

**CH. 31  
JUDGE**

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### §31-1

#### Conduct and Comments of

#### §31-1(a)

#### Generally

[Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 \(1965\)](#) The trial judge may not comment on defendant's failure to testify.

[Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 \(1972\)](#) Violation of due process occurred where trial judge threatened sole defense witness with perjury if he lied, causing witness to refrain from testifying.

[Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 \(1997\)](#) Defendant filed a federal *habeas* petition claiming that he had been denied a fair trial because in order to conceal the fact that he had accepted bribes from criminal defendants in some cases, the trial judge was "prosecution oriented" in cases in which he had not been bribed. In support of this claim, defendant sought discovery of several matters.

At the minimum, due process requires a "fair trial in a fair tribunal . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Thus, if defendant could establish that the trial judge was biased against the defense in cases in which he had not been bribed, the due process clause would be violated.

Defendant had shown "good cause" to justify discovery. Defendant supported his motion for discovery with documents showing that the trial court had fixed felony cases regularly (both as a practicing attorney and as a judge), and that at least one attorney from his former law firm had been actively involved. In addition, defendant showed that his murder trial was "sandwiched tightly" between two other murder trials on which the judge had been bribed, petitioner's trial attorney was a former associate of the judge who was appointed by the judge, and the attorney announced that he was ready for trial just a few weeks after being appointed. In addition, counsel requested no additional time to prepare for the death hearing phase. Under these circumstances, the record suggested that the trial lawyer might have been appointed with the understanding that he would cooperate with a prompt trial so that defendant's case could "camouflage" acquittals in the two concurrent cases in which bribes had been paid.

The court's opinion was not based merely on the fact that the trial judge had been taking bribes in other cases, but on the additional evidence unique to this case, including the possibility that trial attorney had been appointed with the understanding that he would not object to a speedy trial. The actions of defendant's counsel lend support to the claim that the judge was actually biased *in petitioner's own case*.

See also, [Cartalino v. Washington, 122 F.3d 8 \(7th Cir. 1997\)](#) (cause remanded for further proceedings where affidavit in support of *habeas corpus* alleged that codefendant had bribed judge to acquit codefendant and have defendant "take the fall").

[People v. Titone, 151 Ill.2d 19, 600 N.E.2d 1160 \(1992\)](#) Although the judge who presided over defendant's trial was subsequently found to have accepted bribes in other cases, defendant was not entitled to relief unless he could show some connection between the judge's questionable activities in other cases and his conduct in defendant's case.

[People v. Fair, 193 Ill.2d 256, 738 N.E.2d 500 \(2000\)](#) Where a post-conviction petitioner alleges that the trial judge's corruption violated the right to a fair trial, he must establish both: (1) a nexus between the corruption or criminal conduct in other cases and the judge's conduct at petitioner's trial, and (2) actual bias.

[People v. Hawkins, 181 Ill.2d 41, 690 N.E.2d 999\(1998\)](#) Defendants Hawkins and Fields were convicted in a bench trial of murder, and were sentenced to death in a jury hearing. After the convictions were affirmed on direct appeal, federal indictments were returned against the trial judge, Hawkins' defense attorney (Swano), and an attorney who had acted as the trial judge's intermediary for persons who wished to offer bribes (McGee). The trial judge was eventually convicted in federal court of accepting bribes to return acquittals in some trials.

The evidence at the federal trial showed that defendant Hawkins obtained \$10,000 from leaders of the EL Rukn gang, and that Swano used the money to bribe the judge to return an acquittal for both defendants. McGee accepted the \$10,000 after checking with the trial judge, but after the first three days of trial said that the judge wanted to return the money. There was evidence that the trial judge feared that information about his bribery practice had come to the attention of the FBI.

The trial court eventually entered a finding of guilty against both Hawkins and Fields. On the day judgment was entered, the judge handed Swano a folder containing the \$10,000 that had been paid as a bribe.

After the judge's federal conviction was affirmed on appeal, Fields and Hawkins filed amended post-conviction petitions arguing that they had been denied due process. Defendants argued that because the judge was afraid his bribery scheme had come to the attention of federal authorities, he was predisposed to convict the defendants to avoid any suspicion.

A new trial was warranted. The trial judge had "a personal, pecuniary interest in the outcome of defendants' case." Evidence at the federal trial showed beyond any doubt that the judge "traded verdicts for bribes," communicated to the defense that he would accept a bribe in this case, and accepted a \$10,000 bribe to return an acquittal. The fact that the money was eventually returned "did not render his interest in the outcome any less acute," because the money was returned out of fear that the bribery practice had come to the attention of the FBI, creating a motive to return a guilty verdict so as not to arouse suspicion.

Defendants did not waive the right to raise due process challenges by failing to object when their convictions were announced, at which time they knew that the attempted bribe "did not work." The waiver doctrine is inapplicable where the evidentiary basis for the claim lies outside the record; here, the facts forming the basis for the due process claim were outside the record and came to light only after the judge was indicted and convicted in federal court.

Defendants' claims were not barred by laches, both because the State waived this argument by failing to present it in the trial court and because the equitable doctrine of laches did not apply under the circumstances.

Although one of the defendants was responsible for attempting to bribe the trial judge, the "clean-hands" doctrine did not apply. The State had not cited any case in which the "clean-hands"

doctrine was employed in a criminal case.

Furthermore, where a fundamental constitutional right is involved, whether a criminal defendant has been denied a fair trial is a separate question from whether he or she may have contributed to the error. Also, because attempting to bribe a judge is punishable as a felony, there is an adequate remedy for the attempted bribery.

Further, defendant was not “solely responsible” for the due process violation - no bribe would have occurred had the trial judge not signaled to defense counsel that he was willing to “fix” the case.

Defendants’ convictions and sentences could not be upheld solely because the convictions were affirmed on appeal before any issue of bribery arose. Due process was lacking in the criminal proceedings, making it impossible to know whether the verdict would have been the same if rendered by an uncorrupted judge.

[People v. Bellmyer, 199 Ill.2d 529, 771 N.E.2d 391 \(2002\)](#) Where the parties stipulated to the evidence but not whether it established an affirmative defense, and agreed that there was no additional evidence to be presented, the trial court erred by refusing to enter a verdict and insisting that the cause be set for a full trial.

[People v. Woolley, 205 Ill.2d 296, 793 N.E.2d 519 \(2002\)](#) The trial court abused its discretion at a death hearing by informing a panel of prospective jurors that a previous jury had sentenced defendant to death in the same case. Defendant did not waive this issue although he failed to make a contemporaneous objection and first raised the issue on the day following the judge’s remarks; where an alleged error involves the act of the trial judge, the rule requiring a timely and proper objection is less rigidly applied.

[People v. King, 154 Ill.2d 217, 608 N.E.2d 877 \(1993\)](#) Trial court erred by threatening to revoke defense witness’s plea bargain if it believed testimony on behalf of defendant was perjurious. Admonitions concerning a potential witness's Fifth Amendment rights implicate due process when they are incorrect and cause the witness to decide not to testify. The admonitions in this case were incorrect because contrary to the trial judge’s belief, codefendant’s proposed testimony was not inconsistent with the stipulated facts underlying his guilty plea.

In addition, the judge improperly threatened to withhold the codefendant's eight-year sentence if he testified in defendant's favor. See also, [People v. Radovick, 275 Ill.App.3d 809, 656 N.E.2d 235 \(1st Dist. 1995\)](#) (trial court committed reversible error by repeatedly advising potential defense witness of his rights to counsel and to refuse to testify; such admonishments and insistence that witness should speak to counsel were "clearly excessive" where witness said he had already spoken to counsel and wanted to testify); [People v. Morley, 255 Ill.App.3d 589, 627 N.E.2d 397 \(2d Dist. 1994\)](#) (judge erred by telling defense witness that he had "a shot" in his own case if he did not testify at defendant's trial, but that if he did testify "there would be two convictions, instead of one.")

[People v. Sims, 192 Ill.2d 592, 736 N.E.2d 1048 \(2000\)](#) No error occurred at a death hearing where, as the decedent’s grandmother was leaving the witness stand, the trial judge stated, “I am sorry about your loss, ma’am.” Although a trial judge must refrain from interjecting opinions or comments which reflect bias toward or against any party, the judge’s comment was merely a “polite expression of condolence, and . . . did not reflect a bias.”

[People v. Sprinkle, 27 Ill.2d 398, 189 N.E.2d 295 \(1963\)](#) Judge committed prejudicial error by telling complaining witness she was “marvelous,” implying by questions that defendant’s father helped “set up the defense,” and commenting during cross-examination that the witness was “slower than cold molasses.”

[People v. Finn, 17 Ill.2d 614, 162 N.E.2d 354 \(1959\)](#) Conviction reversed because the judge’s remarks conveyed to the jury the belief that the insanity defense was a sham.

[People v. Chrfrikas, 295 Ill. 222, 129 N.E. 73 \(1920\)](#) Trial judge should not be even temporarily absent from courtroom during trial. See also, [People v. Vargas, 174 Ill.2d 355, 673 N.E.2d 1037 \(1996\)](#) (trial court’s absence from courtroom is plain error that cannot be harmless).

[People v. Leverenz, 24 Ill.2d 295, 181 N.E.2d 99 \(1962\)](#) Judge committed prejudicial error by characterizing defense objections (which were normal and brief) as “speeches” and by admonishing defense counsel not to make speeches before the jury.

[People v. Urdiales, 225 Ill.2d 354, 871 N.E.2d 669 \(2007\)](#) Defendant was not denied due process and fundamental fairness when the trial judge disparaged several justices of the Illinois Appellate Court and expressed contempt for recent appellate opinions. Although the trial court “registered his disagreement” with precedent, he did not disregard the precedent or make disparaging comments before the jury.

Further, defendant was not denied due process and fundamental fairness when the trial court made disparaging remarks about attorneys employed by the Death Penalty Trial Assistance Unit of the State Appellate Defender and refused to permit staff attorneys other than the DPTA Deputy to enter appearances.

[People v. Mitchell, 152 Ill.2d 274, 604 N.E.2d 877 \(1992\)](#) Trial judge violated due process by failing to consider evidence crucial to the defense case. However, the error was harmless where the evidence of guilt was overwhelming. See also, [People v. Bowie, 36 Ill.App.3d 177, 343 N.E.2d 713 \(1st Dist. 1976\)](#) (defendant did not receive a fair trial where the record affirmatively indicated that the trial judge did not remember or consider the crux of the defense before entering judgment).

[People v. Kelly, 347 Ill. 221, 179 N.E. 898 \(1932\)](#) Trial judge invades the function of the jury by assuming or intimating to jury what evidence is on controverted point, or by commenting on his or her interpretation of the weight of the evidence. See also, [People v. Kelley, 113 Ill.App.3d 761, 447 N.E.2d 973 \(1st Dist. 1983\)](#) (plain error occurred where before trial, the judge expressed belief that evidence would show that defendant was guilty; such remarks may have affected the jury’s verdict).

[People v. Rivera, 221 Ill.2d 481, 852 N.E.2d 771 \(2006\)](#) The trial court has authority and standing to raise a **Batson** issue *sua sponte*.

[People v. Storms, 155 Ill.2d 498, 617 N.E.2d 1188 \(1993\)](#) Trial judge was not required to recuse himself from sentencing on ground he had appeared as prosecutor on prior convictions that were to

be presented as aggravating evidence.

[People v. Hill, 315 Ill.App.3d 1005, 735 N.E.2d 191 \(1st Dist. 2000\)](#) Reversible error occurred where, after the trial judge left the courthouse during deliberations, a substitute judge refused to answer the jury's questions because he was "not familiar with the evidence in the case." While the substitute judge might properly have exercised discretion to decline to answer the questions, "[a]bstention is not an appropriate response from a trial judge" where a ruling is required.

[People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 \(1st Dist. 1998\)](#) The court criticized the trial judge for failing to confine prejudicial evidence to the only count to which it was arguably relevant. Although defendant failed to ask for a limiting instruction, "[t]here are times when a trial judge's uninvited action can cure unfair prejudice."

[People v. Rivers, 294 Ill.App.3d 601, 690 N.E.2d 628 \(1st Dist. 1998\)](#) Defendant was not denied a fair trial by the trial court's comments to defense counsel and to a potential juror. In the context of the record, the remarks did not prejudice defendant. Most of the objectionable remarks occurred outside the presence of the jury, and thus did not affect its perception of the case. In addition, at the hearing on the motion for a new trial the trial judge admitted making improper remarks before the trial started, but said it "changed its mind" after hearing opening statements and realizing that counsel was prepared to try the case. Nothing in the record indicated that defendant was prejudiced by the remarks.

[People v. West, 294 Ill.App.3d 939, 691 N.E.2d 177 \(5th Dist. 1998\)](#) At the close of the case, the trial court said that it had taken copious notes during the course of the trial, had reviewed the notes for at least seven hours over the previous weekend, and had given additional thought to the case. These remarks did not establish that the trial judge improperly began deliberations before the defense rested.

A criminal defendant has a constitutional right to an unbiased, open-minded trier of fact, including one that has not prejudged the case. Because the trial court merely stated that it had reviewed its notes as the trial progressed, without indicating that it had reached any decision as to guilt or innocence, defendant failed to make the required showing of prejudice.

