecutors died.

When the proceedings resumed, the trial court ordered a mistrial *sua sponte* after noting that the remaining prosecutor had never tried a felony case. Defendant was subsequently tried and convicted of attempt residential burglary and possession of burglary tools.

On appeal, defendant claimed that he was placed in jeopardy when the trial court swore eight jurors before recessing overnight. The Appellate Court rejected this argument, citing **LaFave,** 6 Criminal Procedure §25.1(d) (4th ed. 2015), for the principle that jeopardy attaches when the "entire" jury has been selected and sworn. The court concluded that because the trial judge announced an intention to select additional jurors on the following morning, jury selection had not been completed. Where only eight jurors had been sworn, the jury had not been "empaneled and sworn."

The court also noted that it would be a better practice for the trial court to wait until the entire jury is selected before swearing any jurors. Furthermore, in this case the trial court should have consulted the prosecutor to determine whether he was able to try the case or whether there could be further assistance from the State's Attorney's office, and inquired of the parties about the possibility of suspending the proceedings until the original prosecutor was available.

2. In dissent, Justice Steigmann stated that the **LaFave** treatise misstates United States Supreme Court case law by holding that jeopardy attaches only when the entire jury is sworn. Justice Steigmann would have held that right to have the case tried by the jurors who have been selected applied once any jurors are sworn.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Ventsias, 2014 IL App (3d) 130275 (No. 3-13-0275, 7/1/14)

1. Double jeopardy precludes a second prosecution for the same offense after an acquittal or conviction. This protection only applies if the defendant was placed in jeopardy during the earlier proceedings, which depends on the point at which jeopardy attached. In a guilty plea proceeding, jeopardy attaches when the trial court accepts the guilty plea, and only attaches to the offenses to which defendant pled guilty. Additionally, double jeopardy does not bar reprosecution of a pled charge if the plea proceeding is later terminated for a proper reason.

2. Here, a jury convicted defendant of predatory criminal sexual assault, but acquitted him of aggravated criminal sexual abuse. On appeal, his conviction was reversed and remanded for a new trial. Prior to the new trial, the State and defendant entered a plea agreement where in exchange for defendant's guilty plea to the abuse charge, the State would nol pros the assault charge.

The court accepted defendant's plea after admonishing him that his reprosecution on the abuse charge would have been barred by double jeopardy. Pursuant to the plea agreement, the State nol-prossed the assault charge. But prior to sentencing, the court expressed concerns

about the propriety of defendant pleading guilty to the abuse charge. In response, the State moved to vacate the guilty plea. At a hearing on the State's motion, defendant said he no longer wanted to plead guilty. The court vacated the plea and reinstated the assault charge. Following a trial, defendant was convicted of the assault charge.

3. On appeal, defendant argued that double jeopardy barred his second trial on the assault charge. Defendant argued that jeopardy had attached to and he had been acquitted of the assault charge when the State nol-prossed the charge after defendant pled guilty to the abuse charge. Defendant further argued that the trial court improperly vacated the guilty plea to the abuse charge since defendant validly waived his double jeopardy rights to that charge.

4. The Appellate Court rejected defendant's arguments and held that double jeopardy did not bar retrial on the assault charge. Jeopardy never attached to the assault charge at the plea hearing because defendant never pled guilty to that charge. Instead, the State simply nol-prossed that charge.

Even if jeopardy had attached to the assault charge, the trial court properly vacated the plea when it realized defendant could not enter a valid plea to the abuse charge since he had been acquitted of that charge. A defendant cannot validly waive the double jeopardy bar on reprosecution following an acquittal.

Defendant's conviction on the assault charge was affirmed.

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§17-3
Dismissals and Mistrials

Serfass v. U.S., 420 U.S. 377, 95 S.Ct. 1055, 43 N.E.2d 265 (1975) When a criminal prosecution is terminated before trial without a risk of determination of guilt, jeopardy does not attach. Thus, neither an appeal by the prosecution nor a renewed prosecution constitutes double jeopardy.

U.S. v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) Following a jury verdict of guilty, the trial judge dismissed the indictment on the ground that delay between the offense and the indictment prejudiced defendant's right to a fair trial.

The Government could properly appeal from the dismissal order because a ruling in the Government's favor would not subject defendant to another trial, but would merely reinstate the guilty verdict. The Double Jeopardy Clause does not bar a Government appeal where, if errors of law are corrected, the result will simply be a reinstatement of the verdict.

Downum v. U.S., 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963) Where the judge discharged the jury because a key prosecution witness was missing, the Double Jeopardy Clause barred a subsequent trial before another jury.

Lee v. U.S., 432 U.S. 23, 97 S.Ct. 2141, 52 L.Ed.2d 80 (1977) An order granting defendant's motion to dismiss the indictment because it failed to allege the specific intent required by statute did not bar retrial under a proper indictment, even though the dismissal was granted at the close of evidence. See also, Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) (where a mistrial is required by "manifest necessity" and the "ends of public justice," retrial is not barred by double jeopardy; here, defendant could be reindicted and

retried where trial judge declared mistrial because of a defective indictment).

U.S. v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) The prosecution may appeal from trial court orders granting defense motions to terminate the trial before a verdict. Because defendant deliberately chose to seek termination of the proceedings on a basis unrelated to factual guilt or innocence (here, a claim of prejudicial preindictment delay), an appeal by the prosecution causes no injury that is cognizable under the Double Jeopardy Clause.

U.S. v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) The prosecution was precluded from a retrial where, out of a concern about preserving the privilege of government witness, the trial court erroneously ordered a mistrial sua sponte to allow the witness to confer with attorneys.

Richardson v. U.S., 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) A mistrial was declared when the jury was unable to reach a verdict; a retrial of defendant was then scheduled. The failure of a jury to reach a verdict is not an event which terminates jeopardy:

> "The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial."

Gori v. U.S., 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961) The Double Jeopardy Clause does not prevent the retrial of defendant after the judge declared a mistrial, without defendant's consent, in order to protect the rights of defendant.

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) Defendant's retrial, after the trial judge declared a mistrial because of the improper and prejudicial remarks of defense counsel in his opening statement, was not barred by double jeopardy.

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) The granting of a mistrial on defendant's motion, based upon prosecutorial misconduct, bars retrial only where the "governmental conduct in question is intended to goad the defendant into moving for a mistrial." See also, U.S. v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) (mistrial motion precipitated by defendant's desire to have excluded attorney try case); People v. Davis, 112 Ill.2d 78, 491 N.E.2d 1163 (1986) (prosecutor did not intend to provoke a mistrial); People v. Ramirez, 114 Ill.2d 125, 500 N.E.2d 14 (1986) (prosecutor error did not allow inference that he was intentionally attempting to provoke a mistrial).

U.S. v. Huang, 960 F.2d 1128 (2d Cir. 1992) Double jeopardy was violated where the State attempted to retry two defendants who had objected to an earlier mistrial motion, which was granted because a court interpreter was not properly certified.

People v. Creek, 94 Ill.2d 526, 447 N.E.2d 330 (1983) At the preliminary hearing, the trial court granted the State's motion to dismiss "with prejudice" the information charging defendant with reckless homicide. An indictment was subsequently obtained for the same offense.

The dismissal with prejudice was equivalent to a final adjudication on the merits of the case; thus, any further prosecution of defendant was barred.

People v. Milka, 211 Ill.2d 150, 810 N.E.2d 33 (2004) Dismissal of a charge during trial does not operate as an "acquittal" sufficient to preclude a felony murder conviction predicated on the dismissed charge, provided that the felony murder conviction is returned at the same trial in which the dismissal occurred. Double jeopardy protects a defendant against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. The dismissal would have barred the State from bringing a second action for the predicate offense, but that rule did not apply to the trial in which the dismissal occurred.

People v. Quigley, 183 Ill.2d 1, 697 N.E.2d 735 (1998) 720 ILCS 5/3-4, which provides that a prosecution is barred if defendant was previously prosecuted for a different offense, the previous prosecution resulted in a "conviction" or an "acquittal," and the subsequent prosecution is for an offense that was required by the compulsory joinder statute to have been brought in the prior proceeding, does not apply where the previous charge was dismissed on speedy trial grounds and therefore did not result in a "conviction" or an "acquittal."

People v. Nelson, 193 Ill.2d 216, 737 N.E.2d 632 (2000) Where defendant moves for a mistrial, double jeopardy bars retrial only if the prosecutor actually intended to cause the defense to seek the mistrial.

The record did not show that the prosecutor actually intended to cause a mistrial where the prosecutor strongly believed that the evidence in question was admissible and "actively" fought the mistrial motion. See also, People v. Adams, 316 Ill.App.3d 202, 736 N.E.2d 728 (4th Dist. 2000) (where defendant seeks to have his trial terminated without submitting the issue of guilt or innocence to the trier of fact, the double jeopardy clause applies only if the prosecution intended to "goad" defendant into requesting a mistrial); People v. Walker, 308 Ill.App.3d 435, 720 N.E.2d 297 (2d Dist. 1999) (a prosecution witness's intentional reference to evidence that the trial court has excluded should be imputed to the State, for purposes of determining whether "prosecutorial overreaching" occurred, only if the prosecutor actively aided, counseled, or "became a willing party in the error").

People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 (2000) Whether to seek a mistrial is a matter of trial strategy and is therefore left to defense counsel's discretion.

People ex rel. Roberts v. Orenic, 88 Ill.2d 502, 431 N.E.2d 353 (1981) At defendant's trial for attempt murder, he requested that the jury be instructed on self-defense. The State objected, and the trial court refused the instruction. During deliberations, the jury sent a note to the judge inquiring about self-defense, and defendant again requested the instruction. The State continued to object.

The judge indicated that he thought the self-defense instruction should have been given, but refused to give it at that point because counsel had not had the opportunity to argue self-defense. Defense counsel then moved to dismiss with prejudice "and if that is not allowed we would move for a mistrial." The judge refused to dismiss, but granted a mistrial.

The State sought to retry defendant. Defendant made a pretrial motion to bar trial on double jeopardy grounds. The judge denied the motion, and defendant sought a writ of mandamus.

A retrial would not violate double jeopardy because, inter alia, the mistrial was requested or consented to by defendant. The mere fact that the prosecutor objected to the giving of the self-defense instruction does not constitute overreaching; similarly, the judge's possible error with regard to the instruction is not overreaching.

People ex rel. Mosley v. Carey, 74 Ill.2d 527, 387 N.E.2d 325 (1979) After a potentially prejudicial newspaper article was brought to the trial judge's attention, defense counsel filed various motions for mistrial on grounds of prosecutorial misconduct and fundamental fairness, and because the trial judge at one point examined the jurors in a group concerning the article. Although each juror denied reading the article in question, the judge felt he had highlighted the article to the jury and that a mistrial should be declared. Defense counsel objected to a mistrial and asked the judge to simply sequester the jury; however, after a short recess defense counsel withdrew his objection to a mistrial.

The judge declared a mistrial, stating that the previous defense motion for mistrial was granted. Defense counsel objected, saying: "We never moved for a mistrial on that point. . . . Your Honor did that on your own motion."

The mistrial "may be said to have resulted from defendant's repeated requests, or at the minimum, to have been declared with his consent." Therefore, his motion to bar further prosecution was properly denied.

People v. Ortiz, 151 Ill.2d 1, 600 N.E.2d 1153 (1992) Defendant was tried in a bench trial for the aggravated sexual abuse of his girlfriend's nine-year-old daughter. During trial, the State requested a short continuance because the complainant's father had confused the trial date and was going to be late in bringing her to court. Defense counsel moved to dismiss the charge, and the trial judge granted the dismissal.

The State then moved to reconsider the dismissal order. At the hearing on the motion, the complainant's father testified that although he had been confused about the trial date, when he received a call from the prosecutor's office he agreed to bring his daughter to court immediately. The State also established that it had two witnesses waiting to testify when the trial judge dismissed the case.

The trial judge subsequently reinstated the charge on the State's motion to reconsider. Defendant was convicted in a second trial before a different judge.

Although jeopardy clearly attached before the dismissal order, double jeopardy principles are not to be applied "mechanically" where the interests protected by the Double Jeopardy Clause are not endangered. In this case, the dismissal order was the functional equivalent of a declaration of a mistrial and should be affirmed only if there was "manifest necessity" justifying termination of the trial. In making this determination, the most important factor is whether the trial court contemplated that its action would preclude any possibility of defendant being prosecuted for his crime.

There was no manifest necessity to dismiss the prosecution where other witnesses were waiting to testify, a short recess would have allowed the victim to arrive, and the trial judge wrongly believed that he had no alternative but to grant a dismissal.

People v. Mulcahey, 155 Ill.2d 549, 617 N.E.2d 1176 (1993) At the close of the State's evidence, the parties announced a plea agreement calling for dismissal of six counts of aggravated criminal sexual abuse in return for guilty pleas to three new misdemeanor charges. The trial judge refused to allow the misdemeanor informations to be filed under the same case number, and ordered the State to either proceed to verdict or nol pros the felony charges. The

State filed a motion to nol pros which stated that defendant had agreed to plead guilty to three misdemeanor counts based on the same conduct.

After the State filed the misdemeanor counts, defendant refused to plead guilty. The State then filed new indictments recharging the original six counts of aggravated criminal sexual abuse. The trial judge dismissed the charges on double jeopardy grounds, finding that the State had exercised its discretion in dismissing the original charges and that there had been no "manifest necessity" requiring it to do so.

Because defendant voluntarily chose to terminate his trial by entering into a plea agreement, and then voluntarily chose to back out of the agreement, the Double Jeopardy Clause did not bar reinstatement of the dismissed charges. Both the State and defendant bargained for and received substantial benefits when they entered the plea agreement, and the new indictment merely returned the parties to the positions they had occupied when the agreement was entered. Under these circumstances, the new indictment did not raise the "specter of government oppression" which is the focus of the Double Jeopardy Clause. Compare, People v. Blake, 287 Ill.App.3d 487, 678 N.E.2d 761 (1st Dist. 1997) (charges dismissed by the prosecution at the end of its case, in the erroneous belief that they were duplicative, could not be reinstated where the defense had done nothing to induce the dismissal).

People v. Street, 316 Ill.App.3d 205, 735 N.E.2d 1052 (4th Dist. 2000) A judge must not foreclose defendant's right to have a particular tribunal decide his fate until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by continuing the proceedings. The trial judge did not exercise sound discretion in determining that a mistrial was necessary due to defense presentation of "improper" evidence where he ordered a mistrial without giving the parties adequate time to prepare arguments, despite the State's desire to avoid a mistrial and belief that cautionary instruction would cure any error, and without considering alternatives.

People v. Burtron, 376 Ill.App.3d 856, 877 N.E.2d 87 (5th Dist. 2007) The trial court did not abuse its discretion by ordering a mistrial after defense counsel stated, in the jury's presence, that defendant was willing to take a polygraph examination. Counsel's statement was the "last in a series" of defense counsel's blatant indiscretions," including repeated attempts to "abuse the rules of trial procedure" and repeated improper commentary in the jury's presence. Because the trial judge had dealt with defense counsel's "many indiscretions in a patient, calm, and professional manner," the judge did not abuse his discretion by taking only a two-minute recess before declaring a mistrial.

People v. Hawks, 386 Ill.App.3d 844, 899 N.E.2d 632 (4th Dist. 2008) After a mistrial and recusal resulted from an ex parte conversation between the First Assistant State's Attorney and the trial judge, over objection from the State, defendant can be retried for underlying DUI offense without violating double jeopardy, because there is no evidence that the State deliberately caused the mistrial.

People v. Dahlberg, 355 Ill.App.3d 308, 823 N.E.2d 649 (2d Dist. 2005) Defendant was charged with domestic battery and filed a notice indicating that he intended to raise a claim of self-defense. At trial, the complainant testified to her relationship with defendant and her version of the incident. On cross-examination, defendant asked the complainant whether she had ever filed orders of protection against three other specific men. Before the complainant

could answer, the State objected, and the judge declared a mistrial. The next day, defendant filed a motion to dismiss based on double jeopardy grounds.

There was not a manifest necessity to declare a mistrial. Under Arizona v. Washington, 434 U.S. 497 (1978), the Court affirmed that there must be a "high degree" of necessity. Similar to Brady v. Samara, 667 F.2d 224 (1st Cir. 1981), here the trial court acted hastily in response to the State's request for a mistrial, failed to consider any other alternatives, took little time for reflection, and acted without permitting defendant to make an offer of proof. The judge did not exercise sound discretion in declaring a mistrial and a second prosecution was constitutionally barred on double jeopardy grounds.

People v. Hobbs, 301 Ill.App.3d 481, 703 N.E.2d 943 (4th Dist. 1998) Where a mistrial was previously declared solely because the jury was unable to reach a verdict, a retrial does not violate double jeopardy even if the evidence at the first trial was insufficient to convict.

People v. Largent, 337 Ill.App.3d 835, 786 N.E.2d 1102 (4th Dist. 2003) Once a defendant has been placed in jeopardy, the trial court may not declare a mistrial without defendant's consent unless there is manifest necessity to do so or the ends of public justice would otherwise be defeated. A criminal defendant has the right to have a particular tribunal decide his fate, and a mistrial may be declared over defendant's objection only if the circumstances are "very extraordinary."

The State bears a heavy burden to demonstrate that manifest necessity required a mistrial granted on the prosecution's motion. The prosecution has the same burden on appeal where the trial court declared a mistrial sua sponte over defendant's objection.

Here, the trial court abused its discretion by declaring a mistrial after learning that a juror's mother-in-law had broken her leg and been taken to the hospital. There was no "manifest necessity" for a mistrial; retrial was barred by double jeopardy.

People v. Sanders, 342 Ill.App.3d 374, 795 N.E.2d 329 (5th Dist. 2003) Where a trial court declares a mistrial without defendant's consent, retrial is permitted only if manifest necessity required the mistrial or continuing the proceeding would have defeated the ends of public justice. A mistrial is generally appropriate if an impartial verdict could not be reached, or if any conviction obtained would have to be reversed on appeal due to an obvious procedural error. Although a defendant has a right to complete his trial before a particular tribunal, that right is in some instances subordinate to the public's interest in a fair trial designed to render a just judgment.

Discharging a juror is a matter of discretion to be exercised by the trial court. The trial judge did not abuse his discretion by discharging a juror who realized during trial that he knew the victim of one of the offenses and who said that he would find it "quite hard" to be fair and impartial, although the juror was the only African-American on the venire, defendant was an African-American, the juror had made other attempts to be removed from the jury, and the judge expressed doubts whether the juror was being truthful. The mere fact that defendant did not object to leaving a juror on a case does not mean that the "circuit judge should surrender his obligation to ensure a fair trial for both the State and the defendant."

Nor did the trial court err by declaring a mistrial without defendant's consent. Continuing the trial with a juror who said that he could not be impartial would "most certainly have defeated the ends of public justice." Because defendant refused to consent to a verdict by 11 jurors, the trial could not have been continued.

People v. Andrews, 364 Ill.App.3d 253, 845 N.E.2d 974 (2d Dist. 2006) The trial court did not abuse its discretion by declaring a mistrial due to jury deadlock. Although the judge did not poll the jury as to whether a unanimous verdict could be reached with further deliberations, and a better practice would have been to conduct such an inquiry, the record supports the conclusion that the jury was deadlocked and that further deliberations would not lead to an unanimous verdict.

