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INDICTMENTS, INFORMAT IONS, COMPLAINTS

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§29-1
Manner of Charging – Discretion in Bringing Charges

U.S. v. Armstrong, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) Defendants were charged with conspiring to possess crack cocaine with intent to distribute. They alleged that they had been selected for prosecution on the basis of their race and presented an affidavit showing that African-American defendants had been involved in all twenty-four prosecutions for this offense handled in 1991 by the Federal Public Defender's Office for the district in which they were charged. The Supreme Court held that to prevail on a claim of selective prosecution, the defendants must show that the decision to prosecute a particular case violates equal protection. To make such a showing, the defendant must establish that the prosecutor's policy "had a discriminatory effect and . . . was motivated by a discriminatory purpose." To establish the former requirement, "the claimant must show that similarly situated individuals of a different race were not prosecuted." Here, defendants failed to make a "colorable showing" that similarly situated, non-black defendants had not been prosecuted; the records of cases handled by the Federal Defender failed to identify potential non-African-American defendants who had not been prosecuted for the same offenses.

People v. Jamison, 197 Ill.2d 135, 756 N.E.2d 788 (2001) Where conduct constitutes more than one offense, the State's Attorney has discretion to decide which charge should be brought. The prosecutor could charge armed robbery based on taking the contents of a car rather than aggravated vehicular hijacking for taking the car itself where defendant was eligible for a death sentence for armed robbery and would not have been death-eligible for aggravated vehicular hijacking.

People v. Redmond, 67 Ill.2d 242, 367 N.E.2d 703 (1977) All prosecutions of felonies shall be by information or indictment. Prosecution may be by information only where a preliminary hearing has been held or waived by the accused. Moreover, a defendant may be prosecuted by information for all offenses arising from the same transaction, though a preliminary hearing was held on only one or some of the offenses.

People v. Kline, 92 Ill.2d 490, 442 N.E.2d 154 (1982) Defendant alleged that the statute that authorizes prosecution by either indictment or information violates equal protection and due process because persons who receive a preliminary hearing have an unfair advantage over those indicted since at a preliminary hearing they have the rights to counsel, cross-examination and discovery. The Court held that the wording of Art. I, §7 of the Illinois Constitution clearly establishes that a defendant charged by indictment is not entitled to a preliminary hearing.

People v. Pankey, 94 Ill.2d 12, 445 N.E.2d 284 (1984) Defendant was issued an "Illinois Citation and Complaint" (used for traffic offenses) that charged him with aggravated battery. Later the same day, without the State's Attorney being present, the defendant appeared in court, entered a plea of guilty, and was fined $50. The next day the State's Attorney filed an information charging aggravated battery arising from the same acts. This information was dismissed based upon defendant's double jeopardy motion. The Court held that the guilty plea was a nullity and that the subsequent information was not barred. The State's Attorney is the only person who can file a felony charge; since he was neither present at the guilty plea nor acquiesced in that disposition," the circuit court never acquired jurisdiction over the State in the original guilty plea proceeding." A judgment entered by a court having no jurisdiction is void and does not bar a subsequent prosecution.

People v. Gordon, 64 Ill.2d 166, 355 N.E.2d 3 (1976) Defendant claimed that he could not be prosecuted

for theft or conspiracy to commit theft for acts that arose from his services as a real estate broker, because the same conduct is proscribed by the Real Estate Brokers Act. The Court stated that the proof required for conviction of theft is far different than under the Broker's Act, and the legislature did not intend "to give real estate brokers a special status to prohibit their prosecution for theft if there is a mishandling of clients' funds."

People v. Brooks, 65 Ill.2d 343, 357 N.E.2d 1169 (1976) Defendant claimed that she could not be prosecuted for theft where her alleged conduct also constituted a violation of the Public Aid Code. The Court held that the theft offense contained an element (intent to permanently deprive) that is not required to prove a violation under the Public Aid Code, and that the prosecutor has discretion to charge under either statute. See also, **People v. Nash**, 183 Ill.App.3d 924, 539 N.E.2d 822 (4th Dist. 1989) (prosecutor may use discretion to charge offense as either a felony or misdemeanor).

People v. Kelly, 299 Ill.App.3d 222, 701 N.E.2d 114 (3d Dist. 1998) Where the defendant was not afforded a preliminary hearing, the trial judge erred by allowing the State to dismiss an indictment and substitute an information bringing additional charges. 725 ILCS 5/109-3.1(b), which provides that a defendant is not entitled to a preliminary hearing where he or she "has been indicted by the grand jury on the felony offense for which he or she was initially taken into custody or on an offense arising from the same transaction or conduct of the defendant that was the basis for the felony offense or offenses initially charged," does not authorize the State to replace an indictment with an information charging additional offenses unless a preliminary hearing is provided. §109-3.1(b)(2) "is an exception to the limitations period for subsequent indictments, not a statutory provision obviating the need for a preliminary hearing when an information is substituted for an indictment." Furthermore, although a new preliminary hearing is not required where the State amends an information to charge additional offenses arising from the same transaction (725 ILCS 5/111-2(f)), there is no statutory provision allowing the State to substantively amend an indictment by substituting an information without affording the accused a preliminary hearing.

People v. Hall, 311 Ill.App.3d 905, 726 N.E.2d 213 (4th Dist. 2000) A presumption of prosecutorial vindictiveness applies where a more serious, charge is brought after a convicted defendant successfully challenges a conviction. The presumption of vindictiveness does not apply, however, where the State files a more serious charge before the defendant stands trial on a lesser charge. Even where there is no presumption of vindictiveness, the defendant is entitled to relief if he can "prove objectively" that the decision to file a charge "was motivated by a desire to punish him for doing something that the law plainly allowed him to do." Here, the State was allowed to file an aggravated battery charge after defendant objected to a motion to continue a DUI prosecution and successfully moved to dismiss the DUI charge. Although the record showed that: (1) "an animated conversation" occurred between defense counsel and the prosecutor concerning the former's intent to object if the State attempted to introduce breathalyzer evidence for which there was no proper foundation, (2) defense counsel objected to the State's motion for a continuance, and (3) the State nol-prossed the DUI charge after the trial court denied a continuance, "[t]his evidence is insufficient to establish that the aggravated battery charge was filed out of vindictiveness.

People v. Fields, 322 Ill.App.3d 1029, 751 N.E.2d 97 (5th Dist. 2001) . Selective prosecution and vindictive prosecution involve separate but related theories. "Selective prosecution" requires a showing that: (1) the defendant was singled out for prosecution while similarly situated violators were not prosecuted, and (2) the decision to prosecute was based on an arbitrary classification such as race, religion or the exercise of constitutional rights. "Vindictive prosecution" requires a showing that the prosecution was pursued in retaliation for the defendant's exercise of a protected statutory or constitutional right. In determining whether a prosecution was retaliatory, the court will consider whether the prosecutor "harbored genuine animus" toward the defendant and whether defendant would otherwise have been prosecuted. Although charges were

not brought for five months after the offense and were filed only after defendant filed a separate class action suit against DOC, defendant failed to raise a reasonable doubt that the State acted improperly. **U.S. v. Monsoon**, 77 F.3d 1031 (7th Cir. 1996) holds that an improper motive by an agency which refers the defendant for criminal charges can be imputed to the prosecutor only if the agency "in some way prevailed upon the prosecutor to make the decision to prosecute." Here, there was no showing that DOC decided to prosecute defendant and then persuaded the State's Attorney to file charges.

People v. Brooks, 75 Ill.App.3d 109, 394 N.E.2d 10 (5th Dist. 1979) Defendant waived error for being prosecuted for a felony by way of a complaint when he failed to file a timely pretrial motion to dismiss. See also, **People v. Kleiss**, 90 Ill.App.3d 53, 412 N.E.2d 39 (3d Dist. 1980).
People v. Montgomery, 21 Ill.App.3d 230, 315 N.E.2d 92 (1st Dist. 1974) Defendant argued unsuccessfully that the State's Attorney had no authority to prosecute a municipal offense. Since there was no objection by defendant at trial, and because the State's Attorney's jurisdiction is countywide, the State's Attorney was properly permitted to prosecute a city charge along with State offenses, "at least where they both occurred at the same point in time."

People v. Lewis, 73 Ill.App.3d 361, 386 N.E.2d 910 (3d Dist. 1979) The Constitution gives the State's Attorney discretion to decide whether to prosecute an individual. However, that discretion is subject to constitutional limits, and cannot be exercised on the basis of race, religion, or First Amendment rights. A prosecution is presumed to be taken in good faith, and a defendant is entitled to a hearing on this issue only where he presents sufficient facts to establish at least a prima facie case of improper discrimination. See also, **People v. Golz**, 53 Ill.App.3d 654, 368 N.E.2d 1069 (2d Dist. 1977) (discussion of leading cases on this issue).

People v. Kail, 150 Ill.App.3d 75, 501 N.E.2d 979 (4th Dist. 1986) Defendant was riding her bicycle on a business sidewalk in the city of Champaign, at 10:47 a.m. A police officer suspected the defendant was a prostitute, and stopped her pursuant to a police department policy requiring strict enforcement of all laws against suspected prostitutes. The officer acknowledged that she would not have stopped defendant but for her suspicion and the department policy. After making the stop, the officer noticed defendant's bicycle lacked a bell. Riding a bicycle on a business sidewalk and failing to have a bell on a bicycle are both violations of city ordinances. The officer charged defendant with failing to have a bell on her bicycle. Because defendant did not have adequate identification she was arrested, taken to the police station and subjected to an inventory search that disclosed cannabis. Defendant was convicted of a cannabis offense. The Appellate Court found that defendant's right to equal protection had been violated:

> "We are here confronted with the constitutionality of an administrative policy under which an otherwise constitutional ordinance is selectively enforced. This case does not . . . involve the enforcement of a law the purpose of which is to combat prostitution. Rather, the law involved is an obscure minor ordinance the purpose of which is to assure a modicum of safety in warning of the approach of a bicycle. . . . While the State [or city] has broad discretion to enforce its laws, that discretion may not be exercised on the basis of an arbitrary classification. . . . [T]he State [or city] may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

Here, defendant was stopped because of the policy to strictly enforce all ordinances against suspected prostitutes. " There is no conceivable set of facts which would establish a rational relationship between the class of suspected prostitutes and the State's legitimate interest in enforcing the ordinance requiring bells on bicycles. To suggest that the requirement of a bell on one's bicycle should be enforced only against suspected prostitutes because it helps combat prostitution is so attenuated as to render the classification irrational."

People v. Tackett, 239 Ill.App.3d 1031, 607 N.E.2d 284 (3d Dist. 1993) Defendant was convicted of unlawful possession of more than 30 grams of cannabis after four marijuana plants weighing 99.5 grams were found in her car. She contended that she was denied due process and equal protection because she could have been charged with another offense (possession of fewer than five cannabis plants). Persons convicted under the latter statute are eligible for first-offender probation, while defendant was not eligible for this disposition. The Court found that where an act violates more than one criminal statute, the State may prosecute under either statute provided it does not discriminate against any class of defendants. Whether to prosecute at all, and if so, under what statute, are decisions that rest in the prosecutor's discretion.

People v. Karraker, 261 Ill.App.3d 942, 633 N.E.2d 1250 (3d Dist. 1994) Defendant was improperly convicted of three unrelated offenses charged in a single indictment. Under 725 ILCS 5/111-4(a), two or more offenses may be charged in the same indictment if they are based on the same act or on multiple acts that are part of the same comprehensive transaction. Factors considered in determining whether offenses are part of the same transaction include proximity in time and location, whether the evidence to be presented is similar, whether similar acts were involved, and whether there was a common method of operation. The three offenses here occurred "days and months apart" and were not part of any comprehensive transaction.

Cumulative Digest Case Summaries **§29-1**

People v. Stapinski, 2015 IL 118278 (No. 118278, 10/8/15)

After he was arrested for unlawful possession of ketamine with intent to deliver, defendant entered an agreement with police to assist in apprehending the persons to whom he was supposed to deliver the ketamine. Approximately a year after defendant provided such assistance, and the intended recipients had been prosecuted, defendant was charged with unlawful possession of ketamine with intent to deliver.

At a hearing on his motion to dismiss the charge, defendant, his mother, and his attorney testified that defendant and the police had agreed that the ketamine charge against defendant would be dropped in return for his cooperation in apprehending the intended recipients of the substance. Furthermore, if defendant assisted in four additional cases, an old drug charge would also “go away.” A police officer testified, however, that defendant was required to assist in the additional four cases in order to obtain dismissal of the ketamine charge.

The trial court dismissed the charge after concluding that the agreement was to dismiss the ketamine charge in return for assisting the police in apprehending the two intended recipients. The trial judge found that defendant had fulfilled his obligations under the agreement, and that due process was violated because defendant incriminated himself based on a bargain which the State refused to honor.

The Appellate Court reversed, finding that the only prejudice suffered by defendant was that he made incriminating statements. The Appellate Court found that defendant would be protected if the incriminating statements were suppressed.

The Supreme Court affirmed the trial court, finding that there was a due process violation.

1. Cooperation agreements benefit law enforcement by permitting police to apprehend large-scale drug dealers. Such agreements are to be construed under general contract principles. Because of the unequal bargaining positions of police officers and suspects, governmental agencies are obliged to deal fairly with persons who, in return for offers of immunity, agree to provide information which may expose them to greater criminal liability.

Due process is implicated where the State’s actions toward its citizens are oppressive, arbitrary, or unreasonable. The trial court has inherent discretion to dismiss a charge where the State has violated due process.

The court concluded that where the trial judge found that the parties agreed that defendant would have his charge dismissed in return for helping officers apprehend the recipients of the ketamine, and

defendant fulfilled the agreement, the trial court did not abuse its discretion by dismissing the charge.

2. The court rejected the State's argument that in the absence of the prosecutor's approval, there was no valid agreement that defendant's charge would be dropped. Although police officers cannot bind the State's Attorney, the court found that the issue was whether due process concerns require that a person who fulfills his obligation under an agreement which was negotiated with police is entitled to be treated with fairness and justice. "Whether or not the cooperation agreement was 'valid' in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences."

The trial court's dismissal order was affirmed.

People v. Determan, ___ Ill.App.3d ___, ___ N.E.2d ___ (5th Dist. 2009) (No. 5-08-0209, 10/21/09)

As an issue of first impression, the Appellate Court found that 750 ILCS 16/10, which provides that a criminal prosecution for wilfully failing to provide for the support of a spouse or a child "may be instituted and prosecuted . . . only upon the filing of a verified complaint by the person or persons receiving child or spousal support," requires that a verified complaint be filed with the circuit court before criminal proceedings are instituted. The court rejected the State's argument that §16/10 is satisfied by filing a verified complaint with the State's Attorney's office.

The court rejected the State's argument that §16/10 interferes with the State's Attorney's exclusive discretion to initiate and manage criminal prosecutions. Although the filing of a verified complaint with the trial court "is a necessary prerequisite" for the State's Attorney to file a charging instrument, once a verified complaint has been filed the State's Attorney retains discretion concerning whether and how to prosecute the case.

Because no verified complaint was ever filed with the trial court, it was improper for the State's Attorney's to initiate a criminal prosecution.

(Defendant was represented by Assistant Defender Joyce Randolph, Mt. Vernon.)

People v. Goad, 2013 IL App (4th) 120604 (Nos. 4-12-0604 & 4-12-0605 cons., 4/30/13)

1. The inherent authority to ensure a fair trial permits the trial court to dismiss an indictment where the defendant has been denied due process because of actual and substantial prejudice resulting from pre-indictment delay. A claim of pre-indictment delay is analyzed under a two-part test. First, the defendant must make a clear showing of actual and substantial prejudice to his ability to obtain a fair trial. A mere assertion of an inability to recall is insufficient to satisfy the defendant's burden.

If the defendant makes a clear showing, the burden shifts to the State to show the reasonableness of the delay. The trial court's ruling on a motion to dismiss an indictment due to unreasonable pre-indictment delay is reviewed *de novo*.

2. Where the defendant claims that he was prejudiced by pre-indictment delay, he is entitled to relief only if he can show "actual damage to [his] ability to obtain a fair trial." The court rejected the argument that pre-indictment delay of 18 months concerning two charges of possessing a hypodermic needle caused prejudice because it disrupted defendant's ability to leave the State to accept a job after he completed a sentence imposed on a guilty plea conviction for possession of a controlled substance. When defendant entered the plea for possession of a controlled substance, the State had knowledge of the hypodermic needle offenses but had decided not to file charges. The charges were brought after defendant had completed his sentence and MSR requirements in the guilty plea case, when defendant was planning to move to Arizona to accept a job.

The court concluded that the alleged prejudice to defendant's job prospects and continued rehabilitation constituted mere speculation concerning possible inconvenience, and was not the type of prejudice which justified shifting the burden to the State to show that the pre-indictment delay was reasonable.