[People v. Feathers, 134 Ill.App.3d 1060, 481 N.E.2d 826 \(5th Dist. 1985\)](#) The trial judge committed reversible error by telling jury that instructions were "boring" and that "you'd be well off" if you "threw out all the Instructions."

[People v. Galan, 151 Ill.App.3d 481, 502 N.E.2d 853 \(2d Dist. 1986\)](#) Trial court did not err by counseling the prosecutor as to the proper method of laying a foundation for certain testimony. It is proper "for a judge to aid in bringing out the truth in a fair and impartial manner."

[People v. Ousley, 297 Ill.App.3d 758, 697 N.E.2d 926 \(3d Dist. 1998\)](#) The trial court erred by urging the prosecution to reopen its case to "perfect" improper impeachment. The trial judge should have directed the jury to disregard the prosecution's improper evidence; instead, he "crossed the line of judicial propriety when he urged the prosecution to reopen its case in order to introduce highly prejudicial, inadmissible evidence against defendant."

[People v. Bedenkop, 252 Ill.App.3d 419, 625 N.E.2d 123 \(1st Dist. 1993\)](#) The trial judge acted improperly by *sua sponte* enlarging the grounds in a petition to revoke probation.

[People v. Gray, 363 Ill.App.3d 897, 845 N.E.2d 113 \(4th Dist. 2006\)](#) [730 ILCS 5/5-4-1\(b\)](#), which provides that upon revocation of probation the judge who presided at the trial or who accepted the plea of guilty “shall” impose the new sentence unless he or she is no longer sitting as a trial judge, is directory rather than mandatory. Thus, the presiding judge did not err, when sentencing defendant on two negotiated guilty pleas, by also imposing a sentence on a probation revocation which had been ordered by a different judge who was still sitting in the county.

[People v. Crawford, 343 Ill.App.3d 1050, 799 N.E.2d 479 \(1st Dist. 2003\)](#) Even in a bench trial, the trial court may not deny defendant the right to make a closing argument. Wide latitude is afforded to counsel in closing argument, and the trial judge has an obligation to remain attentive, patient and impartial.

The trial court violated its obligation to remain impartial where it repeatedly interrupted defense counsel’s closing argument and revealed a bias against the defense. The judge was not merely attempting to clarify the argument; the judge interrupted the defense’s opening statement, suggesting that he had prejudged the merits of the case before any evidence had been presented. Furthermore, the trial judge’s comments were “more in the form of a rebuttal and expression of the court’s opposition to defense counsel’s argument” than an attempt to seek clarification.

Finally, although defendant failed to object to the trial court’s interruptions, the waiver rule is relaxed when the judge’s conduct would have been the basis of the objection. The issue was reached as plain error.

[People v. Mays, 188 Ill.App.3d 974, 544 N.E.2d 1264 \(5th Dist. 1989\)](#) Trial judge committed reversible error by slamming down pencil and heaving a sigh during defense cross-examination. Defense counsel’s failure to object at the time of the judge’s actions did not waive the issue; though a contemporaneous objection is normally required to preserve an argument, “it is not always practical or wise to object to unjudicial conduct before a jury.”

[People v. Eckert, 194 Ill.App.3d 667, 551 N.E.2d 820 \(5th Dist. 1990\)](#) The judge acted improperly by telling counsel that “I’ve tried cases too,” complaining that cross-examination of a witness was taking twice as long as the direct examination, refusing to allow counsel to approach the bench, and saying that counsel was trying to “louse up the case.”

[People v. Mitchell, 228 Ill.App.3d 167, 592 N.E.2d 175 \(1st Dist. 1992\)](#) The trial court’s actions displayed bias and hostility toward the defense where the judge repeatedly interrupted and corrected defense counsel in front of the jury, disparaged counsel’s line of questioning, accused counsel of having “made up” a conversation, and interjected hostile comments during defendant’s testimony. In addition, the trial judge refused to allow defense counsel to discuss the presumption of innocence during his opening argument, though he had allowed the State to explain the law of accountability in its argument. See also, [People v. Greer, 293 Ill.App.3d 861, 689 N.E.2d 134 \(3d Dist. 1997\)](#) (ridiculing defense cross-examination and then attempting to explain remark to jury).

[People v. Peden, 377 Ill.App.3d 463, 878 N.E.2d 1180 \(1st Dist. 2007\)](#) At a jury trial for residential

burglary, defendant claimed that he formed the intent to steal only after he legitimately entered his deceased's brother's house in order to feed the pets. Defense counsel stated in his opening statement that after entering for a proper purpose, defendant took some coins and a gold ring. Immediately after the opening statement, the trial court asked defendant whether he knew that the opening statement would include an admission to theft. After defendant said that he had consented to counsel's strategy, the trial continued.

After the State completed its evidence, defense counsel stated that defendant would testify. The trial court then questioned defendant about his right to testify and his right not to testify, and asked whether he had discussed the issue with his attorney. Defendant confirmed that he wished to testify.

The trial court then asked defense counsel whether defendant would make an admission during his testimony. When counsel answered affirmatively, the court asked whether counsel and defendant had discussed the ramifications of admitting to a crime. After a recess to discuss the issue with his attorney, defendant elected not to testify.

The trial court improperly interfered with the attorney/client relationship, and therefore violated defendant's Sixth Amendment rights. A trial judge is not required to admonish a defendant regarding his constitutional right to testify, or to make a record on defendant's decision whether to testify. Whenever the trial court chooses to admonish a defendant on issues which implicate trial strategy, it runs the risk of interfering with the attorney/client relationship and undermining defense counsel's strategy.

Thus, although the trial court has discretion to admonish a defendant of his right against self-incrimination, it must be careful not to impair the ability to present a defense. A fair trial is denied where the trial court's improper admonitions concerning the right to testify influence a defendant not to testify, and the outcome of the trial is affected.

"The record strongly suggests that defendant would have testified had the trial court refrained from repeatedly discussing with him and his counsel matters involving the defense theory and defendant's decision to testify." In the absence of defendant's testimony, there was no evidentiary support for counsel's theory of defense - that defendant was innocent of residential burglary because he formed the intent to commit a theft only after he entered the home. Because defendant likely would have offered such testimony had the trial court not excessively and repeatedly admonished him concerning the defense strategy and the right to testify, the admonishments likely affected the outcome of trial.

The issue was reached as plain error; although defendant failed to object at trial or raise the issue in the post-trial motion, a less rigid standard of waiver applies when an issue involves potential misconduct by the trial judge.

[People v. Vaughn, 354 Ill.App.3d 917, 821 N.E.2d 746 \(1st Dist. 2004\)](#) At defendant's jury trial for DUI and driving with a suspended license, defense counsel's opening argument indicated that defendant would testify concerning several points. After the officer who made the stop testified, defendant took the stand and testified that at the scene he told the officer that his driver's license was suspended.

At a sidebar, the trial court advised defendant that he had admitted before the jury that he had committed a crime, and that it was "highly probable" the jury would convict him. The trial court asked defendant whether he had discussed his trial strategy with defense counsel and offered to allow defendant to withdraw his testimony and have it stricken from the record. After consulting with

counsel, defendant agreed to the trial judge's suggestion. The trial judge then advised the jury that defendant had chosen not to testify and that his prior testimony should be disregarded.

Defense counsel moved for a mistrial based on the trial court's remarks. Counsel stressed that his opening statement had asserted that defendant would testify, and that the defense strategy had been modified by the trial court's actions. The trial court denied the motion for a mistrial, and defendant was convicted. The trial court's actions were improper.

A criminal defendant has the right to testify or to refuse to testify. Where a defendant is represented by counsel, the trial court has no duty to inform him of his right to testify. Instead, defense counsel has the responsibility to advise defendant concerning the right to testify and to explain the advantages and disadvantages of testifying. The ultimate decision whether to testify belongs to defendant.

Where a defendant is represented by counsel, the trial court has discretion to inform defendant of the right against self-incrimination. If it chooses to do so, it "must walk the fine line between" adequately advising defendant and impairing the right to testify. A defendant is deprived of his right to a fair trial if the trial judge makes improper admonitions which cause defendant to refrain from testifying and the outcome of the trial is affected.

Here, the trial judge's remarks caused defendant not to testify. Although the judge's intention was to insure that defendant understood his rights, "the trial judge ceased to act as a neutral decision-maker and resumed the role as a trial strategist" by telling defendant that the jury would find him guilty if allowed to consider his testimony. Defendant clearly intended to testify but elected not to do so after the judge's remarks.

The trial judge's remarks did not affect the verdict for driving on a suspended license, because the arresting officer testified that defendant had been driving the vehicle and about the results of a license check. However, the judge's remarks did affect the DUI verdict - because defendant was the only witness for the defense, he suffered greater harm than would otherwise have been the case. In addition, because defendant elected not to testify after the trial court's remarks, "we do not know what defendant would have" said concerning the DUI.

The DUI conviction was reversed and remanded for a new trial.

[People v. Merz, 122 Ill.App.3d 972, 461 N.E.2d 1380 \(2d Dist. 1984\)](#) Attempts "at judicial humor by a judge during a trial are ill-advised and inappropriate"; however, the error was harmless under the facts of this case.

[People v. Heidorn, 114 Ill.App.3d 933, 449 N.E.2d 568 \(2d Dist. 1983\)](#) Trial court's ambiguous remarks about "false issues" being created by defense counsel's cross-examination, and remark that judge did not understand counsel's closing argument, were harmless where trial court instructed the jury that its rulings or remarks were not meant to "indicate any opinion as to the facts or as to what your verdict should be."

[People v. Schmidt, 118 Ill.App.2d 476, 254 N.E.2d 810 \(3d Dist. 1970\)](#) Prejudicial error occurred at jury trial for speeding where judge commented that court will take judicial notice of accuracy and reliability of radar devices.

[People v. Kuntz, 239 Ill.App.3d 587, 607 N.E.2d 313 \(3d Dist. 1993\)](#) Judge erred by *sua sponte* granting a continuance and suggesting that the State bring in additional evidence. Judge may not

"depart from his function as judge and assume the role of an advocate."

[People v. DeBerry, 72 Ill.App.2d 279, 219 N.E.2d 701 \(1st Dist. 1966\)](#) Trial judge erred by commenting, in front of the jury, that defendant could receive probation if convicted. However, the error was harmless in light of the conclusive evidence of guilt.

[People v. Blommaert, 184 Ill.App.3d 1065, 541 N.E.2d 144 \(3d Dist. 1989\)](#) Changing judge in middle of trial was not reversible error; though new judge allowed certain evidence to go to jury's room upon jury's request, there was no reason to believe the change of judge affected the jury.

[People v. Hull, 258 Ill.App.3d 13, 629 N.E.2d 673 \(1st Dist. 1994\)](#) The trial court lacked authority to bar defense attorney from appearing in its courtroom "on any case" because her demeanor was "offensive and deliberately calculated to incur the anger of the Court." The inherent power to control the courtroom and maintain decorum authorizes a judge to hold an attorney in contempt of court, but does not include the power to disbar or suspend her.

[705 ILCS 205/6](#), which provides that where an attorney has committed "malconduct" in office "a circuit judge has the power to suspend him from practice in the court over which he presides, during such time as he may deem proper," is unconstitutional as a legislative interference with the exclusive authority of the Illinois Supreme Court to discipline members of the Illinois bar.

[People v Lambert, 288 Ill.App.3d 450, 681 N.E.2d 675 \(2d Dist. 1997\)](#) Due process was violated where the trial court abdicated its role by warning the prosecutor that he was inviting error by attempting to introduce certain evidence, but stating "if you . . . want it done, it's your case, God Bless you." "The trial judge's statement indicates that he failed to realize that the evidentiary rulings were *his*, not the prosecution's." This error was not subject to harmless error analysis, because defendant's due process rights and the integrity of the judicial process were at stake.

[People v. Phuong, 287 Ill.App.3d 988, 679 N.E.2d 425 \(1st Dist. 1997\)](#) The trial judge made "numerous derogatory statements . . . directed against defendant, her counsel and a defense witness," including references to defense counsel as "Ms. Public Defender."

In addition, the judge repeatedly commented about the fact that defendant and other witnesses required a Chinese interpreter. The court's remarks exhibited a personal bias against defendant and required reversal as a matter of plain error

"It is irrelevant that this was a bench trial and there was no jury to be swayed by the court's comments. The fact that the judge, who was the fact finder in this case, was giving voice to his impatience and sarcasm is enough to show prejudice."

[People v. Heiman, 286 Ill.App.3d 102, 675 N.E.2d 200 \(1st Dist. 1996\)](#) As a matter of plain error, the trial court was biased against defendant where, after allowing the State to present its closing argument with only one minor interruption, the trial court interrupted defense counsel 45 times during his closing argument. In addition, the trial judge made derogatory comments during defense counsel's closing argument. Also, the judge made derogatory, sarcastic comments about the testimony and expertise of a defense expert and the testimony of an eyewitness.

The record showed the trial judge “harbored preconceived notions regarding defendant and his witnesses, which led it to reject defendant’s claim of self-defense even before defendant presented all his evidence.”

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Cumulative Digest Case Summaries §31-1(a)

[Williams v. Pennsylvania, U. S. , 136 S.Ct. 1899, L.Ed.2d \(2016\)](#) (No. 15-5040, 6/9/16)

1. Due process guarantees that the judge is not actually biased, and requires recusal when the likelihood of bias is “too high to be constitutionally tolerable.” Whether due process is violated where a judge refuses to recuse himself depends on whether an average judge in the same position would be likely to remain neutral.