After deliberating for four hours, the jury reported that it was deadlocked at seven votes to five. After the Prim instruction was given, the jury deliberated for another 90 minutes, and the foreperson stated that the jury was no closer to a verdict. Because a unanimous verdict would have required either seven or five jurors to change their minds, it was within the trial court's discretion "to conclude that the collective opinion of the jury was that it could not agree." It was significant that, in addition to the foreperson's statement, the jury had reported on its own initiative that it was deadlocked.

People v. Reimnitz, 97 Ill.App.3d 946, 423 N.E.2d 934 (1st Dist. 1981) When a mistrial is necessary due to judicial or prosecutorial overreaching, a retrial is unjust and violates double jeopardy. Here, however, the State's introduction of a homosexual act by defendant did not constitute "overreaching," and a new trial was not prohibited. See also, People v. Wright, 105 Ill.App.3d 187, 434 N.E.2d 26 (2d Dist. 1982) (witness "volunteered" prejudicial testimony leading to mistrial at defendant's request).

People v. Franklin, 119 Ill.App.3d 899, 457 N.E.2d 1005 (1st Dist. 1983) Before defendant's trial for the murder of her child, the State disclosed a medical examiner's report indicating that the cause of death was "undetermined." Although defense counsel and the trial judge asked the State to disclose any other statements by the medical examiner, none were furnished. Defense counsel relied upon the "undetermined" cause of death during his opening statement.

However, during direct examination the medical examiner testified that based on other material to which he had access, the cause of death was "homicide." Due to the State's lack of discovery, the trial judge granted a mistrial on a defense motion.

Defendant moved to dismiss on the ground that "reprosecution was barred because the mistrial was declared due to prosecutorial misconduct." The trial judge granted the motion to dismiss.

The appropriate test to determine whether a retrial following the granting of a defense motion for mistrial is barred by double jeopardy is whether "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." Here, the trial court made no finding concerning the intent underlying the prosecutor's conduct. The cause was remanded for the trial court to make pertinent findings concerning whether the State intended to provoke defendant into moving for a mistrial.

People v. Pendleton, 75 Ill.App.3d 580, 394 N.E.2d 496 (1st Dist. 1979) Defendant's double jeopardy claim was reached as "plain error," and a second trial was barred after a mistrial on the basis of prosecutorial misconduct.

The complaining witness at defendant's rape trial testified on a Friday afternoon, and was unable to identify her alleged attackers. During the weekend recess, an assistant state's attorney met with the complainant to "review and discuss" her testimony. When trial reconvened on Monday, the complainant "positively, conclusively and unhesitatingly identified the defendants as the men who had allegedly raped her." Upon inquiry by the trial judge, an

assistant state's attorney implied "at the very least . . . that no one from the State's Attorney's office had met with the complainant over the weekend recess to discuss her testimony." Subsequently, the weekend meeting with the complainant was revealed. The trial judge declared a mistrial, and defendants were later retried and convicted.

The assistant state's attorney's misconduct in meeting with the complainant over the weekend recess and then attempting to conceal that meeting amounted to overreaching, such that double jeopardy rules barred retrial.

People v. Johnson, 113 Ill.App.3d 367, 447 N.E.2d 502 (2d Dist. 1983) Where the State improperly takes an interlocutory appeal over defendant's objection during trial, retrial of defendant is barred by double jeopardy.

People v. Cobb, 19 Ill.App.3d 520, 311 N.E.2d 702 (5th Dist. 1974) During testimony of the first witness at trial, defendants were granted a mistrial due to the State's failure to comply with discovery. Before the second trial, both the defense and the State agreed to use the same jury as at the first trial. After the jury had been sworn, the State objected to the jury and attempted to use 12 peremptory challenges. The trial court eventually declared a mistrial, over a defense objection. The charges were dismissed, and the State was barred from further prosecution.

People v. Palmisano, 124 Ill.App.3d 770, 464 N.E.2d 1147 (1st Dist. 1984) After both the State and defendant had rested their cases at a bench trial, the judge asked defense counsel if he had discussed a disposition other than the trial with the State. Defendant moved for a mistrial, contending that the communication by the trial judge was improper and constituted the initiation of a plea bargaining discussion. A mistrial was granted, and defendant was properly brought before a different judge for a second trial. The trial judge's plea-related comments were not designed to provoke a mistrial, motivated by bad faith, or undertaken to prejudice defendant.

People v. Hunter, 298 Ill.App.3d 126, 698 N.E.2d 230 (2d Dist. 1998) Where an indictment is dismissed because it was procured through the use of perjured testimony, due process prohibits the State from merely obtaining a new indictment. The State's only remedy for an erroneous dismissal due to the use of perjury is to appeal.

People v. Hurlbert, 41 Ill.App.3d 300, 354 N.E.2d 652 (4th Dist. 1976) Defendant was indicted for aggravated battery and, after the jury was sworn, moved to dismiss the indictment for failing to allege physical harm. The trial judge found that the indictment was not sufficient to charge simple battery and ordered the State to proceed with trial on that charge.

After the State's motion to amend the indictment was denied, the prosecutor refused to present any evidence and said he would file a notice of appeal. The trial judge then dismissed both counts of the indictment for the State's failure to proceed. Defendant was reindicted, but the indictment was dismissed on the basis of double jeopardy.

Jeopardy had attached at the first trial when the jury was sworn, and the discharge was not because of "manifest necessity." Dismissal affirmed.

People v. Phillips, 29 Ill.App.3d 529, 331 N.E.2d 163 (1st Dist. 1975) Before and during a bench trial, the judge heard various remarks by the complaining witness (such as whether the judge was "fixed" and that the judge "ought to disqualify himself"). In the "interest of fair and

impartial justice," the trial judge recused himself and declared a mistrial.

Before the second trial, a different judge properly granted a motion to dismiss on double jeopardy grounds. A mistrial was neither manifestly necessary nor in the interest of public justice.

People v. Stafford, 325 Ill.App.3d 1069, 759 N.E.2d 115 (1st Dist. 2001) The trial court erred at defendant's retrial by allowing the State to proceed on charges that had been dismissed on the State's motion before the first trial and not reinstated by indictment. A motion for nolle prosequi is a formal admission by the State that it is unwilling to prosecute particular counts, and terminates further prosecution of the dismissed charges. To reinstate dismissed charges, the State must file a new charging instrument.

Where charges have been dismissed by entry of an order of nolle prosequi, reindictment is prohibited if the circumstances indicate a realistic likelihood of vindictiveness by the State. Prosecutorial vindictiveness occurs when reindictment would subject a defendant to increased sanctions or takes place after the State has dismissed charges and defendant has successfully appealed convictions on the remaining charges. Where there is a realistic likelihood of vindictiveness, the State bears the burden of demonstrating objective facts which justify the decision to pursue previously dismissed charges.

People v. Fulkerson, 127 Ill.App.3d 1084, 469 N.E.2d 1124 (4th Dist. 1984) Defendant was charged with five counts of indecent liberties, all based upon the same occurrence. After the jury had been sworn, the State moved to nol pros the first count. The trial court denied the motion, and defendant was convicted on two counts. Judgment was entered on the first count.

The trial court erred in denying the State's motion to nol pros the first count. "A motion to nol pros a charge must be allowed unless it is part of a vexatious or repetitious course of conduct directed against the defendant."

Granting of a nol pros motion after jeopardy attaches does not preclude prosecution on the remaining charges. Although all the counts charged indecent liberties, only the first count alleged an act of sexual intercourse. Thus, double jeopardy did not preclude prosecution on the other four counts. Cause remanded to the trial court to vacate judgment on the first count, enter judgment on the verdict on the other count, and impose sentence.

People v. Luallen, 188 Ill.App.3d 862, 544 N.E.2d 1206 (4th Dist. 1989) After the jury was impaneled at defendant's DUI trial, the trial judge declared a mistrial and dismissed the charge on the ground that the State had lost a valuable piece of evidence. Subsequently, the judge granted the State's motion to reconsider and reinstated the charge.

Double jeopardy did not bar the prosecution; the original dismissal was not based on guilt or innocence, but on a perceived due process problem.

People v. Cearlock, 381 Ill.App.3d 975, 887 N.E.2d 893 (5th Dist. 2008) A "nearly-universal" rule of procedure prohibits the admission of juror testimony to impeach a verdict, unless a party alleges that the jury was affected by some extraneous influence. The rule against impeaching a verdict with juror testimony applies not only when a verdict has been returned, but also when a mistrial is declared due to the jury's inability to reach a verdict.

Generally, a defendant may be retried after a mistrial if the mistrial was manifestly necessary. When deciding whether a mistrial was manifestly necessary, "[t]he question is not why the jury could not reach a verdict, but whether the jury was truly deadlocked with no hope of reaching a verdict." In other words, the fact that a jury is hopelessly deadlocked

creates a manifest necessity to declare a mistrial and discharge the jury, allowing defendant to be retried.

Thus, defendant could be retried even if the first jury's inability to reach a verdict was due to a juror refusing to deliberate.

People v. Cooper, 210 Ill.App.3d 427, 569 N.E.2d 144 (1st Dist. 1991) After the jury was selected and sworn, the trial was delayed while the judge heard various motions. Three days later, six or seven jurors sent a note to the judge indicating that the jurors did not think they could be fair or impartial because of the delay. The judge decided that the jury was too frustrated by the delay to remain impartial and that neither party would be prejudiced by dismissing the jury and selecting a new one.

The trial judge properly exercised discretion in dismissing the jury. In view of the jury's frustration with the delay, defendant would be less prejudiced by selecting a new jury than by proceeding with the old one. Defendant's retrial did not violate double jeopardy.

People v. Moore, 385 Ill.App.3d 1019, 897 N.E.2d 369 (3d Dist. 2008) 725 ILCS 5/114-11(g) provides that if a motion to suppress is made during trial, is determined by the trial court to be timely, and results in suppression of a confession, the trial court "shall terminate the trial . . . without further proceedings, unless the State files a written notice that there will be no interlocutory appeal . . . Such termination of trial shall be proper and shall not bar subsequent prosecution of the identical charges and defendants."

Reversible error occurred where the trial court failed to terminate the trial to allow the State to file an interlocutory appeal from a mid-trial suppression order. Thus, the State was free to bring defendant to trial again after the suppression order was affirmed, despite the trial court's declaration of a mistrial.

People v. Pondexter, 214 Ill.App.3d 79, 573 N.E.2d 339 (1st Dist. 1991) Defendant, a prison inmate charged with aggravated battery arising out of a fight with a correctional officer, represented himself pro se. Prior to trial, defendant stated that he had no specific names of people to call as witnesses. After the State completed its case, defendant produced an affidavit from another inmate who claimed to have witnessed the fight. Defendant stated that he had forgotten about the affidavit until the previous evening, when he found it in his files. Defendant requested that this witness be called on his behalf.

The trial judge stated that although the affidavit should have been disclosed before trial, he was hesitant to exclude the material testimony of an eyewitness. The judge found that a continuance would not remedy the problem, and over the prosecutor's objection declared a mistrial. On retrial, defendant's motion to dismiss on double jeopardy grounds was denied.

The trial judge erred by declaring a mistrial and denying the motion to dismiss. The proper action would have been a continuance rather than a mistrial, as the State knew before trial that defendant intended to present a self-defense theory and would not likely have altered its case had it known of the witness before trial.

People v. Barfield, 288 Ill.App.3d 578, 680 N.E.2d 805 (5th Dist. 1997) The trial court did not err by granting a mistrial where defense counsel, in the jury's presence, repeatedly referred to inadmissible evidence.

Renico v. Lett, ___ U.S. ___, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (No. 09-338, 5/3/10)

1. Where under all of the circumstances there was a "manifest necessity" for a mistrial in a previous trial, the Double Jeopardy clause does not bar a retrial. The "manifest necessity" standard is not to be interpreted literally; "a mistrial is appropriate where there is a 'high degree' of necessity."

Whether to grant a mistrial is left to the broad discretion of the trial court, whose decision is entitled to "great deference" unless the judge failed to exercise discretion or acted for reasons completely unrelated to the problem which purported to be the reason for the mistrial. A trial judge who orders a mistrial is not required to make explicit findings concerning manifest necessity, or to articulate on the record the factors which led to the belief that a mistrial was necessary.

2. See also, **COLLATERAL REMEDIES**, §9-5(a).

People v. Bennett, 2013 IL App (1st) 121168 (No. 1-12-1168, 7/3/13)

Where the defendant rather than the State moves for a mistrial, the defendant is deemed to have deliberately chosen to forgo his valued right to have his guilt or innocence determined before the first trier of fact. Double jeopardy bars retrial only when the prosecutor actually intends to goad the defense into moving for a mistrial, a rare circumstance. A prosecutor's harassment, overreaching, or bad faith does not suffice. A trial court's ruling that a prosecutor did not intend to cause a defendant to seek a mistrial is reviewed for an abuse of discretion.

The trial court did not abuse its discretion in finding that the prosecutor did not intend to force the defense to request a mistrial. The defendant's argument that the prosecutor acted intentionally in eliciting inadmissible testimony to gain unfair advantage over the defense, even if accepted, provided an insufficient basis to bar retrial. While the prosecutor's conduct was sufficient to justify declaring a mistrial on defendant's motion, nothing supported the conclusion that the prosecutor intended to subvert the protections afforded by the Double Jeopardy Clause.

People v. Palen, 2016 IL App (4th) 140228 (No. 4-14-0228, 9/30/16)

1. For purposes of the double jeopardy clause, jeopardy attaches when the accused has been arraigned and the jury impaneled and sworn. Once jeopardy has attached, the defendant has a right to have his fate decided by the particular jury which has been selected. This right may be denied only where the ends of justice would be defeated by continuing the trial.

The parties selected eight jurors on the first day of proceedings. The trial court administered the oath to these eight jurors and continued the cause until the next day. The parties expected to select four jurors and two alternates the next day, but during the night the father of one of the prosecutors died.

When the proceedings resumed, the trial court ordered a mistrial *sua sponte* after noting that the remaining prosecutor had never tried a felony case. Defendant was subsequently tried and convicted of attempt residential burglary and possession of burglary tools.

On appeal, defendant claimed that he was placed in jeopardy when the trial court swore eight jurors before recessing overnight. The Appellate Court rejected this argument, citing **LaFave,** 6 Criminal Procedure §25.1(d) (4th ed. 2015), for the principle that jeopardy attaches when the "entire" jury has been selected and sworn. The court concluded that because the trial judge announced an intention to select additional jurors on the following morning, jury selection had not been completed. Where only eight jurors had been sworn, the jury had

not been "empaneled and sworn."

The court also noted that it would be a better practice for the trial court to wait until the entire jury is selected before swearing any jurors. Furthermore, in this case the trial court should have consulted the prosecutor to determine whether he was able to try the case or whether there could be further assistance from the State's Attorney's office, and inquired of the parties about the possibility of suspending the proceedings until the original prosecutor was available.

2. In dissent, Justice Steigmann stated that the **LaFave** treatise misstates United States Supreme Court case law by holding that jeopardy attaches only when the entire jury is sworn. Justice Steigmann would have held that right to have the case tried by the jurors who have been selected applied once any jurors are sworn.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

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§17-4
Acquittals

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) The protection against double jeopardy unequivocally prohibits a second trial following an acquittal, even if the acquittal was based upon an egregiously erroneous foundation. See also, Fong Foo v. U.S., 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

Sanabria v. U.S., 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) Even when a trial court's erroneous evidentiary ruling leads to an acquittal for insufficient evidence, the prosecution may not appeal. A judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error.

Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986) At the close of the State's case at a bench trial, defendant challenged the sufficiency of the evidence by filing a demurrer (similar to a motion for directed verdict). The trial judge sustained the demurrer, and the State appealed.

The granting of the demurrer constituted an acquittal. Thus, the State's appeal was barred by the Double Jeopardy Clause. See also, Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981) (defendant's second trial was barred by the Double Jeopardy Clause where the trial judge at defendant's first trial granted defendant's motion for new trial on the ground that the State evidence was insufficient to prove guilt).

U.S. v. Martin Linen Supply, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) Following discharge of a deadlocked jury, the trial judge granted defendant's motion for judgment of acquittal. The government appealed. The Double Jeopardy Clause barred appellate review; jeopardy had attached, a successful appeal would necessitate another trial or some further proceedings devoted to resolving the factual issues going to the elements of the offense, and the judgment was an "acquittal" in substance and form by representing "a resolution of some or all of the factual elements of the offense charged."

Smith v. Massachusetts, 543 U.S. 462, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005) After the State rested its case at a jury trial on charges arising out of a shooting, the trial court granted defendant's motion for a directed finding on the charge of unlawful possession of a firearm. The trial court found that there was no evidence to support a required element of the charge - that the firearm have a barrel shorter than 16 inches.

The defense then presented its case on the remaining charges. At the close of all the proofs, and immediately before closing arguments, the court granted the prosecution's request to reverse its directed finding on the firearms charge, agreeing with the prosecutor that the victim's testimony - that defendant shot him with a "pistol" or "revolver" - was sufficient to establish the length of the gun's barrel. The jury thereafter convicted defendant on the firearm charge.

Double jeopardy was violated by the trial court's reinstatement of the firearm charge and its submission to the jury. Because under Massachusetts law a directed verdict constituted a final order, the trial court's action plainly subjected defendant to further fact-finding on guilt or innocence after an "acquittal." The midtrial acquittal could not be reconsidered.

People v. VanCleve, 89 Ill.2d 298, 432 N.E.2d 837 (1982) A judgment of acquittal notwithstanding the verdict constitutes a "judgment of acquittal" under the Illinois Constitution, and the State may not appeal from it.

People v. Mink, 141 Ill.2d 163, 565 N.E.2d 975 (1990) After the jury returned a guilty verdict, the trial court granted defendant's post-trial motion on the ground that the State had failed to prove venue. The State filed a motion for reconsideration. The motion was granted, judgment was imposed on the jury's verdict, and sentence was imposed.

Even assuming that the initial order constituted an acquittal, reconsideration of the order did not violate double jeopardy because it did not expose defendant to a second trial:

People v. Woodall, 61 Ill.2d 60, 329 N.E.2d 203 (1975) Where the trial court granted a new trial on the ground that the evidence was insufficient to justify a conviction, double jeopardy principles and Ch. 38, §3-4(a)(1) barred retrial.

People v. Carter, 194 Ill.2d 88, 741 N.E.2d 255 (2000) After the jury convicted defendant of driving with a suspended license, the trial court granted a motion for acquittal notwithstanding the verdict. The judge subsequently vacated that order and ordered a new trial, finding that he had erroneously excluded evidence that would have sustained the charge.

The double jeopardy clauses of both the U.S. and Illinois constitutions prohibit a second trial after a finding that the evidence is insufficient to convict, even if that finding was legally erroneous.

People ex rel. Daley v. Crilly, 108 Ill.2d 301, 483 N.E.2d 1236 (1985) Defendant was charged with murder and conspiracy to commit murder. The jury convicted of conspiracy but was unable to reach a verdict on the murder charge. The trial judge entered judgment on conspiracy and discharged the jury.