3. The court also rejected the argument that defendant suffered substantial prejudice because the

delay in bringing charges until he entered a guilty plea on another charge allowed the State to circumvent the statutory limitations on consecutive sentences. Unlike **People v. Bredemeier**, 346 Ill. App. 3d 557, 805 N.E.2d 261 (5th Dist. 2004), where the delay deprived the defendant of an opportunity to serve an Illinois sentence concurrently with an Indiana sentence, defendant's arguments concerning consecutive sentencing demonstrated only the possibility of prejudice. The court also noted that defendant and his attorney were aware of the possibility of the additional charges when they negotiated the guilty plea agreement, and could have sought to include those offenses in the disposition.

The trial court's order granting defendant's motion to suppress was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Herman, 2012 IL App (3d) 110420 (No. 3-11-0420, modified 1/14/13)

"The State's Attorney of the county in which [a violation of the Illinois Vehicle Code] occurs shall prosecute all violations except when a violation occurs within the corporate limits of a municipality, the municipal attorney may prosecute if written permission to do so is obtained from the State's Attorney." 625 ILCS 5/16-102(c).

Defendant received citations for violations of the Illinois Vehicle Code, naming the People of the State of Illinois as prosecutor. A municipal attorney moved to amend the citations to designate the municipality, rather than the State, as the prosecuting authority. An assistant State's Attorney placed her initials on the face of the amended citation near the handwritten changes. The record contains no written permission from the State's Attorney granting the municipal attorney written authority to prosecute the citations. The motion to amend was not prepared by the State's Attorney and no request was made to amend the citations to allege violations of the municipal ordinance.

The municipality did not obtain acquire authority to prosecute by simply having the assistant State's Attorney initial the face of the citation. The lapse in prosecutorial authority could not be excused as harmless because the municipality's traffic ordinance prohibits the same conduct. A conviction under the Illinois Vehicle Code carries a harsher range of punishment than the same conviction pursuant to local ordinance. The circuit court considered the violations to arise solely out of the Code as alleged on the citation, as the court appointed the public defender at county expense and the State Appellate Defender on appeal.

The Appellate Court reversed defendant's conviction.

(Defendant was represented by Panel Attorney Joshua Sachs, Evanston.)

People v. Lee, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-10-0205, 6/29/11)

A prosecutor violates due process by exacting a price for a defendant's exercise of an established right, or by punishing a defendant for doing what the law plainly entitles him to do. Therefore, if a prosecutor responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally. A finding of prosecutorial vindictiveness is remedied through dismissal of the criminal charges brought against a defendant.

To establish prosecutorial vindictiveness, a defendant must demonstrate, through objective evidence that: (1) the prosecutor acted with genuine animus or retaliatory motive toward the defendant; and (2) the defendant would not have been prosecuted but for that animus or motive. If a defendant is unable to prove an improper motive with direct evidence, he may still present evidence of circumstances from which a vindictive motive may be presumed. To invoke such a presumption, a defendant must show that the circumstances pose a reasonable likelihood of vindictiveness. When vindictiveness is presumed, the burden shifts to the government to present objective evidence justifying its conduct.

A presumption of vindictiveness will rarely be applied to a prosecutor's pretrial decisions. Prosecutors' charging decisions are presumptively lawful. Based on the broad discretion given prosecutors, and the wide range of factors that may properly be considered in making pretrial prosecutorial decisions, a prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the

extent of the societal interest in prosecution. An initial decision should not freeze future conduct.

Defendant was charged in separate cases with aggravated criminal sexual assault and unlawful restraint of his wife on November 9, 2005, and the residential arson of her home on November 22, 2005. After defendant was convicted and sentenced on the first case, the State dismissed the residential arson charge. After defendant's convictions were reversed on appeal, the State reindicted defendant for residential arson. The circuit court dismissed the arson charge after finding that the State did not meet its burden of establishing that it was not being vindictive.

As a rule, no presumption of vindictiveness arises where the State indicts a defendant following a successful appeal from an unrelated conviction. The residential arson charge was completely separate from the other charges that defendant faced. The State charged residential arson before reversal of defendant's convictions. After the reversal, the State merely exercised its prosecutorial discretion to re-indict defendant for a charge that he had been indicted for previously, in a pretrial setting, in a separate felony case. Therefore, no presumption of vindictiveness was triggered by the refiling after defendant's successful appeal.

Because the defendant provided no proof of actual vindictiveness, the court reversed the order of dismissal.

People v. Peterson, 397 Ill.App.3d 1048, 923 N.E.2d 890 (3d Dist. 2010)

The prosecutor's charging decision is presumed to be lawful and motivated by proper considerations. A prosecutor has broad discretion whether to file charges and which charges to file. A claim of vindictive prosecution does not constitute an affirmative defense to a crime, and does not mandate pretrial discovery concerning the charging decision. (See **APPEAL**, §2-6(a) & **DISCOVERY**, §15-1).

People v. Rendak, 2011 IL App (1st) 082093 (No. 1-08-2093, 9/1/11)

A prosecution is vindictive and violates due process if it is undertaken to punish a defendant because he has done "what the law plainly allows him to do." **United States v. Goodwin**, 457 U.S. 368 (1982). Presumptions of vindictiveness exist only in a narrow set of circumstances, such as where a prosecutor brings additional charges and more serious charges after a defendant has successfully overturned a conviction, effectively subjecting the defendant to greater sanctions for pursuing a statutory or constitutional right. Generally, no such presumption exists in a pretrial setting where a prosecutor has broad discretion in charging a defendant. In the absence of a presumption, defendant must show actual prosecutorial vindictiveness, which requires: (1) objective evidence that the prosecutor had some animus or retaliatory motive; and (2) objective evidence that tends to show the prosecution would not have occurred absent the motive.

Defendant was charged with aggravated battery to a peace officer due to her conduct during her arrest for domestic battery and while being processed at the police station. The aggravated battery charges were originally nolled due to the officers' failure to appear, but an indictment was returned almost two years later, after defendant filed a civil rights lawsuit alleging that she had been battered by the police without provocation and the parties' attempt to settle the lawsuit was unsuccessful.

The mere temporal sequence of these events was insufficient to create a presumption of vindictiveness or to establish actual vindictiveness. Mere opportunity for vindictiveness, and speculation based on such opportunity, is insufficient to establish any prosecutorial animus, due to the broad discretion afforded to a prosecutor at the pretrial stage. As a matter of public policy, to hold that timing alone would be sufficient would be too lax of a standard and encourage abuse. Suspects could strategically file civil suits against government agencies as either a tool to obtain leverage in negotiation or a precautionary measure in order to establish prosecutorial vindictiveness should they be prosecuted. Even assuming that there might be subjective evidence of animus, there was a clear shortage of objective evidence establishing both actual animus and that the prosecution would not otherwise have occurred.

People v. Velez, 2012 IL App (1st) 110801 (No. 1-11-0801, 12/21/12)

No prosecution can be pursued by information "unless a preliminary hearing has been held or waived in accordance with Section 109-3 and at that hearing probable cause to believe the defendant committed an offense was found, and the provisions of Section 109-3.1 of this Code have been complied with." 725 ILCS /111-2(a).

After compliance with §111-2(a), "such prosecution may be for all offenses, arising from the same transaction or conduct of a defendant even though the complaint or complaints filed at the preliminary hearing charged only one or some of the offenses arising from that transaction or conduct." 725 ILCS 5/111-2(f). Only charges completely unrelated to and fundamentally different from the offenses originally charged may not included.

After a finding of probable cause at a preliminary hearing on charges of armed robbery and aggravated vehicular hijacking, the State filed an information also charging armed habitual criminal, unlawful use of a weapon by a felon, and unlawful use or possession of a weapon by a felon. The circuit court dismissed these added counts because there had been no evidence at the preliminary hearing that defendant was a convicted felon.

Because the dismissed counts rose from the same conduct as the counts on which probable cause had been found at the preliminary hearing, the Appellate Court reversed. The charges were not completely unrelated or fundamentally different from the charges considered at the preliminary hearing because the evidence at the hearing showed that a gun had been used in the commission of the offenses.

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§29-2
Grand Jury Proceedings

U.S. v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) An indictment that is valid on its face may not be challenged on the ground that the grand jury acted on inadequate or incompetent evidence or relied on information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) The defendant, a black man, was entitled to federal habeas relief because blacks had been systematically excluded from the grand jury that indicted him. The Court rejected the State's contention that any taint attributable to the indictment was purged because defendant received a fair trial.

Campbell v. Louisiana, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998) A white defendant has standing to object where black persons are discriminated against in the selection of grand jurors. The court extended to grand jury proceedings precedent that a criminal defendant has standing to assert the equal protection rights of citizens excluded from petit juries based on their race, even where the defendant is not a member of the same race.

Hobby v. U.S., 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984) A defendant is not entitled to reversal of his conviction and dismissal of the indictment because of discrimination, resulting in the underrepresentation of blacks and women, in the selection of a grand jury foreman.

People v. Creque, 72 Ill.2d 515, 382 N.E.2d 793 (1978) The Court made the following holdings regarding grand jury proceedings: (1) The prosecution may obtain an indictment on wholly hearsay evidence, and is not required to show a "compelling justification" for using hearsay. (2) The prosecutor is not required to inform the grand jury that evidence is hearsay; here, there was no attempt to mislead the grand jury and the hearsay testimony could not have been mistaken for an eyewitness account. (3) The prosecutor is not required to advise the grand jury that it has the power to subpoena the alleged victim. (4) The prosecutor is not

required to inform the grand jury of a prior finding of no probable cause on the same charges. (5) The prosecutor is not required to instruct the grand jury as to the differences between offenses (e.g., aggravated battery and attempt murder). (6) The defendant may not challenge an indictment on the ground it is not supported by adequate evidence. (7) A defendant does not have the right to have counsel present or to conduct cross-examination during grand jury proceedings. (Note: 725 ILCS 5/112-4 now requires that the prosecutor inform the grand jury of its right to subpoena persons and documents, and that the grand jury be informed of prior findings of no probable cause.)

In re May 1991 Will County Grand Jury, 152 Ill.2d 381, 604 N.E.2d 929 (1992) Defendants received grand jury subpoenas requiring them to appear in lineups and submit blood, head hair, and pubic hair samples. One defendant was also ordered to allow his finger and palmprints to be taken. Neither man had been charged with any crime. The Appellate Court required defendants to appear in the lineup and to provide head hair samples and fingerprints, but did not require pubic hair samples. Both the State and defense appealed to the Illinois Supreme Court. Article I, §6 of the Illinois Constitution recognizes a right to a "zone of privacy," which includes the privacy of one's person. The reasonableness of a seizure affecting the right to privacy is to be determined by balancing the individual's interests against the State's interest in preserving the effectiveness of the grand jury system. After performing this balancing test, the Court allowed the State to enforce a subpoena requiring physical evidence of a non-invasive nature, if it can show both relevancy and individualized suspicion. Unless there are exigent circumstances or the evidence sought involves physical characteristics that are normally exposed to the public, a subpoena that seeks to invade the "physical integrity" of one's body requires a showing of probable cause. Because the pubic area is commonly regarded as highly private, a subpoena requiring submission of pubic hair samples requires probable cause. A subpoena for head hair samples is also subject to the probable cause requirement - although head hair can be observed, there is normally an expectation that it will not be cut, pulled, or combed without consent.

People v. Watson, 214 Ill.2d 271, 825 N.E.2d 257 (2005) Under Illinois law, some showing of individualized suspicion and relevance must be made before a grand jury may issue a subpoena to obtain evidence of a non-invasive nature (i.e., appearance in lineup, fingerprinting, handwriting or voice exemplars). A grand jury subpoena to obtain evidence of a more invasive nature (i.e., blood, head hair, facial hair or pubic hair) may be issued only upon probable cause. When confronted with a grand jury subpoena a witness may file a motion to quash or simply refuse to comply, requiring the prosecutor to demonstrate to a judicial magistrate that the subpoena is supported by probable cause. Here, after the defendant refused to comply with the subpoena he was afforded judicial review of the grand jury subpoena at a hearing on a Rule to Show Cause where it was determined that the grand jury subpoena for defendant's blood sample was supported by probable cause.

People v. Benitez, 169 Ill.2d 245, 661 N.E.2d 344 (1996) The Court held that defendant was never properly charged with a crime where the indictment returned by the grand jury did not name him as a defendant, but the State's Attorney's office substituted a second indictment that it prepared and that included the defendant's name. The State may commence the prosecution of a felony by filing an information, which requires only the State's Attorney's signature, or by obtaining a grand jury indictment. Here, the State chose to proceed by indictment, but upon discovering an error neither reconvened the grand jury nor filed a motion to amend the erroneous indictment. Because the State may not "arrogat[e] for itself the power to amend the indictment as it [sees] fit," the second indictment was invalid. The State argued that even if there was no valid indictment, the convictions should stand because defendant could not show any prejudice from having been tried under the second indictment but the Court held that the "actual and substantial prejudice" standard does not apply under the unique circumstances of this case.

People v. DiVincenzo, 183 Ill.2d 239, 700 N.E.2d 981 (1998) Grand jury proceedings may be challenged

only in limited circumstances; generally, a defendant may not challenge "the validity of an indictment [or] the sufficiency of the evidence considered by the grand jury if some evidence was presented." A defendant may seek dismissal of an indictment procured by prosecutorial misconduct, however, where the misconduct is reflected by the grand jury transcripts and need not be shown through extrinsic evidence. Dismissal may be appropriate where the prosecutor deliberately or intentionally misled the grand jury, knowingly used perjured testimony, or presented deceptive or inaccurate evidence. Dismissal is also appropriate where the prosecutor applied undue pressure or coercion to induce an indictment. Although the prosecutor asked the grand jury to reconsider its earlier vote when he learned that the jurors were confused about the applicable law, a "no probable cause" determination does not preclude subsequent consideration of the same question., In addition, the prosecutor's explanation of the applicable law was accurate, and before returning the indictment the grand jurors questioned the prosecutor's "statements and suggestions." The record did not show that the grand jury's will was overborne by the prosecutor's statements; to the contrary, "[t]he transcript shows an independent grand jury that . . . exercised its own independent will."

People v. Fassler, 153 Ill.2d 49, 605 N.E.2d 576 (1992) Illinois law provides that grand jury sessions may be attended only by the State's Attorney, the court reporter, and other persons whose presence is authorized by the court, but also permits dismissal of an indictment where there is "substantial injustice" to the defendant. "Substantial injustice" occurs when the purposes of the secrecy requirement are not met or the indictment is obtained through undue influence or coercion. There was no "substantial injustice" where the mother of a 13-year-old sexual assault victim was allowed to be in the grand jury room during her daughter's testimony; the mother's presence neither endangered the secrecy of the proceedings nor influenced the daughter's testimony or the grand jury's decision to prosecute. Instead, the mother was present only to provide emotional support, and she spoke only to tell the daughter to "calm down." See also, **People v. Hunter**, 61 Ill.App.3d 588, 376 N.E.2d 1065 (4th Dist. 1978) (indictment not vitiated because police officers were present; purpose of secrecy requirement is to prevent suspects from fleeing, allow witnesses to make free and truthful disclosures, and protect the innocent from unwarranted exposure); **People v. Toolen**, 116 Ill.App.3d 632, 451 N.E.2d 1364 (5th Dist. 1983) (an indictment will not be dismissed on the ground that witnesses were present in the grand jury room while other witnesses were testifying).

People v. Hayes, 139 Ill.2d 89, 564 N.E.2d 803 (1990) Defendant contended that the State misused the grand jury procedure to depose potential defense witnesses. Six members of defendant's family had been called to testify before the grand jury regarding the whereabouts of defendant on the day of the crime, and each testified he was at home. The Court held that the purpose of a grand jury investigation "is not only to cause the prosecution of the guilty, but also to protect the innocent from unfounded criminal prosecutions." The family members testimony was properly introduced so the grand jury could ascertain whether the defendant had an alibi.

People v. Buffalo Confectionery, 78 Ill.2d 447, 401 N.E.2d 546 (1980) Indictments for revenue violations were not invalid where they were prosecuted before the grand jury by the Attorney General who is authorized to appear before the grand jury where the State's Attorney expresses no objection. Here, the State's Attorney not only failed to object but also acquiesced in the procedure by signing the indictments, attending the arraignments, and conducting certain pretrial discovery proceedings. See also, **People v. Massarella**, 72 Ill.2d 531, 382 N.E.2d 262 (1978).

People v. J.H., 136 Ill.2d 1, 554 N.E.2d 961 (1990) A murder indictment was dismissed on the ground of prosecutorial misconduct before the grand jury. The Court held that the prosecutor's conduct neither prejudiced defendant's right to a fair trial nor undermined the integrity of the judicial process. The exclusionary rule does not bar presentation of illegally obtained evidence to a grand jury. In addition, a person called to testify before a grand jury is not entitled to be warned that he is a target of the investigation.