The court concluded that there is an unacceptable risk of actual bias where a judge had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case, because of the potential for bias where a single person serves as both accuser and adjudicator in the same case.

2. Where during trial the district attorney personally approved his assistant’s request to seek a death sentence against the defendant, due process was violated thirty years later when, as Chief Justice of the Pennsylvania Supreme Court, the former district attorney participated in the court’s decision to reinstate the death sentence and vacate a lower court’s decision granting post-conviction relief based on a **Brady** violation. Before participating in the decision, the former district attorney denied defendant’s request that he recuse himself.

The Supreme Court stated: “When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.” The court added that the personal knowledge which the judge acquired as an advocate for the prosecution “may carry far more weight with the judge than the parties’ arguments to the court.”

The court found that the decision to seek a death sentence amounted to significant, personal involvement in a critical trial decision, because without the prosecutor’s express authorization the State would not have been able to pursue a death sentence. The court also noted that the relief ordered by the lower court was based on repeated, intentional **Brady** violations. Even if the former district attorney had not been aware of the violations at the time of defendant’s trial, it would be difficult for a judge in his position not to view the [post-conviction] court’s findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.”

3. The court also stressed that the due process clause marks only the “outer boundaries of judicial disqualification,” and that ethical rules in many jurisdictions would have required the judge to recuse himself under these circumstances.

4. A due process violation based on a judge’s failure to recuse himself does not amount to harmless error even if the jurist’s vote was not decisive on a multimember court. The deliberations of an appellate panel are confidential, and it is not possible to determine whether a particular jurist’s position may have influenced the views of his or her colleagues. In addition, due process guarantees an opportunity to present one’s claims to a court which is not burdened by any temptation to be affected by the fact that a member of the court participated in the case as a prosecutor.

4. In a dissenting opinion, Chief Justice Roberts and Justice Alito stated that although they

did not believe that due process required the judge to recuse himself, “[t]hat does not mean . . . that it was appropriate” for the judge to participate in the case. The dissenters noted State court decisions and ethic opinions that would prohibit a prosecutor from serving as judge in a case which he previously prosecuted, and found that it was up to State authorities to determine whether recusal should have been required.

**People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 (1st Dist. 2010)**

1. Although the defendant has a constitutional right to cross-examine State’s witnesses, the trial court may intervene to avoid repetitive or unduly harassing interrogation and to clarify issues. In a bench trial, the trial court may have greater latitude to question witnesses because there is less danger of prejudicing the jury. However, the court must always remain impartial and cannot assume the role of an advocate.

Here, the trial court’s numerous interruptions of defense counsel’s cross-examination were intended to clarify issues and “[move] the proceedings along,” particularly because the witnesses in question did not speak English proficiently. At other times, the interruptions merely corrected defense counsel’s misstatements of the evidence. In these circumstances, the judge’s actions neither limited counsel’s ability to cross-examine nor resulted in the judge becoming an advocate for the State.

2. The interruptions of defense counsel and criticism of counsel’s conduct did not show bias or prejudice which caused the trial court to prejudice guilt. Instead, the court’s actions reflected impatience with counsel or were attempts to correct misstatements.

**People v. Gacho, 2012 IL App (1st) 091675 (No. 1-09-1675, 4/16/12)**

A fair trial in a fair tribunal is a basic requirement of due process. Fairness at trial requires not only the absence of actual bias but also the absence of the probability of bias. To this end, no person is permitted to judge cases in which he or she has an interest in the outcome.

A defendant who alleges that his trial judge’s corruption violated his right to a fair trial must establish: (1) a nexus between the judge’s corruption or criminal conduct in other cases and the judge’s conduct at the defendant’s trial; and (2) actual bias resulting from the judge’s extrajudicial conduct, or that the judge had a personal interest in the outcome of the trial.

Defendant’s post-conviction petition sufficiently alleged that defendant’s trial judge, Maloney, was corrupt and that his corruption tainted the trial of the co-defendant. Maloney had been convicted of accepting bribes in exchange for promises to fix trials and had accepted a bribe from the co-defendant who was tried in a bench trial conducted simultaneously with defendant’s jury trial. There was also a nexus alleged between Maloney’s corruption and defendant’s case in that an affidavit of the co-defendant’s father established that Maloney accepted the bribe with the expectation that he could conceal his deceit by ensuring that the jury find defendant guilty. These same allegations sufficiently alleged that Maloney had a personal interest in the outcome of defendant’s trial. Regardless of whether Maloney could have been effective in steering the jury’s verdict, the fact that he had an interest in doing so means that the defendant did not receive a fair trial before an impartial tribunal.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

**People v. Guerrero, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (2d Dist. 2011) (No. 2-09-0972, 5/18/11)**

The court rejected the argument that due process is violated in a non-guilty plea case where

the trial court attempts to advise the defendant of the potential penalties, but gives erroneous information. The obligation to give accurate sentencing information in guilty plea cases stems from the fact that the defendant must enter a knowing and voluntary waiver of the right to trial. Because there is no such waiver attached to the court's voluntary provision of sentencing information in a non-plea case, the provision of inaccurate information does not offend due process.

In the alternative, the court found that defendant could show no prejudice from the trial court's inaccurate admonishments where there was no basis in the record to believe that the State would have been willing to enter plea negotiations with the defendant even had the latter realized that imprisonment was mandatory if he was convicted.

**People v. Johnson, 2012 IL App (1st) 091730 (No. 1-09-1730, 3/23/12)**

1. It is well established that, because of the trial judge's great influence over the jury, the judge must take care to avoid any unnecessary display of antagonism or favor toward any party. While the judge has wide discretion in the conduct of a trial, the judge may not make comments that would reveal his opinion as to the credibility of a witness or the arguments of counsel. For such comments to constitute reversible error, the defendant must show not only that such comments are improper, but also that he has been thereby prejudiced.

The court found that comments by the judge in the presence of the jury were at least marginally inappropriate. First, the court commented on a defense investigator's report relating to alibi witnesses ("That's it? . . . The list of the witnesses? . . . And it says they confirm an alibi? Is that it? You call that a report?"). "The patent sarcasm inherent in that comment unnecessarily displayed a personal evaluation of the report's quality beyond the bounds of its technical evidentiary sufficiency." It was not appropriate for the court to comment in the presence of the jury on the quality of the evidence and the diligence of the investigator.

The judge was also "unnecessarily preemptive and dismissive" in terminating defense counsel's repeated attempts to elicit impeachment testimony from a detective, which the judge erroneously ruled to be inadmissible hearsay ("Ladies and gentlemen, this testimony is not admissible, as counsel knows. . . . This is not impeachment, ladies and gentlemen. You'll hopefully see what impeachment is, if it comes to that. . . . Counsel, any statements that Kentrae Wade made to this detective – as you stated, you are aware of hearsay – are inadmissible."). The judge's display of annoyance could potentially have reinforced any impression of hostility toward the defense that the jury had received from the judge's colloquy with the defense investigator.

Because the defendant's conviction was reversed and the cause remanded for a new trial on other grounds, the court found it unnecessary to determine whether the judge's comments were sufficient to require reversal. The court found it arguable that "the trial court's casting of aspersions upon the defense – and in particular, the defense investigator who found the alibi witnesses whose testimony was critical to the defense – might well have influenced the jury in reaching its verdict."

2. The need for judicial restraint in the court's conduct and remarks is not limited to the presence of the jury, but must be maintained throughout all of its dealings with the litigants who come before it. Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom they have contact in their official capacity. When it becomes necessary during a trial for the judge to comment on the conduct of witnesses, spectators, counsel or others, or upon the testimony, the judge should do so in a firm, dignified and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the progress of the trial, and refraining from unnecessary disparagement of persons or issues.

Outside of the presence of the jury, the trial judge questioned a defense investigator about her salary and the expenses entailed in her out-of-state trip to interview alibi witnesses, spoke disparagingly of a report prepared by the investigator's partner, and when defense counsel objected to the judge yelling at the witness, stated, "[H]ow a Cook County Public Defender employee can call that a report is beyond me. That borders on perjury for both of you, and you know it. And I want this transcript to go to the County Board."

These comments outside the presence of the jury were inappropriate. Regardless of whether the judge's critique had merit, it should have been avoided in the context of an ongoing trial. The comments were not reasonably required for the underlying progress of the trial insofar as they related to the collateral issue of the witness's job performance. Nor were they made in a firm, dignified and restrained manner. The court found it unnecessary to decide whether these comments would be sufficient to require reversal, as it had already decided to reverse on other grounds.

3. The court concluded, however, that "although we have no reason to doubt or question the integrity, good faith, and overall ability and competence of the trial judge, we believe that in this case, it would be best for both the court and the parties if the trial on remand were to take place before a different judge."

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

[People v. Kelly, 2012 IL App \(1st\) 101521 \(No. 1-10-1521, 9/5/12\)](#)

Defendant filed a post-conviction petition claiming that the judge who presided over his jury trial was not a judge under the Illinois Constitution, which provides: "No person shall be eligible to be a Judge or Associate Judge unless he is a United States citizen, a licensed attorney-at-law of this State, and a resident of the unit which selected him." [Ill. Const. 1970, art. VI, § 11](#). The judge had been removed from the bench by the Illinois Courts Commission after a determination that the judge had fraudulently misrepresented his address when running for election.

While not reaching the merits of this claim, the Appellate Court made certain observations in response to the prosecution's argument that granting defendant a new trial as a result of the judge's fraud was too drastic a remedy. The court questioned, "Which is more drastic, granting the petitioner's requested relief, with the possibility that a number of other rulings by Golniewicz might be voided as well, or serving a sentence of natural life in prison which was imposed by a void judge?" "[A] possible answer to the State's articulated 'chaos' problem might lie in increased efforts at deterring the kind of misconduct Golniewicz engaged in, which efforts could result in fewer potentialities for such chaos."

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

[People v. Miller, 2013 IL App \(1st\) 110879 \(No. 1-11-0879, 6/28/13\)](#)

The Appellate Court concluded that at defendant's bench trial for aggravated possession of a stolen motor vehicle, the trial court committed plain error when it relied on its incorrect memory of a critical witness's testimony to make credibility determinations. The court concluded that reversal of the conviction was required by the cumulative effect of incorrectly remembering the testimony and excluding evidence.

Defendant was prejudiced by the cumulative effect of the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner's husband, and defendant's explanation was reasonable and could

have convinced a reasonable trier of fact.

Defendant's conviction for aggravated possession of a motor vehicle was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

**People v. Radcliff**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (1st Dist. 2011) (No. 1-09-1400, 6/23/11)

1. Due to the inherent prejudice to both the right to a fair trial and the integrity of the judicial process, the absence of the judge from a portion of a felony trial is *per se* reversible error. A bright line rule requiring reversal due to the trial judge's absence during trial was established by [People v. Vargas, 174 Ill.2d 355, 673 N.E.2d 1037 \(1996\)](#). In [Vargas](#), the Supreme Court held that a bright line rule was necessary to "effectively remove any incentive . . . for the judge to disregard the significant interests involved in a criminal trial" and to preclude any tendency by jurors to regard evidence heard in the judge's absence as less significant.

As a matter of plain error under the "fundamental error" prong of the plain error rule, the court concluded that reversible error occurred when the trial judge left the courtroom during cross-examination of a State's witness. Before leaving, the judge told defense counsel that he could show the witness a police report in order to refresh his

recollection. During the judge's absence, the following exchange occurred:

Q. I'm showing you Defendant's Exhibit 1 previously shown to counsel. Officer, do you remember what this report is about? Is that the incident report from that day?

A. Yes. That's from that day.

Q. Why don't you take a look at it until the judge gets back?

The court concluded that although no substantive questions were asked, the judge's absence required reversal under [Vargas](#). The court also observed that in the absence of the judge there is no judicial authority to observe, cure, and deter objectionable conduct, and that defense counsel's improper compound question could have been corrected had the judge been present.

2. The court rejected the State's argument that defense counsel was responsible for any error by asking questions while the trial judge was absent instead of merely showing the police report to the witness. Noting that the trial judge instructed counsel to "show [the witness] the report" while the judge was gone and that counsel deferred all other questioning until the judge returned, the court concluded that counsel's questions were an attempt to lay a foundation to show the report to the witness. The court also noted that during jury deliberations, the trial court examined the transcript and indicated that defense counsel had merely complied with the trial court's direction.

Because the trial judge left the courtroom during cross-examination of a witness, the conviction for possession of a stolen motor vehicle was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Daniel Mallon, Chicago.)

[People v. Rios, 2013 IL App \(1st\) 121072 \(No. 1-12-1072, 11/26/16\)](#)

1. *Habeas corpus* relief is available only for the grounds specified by the Code of Civil Procedure. These grounds fall into two general categories: (1) where the prisoner was incarcerated by a court which lacked personal or subject matter jurisdiction, and (2) where an occurrence subsequent to the conviction entitles the prisoner to immediate release.

Jurisdiction lies with the court itself, and not with an individual judge. Subject matter

jurisdiction is afforded by the constitution, and personal jurisdiction is obtained when a defendant appears before the court.