Ten days later, defendant filed a new trial motion and renewed an earlier motion for directed verdict on the murder charge. The trial judge granted the motion for directed verdict and announced a "judgment of acquittal" on the murder charge. The State then filed a supervisory petition requesting the Supreme Court to vacate the order of acquittal.

To grant supervisory relief would deprive defendant of the protection against double jeopardy by subjecting him to a second trial after he had been acquitted due to insufficient evidence.

People v. Knaff, 196 Ill.2d 460, 752 N.E.2d 1123 (2001) Under double jeopardy principles, an "acquittal" shields a defendant from further prosecution. Whether an acquittal has been entered is not to be determined by mechanical rules, however; the controlling question is whether the trial court's order contemplated that the prosecution against defendant would end.

Where the trial court's finding that the State's evidence was insufficient on the charged offenses did not contemplate that the prosecution would end, but that the case would proceed on lesser included offenses on which the State had presented a prima facie case, defendant was not "acquitted."

People ex rel. Daley v. Limperis, 86 Ill.2d 459, 427 N.E.2d 1212 (1981) Defendants were charged with the unlawful delivery of more than 30 grams of cocaine — a Class X, non-probational felony. The uncontradicted and stipulated evidence at their bench trials was that they delivered over 30 grams of cocaine. However, the trial judges found each defendant guilty of delivery of less than 30 grams and imposed probation sentences. The State's Attorney sought writs of mandamus to expunge the sentencing orders and sentence defendants for Class X felonies. The writs were denied.

The convictions on the lesser included offenses operated as an acquittal of the greater offenses. The Illinois Constitution (art. VI, §6) prohibits the State from appealing from judgments of acquittal. Furthermore, to allow the State's petitions would violate double jeopardy.

People v. Rudi, 103 Ill.2d 216, 469 N.E.2d 580 (1984) On the date set for trial, the prosecution moved for a two-day continuance. The motion was based on the prosecutor's confusion about the trial date, which caused subpoenas to be issued for the wrong date.

The trial judge denied the motion for continuance, and the prosecutor moved to nol pros the charge. The trial judge denied the nol pros motion, finding that it was merely another motion for continuance. The judge then had defendant sworn and, after the State failed to present any evidence, entered an order finding defendant not guilty.

About a month later the prosecutor filed a new information charging the same offense. The trial judge dismissed this information on double jeopardy grounds, and the State appealed.

The trial judge abused his discretion by denying the motion to nol pros. There was no indication in the record of "intentional delay or harassment by the prosecution." Instead, the prosecutor simply made a clerical error concerning the trial date. Retrial would not violate double jeopardy. The "trial" was a "sham, an artifice employed by the trial judge to achieve the result of a dismissal with prejudice for want of prosecution."

People v. Deems, 81 Ill.2d 384, 410 N.E.2d 8 (1980) On the day set for trial, the State moved to dismiss the charge on the ground that defendant was not guilty of a violation under the subsection charged. The State indicated that it would indict defendant under another subsection and would be ready for trial within a week.

The trial judge refused to dismiss the indictment and, over the State's objection, called the case to trial. The State presented no witnesses, no opening statements were made, and

defendant was sworn but did not testify. The trial judge found defendant not guilty.

The State subsequently indicted defendant for theft under the new subsection. That indictment was dismissed on double jeopardy grounds. The State appealed both the "acquittal" and the dismissal.

The trial judge improperly called the case to trial. The "trial" of defendant was a:

> "sham, an artifice employed by the trial judge to achieve the result of a dismissal with prejudice for want of prosecution which [People v. Thomas, 24 Ill.App.3d 907, 322 N.E.2d 907 (3d Dist. 1975)] had held he did not have the authority to order. Such a 'trial' might conceivably be appropriate in extraordinary circumstances, but it is not permissible when the prosecutor, well within the 120-day rule, seeks to dismiss, stating that the defendant is not guilty of the crime charged and declaring that the State intends to seek an indictment for a related offense which will be promptly tried."

Defendant was not placed in jeopardy at his first "trial." The only person sworn was defendant himself, and he did not testify. No evidence of any type was introduced, and it is clear that defendant was at no time in danger of being found guilty of any offense. Since defendant never faced the "risk of a determination of guilt," jeopardy did not attach. Thus, the trial court erred by dismissing the second indictment.

People v. Williams, 188 Ill.2d 293, 721 N.E.2d 524 (1999) Double jeopardy protection is triggered whenever a judgment of acquittal "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." A directed verdict based on insufficiency of the evidence constitutes an "acquittal," even if the ruling was based on a mistake of fact or law. A trial judge does not have authority to reconsider or vacate an order directing a verdict of not guilty.

After indicating that she was "going to grant" defendant's motion for directed finding, the trial judge repeatedly said that she would review any legal authority which the State wanted to present and "did not yet know" whether the applicable authority would justify granting the motion for directed verdict. The remarks, "as a whole," were not an acquittal but rather informed the parties that the judge would rule on the request for a directed verdict only after she reviewed any legal authority presented by the prosecution.

See also, People v. Johnson, 304 Ill.App.3d 599, 710 N.E.2d 161 (1st Dist. 1999) (double jeopardy not violated where trial court stated that it was "reversing" order that evidence was insufficient to convict on charged offense and entering conviction on lesser included offense; trial judge did not change the "not guilty" finding on the greater offense, but merely "made an additional finding on a separate crime, immediately after the State interrupted it in the mist of its rulings").

People v. Henry, 204 Ill.2d 267, 789 N.E.2d 274 (2003) Whether a trial judge has granted a motion for directed verdict is based upon the "entire response" of the trial judge to the motion. The record showed that the trial judge "unequivocally acquitted" defendant of aggravated battery; not only did the judge state his intention to grant the motion, but unlike the judge in People v. Williams, 188 Ill.2d 293, 721 N.E.2d 524 (1999), he did not express a willingness to examine authority or offer to postpone the ruling until the parties researched the law. The trial judge and the parties acted as if they believed that the motion for a directed verdict had been granted, and the judge subsequently stated that he was "reconsidering" counsel's

arguments and "vacat[ing]" the previous order. The court could not "vacate" that order on reconsideration.

However, the Appellate Court erred by entering an acquittal for the involuntary manslaughter charge on which the judge did not direct a verdict and on which the jury was unable to reach a verdict. Because the involuntary manslaughter and aggravated battery charges were based on the single act of striking the victim in the face, they were subject to compulsory joinder under 720 ILCS 5/3-3(b). In addition, under "one act, one crime" principles, only one conviction and sentence could be imposed. Because the "one-act, one-crime" rule is not a matter of constitutional law, however, it does not create a constitutional bar to trying defendant on the involuntary manslaughter charge after the jury was unable to reach a verdict.

Double jeopardy is violated by a second prosecution for an offense only if defendant was "acquitted" or "convicted" of the same "offense" in a previous prosecution. Where a single act violates distinct statutory provisions, each of which requires proof of a fact not required to prove the other, the offenses are not the same for double jeopardy purposes. Thus, neither a conviction nor an acquittal for aggravated battery would preclude a prosecution for involuntary manslaughter.

People v. Cole, 91 Ill.2d 172, 435 N.E.2d 490 (1982) Defendants were charged with two counts of solicitation, one alleging that they "requested" another to commit murder and the other that they "encouraged" another to commit murder. The jury acquitted on the "requested" count, but was unable to reach a verdict on the "encouraged" count. A mistrial was declared, and defendants were retried and convicted on the latter count.

Retrial was not barred on double jeopardy grounds. When a defendant is charged with the same offense in two counts based upon different theories, an acquittal on one count does not bar reprosecution on the other count after the jury failed to reach a verdict.

People v. Holloway, 92 Ill.2d 381, 442 N.E.2d 191 (1982) Defendant was charged with and convicted of the burglary of a certain building. The indictment alleged that the victim was Mr. Charles June, director of the county housing authority. The Appellate Court reversed the conviction, holding that the housing authority and Mr. June had no possessory interest in the burglarized portion of the building.

The State did not appeal this reversal, but reindicted defendant for burglary of the same building. In the second indictment, the alleged victim was Mrs. Arementa Ervin, a supervisor of a day care center in the building.

Section 3-4(b)(1), when read in conjunction with §3-3(b), requires that if several offenses are known to exist and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution. Here, however, at the time of the original charge the State did not know, and had no reason to believe, that defendant's conduct was the basis of more than one offense. It was only when the Appellate Court reversed the original conviction that the State's Attorney discovered that the alleged victim "had no possessory interest in the premises and that to charge an offense some other party, with what the Appellate Court would consider to be a sufficient possessory interest, would have to be named." Consequently, §3-4(b)(1) did not bar the second indictment.

Likewise, this was not a case where defendant was reindicted for the same offense, thus the prosecution was not barred by the Double Jeopardy Clause either.

People v. Carrillo, 164 Ill.2d 144, 646 N.E.2d 582 (1995) In 1979, Carrillo and Stacey agreed

that Carrillo would break into an apartment that Stacey owned, to frighten the tenant into leaving. However, the tenant was shot and paralyzed during the break-in, and both defendants were tried for several offenses. Carrillo was convicted (as a principal) of attempt murder, home invasion, armed robbery, burglary, aggravated battery and armed violence. Stacey was convicted (as an accomplice) of home invasion and burglary, but was acquitted of attempt murder, armed robbery, aggravated battery, and armed violence.

Nine years after the offense, the tenant died of injuries sustained in the break-in. Defendants were then charged with "intentional and knowing" murder, "knowledge of the strong probability of death or great bodily harm" murder, and felony murder.

The collateral estoppel doctrine barred prosecution of the offenses of which Stacey had been acquitted. Thus, collateral estoppel also barred prosecution of Stacey on charges involving the same mental states of which she had been acquitted in the earlier prosecutions. Because Stacey had been acquitted of armed robbery and attempt murder, the State could not subsequently prosecute her for intentional murder or felony murder based on armed robbery.

People v. West, 187 Ill.2d 418, 719 N.E.2d 664 (1999) Where the State's evidence at the first stage of the death hearing was insufficient to establish death eligibility, the Double Jeopardy Clause barred the State from seeking a death sentence in subsequent proceedings.

People v. Holman, 130 Ill.App.3d 153, 474 N.E.2d 391 (1st Dist. 1985) At defendants' bench trial, the State presented the testimony of the complainant. The trial was then continued for two-and-one-half weeks. When the trial was reconvened, the State requested a continuance on the ground that two police officers were unavailable to testify. The trial judge denied the continuance because, inter alia, this was the third time the State had sought a continuance due to unavailability of witnesses. The trial proceeded, over the State's objection, and defendants presented their case, including alibi witnesses. The trial judge then found defendants not guilty. The State appealed.

A midtrial order denying the State requested continuance "does not have the effect of dismissing the charges against the defendant and is not appealable under Supreme Court Rule 604(a)(1) under the circumstances herein." The retrial of defendants "is barred whether the proceeding below is construed as an improper termination of the trial after the first prosecution witness or as an acquittal based upon the trial court's determination that the evidence was insufficient to warrant a conviction." State appeal dismissed.

In re R.K.K., 112 Ill.App.3d 982, 446 N.E.2d 307 (3d Dist. 1983) Where the trial court entered a directed finding of not guilty, and an Illinois Supreme Court decision issued the following day changed the law on which the court's decision was based, the court could not vacate its order of acquittal. Double jeopardy barred further prosecution. The trial judge's directed finding was an acquittal. Therefore, double jeopardy barred vacation of that order and further prosecution. Accord, People v. Strong, 129 Ill.App.3d 427, 472 N.E.2d 1152 (1st Dist. 1984) (although trial court erred in directing verdict, legal effect was to bar vacation or reversal of that verdict on double jeopardy grounds).

People v. Stout, 108 Ill.App.3d 96, 438 N.E.2d 952 (2d Dist. 1982) Granting a motion to direct a verdict is an "acquittal." Because double jeopardy principles bar further prosecution, it was improper to vacate or reverse the directed verdict.

People v. Hutchinson, 26 Ill.App.3d 368, 325 N.E.2d 115 (2d Dist. 1975) Granting of a

directed verdict, even where based on an erroneous reason, was decisive and could not be suspended or rescinded. A defendant who is placed in jeopardy and has charges dismissed cannot have the charges reinstated either before or after the jury is discharged.

People v. Charleston, 278 Ill.App.3d 392, 662 N.E.2d 923 (2d Dist. 1996) A directed verdict is deemed an acquittal so long as it is not the result of a "sham" trial. A directed verdict may not be withdrawn even if the trial court's ruling was based on a mistake of fact or law.

People v. Lewis, 379 Ill.App.3d 829, 884 N.E.2d 823(1st Dist. 2007) A defendant is "acquitted" of an offense when the trial judge finds the evidence to be insufficient and enters a judgment of "not guilty." A judgment of acquittal, no matter how erroneous, bars further prosecution.

Where the trial court first found that the State had carried its burden of proof on Count III, but then stated that the State had not met the burden of proof and "there would be a finding of not guilty for Count III," an "acquittal" was entered on Count III. The judge's ruling was not equivocal and resolved some or all of the elements of the crime.

Although the half-sheet indicated that defendant had been convicted of Count III, the judgement consists of the trial court's oral pronouncement. When the oral pronouncement conflicts with the written judgment, the oral pronouncement controls. If the State believed that the judge had misspoken, it should have sought clarification immediately instead of waiting until sentencing, when it simply proceeded as if defendant had been convicted of all counts.

The issue was not waived though it had not been raised in a written post-trial motion. Waiver generally does not apply when a judgment is challenged as void. In addition, whether a defendant has been "acquitted" necessarily implicates substantial rights and requires review.

People v. Wiley, 71 Ill.App.3d 641, 389 N.E.2d 1383 (1st Dist. 1979) A new trial is prohibited even if an acquittal is contrary to the evidence. During trial, the State sought a recess to bring in other witnesses. The trial judge denied the request and, on the court's own motion, "dismissed" the case and "acquitted" the defendants.

Retrial was barred whether the trial court's action was viewed as an acquittal or as a dismissal. The judge's action was not prompted by the defendants, and to allow another trial would place defendants in the absurd situation of having "to object to their own acquittal in order to avoid retrial."

People v. Ousley, 297 Ill.App.3d 758, 697 N.E.2d 926 (3d Dist. 1998) Where a defendant is acquitted of a predicate offense, double jeopardy precludes retrial on a compound offense even if the acquittal was based on the jury's improper understanding of the applicable law.

People v. Kelley, 328 Ill.App.3d 227, 765 N.E.2d 1109 (1st Dist. 2002) Where the trial judge explicitly found that the State had not satisfied the reasonable doubt standard concerning the charged offense, but erroneously entered a conviction on an offense that was not a lesser included offense, it would be "inappropriate" to remand the cause for a trial on either the charged offense or on the offense that had not been charged.

People v. Jones, 75 Ill.App.3d 945, 393 N.E.2d 1372 (3d Dist. 1979) During trial, defendant moved for acquittal based upon false grand jury testimony. The trial judge did not enter an

acquittal, but dismissed the indictment. The dismissal did not constitute an "acquittal" and was not a bar to reindictment.

People v. Milka, 336 Ill.App.3d 206, 783 N.E.2d 51 (2d Dist. 2003) Where the State dismissed counts charging predatory criminal sexual assault of a child, but proceeded on a count charging felony murder predicated on predatory criminal sexual assault of a child, the dismissal of the count alleging only the predicate offense did not amount to an "acquittal for purposes of the double jeopardy clause."

People v. Wharton, 334 Ill.App.3d 1066, 779 N.E.2d 346 (4th Dist. 2002) Defendant was charged with home invasion, armed robbery and residential burglary based on an entry to an apartment during which one of the occupants was struck and money taken. The jury acquitted of home invasion, but could not reach a verdict on armed robbery or residential burglary. The trial court entered an acquittal of home invasion and declared a mistrial on the other two counts. After the trial court denied a motion to bar a retrial, defendant appealed.

Under the Illinois and federal constitutions, a person may not be tried twice for the same offense. The collateral estoppel doctrine, a corollary to double jeopardy, provides that an issue of ultimate fact which has been determined by a valid and final judgment cannot be relitigated by the same parties. Thus, if the record shows that a previous verdict could not have been reached without deciding the particular issue in question, the parties are estopped from relitigating the issue. A defendant seeking to bar a trial bears the burden of proving that a previous verdict necessarily determined the issue in question.

Here, further prosecution for armed robbery and residential burglary was barred by the jury's verdict of acquittal on a charge of home invasion. In view of the overwhelming evidence on the other elements, the only rational interpretation of the acquittal on home invasion was that the jury had a reasonable doubt whether defendant was one of three men who unlawfully entered the dwelling. Thus, the most likely basis for the acquittal was the jury's disbelief that defendant was one of the perpetrators.

People v. Zegiel, 179 Ill.App.3d 649, 534 N.E.2d 664 (2d Dist. 1989) Following a traffic accident defendant was charged with reckless homicide, driving under the influence of alcohol, driving with a suspended or revoked driver's license, and refusing to take a chemical test. Defendant was first tried for reckless homicide.

Where the court granted defendant's motion for directed verdict on reckless homicide, finding that the State had failed to prove intoxication, the State was collaterally estopped from prosecuting defendant for DUI.

Because proof of intoxication is not necessary for the State to prove the other charges (i.e., driving with a suspended or revoked driver's license and refusal to take a chemical test), however, the motion to dismiss those charges was properly denied.

Cumulative Digest Case Summaries **§17-4**

Blueford v. Arkansas, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2012 WL 1868066 (No. 10-1320, 5/24/12)

The double jeopardy clause guarantees that the State shall not be permitted to make repeated attempts to convict the accused following an acquittal.

The trial court instructed the jury on the charge of capital murder and three lesser

offenses: first-degree murder, manslaughter and negligent homicide. The jury was directed to first consider the capital murder charge and then consider each lesser charge in turn only after deciding that it had a reasonable doubt of defendant's guilt of the greater charge. The jury was provided with a guilty verdict form for each charge and a general verdict form of not guilty.

After the jury reported that it was unable to reach a verdict, the court asked the foreperson to disclose the jury's votes on each offense. The foreperson disclosed that the jury was unanimous against the capital murder and first-degree murder charges, was split 9-3 on the manslaughter charge, and had not voted on the negligent homicide charge in accordance with its instructions that it should consider that charge only after finding a reasonable doubt as to the greater charges. The court instructed the jury to continue to deliberate, denying the defense request that the jury be given verdict forms for the counts on which it had reached agreement. Ultimately, the court declared a mistrial and discharged the jury without any verdict being returned.

The Supreme Court held that the double jeopardy clause did not bar retrial on the charges of capital murder and first-degree murder.

1. Because the jury had not ended it deliberations at the time that it reported its agreement against those charges, that report lacks the finality necessary to constitute an acquittal on the murder offenses. Nothing prohibited the jury from reconsidering its vote when it resumed its deliberations. That lack of finality distinguishes this case from **Green v. United States**, 355 U.S. 184 (1957), and **Price v. Georgia**, 398 U.S. 323 (1970), which held that a defendant tried on a greater offense and convicted of a lesser offense cannot be retried on the greater offense.