Finally, dismissal was inappropriate because defendant would have been indicted even without the prosecutor's alleged misconduct or the defendant's own testimony. See also, **People v. Morgan**, 169 Ill.App.3d 368, 523 N.E.2d 560 (4th Dist. 1988); **People v. Seehausen**, 193 Ill.App.3d 754, 550 N.E.2d 702 (2d Dist. 1990).

People v. Barton, 190 Ill.App.3d 701, 546 N.E.2d 1091 (5th Dist. 1989) The trial judge properly dismissed an indictment because it was brought for "political and vindictive reasons" and because the prosecutor misled the grand jury as to the defendant's previous testimony.
People v. Whitlow, 89 Ill.2d 322, 433 N.E.2d 629 (1982) . Defendants alleged that the sole witness before the grand jury was unsworn. Although the transcript did not indicate if the witness was sworn, an indictment is presumed valid in the absence of evidence to the contrary.

People v. Rodgers & Reed, 92 Ill.2d 283, 442 N.E.2d 252 (1982) A trial court has authority to review grand jury transcripts to determine whether "any evidence was presented which tends to connect the accused to the offense charged." If no such evidence was presented, the trial court may properly dismiss the indictment, "When it is alleged that no evidence was presented to the grand jury in support of the charges, the State shall direct the trial judge's attention to any direct or circumstantial evidence in the transcript from which an inference of criminal conduct could be derived. This procedure of shifting the burden to the State will eliminate the need for the trial judge to review the entire transcript. Nor will it be necessary to determine whether any evidence was presented as to each element of the offense. We require only that there be some evidence relative to the charge." See also, **People v. Linzy**, 78 Ill.2d 106, 398 N.E.2d 1 (1979).

People v. Mattis, 367 Ill.App.3d 432, 854 N.E.2d 1149 (2d Dist. 2006) The Court concluded that it had jurisdiction to consider a State appeal from an order dismissing an indictment for prosecutorial misconduct. In addition, the court found that the prosecution's actions before the grand jury, if improper, were not so egregious as to justify dismissing the indictment.

People v. Oliver, 368 Ill.App.3d 690, 859 N.E.2d 38 (2d Dist. 2006) Even the unintentional presentation of deceptive evidence to the grand jury may violate due process. However, to justify dismissal of the indictment, the denial of due process must be unequivocally clear and result in actual and substantial prejudice. Due process was violated where, in his testimony before two grand juries, a police officer who had not been at the surveillance scene implied that he had observed the defendant engaged in drug transactions. In fact, the officer was basing his testimony on a police report by an officer who specifically stated that he was unable to tell whether any controlled substances were exchanged. The court concluded that the misrepresentation was prejudicial - had the observations been accurately reported, there would not have been sufficient probable cause for an indictment on charges of possession with intent to deliver.

People v. Lightner, 145 Ill.App.3d 741, 496 N.E.2d 269 (2d Dist. 1986) The trial judge's inquiry into the grand jury testimony is limited to a search for "any evidence" connecting defendant to the offense. The judge is not authorized "to inquire into the competency or adequacy of the evidence to support the indictment nor . . . to recognize and act upon any defenses [which] may exist to the indictment under the evidence there presented."

People v. Curoe, 97 Ill.App.3d 258, 422 N.E.2d 931 (1st Dist. 1981) At grand jury proceedings, no witnesses were sworn or testified. Instead, the prosecutor read a summary of testimony which had been presented to a prior grand jury. Several Illinois cases have upheld indictments based upon the sworn testimony of a prosecutor reading the transcript of proceedings before another grand jury. In this case, however, the prosecutor was not sworn and did not read a transcript, but merely presented a summary of prior testimony. Since the indictment was based on an unsworn summary of testimony offered before a different grand jury,

it was invalid.

Cumulative Digest Case Summaries **§29-2**

People v. Boston, 2016 IL 118661 (No. 118661, 2/26/16)

1. A grand jury investigation is designed to both exonerate individuals suspected of criminal activity and to establish probable cause necessary to arrest suspected felons. The grand jury has the power to investigate crimes and may issue subpoenas regardless of whether a specific charge is pending. Matters occurring before a grand jury may be disclosed to the prosecution and other government personnel for use in the enforcement of criminal law. 725 ILCS 5/112-6.

In **In re May 1991 Will County Grand Jury**, 152 Ill. 2d 381 (1992), the court held that under the federal constitution, no preliminary showing of reasonableness is necessary for a grand jury to issue a subpoena for noninvasive physical evidence. Under the Illinois Constitution, which the court recognized as providing broader protections from unreasonable searches, there must be some showing of individualized suspicion before a subpoena for noninvasive physical evidence may be issued. This showing may be made by an affidavit from the prosecutor.

2. Here the police found a bloody palm print on a wall near the victim's body. The prosecutor investigating the case asked a grand jury to issue a subpoena for defendant's palm prints. The prosecutor informed the grand jury that defendant was the ex-boyfriend of the victim and "the police have received information that he may have been involved in her killing."

The grand jury issued a subpoena for a complete set of defendant's palm prints. Chicago police officers served the subpoena on defendant, obtained his palm prints, and delivered them to the Illinois State Police crime lab. The defendant's palm prints matched the palm print found at the scene and were used to convict defendant of first degree murder.

3. The court found that the State provided the grand jury with the requisite individualized suspicion to support the issuance of the subpoena. The prosecutor informed the grand jury that defendant was the ex-boyfriend of the victim and that the police had information that defendant may have been involved in the murder. Although the prosecutor did not provide this information in an affidavit, there was no allegation that any false statements were made to the grand jury.

4. The court also found that the procedures used in this case were "sloppy" and should not be repeated. The subpoena was prepared at the direction of the prosecutor rather than the grand jury. The evidence was made returnable to the prosecutor rather than the grand jury. And the evidence was delivered to the crime lab rather than the grand jury. But since the grand jury could have disclosed the evidence to the prosecution, defendant failed to show that he was prejudiced by these procedures.

5. The dissenting justice believed that the procedures used in this case were not simply "sloppy," but instead constituted "a complete breakdown of the procedures governing the grand jury process." As such, they undermined the integrity of the judicial process, requiring suppression of the evidence.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

In re Angel P., 2014 IL App (1st) 121749 (No. 1-12-1749, 6/27/14)

1. The trial court has inherent authority to dismiss criminal charges where there has been a clear denial of due process which prejudices the defense. To justify dismissal of an indictment, the denial of due process must be unequivocally clear. In addition, the prejudice must be actual and substantial.

A due process violation consisting of prosecutorial misconduct before a grand jury causes substantial prejudice only if in the absence of the misconduct, the grand jury would not have returned an indictment.

2. In his testimony before the grand jury, a Chicago police officer misrepresented the age of the 16-year-old respondent as 17. The grand jury returned an indictment, but the charges were dismissed and replaced with juvenile charges after the minor presented the trial court with a certified copy of his birth

certificate. The minor argued that the criminal charges should have been dismissed with prejudice because the indictment was obtained through perjured testimony.

The court held that the trial judge did not err by refusing to hold an evidentiary hearing to determine whether the officer's misrepresentation was intentional or unintentional. Whether the misrepresentation resulted in substantial prejudice did not depend on whether the officer acted intentionally or unintentionally. Instead, the relevant question was whether the deception was crucial to determining probable cause. The court concluded that even if the officer's misrepresentation of defendant's age was intentional, the belief that the defendant was 17 was unrelated to the finding of probable cause. Therefore, defendant did not suffer substantial prejudice.

The court acknowledged that the respondent would not have been indicted had his true age been known. However, the failure to indict would have been based on his status as a minor rather than on a lack of probable cause. Because the intentional or unintentional nature of the misrepresentation would have been irrelevant to whether a due process violation occurred, the trial court did not err by refusing to hold an evidentiary hearing on that issue.

Defendant's delinquency adjudication and disposition were affirmed.

People v. Bauer, 402 Ill.App.3d 1149, 931 N.E.2d 1283, 2010 WL 2780426 (5th Dist. 2010)

A grand jury has the power to issue subpoenas to obtain documents relevant to its inquiry when an individual is under investigation for a crime. Subpoenas need not be supported by probable cause. Subpoenas are returnable to the grand jury, but the grand jury may disclose the subpoenaed documents to the State's Attorney for the purpose of the State's Attorney furthering his responsibility to enforce the law. A State's Attorney can abuse the grand jury's subpoena power if the subpoenas are not prepared at the direction of the grand jury and returnable to it, but to the State's Attorney. Any error in the abuse of that power can be harmless if the State's Attorney would have received the documents from the grand jury had the proper procedure been followed.

In this case, the grand jury issued two subpoenas to a hospital where defendant had been taken following an accident seeking the results of a blood alcohol test performed on defendant. On both occasions, the subpoenaed documents were returned to the State's Attorney rather than the grand jury, as directed by the subpoena. The State's Attorney delivered the documents to the grand jury, which ultimately released the results of the blood test to the State's Attorney. The court held that there was no abuse of the grand jury's subpoena power because the State's Attorney did not attempt to circumvent the grand jury, but repeatedly appeared before it, kept it informed of the results of the subpoenas, and sought its permission to act under its authority. Even if the State's Attorney had abused the subpoena power, the error was harmless. The Illinois Vehicle Code, 625 ILCS 5/11-501.4(a) provides that results of blood alcohol tests performed on a person receiving treatment in an emergency room following a motor vehicle accident can be disclosed to law enforcement on request.

The Appellate Court affirmed the circuit court's denial of a motion to suppress the results of the blood alcohol test.

People v. Reimer, 2012 IL App (1st) 101253 (No. 1-10-1253, mod. op. 5/8/12)

1. In proceedings before the grand jury, the State's Attorney acts as an advisor in terms of the applicable law and the proposed charges. Challenges to grand jury proceedings are limited; a defendant may not challenge either the validity of an indictment returned by a legally constituted grand jury or the sufficiency of the evidence considered by the grand jury (so long as some evidence was presented). However, a defendant may challenge an indictment which resulted from prosecutorial misconduct which violated due process.

When ruling on a motion to dismiss an indictment, courts typically consider only the transcript of the proceedings before the grand jury. Prosecutorial misconduct before the grand jury warrants dismissal of the indictment if that misconduct violated due process and resulted in actual and substantial prejudice to the

defendant. Prosecutorial misconduct violates due process if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjury or false testimony, or presents deceptive or inaccurate evidence. An indictment may also be dismissed where the prosecutor applied undue pressure or coercion so that the indictment is, in effect, the action of a prosecutor rather than the grand jury.

Whether the prosecutor's misconduct before the grand jury caused a prejudicial denial of due process is reviewed *de novo*.

2. The prosecutor engaged in misconduct when, in responding to questions from the grand jury, he twice elicited testimony which misstated the applicable law. Defendant was indicted for home repair fraud for allegedly entering into a home repair contract which he did not intend to perform or knew would not be performed. In response to questions by the grand jury, the prosecutor elicited testimony from a police detective that the Home Repair Fraud Statute "specifically shows some examples" from which intent can be inferred. The examples elicited by the prosecutor were found in 815 ILCS 515/3(c), which had been held unconstitutional because it created an unconstitutional presumption. (**People v. Watts**, 181 Ill. 2d 133, 692 N.E.2d 315 (1998)). The court concluded that despite the Illinois Supreme Court's holding in **Watts**, the testimony elicited by the prosecutor informed the grand jury that intent not to perform the contract could be presumed from the examples cited by the detective.

In addition, in response to a subsequent question from the grand jury, the prosecutor elicited testimony that home repair fraud does not require a finding that at the time defendant entered the contract, he lacked intent to complete the work. The court concluded that under the plain language of §515/3(a)(1) and the **Watts** decision, the elements of home repair fraud include the intent not to perform the work at the time the contract was entered.

3. To obtain dismissal of the indictment, the defendant was required to show that the prosecutor's misconduct resulted in actual and substantial prejudice. The court held that the defendant satisfied this burden because the evidence which the State presented to the grand jury focused exclusively on what happened after the work had been started, and did not concern defendant's intent when the contract was entered. The court concluded that defendant was prejudiced because it was not clear that the grand jury would have returned an indictment had it been properly informed of the applicable law.

The court rejected the State's argument that a finding of prejudice required that the prosecutor intentionally misstate the law to the grand jury. "Subjecting a defendant to criminal prosecution . . . based on the State's incorrect presentation of the law to the grand jury deprived him of his right to due process, whether the assistant State's Attorney's actions were intentional or not."

4. The court concluded, however, that the indictment need not be dismissed with prejudice. Dismissal with prejudice would be proper if the indictment was based on perjured testimony which was deliberately presented by the State and which was discovered by the defense rather than disclosed by the prosecution. Because no such concerns were present here, the indictment was dismissed without prejudice.

The cause was remanded with instructions for the trial court to dismiss the indictment without prejudice.

(Defendant was represented by Assistant Defender Philip Payne, Chicago.)

People v. Sampson, 406 Ill.App.3d 1054, 943 N.E.2d 783 (3d Dist. 2011)

An indictment can be dismissed for prosecutorial misconduct if the misconduct rises to the level of a deprivation of due process or miscarriage of justice. The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. An indictment may also be dismissed where the prosecutor applies undue pressure or coercion so that the indictment is, in effect, that of the prosecutor rather than the grand jury. To warrant dismissal of an indictment, defendant must show that prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.

An indictment is not subject to dismissal in every instance where a prosecutor fails to disclose the hearsay nature of a witness's testimony to the grand jury. Where the witness merely responded to the

prosecutor's leading questions and made no statement that his testimony was based on personal observations, the prosecutor did not mislead or deceive the grand jury. The witness's inconsistent testimony regarding which hand of a correctional officer defendant had bitten was also not grounds for dismissal as the inconsistent testimony did not mislead or deceive the grand jury. Finally, the failure of the witness to disclose that he was a detective was not grounds for dismissal of the indictment where that fact did not disqualify him as a witness and the grand jury was not misled or deceived.

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

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§29-3
Dismissal of Charges

People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 (1995) In addition to the 11 grounds for dismissing a charge specified in 725 ILCS 5/114-1(a), the trial court has inherent authority to dismiss a charge to avoid a "deprivation of due process or . . . [a] miscarriage of justice." Therefore, the trial court had inherent authority to dismiss drug charges where the State violated due process by erroneously destroying alleged cocaine seized from the defendant.

People v. Kent, 54 Ill.2d 161, 295 N.E.2d 710 (1972) A finding of no probable cause at a preliminary hearing does not preclude a subsequent indictment. See also, **People v. Mennenga**, 195 Ill.App.3d 204, 551 N.E.2d 1386 (4th Dist. 1990) (finding of no probable cause at preliminary hearing does not bar grand jury indictment for the same offense absent harassment, bad faith or fundamental unfairness).

People v. Starks, 106 Ill.2d 441, 478 N.E.2d 350 (1985) Defendant was convicted of armed robbery. He argued that before trial an Assistant State's Attorney agreed to dismiss the charge if defendant passed a polygraph examination conducted by a certain person. Defendant passed the examination, but the charge was not dismissed. Defendant testified at a post-trial hearing about the alleged agreement. The Court held that defendant's testimony as to the terms of the alleged agreement required remand for a hearing to determine if such an agreement existed. If such an agreement existed it was enforceable. "We believe that in the case at bar if the State made an agreement with the defendant, it is bound to abide by that agreement."

People v. Norris, et al., 214 Ill.2d 92, 824 N.E.2d 205 (2005) The State was not barred by Rules 504 and 505 from refiling charges which had been previously *nol prossed* because the arresting officer failed to appear at the first hearing date. A *nolle prosequi* is a formal entry by the prosecuting attorney indicating an unwillingness to prosecute a case. Where a *nolle prosequi* is entered before jeopardy attaches, the State is entitled to refile the charges unless there is a showing of harassment, bad faith or fundamental unfairness.

People v. Gill, 379 Ill.App.3d 1000, 886 N.E.2d 1043 (4th Dist. 2008) The Court discussed possible motions by which the prosecution may dismiss a criminal proceeding: A motion for nolle prosequi has the same effect as a simple motion to dismiss, and when entered before jeopardy attaches does not bar the refiling of charges unless there is a showing of harassment, bad faith or fundamental unfairness. The trial court has discretion to deny a motion for nolle prosequi that will result in substantial prejudice to the defendant, such as where the State is attempting to delay the proceeding or avoid the effect of the speedy trial provision. In Cook County, prosecutors sometime dismiss by a motion to strike with leave to reinstate (motions "SOL"). Such motions are not authorized in Illinois, and appear to be used only in Cook County. If the motion is granted, the case remains pending against the defendant subject to a motion to reinstate. The State may also dismiss

a charge with prejudice, which bars a subsequent prosecution for the same offense based on same facts. Because the effect of dismissing with prejudice is to bar further prosecution, a dismissal should be deemed to be "with prejudice" only if there is an explicit statement by the prosecution to that effect. In a criminal case, there is no right to summary dismissal based on the discovery. If the defendant feels the State will be unable to prove an element of the crime, it should use that fact as a defense at trial rather than obtain a dismissal before trial. Thus, the trial court should not have granted a motion to dismiss when the discovery showed that the offense did not occur in Illinois.