2. The “*de facto* doctrine” provides that a person who performs the duties of an officer under color of title is an officer *de facto*. The acts of such a person are valid with respect to the public or third parties, and are not subject to collateral attack.

The “*de facto* doctrine” applied where the judge who presided over the trial at which defendant was convicted of first degree murder and aggravated discharge of a firearm was subsequently placed on administrative leave and eventually removed from office because he misrepresented his residency in order to run for election and remain in office. Because the conviction was obtained with subject matter and personal jurisdiction, the convictions were not subject to *habeas* relief despite the judge’s fraud.

The court distinguished this case from [People v. Kelly, 2012 IL App \(1st\) 101521](#), in which the petitioner appealed from the second-stage dismissal of a post-conviction petition which alleged that the right to a fair trial was denied because the trial judge obtained his judgeship through fraud. In [Kelly](#), the issue was whether a substantial violation of a constitutional right had been sufficiently shown to withstand dismissal at the second stage of post-conviction proceedings. Here, the issue was whether *habeas corpus* relief was justified because the trial court lacked personal or subject matter jurisdiction.

[People v. Wiggins & Swift, 2015 IL App \(1st\) 133033](#) (No. 1-13-3033 & 1-13-3107, Supp. Op. 11/3/15)

1. The trial judge has discretion to raise objections and question witnesses, but must not invade the province of the jury by making comments, insinuations or suggestions indicating a belief or disbelief in the credibility of a witness. Jurors are watchful of the trial judge’s actions, and a hostile attitude toward the accused or his witnesses is likely to influence the process of arriving at a verdict. Therefore, when a judge decides to question witnesses or call additional witnesses to testify, he or she must do so in a fair and impartial manner and without showing bias or prejudice against either party.

2. The trial judge interrupted the questioning of the complainant, who testified that he lied in his pretrial statement to police and signed a statement in defense counsel’s office indicating that he had lied, to ask whether the complainant had informed the police or prosecutor about the differences between his statements. In addition, when the prosecutor made a meritless objection during cross-examination of the complainant, the trial court raised and sustained a different objection. Furthermore, when defense counsel attempted to cross-examine an Assistant State’s Attorney to show that the investigation had been cut short, the trial judge interrupted to state that the witness could not speak for someone else and “so I’m going to sustain my own objection.” Finally, in the presence of the jury, the judge referred to the State’s examination of a witness as “what we just did” and stated to defense counsel, “[W]atch yourself, man.”

The court concluded that the judge abandoned the role of an impartial arbiter by interposing objections on behalf of the State and questioning the complainant in a manner that was calculated to impeach his trial testimony. In addition, the judge indicated a preference for the prosecution’s case by stating “watch yourself, man” to defense counsel and referring to the State’s examination of a witness as “what we just did.” The court rejected the State’s argument that defendant waived the issues by failing to object at trial, noting that the waiver rule is relaxed when the trial court’s conduct is at issue.

3. The court concluded that the defense was prejudiced by the cumulative effect of the trial court's actions and the erroneous admission of a prior consistent statement. The court concluded that in light of the closely balanced evidence, the right to a fair trial was denied. The convictions were reversed and the cause remanded for a new trial.

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§31-1(b)

### Questioning Witnesses

[People v. Hopkins, 29 Ill.2d 260, 194 N.E.2d 213 \(1963\)](#) Trial judge acted properly by questioning complaining witness in an effort to clarify and fill certain gaps in her testimony. A judge has the right to question witnesses in order to elicit the truth. See also, [People v. Falaster, 173 Ill.2d 220, 670 N.E.2d 624 \(1996\)](#); [People v. Williams, 173 Ill.2d 48, 670 N.E.2d 638 \(1996\)](#) (both holding that trial judge did not abuse discretion by asking questions to clarify confusing testimony).

[People v. Marino, 414 Ill. 445, 111 N.E.2d 534 \(1953\)](#) The trial judge has wide discretion in conducting a trial, but must not invade the province of the jury by making comments, insinuations or suggestions that indicate belief or disbelief in the integrity or credibility of a witness. A judge may question a witness or call other witnesses to the stand to elicit the truth or to bring enlightenment on material issue, but must do so in a fair and impartial manner without showing bias or prejudice against either party.

Here, prejudicial error occurred where the judge commented that the defense testimony was “the most fantastic thing I ever listened to in all my life.”

[People v. Hooper, 133 Ill.2d 469, 552 N.E.2d 684 \(1989\)](#) Trial judge acted properly by questioning witness to clarify matters about which the witness admitted having lied.

[People v. Tyner, 30 Ill.2d 101, 195 N.E.2d 675 \(1964\)](#) Judge acted improperly by accusing one witness of lying and interrogating two witnesses to emphasize weaknesses in their defenses and cast doubt on their veracity. A judge should rarely comment on the evidence and should never express an opinion as to its veracity.

[People v. Zaccagnini, 29 Ill.2d 408, 194 N.E.2d 286 \(1963\)](#) Judge acted improperly by pointing at defendant and asking a State witness whether defendant was the perpetrator. Judge also erred by telling only defense witness not to lie and by asking if he understood the sanctity of an oath and what perjury is.

[People v. Santucci, 24 Ill.2d 93, 180 N.E.2d 491 \(1962\)](#) Judge acted improperly by interrogating each witness, reiterating and emphasizing testimony pointing to guilt, and bringing out that key defense witness was a married woman who had gone out with defendant on the night in question. Judge also showed impatience, if not hostility, toward defense counsel. See also, [People v. Brown, 200 Ill.App.3d 566, 558 N.E.2d 309 \(1st Dist. 1990\)](#).

[People v. Moriarity, 33 Ill.2d 606, 213 N.E.2d 516 \(1966\)](#) Trial judge abandoned role as an impartial arbiter and assumed the role of a prosecutor by emphasizing identifications made by State witnesses, asking questions when the prosecutor faltered, objecting to defense questions on cross-examination, rebuking defense counsel in front of the jury, and asking defense witness if she knew the penalty for lying.

[People v. Stokes, 293 Ill.App.3d 643, 689 N.E.2d 625 \(1st Dist. 1997\)](#) The trial court improperly disparaged the defense in the jury's presence. During defense counsel's cross-examination of one witness, the trial judge interrupted to complain that the questioning was "driving him 'crazy.'" The judge also said that "maybe he could do a better job than defense counsel," and in the presence of the jury said "we will get through it one way or the other" and "I am wondering what the relevance is of where these guys are." During cross-examination, the trial court said: "This is unbelievable, isn't it? Unbelievable. Go ahead. Pose your questions."

During defense counsel's cross-examination of a different witness, the judge said, "I don't know where we are going [but] when and if this is not tied up, all this stuff you can ignore. . . kind of like some of the other stuff you heard that was not tied up." Finally, the judge characterized defense counsel's questions as "unartful" and asked, "You are not going to start crying are you [defense counsel]?"

The cumulative effect of such remarks denied defendant a fair trial, because the trial court "belittled defense counsel and communicated to the jury the judge's opinion of defense counsel and the case."

[People v. Rega, 271 Ill.App.3d 17, 648 N.E.2d 130 \(1st Dist. 1995\)](#) After the prosecutor completed cross-examination of defendant, the trial court questioned him in detail for several pages of transcript. Though the trial judge may question witnesses where "justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued," the judge may act only to "avoid the miscarriage of justice" and must not show "bias or prejudice against either party."

Here, the trial judge crossed the line between trier of fact and advocate "by a wide margin," conducting a "textbook cross-examination: terse, probing, telling, using sarcasm, impeaching by omission on material facts." The judge's questioning "was everything a cross-examination should be--for prosecutors, not judges."

[In re R.S., 117 Ill.App.3d 698, 453 N.E.2d 139 \(3d Dist. 1983\)](#) The trial judge erred by calling, as a court's witness, a co-participant who had previously admitted that he had been at the scene of the offense. By calling the co-participant, who had not been on the State's list of witnesses, "[t]he judge helped establish the State's case against the minor . . . [and] took on the role of prosecutor."

[People v. Bullard, 52 Ill.App.3d 712, 367 N.E.2d 1017 \(2d Dist. 1977\)](#) The trial court abused its discretion and committed reversible error at a probation revocation hearing by questioning witnesses about immaterial issues. The trial judge questioned three women "regarding their employment, education, drinking and drug use habits, resort to public aid, and associations with 'colored men.'" In addition, defendant was questioned by the court concerning his association with "white women." Furthermore, a friend of defendant was asked whether he had served in the armed forces, and the court characterized some defense witnesses as "hippie-dippies."

[People v. Hughes, 121 Ill.App.3d 992, 460 N.E.2d 485 \(1st Dist. 1984\)](#) At defendant's bench trial for rape, the judge asked defendant the following questions:

“Q. Well, you heard her [complainant] testify here, didn't you?”

A. Yes.

Q. She seemed to appear very sincere in what she was saying, didn't she? A. Yes, sir.

Q. And you admit engaging in all these other illegal crimes and activities and you are saying that she is not telling the truth?

A. No, she isn't, your Honor.

Q. In other words, you admitted all these other crimes but you didn't commit the crime of rape as she said you did?

A. No, I didn't, your Honor.

Q. Even though she appears very sincere in what she is saying and very truthful?

A. No, your Honor. I didn't commit this crime.

THE COURT: All right, you can step down.”

The above examination was proper. “[R]ather extensive examination by the trial court may be justified if the court has reason to believe that a witness is not telling the truth. . . . The Court must not forget its judicial function, however, and assume the role of an advocate.”

Here, the questions “were appropriate to the court's role as the finder of fact,” because “it may very well be that the court merely sought to clarify the defendant's version of the incident and attempted to elicit testimony as to why the complainant's story should not be believed.”

[People v. Bedenkop, 252 Ill.App.3d 419, 625 N.E.2d 123 \(1st Dist. 1993\)](#) The trial court improperly abandoned its role as an impartial arbiter and assumed the role of a prosecutor; the judge called and questioned the State's witnesses, and the prosecutor did not speak during the entire hearing.

Although defense counsel failed to object in the trial court, the issue was not waived because waiver does not apply where the judge assumes a prosecutorial role.

[People v. Godbout, 42 Ill.App.3d 1001, 356 N.E.2d 865 \(1st Dist. 1976\)](#) At a jury trial for DUI, the trial judge erred by participating in (and at times conducting) the direct examination of defendant's expert witness. The record showed no reason or need for the judge to take such an active part in the examination.

[People v. Rush, 250 Ill.App.3d 530, 620 N.E.2d 1262 \(1st Dist. 1993\)](#) Judge erred by questioning complainant and expressing opinion on his credibility. The error was not cured by subsequent instruction to disregard; instruction was not given until after the jurors had made their preliminary evaluations of witness credibility and merely highlighted the improper remark. In addition, the evidence was closely balanced and the verdict likely turned on the jury's evaluation of credibility.

[People v. Martin, 66 Ill.App.2d 290, 214 N.E.2d 324 \(1st Dist. 1966\)](#) Judge's questions of defendant, which indicated a disbelief of defendant's testimony, were improper and prejudicial.

[People v. Stephens, 12 Ill.App.3d 215, 297 N.E.2d 224 \(2d Dist. 1973\)](#) Judge acted improperly by questioning defense witness in manner that tended to discredit rather than elicit the truth.

[People v. Crane, 34 Ill.App.3d 850, 341 N.E.2d 97 \(5th Dist. 1976\)](#) Judge erred by questioning a key State witness in such a manner as to rehabilitate him and lend the weight of the court to his credibility.

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**Cumulative Digest Case Summaries §31-1(b)**

[People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 \(1st Dist. 2010\)](#)

1. Although the defendant has a constitutional right to cross-examine State's witnesses, the trial court may intervene to avoid repetitive or unduly harassing interrogation and to clarify issues. In a bench trial, the trial court may have greater latitude to question witnesses because there is less danger of prejudicing the jury. However, the court must always remain impartial and cannot assume the role of an advocate.

Here, the trial court's numerous interruptions of defense counsel's cross-examination were intended to clarify issues and "[move] the proceedings along," particularly because the witnesses in question did not speak English proficiently. At other times, the interruptions merely corrected defense counsel's misstatements of the evidence. In these circumstances, the judge's actions neither limited counsel's ability to cross-examine nor resulted in the judge becoming an advocate for the State.

2. The interruptions of defense counsel and criticism of counsel's conduct did not show bias or prejudice which caused the trial court to prejudice guilt. Instead, the court's actions reflected impatience with counsel or were attempts to correct misstatements.

[People v. Jackson, 409 Ill.App.3d 631, 949 N.E.2d 215 \(1st Dist. 2011\)](#)

1. The trial court has the right to question witnesses in order to elicit the truth or to bring enlightenment on material issues that seem obscure. A trial judge's questioning must be done in a fair and impartial manner, without showing bias or prejudice against either party. A trial judge's questioning should rarely be extensive, although an extensive examination may be justified if the court has reason to believe that a witness is not telling the truth.

Whether a trial court's questioning of a witness is appropriate depends on the facts and circumstances of each case, and rest largely in the discretion of the trial court. A trial court abuses its discretion when it adopts the role of advocate for one of the parties. In a bench trial, the danger of prejudice due to the trial judge's questions to a witness is lessened. To show prejudice in a bench trial, the defendant must show that the tenor of the court's questioning indicates the court prejudged the outcome before hearing all of the evidence.