2. The jury's inability to reach a verdict provided a manifest necessity for declaration of the mistrial. The court's refusal to allow the jury an opportunity to give effect to its votes against the murder charges by providing additional verdict forms was not an abuse of discretion. "We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict."

Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissented. The majority's decision misapplies two longstanding principles. First, an acquittal occurs if a jury's decision, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. Second, a trial judge may not defeat a defendant's entitlement to the verdict of a tribunal he might believe to be favorably disposed to his fate by declaring a mistrial before deliberations end, absent a defendant's consent or a manifest necessity to do so.

Because state law requires that the jury acquit the defendant of the greater offense before considering his guilt on the lesser offense, the forewoman's announcement in open court that the jury was unanimous against conviction on the murder charges was an acquittal for double jeopardy purposes. This case is stronger than **Green** or **Price** because the jury was not silent on the murder counts. Nothing indicates that the jury reconsidered its decision, and nothing in its instructions allowed it to reconsider its decision.

There was no manifest necessity for declaration of a mistrial on the murder charges. Unlike a case where there is a genuine inability to reach a verdict, under the procedure adopted by Arkansas, a jury that advances to consideration of lesser offenses has not demonstrated an inability to reach a verdict on the greater offenses – it has acquitted on the greater. Therefore, the trial judge should have honored the defense request to allow the jury to return a partial verdict.

Bravo-Fernandez et al v. United States, ___ U. S. ___, 137 S.Ct. 352, ___ L.Ed.2d ___ 2016) (No. 15-537, 11/29/16)

1. U.S. Supreme Court double jeopardy precedent holds that once an issue has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in any future lawsuit. **Ashe v. Swenson**, 397 U. S. 436 (1970). The defendant has the burden to demonstrate that the issue which is sought to be relitigated was actually decided by a prior jury's verdict.

In **United States v. Powell**, 469 U. S. 57, the court held that the defendant could not meet this burden when the jury returned irreconcilably inconsistent verdicts on the issue in question. The **Powell** court stressed that the doctrine of issue preclusion is based on the presumption that the jury acted rationally in returning verdicts, and that such a presumption cannot be indulged where verdicts are irreconcilably inconsistent.

However, the **Powell** rule does not apply where the jury acquits on one count and is unable to reach a verdict on another count. **Yeager v. United States**, 557 U.S. 110 (2009). Under such circumstances, the acquittal has preclusive force because the hung count is not inconsistent with an acquittal on another count, but merely represents the jury's failure to decide anything concerning one count.

2. Defendants were indicted on federal charges of bribery, conspiracy to commit bribery, and traveling in furtherance of bribery. The only contested issue at trial was whether the offense of bribery had been committed, as there was a dispute whether the statute in question covered defendants' conduct.

The jury acquitted defendants on the conspiracy and travel counts but convicted them of bribery. On appeal, the U.S. Court of Appeals vacated that conviction on the ground that the jury instructions permitted the jury to convict on a "gratuity" theory although the statute covered only "*quid pro quo*" bribery. The cause was remanded for retrial on the bribery charge.

On remand, defendants claimed that the double jeopardy clause prohibited retrial because they had been acquitted of charges which were based on the bribery counts and the only issue had been whether the bribery had occurred. The court rejected this argument, concluding that unless the conviction was vacated due to an insufficiency in the evidence or trial error which could have caused the apparent inconsistency in the jury's verdicts, the **Powell** rule applied.

The court noted that the defense had the burden to show that the jury actually decided that defendants did not violate the statute, and found that it was impossible to carry this burden in light of the irreconcilably inconsistent verdicts. The fact that the conviction based on the guilty verdict was subsequently overturned due to instruction error did not establish a finding by the jury that defendants did not violate the statute, particularly where there was sufficient evidence on which a properly instructed jury could have voted to convict,. Therefore, the doctrine of issue preclusion did not apply to retrial of the count on which the conviction was vacated.

Evans v. Michigan, ___U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 11-1327, 2/20/13)

At a trial for arson based on burning "other real property," the State's evidence showed that defendant burned an unoccupied house. At the close of the State's case, the trial court granted defendant's motion for a directed verdict on the ground that the statute creating the offense required that the building not be a "dwelling house." The court concluded that the burned building was a "dwelling house" and therefore not covered by the statute.

On appeal, the parties agreed that under Michigan law, burning "other real property" is a lesser included offense of the separate offense of burning a dwelling house. Furthermore,

the essential elements of arson of "other real property" do not include the fact that the structure is not a dwelling house. Because it was undisputed that the trial court misunderstood the elements of the offense and erred by directing a verdict, the Michigan Court of Appeals reversed the trial court's order and held that the Double Jeopardy Clause did not bar retrial.

The United States Supreme Court reversed.

1. The Double Jeopardy Clause bars retrial following an acquittal, even if the acquittal is ordered by the trial court rather than returned by the jury and even if it is based on an erroneous foundation. Thus, double jeopardy principles bar retrial even if the acquittal was based on an erroneous decision to suppress evidence, a mistaken understanding of the evidence needed to convict, or a misunderstanding of the statute defining the offense.

The court distinguished acquittals from procedural rulings such as dismissals and mistrials, which are unrelated to factual guilt or innocence, carry no expectation of finality, and in many cases permit a retrial. The law attaches special significance to acquittals, by contrast, because "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'"

2. The trial court clearly granted an "acquittal," as its ruling was based not on a procedural ground but on the judge's belief that the State had failed to carry its burden of proof. Although the judge's ruling was wrong and based on a misunderstanding of the elements of the offense, that misunderstanding means only that the decision to acquit was erroneous. The essential character of the acquittal was not affected by the fact that it had an erroneous basis.

The court rejected the argument that an acquittal can occur only if an actual element of the offense has been resolved against the State, and that an "acquittal" therefore cannot be based on a misinterpretation of the elements of the crime. The court stressed that an "acquittal" involves a determination that a defendant is not criminally culpable for an offense, without regard to whether that determination concerns an element of the crime.

3. The court declined to reconsider its precedent concerning the double jeopardy aspects of erroneously entered acquittals. The court found that there was no showing that its existing precedent was unworkable, and that the logic of the precedent still applies. The court also stated that states may elect to deny trial courts the power to grant a mid-trial acquittal, noting that at least two states have done so and that other jurisdictions encourage courts to defer consideration of motions for directed verdict until after the jury has returned its verdict. "But having chosen to vest its courts with the power to grant mid-trial acquittals, the State must bear the corresponding risk that some acquittals will be granted in error."

Martinez v. Illinois, ___ U.S. ___, ___ S.Ct. ___, ___ L.E2d ___ (2014) (No. 13-5967, 5/27/14)

1. For purposes of the double jeopardy clause, jeopardy attaches when the jury is empaneled and sworn. **Crist v. Bretz,** 437 U.S. 28 (1978). The Illinois Supreme Court erred by finding that jeopardy attaches with the swearing of the jury only if, based on the facts of the particular case, the defendant is "at risk of conviction." Instead, **Bretz** established a "bright-line" which precludes the sort of case-by-case approach adopted by the Illinois Supreme Court.

Thus, at defendant's trial for aggravated battery and mob action, jeopardy attached when the jury was sworn although the State refused to make an opening statement or present witnesses.

2. Once jeopardy has attached, the entry of an acquittal implicates the double jeopardy clause and bars a second trial. An "acquittal" is defined as any ruling that the prosecution's evidence is insufficient to establish criminal liability for an offense. Whether a defendant has been acquitted is determined not by the form of the judge's action, but by whether the ruling, whatever its label, represents a resolution of some or all of the factual elements of the crime.

After obtaining several continuances to find two witnesses, the prosecution declined to participate in defendant's trial. Defense counsel moved for directed findings of not guilty on both counts, and the trial court granted the motion. Under these circumstances, the ruling constituted a "textbook acquittal" because it was "a finding that the State's evidence [could not] support a conviction." Because an acquittal was entered after jeopardy had attached, a second trial was barred.

This result did not change because the State informed the court before the jury was sworn (but after *voir dire*) that it did not intend to participate in the trial. The trial judge had repeatedly granted continuances so the State could attempt to find its witnesses, and on the day of trial conducted *voir dire* but delayed swearing the jury to give the State more time. Furthermore, before the jury was sworn the trial judge told the prosecutor that the State could move to dismiss the case, which would not have implicated the double jeopardy clause. Instead, the State participated in the selection of jurors, failed to seek dismissal before the jury was sworn, and elected not to participate in the trial. Under these circumstances, fairness to the prosecution and the public does not require modification of the bright-line rule that jeopardy attaches when the jury is sworn.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Martinez, 2013 IL 113475 (No. 113475, 4/18/13)

To trigger the protections of the double jeopardy clause, there must first be an attachment of jeopardy. Generally, in a jury trial, jeopardy attaches when a jury is empaneled and sworn. But in assessing whether jeopardy has attached, rules should not be applied mechanically when the interests they protect are not endangered and when their mechanical application would frustrate society's interest in enforcing its criminal laws. The overriding inquiry should be whether the defendant was actually in danger or at risk of being found guilty of any offense.

The State participated in jury selection after the court denied the State's oral motion for a continuance of the trial because two of its witnesses were not present. Before the jury was sworn, the State presented a written motion for a continuance. When the court denied that motion, the State indicated it would not participate any further in the proceedings. The jury was sworn, the State declined to present any evidence, and the court granted the defense motion for a directed acquittal.

Under the "unique set of facts presented here," the Illinois Supreme Court held that jeopardy did not attach when the jury was sworn. Defendant was never at risk of a conviction when the State indicated it would not participate before the jury was sworn. The defendant's interest in retaining a chosen jury was not implicated where there was no trial to be completed by that tribunal. Because defendant was not placed in jeopardy, there was no true acquittal.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

People v. Cervantes, 2013 IL App (2d) 110191 (No. 2-11-0191, 6/11/13)

The constitutional bar against double jeopardy protects against: (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

An acquittal includes any ruling that relates to the ultimate question of guilt or innocence, as opposed to a procedural ruling unrelated to guilt or innocence that results in dismissal. Whether the acquittal was the product of an erroneous interpretation of law or fact affects only the accuracy of the determination to acquit, not its essential character. The issue is only whether the bottom-line question of culpability was resolved. **Evans v. Michigan**, 568 U.S. ___, 133 S. Ct. 1069, ___ L.Ed.2d ___ (2013). The Illinois Supreme Court also requires that the acquittal be unequivocal for jeopardy to terminate, but **Evans** contains no similar requirement. The double-jeopardy clause in the state constitution is interpreted in the same manner as the federal constitution.

After a bench trial, the court found defendant not guilty of possession of a controlled substance with intent to deliver but guilty of simple possession. The court then found the defendant not guilty of armed violence based on its mistaken belief that the armed violence charge was predicated on the controlled substances charge for which it had acquitted the defendant. The prosecutor asked to clarify the ruling, pointing out that the armed violence charge was based on the simple possession charge for which defendant had been convicted. Acknowledging its error, the court entered a written order a week later finding defendant guilty of armed violence.

The court's misreading of the indictment led it to find defendant not guilty due to the State's failure to prove an element that was not an element of the offense. This ruling constituted an acquittal even though erroneous because it was based on guilt or innocence rather than a procedural ground unrelated to guilt or innocence. Assuming that the threshold requirement that the acquittal be unequivocal survives **Evans**, it was met in this case where the court unhesitatingly found defendant not guilty. Once jeopardy terminated with the court's entry of an acquittal, the double jeopardy clause prohibited the court from placing defendant in jeopardy a second time by reconsidering its finding.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Clark, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)

The Illinois Constitution bars an appeal from a judgment of acquittal even where the court's ruling was based on a mistake of fact or law. Similarly, the double jeopardy clauses of the United States and Illinois Constitutions preclude retrial after an acquittal due to insufficient evidence, without regard to whether the court erred in evaluating the evidence or the decision flowed from an incorrect ruling of law. A judgement constitutes an acquittal where it actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

Here, defendant was charged with aggravated vehicular hijacking while armed with a firearm and armed robbery while armed with a firearm. At the close of trial, the judge stated that he found defendant "guilty of aggravated vehicular hijacking and armed robbery without a firearm." The basis of the ruling was that the defendant had been armed with a firearm but used the weapon only as a bludgeon.

The court concluded that the defendant was acquitted by the trial court's ruling. The court also noted that where there is a conflict between the oral pronouncement of a court and a written order, the oral pronouncement controls. Thus, defendant was acquitted by the judge's oral statement although the written sentencing order stated that defendant had been convicted of vehicular hijacking with a firearm and armed robbery with a firearm.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Martinez, 2011 IL App (2d) 100498 (No. 2-10-0498, 10/5/11)

Whether jeopardy attached is decided based on whether defendant was placed at risk of a determination of guilt, not by mechanical application of a rule of thumb, such as whether the jury was empaneled and sworn. Jeopardy does not attach even where evidence is produced if the evidence does not inculpate the defendant.

The "acquittal" entered by the trial court was in fact a dismissal. A jury was sworn and given preliminary instructions. But before the jury was sworn, the State unsuccessfully moved for a continuance, and indicated that it would not participate in the trial as its material witnesses were absent. The court ultimately granted the defense motion for a directed finding after no evidence was presented. As there was no risk of a determination of guilt, jeopardy had not attached.

It was irrelevant that the State reneged on its agreement to the court's proposal that the jury be selected and that the State then decide, before the jury was sworn, whether to dismiss the charges or proceed with the prosecution, or that the State never moved to *nol-pros* the charges. Nor did it matter that the court did not intend that a sham trial occur. It only matters that the trial proceedings had not matured to the point that defendant was at risk of a conviction because no witnesses were sworn and the State presented no evidence.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Ventsias, 2014 IL App (3d) 130275 (No. 3-13-0275, 7/1/14)

1. Double jeopardy precludes a second prosecution for the same offense after an acquittal or conviction. This protection only applies if the defendant was placed in jeopardy during the earlier proceedings, which depends on the point at which jeopardy attached. In a guilty plea proceeding, jeopardy attaches when the trial court accepts the guilty plea, and only attaches to the offenses to which defendant pled guilty. Additionally, double jeopardy does not bar reprosecution of a pled charge if the plea proceeding is later terminated for a proper reason.

2. Here, a jury convicted defendant of predatory criminal sexual assault, but acquitted him of aggravated criminal sexual abuse. On appeal, his conviction was reversed and remanded for a new trial. Prior to the new trial, the State and defendant entered a plea agreement where in exchange for defendant's guilty plea to the abuse charge, the State would nol pros the assault charge.

The court accepted defendant's plea after admonishing him that his reprosecution on the abuse charge would have been barred by double jeopardy. Pursuant to the plea agreement, the State nol-prossed the assault charge. But prior to sentencing, the court expressed concerns about the propriety of defendant pleading guilty to the abuse charge. In response, the State moved to vacate the guilty plea. At a hearing on the State's motion, defendant said he no longer wanted to plead guilty. The court vacated the plea and reinstated the assault charge. Following a trial, defendant was convicted of the assault charge.

3. On appeal, defendant argued that double jeopardy barred his second trial on the assault charge. Defendant argued that jeopardy had attached to and he had been acquitted of the assault charge when the State nol-prossed the charge after defendant pled guilty to the abuse charge. Defendant further argued that the trial court improperly vacated the guilty plea to the abuse charge since defendant validly waived his double jeopardy rights to that charge.

4. The Appellate Court rejected defendant's arguments and held that double jeopardy did not bar retrial on the assault charge. Jeopardy never attached to the assault charge at the plea hearing because defendant never pled guilty to that charge. Instead, the State simply nol-prossed that charge.

Even if jeopardy had attached to the assault charge, the trial court properly vacated

the plea when it realized defendant could not enter a valid plea to the abuse charge since he had been acquitted of that charge. A defendant cannot validly waive the double jeopardy bar on reprosecution following an acquittal.

Defendant's conviction on the assault charge was affirmed.

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§17-5
Reversals on Appeal

Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) The Double Jeopardy Clause precludes a defendant from being retried after a reviewing court has found the evidence at trial legally insufficient. The appropriate remedy is an acquittal. Prior decisions suggesting defendant waived his right to an acquittal by moving for a new trial were overruled.

However, a reversal for trial error does not preclude retrial where the ruling does not constitute a decision that the prosecution failed to prove its case. See also, Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) Defendant may be retried if his conviction was reversed on appeal because it is "against the weight of the evidence"; however, double jeopardy bars retrial if the conviction is reversed due to the "insufficiency of the evidence."

The evidence is "insufficient" when the prosecution has failed to produce sufficient evidence to prove its case and the only proper verdict is acquittal. When a reviewing court disagrees with the trier of fact's resolution of conflicting testimony or disagrees with the weighing of the evidence, however, the reversal is based on the "weight of the evidence."

Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) States may retry a defendant who has succeeded in getting his first conviction set aside. See also, U.S. v. Tateo, 337 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964) (retrial on charges to which defendant originally pled guilty and later had plea vacated).

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 7007 (1969) Conviction of a lesser offense, although reversed on appeal, precludes retrial on a greater offense. See also, Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

Montana v. Hall, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987) Defendant was charged with and convicted of incest. On appeal, the conviction was reversed because the incest statute, as applicable to this case, did not become effective until after the acts were committed. Retrial for sexual assault, an offense which contained essentially the same elements, was permissible.

The Double Jeopardy Clause permits retrial after a conviction is reversed on appeal on any ground other than insufficiency of the evidence. See also, People v. Zeisler, 125 Ill.2d 42, 531 N.E.2d 24 (1988) (defendant may be prosecuted for arson after he was previously convicted of aggravated arson under an unconstitutional and void statute).

Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988) Where a conviction was reversed on appeal on the ground that evidence was erroneously admitted, defendant may be retried though the reviewing court found that the remaining admissible evidence would not have been sufficient to sustain the conviction. A retrial is barred only if the sole ground for the reversal is that the evidence was insufficient to sustain the verdict.

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) The double jeopardy clause is generally inapplicable to sentencing proceedings, "because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" Bullington v. Missouri, 451 U.S. 430 (1981) creates an exception to this general rule for death penalty hearings, based on several factors unique to capital sentencing proceedings including the "trial-like" nature of a death hearing and the severity of a death sentence.

The **Bullington** exception is inapplicable to non-death sentencing proceedings, even those involving "trial-like" proceedings. The double jeopardy clause does not preclude a non-capital sentencing hearing at which the State attempts to obtain an enhanced sentence due to a prior conviction, even where a reviewing court held that the State failed to prove the prior conviction at the first hearing.

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) Under Pennsylvania law, a death sentence is authorized where a jury unanimously finds at least one aggravating factor and no mitigating circumstances, or that the aggravating circumstances outweigh the mitigating circumstances. In all other cases, a life sentence must be imposed.

At defendant's sentencing, the jury deadlocked 9-3 "for life imprisonment." The trial court imposed a life sentence. Defendant appealed the conviction. The Pennsylvania Supreme Court reversed and remanded due to instruction errors.

On remand, the trial court denied defendant's motion to preclude the State from seeking a death sentence and from adding an aggravating factor that had not been at issue at the first sentencing hearing. At the second trial, the jury convicted defendant of first degree murder and imposed a death sentence.