People v. Jones, 188 Ill.App.3d 183, 543 N.E.2d 1322 (5th Dist. 1989) The State's motion to nol-pros must be allowed unless it is part of a vexatious or repetitious course of conduct; State's authority to nol-pros extends through all phases of trial.

People v. Rivera, 72 Ill.App.3d 1027, 390 N.E.2d 1259 (1st Dist. 1979) A court may dismiss an indictment based upon perjured testimony if a denial of due process is established. See also, **People v. Shaw**, 133 Ill.App.3d 391, 478 N.E.2d 1142 (1st Dist. 1985); **People v. Mack**, 107 Ill.App.3d 164, 437 N.E.2d 396 (4th Dist. 1982).

People v. Chatman, 297 Ill.App.3d 57, 696 N.E.2d 1159 (2d Dist. 1998) Even if defendant could not have been convicted based solely on the State's anticipated evidence, the trial court erred by dismissing the indictment before trial. A trial judge has authority to dismiss an indictment in only two circumstances: where dismissal is authorized under 725 ILCS 5/114-1(a), or where there has been a clear denial of due process. A due process violation does not occur merely because the State lacks sufficient evidence to establish a prima facie case that a crime occurred.

People v. Blaylock, 311 Ill.App.3d 399, 723 N.E.2d 1233 (4th Dist. 2000) The standard of review for an order granting a motion to dismiss an indictment is "whether the trial judge was correct as a matter of law." The trial court erred by granting a motion to dismiss due to the State's failure to preserve evidence, because there was no showing that evidence was destroyed in bad faith.

People v. Benton, 322 Ill.App.3d 958, 751 N.E.2d 1257 (3d Dist. 2001) A trial court has authority to *sua sponte* dismiss a charging instrument that does not state an offense. Although such a dismissal may constitute error where the State is not given notice or an opportunity to respond, in this case the State had ample opportunity to respond during a hearing on its motion to reconsider.

People v. Stafford, 325 Ill.App.3d 1069 759 N.E.2d 115 (1st Dist. 2001) The trial judge erred at defendant's trial for murder by allowing the State to prosecute several counts of attempt murder that had been previously dismissed and never reinstated by a new charging instrument. In addition, the State is precluded from pursuing a new indictment on dismissed charges where the circumstances indicate a reasonable likelihood of vindictiveness.

Cumulative Digest Case Summaries **§29-3**

People v. Hughes, 2012 IL 112817 (No. 112817, 11/29/12)

1. Jurisdiction stems from the Illinois Constitution, which assigns original jurisdiction to the circuit court in all "justiciable matters" except where the Supreme Court has original and exclusive jurisdiction. The court rejected the argument that the circuit court lacked jurisdiction to accept a guilty plea on a count on which a *nolle prosequi* order had been entered on the State's motion and which had not been refiled or reinstated.

To *nolle prosequi* a charge means simply that the State indicates an unwillingness to prosecute. Once the charge is *nol prossed*, the proceedings are terminated with respect to that particular charge, but the defendant is not acquitted. If a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant subject to other relevant statutory or constitutional defenses and so long as there is no harassment, bad faith, or fundamental unfairness.

2. Because jeopardy had not yet attached, the State's termination of the criminal prosecution by a *nolle prosequi* gave the State the right to either file a new charge or ask to vacate the dismissal and reinstate the original charge. The failure to do either did not deprive the trial court of jurisdiction, however, because an aggravated criminal sexual abuse indictment is a "justiciable matter" involving an offense created by the Criminal Code. Thus, even if the indictment was legally defective due to the *nolle prosequi*, the trial court had jurisdiction over the cause and could accept the guilty plea.

3. The court rejected the argument that defendant's plea was involuntary because he was not aware that the Attorney General could use the guilty plea as a basis to file a sexually dangerous person's petition. Due process principles provide that a guilty plea is knowing and voluntary only if the defendant has been advised of the "direct consequences" of the plea. A "direct consequence" is one which "has a definite, immediate and largely automatic effect on the range of the defendant's sentence."

By contrast, the trial court need not advise the defendant of the "collateral consequences" of a guilty plea. A "collateral consequence" is one which the circuit court has no authority to impose and which results from a discretionary action by an agency that is outside the trial court's control. Whether a consequence of a guilty plea is direct or collateral is a question of law which is reviewed *de novo*.

The court concluded that the possibility of commitment under the Sexually Violent Person's Commitment Act is merely a collateral consequence of a guilty plea, because it does not follow directly from the fact of a conviction and requires an petition by a prosecuting authority. Thus, a person who is convicted of a predicate sexual offense may or may not become the subject of a sexually violent person's petition, depending on action by an entity that is outside the trial court's control. Because a sexually violent person's proceeding is merely a collateral consequence of a plea, the trial court need not advise the defendant of the possibility of such a proceeding before accepting a guilty plea.

The court concluded, however, that in order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be subject to evaluation for possible commitment under the Sexually Violent Persons Act.

4. In dissent, Justices Freeman and Burke found that unless the State took steps to reinstate the *nol prossed* charge, there was no "justiciable matter" on which a guilty plea could have been entered.

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

People v. Stapinski, 2015 IL 118278 (No. 118278, 10/8/15)

After he was arrested for unlawful possession of ketamine with intent to deliver, defendant entered an agreement with police to assist in apprehending the persons to whom he was supposed to deliver the ketamine. Approximately a year after defendant provided such assistance, and the intended recipients had been prosecuted, defendant was charged with unlawful possession of ketamine with intent to deliver.

At a hearing on his motion to dismiss the charge, defendant, his mother, and his attorney testified that defendant and the police had agreed that the ketamine charge against defendant would be dropped in return for his cooperation in apprehending the intended recipients of the substance. Furthermore, if defendant assisted in four additional cases, an old drug charge would also "go away." A police officer testified, however, that defendant was required to assist in the additional four cases in order to obtain dismissal of the ketamine charge.

The trial court dismissed the charge after concluding that the agreement was to dismiss the ketamine charge in return for assisting the police in apprehending the two intended recipients. The trial judge found that defendant had fulfilled his obligations under the agreement, and that due process was violated because defendant incriminated himself based on a bargain which the State refused to honor.

The Appellate Court reversed, finding that the only prejudice suffered by defendant was that he made incriminating statements. The Appellate Court found that defendant would be protected if the incriminating statements were suppressed.

The Supreme Court affirmed the trial court, finding that there was a due process violation.

1. Cooperation agreements benefit law enforcement by permitting police to apprehend large-scale drug dealers. Such agreements are to be construed under general contract principles. Because of the unequal bargaining positions of police officers and suspects, governmental agencies are obliged to deal fairly with persons who, in return for offers of immunity, agree to provide information which may expose them to greater criminal liability.

Due process is implicated where the State's actions toward its citizens are oppressive, arbitrary, or unreasonable. The trial court has inherent discretion to dismiss a charge where the State has violated due process.

The court concluded that where the trial judge found that the parties agreed that defendant would have his charge dismissed in return for helping officers apprehend the recipients of the ketamine, and defendant fulfilled the agreement, the trial court did not abuse its discretion by dismissing the charge.

2. The court rejected the State's argument that in the absence of the prosecutor's approval, there was no valid agreement that defendant's charge would be dropped. Although police officers cannot bind the State's Attorney, the court found that the issue was whether due process concerns require that a person who fulfills his obligation under an agreement which was negotiated with police is entitled to be treated with fairness and justice. "Whether or not the cooperation agreement was 'valid' in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences."

The trial court's dismissal order was affirmed.

People v. Daniels, 2016 IL App (1st) 142130 (No. 1-14-2130, 6/20/16)

1. A *nolle prosequi* is the formal entry by the State declaring that it is unwilling to prosecute certain charges. It terminates those charges against the defendant and leaves the matter as it was before charges were filed. A *nolle prosequi* is not a final disposition of the case and will not bar another prosecution for the same offense. But where the State "causes the entrance of an unconditional *nolle prosequi*," the proceeding is terminated and the same indictment cannot be reinstated at a subsequent term. The State may only reinstate a *nolled* charge by asking the trial court to vacate the *nolle* order before jeopardy attaches. Alternatively, the State may file a new charge to initiate separate proceedings against a defendant.

2. The State charged defendant with multiple counts of aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon. As part of negotiated guilty plea, the State *nolled* all the charges except one count of AUUW and defendant pled guilty to that count. After serving his sentence, defendant filed a 2-1401 petition challenging his conviction because it was based on a statute held facially unconstitutional in **Aguilar**, 2013 IL 112116. The trial court denied the petition.

3. On appeal, the State conceded that defendant's conviction should be vacated but asked the Appellate Court to remand the case to the trial court to reinstate six of the *nolled* charges. The Appellate Court vacated defendant's conviction but denied the State's request to reinstate the charges.

The court first noted that the State never asked the trial court to reinstate the charges nor did it file new charges to initiate a separate proceeding. The appeal related solely to the dismissal of defendant's 2-1401 petition, which was an altogether new proceeding, not a continuation of defendant's criminal case. That case ended when defendant pled guilty. The Appellate Court thus lacked jurisdiction to address issues related to the *nolled* counts.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

People v. Lopez, 2015 IL App (4th) 150217 (No. 4-15-0217, 4-15-0218), 12/4/15)

Absent statutory authorization or a clear denial of due process which prejudices the defendant, a trial

court has no authority to dismiss criminal charges before trial either on the court's own motion or on the motion of the defense. Statutory authority to dismiss a charge before trial exists only for the grounds set forth in 725 ILCS 5/114-1.

Here, the trial court erred by dismissing traffic charges "for failure to prosecute" after the State's Attorney failed to appear at a pretrial conference. The trial court waited 15 minutes, and then dismissed the charges when no prosecutor appeared.

The Appellate Court stated that although the trial judge lacked authority to dismiss the charge for failure to prosecute, it did have the ability to control its calendar by using its contempt powers to require the prosecutor to appear. The trial court's dismissal order was vacated and the cause remanded for further proceedings.

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§29-4
Sufficiency of Charge

§29-4(a)
Generally

People v. Pujoue, 61 Ill.2d 335, 335 N.E.2d 437 (1975) Citation of the statutory provision alone is not sufficient to charge an offense; an indictment must set forth both the statutory provision and the nature and elements of the offense. However, the failure of a complaint to set out the nature and elements of the offense does not require reversal. The sufficiency of a complaint attacked for the first time on appeal is determined by a different standard than one challenged by a pretrial motion to dismiss or a motion in arrest of judgment. The "appeal-sufficiency test" is whether the complaint "apprized the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." See also, **People v. Grogan**, 197 Ill.App.3d 18, 554 N.E.2d 665 (1st Dist. 1990); **People v. DiLorenzo**, 169 Ill.2d 318, 662 N.E.2d 412 (1996).

People v. Lutz, 73 Ill.2d 204, 383 N.E.2d 171 (1978) The test to determine the sufficiency of indictments challenged for the first time on appeal does not apply to indictments that are challenged in a timely filed motion in arrest of judgment. See also, **People v. Smith**, 99 Ill.2d 467, 459 N.E.2d 1357 (1984); **People v. Wisslead**, 108 Ill.2d 389, 484 N.E.2d 1081 (1985).

People v. Cuadrado, 214 Ill.2d 79, 824 N.E.2d 214 (2005) The standard for resolving a challenge to the sufficiency of an indictment depends on the stage at which the challenge is raised. (1)Where the challenge is raised in a pretrial motion to dismiss, the defendant is not required to show prejudice resulting from the inadequacy of the charge. Thus, the defendant is entitled to relief if the charge does not sufficiently allege an offense.(2) Where the challenge is brought after trial has started, however, the charge is sufficient if it apprised the defendant of the precise offense with enough specificity to allow him to prepare a defense and to permit a conviction to be raised as a bar for future prosecutions for the same conduct. Here, the court rejected the argument that in a charge for solicitation of murder for hire substituting the term "procured" for the term "solicited" constituted a meaningless change. However, defendant was not prejudiced by the mid-trial substitution where, before she brought a mid-trial challenge to the sufficiency of the indictment, defendant moved for a directed verdict due to the State's failure to prove that she had "procured" a murder. Because defendant was clearly aware that the State was required to prove procurement, she was not prejudiced by the change.

People v. Davis, 217 Ill.2d 472, 841 N.E.2d 884 (2005) When an indictment or information is challenged for the first time on appeal, the question on appeal is "whether the defect in the information or indictment prejudiced the defendant in preparing his defense." The defendant here was charged with first degree murder but convicted of the lesser included offense of involuntary manslaughter and sentenced to a Class 2 sentence based on the trial court's holding that the victim was a "family or household member." The defendant was unable to show any prejudice from the indictment's failure to allege that the victim had been a household member. Although defendant claimed that defense counsel "could" have adjusted his trial strategy had the indictment alleged that the victim was the defendant's son, he did not identify any change which defense counsel might have made. The victim's mother testified that defendant was the father of the victim, the defendant failed to refute such testimony and also testified that the victim was his son. Under these circumstances, the omission of the relationship from the charge did not cause prejudice.

People v. Grever, 222 Ill.2d 321, 856 N.E.2d 378 (2006) Defendant, a former township supervisor, was convicted of official misconduct for failing to report amounts his wife owed to the township. The court concluded that the indictments were insufficient because defendant's acts did not come within the official misconduct statute, which requires proof that the defendant, in his official capacity, intentionally or recklessly failed to perform a mandatory duty as required by law. The court concluded that, at a minimum, an indictment for official misconduct must specify a violation of "an identifiable statute, rule, regulation, or tenet of a professional code and demonstrate how defendant exceeded his lawful authority." The Court rejected the State's argument that official misconduct could be based on defendant's breach of an "uncodified" fiduciary duty "predicated on moral principles."

People v. Howard, 228 Ill.2d 428, 888 N.E.2d 85 (2008) The offense of official misconduct occurs when a public officer, acting in his official capacity and with the intent to obtain a personal advantage, performs an act "in excess of his lawful authority." A violation of the Illinois Constitution may serve as the act "in excess of . . . lawful authority" for purposes of the official misconduct statute. Thus, a conviction could be predicated on a violation of Article 8, Section 1 of the Illinois Constitution, which provides that public funds shall be used only for public purposes. The defendant, a former mayor, was charged with using a city credit card to obtain cash advances to use for gambling. The court distinguished **People v. Grever**, which held that official misconduct may not be predicated on an uncodified fiduciary duty to the public. "[T]he Illinois Constitution is the 'supreme law' of this state, . . . [and] every citizen is bound to obey it."

People v. Phillips, 215 Ill.2d 554, 831 N.E.2d 574 (2005) A defendant is prejudiced by a charging instrument that alleges disparate acts in a single count, because the use of the disjunctive creates uncertainty concerning which of the alternative acts the accused is charged with committing. In **People v. Eagle Books, Inc.**, 151 Ill.2d 235, 602 N.E.2d 798 (1992), the defendant was prejudiced by an indictment which alleged that he "provided, offered for sale, or otherwise made available" an obscene magazine, because it was unclear whether the defendant was being charged with providing, offering for sale, or otherwise making available the material. In this case an indictment for possession of child pornography charged defendant with possessing "a photograph or other similar visual reproduction or depiction by computer," but the disjunctive language "simply gave the State flexibility as to the physical form of the pictures," and did not "leave defendant uncertain about which of several disparate acts he stood accused of committing." Because it was clear from the evidence that on the date of his arrest defendant possessed all of the pictures which the police seized, "there was only one act of possession, not three disparate alternative acts."

People v. Thurow, 203 Ill.2d 352, 786 N.E.2d 1019 (2003) In the course of holding that an **Apprendi** error may be harmless, the court held that facts which authorize an increase in the maximum penalty for an offense need not be alleged in the charge.