The trial court abused its discretion and abandoned its role as a neutral and impartial arbiter of fact in a bench trial by adopting a prosecutorial role in questioning the defense expert witness where the defense was insanity. The court's abuse of discretion was plain error and rendered defendant's trial fundamentally unfair.

The tone and manner of the questions asked of the defense expert exhibited a bias that is more similar to a cross-examining prosecutor than an impartial jurist. The court did not exhibit the same tone and manner with the State's expert witnesses. The questioning was argumentative and showed a disregard and unfavorable bias towards the expert's testimony, aiding the prosecution's case. The court effectively took over cross-examination of the witness, assuming the role of a prosecutor. The court constantly interrupted the witness, contradicting and questioning many of his

answers. Many of the court's questions came during the direct examination, hindering defendant from presenting his case as favorable testimony from the expert was halted by the court's questioning. The majority of the court's questions were not designed to elicit the truth or bring enlightenment on material issues that seemed obscure, but rather were argumentative and hostile, and suggested that the trial court prejudged the outcome of the case.

2. In a bench trial, the judge is limited to the record developed during the trial before him. A trial judge is free to accept or reject as much or as little as he pleases of a witness's testimony. A determination made by the trial judge based upon a private investigation or private knowledge of the judge, untested by cross-examination or any of the rules of evidence, constitutes a denial of due process of law. The presumption that the trial judge sitting as trier of fact considered only admissible evidence in making his decision can be rebutted through affirmative evidence in the record.

The trial judge relied on his own personal knowledge and opinions with respect to psychotropic medication, DSM IV, and IQ tests, untested by cross-examination, in rejecting defendant's insanity defense, denying defendant due process.

The Appellate Court remanded for a new trial before a different judge.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

[People v. Wiggins & Swift, 2015 IL App \(1st\) 133033](#) (No. 1-13-3033 & 1-13-3107, Supp. Op. 11/3/15)

1. The trial judge has discretion to raise objections and question witnesses, but must not invade the province of the jury by making comments, insinuations or suggestions indicating a belief or disbelief in the credibility of a witness. Jurors are watchful of the trial judge's actions, and a hostile attitude toward the accused or his witnesses is likely to influence the process of arriving at a verdict. Therefore, when a judge decides to question witnesses or call additional witnesses to testify, he or she must do so in a fair and impartial manner and without showing bias or prejudice against either party.

2. The trial judge interrupted the questioning of the complainant, who testified that he lied in his pretrial statement to police and signed a statement in defense counsel's office indicating that he had lied, to ask whether the complainant had informed the police or prosecutor about the differences between his statements. In addition, when the prosecutor made a meritless objection during cross-examination of the complainant, the trial court raised and sustained a different objection. Furthermore, when defense counsel attempted to cross-examine an Assistant State's Attorney to show that the investigation had been cut short, the trial judge interrupted to state that the witness could not speak for someone else and "so I'm going to sustain my own objection." Finally, in the presence of the jury, the judge referred to the State's examination of a witness as "what we just did" and stated to defense counsel, "[W]atch yourself, man."

The court concluded that the judge abandoned the role of an impartial arbiter by interposing objections on behalf of the State and questioning the complainant in a manner that was calculated to impeach his trial testimony. In addition, the judge indicated a preference for the prosecution's case by stating "watch yourself, man" to defense counsel and referring to the State's examination of a witness as "what we just did." The court rejected the State's argument that defendant waived the issues by failing to object at trial, noting that the waiver rule is relaxed when the trial court's conduct is at issue.

3. The court concluded that the defense was prejudiced by the cumulative effect of the trial court's actions and the erroneous admission of a prior consistent statement. The court concluded that

in light of the closely balanced evidence, the right to a fair trial was denied. The convictions were reversed and the cause remanded for a new trial.

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### §31-2 Bench Trials

#### §31-2(a) Generally

[Herring v. New York](#), 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) It is a violation of the Sixth Amendment for a judge, at a bench trial, to prohibit closing argument. See also, [People v. Smith](#), 205 Ill.App.3d 153, 562 N.E.2d 553 (1st Dist. 1990) (defendant's Sixth Amendment right to present argument at bench trial could not be abrogated merely because the trial court had a crowded docket).

[People ex rel. Daley v. Joyce](#), 126 Ill.2d 209, 533 N.E.2d 873 (1988) Statute requiring a jury trial unless both the State and defendant agree to a bench trial was held unconstitutional; the State constitutional right to a jury trial clearly encompasses "the right of an accused to waive trial by jury." Compare, [U.S. v. Jackson](#), 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (a defendant has no federal constitutional right to insist that he be tried by a judge rather than a jury).

[People v. Gersch](#), 135 Ill.2d 384, 553 N.E.2d 281 (1990) The decision in [People ex rel Daley v. Joyce](#) is to be applied retroactively.

[People ex rel. Daley v. Limperis](#), 86 Ill.2d 459, 427 N.E.2d 1212 (1981) Trial court may not circumvent mandatory sentencing statutes by convicting defendant of possession of a smaller quantity of controlled substances than the evidence showed.

[People v. Jackson](#), 202 Ill.2d 361, 781 N.E.2d 278 (2002) The court rejected the argument that the Illinois prohibition of polygraph evidence applies only at jury trials.

[People v. Nunez](#), 319 Ill.App.3d 949, 745 N.E.2d 639 (1st Dist. 2001) Under [People v. Brocksmith](#), 162 Ill.2d 224, 642 N.E.2d 1230 (1994), the decision to seek a jury instruction on a lesser included offense must be made by defendant rather than by counsel. Similarly, where a defendant is tried at a bench trial on charges for which the statute of limitations has not run, he may be convicted of a lesser included offense on which the statute of the limitations has expired only if the decision to submit the lesser included offense, and thereby waive the statute of limitations, is a product of defendant's informed consent.

Where neither defendant nor defense counsel asked the trial court to consider the lesser included offense, the charge contained no allegation that the statute of limitations for aggravated battery had been tolled, and defense counsel's failure to ask the court to consider a lesser offense appeared to be part of a "cohesive trial strategy" based on the claim that defendant had not been

involved in the offense, defendant should not have been convicted of the lesser included offense.

[People v. Diaz, 1 Ill.App.3d 988, 275 N.E.2d 210 \(1st Dist. 1971\)](#) Defendants were denied a fair and impartial trial where judge found them guilty before the defense rested and before closing argument.

[People v. Coleman, 212 Ill.App.3d 997, 571 N.E.2d 1035 \(1st Dist. 1991\)](#) Defendant waived his right to make a closing argument at his bench trial where he never requested the opportunity to argue and failed to object when the trial court began to announce its findings. In addition, the evidence of guilt was overwhelming.

[People v. Cofield, 9 Ill.App.3d 1048, 293 N.E.2d 692 \(1st Dist. 1973\)](#) Judge at bench trial must be fair and impartial. Trial court exceeded its judicial authority where it called the State's witnesses and asked questions directed at eliciting testimony to support the allegations against defendant.

[People v. McDaniels, 144 Ill.App.3d 459, 494 N.E.2d 1275 \(5th Dist. 1986\)](#) Defendant was denied a fair trial by an unbiased, open-minded trier of fact where it was apparent that the trial judge "had prejudged the validity of the defendant's defense prior to hearing the totality of the evidence."

[People v. Bowie, 36 Ill.App.3d 177, 343 N.E.2d 713 \(1st Dist. 1976\)](#) Where the record affirmatively indicates that the trial judge did not remember or consider the crux of the defense, defendant did not receive a fair trial." See also, [People v. Mitchell, 152 Ill.2d 274, 604 N.E.2d 877 \(1992\)](#) (trial court violated due process by failing to consider crucial defense evidence).

[People v. McKee, 52 Ill.App.3d 689, 367 N.E.2d 1000 \(2d Dist. 1977\)](#) Judge erred by considering a motion to suppress evidence during the bench trial. Before a trial court can conduct a concurrent hearing of evidence on preliminary and substantive issues in a bench trial, it should determine whether the testimony to be offered would be mutually material to both phases of the proceeding and whether the testimony properly relating to the preliminary matter would be improper, inflammatory, or prejudicial in the context of the issue of guilt or innocence. If there is no mutual materiality, or if a probability of admission of improper evidence exists, then the proceedings should be bifurcated.

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### Cumulative Digest Case Summaries §31-2(a)

[People v. Brown, 2013 IL App \(2d\) 110327 \(No. 2-11-0327, 4/12/13\)](#)

In Illinois, a defendant has a state constitutional right to a bench trial. Unlike the right to a jury trial, there is no requirement that the defendant make a knowing, voluntary, and intelligent on-the-record waiver of the right.

It does not automatically follow from the fact that the right to a bench trial and the right to a jury trial are of equal stature that the procedures used to safeguard those rights must be the same. A jury trial is the norm and a bench trial is the exception. Therefore, a defendant who wants a bench trial must make that known to the court and cannot complain if he fails to make his desire known when the court begins the process of selecting a jury. A requirement that the court admonish

defendant of his right to a bench trial could also create problems, such as the court assuming the role of an advocate and interfering with defense counsel's representation, and therefore is a matter best entrusted to the discretion of the court.

(Defendant was represented by Panel Attorney James Leven, Chicago.)

**[People v. Hernandez, 2012 IL App \(1st\) 092841 \(No. 1-09-2841, 3/23/12\)](#)**

The trial judge misconstrued the identity theft statute by finding that the State was not required to show that the defendant knew that a social security number she used to obtain credit at a car dealer belonged to "another person." Defendant told officers that she had made up the number, but the State argued that it belonged to a woman who had the same first name as the defendant, lived in the same general area, and had adequate credit to purchase a car.

The Appellate Court concluded that the trial court's misconstruction of the identity theft statute is subject to harmless error analysis, and that the trier of fact's omission of a required element is harmless if the same verdict would have been reached had the error not occurred. Here, the verdict would not necessarily have been the same had the trial court accurately construed the statute - the omitted element was contested, and there was less than overwhelming evidence to show that defendant knew that the social security number belonged to another person.

Because the trial court's misapplication of an essential element of the offense was not harmless, the court reversed the conviction for identity theft and remanded the cause for a new trial.

**[People v. Miller, 2013 IL App \(1st\) 110879 \(No. 1-11-0879, 6/28/13\)](#)**

The Appellate Court concluded that at defendant's bench trial for aggravated possession of a stolen motor vehicle, the trial court committed plain error when it relied on its incorrect memory of a critical witness's testimony to make credibility determinations. The court concluded that reversal of the conviction was required by the cumulative effect of incorrectly remembering the testimony and excluding evidence.

Defendant was prejudiced by the cumulative effect of the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner's husband, and defendant's explanation was reasonable and could have convinced a reasonable trier of fact.

Defendant's conviction for aggravated possession of a motor vehicle was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

**[People v. Williams, 2013 IL App \(1st\) 111116 \(No. 1-11-1116, 12/13/13\)](#)**

1. The failure of the trial court to recall and consider evidence that is crucial to a criminal defendant's defense is a denial of due process. A trial judge sitting as trier of fact must consider all the matters in the record before deciding the case. Where the record affirmatively shows that the trial court failed to recall crucial defense evidence when entering judgment, the defendant did not receive a fair trial. Whether a defendant's due process rights have been denied is an issue of law reviewed *de novo*.

2. The State's case against the defendant consisted of the testimony of a jailhouse informant and DNA evidence recovered from a pair of gloves left at the crime scene. There were at least three contributors to the DNA found on the gloves. Dueling experts interpreted the data generated from

the DNA by the Illinois State Police and Bode Laboratories. The prosecution's expert, Dr. Staub of Cellmark, testified that the profile of the major contributor matched defendant. The defense expert, Dr. Reich of Independent Forensics Laboratory, testified that because the Illinois State Police, Bode and Dr. Staub had reached different conclusions with respect to interpretation of the alleles at two of the 13 loci, it could not be concluded that defendant was a match, although he could not be excluded as a contributor.

The trial judge viewed the testimony of the informant with extreme caution and determined that it would use it merely as corroboration of the other evidence. With respect to the DNA evidence, the judge found that defendant's DNA was on the gloves because Dr. Staub determined that defendant was a match and Dr. Reich only disputed whether defendant was a major or a minor contributor to the DNA. Based on these findings, the judge found defendant guilty.

3. The Appellate Court held that defendant was denied due process due to the judge's failure to correctly recall the testimony of the defense expert. The trial judge could have made a credibility determination between the dueling DNA experts but did not because he mistakenly believed that the defense expert had agreed that defendant's DNA was on the gloves. Giving deference to the trial judge's conclusion that the informant's testimony must be viewed with extreme caution and was merely corroborative of the other evidence, the error was not harmless beyond a reasonable doubt. The only issue at trial was identification, and the trial judge's belief that the defense and prosecution experts were in agreement on the ultimate issue could have tipped the scales of justice against the defendant.

Lampkin, J., dissented. The trial judge accurately recalled the testimony of Dr. Reich. Dr. Reich asserted that alternative possible interpretations of two loci introduced some ambiguity as to what the major profile was, but conceded on cross-examination that defendant's alleles were present at all 13 loci of the DNA profile taken from the gloves.

(Defendant was represented by Assistant Defender Carson Griffis, Chicago.)