The double jeopardy clause of the Fifth Amendment did not preclude a death sentence. Under Bullington, the double jeopardy bar was not raised by the mere imposition of a life sentence after the original death sentencing proceeding. Because the jury deadlocked, it made no findings with respect to the aggravating factor. Also, because Pennsylvania's sentencing scheme afforded the trial judge no discretion except to impose a life sentence once the jury deadlocked, the judge's entry of a life sentence was not an "acquittal" of a death sentence.

People v. Daniels, 187 Ill.2d 301, 718 N.E.2d 149 (1999) The double jeopardy clause applies only where defendant has been acquitted or convicted of the same charge and to protect against multiple punishments for the same offense. Where defendant's original convictions were reversed on appeal, defendant was neither acquitted nor convicted in the first trial.

Prosecution of particular counts is not barred in a retrial or at a death hearing merely because the jury was not instructed on those counts in an earlier trial. The State's failure to have the jury instructed on a particular theory is not the functional equivalent of a voluntary dismissal of that theory.

Here, the jury's inability to reach a verdict on felony murder precluded a subsequent death sentence based on the "murder in the course of a felony" eligibility factor.

People v. Mack, 182 Ill.2d 377, 695 N.E.2d 869 (1998) A second capital sentencing hearing

is barred, on double jeopardy grounds, where the sentencing judge or reviewing court finds that the prosecution failed to present sufficient evidence to establish that defendant was death-eligible. The double jeopardy clause does not bar a second death hearing where the first sentence was reversed due to trial error rather than evidentiary insufficiency.

Trial error occurred where an essential element of a statutory aggravating factor was omitted from the verdict form on which defendant was found death-eligible. Therefore, the double jeopardy clause did not bar a second death hearing. See also, People v. West, 187 Ill.2d 418, 719 N.E.2d 664 (1999) (where the State's evidence at the first stage of the death hearing was insufficient to establish death eligibility, the Double Jeopardy Clause barred the State from seeking a death sentence in subsequent proceedings).

People v. Sutherland, 223 Ill.2d 187, 860 N.E.2d 178 (2006) Application of the collateral estoppel doctrine is a question of law, to which de novo review applies.

Where a conviction has been reversed for trial error and the cause remanded for a new trial, collateral estoppel bars relitigation of pretrial rulings unless additional evidence or special circumstances exist. The court concluded that the matters raised in defendant's suppression motions had either been expressly litigated at the original trial and not challenged on appeal, or were available at the first trial but not raised.

In addition, there was insufficient newly discovered evidence to bar the collateral estoppel doctrine, because the evidence in question was either: (1) irrelevant, (2) insufficient to require that the motions to suppress be granted, or (3) dependent on the reversal of trial court rulings which defendant did not challenge in his first appeal or in post-conviction proceedings.

People v. Levin, 157 Ill.2d 138, 623 N.E.2d 317 (1993) Where the reviewing court finds that the State failed to present sufficient proof of prior convictions to authorize enhanced sentencing, the State may again attempt to obtain an enhanced sentence on remand. Double jeopardy does not apply to resentencing under the Habitual Criminal Act or the Class X sentencing provision.

People v. Cooper, 194 Ill.2d 419, 743 N.E.2d 32 (2000) Because there is only one offense of first degree murder, the trial court convicted of that offense after explicitly refusing to consider felony murder, and the reviewing court found that the evidence was insufficient to convict on the theory utilized by the trial judge, double jeopardy precluded either a trial for felony murder or a remand for the trial court to consider that offense.

People v. Blackwell, 171 Ill.2d 338, 665 N.E.2d 782 (1996) The Supreme Court declined to decide whether double jeopardy would apply to retrial of a first degree murder charge where, at his first trial, defendant presented sufficient evidence of mitigating circumstances to reduce the conviction to second degree murder. Considered in the light most favorable to prosecution, the evidence would have permitted a rational trier of fact to find that the mitigating factors were not proven.

People v. Moore, 121 Ill.App.3d 570, 459 N.E.2d 1121 (3d Dist. 1984) Even where relief is warranted on another ground, the reviewing court must decide the sufficiency of the evidence issue so that defendant is not denied the "opportunity to be acquitted."

People v. Dungy, 122 Ill.App.3d 314, 461 N.E.2d 485 (1st Dist. 1984) Subsequent prosecution

of defendant is not barred where the conviction was set aside due to "trial error" rather than "evidentiary insufficiency."

In re R.F., 298 Ill.App.3d 13, 698 N.E.2d 610 (1st Dist. 1998) Where the State failed to show that the substance which a chemist found to be heroin was in fact the substance seized from the minor, and therefore failed to prove a foundation to admit the test results, the case suffered from evidentiary insufficiency rather than the erroneous admission of evidence. Under these circumstances, the double jeopardy clause precludes retrial.

People v. Palmer, 188 Ill.App.3d 378, 545 N.E.2d 743 (2d Dist. 1989) Defendant was charged with murder and found guilty but mentally ill. The Appellate Court found that there was a reasonable doubt of defendant's sanity at the time of the offense, and reversed and remanded for entry of a judgment of not guilty by reason of insanity. The trial court subsequently entered such judgment.

The State then reindicted defendant for the murder. The trial judge granted defendant's motion to dismiss on grounds of double jeopardy, res judicata, and collateral estoppel. Dismissal was proper. Reversal of defendant's conviction had been "based on the legal insufficiency of the evidence and not the weight of the evidence." Thus, retrial was barred.

People v. Canulli, 341 Ill.App.3d 361, 792 N.E.2d 438 (4th Dist. 2003) Where novel scientific evidence was erroneously admitted without a Frye hearing, and no other evidence of the offense was introduced, "no fact finder could find beyond a reasonable doubt that defendant was traveling 80 miles per hour in a 65-mile-per-hour zone. Double jeopardy considerations, therefore, prevent retrial."

Cumulative Digest Case Summaries **§17-5**

Bravo-Fernandez et al v. United States, ___ U. S. ___, 137 S.Ct. 352, ___ L.Ed.2d ___ 2016) (No. 15-537, 11/29/16)

1. U.S. Supreme Court double jeopardy precedent holds that once an issue has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in any future lawsuit. **Ashe v. Swenson**, 397 U. S. 436 (1970). The defendant has the burden to demonstrate that the issue which is sought to be relitigated was actually decided by a prior jury's verdict.

In **United States v. Powell**, 469 U. S. 57, the court held that the defendant could not meet this burden when the jury returned irreconcilably inconsistent verdicts on the issue in question. The **Powell** court stressed that the doctrine of issue preclusion is based on the presumption that the jury acted rationally in returning verdicts, and that such a presumption cannot be indulged where verdicts are irreconcilably inconsistent.

However, the **Powell** rule does not apply where the jury acquits on one count and is unable to reach a verdict on another count. **Yeager v. United States**, 557 U.S. 110 (2009). Under such circumstances, the acquittal has preclusive force because the hung count is not inconsistent with an acquittal on another count, but merely represents the jury's failure to decide anything concerning one count.

2. Defendants were indicted on federal charges of bribery, conspiracy to commit bribery, and traveling in furtherance of bribery. The only contested issue at trial was whether the

offense of bribery had been committed, as there was a dispute whether the statute in question covered defendants' conduct.

The jury acquitted defendants on the conspiracy and travel counts but convicted them of bribery. On appeal, the U.S. Court of Appeals vacated that conviction on the ground that the jury instructions permitted the jury to convict on a "gratuity" theory although the statute covered only "*quid pro quo*" bribery. The cause was remanded for retrial on the bribery charge.

On remand, defendants claimed that the double jeopardy clause prohibited retrial because they had been acquitted of charges which were based on the bribery counts and the only issue had been whether the bribery had occurred. The court rejected this argument, concluding that unless the conviction was vacated due to an insufficiency in the evidence or trial error which could have caused the apparent inconsistency in the jury's verdicts, the **Powell** rule applied.

The court noted that the defense had the burden to show that the jury actually decided that defendants did not violate the statute, and found that it was impossible to carry this burden in light of the irreconcilably inconsistent verdicts. The fact that the conviction based on the guilty verdict was subsequently overturned due to instruction error did not establish a finding by the jury that defendants did not violate the statute, particularly where there was sufficient evidence on which a properly instructed jury could have voted to convict,. Therefore, the doctrine of issue preclusion did not apply to retrial of the count on which the conviction was vacated.

People v. Brothers, 2015 IL App (4th) 130644 (Nos. 4-13-0644, 4-13-0650 cons., 9/18/15)

When a court reverses a conviction on appeal based on trial error, retrial does not violate double jeopardy even though the State presented no admissible evidence supporting the conviction. For double jeopardy purposes, all evidence submitted at the original trial, admissible or not, may be considered when determining the sufficiency of the evidence.

Here, the only evidence supporting one of defendant's convictions (for aggravated criminal sexual assault) was inadmissible hearsay. That inadmissible evidence was sufficient, however, to convict defendant. Double jeopardy thus did not bar the State from retrying defendant.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Griffith, 404 Ill.App.3d 1072, 936 N.E.2d 1174, 2010 WL 3834444 (1st Dist. 2010)

The Double Jeopardy Clause bars retrial as a result of prosecutorial misconduct only when the prosecutor intends to goad the defendant to seek a mistrial, not where defendant's conviction is reversed on appeal due to the misconduct of the prosecutor.

On direct appeal, the Appellate Court found the egregious misconduct of the prosecutor harmless and affirmed defendant's conviction. A federal district court granted habeas relief, concluding that reversal was automatic because the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. The State did not appeal the district court's judgment, but sought to retry defendant. Defendant unsuccessfully moved to bar retrial, asking the court to interpret the state constitutional double jeopardy provision to bar retrial when intentional and systematic prosecutorial misconduct deprives the defendant of fundamental fairness at trial, regardless of whether the prosecutor intended to or did provoke a mistrial.

The Appellate Court recognized that states may provide broader double jeopardy protection than is afforded by the federal constitution, and that some states have done so. As a lower court, however, the Appellate Court did not have the authority to depart from Illinois

Supreme Court precedent.

Moreover, the interests protected by the Double Jeopardy Clause would not be served by barring defendant's retrial. The Double Jeopardy Clause prohibits the State from making repeated attempts to convict defendant, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty. Even though the prosecutor's misconduct was intentional and systematic, any embarrassment, expense or ordeal suffered by defendant on account of a retrial is not due to the vast resources of the State, but rather the overwhelming evidence of guilt. The due process rights of the defendant will be adequately protected by a retrial.

The Appellate Court affirmed the denial of the motion to bar prosecution.

People v. Jackson, 2015 IL App (1st) 123695 (No. 1-12-3695, 7/27/15)

In a bench trial, defendant was found guilty of first degree murder, but mentally ill. On appeal, the Appellate Court reversed the conviction and remanded for a new trial because the trial court abandoned its role as a neutral arbiter by adopting a prosecutorial role when questioning an expert witness and by relying on matters based on private knowledge that was outside the record. On remand, defendant argued that double jeopardy and collateral estoppel principles limited the State to seeking a finding of guilty but mentally ill. The trial court rejected defendant's argument, and he filed an interlocutory appeal.

The Appellate Court rejected defendant's argument.

1. The double jeopardy clauses of the United States and Illinois constitutions prohibit placing a person twice in jeopardy for the same offense. Double jeopardy principles prohibit a retrial for the purpose of affording the prosecution an opportunity to supply evidence which it failed to produce in the first proceeding.

Thus, where the evidence at trial was insufficient to sustain a conviction, the State is barred by double jeopardy from retrying the defendant. However, double jeopardy does not prohibit the retrial of a defendant whose conviction is set aside because of an error in the proceedings leading to the conviction. The court noted that in his initial appeal defendant did not challenge the sufficiency of the evidence.

A criminal defendant who raises an insanity defense and who is found guilty of the offense beyond a reasonable doubt, but who fails to prove that he was insane, may be found guilty but mentally ill if he proves by a preponderance of the evidence that he had a mental illness. A person found guilty but mentally ill is subject to any sentence which could have been imposed on a defendant convicted of the same offense without a finding of mental illness. However, DOC is required to make periodic examinations and provide adequate treatment of defendant's mental illness. In other words, an offender found guilty but mentally ill is no less guilty than one who is simply found guilty, but DOC has additional responsibilities concerning the mental illness.

The court concluded that where the first conviction was reversed based on trial errors and not due to insufficiency of evidence, the double jeopardy clause does not preclude the State from seeking a guilty verdict on retrial.

2. The doctrine of collateral estoppel precludes relitigation of issues that were resolved in an earlier case. The doctrine applies when: (1) a party participates in two separate proceedings arising on different causes of action, and (2) some controlling fact or question material to the determination of both causes was adjudicated against that party in the former case. The collateral estoppel doctrine applies only where a final judgment was rendered in the prior case, the party against whom estoppel is asserted was a party or in privity with a party

in the prior case, and the issue decided in the prior case was identical to the issue presented in the instant case.

The court concluded that the doctrine of collateral estoppel does not apply here because there was only one cause of action - the murder of a particular person - and because the prosecution is ongoing and there has not been a final adjudication on the merits.

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§17-6
Successive Prosecutions

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) After a defendant is acquitted of an offense, double jeopardy prohibits a subsequent prosecution for that offense. Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978);

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) The prosecution of defendant for a greater offense is barred after he or she has been convicted of a lesser included offense.

Green v. U.S., 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) Where defendant who is charged with a greater offense is convicted of a lesser included offense, and that conviction is set aside on appeal, retrial on the greater offense is barred. Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) Conviction of a greater offense which cannot be obtained without proof of the lesser included offense bars subsequent prosecution for the lesser offense. People v. Zeisler, 125 Ill.2d 42, 531 N.E.2d 24 (1988).

Richardson v. U.S., 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) When a jury is unable to reach a verdict, there is no conviction or acquittal; thus, a declaration of mistrial does not bar retrial for the same offense. See also, People v. Jenkins, 41 Ill.App.3d 392, 354 N.E.2d 139 (1st Dist. 1976).

U.S. v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) Defendants raised double jeopardy defenses to criminal prosecutions on the ground that they had already been held in contempt of court for the same conduct.

In determining whether a successive prosecution is barred by double jeopardy, the only test to be applied is that of Blockburger v. U.S., 284 U.S. 299 (1932). Under Blockburger, two prosecutions involve the "same offense," so that double jeopardy applies, unless each contains an element not included in the other. Applying that test here, some of the subsequent prosecutions were proper while others were not. See also, People v. Totten, 118 Ill.2d 124, 514 N.E.2d 969 (1987) (defendant may be properly prosecuted for a criminal offense after being found in either direct or indirect criminal contempt for the same conduct; the criminal offense and the contempt are not the "same offense" for double jeopardy purposes).

U.S. v. Felix, 503 U.S. 378, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992) The Double Jeopardy Clause does not prohibit prosecution for an offense merely because that offense was introduced as "other crimes" evidence in an earlier prosecution. Thus, defendant could be prosecuted in Oklahoma for manufacturing methamphetamine in that state in June and July 1987, though evidence of those offenses had been introduced to show intent in a Missouri prosecution involving an August 1987 attempt to manufacture methamphetamine in Missouri.

Likewise, the Double Jeopardy Clause does not prohibit a prosecution for conspiracy merely because the overt acts relied upon to prove the conspiracy were themselves previously prosecuted as substantive offenses. Double jeopardy protects against successive prosecutions for the "same offense"; a substantive offense and conspiracy to commit that offense are not the "same offense."

Morris v. Mathews, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) Defendant pleaded guilty to aggravated robbery. He was subsequently tried and convicted for aggravated murder with the robbery as the aggravating offense.

The prosecution for aggravated murder was barred by double jeopardy. However, a conviction for non-aggravated murder would not be barred. Thus, the conviction could be reduced to murder, with no need for a new trial unless defendant can demonstrate a "reasonable probability" that he would not have been convicted of the lesser offense absent the improper inclusion of the jeopardy-barred charge.

Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975) The prosecution of defendant as an adult, after an adjudicatory finding in juvenile court that he had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated double jeopardy.

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) The doctrine of collateral estoppel is embodied in the Double Jeopardy Clause. Collateral estoppel means that when an issue of ultimate fact has been determined by a valid, final judgment, that issue cannot be again litigated between the same parties.

After defendant had been acquitted for the robbery of one of six poker players, he could not be tried for the robbery of another of the six players. See also, Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971) (store owner and customer).

Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972) After defendant was acquitted of murder during a robbery, his subsequent prosecution for the robbery of the same victim was barred.

Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971) Defendant, who allegedly mailed a bomb, was tried and acquitted of the murder of a person killed by the bomb. A subsequent trial for the murder of another person killed by the bomb was barred by collateral estoppel.

Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980) A subsequent prosecution is barred only if its proof also established the elements of the earlier charge on which defendant was prosecuted and convicted.

Garrett v. U.S., 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985) Double jeopardy did not

bar prosecution of defendant for continuing criminal enterprise after he was convicted of one of the predicate offenses thereof.

Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) Though the Double Jeopardy Clause prohibits cumulative punishments for convictions of the same offense, it does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution. Further, the acceptance of guilty pleas to lesser offenses while charges on the greater offenses remain pending does not present the "implied acquittal" questions that occur when a trier of fact is "charged to consider both greater and lesser included offenses" and convicts on the lesser included offenses.

Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2860 97 L.Ed.2d 1 (1987) Defendant was charged with first degree murder and, as part of a plea agreement, pleaded guilty to second degree murder. Under the agreement, defendant agreed to testify against two codefendants. The agreement also stated that if defendant refused to testify the entire agreement was void and the original charge would be reinstated.

Defendant ultimately refused to testify at the trial of the codefendants. Defendant was then charged with first degree murder, and his second degree murder conviction was vacated.

Defendant's prosecution for first degree murder did not violate double jeopardy. Defendant's breach of the plea agreement removed any double jeopardy bar that otherwise might prevail.

Schiro v. Farley, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) After a jury trial, defendant was convicted of felony murder for inflicting a death while committing a rape. The jury failed to return verdicts on two other murder charges, including one alleging that defendant had "knowingly" killed the decedent. The State then sought a death sentence based on the aggravating factor that defendant had "intentionally" killed the victim while committing or attempting to commit a rape. The trial judge found that the State had proven this factor beyond a reasonable doubt, and a death sentence was imposed.

Use of the "intentional" murder aggravating factor did not violate the double jeopardy prohibition against successive prosecutions, because a death penalty hearing cannot be considered a successive prosecution to the guilt phase of the same trial.

Collateral estoppel did not bar the State from seeking a death sentence based on the "intentional murder" aggravating factor. Collateral estoppel bars relitigation of an issue of ultimate fact that was previously determined by a valid and final judgment. Here, however, the issue of defendant's state of mind was not necessarily determined at the guilt stage, as the failure to return a verdict on "knowing" murder might well have been based on reasons other than the jury's belief that defendant had not acted knowingly or intentionally. Collateral estoppel did not apply.

Hudson v. U.S., 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) The double jeopardy clause protects against the imposition of multiple criminal "punishments" for the same offense. Whether a particular sanction is "civil" or "criminal" depends on a two-part test: (1) whether the legislature intended to adopt a civil or criminal sanction, and (2) whether the scheme is so "punitive" as to render it "criminal" despite the legislature's intent. In making the latter determination, several factors are to be considered, including whether the sanction: (1) involves an "affirmative disability or restraint," (2) "has historically been regarded as a punishment," (3) "comes into play only on a finding of scienter," (4) promotes "the traditional

aims of punishment - retribution and deterrence," and (5) "appears excessive in relation to the alternative purpose assigned." Additional factors to be considered are whether the behavior to which the sanction applies is a crime and whether "an alternative purpose to which [the sanction] may rationally be connected is assignable for it." "[O]nly the clearest proof" will override legislative intent and transform a civil sanction "into a "criminal" punishment.