People v. White, 222 Ill.2d 1, 849 N.E.2d 406 (2006) Defendant was indicted for a drug offense. On the day the jury trial was to begin, the prosecutor filed an information containing a second count alleging the same offense, but adding an allegation that the offense occurred on property owned by a housing authority. Defense counsel objected because the new count contained an additional element and was a more serious offense. The court concluded that the prosecutor improperly attempted to amend the indictment by filing the information. Where the initial charge is by indictment, no preliminary hearing is required. Because the allegations have not been subjected to a preliminary hearing, an indictment can not be broadened unless amended by the grand jury. Because the prosecutor added a new count charging a more serious offense, and defendant was not afforded a preliminary hearing, error occurred. The court concluded, however, that defense counsel at trial had objected to the information on the ground that it was a new charge, but did not raise any argument regarding the defendant's right to a preliminary hearing. Because counsel did not assert the issue that was subsequently raised on appeal, the court applied the standard for criminal charges which are challenged for the first time on appeal. Thus, the information was sufficient if it apprised the defendant of the charge with sufficient specificity to allow him to prepare a defense and plead a resulting conviction as a bar to future prosecution arising from the same conduct. Because defense counsel admitted that defendant was on housing authority property at the time of his arrest there was no prejudice from the filing of the information or the failure to hold a preliminary hearing.

People v. Woodrum, 223 Ill.2d 286, 860 N.E.2d 259 (2006) Where an indictment fails to specify the details of the charged offense sufficiently to enable the defendant to prepare a defense, the State may be required to furnish a bill of particulars to give notice of the charge and the specific transactions at issue. Defendant was charged with child abduction, and moved for a bill of particulars concerning the nature of the "unlawful purpose" with which he allegedly acted. Here, the State had informed the defendant of the evidence it intended to introduce, and that evidence made clear the State's contention that defendant acted with intent to commit a sex offense. Because defendant was aware of the charges and the underlying transactions, and knew that the State would rely on his own statements to identify the allegedly unlawful purpose, he was able to prepare a defense.

People v. Gilmore, 63 Ill.2d 23, 344 N.E.2d 456 (1976) Forgery indictments that failed to set forth the payees of the alleged forged checks satisfy the "appeal sufficiency test" of **Pujoue**. The indictment's failure to charge an offense does not deprive the circuit court of jurisdiction. Jurisdiction is conferred by art. VI, §9 of the Illinois Constitution, which provides that circuit courts have "original jurisdiction of all justifiable matters." See also, **People v. Benitez**, 169 Ill.2d 245, 661 N.E.2d 344 (1996).

People v. Collins, 214 Ill.2d 206, 824 N.E.2d 262 (2005) A variance between the charge and the evidence at trial must be material and of such character as to possibly mislead the defendant. Where an indictment charges all essential elements of an offense, unnecessary additions may be regarded as surplusage. In a trial for reckless discharge of a firearm, there was no fatal variance when two police officers were named as the endangered parties in the indictment but the evidence showed that only one of the officers was endangered. The victim's identity is not an element of reckless discharge, and the indictment stated the name of the accused, the name, date, and place of the offense, the statutory provision violated, and the nature and elements of the offense.

People v. Audi, 75 Ill.2d 535, 389 N.E.2d 534 (1979) It is sufficient for an information to be verified on the State's Attorney's information and belief. Either form of oath provides adequate safeguards against the indiscriminate filing of baseless informations.

People v. Sirinsky, 47 Ill.2d 183, 265 N.E.2d 505 (1970) Defects in the caption of a charging document will not invalidate it. A complaint brought in name of a city rather than the State was not fatally defective. See

also, **People v. Bates**, 9 Ill.App.3d 882, 293 N.E.2d 358 (1st Dist. 1973) (A typographical error does not void an indictment if in the context of the entire record, it is clear there was no prejudice to the defense.)

People v. Custer, 11 Ill.App.3d 249, 296 N.E.2d 753 (5th Dist. 1973) It is not necessary to prove the precise date of the offense as alleged in the indictment unless the time is an essential ingredient of the crime or the running of the statute of limitations.

People v. Larson, 296 Ill.App.3d 647, 695 N.E.2d 524 (2d Dist. 1998) **People v. Tammen**, 40 Ill.2d 76, 237 N.E.2d 517 (1968), which holds that an Illinois uniform traffic ticket adequately alleges the nature and elements of the offense by listing its name and statutory citation even where it states neither the nature and elements of the offense nor the defendant's specific acts, applies only to uniform traffic citations. Where a defendant is charged by complaint, the charging instrument is void if it fails to set forth the nature and elements of the offense.

People v. LaRue, 298 Ill.App.3d 89, 698 N.E.2d 1092 (1st Dist. 1998) The defendant could not be convicted of aggravated vehicular hijacking where his conduct occurred before the effective date of the statute creating that offense. The court rejected the State's argument that aggravated vehicular hijacking is merely a continuation of the pre-existing offense of armed robbery, noting that aggravated vehicular hijacking carries a minimum sentence of seven years, one year greater than the six-year minimum for armed robbery. The court also found it irrelevant that defendant was sentenced to the maximum term authorized for either offense; an indictment charging a crime that was not in effect on the date in question fails to allege an offense.

People v. Boose, 326 Ill.App.3d 867, 761 N.E.2d 1285 (2d Dist. 2002) Where the evidence was insufficient on the theory argued by the State in the trial court, the conviction could not be sustained on a theory that was not alleged in the trial court. "If anything, the State's argument suggests that the charging instrument may have been defective in that defendant was never given proper notice of the precise charge against him."

People v. McClain, 343 Ill.App.3d 1122, 799 N.E.2d 322 (1st Dist. 2003) An enhanced sentencing procedure complies with due process and **Apprendi** if the defendant receives reasonable notice of the possibility of the enhanced sentence and the factors on which it could be based. Because it was "uncontested that defendant received a written notice of the State's intent to seek an extended sentence," due process concerns were satisfied.

People v. Steele, 124 Ill.App.3d 761, 464 N.E.2d 788 (2d Dist. 1984) A date specified in the bill of particulars does not necessarily preclude the State from proving the offense was committed on a slightly different date.

Cumulative Digest Case Summaries **§29-4(a)**

People v. Easley, 2014 IL 115581 (No. 115581, 3/20/14)

1. 725 ILCS 5/111-3(c) provides that when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction in order to give notice to the defense. However, the prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense, and may not be disclosed to the jury during trial unless otherwise permitted by the issues. An "enhanced" sentence is a sentence which is increased by a prior conviction from one class of offense to a higher classification. (725 ILCS 5/111-3(c)).

The court found that notice under §111-3(c) is required only if the prior conviction that would

enhance the sentence is not an element of the charged offense. In other words, notice under §111-3(c) is not required when the prior conviction is a required element of the offense.

2. Defendant was convicted of unlawful use of a weapon by a felon, which is a Class 3 felony for a first offense and a Class 2 felony for a second or subsequent violation. The court concluded that the fact of a prior felony conviction is an element of the offense, and that notice under §111-3(c) is therefore not required. In addition, because a second or subsequent violation is a Class 2 felony with no possibility of any other sentence, the Class 2 sentence is not "enhanced" under the meaning of §111-3(c). Instead, it is the only sentence authorized for the offense.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Espinoza, 2015 IL 118218 (No. 118218, 12/3/15)

1. The Supreme Court reiterated precedent that the charging instrument must identify the victim of the offense. Where a charging instrument is challenged before trial, strict compliance with pleading requirements is necessary. In addition, where the charge is challenged before trial the defendant is not required to show prejudice in order to obtain dismissal of the charge.

2. In the course of rejecting several arguments urging modification of the requirement that charging instruments must identify the victim, the court noted that the current rule has been reflected in Illinois case law for more than 170 years. In addition, the General Assembly accepted the rule when it enacted the Code of Criminal Procedure in 1964 and when amending the Code since that time.

The court stressed that a criminal defendant has a fundamental right to be informed of the nature of the accusations against him, and that due process requires that the charging instrument notify the defendant of the offense with enough specificity to enable a proper defense. In addition, because the purpose of alleging the name of the victim is to enable the accused to plead either a formal acquittal or a conviction as a bar to a second prosecution for the same offense, the requirement that the victim be named is founded on protection of the right against double jeopardy.

The court rejected the argument that the public interest in protecting minors' privacy warrants an exception to the requirement that the charge name the victim. The court noted that in this case the State sought to eliminate the need to provide any identifying information concerning victims who were minors. However, 725 ILCS 5/111-3(a-5) requires that the victims of sexual offenses be identified by name, initials, or description. The court stated, "The State has failed to persuade this court that minor victims of nonsexual offenses should be provided greater protections than those provided to victims of illegal sexual acts."

3. The first defendant was charged with domestic battery for making physical contact of an insulting or provoking nature "with a minor, a family or household member, in that said defendant struck the minor about the face." At pretrial hearings, the State indicated that the victim was defendant's son.

The second defendant was charged with endangering the life or health of a child in that she "left the minor child alone . . . without adult supervision." The police report named five different minors under the age of 18, three of whom were allegedly defendant's children. In response to defendant's motion for a bill of particulars, the State filed a sealed bill of particulars naming the victim.

The court concluded that because charging documents describing the victims only as "minors" were insufficient to adequately identify the victims, the trial court's order dismissing the charging instruments should be affirmed.

(Defendant was represented by Assistant Defender Lucas Walker, Elgin.)

People v. Zimmerman, 239 Ill.2d 491, 942 N.E.2d 1228 (2010)

720 ILCS 5/24-1.6(a)(3)(D) creates the offense of aggravated unlawful use of a weapon for possession of a weapon by a person who has been adjudicated delinquent for an act which would have been a felony if committed by an adult. The court concluded that the plain language of §24-1.6 establishes that the prior juvenile adjudication is an element of aggravated unlawful use of a weapon, and not merely a factor enhancing the sentence for misdemeanor unlawful use of a weapon.

The court noted that §24-1.6 defines the offense of aggravated unlawful use of a weapon, and does not merely enhance the sentence for misdemeanor UUW, which is defined in a different section. The court also noted that §24-1.6 contains eight other factors, all of which constitute elements of the offense, and that it would have been illogical for the General Assembly to include one sentence enhancing factor.

Because the prior juvenile adjudication was an element of the offense, 725 ILCS 5/111-3(c) does not apply. (Section 111-3(c) states that the charge must include a prior conviction used to enhance the sentence for an offense, but the prior conviction is not to be disclosed to the jury.) Thus, the trial court did not err by informing the jury of a stipulation that defendant had a prior juvenile adjudication which satisfied the requirement of the offense.

(Defendant was represented by Deputy Defender Pete Carusona, Ottawa.)

People v. Barwan, Sandkam, & Klicko, 2011 IL App (2d) 100689 (Nos. 2-10-0689, 2-10-0690, 2-10-0691, 7/26/11)

1. A motion to dismiss a charge for failing to allege an offense challenges the sufficiency of the allegations of the complaint, and does not concern the evidence which might be introduced to support those allegations. A charging instrument is sufficient to state an offense where it is in writing, sets forth the nature and elements of the offense, and alleges the provision violated, the name of the accused, and the date and county of commission. Where the State seeks an enhanced sentence due to a prior conviction, the charge must state the prior conviction and the intent to seek the enhancement, although neither are elements of the offense. (725 ILCS 5/111-3).

Aggravated DUI charges which alleged that the defendants had committed DUI three times, and were therefore subject to Class 2 felony sentences under 625 ILCS 5/11-501(d)(2)(B), were sufficient to allege offenses although the second violation in each case involved pending charges that had not yet been resolved. Because the third-time offender provision is a sentencing enhancement, whether the evidence supports the enhancement is determined at sentencing rather than before trial. Thus, it was premature for the trial court to consider the status of the predicate offenses when ruling on pretrial motions to dismiss.

2. The court declined to decide whether the Class 2 felony enhancement of 625 ILCS 5/11-501(d)(2)(B) would apply if at sentencing, a charge used as one of the predicate offenses was still pending in the trial court. The court noted, however, that under Supreme Court precedent, a charge on which the defendant received supervision is a prior "violation" for purposes of the Class 2 enhancement. (**People v. Sheehan**, 168 Ill.2d 298, 659 N.E.2d 1339 (1995)).

The trial court's pretrial orders dismissing the charges as insufficient were reversed, and the causes were remanded for further proceedings.

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

People v. Easley, 2012 IL App (1st) 110023 (No. 1-11-0023, 12/24/12)

Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. 725 ILCS 5/111-3(a) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State's argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge

had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Espinoza, 2014 IL App (3d) 120766 (No. 3-12-0766 & 3-12-0050 cons., 8/7/14)

Under section 111-3 of the Code of Criminal Procedure, a defendant has a fundamental right to be informed of the nature of any criminal accusations against him. 725 ILCS 5/111-3. If a charging instrument is challenged before trial it must strictly comply with the pleading requirements of section 111-3, and if it does not, the proper remedy is dismissal.

The charging instrument must set forth the nature and elements of the offense, and where it charges an offense against a person, it must state the name of the person. The identity of the individual victim is an essential allegation of the charging instrument and the failure to identify the victim, if known, renders it deficient.

Here, the State refused to identify the juvenile victims by initials in the charging instruments. The trial court dismissed the charging instruments and the State appealed, arguing that defendants could not show that they were prejudiced since the victims could be identified in a bill of particulars or in discovery.

The Appellate Court rejected this argument holding that defendants were not required to show prejudice at this stage of the proceedings. When a charging instrument is attacked for the first time post-trial, a defendant must show that he was prejudiced in the preparation of his defense. But when a defendant makes a pretrial challenge, the State must strictly comply with the pleading requirements of section 111-3, or suffer dismissal. Here, defendants challenged the sufficiency of the charging instruments pre-trial and hence were not required to show prejudice.

The State also argued that its refusal to include the minors' initials in the charging instruments was justified on public policy grounds, pointing out that other states ban the disclosure of the identities of juvenile victims in any public document. The court rejected this argument, pointing out that Illinois has not enacted similar legislation, and that it is the province of the legislature, not the courts, to prescribe such a policy.

The court affirmed the dismissal of the charging instruments.

The dissent believed that the changes in criminal discovery rules have eliminated much of the reliance on the charging instrument as a source of information in preparation of a defense or a protection against double jeopardy. The dissent thus did not believe the omission of the juveniles names made the charging instruments defective.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Mimes, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-2747, 6/20/11)

1. In response to the United States Supreme Court's decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the legislature enacted 725 ILCS 5/111-3(c-5), which provides that if an alleged fact other than the fact of a prior conviction is sought to be used to increase the range of penalties for an offense beyond the statutory maximum, "the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification prior to trial."

Defendant was charged with attempt first degree murder and was subject to an additional mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS

5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

The court held that the plain language of the indictment alleged that defendant personally discharged a firearm. Since the indictment also cited both the attempt and the first degree murder statutes, the defendant could look to subsection (c)(1)(C) of the attempt statute to know that he was subject to a mandatory 20-year add-on for personally discharging a firearm.

The court agreed that the indictment did not sufficiently allege that the shooting proximately caused great bodily harm, even though it alleged that Richardson was shot about the body, because a gunshot wound does not necessarily satisfy the requirement of great bodily harm.

2. A charging instrument challenged before trial must strictly comply with the pleading requirements of §111-3. When a challenge is made for the first time post-trial, defendant must show that he was prejudiced in the preparation of his defense. A charging instrument attacked post-trial is sufficient if it apprised the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

Even though the indictment did not sufficiently allege the great-bodily-harm requirement, the omission was not fatal where the challenge to the sufficiency of the indictment was first made on appeal. The defendant was apprised of the serious nature of Richardson's injuries long before trial. The police reports mentioned that Richardson had suffered serious injuries and the defense was aware at the bond hearing that Richardson was paralyzed as a result of the shooting. Since the indictment cited to the attempt and first degree murder statutes, defendant could look to subsection (c)(1)(D) of the attempt statute to find the missing sentencing-enhancement factor. Therefore, defendant was not prejudiced in the preparation of his defense.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Nowells, 2013 IL App (1st) 113209 (No. 1-11-3209, 11/7/13)

725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

The court concluded that under the plain language of §111-3(c), the charge is only required to give notice of the intent to seek an enhanced sentence if the prior conviction is not an element of the offense. Where defendant was charged with unlawful use of a weapon by a felon, which includes as an element a prior felony conviction, §111-3(c) was inapplicable although UUW by a felon is a Class 2 felony which carries a special sentencing range of three to 14 years. The court stressed that the State was not seeking an enhanced sentence, but was merely seeking a conviction which would be subject to the only authorized sentence for the offense.

The court rejected precedent which held that the State is required to comply with §111-3(c) when charging UUW by a felon. (See **People v. Easley**, 2012 IL App (1st) 110023 (l/a granted 3/27/13 as No. 115581)).

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

People v. Pryor, 2013 IL App (1st) 121792 (No. 1-12-1792, 12/27/13)

Under 725 ILCS 5/111-3(c), when the State seeks an enhanced sentence based on a defendant's prior conviction it must specifically state its intention to do so in the charging instrument, and it must state the prior conviction that is the basis of the enhancement. Subsection (c) defines an enhanced sentence as a sentence which is increased by a prior conviction from one class of offense to a higher class.