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§31-2(b)

**Presumption Judge Considered Only Proper Evidence**

[People v. Naylor, 229 Ill.2d 584, 893 N.E.2d 653 \(2008\)](#) Although defendant was convicted in a bench trial, and the trial court in a bench trial is presumed to disregard incompetent evidence, the presumption is rebutted where the record affirmatively shows that the evidence was considered. Here, the record showed that the trial judge committed plain error where he clearly believed that the evidence in question was admissible, as it overruled a defense objection.

[People v. Hall, 114 Ill.2d 376, 499 N.E.2d 1335 \(1986\)](#) A trial judge is "presumed to have considered only proper evidence and to have disregarded inadmissible evidence."

[People v. Nuccio, 43 Ill.2d 375, 253 N.E.2d 353 \(1969\)](#) Although judge at bench trial is presumed to have considered only competent evidence, there are limits to the immunity to improper and prejudicial insinuations which judges are presumed to possess. Defendant was entitled to a new trial because his guilt was not manifest, credibility was an essential issue, there were a substantial number of unsupported insinuations that could have impeached defendant's credibility, and there was no

indication that the judge was aware of the impropriety.

[People v. Stewart, 130 Ill.App.2d 623, 264 N.E.2d 557 \(2d Dist. 1970\)](#) The presumption that the judge considered only competent evidence does not apply where the judge erroneously believed that improper hearsay testimony was admissible. By overruling an objection to the evidence, the trial court indicates its belief that consideration of the evidence was appropriate.

[People v. Hampton, 96 Ill.App.3d 728, 422 N.E.2d 11 \(1st Dist. 1981\)](#) The trial judge “must have considered” improper evidence, where the evidence was admitted over objection and the case was close.

[People v. Shaw, 98 Ill.App.3d 682, 424 N.E.2d 834 \(1st Dist. 1981\)](#) The presumption that the trial judge at a bench trial considered only proper evidence was not overcome where the record did not affirmatively show that the judge “actually used the improper evidence.”

[People v. Chilikas, 128 Ill.App.2d 414, 262 N.E.2d 732 \(1st Dist. 1970\)](#) The presumption that trial judge considered only competent evidence cannot be indulged in this case, in which the judge himself elicited and considered hearsay testimony.

[People v. Alford, 111 Ill.App.3d 741, 444 N.E.2d 576 \(1st Dist. 1982\)](#) The general presumption that a trial judge considered only competent evidence was negated where the evidence was admitted over objection, and the judge’s comments indicated that he considered the evidence.

[People v. Agyei, 232 Ill.App.3d 546, 597 N.E.2d 696 \(1st Dist. 1992\)](#) It could not be presumed that the trial court ignored a statement that the State had failed to disclose; in denying a defense motion to strike, the trial judge ruled that the statement would be received for the limited purpose of determining the weight to be given to the police officer’s other testimony, but the officer gave no substantive testimony other than the statement.

[People v. Gonzalez, 175 Ill.App.3d 466, 529 N.E.2d 1027 \(1st Dist. 1988\)](#) After the State rested its case at a bench trial for murder, the prosecutor refused to stipulate to the testimony of a crime laboratory chemist and stated that the chemist could be in court within an hour. The trial judge stated that he would not wait, and the defense then presented its case. The chemist was still not present after the defense had rested, and the judge repeated that he would not wait.

Defense counsel then made an offer of proof that the chemist would testify that she tested swabs taken from defendant’s hands and found them to be negative for gun powder. The trial judge stated that he accepted the offer of proof and it was “made part of the evidence.” The prosecutor then made an offer of proof that the chemist would also testify that gunshot residue does not adhere after 6 hours, defendant was tested 5½ hours after the shooting, and washing, rubbing or spilling something on the hands would affect the test results. Defendant objected to this offer of proof, but the trial judge stated that it would also be considered as part of the evidence.

The trial judge’s remarks indicated that he considered the offers of proof as evidence and therefore “overcome the presumption that, in a bench trial, the court considered only competent and relevant evidence.”

[People v. Virella, 256 Ill.App.3d 635, 628 N.E.2d 268 \(1st Dist. 1993\)](#) Trial court could not be presumed to have known and applied the proper burden of proof where it misstated that burden four separate times.

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**Cumulative Digest Case Summaries §31-2(b)**

[People v. Hernandez, 2012 IL App \(1st\) 092841 \(No. 1-09-2841, 3/23/12\)](#)

The trial judge misconstrued the identity theft statute by finding that the State was not required to show that the defendant knew that a social security number she used to obtain credit at a car dealer belonged to “another person.” Defendant told officers that she had made up the number, but the State argued that it belonged to a woman who had the same first name as the defendant, lived in the same general area, and had adequate credit to purchase a car.

The Appellate Court concluded that the trial court’s misconstruction of the identity theft statute is subject to harmless error analysis, and that the trier of fact’s omission of a required element is harmless if the same verdict would have been reached had the error not occurred. Here, the verdict would not necessarily have been the same had the trial court accurately construed the statute - the omitted element was contested, and there was less than overwhelming evidence to show that defendant knew that the social security number belonged to another person.

Because the trial court’s misapplication of an essential element of the offense was not harmless, the court reversed the conviction for identity theft and remanded the cause for a new trial.

[People v. Miller, 2013 IL App \(1st\) 110879 \(No. 1-11-0879, 6/28/13\)](#)

The Appellate Court concluded that at defendant’s bench trial for aggravated possession of a stolen motor vehicle, the trial court committed plain error when it relied on its incorrect memory of a critical witness’s testimony to make credibility determinations. The court concluded that reversal of the conviction was required by the cumulative effect of incorrectly remembering the testimony and excluding evidence.

Defendant was prejudiced by the cumulative effect of the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner’s husband, and defendant’s explanation was reasonable and could have convinced a reasonable trier of fact.

Defendant’s conviction for aggravated possession of a motor vehicle was reversed, and the cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

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§31-2(c)

**Considering Matters Outside the Record; Private Investigations and Experiments**

[People v. Nelson, 58 Ill.2d 61, 317 N.E.2d 31 \(1974\)](#) A trial judge at a bench trial is limited to the record made during trial. Due process is violated where the court engages in a private investigation or relies on private knowledge that is untested by cross-examination or the rules of evidence.

[People v. Thunberg, 412 Ill. 565, 107 N.E.2d 843 \(1952\)](#) Judge acted improperly by reading confession that had not been introduced and interviewing complainant outside the presence of defendant.

[People v. Wallenberg, 24 Ill.2d 350, 181 N.E.2d 143 \(1962\)](#) Deliberations of trial judge are limited to the record. Although every presumption will be accorded that the judge considered only admissible evidence, that presumption is rebutted by comments showing that matters outside the record were considered.

[People v. Gilbert, 68 Ill.2d 252, 369 N.E.2d 849 \(1977\)](#) It is improper for the trier of fact to conduct experiments or private investigations that were not introduced at trial. Judge may properly examine the physical evidence introduced at trial. See also, [People v. Schultz, 99 Ill.App.3d 762, 425 N.E.2d 1267 \(3d Dist. 1981\)](#).

[People v. Harris, 57 Ill.2d 228, 314 N.E.2d 465 \(1974\)](#) The trial judge in effect conducted a private investigation and improperly considered matters not in evidence. The judge asked the public defender whether the story defendants told in court was the same they told when first interviewed by a public defender, and when told that such information could not be obtained said, “[T]hen I can’t believe them.”

[People v. Cain, 14 Ill.App.3d 1003, 303 N.E.2d 756 \(1st Dist. 1973\)](#) Rule that judge must limit his deliberations to the evidence at trial does not preclude drawing reasonable inferences from that evidence. Also, judge may take judicial notice of that which everyone knows to be true.

[People v. Brantley, 43 Ill.App.3d 616, 357 N.E.2d 105 \(1st Dist. 1976\)](#) At a bench trial, a defense witness testified that he alone had committed the offense for which defendant was being tried. The witness also stated he had previously testified to this fact at his guilty plea. The trial judge was suspicious of this testimony and ordered defense counsel to obtain the transcript of the witness’s guilty plea hearing. The trial judge subsequently received and considered the transcript before finding defendant guilty.

The judge erred by considering the transcript. A judge may not consider evidence outside the record to determine the credibility of a witness; here, the judge based his finding, at least in part, on material that was outside the record.

[People v. Rowjee, 308 Ill.App.3d 179, 719 N.E.2d 255 \(1st Dist. 1999\)](#) In a bench trial, due process prohibits a verdict based on the trial court’s private investigation. At defendant’s trial for theft and vendor fraud, the trial judge erred by questioning defendant at length about patients who had not been mentioned in the State’s case, *sua sponte* ordering the prosecution to obtain the files of those patients, offering to enter any orders required to overcome confidentiality issues, delaying the trial for weeks until the files were produced, and stating that the files were being used to determine defendant’s credibility.

The defense did not waive any objection to the private investigation by failing to object at trial or in the post-trial motion. First, the waiver rule is applied less rigidly where the alleged error is caused by the trial judge's conduct. Second, the prosecutor also failed to object to the judge's improper action; "[t]he reluctance on the part of the defense and the prosecution to challenge the authority of the trial judge is understandable and one of the reasons for the relaxation of the waiver rule."

The error was not harmless beyond a reasonable doubt, although the trial court did not expressly assert that it had relied on files that had not been introduced. In view of the trial court's examination of the additional files and its comment on defendant's credibility, the undisclosed evidence "probably affected the trial court's sentencing decision and raises grave doubts regarding the verdict as well."

[People v. Jones, 18 Ill.App.3d 198, 309 N.E.2d 776 \(1st Dist. 1974\)](#) Conviction reversed where trial judge in bench trial considered testimony from hearing on motion to suppress; such testimony was not in evidence at the trial.

[People v. Hummert, 132 Ill.App.2d 340, 270 N.E.2d 496 \(1st Dist. 1971\)](#) Judge erred by making independent investigation of defendant's character and background before ruling on post-trial motion.

[People v. Loftis, 55 Ill.App.3d 456, 370 N.E.2d 1160 \(1st Dist. 1977\)](#) During a bench trial, the complainant completed her direct testimony and was instructed to return to court the next morning. She refused to do so, and her refusal brought her "close to being held in contempt." Subsequently the prosecutor, without notifying the defense, took the complainant to the judge's chambers to apologize.

The *ex parte* meeting and apology had "at least some rehabilitative effect" and was "highly improper." Reversed and remanded.

[People v. Kennedy, 191 Ill.App.3d 86, 547 N.E.2d 634 \(1st Dist. 1989\)](#) The conviction was reversed and remanded because defendant was not judged by an impartial, open-minded trier of fact.

The record did not support the judge's belief that the defense witnesses were "thieves, drug addicts, fornicators and welfare recipients." The judge either guessed these things from the witnesses' clothing or relied on information outside the record; in either case, he was unwilling to believe the defense witnesses because of their living arrangements and employment status.

[People v. White, 183 Ill.App.3d 838, 539 N.E.2d 456 \(3d Dist. 1989\)](#) The trial judge committed plain error by finding that the complainant had been cut with a knife, as he claimed, and not by a broken bottle, as defendant claimed. The "ability to examine a cut and determine the instrument that made it is beyond the province of common knowledge."

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Cumulative Digest Case Summaries §31-2(c)

[People v. Jackson, 409 Ill.App.3d 631, 949 N.E.2d 215 \(1st Dist. 2011\)](#)

1. The trial court has the right to question witnesses in order to elicit the truth or to bring enlightenment on material issues that seem obscure. A trial judge's questioning must be done in a fair and impartial manner, without showing bias or prejudice against either party. A trial judge's questioning should rarely be extensive, although an extensive examination may be justified if the court has reason to believe that a witness is not telling the truth.

Whether a trial court's questioning of a witness is appropriate depends on the facts and circumstances of each case, and rest largely in the discretion of the trial court. A trial court abuses its discretion when it adopts the role of advocate for one of the parties. In a bench trial, the danger of prejudice due to the trial judge's questions to a witness is lessened. To show prejudice in a bench trial, the defendant must show that the tenor of the court's questioning indicates the court prejudged the outcome before hearing all of the evidence.

The trial court abused its discretion and abandoned its role as a neutral and impartial arbiter of fact in a bench trial by adopting a prosecutorial role in questioning the defense expert witness where the defense was insanity. The court's abuse of discretion was plain error and rendered defendant's trial fundamentally unfair.

The tone and manner of the questions asked of the defense expert exhibited a bias that is more similar to a cross-examining prosecutor than an impartial jurist. The court did not exhibit the same tone and manner with the State's expert witnesses. The questioning was argumentative and showed a disregard and unfavorable bias towards the expert's testimony, aiding the prosecution's case. The court effectively took over cross-examination of the witness, assuming the role of a prosecutor. The court constantly interrupted the witness, contradicting and questioning many of his answers. Many of the court's questions came during the direct examination, hindering defendant from presenting his case as favorable testimony from the expert was halted by the court's questioning. The majority of the court's questions were not designed to elicit the truth or bring enlightenment on material issues that seemed obscure, but rather were argumentative and hostile, and suggested that the trial court prejudged the outcome of the case.

2. In a bench trial, the judge is limited to the record developed during the trial before him. A trial judge is free to accept or reject as much or as little as he pleases of a witness's testimony. A determination made by the trial judge based upon a private investigation or private knowledge of the judge, untested by cross-examination or any of the rules of evidence, constitutes a denial of due process of law. The presumption that the trial judge sitting as trier of fact considered only admissible evidence in making his decision can be rebutted through affirmative evidence in the record.