People ex rel. Daley v. Limperis, 86 Ill.2d 459, 427 N.E.2d 1212 (1981) When a defendant charged with a greater offense is found guilty of a lesser included offense, the conviction operates as an acquittal of the greater offense. See also,720 ILCS 5/3-4(a).

People v. Hoffer, 106 Ill.2d 186, 478 N.E.2d 335 (1985) The principle that a conviction of a lesser offense is an acquittal of the greater offense is not applicable where guilty verdicts are returned on both offenses. This principle applies "only when the jury returns a guilty verdict on the lesser offense and is silent as to the [greater] offense charged." But see, People v. Jeffries, 164 Ill.2d 104, 646 N.E.2d 587 (1995) (overruling Hoffer on other grounds).

People v. McCutcheon, 68 Ill.2d 101, 368 N.E.2d 886 (1977) The principle that a conviction of a lesser offense is an acquittal of the greater offense is not applicable where defendant pleads guilty to a lesser offense and the greater offense is nol-prossed pursuant to a plea agreement. Upon vacation of the guilty plea, defendant may be prosecuted for the greater offense. See also, People v. Jenkins, 41 Ill.App.3d 392, 354 N.E.2d 139 (1st Dist. 1976) (the principle that an acquittal of a greater offense bars a subsequent prosecution for a lesser offense is not applicable when the jury acquits a defendant of the greater offense and is unable to reach a verdict on the lesser offense).

People v. Smith, 78 Ill.2d 298, 399 N.E.2d 1289 (1980) A lesser included offense is generally defined as one which contains some of the elements of the greater offense but has no elements that are not included in the greater offense.

People v. Borchers, 67 Ill.2d 578, 367 N.E.2d 955 (1977) Defendant was convicted of theft and official misconduct after having previously been acquitted on federal charges of mail fraud and conspiracy. The controlling fact or question in both the federal and state prosecutions was the same (i.e., intent to commit a fraud); therefore, relitigation of the question after it had been resolved in defendant's favor in federal court violated the doctrine of collateral estoppel.

In re Nau, 153 Ill.2d 406, 607 N.E.2d 134 (1992) Where defendant is acquitted of murder, evidence of defendant's participation in the murder is properly admitted at his later civil commitment trial.

People v. Stefan, 146 Ill.2d 324, 586 N.E.2d 1239 (1992) Defendant pleaded guilty to a municipal ordinance violation for hazardous waste dumping. He was subsequently indicted for violations of the State Environmental Protection Act based upon the same acts.

The State prosecution was barred by double jeopardy, because the conduct which the State sought to prosecute is the same conduct for which defendant was convicted in the ordinance violation cases.

People v. Colon, 225 Ill.2d 125, 866 N.E.2d 207 (2007) Because probation revocation is governed by a lower standard of proof than a criminal trial, collateral estoppel does not

preclude litigation of a probation revocation petition after defendant has been acquitted in a criminal trial based on the same conduct.

People v. Albanese, 104 Ill.2d 504, 473 N.E.2d 1246 (1984) Defendant was convicted of the murders of his father and his wife's grandmother. Subsequently, he was tried for the murder of his mother-in-law based upon essentially the same evidence that had been used to support his conviction for the murder of his wife's grandmother. Defendant contended that the latter prosecution was barred.

Ch. 38, ¶3-3(b) requires that all offenses known to the prosecutor be "prosecuted in a single prosecution." The Committee Comments to that statute state that it is not intended to cover, inter alia, "multiple murder situation[s]."

Ch. 38, ¶3-4(b)(1) bars prosecution if a prior trial resulted in conviction and the "subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution." The Committee Comments state that ¶3-4 does not apply in regard to "the same conduct with respect to a different victim . . . even if the offenses charged are violations of the same statute, committed at the same time." Conviction upheld.

People v. Carrillo, 164 Ill.2d 144, 646 N.E.2d 582 (1995) In 1979, Carrillo and Stacey agreed that Carrillo would break into an apartment that Stacey owned, to frighten the tenant into leaving. However, the tenant was shot and paralyzed during the break-in, and both defendants were tried for several offenses. Carrillo was convicted (as a principal) of attempt murder, home invasion, armed robbery, burglary, aggravated battery and armed violence. Stacey was convicted (as an accomplice) of home invasion and burglary, but was acquitted of attempt murder, armed robbery, aggravated battery, and armed violence.

Nine years after the offense, the tenant died of injuries sustained in the break-in. Defendants were then charged with "intentional and knowing" murder, "knowledge of the strong probability of death or great bodily harm" murder, and felony murder.

The murder charges alleging knowledge of the strong probability of death or great bodily harm could be brought against both defendants, since none of the previously prosecuted charges had involved that mental state.

Double jeopardy did not prohibit prosecution of the felony murder charges, even if the same mental states had been involved in the original prosecutions. Under Diaz v. U.S., 223 U.S. 442 (1912), a double jeopardy exception exists where, at the time of the original charges, the State could not proceed on more serious charges because additional facts necessary to sustain those charges had not yet occurred. Thus, the second prosecutions were not barred, although defendants had previously been tried for offenses involving the same mental states or predicate felonies, because a fact necessary for those prosecutions (i.e., the decedent's death) had not yet occurred when the lesser offenses were prosecuted.

The collateral estoppel doctrine does not apply to guilty pleas, because such pleas do not "litigate issues." Furthermore, unlike an acquittal, a guilty plea does not foreclose prosecution of offenses arising out of the same conduct but requiring proof of additional elements. Thus, collateral estoppel did not apply to the offenses to which Carillo pleaded guilty.

Collateral estoppel clearly precludes relitigation of issues previously resolved in a defendant's favor. Because Stacey had been acquitted of armed robbery and attempt murder, therefore, the State could not subsequently prosecute her for intentional murder or felony murder based on armed robbery.

People v. Jones, 207 Ill.2d 122, 797 N.E.2d 640 (2003) A second trial judge, to whom the case was transferred for retrial after the first trial judge vacated a conviction for mob action on the ground that the conviction was legally inconsistent with acquittals of aggravated battery, had authority to reverse the first judge's finding and reinstate the conviction. In a criminal case, the circuit court has inherent power to reconsider and correct its rulings.

Furthermore, the Appellate Court had authority to reinstate the vacated conviction when it considered defendant's appeal from the denial of a motion to bar a new trial on the vacated conviction. The first judge's erroneous order was "brought up for review" when defendant appealed from the denial of his motion to bar a retrial.

Finally, although the jury had acquitted defendant of aggravated battery, he could be retried on a robbery charge on which the jury had been unable to reach a verdict. The acquittal for aggravated battery established that the jury believed that neither defendant nor a person for whom he was accountable pushed or struck the complainant with intent to commit bodily harm or with knowledge that such actions would cause bodily harm. A retrial for robbery would involve a different question - whether defendant or an accomplice took property from the complainant by use of force or by threatening the imminent use of force, "both of which can be accomplished without defendant actually pushing or striking" the complainant. Because the jury would not be required to relitigate whether defendant pushed or struck the complainant, the collateral estoppel doctrine did not apply.

People v. Sienkiewicz, 208 Ill.2d 1, 802 N.E.2d 767 (2003) Defendant pleaded guilty to reckless driving based upon "improper stopping in traffic, failure to signal when required, improper lane usage [and] traveling 80 m.p.h. plus in a 55 m.p.h. zone." Defendant was subsequently indicted for reckless homicide on the same date and in the same location, on the ground that he operated his vehicle at a speed that was greater than the posted speed limit, causing the vehicle to leave the roadway, strike a van and kill a passenger in defendant's vehicle.

The reckless driving and reckless homicide charges were based on a single act. Defendant's actions were not interrupted by any intervening event and occurred over an unbroken time interval, and the identity of the victim was the same in both charges. The conduct underlying the two offenses was identical - excessive speed causing the vehicle to leave the roadway and cause an accident. Also, all of defendant's conduct occurred in one location.

Because the offenses were based on a single act, Blockburger permitted the reckless homicide prosecution only if reckless homicide and reckless driving each contain an element not included in the other. This test could not be met.

First, the mental states for the offenses are equivalent. Reckless driving requires that a vehicle be operated with a "wilful or wanton disregard for the safety of persons or property," while reckless homicide requires that conduct be performed "recklessly," which is defined as an act "performed wantonly." Second, because the only difference between the offenses is that a death is required for reckless homicide but not for reckless driving, the elements of reckless driving "are necessarily included in the proof required for a charge of reckless homicide."

People v. Mueller, 109 Ill.2d 378, 488 N.E.2d 523 (1985) Defendant was charged with murder in Scott County, but was acquitted after a jury trial at which he claimed self-defense. He was then charged and convicted in Cass County for concealment of a homicidal death involving the same victim. Defendant contended that prosecution of the concealment offense was barred by double jeopardy and Ch. 38, ¶3-4(b)(1).

Section 3-4(b)(1) provides that a prosecution is barred if defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

> "Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3.3."

Since the offenses of murder and concealment are different (the former resting upon acts of shooting and the latter on acts of secreting bodies subsequent to the shooting), the first clause of 3-4(b)(1) does not require that they be prosecuted together.

The second clause of 3-4(b)(1) requires offenses to be prosecuted together when 3-3 is applicable. However, 3-3(b) requires several offenses to be prosecuted in a single prosecution only "if they are based on the same act." Since the murder and concealment offenses were not based on the "same act," but were accomplished by "independent overt acts," there was no requirement that they be prosecuted together.

Finally, the concealment prosecution was not barred by double jeopardy. Since the offenses of murder and concealment require different acts as well as different states of mind, they are not the "same offense" for double jeopardy purposes.

People v. Gray, 214 Ill.2d 1, 823 N.E.2d 555 (2005) After defendant pleaded guilty in Coles County to two counts of criminal sexual assault and one count of UUW, he was charged in Champaign County with four counts of predatory criminal sexual assault of a child based upon the same conduct. Before defendant pleaded guilty in Coles County, defense counsel had contacted the Champaign County State's Attorney's Office, given notice of the plea agreement in Coles County, and informed the Champaign prosecutor that some of the offenses appeared to have been committed in Champaign County.

In response, a Champaign County Assistant State's Attorney told defense counsel that Champaign prosecutors were unaware of any investigation against defendant and were not contemplating any charges. After pleading guilty, but before being sentenced, defendant received a presentence report indicating that the Champaign County State's Attorney "was indeed contemplating filing charges."

Defendant then moved in Coles County to supplement the record in support of his plea or to withdraw the plea. The motion alleged that some of the offenses to which defendant had pleaded guilty occurred in Champaign County, that defense counsel had discussed the situation with Champaign County authorities, and that defendant had waived any objection to improper venue in Coles County. The Coles County judge allowed defendant to supplement the record, and defendant was sentenced to concurrent sentences of five years on each count.

Two months later, Champaign County filed an information charging five counts of predatory criminal sexual assault of a child, a Class X felony. The Champaign prosecutor admitted that four of the five counts were based on the same acts as the Coles County charges to which defendant had pleaded guilty. The trial court denied defendant's motion to dismiss the charges on double jeopardy grounds, and defendant took an interlocutory appeal.

Under the Blockburger "same elements" test, no double jeopardy violation occurred. Each of the counts of criminal sexual assault filed in Coles County required the State to prove that either: (1) the victim was under the age of 18 and the accused was a family member, or (2) force or the threat of force was used. By contrast, each of the Champaign County charges of predatory criminal sexual assault required the State to prove that defendant was at least

17 and the victim was under 13 when the act was committed. Because each offense requires proof of an element not required in the others, no double jeopardy violation occurred "notwithstanding a significant overlap in the proof offered to establish the crimes."

Furthermore, the Champaign County charges were not barred by 720 ILCS 5/3-4(a)(1), which provides that a prosecution is barred if defendant was previously prosecuted for the same offense based upon the same act, if the former prosecution resulted in a conviction, an acquittal or a determination that the evidence was insufficient to warrant a conviction. Because the Coles County and Champaign County prosecutions were for different offenses,§3-4(a)(1) did not apply.

Finally, because the Coles County State's Attorney was not the "proper prosecuting officer" for offenses which occurred in Champaign County, 720 ILCS 5/3-4(b)(1) - which bars prosecution for certain offenses which were known to the "proper prosecuting officer" at the time of a previous prosecution - did not apply.

The court also acknowledged that defendant had not challenged the Coles County convictions on which he was incarcerated, and that "one-act, one-crime" issues could arise if defendant was convicted of the Champaign County offenses.

People v. Dinelli, 217 Ill.2d 387, 841 N.E.2d 968 (2005) A guilty plea in Cook County to criminal trespass of a vehicle did not preclude, on double jeopardy grounds, a prosecution in DuPage County for unlawful possession of a stolen motor vehicle, where both offenses involved the same vehicle.

Where prosecutions are predicated on different criminal acts, the prohibition against double jeopardy is not violated by multiple prosecutions. An "act" is defined as "any overt or outward manifestation which will support a different offense." The factors used to determine whether one or more acts are involved in criminal charges include: (1) whether the acts were interrupted by an intervening event; (2) the time interval between the successive parts of defendant's conduct; (3) the identity of the victim; (4) any similarity of the acts performed; (5) whether the conduct occurred in the same location; and (6) the prosecutorial intent as shown by the wording of the charging instruments.

Here, the charges of criminal trespass and unlawful possession of a stolen motor vehicle were based on separate acts. Not only did the charges involve conduct occurring some 20 days apart, but one incident occurred in Cook County while the other occurred in DuPage County. No double jeopardy violation occurred.

People v. Ward, 72 Ill.2d 379, 381 N.E.2d 256 (1978) Defendant was charged with burglary, testified in his own behalf, and was found not guilty by a judge who concluded that the evidence was insufficient to prove guilt. Defendant was then prosecuted for perjury based upon his trial testimony that he did not enter the premises and did not steal the property.

The perjury prosecution was barred by the doctrine of collateral estoppel, because the perjury prosecution was "really an effort to relitigate the burglary charge."

People v. Williams, 59 Ill.2d 557, 322 N.E.2d 461 (1975) Collateral estoppel prohibited the State from re-litigating the decision in defendant's favor on a motion to suppress in one case in an effort to use those same statements in a second case.

People v. Enis, 163 Ill.2d 367, 645 N.E.2d 856 (1994) Where a new trial is ordered in an appeal in which defendant did not challenge pretrial suppression rulings, the collateral estoppel doctrine bars relitigation of the pretrial rulings unless defendant offers additional

evidence, the applicable law has changed, or there are other "special circumstances.

People v. Billops, 125 Ill.App.3d 483, 466 N.E.2d 304 (5th Dist. 1984) Guilty plea did not waive the claims that double jeopardy and compulsory joinder rules were violated. The prosecutor's knowledge of both offenses could be "inferred from the record."

People v. Poliak, 124 Ill.App.3d 550, 464 N.E.2d 304 (2d Dist. 1984) Defendant was charged with theft for knowingly obtaining unauthorized control of an automobile belonging to another. Defendant moved to dismiss the charge under Ch. 38, ¶3-4(c), alleging that she had been found delinquent in Colorado for the same conduct. ¶3-4(c) barred the prosecution.

People v. Barash, 325 Ill.App.3d 741, 759 N.E.2d 590 (3d Dist. 2001) 720 ILCS 550/13(b), which provides that "[a] conviction or acquittal, under the laws of the United States or of any State relating to Cannabis for the same act is a bar to prosecution in this State," was intended to prevent multiple prosecutions for cannabis violations based upon the same conduct. Identical elements are not required for convictions to be based on the same "act."

Because defendant's Arizona conviction for illegally conducting an enterprise was clearly based on the same act for which defendant was being prosecuted in Illinois, prosecution of the Illinois charges was barred.

People v. Flaar, 366 Ill.App.3d 685, 852 N.E.2d 338 (1st Dist. 2006) The offense at issue here arose from defendant's act of e-mailing a picture to an undercover officer in Cook County. Defendant was charged in Kendall County, where he lived, with possession of child pornography for having the image on his computer's hard drive when a search warrant was executed several weeks after he sent the e-mail. He was subsequently charged in Cook County with disseminating child pornography by sending the e-mail.

Defendant pleaded guilty in Kendall County, and raised the plea as a double jeopardy bar to the Cook County charges. The parties agreed that possession of child pornography is a lesser included offense of dissemination of child pornography.

E-mailing the image to the undercover officer was a separate "act" from retaining a copy of the image on the computer. Because separate acts were involved, there was no double jeopardy bar to the Cook County prosecution.

People v. Baker, 77 Ill.App.3d 943, 397 N.E.2d 164 (4th Dist. 1979) Defendant pleaded guilty to illegal transportation of liquor and possession of cannabis. About five months later he was indicted for unlawful possession of a controlled substance, arising from the same incident as the previous charges. The trial court dismissed the controlled substance indictment on the basis of Ch. 38, ¶3-3(b).

All of the offenses were within the jurisdiction of the court and known to the State's Attorney at the time the prosecution was commenced; thus, they were required to be prosecuted together.

People v. Hoskinson, 201 Ill.App.3d 411, 559 N.E.2d 11 (1st Dist. 1990) The compulsory joinder provisions do not apply where the initial charges were brought by a police uniform citation and complaint form.

People v. Fako, 312 Ill.App.3d 313, 726 N.E.2d 734 (2d Dist. 2000) The municipal court lacked jurisdiction over a misdemeanor charge which was dismissed by the State's Attorney

four days before defendant pleaded guilty. Therefore, double jeopardy did not bar subsequent prosecution of a felony charge based on the same act.

People v. Wilson, 61 Ill.App.3d 1029, 378 N.E.2d 378 (5th Dist. 1978) Defendant was convicted of murder and felony murder arising out of the same incident. In the belief that judgment could not be entered on both convictions, the State nolle prossed the felony murder. Subsequently, the murder conviction was reversed and remanded. Defendant could be retried on both murder and felony murder.

People v. Turner, 325 Ill.App.3d 185, 757 N.E.2d 658 (5th Dist. 2001) Where defendant pleaded guilty to predatory criminal sexual assault of a child, was completing his prison term, and took no steps to challenge his convictions after the Illinois Supreme Court struck down the public act creating the offense, the State acted improperly by obtaining a second indictment for the same crimes on the ground that the first convictions were void.

People v. Jones, 301 Ill.App.3d 608, 703 N.E.2d 994 (5th Dist. 1998) Neither double jeopardy nor collateral estoppel preclude a criminal prosecution because defendant has been previously tried and acquitted in prison disciplinary proceedings. Prison disciplinary proceedings are not "criminal" proceedings and do not implicate the double jeopardy clause.

People v. Huff, 44 Ill.App.3d 273, 357 N.E.2d 1380 (4th Dist. 1976) The State may seek revocation of probation without first trying a defendant criminally for the offense that is the basis of the revocation.