Here, the State charged defendant with unlawful use of a weapon by a felon (UUWF) under 720 ILCS 5/24-1.1(a). Under subsection (e) of the UUWF statute, the sentence for this offense is a Class 3 felony, but any second or subsequent violation is a Class 2 felony. The charging instrument alleged that defendant had a previous conviction for UUW under case number 07 CR 18901 in violation of section 24-1.1(a). The parties stipulated at trial that defendant had a prior felony conviction under case number 07 CR 18901, but did not state what the prior conviction was for. The State did not introduce a certified copy of conviction. The presentence investigation report stated that defendant had been convicted of an offense under section 24-1. At sentencing, the State argued that the sentence should be enhanced due to "a prior gun conviction." The trial court agreed and imposed a Class 2 sentence on defendant.

On appeal, defendant argued that the State failed to provide him with notice of its intent to seek an enhanced sentenced as required by section 111-3. The Appellate Court agreed, holding that the State sought an enhanced sentence due to a prior conviction and that the charging instrument failed to state the prosecutor's intention to seek an enhanced sentence. The court also held that the charging instrument failed to state the prior conviction which served as the basis of the enhancement since the charge only mentioned the case number of defendant's prior conviction.

The Appellate Court noted that in two prior cases, **People v. Easley**, 2012 IL App (1st) 110023 and **People v. Whalum**, 2012 IL App (1st) 110959, the court reached a similar result. The court declined to follow **People v. Nowells**, 2013 IL App (1st) 113209, which held that section 111-3(c) does not apply when the prior conviction used to enhance the offense is an element of the offense. The court also distinguished **Nowells** because there the defendant had been placed on actual notice about the type and class of the prior offense being relied on by the State. The court noted that **Easley** is pending in the Illinois Supreme Court as No. 115581.

Although defendant forfeited this issue by failing to properly object at trial, the Appellate Court addressed the issue as plain error since the improper enhancement of the class of offense implicates a defendant's substantial rights. The court vacated defendant's sentence and remanded for resentencing.

Justice Palmer, dissenting, would have followed **Nowells** instead of **Easley** and **Whalum**.

(Defendant was represented by Assistant Defender Jim Morrissey, Chicago.)

People v. Rich, 2011 IL App (2d) 101237 (No. 2-10-1237, 11/3/11)

Under 720 ILCS 5/6-1, a criminal conviction cannot be entered for an offense which occurred when the defendant was under the age of 13. Thus, the trial court properly dismissed an indictment which alleged that defendant committed aggravated criminal sexual assault when he was 12 years old.

People v. Whalum, 2012 IL App (1st) 110959 (No. 1-11-0959, 12/24/12)

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. *** For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of an offense to another higher level of classification of offense ***; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c).

The offense of unlawful use of a weapon by a felon is a Class 3 felony, but it is enhanced to a Class 2 felony if the defendant has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). Because the statute elevates the classification of the offense, the State must indicate in the charging instrument which class of offense it seeks to charge. Because the State failed to do so in the prosecution of defendant for UUW by a felon, the cause was remanded for defendant to be sentenced for a Class 3 felony.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, 9/15/14)

Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in

the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, mod. op. 11/10/14)

1. Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

2. Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

3. The court rejected the State's argument that the Wisconsin conviction for delivery of a controlled substance was the equivalent of one of the drug-related offenses listed in subsection (e). The legislature did not set out a general description of a crime in subsection (e) that would have been comparable to crimes from other states. It instead listed several specific statutes defining Illinois offenses. By doing so, the legislature did not intend to include equivalent offenses from other states under subsection (e).

4. Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

People v. Wooden, 2014 IL App (1st) 130907 (No. 1-13-0907, 8/8/14)

Under 725 ILCS 5/111-3(c) when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction to give the defense notice. In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice under §111-3(c) is required only if the prior sentence that would enhance the sentence is not an element of the charged offense.

Here, the State charged defendant with unlawful use of a weapon by a felon, alleging that the prior felony was vehicular hijacking. The prior conviction for vehicular hijacking was used to elevate the offense from a Class 3 to a Class 2 felony on the basis that it was a forcible felony. 720 ILCS 5/24-1.1(e).

Defendant argued that he was improperly convicted of a Class 2 felony because the State did not give him notice that it would seek an enhanced sentence. Defendant further argued that **Easley** did not apply to his case because vehicular hijacking is not per se a forcible felony. Vehicular hijacking is not one of the specifically enumerated offenses in the forcible felony statute and, according to defendant, does not fall within the residual clause definition of forcible felony.

The Appellate Court rejected this argument finding that vehicular hijacking falls squarely within the definition of forcible felony. A defendant commits vehicular hijacking when he knowingly takes a motor vehicle from a person by the use or imminent threat of force. 720 ILCS 5/18-3(a). A forcible felony includes several specifically enumerated felonies and any other felony which involves the use or threat of physical force or violence against any person. 720 ILCS 5/2-8.

The act of taking a motor vehicle from a person by force or threat of imminent force necessarily involves at least the contemplation that violence might be used. Defendant could not provide, and the court could not conceive of, a situation where a defendant could commit vehicular hijacking without using or threatening physical force or violence. Vehicular hijacking thus falls within the definition of forcible felony and **Easley** controls the outcome of this case. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Sam Hayman, Chicago.)

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§29-4(b)
In Charging Offense (Also See Substantive Offense)

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) A conviction based upon a charge not made violates due process.

U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) The omission of an element of a crime from an indictment does not deprive a court of jurisdiction to hear the case.

People v. Wisslead, 108 Ill.2d 389, 484 N.E.2d 1081 (1985) The Illinois constitution requires that a defendant be informed of the nature and elements of the charge. The language of the statute may serve to apprise defendant of both the nature and the elements of the offense, "so long as the statutory language specifies, with reasonable certainty, the type of conduct being alleged." See also, **People v. Davis**, 281 Ill.App.3d 984, 668 N.E.2d 119 (1st Dist. 1996).

People v. Schmidt, 126 Ill.2d 179, 533 N.E.2d 898 (1988) A defendant may not be convicted of an offense which is not charged unless such offense is a lesser included offense of one which was charged. See also, **People v. Hill**, 190 Ill.App.3d 20, 545 N.E.2d 977 (1st Dist. 1989) (defendant charged with attempt murder could not be convicted of aggravated assault).

People v. Heard, 47 Ill.2d 501, 266 N.E.2d 340 (1970) A complaint that charges in the language of the statute and uses the disjunctive "or" is not sufficient where the statute names disparate and alternative acts, any one of which will constitute the offense. See also, **People v. Eagle Books, Inc.**, 151 Ill.2d 235, 602 N.E.2d 798 (1992) (obscenity charge alleging that defendant "provided, offered for sale or otherwise made available" obscene magazines was flawed. The Court rejected the State's argument that the three ways of committing the offense were so intimately related that defendant had sufficient notice of the charge).

People v. Phillips, 215 Ill.2d 554, 831 N.E.2d 574 (2005) A defendant is prejudiced by a charging instrument that alleges disparate acts in a single count, because the use of the disjunctive creates uncertainty concerning which of the alternative acts the accused is charged with committing. In **People v. Eagle Books, Inc**., 151 Ill.2d 235, 602 N.E.2d 798 (1992), the defendant was prejudiced by an indictment which alleged that he "provided, offered for sale, or otherwise made available" an obscene magazine, because it was unclear whether the defendant was being charged with providing, offering for sale, or otherwise making available the material. In this case an indictment for possession of child pornography charged defendant with possessing "a photograph or other similar visual reproduction or depiction by computer." but the disjunctive language "simply gave the State flexibility as to the physical form of the pictures," and did not "leave defendant uncertain about which of several disparate acts he stood accused of committing." Because it was clear from the evidence that on the date of his arrest defendant possessed all of the pictures which the police seized, "there was only one act of possession, not three disparate alternative acts."

People v. Nash et al., 173 Ill.2d 423, 672 N.E.2d 1166 (1996) Defendants Nash, Fuller and Johnson were charged by complaint with mob action which is defined as the "assembly of 2 or more persons to do an unlawful act." The charges alleged that defendants "knowingly by the use of intimidation, disturbed the public peace," in that "while acting with others and without the authority of law, [they] blocked the sidewalk. . . ." The Supreme Court held that these complaints were insufficient. The charging instrument must set forth the nature and elements of the offense charged. Where the statute defining the offense specifies the type of conduct prohibited, the nature and elements of the offenses are sufficiently set forth if the charge states the offense in the statutory language. However, where the statute creating the offense does not define the specific acts constituting the crime, use of the statutory language alone is insufficient. Because the mob action statute does not specifically define the acts which constitute this offense, a mob action charge must include the statutory language and the specific facts constituting the crime.

People v. Smith, 99 Ill.2d 467, 459 N.E.2d 1357 (1984) The information was defective because it only alleged that defendant drove "a motor vehicle at an excessive rate of speed resulting in a crash . . . and death." The information did not allege that the defendant's acts were performed recklessly, an essential element of reckless homicide.

People v. Oaks, 169 Ill.2d 409, 662 N.E.2d 1328 (1996) Defendant challenged indictments which alleged that he "killed" or "caused great bodily harm" by subjecting the victim to physical injury "or by creating a situation which subjected the victim to physical injury. . ." Defendant argued that the statutes defining the offenses do not include "creating a situation" which permits an injury to occur, and that a conviction for "creating a situation" could be based on reckless or negligent conduct. The Court held that the indictments complied with statutory requirements. First, each of the counts set forth the statutory elements for the offense. Second, "creating a situation" referred only to the method by which the crimes were committed; because the method by which a crime is committed is not "integral to these offenses . . .," that language may be regarded as mere surplusage.

People v. DiLorenzo, 169 Ill.2d 318, 662 N.E.2d 412 (1996) The Court noted a split between the appellate districts concerning whether an aggravated criminal sexual abuse charge that is challenged at trial must

explicitly allege that defendant's acts were for purposes of "sexual gratification." Because defendant did not challenge the indictments in the trial court and the charges were sufficient when challenged for the first time on appeal, the Court held that the issue was not presented in this case. See also, **People v. Allensworth**, 235 Ill.App.3d 185, 600 N.E.2d 1197 (3d Dist. 1992) (indictment for aggravated criminal sexual abuse is sufficient where it alleges that defendant committed "sexual conduct," without specifying that the conduct was for the purpose of sexual gratification or arousal; furthermore, where there was evidence that defendant was at least 26 years older than the victim, the indictment was not insufficient because it failed to allege that the accused was more than five years older than the victim).

People v. Melton, et al., and Turner, 282 Ill.App.3d 408, 667 N.E.2d 1371 (1st Dist. 1996) Where a defendant is convicted under a section of the Criminal Code that has been repealed but incorporated in substance by another act, the conviction is not void. Instead, the citation to the repealed statute will be treated merely as an incorrect statutory citation, and the conviction will be overturned only if the defendant can demonstrate prejudice. Because defendants were fully aware of the elements of the offense with which they were charged, and in fact benefitted from proceeding under the repealed version of the statute because the State's burden of proof was greater than it would have been under the reenacted statute, no prejudice was shown.

People v. Podhrasky, 197 Ill.App.3d 349, 554 N.E.2d 578 (5th Dist. 1990) Reckless driving information alleging that defendant "drove on Lebanon Avenue near Sir Lawrence Drive in St. Clair County, Illinois with wanton disregard for the safety of persons or property" was fatally defective; charge was not sufficiently definite to bar further prosecution for the same acts.

People v. Clutts, 43 Ill.App.3d 366, 356 N.E.2d 1367 (5th Dist. 1976) Indictment alleging defendant sold 50,000 amphetamine tablets did not charge unlawful delivery of 200 grams of amphetamine; the gram amount is an essential element that must be alleged in the indictment.

People v. Lucas, 372 Ill.App.3d 279, 865 N.E.2d 420 (3d Dist. 2007) Where due to a prior conviction the State seeks an enhanced sentence which increases the classification of the offense, the fact of the prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial. (725 ILCS 5/111-3(c)). Because driving while license revoked is elevated from a Class A misdemeanor to a Class 4 felony where there is a prior conviction for the same offense, §111-3(c) prohibited the State from proving the prior conviction at a trial in which armed violence was predicated on felony driving while license revoked. Thus, evidence of the prior conviction was properly presented only at sentencing.

People v. Lauderdale, 228 Ill.App.3d 830, 593 N.E.2d 757 (1st Dist. 1992) "Bodily harm" under the aggravated criminal sexual assault statute should be given the same meaning as under the battery statute. Thus, an aggravated criminal sexual assault indictment was sufficient to charge an offense where it alleged that defendant committed "sexual penetration" and "caused bodily harm . . . by causing destruction of the hymen, and causing bruises and abrasions."

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) An indictment charging possession of a controlled substance with intent to deliver "within 1000 feet of the real property comprising a school" is defective if it fails to allege that the possession took place "on any public way." Under **People v. Jones**, 288 Ill.App.3d 293, 681 N.E.2d 537 (1st Dist. 1997), the allegation that the possession occurred "on any public way" is essential to the offense.

People v. Swanson, 308 Ill.App.3d 708, 721 N.E.2d 630 (2d Dist. 1999) Defendant was charged with

disorderly conduct for "knowingly transmitt[ing] . . . a report that the offense of domestic battery had been committed, knowing that at the time of such transmission, . . . there was no reasonable ground for believing that such offense had been committed." The Court held that the charge failed to allege an offense. Where a charging instrument is challenged in the trial court, it must strictly comply with the pleading requirements of 725 ILCS 5/111-3(a), including setting forth the nature and elements of the offense. The failure to allege an offense is a fundamental defect that renders the charge void and which cannot be cured by amendment. The use of statutory language in the charging instrument may be sufficient to charge an offense where such language specifically apprises the accused of the alleged offense. Because the disorderly conduct statute uses only general language in describing the offense, however, the State must plead additional facts to describe the particular conduct involved. Where the offense that was allegedly the subject of the false report can be committed in at least two ways and may be either a misdemeanor or a felony, and defendant made at least two statements which could have been the basis for the charge, the failure to specifically identify the alleged false statement rendered the information insufficient to apprise defendant of her precise criminal conduct.

People v. Smit, 312 Ill.App.3d 150, 726 N.E.2d 62 (1st Dist. 2000) A criminal charge is sufficient where it sets forth the nature and elements of the offense with enough specificity to enable the defendant to prepare a defense. An information alleging assault was sufficient to charge a crime where it alleged that the defendant flashed a laser pointer at the person of the complainant.

People v. Morrissette, 225 Ill.App.3d 1044, 589 N.E.2d 144 (4th Dist. 1992) The trial court properly dismissed an indictment for unlawful possession of contraband in a penal institution The indictment alleged defendant brought a hacksaw blade into a Correctional Center. The statute defines "contraband" as certain controlled substances, hypodermic needles, specified weapons, and "any dangerous weapon or instrument of like character." Because a hacksaw blade is not specifically listed, it can be contraband only if it is a "dangerous weapon or instrument of like character." A hacksaw blade is not a dangerous weapon per se, and the State failed to allege that it had been used as a dangerous weapon. Thus, because the indictment omitted an essential element of the offense, it failed to state an offense.

Cumulative Digest Case Summaries **§29-4(b)**

People v. Espinoza, 2015 IL 118218 (No. 118218, 12/3/15)

1. The Supreme Court reiterated precedent that the charging instrument must identify the victim of the offense. Where a charging instrument is challenged before trial, strict compliance with pleading requirements is necessary. In addition, where the charge is challenged before trial the defendant is not required to show prejudice in order to obtain dismissal of the charge.

2. In the course of rejecting several arguments urging modification of the requirement that charging instruments must identify the victim, the court noted that the current rule has been reflected in Illinois case law for more than 170 years. In addition, the General Assembly accepted the rule when it enacted the Code of Criminal Procedure in 1964 and when amending the Code since that time.

The court stressed that a criminal defendant has a fundamental right to be informed of the nature of the accusations against him, and that due process requires that the charging instrument notify the defendant of the offense with enough specificity to enable a proper defense. In addition, because the purpose of alleging the name of the victim is to enable the accused to plead either a formal acquittal or a conviction as a bar to a second prosecution for the same offense, the requirement that the victim be named is founded on protection of the right against double jeopardy.

The court rejected the argument that the public interest in protecting minors' privacy warrants an exception to the requirement that the charge name the victim. The court noted that in this case the State sought to eliminate the need to provide any identifying information concerning victims who were minors.

However, 725 ILCS 5/111-3(a-5) requires that the victims of sexual offenses be identified by name, initials, or description. The court stated, "The State has failed to persuade this court that minor victims of nonsexual offenses should be provided greater protections than those provided to victims of illegal sexual acts."

3. The first defendant was charged with domestic battery for making physical contact of an insulting or provoking nature "with a minor, a family or household member, in that said defendant struck the minor about the face." At pretrial hearings, the State indicated that the victim was defendant's son.