The trial judge relied on his own personal knowledge and opinions with respect to psychotropic medication, DSM IV, and IQ tests, untested by cross-examination, in rejecting defendant's insanity defense, denying defendant due process.

The Appellate Court remanded for a new trial before a different judge.  
(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

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§31-3

**Substitution of Judge**

§31-3(a)

**Generally**

[Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 \(1972\)](#) A defendant charged with traffic

offense was denied Fourteenth Amendment right to trial by an impartial judicial officer where he was compelled to stand trial before the mayor. (The mayor was responsible for village finances, much of which were derived from traffic fines imposed in his court.) The fact that defendant could later obtain a trial *de novo* in another court is irrelevant.

[People v. Mays, 23 Ill.2d 520, 179 N.E.2d 654 \(1962\)](#) Defendant was not prejudiced by the substitution of one judge for another after the trial had been completed.

[People ex rel. Baricevic v. Wharton, 136 Ill.2d 423, 556 N.E.2d 253 \(1990\)](#) Chapter 38, ¶114-5(c), which gives the State the right to substitute a judge on the ground of prejudice against the State, does not violate the separation of powers doctrine.

However, because there is a possibility that ¶114-5(c) “may be used by the State for unconstitutional purposes,” procedures are necessary for “assessing a State’s use of section 114-5(c) motions where it appears that such motions are being used to thwart the chief judge of a circuit court’s exercise of independent assignment authority.” In the instant case, the prosecutor’s “blanket use of substitution motions in all felony proceedings before Judge Wharton, when viewed in conjunction with his earlier attempts at having Judge Wharton reassigned, poses a substantial threat to the dignity and independence of the judiciary.”

The following procedure is to be used for determining whether a prosecutor’s use of ¶114-5(c) violates the separation of powers doctrine:

First, the trial judge must determine whether there is *prima facie* evidence that the State is attempting to thwart the chief judge’s independence in assigning cases to the judges in his circuit. Among the factors to be considered are whether the State’s Attorney’s office uses section 114-5(c) motions in almost every case assigned to the judge; whether the State’s Attorney’s office had made other attempts to have the judge reassigned; whether members of the State’s Attorney’s office indicated a desire that the judge be reassigned; and any other evidence that indicates that the motions are being used for the purpose of influencing the chief judge in his assignment decisions.

If the trial judge determines that a *prima facie* case does not exist, the ¶114-5(c) motion must be granted. If a *prima facie* case is found to exist, a hearing shall be conducted as soon as possible before a judge other than the judge named in the motion.

At the hearing, the prosecutor must explain the basis for his allegation that the judge is prejudiced against the State. The judge named in the motion need not testify at the hearing, but he may submit an affidavit. The mere fact that the judge has previously ruled against the State is not sufficient to support a claim of prejudice.

The prosecutor need not prove that the judge is in fact prejudiced. Instead, the prosecutor must demonstrate that there are facts or circumstances related to the case at bar which indicate prejudice. If such facts or circumstances can be demonstrated, the motion must be granted and the case reassigned to another judge. If not, the motion should be denied and the case reassigned to the judge named in the motion.

Finally, if the above procedure demonstrates facts which indicate that the judge involved will be prejudiced against the State in all future criminal cases (or in all future criminal cases of a certain type), the chief judge may, in the exercise of his assignment authority, transfer the prejudiced judge to a different branch of the circuit court.

[In re Dominique F., 145 Ill.2d 311, 583 N.E.2d 555 \(1991\)](#) In a series of petitions for adjudication of wardship, the Public Guardian petitioned for substitution of the judge on the ground that he was prejudiced against the Public Guardian. The trial judge denied the petitions, finding that they were an “abuse of legal procedure” because the Public Guardian had previously filed over 50 similar petitions against the same trial judge and had stated an intention to file such petitions in every sexual and physical abuse case assigned to the judge.

Under the Code of Civil Procedure (which applies because the minors’ liberty was not at issue and

the Juvenile Court Act does not expressly regulate change of venue procedures), litigants have an absolute right to a change of venue where a petition asserting general prejudice is filed before the trial judge has made any substantial rulings in the case. Because the petitions were filed prior to any substantial ruling and contained general allegations of prejudice, the trial judge had no discretion to deny them.

It is not necessary to give the trial judge the right to deny petitions filed in “bad faith” and with the intention of disrupting the smooth functioning of the circuit courts. Since the Public Guardian serves “at the pleasure of the chief judge,” any disruption of proceedings by the Public Guardian’s filings “can be dealt with swiftly and effectively by other means.”

[People v. Eubanks, 307 Ill.App.3d 39, 716 N.E.2d 1253 \(3d Dist. 1999\)](#) Supreme Court Rule 63(C)(1)(c), which provides that a judge shall disqualify himself where, within the preceding three years, he was "associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy . . . or, for a period of seven years following the last date on which the judge represented any party to the controversy while the judge was an attorney engaged in the private practice of law," did not require recusal where the trial judge had previously prosecuted defendant in a different case. By its plain terms, the rule applies to attorneys "in the private practice of law," and not to attorneys employed by the State's Attorney's office.

[People v. Vasquez, 307 Ill.App.3d 670, 718 N.E.2d 356 \(2d Dist. 1999\)](#) Under Supreme Court Rule 63(C)(1)(b), a trial judge is required to recuse himself where his impartiality might reasonably be questioned, including where the judge "served as a lawyer in the matter in controversy." Although a post-conviction proceeding is a collateral attack, it is "sufficiently related to the original prosecution" to fall within the scope of the rule. Thus, if the trial judge is the same "George Bridges" who appeared at a status hearing during the prosecution and requested a continuance because the State had not yet decided whether to seek a death sentence, "he should recuse himself."

[In re Moses W., 363 Ill.App.3d 182, 842 N.E.2d 783 \(2d Dist. 2006\)](#) Under Illinois law and the Illinois Judicial Code, a judge should recuse him or herself where he or she has knowledge outside the record concerning the truth or falsity of the allegations that are the basis for the proceeding before the judge. Proof that the trial judge was prejudiced by the outside knowledge is not required. In addition, [People v. Bradshaw, 171 Ill.App.3d 971, 525 N.E.2d 1098 \(1st Dist. 1988\)](#), suggests that recusal may be required as a preventive measure even where it is uncertain whether the judge actually acquired extrajudicial information.

In response to a minor’s motion for substitution of judge, the trial court submitted an affidavit indicating that he had visited the minor at an out-of-state treatment center and discussed the importance of following the center’s rules. The trial judge should have recused himself from hearing the State’s motion to modify probation based on the minor’s failure to comply with those rules, or the minor’s motion for substitution should have been granted. Because action taken by a trial judge after a motion for substitution of judge is improperly denied is void, the order revoking the minor’s probation was reversed.

It was proper for the juvenile judge to receive regular reports about the probationer’s conduct at the treatment center, however, because the role of the trial court in juvenile proceedings is broader than in criminal proceedings. Furthermore, the trial judge’s concern about the cost to the county of providing residential treatment did not indicate that he was biased against the respondent.

[People v. Friedman, 144 Ill.App.3d 895, 494 N.E.2d 760 \(1st Dist. 1986\)](#) There is no duty on a judge to disqualify himself where defendant failed to move for substitution prior to trial.

[People v. Zajic, 88 Ill.App.3d 412, 410 N.E.2d 626 \(2d Dist. 1980\)](#) An associate judge may not conduct a trial for a felony ([Ill.Sup.Ct. Rule 295](#)). However, this is not a jurisdictional limitation; thus, a timely objection must be raised. (Note: [Rule 295](#) permits the Supreme Court to authorize an associate judge to

handle felony trials “upon a showing of need”).

[People v. Hargraves, 28 Ill.App.3d 560, 328 N.E.2d 639 \(5th Dist. 1975\)](#) An associate judge is not authorized to accept a plea of guilty to a felony charge. An associate judge may not terminate felony matters on their merits, but may handle preliminary and non-dispositional matters, such as a plea of not guilty.

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### §31-3(b)

#### For Cause

[People v. Peter, 55 Ill.2d 443, 303 N.E.2d 398 \(1973\)](#) A defendant has an absolute right to substitution of judge if a motion is filed within 10 days after the case is placed on the judge’s call. After the 10-day period elapses, a motion for substitution supported by affidavit may be filed, and a hearing must be held before a different judge. If prejudice is established, substitution must be granted.

[People v. Jones, 197 Ill.2d 346, 757 N.E.2d 464 \(2001\)](#) Under [725 ILCS 5/114-5\(d\)](#), defendant “may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such a motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion. . .” A motion for substitution for cause must be made at the earliest practical moment after the potential prejudice is discovered, and Section 114-5(d) should be liberally construed to promote, rather than defeat, an application for substitution.

Under [People v. Emerson, 122 Ill.2d 411, 522 N.E.2d 1109 \(1987\)](#), substantive rulings made during trial bar a motion for automatic substitution on remand, because the remand is viewed as a continuation of the original proceedings. Automatic substitution must be requested within ten days after a case is placed on a judge’s call, and before any substantive rulings have occurred.

The same rule does not apply to motions to substitute for cause, however. A motion to substitute for cause invokes the right to a fair and impartial hearing, and is not precluded by a previous substantive ruling. Instead, the only timing requirement is that defendant act promptly upon discovering the alleged prejudice.

Where the basis to substitute for cause arose after defendant’s first trial - when the judge made negative comments about defendant - and defendant moved promptly for substitution when the case was remanded to the trial court, the motion to substitute was timely.

[People v. Hooper, 133 Ill.2d 469, 552 N.E.2d 684 \(1989\)](#) A judge should be disqualified where he has prejudged a case in favor of one of the parties; however, the mere expression of an opinion or strong feeling on an issue does not amount to bias or prejudice. Disqualification was not required here; though the trial judge repeatedly and “inappropriately indicated his attitude toward **Batson** and other subjects,” there was no showing that he was unwilling or unable to apply the relevant law to the case before him.

[People v. Chatman, 36 Ill.2d 305, 223 N.E.2d 110 \(1967\)](#) Where the judge indicated at one trial that he didn’t believe defendant or his alibi witness, defendant had an absolute right to a substitution of judge for his second trial on similar charges.

[People v. DelVecchio, 129 Ill.2d 265, 544 N.E.2d 312 \(1989\)](#) Defendant filed a post-conviction petition alleging, *inter alia*, that the judge who presided at his 1979 trial had a conflict of interest stemming from his involvement in a 1965 case in which defendant was also convicted. In 1965, the judge had been the Chief of the State’s Attorney’s criminal division.

The trial judge was not required to recuse himself from the 1979 trial, because defendant has presented nothing indicating involvement in the 1965 case beyond likely receipt of a “State’s Attorney’s

report” regarding the case, presence in the courtroom during defendant’s guilty plea and sentencing, and likely knowledge of the details of the case because the State’s Attorney’s office was relatively small at the time. In light of the judge’s limited involvement in the prior case, there was no prejudice to defendant and no due process violation.

[People v. Taylor, 101 Ill.2d 508, 463 N.E.2d 705 \(1984\)](#) A motion for substitution of judge was untimely where it was filed after the trial judge had ruled on a number of substantive issues. A motion to transfer a case to a new judge due to alleged prejudice “must be made at the earliest practical moment after any potential prejudice is discovered.” See also, [People v. Norcutt, 44 Ill.2d 256, 255 N.E.2d 442 \(1970\)](#) (motion for substitution was untimely where it was filed after the judge had ruled on a motion to suppress).

Also, the fact that a judge has ruled against a defendant in a prior case is not sufficient reason to disqualify that judge.

[People v. Davis, 95 Ill.2d 1, 447 N.E.2d 353 \(1983\)](#) Before trial defendant moved for substitution of judge on the ground that the judge had presided over a trial of his co-defendant for an unrelated murder. That motion was denied. Following the jury’s return of a death penalty verdict, the trial judge stated, “Mr. Davis is a no-good, cold-blooded killer that doesn’t deserve to live.”

The post-trial statement did not show that the judge was predisposed against defendant during trial. The record did not disclose any instances of inappropriate judicial behavior or intentional unfair treatment of defendant. Thus, the denial of defendant’s substitution of judge motion was not error.

[People v. Hall, 114 Ill.2d 376, 499 N.E.2d 1335 \(1986\)](#) Defendant contended that the trial judge erred by refusing to transfer the case to another judge after defendant struck the judge with his fist. The trial judge expressly stated that he would not allow the striking incident to prejudice him in any way. There is no presumption of bias by a trial judge “even under extreme provocation.” In addition, an examination of the record failed to show any unfairness to defendant.

[People v. Hicks, 44 Ill.2d 550, 256 N.E.2d 823 \(1972\)](#) Judge’s conversation with a prospective State witness (concerning her desire to sit in the front of the courtroom and objection to delays in the trial) did not give cause for disqualification.

[People v. Vance, 76 Ill.2d 171, 390 N.E.2d 867 \(1979\)](#) A judge is not disqualified from hearing cases involving a defendant who has been previously convicted before the same judge. Disqualification requires “something more” – a showing of animosity, hostility, ill will or distrust towards defendant.