People v. Newell, 105 Ill.App.3d 330, 434 N.E.2d 349 (1st Dist. 1982) The State may both revoke defendant's probation and obtain a criminal conviction based upon the same conduct; this result does not constitute double jeopardy.

People v. T.D., 180 Ill.App.3d 608, 536 N.E.2d 211 (4th Dist. 1989) Defendant was charged with sex offenses against his children, and was found not guilty. Subsequently, a juvenile petition was filed alleging that the children were abused and neglected.

The subsequent petition was proper because a finding of not guilty in a criminal proceeding does not preclude a civil proceeding based on the same allegations.

In re K.B., 301 Ill.App.3d 926, 704 N.E.2d 791 (1st Dist. 1998) Double jeopardy did not preclude a petition for adjudication of wardship based upon the conduct (possessing cannabis at school) for which defendant had previously been suspended from school for two years. The two-year suspension was "remedial" rather than "punitive," because its purpose was to remove "a disruptive activity with potentially serious consequences to the overall educational setting."

In re N.R.L., 199 Ill.App.3d 1024, 558 N.E.2d 538 (2d Dist. 1990) The State filed a petition to revoke the minor's probation based upon his alleged commission of an aggravated battery. The State also filed a delinquency petition based upon the same aggravated battery, and a single hearing was held on both petitions.

The trial judge ruled in respondent's favor on the delinquency petition, finding that the evidence was not sufficient to prove the aggravated battery beyond a reasonable doubt. However, the judge found that the evidence was sufficient to prove the aggravated battery by a preponderance of the evidence. Based on this finding, the judge concluded that respondent

had violated his probation.

The judge's rulings were not inconsistent and there was no violation of collateral estoppel or double jeopardy. The essence of both collateral estoppel and double jeopardy "is that the State, having once failed to prove an offense, does not get a second chance." Here, there was only one hearing, at which the judge was asked to answer two questions based upon the evidence. Thus, there was no attempt to relitigate ultimate facts at a second proceeding, and the respondent was not forced to "run the gauntlet twice."

People v. Smith, 233 Ill.App.3d 342, 599 N.E.2d 492 (2d Dist. 1992) After defendant was indicted on two counts of unlawful delivery of cannabis, the State agreed to dismiss the charges if she provided information leading to the purchase of two ounces of cocaine. Defendant eventually introduced an undercover officer to Mark Lambrecht, who sold the officer the cocaine. Lambrecht was arrested, and the charges against defendant were dismissed before Lambrecht's trial.

When called as a defense witness at the trial, defendant testified that she had entrapped Lambrecht into delivering the cocaine because he was "naive and easy to fool." The State then reindicted defendant on the original cannabis charges. The trial judge dismissed the new indictments on the ground that they violated due process, double jeopardy and res judicata.

The trial judge's interpretation of the agreement between the parties was not manifestly erroneous. When he originally outlined the agreement for the trial court, the prosecutor said that defendant had agreed to cooperate with authorities in return for "outright dismissal" of the charges. In addition, the State's motion to dismiss stated that defendant had cooperated with police in securing Lambrecht's arrest. Under the circumstances, the trial court could logically conclude that the State intended to dismiss the charges and not merely to nol pros them. Thus, the dismissal operated as an acquittal, and the new indictments violated due process and double jeopardy.

In addition, defendant had fulfilled her part of the agreement and the State had received the full benefit of its bargain. Finally, defendant was entitled to the dismissal under Ch. 38, ¶114-1(a)(3), which provides that a defendant who has been granted immunity for an offense cannot be indicted for that offense.

People v. Fisher, 259 Ill.App.3d 445, 632 N.E.2d 689 (5th Dist. 1994) Conviction of a predicate offense amounts to an implied acquittal of the greater offense. Therefore, defendant could not be retried for armed violence (based on aggravated battery) where, at the first trial, he had been convicted of aggravated battery and a mistrial had been declared on the armed violence charge. The aggravated battery conviction impliedly acquitted defendant of armed violence.

In addition, defendant did not waive his objection to the retrial by failing to object to the first jury's discharge. Since the State had the same right as defendant to object to the discharge, defendant's failure to object could not be said to have caused any prejudice.

People v. Aleman, 281 Ill.App.3d 991, 667 N.E.2d 615 (1st Dist. 1996) As a matter of first impression, double jeopardy does not bar retrial where the trier of fact in the first trial was bribed to return an acquittal. Double jeopardy does not apply because defendant does not actually face the risk of conviction.

People v. Eck, 279 Ill.App.3d 541, 664 N.E.2d 1147 (5th Dist. 1996) Subjecting a criminal

defendant to both summary suspension and a criminal prosecution for DUI does not violate double jeopardy. See also, People v. Dvorak, 276 Ill.App.3d 544, 648 N.E.2d 869 (2d Dist. 1995); People v. Lopeman, 279 Ill.App.3d 1058, 665 N.E.2d 881 (3d Dist. 1996).

Cumulative Digest Case Summaries **§17-6**

Yeager v. U.S., ___ U.S. ___, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009)

1. Under **Ashe v. Swenson**, 397 U.S. 436 (1970), an issue of ultimate fact that has been determined by a valid and final judgment of acquittal cannot be relitigated in a second trial for a separate offense. To determine what issues the acquittal necessarily decided, courts should examine the entire record of the prior proceeding including the pleadings, evidence, charge, and other relevant material, to determine whether a rational jury could have grounded the acquittal on an issue other than that which the defendant seeks to foreclose from consideration in a second trial.

2. Where the defendant was acquitted of fraud in the first trial, but the jury could not reach a verdict on insider trading and money laundering counts, a second trial would be precluded only if the acquittal for wire fraud necessarily involved determination of an issue that was necessary to obtain a conviction on the remaining charges. The court stressed that only the issues required for the acquittal were in question – the jury's inability to reach a verdict on some counts is a "nonevent" in terms of precluding issues from being considered at the second trial. In other words, "the consideration of hung counts has no place in the issue-preclusion analysis."

3. Because the lower court did not consider whether the acquittal for fraud necessarily rested on an issue which would be required to convict at a second trial for inside trading and money laundering, the cause was remanded for further consideration.

People v. Brown, 2015 IL App (1st) 134049 (No. 1-13-4049, 6/22/15)

Defendant was prosecuted in separate trials on charges arising from a 2007 gun battle which defendant initiated with three persons. At the first trial, defendant was convicted of aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm for shooting at Terrell Spencer, and was also convicted of two counts of aggravated discharge of a firearm for shooting in the direction of Michael Dixon and Jarrett Swift. However, defendant was granted a directed verdict on charges of attempt murder, aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm relating to the shooting of Mycal Hunter, a bystander who was struck in the neck by a bullet. The trial court stated that there was insufficient evidence to show that defendant fired the shots which struck Hunter.

After the first trial was completed, Hunter died. Defendant was then tried for first degree murder based on two counts of knowing murder and five counts of felony murder predicated on the five felony convictions which he received in the first trial for offenses committed against Spencer, Dixon and Swift.

The court rejected arguments that double jeopardy and collateral estoppel barred a trial for murder after defendant was acquitted in the first trial of offenses against the same person.

1. The Illinois and Federal constitutions provide that no person shall be put twice in jeopardy for the same offense. In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. Entry of a directed verdict is an "acquittal" for double jeopardy purposes where the basis for the verdict is insufficient evidence to establish

some or all of the essential elements of the crime.

Illinois statutory law also provides that a prosecution is barred if the defendant was formerly prosecuted for the same offense based on the same facts and the prior prosecution resulted in an acquittal or a determination that the evidence was insufficient to warrant a conviction. 720 ILCS 5/3-4(a)(1). A prosecution for a different offense is barred where a former prosecution was for an offense that involved the same conduct unless each prosecution requires proof of a fact not required for the other or "the offense was not consummated when the former trial began." 720 ILCS 5/3-4(b)(1).

The court held that §3-4(b)(1) embodies an exception to double jeopardy principles recognized in **Diaz v. United States**, 223 U.S. 442 (1912), where the United States Supreme Court found that a subsequent trial is permissible where at the time of the first trial, the prosecution could not have proceeded on the charge brought in the subsequent trial because additional facts necessary to sustain that charge had not yet occurred.

Because a murder prosecution cannot commence until the victim's death has occurred, the court concluded that the **Diaz** exception and §3-4(b)(1) applied. Thus, double jeopardy was not violated where defendant was prosecuted for murder after the decedent's death although he had been acquitted of related offenses at a trial which occurred while the decedent was still alive.

2. In a criminal context, collateral estoppel is a component of double jeopardy. The collateral estoppel doctrine holds that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a subsequent lawsuit. A party who seeks to invoke collateral estoppel must show that the issue was raised and litigated in a prior proceeding, determination of the issue was a critical and necessary part of the final judgment in that proceeding, and the issue sought to be precluded in the later trial is the same as the issue decided in the prior trial. Where the defendant claims that a previous acquittal bars a subsequent prosecution for a related offense, the collateral estoppel rule requires a court to examine the record of the prior proceeding and determine whether a rational jury could have grounded its verdict on an issue other than the one which the defendant seeks to foreclose from consideration.

A directed verdict in favor of the defendant constitutes an "acquittal" where the verdict was based on a finding that there was insufficient evidence concerning an essential element of the crime. Thus, the directed verdict in the first trial has preclusive effect under the collateral estoppel doctrine to the extent that it represented a determination that there was insufficient evidence to sustain an element of a charged offense.

Because intent to kill is an element of attempt murder, the directed verdict on attempt murder in the first trial precluded relitigation concerning whether defendant intended to kill the decedent. Thus, in the second trial the State was estopped from prosecuting defendant for intentional first degree murder.

The acquittal for attempt murder did not preclude a subsequent prosecution for first degree murder based on knowledge that the shooting created a strong probability of death or great bodily harm. However, such charges could not be brought in the second trial because in the first trial, defendant was acquitted of charges (aggravated battery, aggravated battery of a firearm, and aggravated discharge of a firearm) which required a knowing mental state and which were directed toward Hunter. Because the acquittals on these offenses were based on the trial court's finding that there was insufficient evidence to show that defendant knowingly caused Hunter's injuries, the collateral estoppel doctrine precluded a subsequent prosecution for knowing murder.

However, the acquittals for attempt murder and offenses based on knowledge did not

preclude a subsequent prosecution for felony murder predicated on the convictions obtained in the first trial against persons other than Hunter. Felony murder does not require a particular mental state, but only that the defendant was committing a forcible felony when he committed the acts which resulted in death. Furthermore, under the Illinois "proximate cause" theory, liability for felony murder attaches for any death which proximately results from unlawful activity initiated by the defendant, even if the killing was performed by the intended victim of the crime. Thus, where defendant was convicted of five felonies for initiating a shootout with individuals other than Hunter, and Hunter died in the course of those felonies, defendant could be prosecuted for felony murder whether or not he fired the shot which hit Hunter.

3. The court noted, however, that the single act of shooting Hunter could not support three separate felony murder convictions. The court vacated two counts of felony murder, affirmed the conviction for felony murder predicated on aggravated battery with a firearm directed against Spencer, and remanded the cause for re-sentencing.

People v. Cordero, 2012 IL App (2d) 101113 (No. 2-10-1113, 2/10/12)

The double jeopardy clause prohibits a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction, and multiple prosecutions for the same offense. However, double jeopardy protection is triggered only if there has been an event which terminates the original jeopardy from the first proceeding. The original jeopardy is not terminated where the jury fails to reach a verdict at the first trial, or the defendant is convicted but the trial court grants a new trial due to trial error:

> [W[here the trial court sets aside a conviction, based on trial error, double jeopardy does not bar retrying the defendant – regardless of whether the evidence at the first trial was legally sufficient. Whatever the strength of the evidence at the original trial, the new trial cannot put the defendant in jeopardy for a *second* time – for the simple reason that he is still in jeopardy for the *first* time.

Where the defendant was convicted of aggravated sexual assault, but the trial court granted defendant's post-trial motion and ordered a new trial, the original jeopardy was not terminated. Therefore, a new trial would not subject the defendant to double jeopardy even if the evidence at the first trial was legally insufficient. Therefore, the trial court properly denied defendant's motion to dismiss the charge on the ground that the evidence presented at the first trial was insufficient to satisfy the reasonable doubt standard.

People v. Guillen, 2014 IL App (2d) 131216 (No. 2-13-1216, 11/25/14)

The trial court was in the process of accepting defendant's guilty plea and determining what sentence to impose (more or less at the same time), when the State decided that it had charged the wrong offense. The court allowed the State to *nolle pros* the current charges over defendant's objection.

When the State brought new charges, defendant moved to dismiss them on double jeopardy grounds, arguing before a new judge that the prior judge had implicitly accepted the guilty plea by discussing sentencing factors and thus jeopardy had attached. The new judge agreed and dismissed the charges.

The State appealed the trial court's dismissal. Defendant was not represented by counsel on appeal and filed no appellate brief responding to the State's arguments. The Appellate Court agreed that it could nonetheless consider the merits of the appeal, but split

three ways on the rationale for doing so with no controlling opinion. The court decided 2-1 to reverse the trial court, again with no controlling opinion.

In **First Capitol Mortgage Corp. v. Talandis Construction Corp.**, 63 Ill. 2d 128 (1976), the Supreme Court set out three options available to the reviewing court when an appellee does not file a brief: (1) the court may, if justice requires, serve as an advocate for the appellee and search the record for reasons to affirm the judgment being appealed; (2) the court may decide the case on the merits if the record is simple and the issues easily decided even without an appellee's brief; or (3) the court may reverse the judgment below if the appellant's brief demonstrates *prima facie* reversible error and the record supports the appellant's contentions.

1. Justice Schostok delivered the judgment of the court reversing the trial court. Writing for herself alone, she selected the second **Talandis** option and determined that the trial court had improperly dismissed the charges on double jeopardy grounds.

Double jeopardy is violated by a second proceeding when the defendant was placed in jeopardy during the first proceeding and the first proceeding was improperly terminated. When the State *nol prosses* charges, a second prosecution is permitted if the *nol pros* occurred before jeopardy attached. If the *nol pros* occurs after jeopardy has attached, the *nol pros* generally acts as an acquittal that bars further prosecution.

In a guilty plea, jeopardy attaches when the court accepts the plea, but Illinois law has not clearly defined the point when a guilty plea has been accepted. In particular, the Illinois Supreme Court has not decided whether a trial court has accepted a plea when it has begun to accept the plea but then vacates the plea during the same hearing.

Substantial authority from other jurisdictions, however, suggests that a plea is accepted only when the trial court unconditionally accepts the plea. Thus, a trial court may vacate a guilty plea if it becomes aware of facts counseling against the plea, so long as the plea has not been accepted in a final and unconditional manner.

Based on these principles, Justice Schostok found that jeopardy had not attached when the State *nol prossed* the charges. Although defendant indicated that he wished to plead guilty, and the court admonished him about some of the consequences of his plea and began considering sentencing matters, other aspects of plea acceptance were not present here. The parties still had not agreed on the minimum punishment defendant faced and the State had not presented a factual basis. The plea hearing thus had not concluded when the State *nol prossed* the charges. Any acceptance of the plea was preliminary rather than unconditional.

Even if jeopardy had attached, the prosecution was not improperly terminated. During the plea hearing, both the State and the court realized that defendant had been improperly charged. The State's decision to *nol pros* the charges thus was not for an improper purpose and the court could properly terminate the plea proceedings, vacate the plea, and grant the State's motion without violating double jeopardy.

The trial court's dismissal of the charges was reversed.

2. Justice Zenoff agreed with the judgment reversing the trial court, but disagreed with Justice Schostok's use of the second **Talandis** option. Instead, Justice Zenoff selected the third **Talandis** option and determined that the appellant's brief showed *prima facie* reversible error.

The State argued that Supreme Court Rule 402 requires the trial court to comply certain formalities before accepting a plea. The record showed that the court did not comply with those formalities and thus the State argued that the trial had not yet accepted defendant's plea. Justice Zenoff found that this argument made a *prima facie* showing that no double jeopardy violation occurred here. Under the third **Talandis** option, that was enough

to reverse the trial court's dismissal.

3. Justice Hudson dissented from the judgment reversing the trial court. He selected the first **Talandis** option and, acting as an advocate for defendant, would have found that the trial court properly dismissed the charges on double jeopardy grounds. The record showed that the trial court was beginning to pronounce sentence and therefore had already accepted the guilty plea. Jeopardy had thus attached and the trial court properly dismissed the new charges on double jeopardy grounds.

People v. Howard, 2014 IL App (1st) 122958 (No. 1-12-2958, 3/17/14)

1. The double jeopardy clause provides protection against: (1) a second prosecution after an acquittal; (2) a second prosecution after a conviction; and (3) multiple punishments for the same offense. If double jeopardy protection has attached, a defendant may not be subjected to a second prosecution after a court-decreed acquittal, even if the acquittal was based on erroneous grounds. Thus, double jeopardy has been held to prevent second prosecutions where acquittals were based on the court's mistaken understanding of the evidence necessary to sustain a conviction or the statute defining the requirements for a conviction.

2. Defendant was charged with unlawful possession of a controlled substance and four counts of unlawful use of a weapon for knowingly possessing firearms or firearm ammunition after having been convicted of a felony. (720 ILCS 5/24-1.1(a)). All of the UUW counts were based on the same prior felony conviction. Counts IV and VI were based on possession of a firearm, and Counts V and VII were based on possession of the ammunition inside that firearm.

Counts IV and V also contained a notice that, pursuant to 720 ILCS 5/24-1.1(e), the State would seek enhanced sentencing because at the time of the offense, defendant was on parole or mandatory supervised release. Section 24-1.1(e) provides that a violation of §24-1.1(a) by a person who is on parole or mandatary supervised release constitutes a Class 2 felony carrying a sentence of not less than two years or more than 14 years if a prison sentence is imposed.

At the end of the trial, the trial court entered an acquittal on Counts IV and V, finding that the State had failed to prove beyond a reasonable doubt that defendant was a parolee. At the sentencing hearing for the remaining counts, the State asked the trial judge to "revisit" the acquittal because defendant's status as a parolee was a sentencing enhancement that need not be proven at trial. The trial court agreed and "revised" its findings to enter convictions on all four UUW counts.

On appeal, the State conceded that double jeopardy principles prevented the trial court from "revisiting" the acquittals, and that the convictions on Counts IV and V must be vacated. The Appellate Court also concluded that on resentencing for the two counts of UUW on which the trial court had not entered acquittals, the trial court was precluded from imposing enhanced sentences based on defendant's parole status. The Appellate Court found that the trial court had acquitted defendant of the Class 2 offense of unlawful use of a weapon based on his status as a parolee, and that allowing the State to apply the same factor to the remaining counts would amount to a second prosecution even if the acquittal was based on a misunderstanding of the law.

The court stressed that it was not deciding whether the defendant's parole status is an "element" of Class 2 unlawful use of a weapon and, if so, whether that element must be proven at trial. Instead, the basis of the holding was that once the trial court entered an acquittal due to the State's failure to satisfy the reasonable doubt standard, the State was precluded from revisiting that issue for related counts of UUW on which acquittals had not been entered.

(Defendant was represented by Assistant Defender Michael Gomez, Chicago.)