The second defendant was charged with endangering the life or health of a child in that she "left the minor child alone . . . without adult supervision." The police report named five different minors under the age of 18, three of whom were allegedly defendant's children. In response to defendant's motion for a bill of particulars, the State filed a sealed bill of particulars naming the victim.

The court concluded that because charging documents describing the victims only as "minors" were insufficient to adequately identify the victims, the trial court's order dismissing the charging instruments should be affirmed.

(Defendant was represented by Assistant Defender Lucas Walker, Elgin.)

People v. Barwan, Sandkam, & Klicko, 2011 IL App (2d) 100689 (Nos. 2-10-0689, 2-10-0690, 2-10-0691, 7/26/11)

1. A motion to dismiss a charge for failing to allege an offense challenges the sufficiency of the allegations of the complaint, and does not concern the evidence which might be introduced to support those allegations. A charging instrument is sufficient to state an offense where it is in writing, sets forth the nature and elements of the offense, and alleges the provision violated, the name of the accused, and the date and county of commission. Where the State seeks an enhanced sentence due to a prior conviction, the charge must state the prior conviction and the intent to seek the enhancement, although neither are elements of the offense. (725 ILCS 5/111-3).

Aggravated DUI charges which alleged that the defendants had committed DUI three times, and were therefore subject to Class 2 felony sentences under 625 ILCS 5/11-501(d)(2)(B), were sufficient to allege offenses although the second violation in each case involved pending charges that had not yet been resolved. Because the third-time offender provision is a sentencing enhancement, whether the evidence supports the enhancement is determined at sentencing rather than before trial. Thus, it was premature for the trial court to consider the status of the predicate offenses when ruling on pretrial motions to dismiss.

2. The court declined to decide whether the Class 2 felony enhancement of 625 ILCS 5/11-501(d)(2)(B) would apply if at sentencing, a charge used as one of the predicate offenses was still pending in the trial court. The court noted, however, that under Supreme Court precedent, a charge on which the defendant received supervision is a prior "violation" for purposes of the Class 2 enhancement. (**People v. Sheehan**, 168 Ill.2d 298, 659 N.E.2d 1339 (1995)).

The trial court's pretrial orders dismissing the charges as insufficient were reversed, and the causes were remanded for further proceedings.

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

People v. Carey, 2016 IL App (1st) 131944 (No. 1-13-1944, 8/22/16)

The due process right to be adequately informed of the charged offense applies to the predicate felony in a felony murder charge. When the charging instrument is attacked for the first time on appeal, the court must determine whether the charge was specific enough to allow defendant to prepare his defense and to bar future prosecution arising out of the same conduct. Additionally, when the challenge is made for the first time on appeal the defendant must show that he was prejudiced in the preparation of his defense.

The State charged defendant with first degree murder alleging that he caused the death of his co-offender while committing the offense of armed robbery. The charge did not specify which of the two mutually exclusive forms of armed robbery defendant committed: armed robbery with a firearm, 720 ILCS 5/18-2(a)(1), or armed robbery with a dangerous weapon, 720 ILCS 5/18-2(a)(2).

The court held that since the indictment did not indicate through statutory citation or other specific detail which of the two armed robbery offenses formed the predicate felony, the indictment failed to adequately inform defendant of the charges against him. The court rejected the State's argument that defendant could look to the nolled charges, which included a charge of attempted armed robbery with a firearm, to determine the specific nature of the felony murder charge. Since the State declined to prosecute defendant on the nolled charge, "the State cannot rely on its contents to supplement" the defective murder charge.

The court further held that the defective charge prejudiced defendant in preparing his defense. Since the indictment did not specify which form of armed robbery constituted the predicate felony, "the State was effectively free to proceed at trial under either theory." There was some doubt about whether the gun defendant carried was a firearm since it may not have been operable. By keeping the dangerous weapon theory open, the State may have been able to convict defendant even if the jury found that he was not carrying a firearm.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

People v. Easley, 2012 IL App (1st) 110023 (No. 1-11-0023, 12/24/12)

Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. 725 ILCS 5/111-3(a) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State's argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Mimes, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-2747, 6/20/11)

1. In response to the United States Supreme Court's decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the legislature enacted 725 ILCS 5/111-3(c-5), which provides that if an alleged fact other than the fact of a prior conviction is sought to be used to increase the range of penalties for an offense beyond the statutory maximum, "the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification prior to trial."

Defendant was charged with attempt first degree murder and was subject to an additional mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS

5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

The court held that the plain language of the indictment alleged that defendant personally discharged a firearm. Since the indictment also cited both the attempt and the first degree murder statutes, the defendant could look to subsection (c)(1)(C) of the attempt statute to know that he was subject to a mandatory 20-year add-on for personally discharging a firearm.

The court agreed that the indictment did not sufficiently allege that the shooting proximately caused great bodily harm, even though it alleged that Richardson was shot about the body, because a gunshot wound does not necessarily satisfy the requirement of great bodily harm.

2. A charging instrument challenged before trial must strictly comply with the pleading requirements of §111-3. When a challenge is made for the first time post-trial, defendant must show that he was prejudiced in the preparation of his defense. A charging instrument attacked post-trial is sufficient if it apprised the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense and to allow him to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

Even though the indictment did not sufficiently allege the great-bodily-harm requirement, the omission was not fatal where the challenge to the sufficiency of the indictment was first made on appeal. The defendant was apprised of the serious nature of Richardson's injuries long before trial. The police reports mentioned that Richardson had suffered serious injuries and the defense was aware at the bond hearing that Richardson was paralyzed as a result of the shooting. Since the indictment cited to the attempt and first degree murder statutes, defendant could look to subsection (c)(1)(D) of the attempt statute to find the missing sentencing-enhancement factor. Therefore, defendant was not prejudiced in the preparation of his defense.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Moman, 2014 IL App (1st) 130088 (No. 1-13-0088, 8/14/14)

A defendant has a due process right to notice of the State's charges, and may not be convicted of an offense the State has not charged. But, a defendant may be convicted of an uncharged offense if it is a lesser-included offense of the charged offense.

To determine whether an uncharged offense is a lesser-included offense, Illinois courts employ the charging instrument test. Under this test, the court must determine whether: (1) the description in the charging instrument contains a "broad foundation or main outline" of the lesser offense; and (2) the trial evidence rationally supports a conviction of the lesser offense.

Here, the State charged defendant with aggravated battery premised on complainant's status as a correctional officer. The charged alleged that defendant caused bodily harm to complainant knowing that he was a peace officer performing his official duties. The trial court found defendant guilty of obstructing a peace officer, which is defined as knowingly obstructing the performance of a known peace officer of any authorized act within his official capacity. 720 ILCS 5/31-1(a).

The charging instrument plainly stated the "broad foundation or main outline" of obstructing a peace officer. It alleged that defendant battered the officer while he was performing his official duties, claims which sufficiently mirror the elements of obstructing a peace officer. Although the indictment did not use the identical language of the statute defining the lesser offense, it stated facts from which the elements could be reasonably inferred. In particular, the allegation that the officer was performing his official duties was sufficient to notify defendant of the element that the officer was engaged in an authorized act within his official capacity.

The trial evidence also rationally supported a conviction on the lesser offense. It showed that defendant repeatedly kicked the officer while he was placing defendant in restraints. This evidence supports a finding that defendant obstructed a peace officer while he performed an authorized act.

The conviction for obstruction of a peace officer was affirmed.
(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Nowells, 2013 IL App (1st) 113209 (No. 1-11-3209, 11/7/13)

725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

The court concluded that under the plain language of §111-3(c), the charge is only required to give notice of the intent to seek an enhanced sentence if the prior conviction is not an element of the offense. Where defendant was charged with unlawful use of a weapon by a felon, which includes as an element a prior felony conviction, §111-3(c) was inapplicable although UUW by a felon is a Class 2 felony which carries a special sentencing range of three to 14 years. The court stressed that the State was not seeking an enhanced sentence, but was merely seeking a conviction which would be subject to the only authorized sentence for the offense.

The court rejected precedent which held that the State is required to comply with §111-3(c) when charging UUW by a felon. (See **People v. Easley**, 2012 IL App (1st) 110023 (l/a granted 3/27/13 as No. 115581)).

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

People v. Swift, 2016 IL App (3d) 140604 (No. 3-14-0604, 10/19/16)

The State charged defendant with aggravated driving under the influence. 625 ILCS 5/11-501(a)(6), (d)(1)(C). One of the elements of aggravated DUI is that defendant's driving was a proximate cause of the victim's injuries. The indictment failed to include this element. After the first witness testified at trial, defendant moved to dismiss the indictment on the grounds that it was defective for failing to include an essential element of the charged offense. The trial court denied defendant's motion and directed the State to amend the indictment to include the missing element.

The Appellate Court held that the indictment contained a substantive defect by failing to include an essential element of the offense. But it affirmed defendant's conviction because he was unable to show that he was prejudiced by this defect. When an indictment is challenged prior to trial, it will be dismissed if it contains a substantive defect and there is no need for a defendant to show any prejudice. As a general rule, however, if an indictment is challenged during trial, defendant must show that he was prejudiced. Here defendant did not challenge the indictment until after trial began and he could show no prejudice since he was clearly aware of the proximate cause element during trial.

(Defendant was represented by Assistant Defender Ann Fick, Elgin.)

People v. Walton, 2013 IL App (3d) 110630 (No. 3-11-0630, 5/29/13)

A defendant has a fundamental right to be informed of the nature and cause of criminal accusations made against her. As part of that right, the Code of Criminal Procedure provides that the charging instrument must set forth the nature and elements of the offense charged. 725 ILCS 5/111-3(a)(3). When challenged for the first time on appeal, the charging instrument will be found sufficient if it: (1) apprised the accused of the precise offense with sufficient specificity to prepare her defense; and (2) would allow her to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

The State charged the defendant with one act of felony theft under 720 ILCS 16-1(a)(4) in that she obtained control of multiple items of stolen property from various stores having a total value of more then $500 but not exceeding $10,000, under such circumstances as would reasonably induce said defendant to believe the property was stolen. If based on the commission of separate acts, this charge was sufficient to charge felony theft only if it alleged, as required by the joinder statute (725 ILCS 5/111-4(c), that the acts

were committed in furtherance of a single intention and design. The record is silent on whether defendant obtained control over the stolen property through one or multiple acts.

The Appellate Court concluded that it could reduce defendant's conviction to a conviction for the lesser-included offense of felony theft under 720 ILCS 5/16-1 (a)(1), which is violated whenever a person maintains possession over items of property she does not own. This is a continuing crime that could be alleged as a single act of possession and does not require an allegation that defendant's acts were committed in furtherance of a single intention and design.

(Defendant was represented by Assistant Deputy Defender Larry Wells, Mt. Vernon.)

People v. Whalum, 2012 IL App (1st) 110959 (No. 1-11-0959, 12/24/12)

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. *** For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of an offense to another higher level of classification of offense ***; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c).

The offense of unlawful use of a weapon by a felon is a Class 3 felony, but it is enhanced to a Class 2 felony if the defendant has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). Because the statute elevates the classification of the offense, the State must indicate in the charging instrument which class of offense it seeks to charge. Because the State failed to do so in the prosecution of defendant for UUW by a felon, the cause was remanded for defendant to be sentenced for a Class 3 felony.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

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§29-5
Amendment of

Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) After an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself.

People v. Tellez-Valencia & Moore, 188 Ill.2d 523, 723 N.E.2d 223 (1999) Where the statute creating the offense of which the defendants were convicted was subsequently held to be unconstitutional, the State could not amend the charging instruments on appeal to change the name of the conviction to an offense with the same elements. When an act is held unconstitutional, its provisions are "rendered void ab initio; that is, it was as if the law never existed." Because each defendant was charged under an instrument alleging an offense that did not exist at the time of the alleged crime, the charges failed to state offenses. Thus, the convictions could not stand. Although formal defects in a charging instrument may be amended any time, the failure to state an offense is a substantial defect, not merely a formal one. An instrument charging an offense that did not exist at the time of the crime is fatally defective and cannot be cured by amendment.

People v. Knaff, 196 Ill.2d 460, 752 N.E.2d 1123 (2001) A charging instrument implicitly charges lesser included offenses of the charged crime, whether or not the lesser charges are specifically stated. A defendant may be convicted of lesser included offenses even where before trial the State dismissed the lesser included offenses as charged crimes.

People v. Jones, 219 Ill.2d 1, 845 N.E.2d 598 (2006) The trial court did not err by allowing the State to amend the first degree murder indictment on the day of trial. The original indictment charged that defendant's conduct created "a strong probability of death." The amended indictment stated that defendant's conduct "created a strong probability of death or great bodily harm." The State may amend a charging instrument to correct formal defects. The court concluded that where the amendment did not alter the charge, broaden the indictment or add an alternative mental state, the addition of the phrase "or great bodily harm" merely cured a scrivener's error.

People v. Kincaid, 87 Ill.2d 107, 429 N.E.2d 508 (1981) The State was properly allowed to amend the information before trial to add an essential element. The Court set forth the following rules concerning amendments of informations and indictments: (1) An amendment to an indictment to include an essential element "must originate with the grand jury." (2) The State may amend an information to include essential elements of the crime only where the amendment is made before trial, a prompt preliminary hearing is held to determine probable cause, and the defendant is allowed to plead anew and afforded a reasonable time to prepare the defense. The trial judge may also "impose additional conditions to insure the protection of the defendant's rights."

People v. Benitez, 169 Ill.2d 245, 661 N.E.2d 344 (1996) Indictment was invalid where it was prepared in the prosecutor's office and substituted for an indictment that failed to include the defendant. The State may not "arrogat[e] for itself the power to amend the indictment."

People v. Gancarz, 369 Ill.App.3d 154, 859 N.E.2d 1127 (2d Dist. 2006) Defendant was convicted of reckless homicide, aggravated DUI, and driving with a suspended license, and was sentenced to 14 years for reckless homicide. Defendant argued that the trial court erred by failing to inform him that he could elect to be sentenced under a version of the reckless homicide statute that was passed after the date of the offense, and which authorized a lesser sentence than the law in effect at the time of the offense. The State conceded that defendant should have been given an opportunity to elect the new law, but contended that no prejudice occurred because had defendant elected to be sentenced under the more favorable scheme, it would have amended the indictment to allege aggravated DUI under a new version of the aggravated DUI statute, which included defendant's conduct for crimes occurring after the amendment's effective date. The court held that the State could not have amended the indictment to charge a version of aggravated DUI which did not exist at the time of the crime. The court concluded that such an amendment would have charged an offense which did not exist on the date of the offense, in violation of **People v. Tellez-Valencia**, 188 Ill.2d 523, 723 N.E.2d 223 (1999). Because the State could not charge defendant with a version of aggravated DUI which became effective after his conduct occurred, defendant was prejudiced by the failure to advise him of the right to make a sentencing election. (Overruling **People v. Malin**, 359 Ill.App.3d 257, 833 N.E.2d 440 (2d Dist. 2005).

People v. Patterson, 267 Ill.App.3d 933, 642 N.E.2d 866 (1st Dist. 1994) Defendant was indicted for possession, with intent to deliver, of more than 15 but less than 100 grams of cocaine. Before trial, the State moved to amend the indictment to charge possession, with intent to deliver, of more than 400 but less than 900 grams. The trial court allowed the amendment and defendant was convicted of possession with intent to deliver more than 400 but less than 900 grams of cocaine. The Court held that unless only a "formal defect" is involved, an indictment can be amended only by action of the grand jury. "Formal defects" are those that do not alter the nature and elements of the offense; examples include misspellings or grammatical errors, a misjoinder of parties or offenses, unnecessary allegations, failing to negate an exception in the statute, and use of alternative or disjunctive allegations regarding the acts, means, intents, or results charged." In a narcotics case, the quantity of controlled substance "defines both the crime and the punishment." and is an essential element of the offense and not merely a "formal defect." The Court ordered the trial judge

to enter judgment and sentence on the original charge.

People v. Castro, 113 Ill.App.3d 265, 446 N.E.2d 1267 (1st Dist. 1983) An incorrect citation to the applicable statutory provision is a formal rather than a substantive defect, and may be corrected at any time. Striking the words "and threat of force" from attempt deviate sexual assault charge was proper where the stricken words were surplusage. Striking the words "threat of force" from aggravated kidnapping charge was proper where the conviction was based on the use of force.

People v. Johnson, 43 Ill.App.3d 559, 357 N.E.2d 594 (1st Dist. 1976) At the close of the State's case, defendant moved to dismiss the UUW complaint because it failed to allege that the firearm involved had been loaded. The trial court deemed the defect one of form rather than substance, and allowed the State to amend the complaint by inserting the word "loaded." Although the Appellate Court found that the original complaint was defective in a substantive manner, it was not error to allow the amendment. The record shows that defendant was well aware of the charges and could properly prepare a defense, and the amended complaint could be used as a bar to any future prosecution arising out of the same conduct.