[People v. Coleman, 168 Ill.2d 509, 660 N.E.2d 919 \(1995\)](#) Unless the trial judge has a pecuniary interest in a case, substitution is required only where “the case involves a possible temptation such that the average person, acting as judge, could not hold the balance nice, clear and true between the State and the accused.”

Substitution was not required because the offense was committed after the trial court released defendant on bond in an unrelated case or because a local newspaper editorial had been critical of defendant’s release on bond.

[People v. Harston, 23 Ill.App.3d 279, 319 N.E.2d 69 \(2d Dist. 1974\)](#) Conviction reversed because trial judge denied defendant’s motion for substitution of judge for cause without giving defendant the opportunity to comply with the formal requirements of the statute, and without allowing a hearing on the motion. Allowing defendant to testify after the judge denied the motion was not a “hearing” as contemplated by the statute.

[People v. Bell, 276 Ill.App.3d 939, 658 N.E.2d 1372 \(2d Dist. 1995\)](#) Once a motion for substitution of judge for cause is filed, the judges named in the motion lose all authority over the case except to transfer it to another judge for a hearing. However, the trial judge need not transfer the case where the motion for substitution for cause fails to "establish even a threshold basis" for substitution, lacks sufficient specificity, or is not made in good faith.

[People v. Arnold, 76 Ill.App.2d 269, 222 N.E.2d 160 \(1st Dist. 1966\)](#) Motion for substitution for prejudice, filed on day of trial, was improperly denied without a hearing.

[People v. Lipa, 109 Ill.App.3d 610, 440 N.E.2d 1062 \(1st Dist. 1982\)](#) Judge was not required to recuse himself because he had been involved in case as Assistant State's Attorney at time of indictment.

[People v. Hargett, 338 Ill.App.3d 669, 786 N.E.2d 557 \(3d Dist. 2003\)](#) Ninety days before he was to be released from prison for two convictions of aggravated criminal sexual assault, defendant was the subject of a petition seeking commitment under the Sexually Violent Persons Commitment Act ([725 ILCS 207/1](#)). The trial court denied a defense motion for substitution on the basis that the judge had been the elected State's Attorney when defendant pleaded guilty to the two counts of aggravated criminal sexual assault. The judge noted that he had no recollection of the cases and had not handled them personally, though he had appeared on those cases when defendant withdrew his demand for a jury trial.

Under Supreme Court Rule 63(C)(1)(b), a judge must disqualify himself when his impartiality might reasonably be questioned, including where he served as a lawyer in the matter in controversy. A petition for commitment of a sexually violent person is sufficiently related to the prosecution on which it is based that it falls within the scope of Rule 63(C)(1)(b).

[People v. Bradshaw, 171 Ill.App.3d 971, 525 N.E.2d 1098 \(1st Dist. 1988\)](#) The trial judge erred in not recusing himself from the case after an *ex parte* communication with the victim's mother, a deputy sheriff. The victim's mother wrote something on an index card and gave it to one of the prosecutors, who gave the card to the judge. Court was then recessed, and the judge met in chambers with the victim's mother.

The trial judge stated that he received a note saying that a deputy sheriff would like to see him. When the judge ascertained that the deputy sheriff's relationship was to the case before him, he terminated the conversation.

The judge should have recused himself due to the appearance of impropriety.

[People v. Robinson, 18 Ill.App.3d 804, 310 N.E.2d 652 \(1st Dist. 1974\)](#) Motion for substitution of judge was improperly denied where judge had a preconceived conviction, based on separate trial of another person on the same charges, that defendants were guilty. However, the error in denying the substitution motion was waived when defendants subsequently voluntarily and understandingly pleaded guilty.

[People v. Pifer, 80 Ill.App.3d 24, 399 N.E.2d 310 \(2d Dist. 1979\)](#) Upon a showing of actual prejudice, a defendant is entitled to a substitution of judge at a probation revocation proceeding. Here, the judge held an in-chambers conference with defendant and a probation officer, outside the presence of counsel, and "set into motion the filing of" the petition to revoke probation. Because "it was impossible for the judge to resume the role of an impartial decision maker," he erred in failing to grant a motion for substitution.

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§31-3(c)

As a Matter of Right

[People v. Peter, 55 Ill.2d 443, 303 N.E.2d 398 \(1973\)](#) A defendant has an absolute statutory right to substitution of judge if a motion is filed within 10 days after the case is placed on the judge's call (Ch. 38, ¶114-5(a)). After the 10-day period elapses, a motion for substitution supported by affidavit may be filed, and a hearing must be held before a different judge. If prejudice is established, substitution must be granted.

[People v. Evans, 209 Ill.2d 194, 808 N.E.2d 939 \(2004\)](#) Under [725 ILCS 5/114-5\(a\)](#), defendant may move for substitution where the motion is filed within 10 days after the cause is placed on the trial call of a judge. A motion for substitution must be granted if the motion: (1) is timely, (2) names only one judge (unless defendant is charged with a Class X felony), (3) is in writing, (4) alleges that the trial judge is so prejudiced against defendant that a fair trial is impossible, and (5) is made before any substantive rulings occur in the case.

A motion is timely if it is filed within 10 days of the date on which defendant could be "charged with knowledge" that a particular judge has been assigned to the case. Because assignment procedures differ between judicial circuits, the date on which defendant is charged with such knowledge depends on the facts of each case.

Where the defense knew several months before trial that the case was placed on the "felony" calendar, that cases on that calendar were normally assigned to a particular judge, and the judge held a pretrial hearing to select a trial date that would fit the schedules of all the participants, defendant was charged with knowledge that the case had been assigned despite the possibility that the case could be transferred to another judge on the day of trial. Because defendant filed his motion for substitution several months after he charged with knowledge that the cause had been placed on the trial judge's calendar, the motion was untimely.

[People v. Walker, 119 Ill.2d 465, 519 N.E.2d 890 \(1988\)](#) Ch. 38, ¶114-5(a) does not conflict with any Supreme Court Rule or invade the inherent authority of the judiciary. However, a motion for substitution may properly be denied "where it is apparent that the motion is brought for the purpose of delaying or avoiding trial." The fact that "a judge is likely to rule against a defendant based on either facts or circumstances unrelated to the judge's ability to sit impartially does not afford a proper basis for a claim of prejudice."

[People v. Jones, 123 Ill.2d 387, 528 N.E.2d 648 \(1988\)](#) Chapter 38, ¶114-5(a) does not permit a defendant who is charged with a Class X felony or an offense punishable by death or life imprisonment to file two motions for substitution of judge. Rather, §114-5(a) permits a single motion in which defendant may name either one or two judges as prejudiced.

[People v. Agnew, 97 Ill.2d 354, 454 N.E.2d 641 \(1983\)](#) An oral motion to substitute does not comply with Ch. 38, ¶114-5(a), which is "explicit" in requiring a written motion.

[People v. McDuffee, 187 Ill.2d 481, 719 N.E.2d 732 \(1999\)](#) An assignment of judge need not be in a formal, written fashion to trigger the ten-day period. Where the record does not include a written order assigning the case to a judge's trial docket, the ten-day period during which the motion can be filed begins to run on the first date defendant "could be 'charged with knowledge' that the judge at issue ha[s] been assigned to his case." Section 114-5(a) is to be liberally construed to promote substitution.

The fact that only one judge normally hears traffic cases in Ford County did not constitute notice that the case would be assigned to that judge. Thus, defendant could be charged with knowledge of the trial assignment only at his first court appearance. A motion to substitute filed within seven days of that appearance was timely.

[People v. Saltzman, 342 Ill.App.3d 929, 796 N.E.2d 653 \(3d Dist. 2003\)](#) Under [725 ILCS 5/114-5\(a\)](#), within

10 days after a case has been placed on a judge's trial call, defendant may file a motion for substitution as a matter of right. Here, defendant moved to recuse all of the judges in the county because the victim was the county treasurer. In response, the trial judge assigned the case to himself "for the time being."

Approximately six weeks later, the motion to recuse was denied by an out-of-county judge appointed by the Illinois Supreme Court. Defendant immediately moved to substitute the trial judge, on whose call the case had remained.

The motion for substitution filed within 24 hours after denial of the recusal motion was timely, although six weeks had passed since the judge assigned the case to himself "for the time being." The 10-day period for substitution began to run when defendant could be charged with knowing that his case had been assigned to the trial judge. Until his motion to recuse all county judges had been denied, defendant did not know whether the case would remain on the call of the judge to whom it had been temporarily assigned.

**[People v. Gunning, 108 Ill.App.3d 429, 439 N.E.2d 108 \(4th Dist. 1982\)](#)** Defendant's motion for substitution of judge was improperly denied, since the motion was filed within 10 days of the case being set on the trial call of the judge.

Defendant was arrested for driving under the influence on 9/3/81, and on the next day he was arraigned and obtained a continuance to 9/28/81. The proceedings on 9/28/81 occurred before Judge DeLaMar, who set the case for "docket call on October 28, 1981 in courtroom E." On 10/28/81, Judge DeLaMar signed an order setting the case for trial on 11/16/81.

On 10/29/81, defendant filed his motion for substitution of Judge DeLaMar. A different judge heard the motion, and denied it on the ground that it was untimely since it was filed more than 10 days after 9/28/81.

The case was not set on Judge DeLaMar's trial call until 10/28/81. It was of no consequence that Judge DeLaMar was the judge assigned to traffic matters since defendant "did not know, and could not know, until October 28 that in fact Judge DeLaMar was assigned to this specific case." The order of 9/28/81, which set the case for "docket call" on 10/28/81, was not the equivalent of a trial call.

**[People v. Lackland, 248 Ill.App.3d 426, 618 N.E.2d 508 \(1st Dist. 1993\)](#)** A motion for substitution was not untimely where it was filed nine days after defendant was found fit to stand trial. The 10-day period for filing a motion to substitute as a matter of right did not begin until defendant was found fit, when he first knew which judge would hear the trial. In addition, it was up to defendant (and not defense counsel) to move for substitution, and he could not exercise his right while he was unfit.

Because all proceedings after an erroneous denial of a motion for substitution are void, the cause was remanded for a new trial.

**[People v. Burns, 188 Ill.App.3d 716, 544 N.E.2d 466 \(4th Dist. 1989\)](#)** Defendant filed a timely motion for substitution of judge under ¶114-5(a), but made no allegation that the named judge was prejudiced against him. An amended motion filed after the 10-day period alleged that the judge was prejudiced against defendant. Denial of the motion was affirmed because no claim of prejudice was timely made.

**[People v. Langford, 246 Ill.App.3d 460, 616 N.E.2d 628 \(5th Dist. 1993\)](#)** Trial counsel should have been allowed to clarify an ambiguous motion for substitution; although a defendant need not be permitted to amend a motion for purposes of delay or where the initial motion is unambiguous, amendment should be permitted where the facts suggest that a mistake was made and counsel requests an opportunity to correct it.

**[People v. Williams, 217 Ill.App.3d 791, 577 N.E.2d 944 \(5th Dist. 1991\)](#)** A motion for substitution filed before the case is assigned to a particular judge is premature and need not be granted.

[People v. Ash, 131 Ill.App.3d 644, 476 N.E.2d 13 \(5th Dist. 1985\)](#) Defendant (Helton) was jointly tried with a co-defendant (Ash) for home invasion and other offenses. Defendant filed a timely motion for substitution of judge under ¶114-5(a), naming two judges as being prejudiced against him. The co-defendant did not file such a motion. Defendant’s motion was granted in regard to the first judge named, but denied as to the second, who presided at trial. This was improper.

The State argued that because there were multiple defendants, ¶114-5(b) precluded defendant from naming two judges. That section provides that “each defendant shall have the right to move in accordance with [114-5(a)] for a substitution of one judge. The total number of judges named . . . shall not exceed the total number of defendants.”

The Appellate Court rejected the State’s contention. Section 114-5(b) “was designed to apply only to those defendants other than the defendant who filed the initial motion”; thus, it does not bar the initial movant from naming more than one judge.

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**Cumulative Digest Case Summaries §31-3(c)**

[People v. Tate, 2016 IL App \(1st\) 140598 \(No. 1-14-0598, 9/14/16\)](#)

1. A defendant has an absolute right to a substitution of judge upon the timely filing of a proper written motion. In other words, a motion for automatic substitution must be granted if the motion is made within 10 days after the case is placed on the judge’s trial call, names only one judge (except that a person charged with a Class X felony may name two judges), is in writing, and alleges that the trial judge is so prejudiced that defendant cannot receive a fair trial. In addition, the motion must be filed before the trial judge makes any substantive rulings in the case.

A motion for substitution is timely if it is brought within 10 days of the time defendant can be charged with knowledge that a particular judge has been assigned to the case. Whether a substitution motion is timely is to be determined on the facts of each case.

2. Here, defendant could not be charged with knowledge that the case had been assigned to a particular judge where at a preliminary proceeding, the case was assigned for the next appearance to Room 107, where the judge in question customarily presided. The court concluded that defendant was charged with notice of the judge’s assignment only when the Chief Judge officially assigned the case. Because the motion to substitute was filed within 10 days of the latter date, it was timely.

3. Under Illinois law, the erroneous denial of a motion for automatic substitution of judge is a “fundamental defect” which voids all subsequent action taken by the judge who should have been substituted. Because the trial court improperly denied the motion for automatic substitution, the lower court’s judgment was reversed and the cause remanded for further proceedings.

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