People v. Staple, 2016 IL App (4th) 160061 (No. 4-16-0061, 12/20/16)

Double jeopardy protects a defendant against a second prosecution for the same offense following a conviction. It prevents the State from making repeated attempts to convict and thus spares a defendant from continued embarrassment, anxiety, and expense.

The State charged defendant by information with two counts of aggravated driving under the influence, both felonies. Defendant was also ticketed with misdemeanor DUI that arose from the same offense. At defendant's arraignment, the court asked the State if it wanted to consolidate the felony aggravated DUI with the misdemeanor DUI. The State elected to keep the charges separate. Defendant pled guilty to misdemeanor DUI and filed a motion to dismiss the felony charges based on double jeopardy. The trial court granted defendant's motion to dismiss.

The Appellate Court held that the trial court erred in dismissing the felony charges. This case did not present any issues related to finality or prosecutorial overreach. Defendant was never exposed to conviction on the felony charges and his guilty plea to the lesser-included charge did not operate as an acquittal of the greater offenses. Defendant knew the felony charges were pending and thus he did not live in a state of anxiety and insecurity for fear the State might pursue a subsequent prosecution. And there was no governmental overreach since the State never had the opportunity to fine-tune its presentation of the case with a prior prosecution.

A defendant should not be allowed to use double jeopardy as a sword to prevent the State from completing its prosecution on the remaining charges. Here defendant was not using double jeopardy as a shield to protect him from governmental overreach. Instead, he was using double jeopardy as a sword to evade prosecution on the felony charges.

The court reversed the dismissal of the felony charges and remanded for further proceedings.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

People v. Taylor, 2013 IL App (2d) 110577 (Nos. 2-11-0577 & 2-11-0582 cons., 2/21/13)

The prohibition against double jeopardy is of both statutory and constitutional dimension. U.S. Const. Amend. V, XIV, Ill. Const. 1970, Art. I, §10, 720 ILCS 5/3-4(a)(1). The prohibition against double jeopardy protects citizens against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.

When defendants failed to appear on their court dates, the court granted the State's request for forfeiture of their bonds and issued warrants for their arrest. Ultimately, the court entered judgment on the bond forfeitures. The circuit court denied defendant's motions to dismiss the underlying criminal charges on the ground that their prosecutions were barred by double jeopardy because the bond forfeiture judgments constituted convictions and/or punishment.

A bond forfeiture judgment is a civil judgment. 725 ILCS 5/110-7(g). Upon entry of a bond forfeiture judgment, the obligation of a defendant becomes a debt of record as a civil liability. It is separate and distinct from the criminal offense of violation of a bail bond. Because bond forfeiture judgments are civil, they do not constitute criminal convictions that bar a second prosecution.

A bond forfeiture judgment can be employed as aggravation to enhance a future punishment. Enhancement of a future punishment not based on the transaction upon which

the bond forfeiture arose is not punishment. The enhancement of a sentence for a subsequent conviction is not punishment for purposes of double jeopardy.

Because the bond forfeiture judgments constitute neither convictions nor punishment, the circuit court properly denied defendants motions to dismiss on double jeopardy grounds.

(Defendants were represented by Assistant Defender Sherry Silvern, Elgin.)

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§17-7
Dual Sovereignty

Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970) Conviction for municipal violation prevents trial for state charge arising from the same acts. Waller was held retroactive in Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973).

Heath v. Alabama, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985) The Double Jeopardy Clause does not prohibit successive prosecutions against a defendant by two states for offenses arising out of the same conduct.

Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) Successive prosecutions by the State and Federal government are permissible, since separate sovereigns are involved. See also, Abbate v. U.S., 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959).

Rinaldi v. U.S., 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977) A federal court abused its discretion by denying the government's motion to dismiss federal charges against defendant because he had been convicted for the same acts in State court.

People v. Porter, 156 Ill.2d 218, 620 N.E.2d 381 (1993) In 1988, defendant was convicted of the murder of Willie Bibbs. While an appeal was pending before the Appellate Court, defendant was indicted in federal court for racketeering. In the federal prosecution the government was required to prove two predicate charges, at least one of which had occurred within the preceding five-year period. The Bibbs murder was one of eight predicate charges alleged in the federal prosecution. However, it was not one of two offenses alleged to have occurred within the preceding five years.

In 1990, the State murder conviction was reversed and remanded for a new trial because it had occurred under a statute which allowed the State to demand a jury trial. While the State case was awaiting retrial, the federal district court dismissed the racketeering charges on statute of limitations grounds. The federal court concluded that the government could not prove that a predicate offense had occurred within the past five years. The State trial court then dismissed the State charges on double jeopardy grounds and under Ch. 38, ¶3-4(c) (720 ILCS 5/3-4(c)).

The Double Jeopardy Clause does not bar trial on the State murder charge. Under the "separate sovereigns" doctrine, State and federal prosecutions for the same act are not prosecutions for the same "offense." Therefore, double jeopardy principles do not apply.

Similarly, ¶3-4(c) did not bar the State prosecution. Section 3-4(c)(1) bars prosecution only where four requirements are satisfied: (1) the federal or sister-state prosecution must have been a former prosecution, (2) the former prosecution must have resulted in a conviction

or an acquittal, (3) both prosecutions must involve the same conduct, and (4) proof of every required fact of one prosecution must also be required for the other prosecution.

The fourth requirement could not be met in this case, because the State prosecution required proof of murder, while murder was only one of several crimes that could be used to prove federal racketeering. Thus, because the State charge involved proof of facts not necessarily required for federal racketeering, ¶3-4(c)(1) was inapplicable. (The Court concluded that it need not decide whether the Federal proceeding could be a "former" prosecution when it was commenced one year after the State prosecution or whether dismissal on Statute of Limitations grounds is an "acquittal.")

People v. Allison, 46 Ill.2d 147, 263 N.E.2d 80 (1970) The Illinois Constitution bars successive prosecutions of the same offense by both a municipality and the State.

People v. Gault, 21 Ill.App.3d 777, 315 N.E.2d 926 (1st Dist. 1974) The trial court dismissed a battery complaint against defendant since an earlier city charge of disorderly conduct, based upon the same facts, had been dismissed on the city's motion. At a bench trial, jeopardy attaches when the court begins to hear evidence. A dismissal before that time does not bar further prosecution. Thus, the subsequent State prosecution did not place defendant in double jeopardy.

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§17-8
Increasing Punishment or Charge

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) Due process is violated where a penalty is imposed on defendant for having successfully pursued an appeal or collateral remedy. Vindictiveness against defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.

There is not an absolute bar to a more severe sentence upon reconviction; however, to assure the absence of vindictiveness, whenever a more severe sentence is imposed after retrial the reasons for so doing must affirmatively appear.

Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) The holding in Pearce does not apply to a second sentence imposed by a jury that was not informed of first sentence.

Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) The State's two-tier system for less serious criminal offenses, in which defendant convicted in inferior court could obtain a trial de novo in higher court, does not violate due process. Imposition of a more severe penalty after a new trial is not prohibited where it does not appear that the increased penalty is the result of judicial vindictiveness.

Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) A State that chose to prosecute defendant for misdemeanor charge was precluded from prosecuting him on a more serious felony charge, based upon the same conduct, after he appealed the misdemeanor conviction.

Brodenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) Defendant was properly prosecuted for additional charges after he refused to plead guilty to the offense with which he was originally charged. The prosecutor warned defendant during plea negotiations that the additional charges would be filed if defendant refused to plead guilty.

U.S. v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) Defendant was charged with several misdemeanors. However, when he refused to plead guilty and demanded a jury trial, the prosecutor obtained an indictment charging, inter alia, a felony. Though defendant alleged prosecutorial vindictiveness, the prosecutor claimed that he sought the felony indictment based on defendant's prior criminal record, his failure to appear for his original court appearance, and the prosecutor's opinion that defendant had committed a serious violation of the law.

No presumption of vindictiveness arises where, before trial, the prosecutor increases the charges against a defendant who has exercised his right to a jury trial. In such circumstances, defendant bears the burden of proving that the prosecutor's "decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do."

Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) Defendant pleaded guilty to rape and burglary and received concurrent 30-year sentences. A sodomy charge was dismissed. The guilty plea was reversed on appeal because defendant had not been adequately advised of the penalties. Following remand, defendant was tried and convicted of rape, burglary and sodomy. The same judge who had imposed sentence following the guilty plea then sentenced defendant to two life sentences and a 150-year term.

The sentences were upheld. There is no basis for a presumption of vindictiveness where the second sentence is imposed after a trial but is greater than a sentence imposed after a guilty plea.

People v. Rivera, 166 Ill.2d 279, 652 N.E.2d 307 (1995) Double jeopardy and equal protection principles prohibit increasing a sentence as retaliation for a defendant having taken an appeal or obtaining a reversal of his conviction. However, no constitutional violation occurs where the trial court increases the sentence not to punish defendant for taking an appeal, but because of defendant's "specific conduct" occurring after the first trial. Here, the trial court increased the sentence based on evidence that after his first trial, defendant had been convicted of unlawful use of a weapon in a penal institution and had committed other offenses that had been punished by administrative action. Because there was a legitimate basis to increase the sentence after the second conviction, no constitutional violation occurred.

People v. Smith, 59 Ill.2d 236, 319 N.E.2d 760 (1974) Defendant was charged with armed robbery, but pleaded guilty to misdemeanor offenses. The State nolle prossed the armed robbery charge.

Subsequently, defendant's mother informed the trial court that defendant was only 16 years old, putting the matter within the jurisdiction of the juvenile court. The convictions under the plea were vacated and the cause was sent to the juvenile court. The case was ultimately transferred to the criminal division, where defendant was indicted and convicted for armed robbery.

Defendant's double jeopardy claim was rejected, but under the due process principles of Blackledge v. Perry, 417 U.S. 21 (1978), the armed robbery conviction was reversed and the

matter was remanded for a new trial on the misdemeanor offenses.

People v. Scott, 69 Ill.2d 85, 370 N.E.2d 540 (1977) Where the trial court failed to impose a sentence on a conviction, a remand for entry of sentence does not violate North Carolina v. Pearce. The effect of the remand is merely to complete the trial court's order and render the judgment final; where no sentence has been imposed the question of vindictiveness is premature.

People v. McCutcheon, 68 Ill.2d 101, 368 N.E.2d 886 (1977) Pursuant to a plea agreement, defendant pleaded guilty to a misdemeanor, and the State nolle prossed a felony. Defendant received a one-year sentence.

Defendant appealed, and the case was remanded to plead anew because of inadequate compliance with Supreme Court Rule 402. Upon remand, defendant sought a jury trial. The State reinstated the felony charge, and defendant was convicted of both the felony and the misdemeanor.

The State and defense agreed that under Ch. 38, ¶1005-5-4 (730 ILCS 5/5-5-4) defendant could not receive a higher sentence than that previously imposed. Defendant was sentenced to 364 days of imprisonment.

It was not improper for the State to reinstate the felony charge after defendant's successful appeal. Since defendant pleaded guilty to the misdemeanor, jeopardy never attached on the felony. Furthermore, the nolle prosequi had been conditional upon the guilty plea. Finally, Ch. 38, ¶3-4(a), which states that a "conviction of an included offense is an acquittal of the offense charged," does not apply when an accused pleads guilty to the included offense and there is no finding or verdict on the greater offense.

People v. Whitfield, 228 Ill.2d 502, 888 N.E.2d 1166 (2007) Double jeopardy is not violated if a defendant placed on a void term of probation does not receive credit for time served against a statutorily mandated prison sentence. Although double jeopardy principles require credit for time served where defendant is sentenced to prison on a second conviction for the same offense and credit for a fine paid against a subsequent fine if the conviction is reversed and defendant is convicted a second time, probation does not have sufficient similarity to either imprisonment or a fine to require similar treatment.

People v. Johnson, 102 Ill.App.3d 1056, 430 N.E.2d 207 (2d Dist. 1981) Defendant was indicted for armed robbery, attempt murder and aggravated battery. Just prior to trial, the prosecutor elected to proceed only on the armed robbery charge. Defendant was convicted of that offense.

On appeal, the armed robbery conviction was reversed because the State introduced improper evidence. Upon remand defendant was reindicted for attempt murder and aggravated battery. The State nolle prossed the attempt murder, and defendant was convicted of armed robbery and aggravated battery.

It was improper for the State to reindict defendant for offenses that had been effectively nolle prossed before his first trial. Reindictment after defendant's successful appeal presents "a realistic likelihood of vindictiveness," because defendant has successfully asserted a procedural right.

People v. Brexton, 405 Ill.App.3d 989, 939 N.E.2d 1076 (2d Dist. 2010)

1. Under **Blackledge v. Perry**, 417 U.S. 21 (1974), due process is not violated by the mere fact that the sentence is increased upon retrial after a successful appeal. Instead, due process prohibits only an increased sentence that appears to have been motivated by a realistic likelihood of vindictiveness. Under **People v. Walker**, 84 Ill.2d 512, 419 N.E.2d 1167 (1981), there is a presumption of vindictiveness where, in the absence of new evidence or changed circumstances, the prosecutor brings additional, more serious charges after a defendant invokes a right to which the law entitles him. The State must rebut the presumption by presenting objective facts showing that the decision to bring the more serious charges was not motivated by vindictiveness.

2. The prosecution failed to rebut the presumption that it acted vindictively by adding a new burglary charge after defendant successfully sought to withdraw his plea to one count of retail theft. In a jury trial, defendant was convicted of the new burglary charge and of the original counts of retail theft.

The court noted that the burglary charge was based on the same act of shoplifting as the retail theft count, and that the State was aware of the facts supporting both charges when it elected to charge only retail theft. The court also rejected several arguments by the State to show that the decision to add the burglary charge was not vindictive.

First, although the prosecutor claimed that he had agreed to dismiss an unrelated retail theft charge in return for the plea in this case, the State did not attempt to reinstate the unrelated charge, as it would have been entitled to do if defendant had sought to withdraw a negotiated plea. Instead, it added a more serious charge which stemmed from the incident for which defendant pleaded guilty.

Second, the prosecutor claimed to have been contemplating whether to add the burglary charge when defendant entered the guilty plea. However, he did not claim to have communicated that possibility to defendant or defense counsel before the plea was entered. To the contrary, the defense was informed of the possibility of a burglary charge only after the case was remanded, when the prosecutor sent a letter to defense counsel stating that a burglary charge would be considered if defendant was successful in withdrawing his plea.

Third, a lack of vindictiveness was not suggested by the fact that the State dismissed a second, less serious retail theft charge when defendant pleaded guilty. The trial court noted at the time of the plea that the one-act, one-crime doctrine precluded convictions on more than one count, and that defendant was entering what was in effect a blind plea. Even had the State dismissed the lesser count as part of a plea agreement, however, its remedy would have been to reinstate the dismissed count rather than to add a more serious charge carrying a higher sentence.

The court stressed that the State did not claim that new evidence or changed circumstances justified the more serious charge. Instead, the only change was that defendant had withdrawn his plea. Because the State failed to rebut the presumption of vindictiveness, defendant's burglary conviction was vacated and the cause remanded for sentencing on retail theft.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

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§17-9
Forfeitures and Civil Sanctions

United States v. Usery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) In rem civil forfeiture proceedings (i.e., in which the "wrongdoer" is the property in question rather than the criminal defendant) do not involve "punishment" under the Double Jeopardy Clause unless: (1) the forfeiture sanction was intended to be a criminal proceeding, or (2) the proceeding is necessarily by its nature so "criminal and punitive" as to negate the legislature's intent to create a civil remedy. See also, Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (civil commitment of persons likely to engage in "predatory acts of sexual violence" was not "punishment" for purposes of double jeopardy or ex post facto clauses); People v. 1988 Mercury Cougar, 154 Ill.2d 27, 607 N.E.2d 217 (1992) (Double Jeopardy Clause did not apply to in rem civil forfeiture proceeding of specially-equipped car that allowed disabled person to drive; such a proceeding is an action against property used as an instrumentality of a crime (to prevent its use to facilitate criminal activity in the future), and is not an action against defendant in the criminal case).

Department of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) Six defendants, all members of the same family, pleaded guilty to charges relating to the production and sale of marijuana. Prosecutors then brought actions seeking forfeiture of cash and various items of equipment. The forfeiture actions were eventually settled; defendants agreed to surrender cash and equipment.

Based upon a Montana statute imposing a tax "on the possession and storage of dangerous drugs," the State then filed an assessment seeking some $900,000 in unpaid taxes. Under the Montana statute, the tax was to be assessed at either ten percent of market value or $100 per ounce of marijuana, with the proceeds dedicated to youth and chemical abuse programs and to "enforce the drug laws." The act also provided that there was no obligation to file a return or pay the tax until the taxpayer was arrested on drug charges, when a return was to be filed within 72 hours.

The "tax" violated the Double Jeopardy Clause because it constituted a second "punishment" for a criminal offense. Whether a "tax" bears a reasonable relationship to the costs attributable to a criminal defendant's conduct is irrelevant to whether it is a "second punishment."

Though the fact that a tax is high or has an obvious deterrent purpose does not automatically mean that it is a second punishment, this "tax" was more than eight times the drug's market value, was conditioned on the commission of a crime, and was levied on goods that the taxpayer no longer owned or possessed. Under these circumstances, the drug tax "departs so far from normal revenue laws as to become a form of punishment."

Hudson v. U.S., 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) Whether a particular punishment is civil or criminal depends on a two-part test: (1) whether the legislature intended to adopt a civil or criminal sanction, and (2) whether the sanction is in fact punitive despite the legislature's intent.

In re P.S., 175 Ill.2d 79, 676 N.E.2d 656 (1997) Forfeiture under the Illinois Controlled Substances Act is civil in nature.

People v. Lavariega, 175 Ill.2d 153, 676 N.E.2d 643 (1997) Statutory summary suspension of a driver's license is not "punishment" for purposes of the double jeopardy clause. There is no double jeopardy bar to a DUI prosecution based on conduct that previously resulted in a summary suspension.

Wilson v. Department of Revenue, 169 Ill.2d 306, 662 N.E.2d 415 (1996) The Cannabis and Controlled Substances Tax Act violates the double jeopardy clause.

People v. Buonavolanto, 238 Ill.App.3d 665, 606 N.E.2d 509 (1st Dist. 1992) In a 1989 civil forfeiture action against defendant's automobile, the State failed to prove by a preponderance of the evidence that the vehicle had been used to transport narcotics. The State then brought criminal charges for the same delivery of narcotics.

The State was collaterally estopped from prosecuting defendant on the criminal charges. In the forfeiture proceeding, the State failed to show that the car was used to commit a crime. In the criminal case, the State's theory of guilt was that defendant used the car to transport the controlled substance. Having already failed to prove by a preponderance that the car was used to commit a crime, the State could not attempt to establish the same point beyond a reasonable doubt.

Also, although the forfeiture action was an in rem proceeding against the car, defendant was the real party in interest because it was his property right which the State sought to extinguish, thus the proceeding did not involve different parties. Furthermore, when the collateral estoppel doctrine is used defensively to prevent a party from reasserting a claim it previously lost, the modern trend is to require that only the party against whom estoppel is urged must have been involved in the first action. Because the State was a party in the original proceeding and defendant raised collateral estoppel defensively, sufficient identity of parties was established.

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