People v. Troutt, 51 Ill.App.3d 656, 366 N.E.2d 370 (5th Dist. 1977) Defendant was originally charged by information with unlawful possession of "30 grams of a controlled substance, amphetamine." At the preliminary hearing, the State's Attorney was allowed to amend the information to charge the unlawful possession of "300 grams of a substance containing phencyclidine." After the change, the information was not re-verified. The amendment was a material change because it changed the nature and elements of the offense charged. Therefore, re-verification was required.

People v. Betts, 78 Ill.App.3d 200, 397 N.E.2d 106 (1st Dist. 1979) Amendment changing unlawful delivery of a "narcotic" to unlawful delivery of a non-narcotic was a substantive change, though same drug was involved in both offenses. Therefore, the trial court erred by permitting amendment even though amended offense was less serious felony.

Cumulative Digest Case Summaries **§29-5**

People v. Adams, 404 Ill.App.3d 405, 935 N.E.2d 693 (1st Dist. 2010)

An indictment may be amended any time to correct formal defects, including miswritings. 725 ILCS 5/111-5(a). An amendment to an indictment to include an essential element must originate with the grand jury.

An indictment for armed habitual criminal correctly identified the case number of a prior conviction alleged as an element of the offense, but misstated the nature of the prior conviction. The court held that the prosecution could amend the indictment to accurately state the nature of the prior offense. The amendment related to a formal defect in the nature of a miswriting that could be corrected at any time.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

People v. Jones, 2012 IL App (2d) 110346 (No. 2-11-0346, 12/19/12)

1. Once the grand jury has returned an indictment, it may not be broadened through amendment except by the grand jury itself. This rule ensures that individuals' rights are not at the mercy or control of the prosecutor. An exception to this rule exists allowing correction of formal defects if no surprise or prejudice results to the defendant. The lack of surprise by an amendment supports a finding that the amendment is merely technical.

A list of formal defects that may be corrected by amendment is contained in 725 ILCS 5/111-5, but the list is not exclusive. An amendment is substantive and therefore improper if it: (1) materially alters the

charge, and (2) it cannot be determined whether the grand jury intended the alteration.

An abuse-of-discretion standard applies to review of a trial court's decision to allow or deny the amendment of an indictment.

2. The trial court did not abuse its discretion in allowing the amendment of an aggravated battery indictment to change the name of the victim. The identity of the victim is an essential element of an offense, but amending the indictment to change the name of the victim on the day of trial was nonetheless acceptable as the correction of a formal defect. Defendant acknowledged to the court that the grand jury transcript supported a charge of aggravated battery of the victim named in the amended charge, although it also supported the original charge. Defendant declined the court's offer of a continuance when the amendment was made, so defendant was not surprised or prejudiced by the amendment.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Shipp, 2011 IL App (2d) 100197 (No. 2-10-0197, 10/5/11)

A charge must set forth the nature and elements of the offense, as well as cite the statutory provision alleged to have been violated. 725 ILCS 5/111-3(a). It may be amended at any time to correct a formal defect, including a miswriting. 725 ILCS 5/111-5. Amendment is permissible if the change is not material or does not alter the nature and elements of the offense. Formal amendment is warranted especially where there is no resulting surprise or prejudice to the defendant or where the record shows that the defendant was otherwise aware of the actual charge. Generally, an error in the citation of the statute giving rise to a charge is a mere technical defect subject to amendment.

The State charged defendant with a violation of 720 ILCS 570/407(b)(2) in that he possessed with intent to deliver in violation of 720 ILCS 570/401(c) more than 1 gram but less than 15 grams of a substance containing cocaine. At arraignment, the court brought to the prosecutor's attention that §407(b)(2) applies to an amount less than one gram, but the prosecutor declined to correct the inconsistency. Almost two years later, over defense objection, the court permitted the State to amend the charge to a violation of §407(b)(1), conforming the code section to the language of the body of the charge.

The amendment was proper because it was not material and only corrected a formal defect. The amendment related only to the statutory citation, not to the factual allegations. Defendant could not credibly complain surprise because the facts alleged did not change. It was clear all along that the statutory citation was a miswriting.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Swift, 2016 IL App (3d) 140604 (No. 3-14-0604, 10/19/16)

The State charged defendant with aggravated driving under the influence. 625 ILCS 5/11-501(a)(6), (d)(1)(C). One of the elements of aggravated DUI is that defendant's driving was a proximate cause of the victim's injuries. The indictment failed to include this element. After the first witness testified at trial, defendant moved to dismiss the indictment on the grounds that it was defective for failing to include an essential element of the charged offense. The trial court denied defendant's motion and directed the State to amend the indictment to include the missing element.

The Appellate Court held that the indictment contained a substantive defect by failing to include an essential element of the offense. But it affirmed defendant's conviction because he was unable to show that he was prejudiced by this defect. When an indictment is challenged prior to trial, it will be dismissed if it contains a substantive defect and there is no need for a defendant to show any prejudice. As a general rule, however, if an indictment is challenged during trial, defendant must show that he was prejudiced. Here defendant did not challenge the indictment until after trial began and he could show no prejudice since he was clearly aware of the proximate cause element during trial.

(Defendant was represented by Assistant Defender Ann Fick, Elgin.)

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§29-6
Statute of Limitations

People v. Laws, 155 Ill.2d 208, 613 N.E.2d 747 (1993) Any offense for which misdemeanor punishment is possible is classified as a misdemeanor, and is subject to the misdemeanor statute of limitations. Thus, the trial court properly applied the 18-month misdemeanor statute of limitations for offenses than may be punished as felonies or misdemeanors. See also, **People v. Sifford**, 247 Ill.App.3d 562, 617 N.E.2d 499 (3d Dist. 1993) (statute which extends the statute of limitations for certain sex offenses to one year past the victim's 18th birthday, applies only to the offenses that are specifically listed.

People v. Strait, 72 Ill.2d 503, 381 N.E.2d 692 (1978) Indictment or information that shows on its face that the alleged offense was committed beyond the statute of limitations period is fatally defective unless it also alleges facts which invoke statutory exclusions. See also, **People v. Coleman**, 245 Ill.App.3d 592, 615 N.E.2d 53 (5th Dist. 1993) (information was fatally defective because it failed to aver any exception to the statute of limitations; amendments to statute of limitations did not apply retroactively to offenses for which relevant limitation period had already expired); **People v. Laughlin**, 293 Ill.App.3d 194, 687 N.E.2d 1172 (2d Dist. 1997).

People v. Laughlin, 293 Ill.App.3d 194, 687 N.E.2d 1162 (2d Dist. 1997) 720 ILCS 5/3-7(a), which provides that the statute of limitations is tolled by any period in which the "defendant is not usually and publicly resident within this State," is not unconstitutionally vague or a violation of equal protection. The statute of limitations was tolled while defendant lived in Nebraska, even though he did not hide his whereabouts or fight extradition.

People v. Mann, 341 Ill.App.3d 832, 794 N.E.2d 425 (2d Dist. 2003) Under 720 ILCS 5/3-7(c), the statute of limitations for an offense is tolled during any period in which "[a] prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings set aside, or . . . reversed on appeal." The court concluded that a misdemeanor action instituted by a complaint tolls the statute of limitations, even though §3-7 refers only to prosecutions commenced by indictment or information. Here, a misdemeanor prosecution for driving while license revoked was based on the "same conduct" as a felony prosecution for aggravated driving while license revoked, although the felony charge involved two additional elements. The misdemeanor complaint stated defendant drove a motor vehicle on a specific date while his license was revoked, and the same act of driving was alleged in the felony charge for aggravated driving while license revoked.

People v. Martin, 266 Ill.App.3d 369, 640 N.E.2d 638 (4th Dist. 1994) Defendant was charged with three counts of reckless homicide. After the charges had been pending for approximately 20 months, the trial court denied continuance motions by both parties and set the case for trial. The State then dismissed the charges, but on the same day recharged the same counts plus two counts of misdemeanor DUI and one count of leaving the scene of an accident. Defendant was convicted of all six counts. On appeal, defendant contended that the new charges were improper because the 18-month statute of limitations for misdemeanors had expired when the new information was filed. However, Illinois law provides that the statute of limitations period does not include any period of time in which "a prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings thereon are set aside, or reversed on appeal." Because the new charges were based on the same "conduct" as the reckless homicide counts, the period during which the original counts had been pending was excluded from the statute of limitations period.

People v. Chenoweth, 2015 IL 116898 (No. 116898, 1/23/15)

Under section 3-5(b) of the Criminal Code, a felony prosecution must be commenced within three years after the offense was committed. 720 ILCS 5/3-5(b). Section 3-6, however, extends the statute of limitations in certain situations. For theft involving breach of a fiduciary obligation, section 3-6(a) allows a prosecution to begin "within one year after the discovery of the offense by the aggrieved person." In the absence of such discovery, the prosecution must begin "within one year after the proper prosecuting office becomes aware of the offense."

Defendant's stepmother gave defendant power of attorney, allowing her to carry out various financial transactions without prior notice or approval, including the sale of her house in 2005. In 2008, the police learned that defendant had written unauthorized checks on the stepmother's account and proceeds from the house sale were missing. A police officer informed the stepmother of the unauthorized transactions and missing proceeds on December 5, 2008.

The officer continued his investigation, eventually determined that defendant's conduct was illegal, and presented his findings to the prosecutor in January 22, 2009. The prosecutor indicted defendant with financial exploitation of an elderly person on December 21, 2009.

Defendant argued that the indictment was barred by the statute of limitations since she was charged more than one year after the date the aggrieved person, her stepmother, discovered the offense. According to defendant, her stepmother discovered the offense when the officer informed her of the suspicious transactions and missing proceeds on December 5, 2008, more than one year before defendant was charged.

The Supreme Court rejected this argument, holding that the stepmother did not discover the offense when she spoke to the officer on December 5, 2008. The phrase "discovery of the offense" means gaining knowledge or finding out that a criminal statute has been violated. After the December 5th conversation, however, the stepmother only suspected that a crime may have occurred. Because defendant had power of attorney to carry out financial transactions without advance notice or approval, further investigation was needed to determine whether defendant had actually violated a criminal statute.

Since the stepmother did not discover the offense on December 5, 2008, the one-year extension began on January 22, 2009, when the "proper prosecuting office" became aware of the offense. The indictment on December 21, 2009 was thus within the one-year extension period.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Chenoweth, 2013 IL App (4th) 120334 (4-12-0334, 10/11/13)

1. Generally, a three-year statute of limitations applies to the offense of unlawful financial exploitation of an elderly person. (725/ILCS 5/3-5(b)) However, 720 ILCS 5/3-6 creates an extended statute of limitations for the prosecution of theft involving a breach of a fiduciary obligation. Under §3-6, such prosecutions may be commenced within one year after the "the discovery of the offense by an aggrieved person, . . . or in the absence of such discovery, within one year after the proper prosecuting authority becomes aware of the offense," provided that the statute of limitations is not extended by more than three years.

2. Defendant was convicted of unlawful financial exploitation of an elderly person for allegedly taking money from a woman for whom defendant held power of attorney. The court concluded that where more than three years had passed since the offense, the one-year-extension under §3-6 began to run when the victim spoke to police during their investigation and told them that she had not given defendant permission to write several checks. Thus, the State had one year from the date of the conversation to bring criminal charges.

The court rejected the argument that the one-year extension did not begin to run until the victim knew that defendant had illegally misappropriated a specific sum of money in breach of her fiduciary duties.

The extended statute of limitations commences upon "the discovery of the offense by an aggrieved person," and does not require that the aggrieved person have knowledge that each element of an offense has occurred. Because the victim discovered when she spoke to the officer that defendant had written unauthorized checks on the victim's account, she discovered at that time that defendant had misappropriated her money. Therefore, the extended statute of limitations began to run on that date.

The State had one year from the date of the conversation to commence the criminal prosecution. Because the indictment was not filed for more than one year after the conversation, the extended statute of limitations had expired. The conviction for unlawful financial exploitation of an elderly person was vacated.

(Defendant was represented by Assistant Defender Janieen Terrance, Springfield.)

People v. Leavitt, 2014 IL App (1st) 121323 (No. 1-12-1323, 11/21/14)

1. Under Illinois law, the statute of limitations is tolled when an indictment is returned or an information is filed. The Appellate Court concluded that where an indictment was returned within the three-year-statute of limitations, but was sealed because there was an ongoing investigation into police misconduct, no statute of limitations violation occurred when the indictment was unsealed after the statute of limitations had expired.

2. The court rejected arguments that due process and the constitutional right to a speedy trial were violated where the indictment was sealed for 12½ months, until after the statute of limitations had expired. The court concluded that the factors used to determine whether the constitutional right to a speedy trial has been violated also apply to the due process question. Those factors are: (1) the length of the delay, (2) defendant's assertion of his speedy trial right, (3) the reason for the delay, and (4) any prejudice to the defense.

Here, the delay was longer than one year and was therefore presumptively prejudicial. However, because defendant was unaware of the sealed indictment, his failure to assert his speedy trial right was not a factor.

The court found that the purpose for sealing the indictment - to permit law enforcement to complete a sensitive, ongoing investigation into wrongdoing in the Park Ridge Police Department - was clearly proper and served the interests of justice. Thus, the third factor favored a finding that there was no speedy trial or due process violation.

Concerning the final factor, the court held that the sealing did not cause prejudice. In assessing prejudice to the accused from a delay, courts consider three interests that are protected by the speedy-trial right: (1) prevention of oppressive pretrial incarceration, (2) minimization of anxiety and concern on the part of the accused, and (3) limiting the possibility that the defense will be impaired. Because defendant was not incarcerated and was unaware that an indictment had been returned, only the third factor was relevant here.

Defendant did not claim that his defense to the charge had been prejudiced by the sealing of the indictment. However, he stated that he delayed changes in his personal and professional life until after he thought the statute of limitations had expired. The court concluded that because such changes were unrelated to defending against the charge, they did not create prejudice under the final factor.

The trial court's order dismissing the indictment on statute of limitation grounds was reversed.

People v. Lutter, 2015 IL App (2d) 140139 (No. 2-14-0139, 5/18/15)

1. The statute of limitations for a misdemeanor is generally six months. When the charge shows on its face that the offense was not committed within the applicable limitations period, an element of the State's case is to allege and prove the existence of some fact which invokes an exception to the statute of limitations. See **People v. Morris**, 135 Ill. 2d 540, 554 N.E.2d 150 (1990).

The court concluded that where the information "vaguely alleged facts" that might arguably toll the statute of limitations, but the State offered no evidence of those facts during trial, defendant's motion for acquittal should have been granted. Under **Morris**, the State had the burden to both allege and prove facts which would extend the statute of limitations.

2. Because an exception to the statute of limitations was an element of the State's case, defendant did not forfeit the issue by failing to make a pretrial motion to dismiss the information. Due process prohibits requiring a defendant to move to dismiss a charge on which the State failed to prove an element, because the burden of establishing all of the elements of the State's case cannot be shifted to the defense.

The court distinguished this case from one where the charge does not allege that the offense was outside the statute of limitations and that an exception to the limitations period applied. In that situation, the defendant can only raise the issue by filing a motion to dismiss. By contrast, where the State alleges in the charge that there is an exception to the statute of limitations, that exception becomes an element of the State's case and must be proven.

People v. Macon, ___ Ill.App.3d ___, 920 N.E.2d 1224 (1st Dist. 2009) (No. 1-07-3378, 12/18/09)

1. Illinois law requires that unless the statute of limitations is extended, a prosecution for a felony offense must commence within three years of the commission of the offense. The purpose of the statute of limitations is to minimize the danger of punishment for conduct which occurred in the distant past, to encourage the State to be diligent in its investigation, and to provide the trier of fact with fresh evidence that is not distorted by the passage of time.

Because a felony prosecution can be commenced only by indictment or information, a complainant alleging a felony does not commence a prosecution for statute of limitations purposes. Instead, the date on which the indictment or information is filed marks the commencement of a felony prosecution and tolls the running of the statute of limitations.

2. The statute of limitations can be extended in some situations, and certain periods can be excluded from the statute of limitations. Such exceptions are not self-executing, and must be alleged on the face of the indictment along with the specific facts and exception that would suspend the statute.

Where the offense in question was committed on May 20, 2002, the statute of limitations expired on May 20, 2005. Thus, an indictment filed April 20, 2006 was defective on its face. The court noted, however, that the prosecution could refile the indictment with facts giving rise to an extension of the limitation period.

3. The court rejected the State's argument that the rule defining the initiation of adversarial proceedings for purposes of the right to counsel should be applied when considering whether the statute of limitations has been tolled.

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

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